MARIA JUAREZ, on her own behalf and on behalf of her minor child, A M-J; JULIO HERRERA VIVAR, on his own behalf and on behalf of his minor child, O H-L, MARIA CHIQUITO, on her own behalf and on her minor child, D S-C, LILIA FERNANDEZ,

Plaintiffs,

v.

NEW BRUNSWICK BOARD OF EDUCATION Defendant,

and

ST. PETER'S CATHOLIC CHURCH OF NEW BRUNSWICK, NEW JERSEY; CATHOLIC DIOCESE OF METUCHEN

Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO: ______________

On Appeal From:

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY

Docket No.: MID-C-79-20

Sat Below:

HON. ARTHUR BERGMAN, J.S.C.

PLAINTIFFS' BRIEF AND APPENDIX FOR INJUNCTIVE RELIEF AND STAY OF TRIAL COURT'S ORDER DENYING IN PART ORDER TO SHOW CAUSE

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PRELIMINARY STATEMENT

Plaintiffs/Appellants Maria Juarez *et al.* seek an injunction to redress the irreparable harm that will arise from the trial court's July 16, 2020 Order refusing to grant injunctive relief and dismissing Counts I, II, and III of Plaintiffs' Verified Complaint with prejudice.

Plaintiffs are students and parents of students enrolled at the Lincoln Annex School ("School"), as well as a taxpayer of New Brunswick, who are seeking to enforce a restrictive covenant ("Covenant") that prohibits the use of the property where the School is located from being used for anything but public education or public administration. Defendant Board of Education ("Board") is currently attempting to sell the School to an entity that intends to demolish the School and convert it into a private medical facility. The Board's planned course of action violates the Covenant. Furthermore, upon completing its transaction, the Board intends to transfer the approximately 760 students enrolled in the School to a "swing site" located in a warehouse for the next three to five years while the Board constructs a new school for the displaced children to attend. Plaintiffs will experience a decline in educational quality and safety concerns at the swing site.

Plaintiffs satisfy all of the factors required for a stay under *Crowe v. De Gioia*, 90 N.J. 126 (1982). **First**, unless this

Court acts immediately to enjoin the Board from moving forward, the School will be sold and demolished, and Plaintiffs will be moved to an inferior swing site beginning in the Fall of 2020.

Second, the applicable law is settled, and the Plaintiffs are likely to succeed on the merits of their claims for violation of the Covenant (Count I), violation of due process (Counts II and III), violation of the Open Public Meetings Act ("OPMA") (Count IV), and violation of the Educational Facilities Construction and Financing Act ("ECFCA") (Count V).

Third, a balance of the hardships between the parties favors granting a stay and injunction at this time. Granting preliminary injunctive relief will not impose any burden on the Board, which should not be permitted to flout the requirements of the Covenant, the OPMA, or the ECFCA. In contrast, denial of Plaintiffs' motion would be devastating to the Plaintiffs.

Plaintiffs request an order preventing the Board from proceeding any further with the sale of the School until the merits of their appeal have been adjudicated by this Court.

PROCEDURAL HISTORY

On May 19, 2020, Plaintiffs filed a Verified Complaint against the Board, St. Peter's Catholic Church of New Brunswick ("Church") and the Diocese of Metuchen ("Diocese") for violating Plaintiffs' rights through their efforts to sell the School to a private medical group and displacing hundreds of students to an

inferior educational facility in the process. (Pa1-38.) The Church and the Diocese were named as defendants and necessary parties because they had an interest in the property at issue.

On June 9, 2020, Plaintiffs filed a motion for an Order to Show Cause seeking emergency relief in light of the pending sale of the School. (Pa 42-73.) On June 25, 2020, the trial court set a hearing date for July 7, 2020. The Board opposed the motion and Plaintiffs replied. (Pa273-305; Pa335-349.)

Meanwhile, the Board filed a Motion to Dismiss on June 24, 2020. (Pa416-462.) Plaintiffs opposed the motion and the Board replied. (Pa479-513; Pa514-535.) Neither the Church nor the Diocese entered an appearance or answered the pleadings. Oral argument on the Motion to Dismiss was scheduled for July 10, 2020.

On July 7, 2020, the trial court heard oral argument on Plaintiffs' motion for an Order to Show Cause. The trial court denied the motion with respect to Counts I, II, III, and granted the motion with respect to Counts IV and V. (Pa536-538; Pa539-543.) The trial court then proceeded, *sua sponte*, to dismiss the Church and the Diocese from the case. Despite granting Plaintiffs' motion as to Counts IV and V, the trial court refused to enjoin the Board in any respect. (Pa536-538; Trs. 30-31.) At the end of the hearing, the trial court stated that it would not hear argument on the Board's Motion to Dismiss, which

was scheduled for hearing on July 10, because the court had effectively decided that motion. (Tr. 31-34.)

On July 8, 2020, Plaintiffs sought a stay from the trial court's verbal order. (Pa544-546.) The court denied the request for a stay on July 16, 2020, and issued two orders. The first order denied Plaintiffs' request for an injunction and dismissed Counts I, II and III with prejudice. (Pa536-538; Pa542-543.) The second order denied Plaintiffs' request for an injunction while the Plaintiffs pursued their appeal. (Pa547-548.)

STATEMENT OF FACTS

The School is located at 165 Somerset Street, New Brunswick, New Jersey. (Pa10-11.) The Board acquired the property on which the School is located from the Church in 2013. (Pa13-14.) Previously, the School property had been operating as a private school administered by the Church. (Pa13-14.) In September 2016, the Board opened it as a public elementary school. The School is the educational home to approximately 760 students, of which approximately 80% are economically disadvantaged and qualify for subsidized (free) lunch and or other public subsidies. (Pa13-14.) Ninety-four percent of all students at the School are of Latino background. (Pa14.)

The Board purchased the School for $7.4 million and invested $15 million into renovations in order to turn the School into a "state of the art" facility. (Pa14.) The School is

one of the best performing schools in the district. (Pa14.)

The Covenant

The School property is encumbered by a restrictive covenant that limits the use of the property to public education or public administration. Two recorded deeds place restrictions on the Board's use of the land. The first deed listed a series of uses that the Board was prohibited from undertaking, such as using the land as an adult bookstore ("First Deed"). (Pa76.) This First Deed states: "Each of the foregoing restrictions are separate and distinct, shall continue in perpetuity, and shall constitute 'covenants running with the land' enforceable by Grantor at law or equity." (Pa76.)

That First Deed was modified by a subsequent corrective deed registered on January 13, 2014 ("Corrective Deed")which, for no consideration, removed the prohibitions in the First Deed and instead imposed an affirmative duty on the Board with respect to the use of land:

> Grantee acknowledges and agrees that the Property will be conveyed subject to the following restriction: The Property shall be used solely for public education purposes or for public administration offices for no less than fifty (50) years after the date of the conveyance, after which time the Diocese of Metuchen shall have the right of first refusal to re-acquire the Property.

(Pa14-15 [Compl. ¶¶ 14, 16]; Pa82-87.) The parties to the Corrective Deed, the Board and the Church, left the language

regarding covenants running with the land intact, with no modification. (Pa86) (noting that the Corrective Deed was entered into "subject to all easements, restrictions, covenants and other matters of record"). After purchasing the land, the Board began operating the School as a public school in compliance with the Covenant. (Pa14-15.)

On or about June 3, 2019, New Brunswick Development Corporation ("DevCo"), Robert Wood Johnson Barnabas Health ("RWJ Barnabas") and Rutgers Cancer Institute of New Jersey ("Rutgers") announced plans to build a new cancer institute at a cost of $750,000,000. (Pa16 [Compl. ¶ 19].) Although none of the entities promoting the plans for a new cancer institute identified a site for the facility in public, in May 2019, representatives of Rutgers and DevCo identified the School as the site they targeted for acquisition. (Pa16.) In June 2019, RWJ Barnabas offered to purchase the School from the Board. (Pa16.) The Board accepted the offer and approved it in violation of the Covenant and of its mandatory public hearing process procedures. (Pa16 [Compl. ¶¶ 19-20].)

The Board's lack of transparency

On July 10, 2019, Plaintiffs heard that the Board was considering a sale of their School. (Pa17.) New Brunswick Mayor James Cahill stated at a neighborhood group meeting that the School would be sold in order to build a new cancer center and

that a replacement school would be built three to five years later. (Pa17.)

At a public Board meeting on September 17, 2019, Board officials denied that any formal offer to purchase the School was ever made. (Pa17.) When asked directly about conversations with RWJ Barnabas about the sale of the School, Board President Diana Solis refused to comment. (Pa17 [Compl. ¶ 22].) At the next public meeting of the Board on October 15, 2019, President Solis reiterated that there was no official offer to sell the School. (Pa17 [Compl. ¶ 23].) On November 19, 2019, President Solis repeated the same false statement that no proposals for the sale had been made. (Pa17-18 [Compl. ¶ 25].) On November 25, 2019, Board Superintendent Aubrey Johnson released a public statement that referred to the sale of Lincoln Annex as "speculation" and that "no agreement exists regarding the sale of Lincoln Annex School property to facilitate the construction of a cancer institute." (Pa18 [Compl. ¶ 26].)

On February 3, 2020, Mayor James Cahill and representatives of DevCo formally announced plans to sell and demolish the School in order to facilitate the construction of a new cancer pavilion. (Pa18.) At that point, Plaintiffs and various community residents and organizations formed the Coalition to Defend Lincoln Annex. (Pa18 [Compl. ¶ 28].)

On February 6, 2020—more than half-way into the school year—the first meeting of the School's newly-formed parent group was held. At that meeting, Plaintiffs asked whether the Board had any plans to sell the School and were told that the issue would not be discussed. (Pa379 [Chiquito Decl. ¶ 6]; (Pa403 [Juarez Decl. ¶ 5].) When Plaintiffs Juarez and Chiquito attempted to attend a subsequent meeting of a committee addressing a replacement site for the School, they were prohibited from entering. (Pa403 [Juarez Decl. ¶ 8].)

After being denied entrance, Plaintiffs went to address this behavior with the School's principal. (Pa404 [Juarez Decl. ¶ 9].) The principal told Plaintiffs and other School parents that a committee had been formed to address the replacement of the School, however, Superintendent Johnson had selected who the parent representatives would be for the committee, and they were no longer allowing any more parents to serve on it. (Pa404 [Juarez Decl., ¶ 9].) When Plaintiffs Juarez and Chiquito requested to join the committee, they were turned away. (Pa404 [Juarez Decl., ¶ 10].) Plaintiffs Chiquito and Juarez were never contacted further to participate on the committee. (Pa379 [Chiquito Decl. ¶¶ 6-7]; (Pa403-404 [Juarez Decl., ¶¶ 3, 7-8].)

The Board's procedural violations and violations of due process

On February 25, 2020, at a public meeting of the Board, the published agenda for the meeting included a presentation by

DevCo and the Rutgers regarding the School. The Board did not tell the public that it would be voting on the proposed sale of the School. (Pa20 [Compl. ¶ 35].) This meeting was the ***first time*** the Board advised the public about the Board's plans to sell the School. The Plaintiffs were told that a replacement school would be constructed within three to five years during which time the students at the School would be sent to a swing space located at 40 Van Dyke Avenue, New Brunswick, a warehouse that was not designed to be an educational facility. (Pa20.)

Nearly 100 people attended the February 25, 2020 meeting to protest the announced sale of the School and demanded to speak. Board President Solis prevented the majority of attendees from speaking and instead summarily adjourned the meeting without explanation. (Pa21 [Compl. ¶ 36].) Once Plaintiffs and the public had all gone home, the Board then reconvened the meeting to an empty auditorium and voted on a resolution that authorized approval of an amendment to the school district's Long-Range Facilities Plan ("LRFP") calling for the sale and closure of the School. (Pa21 [Complaint ¶ 36; Pa110-111].) The resolution was not shared with the public prior to the vote, nor could it have been, as Board member Spencer drafted the resolution during the February 25, 2020 meeting. (Pa21 [Complaint ¶ 36]; Pa110-111.)

On March 24, 2020, during a public meeting with remote participation due to COVID-19, the Board passed a resolution to

approve the LRFP to shut down the School. (Pa21 [Complaint ¶ 36]; Pa141-162.) The approved LRFP was not made public prior to or during this meeting for review by community residents or parents, nor was it submitted to the Planning Board as required by N.J.R.S. 18A:7G-4. (Pa21-22 [Complaint ¶ 36]; Pa141-162.)

The alternative site is unacceptable to Plaintiffs. The swing site is structurally inferior in that it has little to no windows, no cafeteria, no playground and no auditorium. (Pa20.) The swing site lies on the outskirts of the city, which creates transportation and safety issues for the parents and the students. (Pa20.) More importantly, however, the relocation of the School children to the swing site will substantially diminish the quality of the public school education the Plaintiffs are receiving. (Pa27-28 [Compl. ¶ 58].)

The decisions and actions of the Board to date violate the Covenant, and violate the right to a quality education guaranteed Plaintiffs. The Board has never denied that the Covenant limits the use of the property to public education or public administration. Instead, the Board has taken the position that the Board is above the law and that binding contracts and the State’s education laws are non-binding on the Board.

LEGAL ARGUMENT

Plaintiffs satisfy the four factors enumerated in *Crowe v. De Gioia*, 90 N.J. 126, 132–34 (1982), namely: 1) the likelihood

that plaintiffs will suffer irreparable harm absent relief; 2) whether the underlying legal claim has been settled; 3) the likelihood of success on the merits; and 4) the consideration of relative hardship to the parties in granting or denying relief.[2]

I. PLAINTIFFS WILL SUFFER IRREPARABLE HARM.

In cases seeking equitable relief, harm is irreparable if the remedy sought "cannot be redressed adequately by monetary damages." *Crowe*, 90 N.J. at 132-33. The closure and demolition of the School and the transfer of approximately 760 students to a warehouse presents an imminent harm that only a stay and injunction will remedy. When injunctive relief is sought in order to preserve the status quo, such relief has often been granted "even if the claim appears doubtful when a balancing of the relative hardships substantially favors the movant, or the irreparable injury to be suffered by the movant in the absence of the injunction would be imminent and grave, or the subject matter of the suit would be impaired or destroyed." *Waste Mgmt. of New Jersey, Inc. v. Morris Cty. Mun. Utilities Auth.*, 433 N.J. Super. 445, 454 (App. Div. 2013).

Should this Court refuse to enjoin the sale of the School pending the outcome of this appeal, the School will be sold and destroyed. The Board intends to close on the transaction "by

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[2] Plaintiffs combine the second and third elements below.

mid-August."[3] When the object of the litigation will be destroyed during the litigation, New Jersey courts routinely grant injunctions to preserve the status quo even if the court has doubts about the merits of the claim. *Waste Mgmt.*, 433 N.J. Super. at 452 (denial of interlocutory injunctive relief without consideration of the *Crowe* factors "was erroneous because it overlooks a court's authority to impose interlocutory restraints regardless of doubts about the movants' likelihood of success."); *Haines v. Burlington Cnty. Bridge Comm'n*, 1 N.J. Super. 163, 174 (App. Div. 1949) ("justice is not served if the subject matter of the litigation is destroyed or substantially impaired during the pendency of the suit").

The New Jersey Constitution guarantees a "thorough and efficient" public education to elementary and secondary school-age students. N.J. Const., art. VIII, §4, ¶1. This mandate includes the assurance "that students are educated in physical facilities that are safe, healthy, and conducive to learning." N.J.S.A. 18A:7G-2(a).

The swing site is a warehouse. (Pa20, 24 [Compl. ¶¶ 35, 45-46].) The New Jersey Department of Education acknowledged as much in its 2008 audit of the Board, stating:

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[3] *See* https://www.mycentraljersey.com/story/news/local/middlesex-county/2020/07/09/nj-superior-court-judge-paves-way-lincoln-annex-demolition-rjwbh/5397428002/.

> [t[he new temporary swing space schools are in a warehouse and in order for the community to know it is a school a prominent sign was necessary to identify the schools. Without this no one would be able to determine that indeed is a school due to the construction of the buildings in an industrial site.

(Pa17-18; Pa504 [2008 State Audit at 112].) The building has no windows in the classrooms, no cafeteria, no auditorium, no playground and is located on the outskirts of the city. (Pa20.) The site is located in an industrial park filled with approximately a dozen other similarly designed warehouse buildings, all of them functioning as warehouses. When the Board organized a "tour" of the swing site, parents were only shown one room and were not allowed to visit the entire facility. (Pa379-380 [Chiquito Decl. ¶ 9].)

The State's educational report cards suggest that student academic performance substantially decreases when students are transferred to the swing site. In the 2017-18 and 2018-19 school years, students at the Paul Robeson Community School for the Arts were transferred to the swing site. (Pa288 [Board Opp. to OTSC at 10].) Immediately after moving there, their academic performance in areas like English Language Arts, Mathematics and Student Growth Percentile declined.[4] In fact, in the 2018 – 2019

[4] *See* New Jersey Department of Education, New Jersey School Performance Report at 4, 7 (2018 – 2019), available at https://rc.doe.state.nj.us/report.aspx?type=school&lang=english&county=23&district=3530&school=123&schoolyear=2018-2019.

academic year, the Robeson students failed to meet State standards for Mathematics. *Id.* To make matters worse, many Robeson students were retained and forced to repeat the grade as a result of not passing. (Pa383 [Basurto Decl. ¶ 3].)

II. THE APPLICABLE LAW IS SETTLED AND PLAINTIFFS HAVE A REASONABLE LIKELIHOOD OF SUCCESS ON THE MERITS.

A. Plaintiffs are reasonably likely to succeed on their claim based on the Covenant.

Under New Jersey law, intended beneficiaries of restrictive covenants can assert their claims, even if they are not the grantor or grantee. A third-party beneficiary's rights "depend upon, and are measured by, the terms of the contract between the promisor and the promisee." *Roehrs v. Lees*, 178 N.J. Super. 399, 409 (App. Div. 1981). While at the outset, the "plaintiff has the burden of demonstrating that the covenant was intended for his benefit and that defendants were aware of its existence and of its purpose to benefit plaintiff . . . [o]nce that burden [is] met plaintiff [is] entitled to enforce the covenant for his benefit. . . ." *Roehrs*, 178 N.J. Super. at 405–06 (overturning trial court finding that plaintiff could not enforce covenant).

Under these standards, it is clear that Plaintiffs have a right as third-party beneficiaries to enforce the Covenant. In 2013, the Church sold the property to the Board through the First Deed, subject to covenants that run with the land. (Pa14-15. By including language that the restrictive covenant "runs

with the land," the Church created a covenant that is enforceable not just by the Church itself, but by others as well. *Broadway Maint. Corp. v. Rutgers, State Univ.,* 90 N.J. 253, 259, 447 A.2d 906, 909 (1982).

The Board and the Church later executed the Corrective Deed, which included the following affirmative requirement: "***The Property shall be used solely for public education purposes or for public administration offices for no less than fifty (50) years after the date of the conveyance***..." (Pa15 [Compl. ¶ 16].) Notably, the Corrective Deed was executed subject to the terms of all prior covenants, which left undisturbed the language in the First Deed that the restrictive covenants run with the land. (Pa86.) The Covenant also runs with the land and is enforceable by the public school students and their parents.

The intent of the Covenant to benefit the student body and those who participate in a public educational setting is clear. (Pa16 [Compl. ¶ 17].) The New Jersey Supreme Court has held that where the public is "the intended third party beneficiary of the covenant in the deed [they are] not only entitled to maintain an action to enforce it but is a necessary party to any action to lift the restriction." *Soussa v. Denville Twp. Planning Bd.*, 238 N.J. Super. 66, 69, 568 A.2d 1225, 1227 (App. Div. 1990), citing *Roehrs*, 178 N.J. Super. 399; *see also Am. Dream at Marlboro, L.L.C. v. Planning Bd. of Twp. of Marlboro*, 209 N.J. 161, 169

(2012) (planning board lacked the authority to lift a restrictive covenant that benefitted the public).

The Covenant is enforceable by Plaintiffs as a restrictive covenant running with the land. This Court's opinion in *Sousa* is particularly instructive. In that case, the plaintiffs executed a deed that contained a restrictive covenant barring subdivisions and limiting construction on the plaintiffs' property. *Soussa,* 238 N.J. Super. at 67. The deed "was conveyed by plaintiffs as grantors to themselves as grantees." *Id*. The plaintiffs later filed a lawsuit to force the City of Denville to lift the deed restriction to enable them to build a subdivision on their property. *Id*. at 68. This Court affirmed dismissal of the plaintiffs' complaint, noting that even though "the deed was one from plaintiffs to themselves," the creation of the restrictive covenant had vested a right in the public, and that "neither the [Planning] Board nor the governing body of Denville ha[d] the power separately or together to eliminate the covenant in the deed." *Id*. at 69. The court further explained that in cases where the public interest is involved in the enforcement of a restrictive covenant, "the pivotal consideration [is] to determine exactly what benefit the covenant was meant to bestow on the public," leaving it up to trial court to determine how that public interest will be represented. *Id*.

The existence of the Covenant was a known fact to the Board. In a document known as the Exchange Agreement, which was intended to confirm the sale of the School, the Board explicitly acknowledges the existence of the Covenant, and insists that the purchasing parties secure the permission of the Church in releasing it from the Covenant before proceeding with the sale of the School. (Pa212 at § 4(d).) The Exchange Agreement is clear evidence that the Board knows that the School cannot be converted to a research hospital without violating the Covenant. This Court should act now to prevent the Board from violating the Covenant. *See Springfield Twp. v. Bd. of Educ. of Springfield Twp.*, 217 N.J. Super. 570, 576 (App. Div. 1987) (finding that a school board could not sell a school where there was a restrictive covenant because it "is a binding covenant running with the land").

The opinion in *Springfield* presents nearly the same fact pattern. In that case, the Board of Education of Springfield Township acquired property subject to the following restriction: "The [Board] covenants and agrees that the premises hereby conveyed are restricted to use solely for public school purposes, athletic, recreation and accessory public uses." 217 N.J. Super. at 573. This Court found that "by clear implication, property . . . may not be sold by a school board free of the use restriction encumbering the conveyance prior to the expiration

of the time periods therein prescribed." *Id*. at 577. Where a school board attempts to sell a school property with a restrictive covenant to a private entity, that sale cannot be honored if it violates the restrictive covenant and must even be rescinded. *Id*. The Board should be enjoined from selling the School immediately.

B. <u>Plaintiffs are reasonably likely to succeed on their federal due process claim.</u>

Due process requires that prior to a party being deprived of their property, they must first be granted "notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985); U.S. Const. Amend. XIV. In addition, "the opportunity to be heard must be at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The Board did not provide adequate notice of the pending sale nor a meaningful opportunity for Plaintiffs to be heard.

1. Plaintiffs' property interests.

"A property interest subject to protection by the due process clause results from a 'legitimate claim of entitlement' created by an independent source such as state law." *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 679 (3d Cir. 1991), *abrogated on unrelated grounds by United Artists Theatre Circuit, Inc. v. Twp. of Warrington, PA*, 316 F.3d 392

(3d Cir. 2003); *See also Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). Plaintiffs' property claims are grounded in state common law concerning real property, and their right to assert a claim as the intended beneficiary of the Covenant. (Pa14-16.) "It can hardly be doubted that interests in real estate are protected by the Due Process Clause." *Montville Twp. v. Block 69*, *Lot 10*, 74 N.J. 1, 7 (1977).

In addition, Plaintiffs also have a property interest in a publicly funded equal educational opportunity, which cannot be taken away from them without the minimum guarantees of due process. Plaintiffs' property interest in their education is grounded in the State constitution itself. N.J. Const., art. VIII, § IV, ¶ 1; *Robinson v. Cahill*, 62 N.J. 473, 513, *on reargument*, 63 N.J. 196 (1973), *and on reh'g*, 69 N.J. 133 (1975); *J.A. v. Bd. of Educ. for Dist. of S. Orange & Maplewood*, 318 N.J. Super. 512, 524 (App. Div. 1999), *as amended on reconsideration* (Apr. 9, 1999) (finding that student who was "entitled to receive that education in the [] district" closest to her had a property interest and was entitled to due process before such an interest could be taken). As a result, the Board must follow statutory requirements for drafting, submitting and approving the LRFP, which governs planning for public education facilities before depriving the Plaintiffs of their access to

the high-performing educational facility that currently serves them. N.J.A.C. 6A:26 *et seq.* (Pa26-27 [Compl. ¶¶ 54 – 55].)

2. The Board's due process violations.

The Board violated numerous protocols, statutes and regulations in reaching their decision to sell the School. Among these include shutting off any meaningful public participation in the decision-making process, misleading the public and School community about the sale of the School, not making available proposed resolutions regarding the sale, ignoring mandatory procedures in connection with the LRFP process, denying members of the public the chance to be heard at public meetings, and voting on last-minute resolutions in closed-door sessions. (Pa17-18, 20, 22-23, 27, 30-34 [Compl. ¶¶ 22 - 26, 35, 40, 42 – 43, 57].) The consequence of the Board's actions are to substantially diminish the quality of the education Plaintiffs are receiving. (Pa14 [Compl. ¶ 13].) This violates due process. The Board "may not finally destroy a property interest without first giving the putative owner [or beneficiary] an opportunity to present his claim of entitlement." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982).

The Board admits that the resolution to approve the closure and sale of the School was <u>not</u> scheduled to be voted on during the February 25, 2020 meeting. (Pa90 [Jannarone Aff. at ¶ 5].) The Board did not share the actual proposed resolution with the

public. (Pa20 [Compl. ¶ 35].) That is because Board member Edward Spencer drafted the resolution by hand *during* the public meeting that night. (*See* Pa90 [Jannarone Aff. ¶ 5]; Pa110-111; Pa113-114 [Spencer Aff. ¶¶ 9 - 10].) After Mr. Spencer drafted the resolution by hand, the Board came back to an empty room to vote on the resolution. (Pa20 [Compl. ¶ 36]; Pa110-111.)

At the next public meeting on March 24, 2020, which was conducted by phone conference, the Board again voted to pass a resolution to approve the LRFP to shut down the School, however the LRFP was not sent to the New Brunswick planning board as is required under New Jersey law. (Pa141-162.) The LRFP was never made public nor was it provided to Plaintiffs and parents of the school ahead of the meeting. (Pa21-22 [Compl. ¶ 37].) The Board's actions as described herein violate due process. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) ("It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.'"); *Montville Twp.*, 74 N.J. at 13 (quoting *Mullane v. Central Hanover Bank & Trust Co.* 339 U.S. 306, 314-315 (1950) ("(W)hen notice is a person's due, process which is a mere gesture is not due process.").

"'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise

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interested parties of the pendency of the action and afford them an opportunity to present their objections." *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). And yet, the first time Plaintiffs received confirmation that the Board was considering selling their School was the February 25, 2020 meeting where the Board drafted and voted on a resolution right then and there, not even engaging in any pretense of making Plaintiffs and the public feel heard. On top of the lack of notice, the actual vote took place after all members of the public left the building. (Pa21.) Such State actions are impermissible under the Constitution and offensive to the most basic notions of due process. *Armstrong*, 380 U.S. at 551 (overruling state court decision that "whatever constitutional infirmity resulted from the failure to give the petitioner notice had been cured by the hearing subsequently afforded to him"). "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." *Fuentes*, 407 U.S. at 81.

C. Plaintiffs' are reasonably likely to succeed on their New Jersey due process claim.

New Jersey constitutional jurisprudence closely follows that of federal law, guaranteeing the same procedural due process protections where a property right is at stake. N.J. Const. Art. 1, ¶ 1; *Caviglia v. Royal Tours of America*, 178 N.J.

460 (2004). The due process guarantee in the New Jersey constitution also requires "an opportunity to be heard at a meaningful time and in a meaningful manner." *Seoung Ouk Cho v. Trinitas Reg'l Med. Ctr.*, 443 N.J. Super. 461, 472–73 (App. Div. 2015). It also imposes a duty to provide adequate notice to Plaintiffs prior to decisive State action that would deprive them of their property interest. *Kaprow v. Bd. of Educ. of Berkeley Twp.,* 131 N.J. 572, 587 (1993). For the same reasons set forth above, the Board's conduct also violates the due process provision of the New Jersey constitution.

D. Plaintiffs' are reasonably likely to succeed on their OPMA and ECFCA claims.

The trial court granted Plaintiffs' motion for an Order to Show Cause and held that Plaintiffs have stated a claim for relief under the OPMA, N.J.S.A. 10:4-6 and under the ECFCA, 18A:7G-4. (Pa809-811.) The trial court should have rescinded the Board's decision-making and enjoined the Board from proceeding with the sale of the School in light of these violations.

III. THE BALANCE OF HARMS WEIGHS IN FAVOR OF IMMEDIATE RELIEF.

Courts examine the relative hardship to the parties in deciding whether to grant or deny relief. *Crowe*, 90 N.J. at 134. The Board suffers no cognizable harm in being forced to comply with the Covenant it agreed to, or if the Court forces the Board to comply with due process or New Jersey state education laws.

In contrast, denial of an injunction would permit the destruction of the community’s recently built, taxpayer funded state-of-the-art public school for the benefit of private interests. Courts, “in the exercise of their equitable powers, ‘may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.’” *See Waste Mgmt.*, 399 N.J. Super. at 520 (quotation omitted). Further, “in certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief.” *Crowe*, 90 N.J. at 133.

The sudden, unnecessary disruption of an entire disadvantaged public school community for an extended period of time is not a mere inconvenience, but rather a significant burden on the community’s most vulnerable families that will undoubtedly manifest in emotional, financial, educational, social, and physical hardship. The status quo should not be disrupted until this Court has had a chance to adjudicate the merits of Plaintiffs’ claims. *Brown v. City of Paterson*, 424 N.J. Super. 176, 178 (App. Div. 2012) (finding it was in the public interest to preserve the status quo).

IV. CONCLUSION

For the foregoing reasons, Plaintiffs request immediate injunctive relief from this Court to prevent the Board from

advancing any further with the sale of the School until the merits of Plaintiffs' appeal can be adjudicated.

Dated: August 5, 2020

Respectfully submitted,

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