STATE OF RHODE ISLAND **PROVIDENCE, SC.**		**SUPERIOR COURT**
PROVIDENCE STUDENT UNION, AMERICAN CIVIL LIBERTIES UNION OF RHODE ISLAND, RHODE ISLAND BLACK BUSINESS ASSOCIATION, RI TEACHERS OF ENGLISH LANGUAGE LEARNERS, TIDES FAMILY SERVICES, RHODE ISLAND DISABILITY LAW CENTER, DIRECT ACTION FOR RIGHTS AND EQUALITY, RICK RICHARDS and TOM SGOUROS **Plaintiffs,** **v.** **RHODE ISLAND BOARD OF EDUCATION and EVA-MARIE MANCUSO in her capacity as Chair.** **Defendants.**	: : : : : : : : : : : : : : : : : : : :	**C.A. No.: 2013-3649**

PLAINTIFFS MOTION FOR PRELIMINARY INJUNCTION

Now come the Plaintiffs, by and through their attorneys, and respectfully request that this Court issue a preliminary injunction restraining and enjoining the Board of Education from failing and refusing to comply with the Open Meetings Act (R.I.G.L. § 42-46-1 et. seq) ("OMA") and R.I.G.L. § 42-35-6 ("APA"). Specifically, Defendants have continually and willfully failed to consider Plaintiffs' petition proposing amendments to the "Secondary School Regulations: K-12 Literacy, Restructuring of the Learning Environment at the middle and high school levels, and proficiency based graduation requirements (PBGR) at High Schools" (the "Petition") in violation of the OMA and APA.

As reasons therefore, Plaintiffs aver:

Parties and Jurisdiction

1. The Providence Student Union ("PSU") is a youth-led student organizing program with chapters at multiple Providence public high schools. A number of PSU students have been labeled at risk of not graduating because of the high stakes testing graduation requirement, and so are currently undergoing significant harm from the effects of curriculum narrowing, loss of electives and even core classes, and the replacement of real learning with test prep, both during the school year and the summer. Students believe a formal, public hearing process is necessary.

2. The American Civil Liberties Union of Rhode Island (ACLU/RI) is a non-partisan, non-profit organization with over 2,000 members in Rhode Island, whose mission is to preserve and protect civil rights and liberties. Since at least 2008, ACLU/RI has raised concerns with the Rhode Island Department of Education and other policy-makers about the use of "high stakes testing" in Rhode Island and its disproportionate and adverse impact on racial minorities, English Language Learners, students with disabilities, and other vulnerable groups.

3. The Rhode Island Black Business Association ("RIBBA") is a non-profit organization dedicated to enhancing the growth and economic empowerment of minority owned businesses by providing them a forum to competitively participate in the local and global economy, primarily through business development, legislative advocacy, business mentoring, quality educational opportunities and professional development. In recognition of the clear connection between education and business, and the questionable validity of high stakes testing as an educational tool, RIBBA has strongly supported efforts to rescind the state's high stakes testing requirement.

4. The Rhode Island Teachers of English Language Learners ("RI TELL") is a non-profit professional organization for ESL and Bilingual Education teachers in Rhode Island. As an

affiliate of International TESOL (Teachers of English for Speakers of Other Languages), the purpose of RI TELL is to serve Rhode Island teachers of English Language Learners and their students, from Pre-K through Adult Education. Among the many reasons RI TELL opposes high stakes testing in English for English Language Learners is that testing students in a language the state itself has verified they do not read or write proficiently is neither valid nor reliable.

5. Tides Family Services is a not-for profit organization that provides a range of community-based services for the state's most at-risk adolescents. These systems of support, which include individual and family programming conjunction with educational programming and advocacy, are increasingly critical in today's education and job market. Since a high school diploma communicates a level of independence and growth that will provide our clients with the opportunity to pursue a better job and future educational opportunities, Tides believes that to deny or substantially discourage the attainment of this basic credential is to knowingly increase chronic school absenteeism and ongoing social isolation.

6. Rhode Island Disability Law Center ("RIDLC") is the private non-profit law office that is the designated protection and advocacy agency for the State of Rhode Island. In this capacity, RIDLC advocates for the special education rights of students with disabilities, as well as their efforts to obtain post-secondary education and/or vocational supports. RIDLC endorses those national studies and best practice models that counsel against using high-stakes tests to determine graduation readiness for students with disabilities, and instead support the use of multiple indicators of student learning and skills to demonstrate graduation readiness.

7. Direct Action for Rights and Equality ("DARE") is a member led organization whose mission is to organize low-income families in communities of color for social, political and economic justice. DARE works to undo the systems of oppression that are the root cause of

the problems facing those communities, and opposes the structural racism and further disenfranchisement of communities that standardized testing requirements cause.

8. Rick Richards is a member of the ACLU/RI and a retired employee of the Rhode Island Department of Education's Offices of Testing, School Improvement and School Transformation. He has testified at a number of public hearings in opposition to the use of high stakes testing.

9. Tom Sgouros is a member of the ACLU/RI, and a freelance engineer, policy analyst, and writer. He is the parent of a high school student whose educational opportunities have been damaged, he believes, by the state's high stakes testing policies. He has written a number of articles about, and testified on, the issue of high stakes testing.

10. Eva-Marie Mancuso is the Chair for the Rhode Island Board of Education.

11. The Rhode Island Board of Education ("RIBOE") is the administration agency responsible for promulgation of high school graduation requirements.

12. Jurisdiction is vested in the Superior Court pursuant to R.I. Gen. Laws § 9-30-1 et. seq.

Facts

13. By letter dated May 20, 2013, certain individual and organizations, including Plaintiffs, urged the RIBOE to rescind regulations adopted by its predecessor, the Board of Regents for Elementary and Secondary Education, that condition receipt of a high school diploma on passing a "high stakes test," the New England Common Assessment Program ("NECAP"). The letter noted that the newly-constituted RIBOE "has not had the opportunity to consider the full consequences" of the NECAP requirement, and particularly in light of the "potentially devastating impact of the requirement," asked the RIBOE to consider "alternative

strategies to improve student outcomes." A true and accurate copy of the May 20, 2013, letter is attached as Exhibit A. The RIBOE did not respond to the May 20, 2013, letter.

14. By letter dated June 21, 2013, certain organizations, including Plaintiffs, submitted a petition pursuant to R.I.G.L. 42-35-6 and the RIBOE's Title A Regulations, A-1-23, proposing amendments to the "Secondary School Regulations: K-12 Literacy, Restructuring of the Learning Environment at the middle and high school levels, and proficiency based graduation requirements (PBGR) at High Schools" (the "Petition").

15. The Petition addressed the controversy surrounding implementation of the NECAP graduation requirement by inviting an "official and structured rule-making process." It would essentially prohibit high stakes testing as a graduation requirement, and instead, require that any such assessment "be used to promote school and district accountability and improvement and to target early and intensive remediation to individual students and to at-risk sub-groups." However, the June 21, 2013, letter was careful to note that Petitioners "were not requesting Board members to take a definitive stand on the merits of the Petition," but rather to initiate a "public rule-making process" in which there might be "timely, meaningful and structured consideration of this critical issue." The letter designated ACLU/RI as the contact agency for any response to the Petition. A true and accurate copy of the June 21, 2013 letter and Petition is attached as Exhibit B.

16. By letter to ACLU/RI dated July 12, 2013, RIBOE Chair Mancuso responded to the Plaintiffs' letter and Petition by stating that RIBOE members would be receiving "an in-depth informational briefing on the relationship between large-scale assessments and graduation requirements" at an annual retreat on August 24 and 25, and that "the Board has taken no action to 'deny' your position" but was also not "in a position to begin formal rulemaking within the

prescribed time period [specified in 42-35-6]." The letter concluded by stating that it should be considered "equivalent to a 'denial' of your petition . . . born of temporal circumstance only." A true and accurate copy of the July 12, 2013 letter is attached as Exhibit C. The RIBOE did not discuss or consider Plaintiffs' Petition, nor did the RIBOE discuss or vote upon either denying the Petition or initiating rule-making proceedings pursuant to 42-35-6.

17. A regularly scheduled meeting of the RIBOE was held on July 15, 2013, within thirty (30) days of Plaintiffs' Petition to RIBOE. The Agenda for the July 15, 2013, meeting did not include a discussion or consideration of Plaintiffs' Petition. A true and accurate copy of the posted agenda for the July 15, 2013 RIBOE meeting is attached as Exhibit D. The RIBOE did not discuss or vote upon either denying the Plaintiffs' Petition or initiating rule-making proceedings pursuant to 42-35-6 at this meeting.

18. On or about August 2, 2013, Plaintiff Richards, along with two others, filed suit against Defendants regarding their stated intent to conduct the August 24-25 "retreat," referenced in the July 12, 2013 letter, in closed session. On or about August 6, 2013, Justice Procaccini issued an injunction enjoining Defendants from holding a discussion of the graduation requirements in closed session. See Exhibit E. As a result, the retreat was opened to the public. Although the NECAP graduation requirement was discussed, no action was taken with regard to the Petition.

19. On or about August 14, 2013, the RIBOE met in closed, executive session to discuss the instant lawsuit as filed on July 24, 2013. Immediately following that executive session, Defendant Mancuso announced that the RIBOE would be considering the Petition at its September 9, 2013 meeting.

20. On or about September 6, 2013, the RIBOE posted the Agenda for its September 9, 2013 meeting. The Agenda provided, in pertinent part:

> ***9. EXECUTIVE SESSION***
>
> *The Board may seek to enter into Executive Session to discuss --*
>
> *a. Update on Collective Bargaining pursuant to RIGL §42-46-5 (a)(2) (all bargaining units except Graduate Assistants)*
>
> *b. Discussion of Litigation – Prov. Student Union et al. v. Board of Ed. et al. pursuant to RIGL §42-46-5(a)(2)*
>
> ***10. ADDITIONAL ACTION ITEMS***
>
> *a. Board Determination on Petition of Prov. Student Union et al.*

29. A true and accurate copy of the Notice is attached as Exhibit F.

30. On September 9, 2013, a number of the Plaintiffs, including PSU, ACLU/RI, RITELL, RIDLC, and Richards; other signatories to the Petition; and members of the public who had been apprised of the meeting by the Plaintiffs, attended RIBOE's scheduled meeting in order to listen to and watch the discussion and deliberations of the members of the RIBOE in considering the Petition. At that meeting, the RIBOE went into closed, executive session to discuss the instant lawsuit. In addition to discussing the litigation, the RIBOE discussed and considered the "Determination on Petition of Prov. Student Union et al." in closed, executive session. Immediately following the closed, executive session, Defendant Mancuso announced that the RIBOE had discussed and considered the Petition and had voted to deny the Petition by a vote of 6-5. The RIBOE engaged in no public discussion of the Petition prior or subsequent to announcing the vote on it, and did not explain the reason for the denial.

36. On September 19, 2013, Defendant Mancuso stated, in a Providence Journal Op-Ed, that the September 9 vote "was not about the merits of any of our battery of state assessments; it

was about starting the debate again about whether or not to have state assessments." Thus, by Defendant Mancuso's admission, the vote concerned a matter of public policy.

Standard For Issuance Of Preliminary Injunctive Relief

Pursuant to R.I. Gen. Laws § 42-46-8(d), "this court may issue injunctive relief and declare null and void any actions of a public body found to be in violation of this chapter." Accordingly, Plaintiffs need not satisfy the traditional criteria for injunctive relief in order to obtain an injunction, here; they only need to prove a violation of the Open Meetings Act ("Act"). As discussed below, it is clear that, despite having had notice for months now that they have violated the Act, Plaintiffs have failed and refused to cease their violation by considering and voting on Plaintiffs' Petition in an open meeting. Defendants have further violated the Act by failing to deny the petition in writing or state the basis for the denial. Consequently, Plaintiffs are entitled to an order from this Court declaring Defendants' vote null and void and enjoining Defendants from continuing to violate the Act.

Plaintiffs are also entitled to an injunction because they satisfy the traditional criteria for injunctive relief, which are (1) a likelihood of success on the merits, (2) the possibility of irreparable harm to plaintiffs if preliminary relief is not granted, and (3) that the balance of the equities, including the public interest, as between the parties, favors plaintiffs. See The Fund for Community Progress v. United Way of Southeastern New England, 695 A.2d 517, 521 (R.I. 1997). See also In re State Employees' Union, 587 A.2d 919 (R.I. 1991); Paramount Office Supply Co. v. D.A. MacIsaac, Inc., 524 A.2d 1099 (R.I. 1987), Frenchtown Five, LLC v. Vanikiotis, 863 A.2d 1279, 1282 (R.I. 2004).

Argument

I. RIBOE VIOLATED THE APA BY FAILING TO CONSIDER THE PETITION WITHIN THIRTY (30) DAYS, FAILING TO LAWFULLY DENY THE PETITION, AND FAILING TO STATE ITS REASONS FOR THE DENIAL.

A. The RIBOE failed to consider the Petition within thirty (30) days.

Rhode Island Gen. Laws § 42-35-6 provides:

> Any interested person may petition an agency requesting the promulgation, amendment, or repeal of any rule. Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition. **Upon submission of a petition, the agency within thirty (30) days shall either deny the petition in writing (stating its reasons for the denials) or initiate rule-making proceedings in accordance with § 42-35-3.**

Emphasis added.

The evidence is indisputable that RIBOE failed to comply with the thirty (30) day time constraint. The Petition was filed by letter dated June 21, 2013.[1] The Petition was denied[2] on September 9, 2013.[3] [4]

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[1] Although a regularly scheduled meeting of the RIBOE was held on July 15, 2013, within thirty (30) days of filing the Petition, the Agenda for the meeting did not include a discussion or consideration of Plaintiffs' Petition, and RIBOE did not discuss or vote to either deny the Petition or initiate rule-making.

[2] As discussed infra, the denial was unlawful because the determination was made in closed session.

[3] Defendant Mancuso's communication to Plaintiff ACLU did not constitute action on the Petition. Although Defendant Mancuso on July 12 advised that RIBOE members would be receiving "an in-depth informational briefing on the relationship between large-scale assessments and graduation requirements" at an annual retreat on August 24 and 25, she added that "the Board has taken no action to 'deny' your position" but was also not "in a position to begin formal rulemaking within the prescribed time period [specified in 42-35-6]." Thus, by its terms, the letter was neither a "denial" nor initiation of rulemaking. While the letter concluded that it should be considered "equivalent to a 'denial' of your petition . . . born of temporal circumstance only," Section 42-35-6 prescribes that "the agency," not its Chair, must act on the Petition. RIBOE did not discuss or consider in any manner Plaintiffs' Petition, nor did RIBOE discuss or vote upon either denying the Petition or initiating rule-making proceedings pursuant to 42-35-6, within thirty (30) days, as required by the APA.

B. The RIBOE failed to deny the Petition "in writing" or "stat[e] its reasons for the denial[]."

Rhode Island Gen. Laws § 42-35-6 provides that "[u]pon submission of a petition, the agency . . . shall either **deny the petition in writing (stating its reasons for the denials)** or initiate rule-making proceedings in accordance with § 42-35-3." Emphasis added. Having denied the Petition on September 9 (in closed session), the RIBOE was in any event required to do so "in writing[,] stating its reasons." It did neither.

II. THE RIBOE VIOLATED THE OPEN MEETINGS ACT BY FAILING TO CONSIDER THE PETITION IN OPEN SESSION.

The purpose of the OMA is to require that public business be conducted in the open, to allow meaningful public participation, and the provisions of the Act are to be broadly construed to effectuate this purpose. When construing a statute, the Court's "ultimate goal is to give effect to the purpose of the act as intended by the Legislature." Oliveira v. Lombardi, 794 A.2d 453, 457 (R.I.2002) (quoting Webster v. Perrotta, 774 A.2d 68, 75 (R.I.2001)). Tanner v. Town Council of Town of E. Greenwich, 880 A.2d 784, 791-92 (R.I. 2005). The fundamental purpose of the OMA is set forth in the Preamble to the Act:

> It is essential to the maintenance of a democratic society that **public business be performed in an open and public manner** and that **the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy**.

Emphasis added. Rhode Island Open Meetings Act, R.I. Gen. Laws § 42-46-1. See also Ohs v. N. Kingstown Sch. Comm., C.A. WC 05-441, 2005 WL 2033074 (R.I. Super. Aug. 10, 2005).

> The General Assembly enacted the Open Meetings Act for the stated purpose of guaranteeing that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials

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[4] The RIBOE squandered opportunities to consider the Petition at a meeting; first on August 14, 2013, and again, on August 24-25, when it held a "retreat" concerning graduation requirements.

> and the deliberations and decisions that go into the making of public policy. Section 42-46-1. **We have previously expressly stated that the provisions of the Open Meetings Act should be broadly construed and interpreted in the light most favorable to public access to achieve their remedial and protective purpose.** Solas v. Emergency Hiring Council of Rhode Island, 774 A.2d 820, 824 (R.I.2001).

Emphasis added. See also Anolik v. Zoning Bd. of Review of City of Newport, 64 A.3d 1171, 1174 (R.I. 2013).

A. The RIBOE Unlawfully Considered the Petition in Closed Session.

When the RIBOE finally considered the Petition on September 9, 2013 – eighty (80) days after the Petition was submitted – it did so in closed, executive session. Yet the Agenda for the September 9, 2013, meeting, posted on September 6, provided for determination of the Petition in open session and "discussion" of this litigation in closed session. The Agenda provided, in pertinent part:

> **9. EXECUTIVE SESSION**
>
> The Board may seek to enter into Executive Session to **discuss** --
> a. Update on Collective Bargaining pursuant to RIGL §42-46-5 (a)(2)
> (all bargaining units except Graduate Assistants)
> b. **Discussion of Litigation** – Prov. Student Union et al. v. Board of Ed. et al. pursuant to RIGL §42-46-5(a)(2)
>
> **10. ADDITIONAL ACTION ITEMS**
>
> a. Board **Determination on Petition** of Prov. Student Union et al.

Emphasis added.

R.I. Gen. Laws § 42-46-6 provides that:

> (a) All public bodies shall give written notice of their regularly scheduled meetings at the beginning of each calendar year. …
> (b) Public bodies shall give supplemental written public notice of any meeting within a minimum of forty-eight (48) hours before the date. This notice shall include the date the notice was posted, the date, time and place of the meeting, and **a statement specifying the nature of the business to be discussed.**

Emphasis added. The Agenda is therefore legally inadequate for at least three reasons. First, *the RIBOE promised a determination of the Petition in* ***open session*** (as was legally required)*, yet it made the determination in* ***closed session***. Second*, the Agenda stated that only a* ***discussion of litigation*** *would occur in closed session, but that is where the* ***determination of the Petition*** *occurred*. Third, *determination of the Petition was listed as an "****additional action item[]****," falsely indicating that determination of the Petition was in addition to what had been discussed in closed session*. Even Defendants must acknowledge the dichotomy between "discussion of litigation" and "determination" of the Petition, and the difference between "Executive Session" and "additional action items" in open session.

The Supreme Court's decision in Tanner v. Town Council of Town of E. Greenwich, 880 A.2d 784, 797-98 (R.I. 2005) is directly on point. There, the Town Council posted a notice that it would "interview" candidates for appointment to certain committees, but at the meeting instead appointed the candidates. The Court held that the Notice was fatally defective.

> [W]e recognize that the OMA does not explicitly require a public body to identify on the notice that it intends to vote on an issue at the meeting; however, our task is to determine whether the notice provided by the town council fairly informed the public, under the totality of the circumstances, of the nature of the business to be conducted. In addition to satisfying the date and time requirements of § 42–46–6(b), the contents of the notice reasonably must describe the purpose of the meeting or the action proposed to be taken. Here, plaintiff contends that the notice was misleading, and that misleading notice does not comply with the requirements of the OMA. We agree. Clearly, fair notice to the public under the circumstances, or such notice based on the totality of the circumstances as would fairly inform the public of the nature of the business to be discussed or acted upon, is not met by misleading information about the actions to be taken at a meeting of a public body. . . In our opinion, listing the agenda of the meeting as consisting of "interviews" for potential appointments fairly implies just that, *viz.,* that the town council only would be conducting interviews that evening. It does not reasonably describe the purpose of the meeting or the action proposed to be taken as including "voting" on the appointments of these potential board members. In common parlance, "interview" implies a formal meeting in which the interviewer elicits information from the interviewee to aid in evaluating the interviewee.[17] Hence, by posting the agenda as consisting of interviews, the town

> failed to provide notice to the public that would reasonably describe the action that the town council ultimately took.

Tanner, 880 A.2d at 797-98.

In this case, the RIBOE's Notice was just as misleading. It promised a determination in open session, but made the determination in closed session. RIBOE promised only a discussion of litigation in closed session, but instead made the determination of the Petition there.

This misleading conduct had real, tangible effects on the public, many of whom attended the meeting to hear and attempt to persuade these officials. They were instead presented with a *fait accompli* when the RIBOE emerged from closed session. What message does this send to parents, educators, and particularly students, about civic participation? And about attending the next RIBOE meeting?

B. Determination Of The Petition Does Not Fall Within The "Litigation" Exception

Consideration of the Petition does not fall within the "litigation" exemption of G.L. 42-46-5(a)(2). That section provides that a public body may close "[s]essions pertaining to collective bargaining or litigation, or work sessions pertaining to collective bargaining or litigation." The Supreme Court has not had occasion to consider the scope of this exemption, but in Phoenix-Times Pub.Co. v. Barrington School Committee, 2010 WL 4688074 (RI Super.), Judge Stern issued an instructive opinion examining the issue.

In Phoenix-Times, the School Committee considered in *open session* the merits of implementing a breathalyzer policy, then closed to the public its discussion of possible legal claims associated with such a policy, following receipt of a letter from the ACLU. The Court examined whether the letter could be discussed in closed sessioin. Judge Stern began his analysis by noting the evident purpose of the OMA, citing Tanner and Solas:

> It is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy. Such is the declared purpose for which the OMA was crafted to achieve. *Accordingly, the Rhode Island Supreme Court has required that the OMA be broadly construed and interpreted in the light most favorable to public access in order to effectuate this significant remedial and protective purpose*.

Emphasis added. Op. at 3. "[T]he articulated policy of the OMA 'itself betokens that two salient First Amendment values – the public's right to know and the accountability of public institutions – are at the core of the Act.'" (citation omitted). Op. at 5. Noting that the exemption was ambiguous as to "threatened" or "anticipated" litigation, Judge Stern's analysis returned to the statutory purpose favoring public access and government accountability. It was the counterbalance of the attorney-client privilege, and the necessary protection of trial strategy and settlement proposals, that tipped the scale. Only "litigation strategy" could be conducted in closed session.

Judge Stern was careful to define the limits of this result. "Naturally, this does not mean that consultations by a public body with an attorney in private may be used as a device to thwart the liberal implementation of the policy that the decision making process is to be open and that confidentiality is to be strictly limited." Op. at 12. He noted with approval the Attorney General's view that "because virtually any action or decision by a public body or official could result in litigation, the OMA cannot be read so broadly as to permit closed session discussions any time a public [body] asserts that litigation might ensue." Op. at 6.

A similar situation obtained in Dias v. Edwards, NC900038, 1990 WL 10000173 (R.I. Super. Mar. 26, 1990). There, Justice Israel was presented with a Complaint to enjoin a school

committee from negotiating without first noticing the meeting under the OMA. Distinguishing the "collective bargaining and litigation" exception, he noted:

> Section 42-46-5(a)(2) refers to the situation where the school committee meets, apart from the bargaining process itself, to consult among its members or with its negotiating team to discuss and/or act on matters *pertaining to* collective bargaining. It ought not refer to the occasions when the committee or one of its subdivisions meets *as part of* an on-going bargaining process.

Emphasis in original. Thus, the Court distinguished between the confidential component, insulated by 42-46-5(a)(2), and the actual process of bargaining, which the Court held was not even a "meeting" under the Act. And as Justice Savage held in a similar context, **the mere existence of litigation does not convert an otherwise public matter into a litigation matter**. Pine v. Charlestown Town Council, et al, C.A.No. 95-491, 1997 WL 839926 (R.I. Super. June 4, 1997). See also Burnett v. Gloucester Cnty. Bd. of Chosen Freeholders, 409 N.J. Super. 219, 236-37, 976 A.2d 444, 455 (App. Div. 2009) ("the subject under discussion must be the pending or anticipated litigation itself, i.e., the public body must be discussing its strategy in the litigation, the position it will take, the strengths and weaknesses of that position with respect to the litigation, possible settlements of the litigation or some other facet of the litigation itself.").

Thus, the litigation exemption is to be narrowly construed to protect *litigation strategy*. It is not a talisman for government secrecy. And the mere existence of litigation, or the threat of litigation, does not render public policy discussions confidential.

As of September 9, the litigation involved the (undisputed) allegation that defendants failed to act on the Petition within thirty (30) days, and sought a Writ of Mandamus directing Defendants to act. That question is obviously distinct from the merits of the Petition, i.e., reconsidering utilization of NECAP testing as a graduation requirement. Indeed, Defendant

Mancuso admitted as much in a Providence Journal Op-Ed, when she stated that the September 9 vote "**was not about the merits of any of our battery of state assessments; it was about starting the debate again about whether or not to have state assessments**." Having conceded that the vote was about the merits of the Petition, rather than "litigation strategy," it is clear that the exemption does not apply.

It is important at this juncture to note that the merits of the Petition involve a critical issue in public education. The Petition proposed amendments to the "Secondary School Regulations: K-12 Literacy, Restructuring of the Learning Environment at the middle and high school levels, and proficiency based graduation requirements (PBGR) at High Schools." It addressed the controversy surrounding implementation of the NECAP graduation requirement. This is a matter of keen public interest, and has engendered charged debate. Clearly the matter deserved public airing, and the public was disserved by the secret session.

Of course, there is no small irony in Defendants' invocation of the litigation exception after violating the thirty day time constraint. Consideration of the Petition would have occurred in open session had it been considered by the RIBOE in a timely fashion. Having failed to act within thirty (30) days, thereby provoking a lawsuit, Defendants now claim consideration of the Petition can occur in secret. Defendant asks this Court to condone, indeed reward, its initial violation of the APA by giving it a free pass under the OMA. This turns both statutes, intended to promote open and responsible government, upside down. The Supreme Court "will not construe a statute to reach an absurd result." Kaya v. Partington, 681 A. 2d 256, 261 (R.I. 1996).

III. AS A REMEDY, THE COURT SHOULD DECLARE THE SEPTEMBER 9 VOTE NULL AND VOID, AND ISSUE A PRELIMINARY INJUNCTION DIRECTING THE RIBOE TO CONSIDER THE PETITION.

As noted above, on August 6, 2013, the Court issued an order requiring the Board of Education to "open to the public" discussions regarding "the NECAP and high-stakes testing that they are considering implementing her in Rhode Island or have implemented here in Rhode Island." See Exhibit E at p. 4. If the Board failed to "open that [subject] to the public, then the Court … order[ed] that that topic not be discussed at the retreat so it's either open to the public or eliminated from the agenda." Id. The basis for the Court's order was that the OMA permitted injunctive relief under R.I.G.L. § 42-46-8(d) and that Plaintiffs made a strong showing that the subject matter that would be discussed regarding NECAP and graduation requirement "must be an open public meeting and not be in a closed meeting pursuant to the Open Meetings Act." Exhibit E at p. 2. Notably, the Court also found that Plaintiffs satisfied the other requirements for injunctive relief. "Our legislature has enacted a specific act which protects the rights of the public to know what goes on in the meetings of public bodies so I think the order … will serve the public interests." Exhibit E at p. 3. Finally, the Court noted that Plaintiffs proved irreparable harm because they are being deprived "of that right which our legislature has declared is of utmost importance so, clearly, substantial, irreparable harm would result if they're deprived of their right to participate in that meeting." Id.

In direct violation of the Court's Order, or at least in circumvention of the intent of the Order, the Board considered and voted on the matter in closed session. For the same reasons that Plaintiffs were entitled to an order requiring the Board to hear the matter in open session last month, Plaintiffs are presently entitled to an order requiring the Board to consider and vote on their petition in open session as soon as possible.

> The very word 'secrecy' is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths, and to secret proceedings.

John F. Kennedy, April 27, 1961, "The President and the Press" speech to the American Newspaper Ass'n, New York.

The RIBOE has had ample opportunity to post an accurate Agenda and comply with the thirty (30) day time constraint; its time in fact expired over two (2) months ago. This time can never be recaptured, and each day is another violation of the APA and OMA; the damage is, in a word, irreparable. The only meaningful remedy for this violation is an order directing the RIBOE to consider the Petition immediately, at a special meeting with that matter alone on the Agenda.

The RIBOE has proven itself unable or unwilling to consider the Petition in accordance with the OMA. Whether to commence rulemaking or deny the Petition is a matter of public policy, and the RIBOE Chair has conceded as much. Therefore, the Court should further order that the Petition be considered on its merits by initiating a public rulemaking process, or in the alternative, be considered in open session.

The Court should further declare the vote unlawfully taken in closed session null and void, and should order payment of a fine and attorneys' fees pursuant to G.L. 42-46-8(d), which provides:

> The court shall award reasonable attorney fees and costs to a prevailing plaintiff, other than the attorney general, except where special circumstances would render such an award unjust.
>
> The court may issue injunctive relief and declare null and void any actions of a public body found to be in violation of this chapter. In addition, the court may impose a civil fine not exceeding five thousand ($5,000) dollars against a public body or any of its members found to have committed a willful or knowing violation of this chapter.

In this regard, the Court should note that the RIBOE has been deliberate in its disregard of the APA and OMA. Plaintiffs reminded Defendants of the thirty (30) day requirement well in advance of its expiration, yet Defendant Mancuso took it upon herself to issue a letter "equivalent to a denial," rather than present the matter to the full Board in a timely fashion. The RIBOE might easily have posted and considered the Petition on July 15 or at the August 24-25 retreat, but failed to do so. In addition, only a month before holding the unlawful closed session, Defendants were subject to a Court Order on this very same educational issue, as noted above. And of course, when the matter was finally presented to the RIBOE, it was considered in secret.

Finally, the Court should note that, notwithstanding Defendant Mancuso's pronouncements, the issue raised by the Petition is a matter of great public concern. The issue divides, and likely will continue to divide, well-meaning observers on both sides of the question, including the RIBOE, which decided the question in secret by a *single vote*. It is simply not adequate for the RIBOE to claim it considered the matter in 2010 and now it's closed. Students, businesspeople, teachers, advocates and community members filed a Petition asking this Board to do what educators *ought to do* –continually examine, question, reconsider, and if necessary revise education policy to ensure best outcomes for Rhode Island students. Just as importantly, this is what both the APA and the OMA require the Board to do, and precisely what they have failed to do.

Plaintiffs/Petitioners,
By their attorneys,

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CERTIFICATION

A true and accurate copy of the foregoing was served upon Paul Sullivan, Esq., on September _____, 2013.

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