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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WOI CHENG LIM and LINWEN MAO, as Parents and *Guardians Ad Litem* of, L.L.,	:	**CIVIL ACTION NO. 2:13-CV-07399**
	:	
Plaintiff,	:	**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**
vs.	:	
SANDRA MASSARO, LYNN TRAGER, BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, and CHRISTOPHER D. CERF, Defendants	:	
Defendants,	:	

PLAINTIFFS' BRIEF IN OPPOSITION TO
DEFENDANT COMMISSIONER OF EDUCATION'S MOTION TO DISMISS

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COME NOW the Plaintiffs, Woi Cheng Lim and Linwen Mao, by and through the undersigned counsel, and submit this Brief in Opposition to the defendant Commissioner's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

I. SUMMARY OF ARGUMENTS

N.J.S.A. 18A:37-14 et seq. ("the Act") unconstitutionally restricts a significant amount of otherwise protected student speech, including speech on political and religious topics – speech typically afforded the greatest degree of protection under the U.S. Constitution. Further, the Act is unconstitutionally vague in its prohibitions, preventing a student or parent of ordinary intelligence the ability to determine whether or not their speech will constitute a violation of the Act in advance. As such, the Act should be struck down as unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution.

Even if not facially unconstitutional, however, the Act was unlawfully applied to L.L.'s protected speech, which did not cause or threaten a substantial disruption, or affect the rights of other students. Further, L.L.'s speech was protected truthful speech, and speech on a matter of public or social importance.

Finally, the Defendant Commissioner should be enjoined from further enforcing the unconstitutional Act against L.L. and other

students in the state of New Jersey, and because the defendant Commissioner enforced the Act against L.L. in violation of his clearly established constitutional rights, he is not immune to suit for violations under § 1983 or the New Jersey Civil Rights Act.

II. STATEMENT OF FACTS

The Complaint alleges claims on behalf of L.L., who at the times relevant to the Complaint was a student at a public elementary school in the Tenafly School District. In September 2011, a school nurse sent a note home to all of the parents in L.L.'s class, informing students that one of the children at the school had been afflicted with head lice. Complaint ¶ 17. Several days later, while seated at a group table in class, L.L. overheard another student, S.G., ask a third student, J.L., why she had recently dyed her hair. Complaint ¶ 20-21. After J.L. failed to respond to the question, L.L. responded to S.G., stating that J.L. had done so because she had lice. Complaint ¶ 22. J.L. then informed their teacher that L.L. said J.L. had lice. Complaint ¶ 23. The teacher confronted L.L. about the allegation, taking him into the hallway to discuss his statements. She instructed L.L. to apologize, which he did, and the matter was resolved. Complaint ¶ 24-25. In a Harassment, Intimidation, and Bullying ("HIB") Specialist Reporting Form dated September 27, 2011,

it states that L.L. was "accusing J.L. of having lice." Doc. 9, Laudicina Exhibit A.

On September 28, 2011, Sandra Massaro, the Board's "Anti-Bullying Specialist" ("ABS"), initiated her own investigation on the basis of the HIB Reporting Form. In doing so, she interviewed J.L., S.G., L.L., and a fourth student. In her interview, Massaro determined that J.L. felt "sad, a little mad, and alone" on the basis of L.L.'s statements that she had lice. Id. She further found that L.L. had stated that J.L. had lice because he believed it to be true (which he was ultimately correct about), and because he "wanted to make a point that it was [J.L.] who had the lice because there was a debate about who had it." Id.

On the basis of these interviews and the teacher's report, Massaro concluded that a violation of HIB occurred and that L.L. "intentionally use[d] the perceived characteristic of lice to make [J.L] feel embarrassed and upset." Id. As such, Massaro found that L.L.'s conduct had met the standard for HIB defined by Board Policy 5512 which is substantially identical to the definition for HIB found in The Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13 et seq. Complaint ¶ 33. Soon thereafter, Superintendent of Schools, Lynn Trager affirmed the results of Massaro's investigation and ordered that L.L. complete a remedial assignment that included reading and

discussing a book entitled "Just Kidding," a story about situations where kidding can hurt feelings. Complaint ¶ 41.

Thereafter, the defendant Board pursuant to N.J.S.A. 18A:37-15 (b)(6)(E) issued a decision by way of formal resolution affirming the report and the finding that L.L., had committed an act of bullying. Complaint ¶ 43-50. Plaintiffs subsequently filed a petition of appeal on February 16, 2012 with the Office of Administrative Law, and on November 26, 2012, the Administrative Law Judge assigned to the case issued an Initial Decision granting a motion to dismiss by the Board, and finding that L.L. had committed an act of bullying in violation of the Act. Complaint ¶ 51-54. On January 10, 2013, the defendant Commissioner of Education issued a decision affirming the Initial Decision, admitting that L.L.'s case "may stretch the definition of HIB to the outer edge of legislative intent." Complaint ¶ 54-56; Doc. 9-1, Fogarty Cert., ¶3, Exhibit B.

III. MOTION TO DISMISS STANDARD

When ruling on a Rule 12(b)(6) motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. Erickson v. Pardus, 551 U.S. 89, 94 (2007). To survive the motion, a complaint must contain sufficient facts to state a claim that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 678

(2009). Nevertheless, a complaint need only give a defendant fair notice of what the claim is and the grounds upon which it rests. Pardus, 551 U.S. at 93 (2007) (quoting Fed. R. Civ. P. 8(a)(2). Further, a district court must draw all reasonable inferences in favor of the plaintiff. Edgar v. Avaya, Inc., 503 F.3d 340, 344 (3d Cir. 2007). Dismissal is inappropriate unless, accepting as true the well-pled facts in the complaint and viewing them in the light most favorable to the plaintiff, the plaintiff is unable to state a claim to relief. Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc., 140 F.3d 478, 483 (3d Cir.1998). Particularly, when a "civil rights violation is alleged," courts should not grant a dismissal at the pleading stage, "unless it is readily discerned that the facts cannot support entitlement to relief." Carter v. City of Philadelphia, 989 F.2d 117, 118 (3d Cir. 1993), citing Robb v. City of Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984).

IV. ARGUMENT

A. New Jersey Statute N.J.S.A. 18A:37-13 Et Seq. Represents An Unconstitutional Restriction On Students' Protected First Amendment Speech Rights

Although admirable in purpose, The Anti-Bullying Bill of Rights Act ("The Act"), N.J.S.A. 18A:37-13 et seq. passed in 2011 is unconstitutionally overbroad and vague on its face in violation of the First Amendment of the U.S. Constitution. In seeking to

proscribe "harassment, intimidation, or bullying," it sweeps in too much protected speech. Further, its vague definition of HIB provides school administrators with far too much discretion to apply its prohibitions against speech that is otherwise protected, and leaves persons of ordinary intelligence to guess at what may or may not constitute HIB speech. Finally, the Act's sweeping provisions in targeting HIB speech do not lend themselves to a narrowing construction that could save the constitutionality of the statute. As such, the Act is an unconstitutional restriction on protected First Amendment speech and must be struck down.

i. The Act Is Unconstitutionally Overbroad

As the Supreme Court has previously held, a statute will be struck down as unconstitutionally overbroad on its face when there is a "likelihood that the statute's very existence will inhibit free expression," and that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." Saxe v. State College Area School District, 240 F.3d 200, 214 (3d Cir. 2001) (citing Broadrick v. Oklahoma, 413 U.S. 601, 612-615 (1973)); U.S. v. Stevens, 559 U.S. 460, 473 (2010).

On initial review of the Act it is immediately apparent that the amount of speech covered under the statute is sweeping. By its terms, the statute purports to treat as regulable: "any gesture, any

written, verbal or physical act, or any electronic communication" that is "reasonably perceived as being motivated either by any actual or perceived characteristic . . . or by any other distinguishing characteristic," that "substantially disrupts or interferes with the orderly operation of the school or the rights of other students," and that either: "(a) a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student . . . or placing a student in reasonable fear of physical or emotional harm," "(b) has the effect of insulting or demeaning any student or group of students," or "(c) creates a hostile educational environment for the student by interfering with the student's education or by severely or pervasively causing physical or emotional harm to the student." N.J.S.A. 18A:37-14.

In defending this language against a facial overbreadth challenge, defendant Commissioner compares the Third Circuit cases of Saxe v. State College Area School District and Sypniewski v. Warren Hills Regional Board of Education, 307 F.3d 243 (3d Cir. 2002), ultimately concluding that the language of the Act is more closely analogous to the language upheld by the Third Circuit in Sypniewski. Doc. 17-1 at 8-11.

In Saxe, the Third Circuit struck down, on overbreadth grounds, an anti-harassment policy that prohibited speech that targeted "actual or perceived" identity and other personal characteristics,

and had the "purpose or effect of substantially interfering with a classmate's educational performance or creating an intimidating, hostile, or offensive environment." Saxe, 240 F.3d at 215. Conversely, in Sypniewski, the Third Circuit upheld an anti-harassment policy specifically targeting racial harassment, enacted after a series of racial incidents at a particular school, that prohibited "harassing or intimidating utterances ('name calling' and 'using racial or derogatory slurs')", as well as the display or even possession of racially offensive materials that "depict[] or imply[] racial hatred or prejudice," or were "racially divisive" or "create[] ill will or hatred." Sypniewski, 307 F.3d at 261. After applying a narrowing construction to the policy removing the unconstitutionally overbroad references to "ill will," the court upheld it against overbreadth and vagueness challenges. Sypniewski, 307 F.3d at 265.

1. Substantial Disruption

The Defendant Commissioner's reliance on Sypniewski, however, is misplaced. While the policy in Sypniewski was upheld against an overbreadth challenge, the manner in which the school district in that case defined harassment and the specific type of harassment it targeted were sufficiently narrow to survive constitutional muster. In Sypniewski, the Third Circuit was explicit that the circumstances motivating the enactment of the policy were specific enough to meet

the substantial disruption standard put in place by Tinker to appropriately distinguish it from the broad and generalized policy found in Saxe. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

In Sypniewski, the Third Circuit spent a great deal of time documenting both the history of racial conflict at the school that gave rise to the need for the Policy, and highlighting the very specific language of the policy, noting its narrow focus only on racial harassment. Sypniewski, 307 F.3d at 247-48. Indeed, the court cited with approval the Board of Education's findings that there had been "significant disruption in the school and that the minority population was at a significant risk from, not only verbal and intimidating harassment, but also, increasingly, the risk of physical violence" ahead of the adoption of the policy. Sypniewski, 307 F.3d at 249.

Crediting this, the Third Circuit noted the importance of the documented history of "disturbing racial incidents" for enacting the policy to the overbreadth analysis, acknowledging that "[t]he history of racial difficulties [at the school] provides a substantial basis for legitimately fearing disruption from the kind of speech prohibited by the policy," and that "[t]he lack of a similar history was at least partially responsible for [the Third Circuit's] finding [that] the harassment policy in Saxe [was] unconstitutional."

Sypniewski, 307 F.3d at 262. The Court further distinguished Saxe by noting that the district there "fail[ed] to provide any particularized reason as to why it anticipate[d] substantial disruption from the broad swath of student speech prohibited under the Policy." Id., citing Saxe at 262. See also C.H. v. Brindgeton Board of Education, 2010 WL 1644612 (D.N.J. 2010) (dismissing as "unfounded fear-mongering" a school's alleged disruption concerns over allowing a student to violate school dress code and wear a black armband in protest of abortion); DePinto v. Bayonne Board of Education, 514 F.Supp2d 633 (D.N.J. 2007) (finding that a school failed to demonstrate a likelihood of substantial disruption to justify preventing students from wearing Hitler youth buttons to protest a school's dress code).

A similarly "broad swath" of protected speech is under threat by The Act – the prohibition of which is unsupported by any comparably articulated concerns about disruption in New Jersey. Expanding beyond the very specific racial violence concerns that motivated the court to uphold the policy in Sypniewski, the Act purports to regulate speech that is also motivated by "color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, [] mental, physical or sensory disability" and a broad catchall category of "any other distinguishing characteristic." N.J.S.A. 18A:37-14. Unlike the documented history of intense racial

relations that motivated the enactment of the policy in Sypniewski, the legislative findings section of the Act provide no similar such level of specificity for justifying such broad regulation. ("It is the intent of the Legislature in enacting this legislation to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises.") N.J.S.A. 18A:37-13.2.

2. Student's Right To Be Left Alone

Perhaps realizing the futility of relying on the "substantial disruption" standard alone to save the statute, defendant Commissioner also appears to rely on the language in Tinker that allows for the regulation of speech that collides "with the rights of other students to be secure and to be let alone." Tinker, 393 U.S. at 508. Doc. 17-1 at 17. Defendant Commissioner attempts to distinguish the Act from the policy in Saxe by noting that the Act targets only speech that has the actual effect of interfering with the rights of other students, while language struck down in the Saxe policy targeted speech that had either the "purpose *or* effect" of substantially interfering with a student's educational performance. Doc. 17-1 at 10-11. Much like the policy in Saxe, however, the Act impermissibly inhibits too much protected speech in its attempt to

secure these rights, and the focus only on the "effects" of the speech does not save the statute.

In Saxe, the Third Circuit addressed the district's argument that speech that "creat[es] an intimidating, hostile or offensive environment" could be banned because it "intrudes upon ... the rights of other students." Saxe, 240 F.3d at 217. Dismissing this as an impermissible justification for restricting such broad student speech rights, the Third Circuit acknowledged that the precise scope of this Tinker language is unclear, but that "it is certainly not enough that the speech is merely offensive to some listener," and that because the "hostile environment" prong in that statute had no required showing about the "severity or pervasiveness" of the speech to be covered, it could be applied to any speech on any enumerated personal characteristic that could offend someone. Id. The court concluded by acknowledging that this broad language could include too "much 'core' political and religious speech" to warrant upholding the policy. Id.

Further, in Justice Alito's limiting concurrence in Morse v. Frederick, 551 U.S. 393 (2007), Alito clarified that the court's decision did not "endorse the broad argument ... that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission,' " warning that public school officials could "define[] their

educational mission as including the inculcation of whatever political and social views are held by the members of these groups." Morse, 551 U.S. at 423.

By its own terms, the Act's prohibitions go even further than the ones struck down by the Third Circuit in Saxe, and considered constitutionally problematic by Justice Alito in Morse. In addition to borrowing the invalidated language from Saxe banning speech that "creates a hostile educational environment," and is motivated by any one of a number of enumerated characteristics or distinguishing factors, the Act also targets speech that "has the effect of insulting or demeaning any student or group of students." N.J.S.A. 18A:37-14. Further, completely eschewing Saxe's required showing of "severity or pervasiveness" to justify regulation, the Act is explicit in allowing regulation of "even a single incident" of speech that is motivated by one of the prohibited factors. Id.

This broad language that, at its core, regulates nothing more than "offense," is exactly what worried the Saxe court and caused it to strike down the policy in that case. Indeed, without much difficulty, one could imagine myriad examples of the very "core political and religious speech" worried about by the Saxe court being punishable by the terms of the Act. The Act could be used to stifle student discussion on divisive topics like sincerely held religious beliefs (such as, expression questioning the morality of

homosexuality – the very topic at issue in Saxe), religious practices, ethnic or cultural customs, or even observations about differing physical attributes as innocuous as hair color or length, eye color, or height differences, if such discussions had the effect of "insulting or demeaning" a student or "creat[ing] a hostile educational environtment."

Historical discussions about German atrocities committed during the Holocaust, or observations about the relationship between terrorism and radical Islam might justifiably "insult or demean" German or Muslim students respectively, providing adequate grounds for speech suppression on the basis that the statements disrupt the rights of other students. ("Nor could the school constitutionally restrict, without more, any 'unwelcome verbal ... conduct directed at the characteristics of a person's religion.' The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.") Saxe, 240 F.3d at 215.

3. Off-Campus Speech

In addition to the breathtaking breadth of speech covered by the Act, it also greatly expands the scope of private activity swept into its prohibitions to an unprecedented degree. Not limiting itself to

restricting the speech rights of students on campus, the Act purports to regulate speech that takes place "on school property, at any school-sponsored function, on a school bus, or off school grounds" as provided in N.J.S.A. 18A:37-15.3. N.J.S.A. 18A:37-14. The cited provision further regulates activity "that occurs off school grounds, in cases in which a school employee is made aware of such actions," with no temporal or geographic limits. N.J.S.A. 18A:37-15.3.

Indeed, anticipating these concerns, the Third Circuit in Saxe suggested that such a policy purporting to "cover conduct occurring outside the school premises . . . would raise additional constitutional questions." Saxe, 240 F.3d at 216. The Third Circuit reached this conclusion when interpreting a statute that only arguably covered conduct "in a school sponsored assembly, in the classroom, in the hall between classes, or in a playground or athletic facility," while by the facial terms of the Act, it sweeps in wholly off-campus and off-hours speech. Id.

Additionally, in J.S. ex rel v. Blue Mountain School District, 650 F.3d 915 (3d Cir. 2011), the Third Circuit addressed the extent to which off-campus student speech can be subject to prohibition. In J.S. ex rel, a student was punished under a school policy prohibiting vulgar speech after a student brought to campus a print-out copy of a negative and expletive-filled parody Myspace profile of her school principal. Id. at 939. Opining on the differing degrees of

protection afforded to on and off-campus student speech, the Third Circuit found that school officials exceeded their authority in punishing the student for the purely off-campus speech, stating that "neither the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school," concluding that a holding otherwise would "significantly broaden school districts' authority over student speech and would vest school officials with dangerously overbroad censorship discretion." Id. at 933.

In the factually similar case of Layshock ex rel. Layshock v. Hermitage School Dist., 650 F.3d 205 (3d Cir. 2011), a high school student created a "parody profile" of his principal on Myspace, characterized as "degrading, demeaning, demoralizing, and shocking." Id. at 208. Although he occasionally accessed the profile page while on-campus, the student created the page during off-campus hours, and the bulk of the activity related to the profile took place off-campus. Id. Despite this, school officials argued that there was a sufficient nexus between the school and the offending speech to justify citing him for violation of the school's "Harassment" policy. Id. at 209-10. Affirming the district court's grant of summary judgment in the subsequent § 1983 suit in the student's favor on First Amendment grounds, the Third Circuit noted, "[i]t would be an

unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities." Id. at 216. By its very terms, the Act purports to command this same degree of authority to affect the speech rights of students off-campus.

This preference for providing broad protection for private, off-campus student speech, coupled with a complete lack of evidence supporting a likelihood of disruption to arise from allowing speech on the broad range of topics prohibited by the statute, counsel in favor of invalidating the statute on overbreadth grounds. Surely, if students don't "shed their constitutional rights to freedom of speech at the school house gate," then they certainly don't shed them before even reaching it. Tinker, 393 U.S. at 506.

ii. The Act Is Unconstitutionally Vague In Its Prohibitions

In addition to the stated concerns about the breadth of the Act, it is also unconstitutionally vague in that it fails to give prospective speakers "fair notice" about the potential reach of the regulation, forcing persons of ordinary intelligence to guess at what may or may not constitute prohibited speech. Sypniewski, 307 F.3d at 266. A facially vague statute is constitutionally problematic,

because it runs the risk of "authorize[ing] and even encourage[ing] arbitrary and discriminatory enforcement," by failing to "establish minimal guidelines to govern . . . enforcement." Sypniewski, 307 F.3d at 266 (internal citations omitted).

In Killion v. Franklin Regional School District, a district court encountered a school policy that stated, in part, "it must be clearly understood that if a student verbally or otherwise abuses a staff member, he or she will be immediately suspended from school," without further defining "abuse". Killion v. Franklin Regional School Dist., 136 F.Supp.2d 446, 459 (W.D.P.A. 2001). Determining that the policy was both unconstitutionally overbroad and vague, the court struck down the policy, because its failure to clearly define "abuse" with any degree of specificity or limitation did not give students fair notice as to what speech could be prohibited. Id. at 458. In doing so, the court warned that policies without clearly defined limits gave the "unrestricted delegation of power to school officials" to subjectively interpret the policy arbitrarily. Id. Such an unrestricted delegation of power, the court warned, gave rise to an unconstitutional degree of vagueness.

The Act similarly suffers from an unconstitutional degree of vagueness in purporting to define as HIB, statements that interfere with the rights of students and are motivated by a broad catchall category of "distinguishing characteristics", the limits of which are

unknowable in advance. N.J.S.A. 18A:37-14. Further, the Act prohibits such statements if they have the effect of "insulting or demeaning any student or group of students," or "create a hostile educational environment." Id. Such a focus on the *impact* the statements have on the recipient student does not allow students or parents of ordinary intelligence adequate grounds for determining in advance what statements will "insult[] or demean[]" to a punishable degree, and which will not meet this threshold. Id. The sweeping breadth of subject matter swept into the Act's coverage will force teachers and school administrators into a position where they will have to make subjective and arbitrary judgment calls that a statement was sufficiently "insulting", "demeaning", or "created a hostile environment," and thus constituted HIB under the Act – the result warned-of in Killion.

Vagueness considerations are particularly relevant when the statute incorporates a content-based regulation of speech. In such instances, the vagueness raises special concerns that more speech than necessary may be chilled. Sypniewski, 307 F.3d at 266 (citing Reno v. American Civil Liberties Union, 521 U.S. 844, 871–72 (1997)). See also Speiser v. Randall, 357 U.S. 513, 526 (1958) ("When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone.' "). Indeed, content-based speech restrictions are presumed to be invalid, and the

government bears the burden of showing their constitutionality. U.S. v. Alvarez, 132 S.Ct. 2537, 2544 (2012) (citing Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 660 (2004)).

In Sypniewski, the court ultimately found that although the policy in that case prohibiting race-based harassment did prohibit speech on the basis of content, it could still be upheld. Sypniewski, 307 F.3d at 267-68. However, in reaching this conclusion, the court placed a lot of emphasis on the documented history of disruption at the school, which provided the district with adequate justification for crafting a policy that "narrowly targets the identified problems." Id. at 269. As discussed in the overbreadth section supra § IV.A.i, defendant Commissioner has not identified any similar bases for targeting speech on the selected subjects, and have made no effort to narrowly target their speech restrictions.

As a practical matter, the Act is unreasonable in its expectations and the standard that it purports to hold school children to. In subsection (a), the Act holds students liable under the Act for speech that "a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student." (emphasis added). N.J.S.A. 18A:37-14. By incorporating a "reasonable person" standard, the Act wholly ignores the practical realities of regulating speech in an environment of school-age children. The "special characteristics of the school

environment" in Tinker should cut both ways – while providing educators and teachers with additional tools for managing the scholastic environment for the interest of students, it should also support a practical and realistic understanding of the temperament of children, and their comparatively limited ability to anticipate what would and would not constitute prohibited speech. Tinker, 393 U.S. at 506.

iii. A Narrowing Construction Will Not Save The Act's Facial Invalidity

In order to save a statute from a facial overbreadth challenge, on some occasions courts have applied a limiting construction to the statute, interpreting a facially overbroad or vague statute narrowly in order to maintain its constitutionality. Boos v. Barry, 485 U.S. 312, 331 (1988). The Supreme Court has made clear, however, that limiting constructions are appropriate only where the statute is "fairly susceptible" to narrowing, and that it will not apply narrowing in instances that "require[] rewriting, not just reinterpretation." United States v. Stevens, 559 U.S. 460, 481 (2010). Unlike in Sypniewski, where the constitutionally offensive speech was reducible to the single phrase, "creates ill will", the prohibitions on protected speech in the instant case are central to the act itself and cannot be sufficiently separated and stricken from the act without undermining the meaning and purpose of the Act. As

such, a narrowing construction should not be applied to uphold the Act, and it should be struck down on overbreadth and vagueness grounds.

B. Even If Not Facially Unconstitutional, The Act Was Unlawfully Applied To L.L.

i. Non-Disruptive Speech That Does Not Impact The Rights Of Other Students Is Presumptively Protected

In Tinker, the Supreme Court affirmed the right of students to generally engage in speech unaccompanied by any disorder or disturbance. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). Since Tinker's broad pronouncement, courts have carefully carved out categorical exceptions to the general rule protecting students' rights to engage in non-disruptive speech. In Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986), the court excepted from protection the "use of lewd, vulgar, indecent, and plainly offensive speech"; in Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988), it excepted "school-sponsored [speech] or [speech that] can reasonably be viewed as the school's own speech,"; and in Morse v. Frederick, 551 U.S. 393, 405 (2007) it excepted from protection "speech that can reasonably be regarded as encouraging illegal drug use." Aside from these categorical exceptions, however, the court has never announced a generalized rule providing less

protection for non-disruptive student speech than is otherwise protected by the First Amendment.

As defendant Commissioner notes, Courts have expressed special caution for speech suppression targeting speech on political, religious, and plausibly social issues, both inside and outside of the school context. Tinker, 393 U.S. at 508-12. See also Snyder v. Phelps, 131 S.Ct. 1207, 1215 (2011) ("speech on matters of public concern ... is at the heart of the First Amendment's protection.") (internal citations omitted); Brown v. Entm't Merchs. Ass'n, 131 S.Ct. 2729, 2736 (2011) (finding that "minors are entitled to a significant measure of First Amendment protection" and that the government does not "have a free-floating power to restrict the ideas to which children may be exposed."); Connick v. Myers, 461 U.S. 138, 145 (1983) ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." (internal quotation marks and citations omitted)); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)(The First Amendment " 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people' ") (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

Indeed, in B.H. v. Easton Area School Dist., 725 F.3d 293 (3d Cir. 2013), cited by defendant Commissioner, the Third Circuit invalidated a school district's categorical ban on bracelets that

said "I heart boobies," holding that the bracelets commented on the social issue of breast cancer awareness, and that speech that does not rise to the level of plainly lewd and that could "plausibly be interpreted" as commenting on political or social issues could not be categorically restricted. Id. at 298. It is no accident that the Third Circuit reached such a permissive standard; the B.H. court was explicit that it understood Justice Alito's limiting concurrence in Morse to protect any speech that "can plausibly be interpreted as commenting on any political or social issue." Morse, 551 U.S. at 313.

ii. L.L.'s Speech Did Not Cause Or Threaten A Substantial Disruption, Or Affect The Rights Of Other Students

Considered together, these cases would find as protected, any speech that was: (a) non-disruptive, (b) did not interfere with the rights of another student, and (c) could plausibly be interpreted as commenting on any political or social issue. On this stated standard, it seems evident that L.L.'s statement, "J.L. had lice," was protected expression on a plausibly social issue, and as such did not meet the statutory requirements for HIB. Alternatively, if L.L.'s speech was not on a plausibly social issue, it represented truthful speech deserving of protection.

It is undisputed by the Commissioner Defendant that L.L.'s statement that J.L. "had lice" was limited to a single statement, and that his statement was not responsible for causing any sort of undue delay or distraction from the classroom lesson. Doc. 17-1 at 2-3. Indeed, the Commissioner adopted, in whole, the ALJ's findings that "L.L.'s actions in telling S.G. in front of a table of classmates that J.L. was afflicted with lice was a *single incident* where a 'verbal act' motivated by a 'distinguishing characteristic[.]'" (emphasis added). Complaint ¶ 53; Doc. 9-1, Fogarty Cert., ¶3, Exhibit B.

Further, the Commissioner defendant does not dispute Plaintiff's claim that immediately following the exchange, the class lesson continued. Complaint ¶ 24. There was no extended discussion, unrest, or confrontation that resulted from this interaction. Indeed, the Defendant Commissioner continues to characterize the lunch-break reading assignment that resulted from the anti-bullying specialist's findings as a "learning assignment," implying that the assignment was not punitive or the result of any bad conduct. Doc. 17-1 at 2-3. It is on the basis, then, of this single non-disruptive exchange between L.L. and J.L. that the Commissioner Defendant now argues that L.L.'s single comment constituted a disruption sufficient to restrict his speech rights.

The Third Circuit’s required showing for demonstrating a substantial or likely disruption is high, and requires more than a single exchange between two students, free of any continuing threat of disruption. In Sypniewski, the Third Circuit noted the documented history of intense racial relations that motivated the enactment of the policy upheld in that case, noting that “[t]he history of racial difficulties [at the school] provides a substantial basis for legitimately fearing disruption from the kind of speech prohibited by the policy,” and that “[t]he lack of a similar history was at least partially responsible for [the Third Circuit’s] finding [that] the harassment policy in Saxe [was] unconstitutional.” Sypniewski, 307 F.3d at 262. The Defendant Commissioner has not supplied any evidence that L.L.’s single comment met this high required standard, or that the enforcement of the Act against L.L. was motivated by any other broader concerns about continuing disruption at the school.

For the reasons highlighted here, and in Saxe and Sypniewski discussed in the vagueness and overbreadth sections, supra IV.A.i., the Third Circuit’s high standard for finding speech to constitute a substantial disruption was not met by L.L.’s single statement that “J.L. had lice,” nor could such a statement be considered to intrude on the rights of J.L. Sypniewski, 307 F.3d at 264-65. (“But by itself, an idea's generating ill will is not a sufficient basis for suppressing its expression. ‘The mere fact that expressive activity

causes hurt feelings, offense, or resentment does not render the expression unprotected.' ")(internal citations omitted).

iii. L.L.'s Speech Was On A Plausibly Social Issue, Namely, The Source And Prevalence Of Head Lice In The Classroom

There is little doubt that student discussion about the prevalence of head lice in the classroom would be of sufficient social interest to warrant protection. Indeed, school officials presumably agreed that such information was sufficiently important for members of the school community to know about, sending a note home to all parents informing them to check their children for head lice. Complaint ¶ 17. Having aroused the interest of the parents and students by sending the note home, it would be patently unreasonable to conclude that there would be no further interest about the potential source or extent of the head lice outbreak and that students could be punished for harassment for discussing the same issue the school itself did through issuing the letter.

If, however, the court determines that L.L.'s single statement "J.L. had lice" was not on a plausibly social issue, defendants Commissioner does not dispute the accuracy of L.L.'s statement, which raises additional speech protection considerations. The Supreme Court has showed a special regard for the protection of truthful speech independent of social or political importance, and L.L.'s truthful

statements should not have been the subject of a summary HIB determination. Smith v. Daily Mail Pub. Co., 443 U.S. 97, 102 (1979) ("[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards"). Indeed, it is puzzling that defendant Commissioner attempts to characterize what were ultimately truthful and accurate factual statements that J.L. had lice, as "insult[ing] and demean[ing]," and deserving of permanent stigmatization as "harassment, intimidation and bullying." Doc. 17-1 at 15.

At bottom, defendant Commissioner has made no showing whatsoever that L.L.'s truthful and accurate statements that a fellow student had lice would fit into any of the categorical exceptions to speech protection, or that L.L's singular statement interfered with another student's right or was likely to cause a substantial disruption. As such, the Commissioner's decision affirming the School Board's action violated L.L.'s rights.

C. The Commissioner's Enforcement Of The Act Against L.L. Violated His Due Process Rights Under The Fourteenth Amendment

In the complaint, Plaintiff also alleges violations of L.L.'s due process rights by the Commissioner's enforcement of the Act's strictures against him because the text of the Act does not provide the plaintiff with fair notice about what constitutes prohibited

speech activity. Complaint ¶ 82. Indeed, "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." F.C.C. v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012). Although Fox dealt with a criminal statute, the principle that fair notice of prohibited conduct is required before depriving a person of an interest protected by the constitution similarly applies in civil cases, and cases involving school discipline in particular. San Filippo v. Bongiovanni, 961 F.2d 1125, 1135 (3d Cir. 1992) citing Arnett v. Kennedy, 416 U.S. 134 (1974); Ward v. Hickey, 996 F.2d 448, 452 (1st Cir. 1993) (school may take an adverse action against a teacher because of the teacher's speech only if the school provided the teacher with notice of what conduct was prohibited).

Defendant Commissioner counters, claiming that school disciplinary policies are not required to be as specific as criminal regulations. Doc. 17-1 at 12. Nonetheless, the Supreme Court's student speech cases have made it clear that this deference to educators is not limitless, and is closely tied to their role in preventing disruption and ensuring the rights of other students. Thus, while school officials may have leeway when it comes to addressing student conduct that in fact causes disruption of the educational process, they are not allowed to impose significant discipline on students for innocuous statements devoid of any actual

or potential disruption, and without adequate forewarning that their statements are prohibited.

In this case, plaintiff's single factual assertion that another student had lice caused no actual or potential disruption, and did not impact the rights of another student; the class lesson continued after L.L. apologized for his statement when told to do so. Complaint ¶ 24-25. For this reason, and for the reasons explained in detail in the "vagueness" section Supra § IV.A.ii., this court should find that the Commissioner's enforcement of the Act against L.L. violated his due process rights under the Fourteenth Amendment.

D. The Commissioner's Enforcement Of The Act Against L.L. Violated His Fourteenth Amendment Equal Protection Rights

i. By Failing To Adequately Define Prohibited "Harassment, Intimidation Or Bullying," The Act Infringes On Students' Fundamental Right To Engage In Protected Speech Under The Equal Protection Clause Of The Fourteenth Amendment

The Equal Protection Clause of the Fourteenth Amendment prohibits states from making distinctions that (1) burden a fundamental right, (2) target a suspect classification, or (3) intentionally treat a person differently from others similarly situated without any rational basis for doing so. Horn v. City of Mackinac Island, 938 F.Supp.2d 712, 723 (W.D.M.I. 2013).

As discussed in the vagueness and overbreadth sections Supra, § IV.A.i., the statute's plainly lacking definition of "harassment,

intimidation or bullying" defines a host of First Amendment protected speech as "harassing" speech, and targets that protected speech for suppression without providing a justification for doing so. As such, the Act impermissibly burdens students' rights to engage in protected First Amendment speech, and must be invalidated. ("Students . . . are possessed of fundamental rights which the State must respect. . . They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.") Tinker, 393 U.S. at 511.

ii. Further, The Act Impermissibly Creates A Class Of Disfavored Speakers In Violation Of The Equal Protection Clause Of The Fourteenth Amendment

As noted by defendant Commissioner, in order to establish an equal protection "class of one" claim, a plaintiff must allege that (1) he has been intentionally treated differently from others similarly situated individuals, and (2) that there is no rational basis for the difference in treatment. Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). Additionally, in Phillips v. County of Allegheny the Third Circuit held that a plaintiff need not identify actual instances of differential treatment to successfully plead an equal protection violation in a complaint, and instead must

only raise general allegations of differential treatment for the complaint to be sufficient. Phillips v. County of Allegheny, 515 F.3d 224, 244 (3d Cir. 2008).

In the complaint, plaintiff alleged both that (1) the Act impermissibly distinguishes between students deemed to have engaged in speech considered to be "harassment, intimidation or bullying," and those who have not, and (2) by enforcing the Act against L.L. for making the factually true and non-disruptive statement that "J.L. had lice," defendant Commissioner singled L.L. out for punishment and adverse treatment. Complaint ¶ 82-85. As such, the complaint adequately alleges a Fourteenth Amendment equal protection violation.

E. The Plaintiff Has Alleged Sufficient Facts To Support A Claim Under The New Jersey Civil Rights Act

Defendant Commissioner alleges that Plaintiff's claims fail because they do not provide any evidence that the Commissioner " 'unlawfully by threats and coercion . . . deprive[d], interfere[d] or attempt[ed] to interfere' with L.L.'s federal and state rights," emphasizing that the complaint did not provide specific evidence of any threat or coercion. Doc. 17-1 at 25. The defendant Commissioner states that as a result, plaintiff's claims must be dismissed. Doc. 17-1 at 25-26. Defendant Commissioner misstates the requirement for asserting claims under the New Jersey Civil Rights Act ("NJCRA").

State and federal courts have repeatedly held that the NJCRA is interpreted analogously to claims under § 1983, and that the Act is meant to be construed in terms nearly identical to its federal counterpart. Chapman v. New Jersey, No. 08-4130, 2009 WL 2634888, *3 (D.N.J. August 25, 2009) ("Courts have repeatedly construed the NJCRA in terms nearly identical to its federal counterpart"); Slinger v. New Jersey, No. 07-5561, 2008 WL 4126181, at *5 (D.N.J. September 4, 2008) (noting NJCRA's legislative history, this district utilized existing § 1983 jurisprudence as guidance for interpreting the statute); Armstrong v. Sherman, No. 09-716, 2010 WL 2483911, * 5 (D.N.J. June 4, 2010) ("[T]he New Jersey Civil Rights Act is a kind of analog to section 1983").

As such, if the deprivation of a protected right is actually shown, the requirement to demonstrate a "threat or coercion" under the Act drops away. Felicioni v. Administrative Office of Courts, 404 N.J.Super. 382 (App.Div.2008). ("Thus, properly read, the statute provides a person may bring a civil action under the Act in two circumstances: (1) when he's deprived of a right, *or* (2) when his rights are interfered with by threats, intimidation, coercion or force. . . it makes sense to require, as the Legislature evidently did, that a plaintiff show 'threats, intimidation or coercion' were employed if constitutional rights were merely interfered with or an

attempt was made at interfering with them, and that no such showing is required where one has actually been deprived of the right.")

Article I, ¶ 6 of the New Jersey Constitution grants every person the right to "freely speak, write and publish his sentiments on all subjects," and that "[n]o law shall be passed to restrain or abridge the liberty of speech or of the press." N.J.S.A. Const. Art. 1, ¶ 6. Further, Article I, ¶ 18 of the New Jersey Constitution states that "[t]he people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances." N.J.S.A. Const. Art. 1, ¶ 18. As alleged by the Plaintiff in the complaint, the defendant Commissioner, through his exercise of discretion in affirming the decision of the ALJ, deprived L.L. of his right to free speech under the New Jersey Constitution, and the motion to dismiss the claims under the New Jersey Civil Rights Act must be denied.

A. The defendant Commissioner is not entitled to immunity from claims under the New Jersey Civil Rights Act on Eleventh Amendment grounds

In addition to claiming that Plaintiff has not properly alleged claims under the New Jersey Civil Rights Act, the defendant Commissioner also argues that he is immune from suit under the Eleventh Amendment's bar on claims against states. Doc. 17-1 at 26-27. However, this Eleventh Amendment immunity is limited only to

claims in official capacity suits, while plaintiff has sued defendant Commissioner only in his individual capacity. Indeed, the case cited by defendant Commissioner illustrates this very point. In Torres v. Davis, the court found immunity for the Commissioner of Education because *only* an official capacity claim was alleged ("Complaint states no claim against the Commissioner or Attorney General in their individual capacities"). Torres v. Davis 2012 WL 2397983 at *6 (D.N.J.2012); (" 'neither a State nor its officials acting in their *official capacities*' may be sued for monetary relief under § 1983" unless the State has waived its Eleventh Amendment immunity,") (emphasis added). Id. Because Plaintiffs allege claims against the commissioner Defendant exclusively in his individual capacity, claims of Eleventh Amendment immunity are inapposite.

B. The Commissioner Is Not Entitled To Immunity From Plaintiff's Claims Under § 1983

i. Qualified Immunity

If a reasonable official would understand that their conduct violated a plaintiff's statutory or constitutional right, the official is not entitled to the defense of qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Anderson v. Creithon, 483, U.S. 635 (1987); Ryan v. Burlington County, 860 F.2d 1199, 1208 (3d

Cir. 1998); Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990). In order to determine this, the Supreme Court has established a two-step inquiry for analyzing qualified immunity claims by defendants. Reviewing courts must ask (1) whether, considered in the light most favorable to the injured party, the facts alleged make out a violation of a constitutional right, and (2) whether the right at issue was "clearly established" at the time of a defendant's alleged misconduct. Pearson v. Callahan, 555 U.S. 223, 232 (2009); Kelly v. Borough of Carlisle, 2013 WL 6069275 at *3 (3d Cir. 2013). Additionally, in order for a court to dismiss a complaint on the basis of qualified immunity, it must find that even after accepting as true the well-pled facts in the complaint and viewing them in the light most favorable to the plaintiff, the plaintiff is still unable to state a claim to relief. Trump Hotels & Casino Resorts, Inc., 140 F.3d at 483.

In moving for dismissal, defendant Commissioner asserts that any alleged violation of the plaintiffs' constitutional rights was not "clearly established" at the time the Commissioner exercised administrative discretion in affirming the ALJ's initial decision finding L.L. in violation of the Act. Doc. 17-1 at 36-37. In reaching this conclusion, defendant Commissioner alleges that no precedential decision has established L.L.'s constitutional right to engage in the speech restricted by the Commissioner's decision. Id.

This statement ignores the bounty of precedent in both the Third Circuit and Supreme Court setting out the rights of students to engage in non-disruptive speech. Gruenke v. Seip, 225 F.3d 290, 302 (3d Cir. 2000) (finding that the test for qualified immunity "is not whether the current precedents protect the specific right alleged but whether the contours of current law put a reasonable defendant on notice that his conduct would infringe on the plaintiff's asserted right."); See also Supra § IV.A.

Regardless of the lack of any precedential decisions successfully challenging the newly enacted Act, it would be inappropriate to dismiss plaintiff's allegations at the pleadings stage. ("Just as the granting of summary judgment is inappropriate when a genuine issue exists as to any material fact, a decision on qualified immunity will be premature when there are unresolved disputes of historical fact relevant to the immunity analysis. Thus, while we have recognized that it is for the court to decide whether an officer's conduct violated a clearly established constitutional right, we have also acknowledged that the existence of disputed, historical facts material to the objective reasonableness of an officer's conduct will give rise to a jury issue.") Curley v. Klem, 298 F.3d 271, 278 (3d Cir. 2002).

Further, to whatever extent the defendant Commissioner raises qualified immunity as a defense to plaintiffs' request for injunctive

relief barring the Commissioner from enforcing the unconstitutional Act, or from further applying the Act in an unconstitutional manner, the Commissioner's defense should be given no effect. The Supreme Court has consistently held that qualified immunity cannot be raised as a defense to a claim for injunctive relief. Morse, 551 U.S. at 432-33, citing Wood v. Strickland, 420 U.S. 308, 314, n. 6 (1975); Trotman v. Board of Trustees of Lincoln University, 635 F.2d 216, 227 (3d Cir. 1980).

ii. Quasi-Judicial Absolute Immunity

Even crediting the defendant Commissioner's claims that he affirmed the ALJ's decision while acting in a quasi-judicial capacity, it does not then follow that he is immune to Plaintiff's claims under § 1983. Indeed, in Pulliam v. Allen, 466 U.S. 522 (1984), the Supreme Court addressed this precise question, ultimately concluding that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in his judicial capacity. Id. at 541-42. ("And although courts properly are reluctant to impose costs against a judge for actions taken in good-faith performance of his judicial responsibilities, a court, in its discretion, may award costs against a respondent judge.") Pulliam, 466 U.S. at 538 n.19. The Court further held that judicial immunity did not bar an award of attorney's fees under § 1988 for an

individual who succeeds in obtaining injunctive relief against a judicial officer under § 1983. Pulliam, 466 U.S. at 543-44. As such, quasi-judicial absolute immunity should not be granted to defendant Commissioner.

V. CONCLUSION

For the foregoing reasons, the defendant Commissioner's motion to dismiss must be denied.