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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

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WOI CHENG LIM and LINWEN MAO,	:	CIVIL ACTION NO.
as Parents and <i>Guardians Ad</i>	:	
<i>Litem</i> of, L.L.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
SANDRA MASSARO, LYNN TRAGER,	:	COMPLAINT
BOARD OF EDUCATION OF THE	:	
BOROUGH OF TENAFLY, and	:	
CHRISTOPHER D. CERF,	:	
	:	
Defendants	:	

Plaintiffs, by way of complaint against Defendants,  
hereby aver:

**JURISDICTION**

1. This Court's jurisdiction is founded on the existence of a federal question pursuant to 28 U.S.C. §§ 1331 and § 1343(a)(3), as this is an action for relief under 42 U.S.C. § 1983 based upon a deprivation of a rights secured by the United States

Constitution.

2. The Court has authority to grant declaratory and injunctive relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §2201 et seq.

3. Plaintiffs also invoke this Court's supplemental jurisdiction under 28 U.S.C. § 1367, as to the claims based upon the laws of the State of New Jersey, as such claims form part of the same case or controversy that is the basis for the claims within this Court's original jurisdiction.

#### **VENUE**

4. Venue in the District of New Jersey, Newark Vicinage, is proper pursuant to 28 U.S.C. § 1391 because (a) all of the Defendants reside in this judicial district and in the State of New Jersey, and (b) all or a substantial part of the events or omissions which give rise to the present claims occurred in this judicial district, and more specifically within the County of Bergen, State of New Jersey.

#### **PARTIES**

5. The Plaintiffs, Woi Cheng Lim and Linwen Mao, are and were at all relevant times, residents of the Borough of Tenafly, New Jersey and the natural parents of L.L.

6. L.L., is a minor and citizen of the United States, who at the times complained of attended a public elementary school operated by the Board of Education of the Borough of Tenafly and is

still a student in this school district.

7. Defendant, Sandra Massaro ("Massaro"), is an individual who at all times relevant to this complaint was employed by the Board of Education of the Borough of Tenafly as a school counselor and was charged with responsibility for interpreting and administering at L.L.'s school the "Harassment, Intimidation, and Bullying" ("HIB") policy of the Board of Education of the Borough of Tenafly.

8. Defendant, Sandra Massaro, is sued in her individual capacity for having violated under color of state law L.L.'s clearly established rights and in her official capacity for having violated such rights pursuant to a formal policy of the Board of Education of the Borough of Tenafly.

9. Defendant, Lynn Trager, is an individual who at all times relevant to this complaint was employed by the Board of Education of the Borough of Tenafly as Superintendent of Schools and was charged with supervising and enforcing the "HIB" policy of the Board of Education of the Borough of Tenafly.

10. Defendant, Lynn Trager, is sued in her individual capacity for having violated under color of state law L.L.'s clearly established rights and in her official capacity for having violated such rights pursuant to a formal policy of the Board of Education of the Borough of Tenafly.

11. The Defendant, Board of Education of the Borough of

Tenafly, is a governmental entity charged generally with providing a free, thorough and efficient education to the children of Tenafly and also charged specifically with promulgating, administering and enforcing a "HIB" policy consistent with state law.

12. The Defendant, Christopher D. Cerf, is an individual who at all times relevant to this complaint served as the Commissioner of Education of the State of New Jersey and in said position was charged by state law with "supervision of all schools of the state receiving support or aid from state appropriations, except institutions of higher education, and ... enforce[ment of] all rules prescribed by the state board" in addition to being given authority to "determine, without cost to the parties, all controversies and disputes arising under the school laws."

13. Defendant, Christopher D. Cerf, is sued in his individual capacity for having violated under color of state law L.L.'s clearly established rights and in his official capacity for injunctive relief barring him from enforcing an unconstitutional state statute or applying such statute in an unconstitutional manner.

#### **FACTUAL ALLEGATIONS**

14. In 2011, amendments to New Jersey's existing harassment, intimidation and bully ("HIB") statute under N.J.S.A. 18A:37-13.1, *et seq.* were signed into law.

15. Under the revised HIB statute, each school district Board

in the State of New Jersey is charged with developing, adopting, and implementing policies prohibiting harassment, intimidation, or bullying that are no less inclusive than the definition set forth at N.J.S.A. 18A:37-14 and N.J.A.C. 6A:16-1.3.

16. On August 30, 2011, the Tenafly Board adopted a written policy implementing its version of the required HIB policy, which reads as follows:

“‘Harassment, intimidation, or bullying’ means any gesture, any written, verbal or physical act, or any electronic communication, as defined in N.J.S.A. 18A:37-14, whether it be a single incident or a series of incidents that:

1) Is reasonably perceived as being motivated by either any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability; or

2) By any other distinguishing characteristic; and that

3) Takes place on school property, at any school-sponsored function, on a school bus, or off school grounds, as provided for in N.J.S.A. 18A:37-15.3, that substantially disrupts or interferes with the orderly operation of the school or the rights of other pupils; and that

4) A reasonable person should know, under the circumstances, that the act(s) will have the effect of physically or emotionally harming a pupil or damaging the pupil’s property, or placing a pupil in reasonable fear of physical or emotional harm to his/her person or damage to his/her property; or

5) Has the effect of insulting or demeaning

any pupil or group of pupils; or

6) Creates a hostile educational environment for the pupil by interfering with a pupil's education or by severely or pervasively causing physical or emotional harm to the pupil."

17. In September 2011, a note was sent home by the school nurse, informing all parents that one of the children attending L.L.'s school was afflicted with head lice, and directing parents to inspect their own children.

18. Although head lice, according to the C.D.C., are not known to transmit any disease and therefore are not considered a health hazard, the aforesaid letter of the nurse clearly made the issue of a possible transmission of head lice a matter of public concern for parents and students.

19. This would have been particularly so for medically unsophisticated parents who were unaware that head lice unlike body lice do not transmit disease and that head lice are not a result of unsanitary conditions and therefore should carry no stigma.

20. On September 27, 2011, L.L. was seated at a group table in a classroom with fellow students, including J.L. and S.G.

21. At one point, S.G. asked J.L. why she had dyed her hair.

22. After J.L. failed to reply to the question, L.L. replied to S.G., stating that J.L. had dyed her hair because she was the one who had head lice.

23. In response J.L. complained to the teacher.

24. Upon receipt of this information, L.L.'s teacher immediately instructed L.L. to apologize to J.L., which he did.

25. The class lesson then continued.

26. Although the foregoing clearly did not substantially disrupt or interfere with the orderly operation of the school or the rights of other students, the teacher immediately reported the matter to Defendant Massaro because she was the "Bullying Specialist" charged with responsibility for interpreting and administering the "HIB" policy at L.L.'s school.

27. As a result of this report Defendant Massaro launched a formal investigation and had L.L. removed from class so she could proceed to question him about the incident.

28. When interviewed by Defendant Massaro, L.L., stated, according to her, that he "wanted to make a point that it was J.L. who had the lice because there was a debate about who had it."

29. L.L., also defended his actions claiming that in stating that J.L. had lice, he was simply telling the truth and sharing what he had uncovered with his classmates.

30. In addition Defendant Massaro also interviewed other students present when L.L.'s statements were made, including J.L.

31. According to Defendant Massaro, J.L. felt "sad, a little mad, and alone," as a result of L.L.'s comments.

32. As required by the N.J.S.A. 18A:37-15 (b) (6) (A), and the District's formal policies, Defendant Massaro prepared a written

report of her investigation of the incident of harassment, intimidation, or bullying, which report was completed on or about October 10, 2011.

33. The findings contained in this report were that L.L. had committed an act "bullying" within the meaning of N.J.S.A. 18A:37-14, of the New Jersey Anti-Bullying Statute and the "HIB" policy of the Board of Education of the Borough of Tenafly.

34. Significantly this investigation did not identify any substantial disruption or interference with the orderly operation of the school that was traceable to the comments of L.L.

35. Significantly this investigation did not identify any specific right of a student such as J.L. which was violated by the comments made by L.L.

36. Significantly this investigation did not identify any specific physical or emotional harm suffered by J.L.

37. Significantly this investigation did not identify any specific fear of physical or emotional harm felt by J.L.

38. Significantly this investigation did not identify any specific adverse interference with J.L.'s education.

39. Instead the report apparently found that L.L.'s comment was an act of bullying because, although truthful and on a matter of public concern, it insulted or demeaned J.L and made her feel "sad, a little mad, and alone."

40. Pursuant to the dictates of N.J.S.A. 18A:37-15 (b)(6) (B)



the results of the investigation were reported to the superintendent of schools, Trager.

41. Thereafter, Defendant Trager pursuant to N.J.S.A. 18A:37-15 (b)(6)(B) affirmed the results of the investigation and ordered remedial action in the form of requiring L.L. to meet with Defendant Massaro at lunch and read and discuss a book entitled "Just Kidding," a story about situations where kidding can hurt feelings, and then be asked to answer three questions about the text.

42. L.L.'s teacher was also ordered to re-enforce with her students the need to be kind to each other which ironically embarrassed L.L. in front of all his other classmates as everyone deduced that it was his comment that generated the extra instruction on being nice.

43. Thereafter, Defendant Trager pursuant to N.J.S.A. 18A:37-15 (b)(6)(C) reported the results of the investigation and her response to same to the Defendant Board.

44. Thereafter the Defendant Board pursuant to N.J.S.A. 18A:37-15 (b)(6)(E), which requires boards of education to issue a decision in writing "to affirm, reject, or modify the superintendent's decision," issued a decision by way of formal resolution affirming the report and the finding that L.L., had committed an act of bullying.

45. Initially the aforesaid resolution was passed at a

meeting at which Plaintiffs had no opportunity to appear.

46. Subsequently, because the Plaintiffs had demanded a hearing a rehearing was held by the Defendant Board and after testimony was presented the Board on December 22, 2011 re-affirmed its prior decision.

47. As a result of the fact that the aforesaid finding that L.L. committed an act of bullying was memorialized by way of a formal resolution of a governmental entity, the record of that finding and the report upon which it was based will be maintained in perpetuity.

48. As a further result, this finding affirmed by the Defendant Board shall always be available to be utilized for the purpose of progressive discipline involving L.L.

49. Furthermore in the wake of the tragic death of Rutgers student Tyler Clementi, bullying particularly in New Jersey has been claimed to be a factor in suicides.

50. Thus the finding at issue stigmatizes L.L. as an individual who has engaged in a type of conduct that is so harmful that it causes student suicides across the country.

51. As a result of the foregoing the Plaintiffs filed a petition of appeal with the Defendant Commission of Education on February 16, 2012, who assigned it to an Administrative Law Judge ("ALJ") for an initial hearing.

52. On November 26, 2012, the ALJ ended these proceedings by

issuing an Initial Decision granting a motion to dismiss by the Board.

53. This Initial Decision was based upon the following determinations in regard to the conduct of L.L.:

"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,' head lice, substantially interfered with the rights of another student. Petitioners' attempts to trivialize J.L.'s concerns are unavailing. L.L. told his classmates that insects were breeding in J.L.'s hair. Of course she was embarrassed. Of course she felt insulted. Of course she felt demeaned. L.L. was old enough, and bright enough, to have realized that pointing out her lice to others could hurt J.L.'s feelings. His actions interfered with J.L.'s education. Upset and embarrassed children are not fully available for learning."

54. On January 10, 2013, the Defendant Commissioner of Education issued a decision affirming the Initial Decision of the ALJ for the reasons set forth above.

55. In affirming the decision, the Commissioner also admitted that L.L.'s case "stretch[ed] the definition of HIB to the outer edge of legislative intent," but noted that "districts are struggling to find the right balance between common sense and the highly prescriptive provisions of the law."

56. In affirming the decision, the Commissioner also utilized an abuse of discretion standard of review and after deferring to the original factual findings of the Defendant local Board found

that the actions of said Board were not "unreasonable, arbitrary or capricious."

57. As a result of the Defendants actions, L.L. has been permanently stigmatized as a "bully" and chilled from engaging in speech and other modes of protected expression and he therefore continues to suffer injury, both irreparable and otherwise.

58. As a result of the Defendants actions, L.L. sustained non-pecuniary losses in the form of emotional distress including emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and such other non-pecuniary losses as maybe disclosed in discovery.

59. In order to seek redress for the Defendants actions and to protect their child from the adverse consequences of them Woi Cheng Lim and Linwen Mao sustained pecuniary damages in the form of attorneys fees and costs in connection with the foregoing administrative proceedings.

60. All of the aforesaid actions of the Defendants were performed willfully and intentionally for the purpose of depriving L.L. of his civil rights.

61. Additionally, prior to the incident of September 27, 2011, and subsequent to same, including the remedial instruction involving the "Just Kidding" text, L.L. and other students have been instructed and continue to be instructed by the Defendants that while both in school and out of school they can make no

comments that any other student may find "insulting or demeaning."

62. Under this policy truthful statements of historical facts such as "the Germans were involved in the murder of 6 million Jews" would be subject to punishment where a student of German origin is present.

63. Thus L.L. has been chilled and continues to be chilled in respect to the exercise of his First Amendment rights.

**First Count**  
**Deprivation of Rights Under U.S. Const.**  
**Amend. 1 -- 42 U.S.C. § 1983**

64. The Plaintiffs re-allege and incorporate by reference the allegations in ¶¶ 1 to 63 set forth above.

65. L.L.'s statement that J.L. was the unknown student with lice was factually true and about a matter of public concern.

66. L.L.'s statement that J.L. was the unknown student with lice was made without any intention to harass, intimidate, or bully J.L.

67. L.L.'s making of the statement that J.L. was the unknown student with lice did not constitute a substantial disruption or interference with the orderly operation of the school.

68. L.L.'s making of the statement that J.L. was the unknown student with lice did not violate the rights of a student such as J.L.

69. Because L.L did not intentionally harass, intimidate, or

bully J.L., did not create a substantial disruption or interference with the orderly operation of the school and did not violate the rights of another student, Defendant Massaro's finding that bullying had occurred and Defendant Trager's ratification of that finding penalized L.L. on account of having engaged in expression protected by the First Amendment.

70. Because L.L., did not intentionally harass, intimidate, or bully J.L., did not create a substantial disruption or interference with the orderly operation of the school and did not violate the rights of another student, the Board's and the Commissioner's application of "HIB" policy to L.L. for making the statement at issue deprived L.L., of his right to free speech under the First Amendment.

71. In addition in the Third Circuit the law is clearly established that "HIB" policies such as the present one may only be enforced against students who intentionally mean to do harm and who intentionally cause a substantial disruption or interference with the orderly operation of the school or violate substantial or important rights of another student.

72. The law in the Third Circuit is also clearly established as to the premise that mere hurt or disturbed feelings of a listener are not sufficient grounds to punish or censor expression protected by the First Amendment.

73. As a result the individual Defendants as reasonable

public officials should have known that their actions would deprive L.L. of his right to free speech under the First Amendment.

74. Furthermore, because the subject of the administrative proceedings were statements by L.L. that were not threats and because he had attempted in such proceedings to justify his statements as "the truth," it should have occurred to the Commissioner as a reasonable public official that First Amendment concerns were implicated.

75. In addition as a reasonable public official the Commissioner should have known based upon United States Supreme Court precedent that not only was an abuse of discretion standard of review improper, but that he also had an obligation to make his own findings of fact in order to insure that First Amendment violations had not occurred.

76. In addition the New Jersey HIB statute and the substantially identical HIB policy of the Board set forth above are vague, indefinite and over broad, without any guiding standards for officials attempting to apply or enforce them and/or to determine what properly constitutes "harassment, intimidation, or bullying."

77. In fact the Commissioner in his decision admitted such inherent vagueness by stating that "districts are struggling to find the right balance between common sense and the highly prescriptive provisions of the law."

78. As a result the New Jersey HIB statute and the

substantially identical HIB policy of the Board of Tenafly facially violate the First Amendment to the United States Constitution by lacking standards that would permit judicial review and sweeping so broadly that significant amounts of protected speech fall within their prescriptions.

79. As a result of the foregoing violations L.L and his parents have sustained the previously described damages.

80. Pursuant to 42 U.S.C. §1988 Plaintiffs are entitled to attorney's fees and expert fees in connection with the bringing of the claims alleged in this count.

Wherefore, Plaintiffs, demand judgement against the Defendants for:

- a. Compensatory damages;
- b. Nominal damages in the event no compensatory damages are allowed;
- c. Punitive damages as to the individual Defendants;
- d. Injunctive relief declaring null and void N.J.S.A. 18A:37-14 and the Tenafly Board "HIB" policy, and permanently enjoining its enforcement;
- e. Reasonable attorney's fees and costs; and,
- f. Such other and further relief as this Court may deem appropriate and just.



**SECOND COUNT**

**Deprivation of Fourteenth Amendment Rights -- 42 U.S.C. § 1983**

81. The Plaintiffs re-allege and incorporate by reference the allegations in ¶¶ 1-80 set forth above.

82. On their face, the New Jersey HIB statute and the substantially identical HIB policy of the Board violate due process as guaranteed by the Fourteenth Amendment in that they fail to provide a person or student of ordinary intelligence fair warning as to what conduct will be considered "not nice" or "hurtful of feelings" and therefore a "bullying" violation of their provisions.

83. On their face, the New Jersey HIB statute and the substantially identical HIB policy of the Board violate equal protection as guaranteed by the Fourteenth Amendment in that without a compelling basis they permit school administrators to subjectively create a class of favored speakers whose speech content is deemed not to "hurt feelings" and another class of disfavored speakers whose speech content is deemed to constitute bullying.

84. Additionally L.L.'s statement was singled out for punishment and adverse treatment by the Defendants because of the content of the expression, and due to the subjective characterization of L.L.'s factually true statement as offensive by Defendants.

85. L.L. was thereby treated differently than other similarly

situated persons who engaged in similar expression or conveyed factually true messages about the appearance, characteristics, or features of fellow classmates.

86. As a result of the foregoing violations L.L and his parents have sustained the previously described damages.

87. Pursuant to 42 U.S.C. §1988 Plaintiffs are entitled to attorney's fees and expert fees in connection with the bringing of the claims alleged in this count.

Wherefore, Plaintiffs, demand judgement against the Defendants for:

- a. Compensatory damages;
- b. Nominal damages in the event no compensatory damages are allowed;
- c. Punitive damages as to the individual Defendants;
- d. Injunctive relief declaring null and void N.J.S.A. 18A:37-14 and the Tenafly Board "HIB" policy, and permanently enjoining its enforcement;
- e. Reasonable attorney's fees and costs; and,
- f. Such other and further relief as this Court may deem appropriate and just.

### **THIRD COUNT**

#### **Violation of New Jersey Constitution Art. I, § 6**

88. The Plaintiffs re-allege and incorporate by reference the allegations in ¶¶ 1-87 set forth above.

89. The aforesaid actions of the Defendants violated the rights of L.L. under Art. I, § 6, of the Constitution of New Jersey.

90. Prior to September 27, 2011, the Defendants unlawfully by threats and coercion instructed students such as L.L. that they would be disciplined as "bullies" if they said anything another student might find upsetting.

91. Prior to September 27, 2011, the Defendants did not instruct students such as L.L. as to the correct standard which is that to constitute bullying the speech must be so severe or serious as to cause a substantial disruption of school activities or violate rights of other students.

92. As a result of said threats and coercion and the aforesaid violations of L.L.'s federal and state rights the Plaintiffs may bring a claim under the New Jersey Civil Rights Act which at N.J.S.A. 10:6-2 provides for redress when any person deprives, interferes or attempts to interfere by threats, intimidation or coercion with the exercise or enjoyment by any other person of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State.

93. Pursuant to N.J.S.A. 10:6-2 (f) the court may award the Plaintiffs as prevailing parties reasonable attorney's fees and

costs.

Wherefore, Plaintiffs, demand judgement against the Defendants for:

- a. Compensatory damages;
- b. Nominal damages in the event no compensatory damages are allowed;
- c. Punitive damages as to the individual Defendants;
- d. Injunctive relief declaring null and void N.J.S.A. 18A:37-14 and the Tenafly Board "HIB" policy, and permanently enjoining its enforcement;
- e. Reasonable attorney's fees and costs; and,
- f. Such other and further relief as this Court may deem appropriate and just.

**F. MICHAEL DAILY, JR., LLC  
Attorney for the Plaintiff**

**BY: /s/ F. Michael Daily, Jr.  
F. Michael Daily, Jr.**

**Jury Demand**

Plaintiff herewith demands a jury trial as to all issues which are triable by jury.

**F. MICHAEL DAILY, JR., LLC  
Attorney for the Plaintiff**

**BY: /s/ F. Michael Daily, Jr.  
F. Michael Daily, Jr.**

Dated: December 10, 2013.

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