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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., :  
Plaintiff, :

CIVIL ACTION NO.  
2:13-CV-07399

PLAINTIFFS' SUPPLEMENTAL  
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, :

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PLAINTIFFS' SUPPLEMENTAL BRIEF IN OPPOSITION TO  
DEFENDANTS' 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 Supplemental Brief in Opposition to the defendants' Motion to Dismiss.

**I. INTRODUCTION**

In an Order dated July 7, 2014, the Honorable Claire C. Cecchi requested that the parties submit additional briefing addressing whether defendants are entitled to qualified immunity with respect to Counts 2 and 3 of plaintiffs' complaint. On July 17, 2014, defendants submitted their supplemental briefing. Plaintiffs now submit theirs, arguing that defendants are not entitled to qualified immunity with respect to Count 2, the Fourteenth Amendment claim, and Count 3, the claim under the New Jersey Civil Rights Act ("NJCRA"). Plaintiffs argue that defendants violated L.L.'s clearly established constitutional rights by singling out and targeting L.L.'s speech for punishment and suppression on the basis of the content of his protected expression, in violation of the Equal Protection clause of the Fourteenth Amendment. Further, plaintiffs argue that defendants violated L.L.'s rights under the Due Process clause of the Fourteenth Amendment by arbitrarily imposing punishment against L.L. for engaging in protected speech, without providing prior notice that his speech could be subject to such punishment. Finally, plaintiffs assert that defendants violated L.L.'s rights under NJCRA by interfering with L.L.'s speech rights protected under Article I, ¶ 6 of the New Jersey Constitution.

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 Defendant's alleged misconduct. Pearson v. Callahan, 555 U.S. 223, 232 (2009). Defendants' contend that their conduct does not meet either of the prongs because the Complaint does not allege a violation of the plaintiffs' constitutional rights, and the plaintiffs' right to truthful speech on matters of public concern is not clearly established. Doc. 35 at 2. 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. v. Mirage Resorts Inc., 140 F.3d 478, 483 (3d Cir.1998). Furthermore, where a court in making a qualified immunity analysis fails to credit evidence that contradicts some of its key factual conclusions, it improperly weighs the evidence. Tolan v. Cotton, 134 S. Ct. 1861, 1863 (2014).

Plaintiffs have alleged that defendant Massaro exercised discretion in her position as the Tenafly HIB Specialist to find that L.L. had violated the Board's HIB policy by accurately stating that another student, J.L., had head lice. Further, plaintiffs allege that defendant Trager exercised discretion in reviewing and validating

Massaro's HIB findings. As the Supreme Court observed in Hope v. Pelzer, 536 U.S. 730, 741 (2002), for the purposes of qualified immunity, officials will still be found to be on notice that their conduct violates established law even in novel factual circumstances, as notice does not require that facts of previous cases be materially or fundamentally similar to the situation in question. Because defendants' findings were in contravention to L.L.'s clearly established right to engage in protected speech, qualified immunity should not be granted.

## II. ARGUMENT

### **Defendants Are Not Entitled To Qualified Immunity For Claims In Count 2, Under The Fourteenth Amendment Due Process Clause**

Following Trager's validation of Massaro's finding of HIB through Tenafly's formal HIB review process, L.L. was subjected to a remedial reading assignment. Doc. 1 at ¶ 41. By this, L.L. was subject to disciplinary action without prior notice that his speech was prohibited under Tenafly's HIB policy. The fundamental requirements of due process are notice and an opportunity to be heard. Goss v. Lopez, 419 U.S. 565, 579 (1975). On its face, the Complaint alleges a deprivation of due process by demonstrating that the defendants did not provide L.L. with notice in advance that his utterance of the statement "J.L. had lice" on a single occasion could give rise to a formal finding of HIB.

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). See also 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). 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. Doc. 1 at ¶ 24-25. As such, his statements could not have supported a finding of HIB.

The basis of the due process violation in L.L.'s case is in the lack of notice he received that his exercise of protected speech would subject him to a finding of HIB. Nothing in the New Jersey Anti-Bullying Rights Act or Tenafly Board of Education's Policy No. 5512 informed plaintiff that he could be subject to disciplinary action for expressing factually true protected speech. This lack of notice violates a fundamental tenet of due process, and while school officials may have leeway when it comes to addressing student speech or conduct that in fact causes disruption of the educational process, they are not allowed to impose discipline on students for innocuous statements that are arbitrarily deemed to be violations after the fact.

Supporting their claim that L.L. suffered no deprivation of a fundamental right by the HIB finding and by the imposition of a remedial punishment, defendants argue that the punishment does not rise to a substantive due process violation because such punishment will not



result in any loss of present or future employment for L.L., and the documentation of L.L.'s HIB violation is contained in confidential files not subject to public disclosure, and thus cannot infringe on his liberty interests. Doc. 35 at 3. However, because defendants' findings of HIB will remain in L.L.'s student file for the duration of his academic career and will always be available to be utilized for the purpose of progressive discipline, L.L.'s liberty interests are implicated by defendants' actions. Doc. 1 at ¶ 48. In Lowry ex rel. Crow v. Watson Chapel School Dist., 540 F.3d 752 (8th Cir. 2008), the Eight Circuit affirmed a district court's permanent injunction grant, enjoining school district officials from disciplining any student wearing a black arm band in protest of the school's apparel policy. In doing so, the court relied in large part on the fact that even students not suspended under the policy might eventually suffer continuing irreparable injury due to the school's progressive discipline policy. Id. at 767; Opinion and Order, Lowry et al v. Watson Chapel School District et al., No. 06-cv-00262-JLH (E.D. Ark. Oct. 10, 2006), ECF No. 9. As such, L.L.'s future liberty interests are implicated by defendants' findings of HIB for his protected expression.

**Defendants Are Not Entitled To Qualified Immunity For Claims In Count 2, Under The Fourteenth Amendment Equal Protection Clause**

The Equal Protection Clause of the Fourteenth Amendment prohibits state actors 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). In order for a plaintiff to establish an equal protection "class of one" claim, a plaintiff must allege that (1) he has been intentionally treated differently from other 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). In Phillips v. County of Allegheny, 515 F.3d 224, 244 (3d Cir. 2008), 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. In the complaint, plaintiff has properly alleged that defendants' application of Tenafly's HIB policy against L.L. for making the factually true and non-disruptive statement that "J.L. had lice," singled L.L. out for punishment and adverse treatment. Daily Cert., Exhibit A at 5-6.

**Defendants Are Not Entitled To Qualified Immunity For Claims In Count 3, Under The N.J.C.R.A.**

State and federal courts have repeatedly held that claims under the NJCRA are interpreted analogously to claims under § 1983, and that NJCRA 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, at \*5 (D.N.J. June 4, 2010) ("[T]he New Jersey Civil Rights Act is a kind of analog to section 1983").

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. As alleged by the plaintiff, defendants, through their discretionary enforcement and application of Tenafly's HIB policy against L.L., deprived plaintiff of his right to free speech under the New Jersey Constitution. As such, the plaintiff has properly alleged a violation of the NJCRA for which defendants should not be granted immunity.

### III. CONCLUSION

For all these reasons, defendants have not asserted adequate grounds for dismissal on the basis of qualified immunity as to Counts 2 and 3 of the complaint, and for this reason plaintiffs' motion to dismiss must be denied.

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BY s/F. Michael Daily, Jr.  
F. MICHAEL DAILY, JR.

July 28, 2014.