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December 10, 2019

Via Email
Honorable Jude Tiscornia, ALJ
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: A[redacted] J[redacted] v. Boonton School District
[redacted]

Dear Judge Tiscornia:

This letter memorandum will provide legal support for the proposition that a student in New Jersey can be found to have committed a "HIB" violation for actions which are not specifically directed at a student.

In this case, J.J. uttered a racially objectionable word (the "N" word) in a conversation with another student. J.J.'s statement was overhead by an African-American student, who complained to the District's Administration about J.J.'s use of the word. In her Complaint, the student stated to Heidi Brady, a Boonton Guidance Counselor, that "[t]his school is racist, I don't want to come here."

The definition of "HIB" in the New Jersey Statute includes a verbal statement which is perceived as being motivated by an actual or perceived characteristic such as race, etc. There is no doubt that the use of the "N" word is such a statement. The statement in this case took place on school grounds. The statute requires that the statement "substantially disrupts or interferes with the orderly operation of the school or the rights of other students." In this case the statement had both those effects: the complaining student in this case has the right to go to school without overhearing racially inflammatory statements by fellow students; in addition, the statement interfered with the orderly operation of the school because the victim indicated that she did not want to attend the school in which such racial statements are made. In addition, the statement must satisfy one of three subparts of the definition set forth at N.J.S.A. 18A:37-14. J.J.'s statement met subpart B of this definition, because it had "the effect of insulting or demeaning any student or group of students …".

There is nothing in the detailed statutory definition of a HIB which requires that the statement or action have been explicitly directed toward a particular student. Not only does a statute not include such a requirement, but case law interpreting the statute confirms that a HIB violation can be found to have occurred even if the objected to-action is not specifically directed at an individual student.

In G.T.S. o/b/o S.A.S. v. Union County Vocational School, 2013 N.J. AGEN LEXIS 268, Agency Dkt. No. 229-8/12 (copy attached hereto as Exhibit A), the Petitioner filed an appeal to the Commissioner of Education seeking a reversal of the school district's finding that student S.A.S. committed an act of harassment. S.A.S. made a comment in school about agreeing "to bring the watermelon" in front of an African-American student. The student had also used the

phrase "F--ka u niggaz" on a Twitter posting. The District, after conducting an investigation, concluded that the student had violated New Jersey's HIB statute. Petitioner filed an action with the Commissioner of Education seeking to have her record expunged. ALJ Tiffany Williams denied this request and dismissed the Petition with prejudice.

In J.G. v. Hackettstown Pub. Sch. Dist., 2018 U.S. Dist. LEXIS 133444 (D.N.J. 2018) (copy attached hereto as Exhibit B), a student, during a class discussion, had referred to a police officer (a role in a play to be produced by the class) as "the pig". A student in the class whose father was a police officer objected, and the Hackettstown School District investigated the incident as a HIB incident. The District concluded that statement in fact constituted a "HIB" statement even though it had not been directed at any particular student.[1]

In Melynk v. Teaneck Bd. of Educ., 2016 U.S. Dist. LEXIS 161524 (D.N.J. 2016) (copy attached hereto as Exhibit C), an English teacher, while discussing the essay "Six to Eight Black Men" by David Sedaris, showed the class his Dutch relatives dressed in black face. An African-American student in the class objected to this depiction, the student complained about the incident, and the School District investigated the matter as a HIB violation. The District concluded that the teacher's actions had in fact violated the HIB policy because "[t]he depiction of your relatives in 'black face' is reasonably perceived as being motivated by race or color, took place in school, substantially interfered with the student[s] school day, and interfered with the rights of African-American students." slip Op. at 2.

[1] The student filed an action in Federal Court alleging that this conclusion violated his free speech rights under the New Jersey Constitution. The case is currently still pending in Federal Court before United States District Judge Sheridan.

In addition to the finding of the HIB violation by the teacher, the District also placed a written reprimand in the teacher's personnel file. The teacher filed a grievance challenging the written reprimand, which grievance was upheld by an arbitrator, who ordered the District to remove the reprimand from the teacher's file. Melynk then filed an action in U.S. District Court claiming that the HIB finding by the School District violated her constitutional rights. U.S. District Judge Madeline Cox Arleo rejected Melynk's argument, finding the teacher's actions had in fact violated the School District's HIB policy, and that Teaneck's HIB policy was not constitutionally infirm in any way.

Finally, in In the Matter of the Tenure Hearing of Brigitte Geiger and Sharon Jones, School District of Mount Olive, 2013 N.J. AGEN LEXIS 525 (2013) (copy attached hereto as Exhibit D), two teachers were terminated from their tenured employment in the Mount Olive School District for "engaging in a verbal exchange that was racially derogatory and overheard by students." During a conversation in the High School locker room, one of the teachers said that "[t]hese Negros think they are tough shit", to which the other teacher replied "[y]ea, that is what they are – a bunch of Negros, Negros, Negros." The comments, while obviously not directed at any student or person in particular, were overheard by two students in the locker room. The School District instituted tenure charges against the two teachers.[2]

The ALJ issued a decision recommending the teachers' dismissal from their tenure positions, and the Commissioner of Education accepted that recommendation in a Final Decision. In so doing, the Commissioner noted that "[n]otwithstanding the respondents' assertion that there was no deliberate exposure to the students or the public at large, the reality is

[2] The tenure charges were adjudicated under the "old" tenure procedures – that is, the case was tried before an Administrative Law Judge, with a final decision thereafter issued by the Commissioner of Education.

that the students did in fact hear the respondents using the inflammatory term. As a result, there was a direct impact to the school environment." While this case was not a "HIB" case per se, the fact that two tenured teachers lost their jobs over racially derogatory comments not directed at any individuals supports the proposition that, in this matter, J.J.'s use of an even more racially derogatory phrase constituted a HIB violation even though it was "merely overheard" by an African-American student.

Accordingly, not only does the New Jersey HIB statute itself not contain a requirement that a racially inflammatory verbal statement be directed at a particular student in order for a HIB violation to occur, the cases cited above unequivocally support that conclusion. Please contact this office if you have any questions or require further information.

Sincerely yours,

James L. Plosia Jr.

JLP:CAP
cc: Robert Presuto, Superintendent (via email)
A[redacted] J[redacted] (via email)

EXHIBIT A

2013 N.J. AGEN LEXIS 268

State of New Jersey Office of Administrative Law

October 16, 2013, Decided; September 17, 2013, Record Closed

OAL DKT. NO. EDU 12505-12; AGENCY DKT. NO. 229-8/12

Reporter
2013 N.J. AGEN LEXIS 268 *

G.T.S. INDIVIDUALLY AND ON BEHALF OF MINOR CHILD S.A.S., Petitioner, v. BOARD OF EDUCATION OF UNION COUNTY VOCATIONAL SCHOOL, UNION COUNTY, Respondent.

Core Terms

harassment, intimidate, bully, disciplinary record, hearing date, undisputed, recommend, adjourn, motion to compel discovery, initial decision, final decision, minor child, discovery, guardian, expunge, modify, adult, moot

Counsel

[*1] G.T.S., petitioner, pro se

Robert F. Varady, Esq., for respondent (LaCorte, Bundy, Varady & Kinsella, attorneys)

Initial Decision:

INITIAL DECISION

SUMMARY DECISION

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner G.T.S. filed an appeal seeking to expunge minor child S.A.S.'s student disciplinary record in connection with an investigation of a harassment, intimidation or bullying incident. On September 13, 2012, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case. On October 1, 2012, a pre-hearing order was entered determining the time period for discovery and setting a hearing for February 6, 2013. On October 10, 2012, the petitioner filed a motion to compel discovery, and on January 25, 2013, the petitioner filed a motion to extend discovery. On February 4, 2013, the petitioner requested an adjournment of the February 6, 2013, hearing date, which was granted. The hearing was continued to July 18,

2013. On February 27, 2013, respondent Board of Education of Union County Vocational School filed a response to the petitioner's motion to compel discovery and filed a motion for summary decision. **[*2]** I reserved on the motion for summary decision. An in-person status conference was conducted on July 1, 2013. As a result, the parties renewed the request for summary decision, and the July 18, 2013, hearing date was adjourned to October 1, 2013. Respondent supplemented its request on July 30, 2013. The petitioner responded on September 17, 2013. The hearing date of October 1, 2013, was adjourned in light of this summary decision.

FACTUAL DISCUSSION

The facts in this matter are undisputed. On March 20, 2012, the respondent received a complaint that S.A.S. may have committed an act of harassment, intimidation or bullying. Upon investigation, the respondent determined that the complaint involved an incident on March 9, 2012, where S.A.S. admitted to having made an insulting comment about agreeing "to bring the watermelon" in front of an African-American student, which she acknowledged referenced a "tasteless stereotype." The respondent's investigation also revealed a complaint about S.A.S.'s use of the phrase "f--ka u niggaz" on her Twitter postings. As a result of the investigation, the petitioner was required to participate in sensitivity-and-awareness training. The respondent **[*3]** did not place a record of discipline, nor the record of the investigation, in S.A.S.'s educational file, and neither was anything of the same nature sent to any colleges where S.A.S. had applied. S.A.S. is presently enrolled in college and has reached the age of majority.

CONCLUSIONS OF LAW

The facts involving this motion are not in dispute. Therefore, pursuant to N.J.A.C. 1:1-12.5(b) and Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995), I **CONCLUDE** that there are no genuine issues of material fact and that this matter is ripe for summary decision.

The respondent enacted a Harassment, Intimidation and Bullying (HIB) policy in the aftermath of the enactment of the amendments to the New Jersey Anti-Bullying Law, N.J.S.A. 18A:37-14. Pursuant to N.J.A.C. 6A:16-7.9, the respondent is required to establish a procedure for the prompt investigation of complaints and reports.

I **CONCLUDE** that this matter must be dismissed. The issues presented by the petitioner on appeal are moot. The petitioner requests as relief that the disciplinary **[*4]** record regarding an alleged incident of harassment, intimidation or bullying be expunged from S.A.S.'s disciplinary record. It is undisputed that the respondent did not create a disciplinary record in S.A.S.'s educational file reflecting a finding of harassment, intimidation or bullying. It is undisputed that S.A.S. is currently attending college and has presented no evidence to suggest that the respondent formally or informally conveyed any finding related to the underlying incident to any higher educational institution. In essence, where the respondent created no entry to S.A.S.'s educational file, no remedy is available. As a result, a determination of whether S.A.S. engaged in the communications alleged are moot, where resolution would not further a remedy.

Additionally, the respondent raised a concern that S.A.S.'s guardian is not the appropriate party to prosecute her claim because she is an adult. While I agree that S.A.S. is an adult and

should further her own claim as the real party in interest, I am satisfied that her legal guardian began the proceedings when she was a juvenile and therefore would have allowed her an opportunity to enter her appearance should the matter **[*5]** have proceeded further.

Based on the above, the matter is **DISMISSED**. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Initial Decision By: TIFFANY M. WILLIAMS, ALJ

End of Document

EXHIBIT B

J.G. v. Hackettstown Pub. Sch. Dist.

United States District Court for the District of New Jersey

August 8, 2018, Decided; August 8, 2018, Filed

Civil Action No: 18-cv-2365 (PGS)(DEA)

Reporter
2018 U.S. Dist. LEXIS 133444 *; 2018 WL 3756952

J.G., on behalf of minor K.C., Plaintiff, v. HACKETTSTOWN PUBLIC SCHOOL DISTRICT, et al., Defendants.

Core Terms

motion to dismiss, hostile environment, allegations, slurs, pig, plaintiff's claim, rights, Lives, hostile, subject matter jurisdiction, punitive damages, school district, conversation, individuals

Counsel: **[*1]** For J.G., on behalf of, K.C., Plaintiff: DONALD A. SOUTAR, JOHN RUE AND ASSOCIATES, BLOOMFIELD, NJ; JOHN DOUGLAS RUE, JOHN RUE & ASSOCIATES, LLC, BLOOMFIELD, NJ.

For HACKETTSTOWN PUBLIC SCHOOL DISTRICT, KEVIN O'LEARY, KAHTLEEN MATLACK, JENNIFER SPUKES, Defendants: ALYSSA K. WEINSTEIN, LEAD ATTORNEY, PURCELL, REIS, BEDMINSTER, NJ.

Judges: PETER G. SHERIDAN, UNITED STATES DISTRICT JUDGE.

Opinion by: PETER G. SHERIDAN

Opinion

MEMORANDUM AND ORDER

Presently before the Court is Defendants Hackettstown Public School District, Kevin O'Leary, Kathleen Matlack, and Jennifer Spuckes' Motion to Dismiss Plaintiff J.G.'s Amended Complaint Pursuant Federal Rules of Civil Procedure 12(b)(1) and (6). In her Complaint, Plaintiff asserts claims of: (1) hostile environment, contrary to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; (2) discrimination, contrary to the New Jersey Law Against Discrimination, N.J.S.A. § 10:5-1, *et. seq.*; (3) deprivation of her freedom of speech, contrary to 42 U.S.C. § 1983; and (4) violation of her constitutional right to free speech under Article I of the New Jersey Constitution. For the reasons discussed herein, Defendants' motion is denied.

BACKGROUND

This case involves allegations by a high school student, who claims that she was discriminated against and that her constitutional rights were violated when the Hackettstown Public **[*2]** School District

investigated and ultimately suspended the student for bullying.[1] Plaintiff J.G. brings this matter on behalf of her minor daughter, K.C., a 17 year old student at Hackettstown High School. (Amended Complaint at ¶ 7). On March 8, 2017, K.C. was summoned to the office of Defendant Kevin O'Leary, Assistant Principal at Hackettstown High School. (*Id.* at ¶¶ 13, 17). Apparently, K.C. and other students were overheard having a conversation about guns and violence, which O'Leary wished to address. (*Id.*). O'Leary asked K.C. whether the conversation concerned the Black Lives Movement; when she told him that she was speaking about confrontations between police and African Americans, O'Leary responded, "all lives matter." (*Id.* at ¶¶19-21). According to K.C., she understood this to mean that she was not to discuss the Black Lives Movement while in school. (*Id.* at ¶ 25). Apparently, during this conversation O'Leary also remarked that some individuals are lucky to have light-colored skin and pass as Caucasian, which K.C. took as an insult, being that she is bi-racial. (*Id.* at ¶¶ 23-24). However, K.C. was not disciplined for this incident.

In any event, five days later, March 13, **[*3]** 2017, K.C. again drew the administrator's attention, this time for uttering a purportedly offensive slur. During K.C.'s English class, students were reading the play, "Blood Brothers," which has a scene where a corrupt police officer treats two suspects differently based on their economic status. (*Id.* at ¶ 26). As students were picking roles to play, K.C. volunteered to play the police officer, referring to the officer as "the pig." (*Id.* at ¶ 27). Her English Teacher, Defendant Matlack, reprimanded her for her choice of word and K.C. apologized. (*Id.* at ¶ 28). This being said, J.G. received a phone call a half hour later from Principal Matthew Scanlon, who explained to her that K.C. was the subject of a Harassment, Intimidation, and Bullying (hereinafter, "HIB") investigation, pursuant N.J.S.A. § 18A:37-13, *et seq.*, (*Id.* at ¶ 29). The basis of this investigation was K.C.'s use of the word "pig," which may have offended a student in the class whose father is a police officer. (*Id.* at ¶¶ 30-31). However, Plaintiff avers that the student was not present when she made the purportedly offensive slur. (*Id.* at ¶ 31).

Later that day, the school conducted an HIB investigation, which was attended by K.C., Defendant Jennifer **[*4]** Spuckes, an HIB Investigation specialist, and Defendant O'Leary. (*Id.* at ¶ 36). K.C. apparently recorded this meeting[2]. In any event, during the meeting, K.C. expressed to Defendants Spuckes and O'Leary that use of the word "pig" did not reflect her view of law enforcement and claimed that the classmate who may have been offended by the statement was not present when she uttered the word. (*Id.* at ¶¶ 39, 41). According to the Complaint, "Mr. O'Leary and Ms. Spuckes analogized the use of the term 'pig' to the use of the term 'nigger' and, later, the term 'fag.'" (*Id.* at ¶ 42). Apparently, both of them asked her how she would feel if someone called her by either name.[3] (*Id.* at ¶¶ 43-44). Despite objecting to these slurs, Defendants O'Leary and Spuckes continued to utter them in front of her. (*Id.* at ¶ 45). The two also criticized K.C. for continuing

[1] At the outset, it should be noted that Defendants attach and cite to extraneous documents in their Brief in Support of their Motion to Dismiss. These documents are not referred to in the Complaint and, as such, the Court declines to consider them in addressing the present motion. *See In re Burlington Coat Factory Sec. Litigation*, 114 F.3d 1410, 1426 (3d Cir. 1997) (permitting a district court to consider material beyond the pleadings, without converting the motion to dismiss into a motion for summary judgment, where the document is "integral or explicitly relied upon in the complaint").

[2] The Court has not been provided a copy of the same.

[3] Apparently, K.C. is openly gay and felt that Defendants' use of the word "fag" was intentionally directed towards her.

to discuss the Black Lives Movement, which they compared to someone overhearing a sexually degrading conversation between two teachers. (*Id.* at ¶ 48).

Following the investigation, Defendant O'Leary notified J.G. that they concluded that K.C. had committed an "unintentional HIB offense" and would serve a one day in-school suspension. (*Id.* at ¶ **[*5]** 52). These findings were later brought to the Board of Education on March 22, 2017; however, the Complaint does not state what findings or actions were taken thereafter. (*Id.* at ¶ 56). This being said, the parties do not dispute that Plaintiff did not appeal the initial HIB violation finding.

LEGAL STANDARDS

I. Rule 12(b)(1) Subject Matter Jurisdiction

Under Federal Rules of Civil Procedure 12(b)(1) a claim can be dismissed for "lack of jurisdiction over the subject matter." This motion to dismiss may be asserted at any time in a case. *In re Kaiser Group Int'l, Inc.*, 399 F.3d 558, 565 (3d Cir. 2005). In a motion to dismiss based on subject matter jurisdiction, "the standard . . . is much more demanding [than the standard under 12(b)(6)]." 'When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff must bear the burden of persuasion.'" *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005) (quoting *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991)).

If the defendant's attack is facial, the court may take all allegations in the complaint as true and "may dismiss the complaint only if it appears to a certainty that the plaintiff will not be able to assert a colorable claim of subject matter jurisdiction." *Liu v. Gonzales*, No. 07-1797, 2007 U.S. Dist. LEXIS 74611, at *7 (D.N.J. Oct. 5, 2007). The standard of review differs substantially when the challenge is factual. Then, there is no presumption of truthfulness to a plaintiff's claims in the complaint. *RLR Invs., LLC v. Town of Kearny*, No. 06-4257, 2007 U.S. Dist. LEXIS 44703, at *8 (D.N.J. June 20, 2007) (citations omitted).

Thus, consideration **[*6]** of the motion does not have to be limited; conflicting evidence may be considered so that the court can decide factual issues that may bear on its jurisdiction. *Id.* Furthermore, "[w]hen resolving a factual challenge, the court may consult materials outside the pleadings, and the burden of proving jurisdiction rests with the plaintiff." *Med. Soc'y of N.J. v. Herr*, 191 F. Supp. 2d 574, 578 (D.N.J. 2002) (citing *Gould Elecs. Inc. v. U.S.*, 220 F.3d 169, 176 (3d Cir. 2000)). However, "[w]here an attack on jurisdiction implicates the merits of plaintiff's [f]ederal cause of action, the district court's role in judging the facts may be more limited." *RLR Invs., LLC*, 2007 U.S. Dist. LEXIS 44703, at *9 (internal citations omitted).

II. Rule 12(b)(6) Failure to State a Claim

On a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court is required to accept as true all allegations in the Complaint and all reasonable inferences that can be drawn therefrom, and to view them in the light most favorable to the non-moving party. *See Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 (3d Cir. 1994). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). While a court will accept well-pleaded

allegations as true for the purposes of the motion, it will not accept bald assertions, unsupported conclusions, unwarranted inferences, **[*7]** or sweeping legal conclusions cast in the form of factual allegations. *Iqbal*, 556 U.S. at 678-79; *see also Morse v. Lower Merion School District*, 132 F.3d 902, 906 (3d Cir. 1997). A complaint should be dismissed only if the well-pleaded alleged facts, taken as true, fail to state a claim. *See In re Warfarin Sodium*, 214 F.3d 395, 397-98 (3d Cir. 2000).

DISCUSSION

I. Lack of Standing

As an initial matter, Defendants contend that Plaintiff's Complaint should be dismissed for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), since Plaintiff failed to exhaust her administrative remedies. Plaintiff argues that because her present claims are unrelated to the HIB investigation, she was not required to assert these claims through the administrative process.

It is well-settled that "available and appropriate 'administrative remedies should be fully explored before judicial action is sanctioned.'" *Abbott v. Burke*, 100 N.J. 269, 495 A.2d 376, 391 (N.J. 1985) (quoting *Garrow v. Elizabeth Gen. Hosp. & Dispensary*, 79 N.J. 549, 401 A.2d 533, 538 (N.J. 1979)). Under N.J.S.A. § 18A:6-9, the Commissioner of Education enjoys broad authority "to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws." "In cases '[w]here the controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel.' *Goode v. Camden City Sch. Dist.*, No. 16-3936, 2017 U.S. Dist. LEXIS 79301, at *6 (D.N.J. May 24, 2017) (quoting *Board of Education v. Township Council of East Brunswick*, 48 N.J. 94, 223 A.2d 481, 485 (N.J. 1966)). Courts have held that NJLAD claims fall outside the Commissioner's jurisdiction. *See Hornstine v. Twp. of Moorestown*, 263 F. Supp. 2d 887, 900 (D.N.J. 2003); *Galbraith v. Lenape Reg'l High Sch. Dist.*, 964 F. Supp. 889, 895 (D.N.J. 1997) (Title VII, **[*8]** NJLAD, and breach of contract claims do not "arise under the school laws" for purposes of N.J.S.A. § 18A:6-9); *see also Balsley v. N. Hunterdon Bd. of Educ.*, 117 N.J. 434, 568 A.2d 895, 902 (N.J. 1990). In addition, "[t]here are no state exhaustion requirements for actions brought . . . under 42 U.S.C. § 1983 to enforce a federal constitutional claim." *Id.* (citing *Hochman v. Bd. of Educ.*, 534 F.2d 1094, 1097 (3d Cir. 1976)).

Here, contrary to Defendants' assertion, none of Plaintiffs claims "arise under the school laws" of New Jersey. While the allegations relate to the school's investigation into K.C.'s alleged bullying, the claims asserted arise under a federal statute, state law, United States Constitution, and the Constitution of the State of New Jersey. As such, because the Commissioner of Education did not have jurisdiction under N.J.S.A. § 18A:6-9 to hear Plaintiff's claims, Defendants' exhaustion argument is without merit.

II. Failure to State a Claim

1. Federal and State Constitution Claims

Defendants seek dismissal of Counts III and IV of Plaintiff's Complaint, which assert violations of her First Amendment rights under the United States and New Jersey Constitution, since K.C.'s comments are not constitutionally protected speech. Plaintiff claims that

Defendants deprived her of her First Amendment right to free speech by prohibiting her from referring to a police officer as a "pig" and discussing **[*9]** the Black Lives Matter movement.

To sustain a claim under Section 1983, a plaintiff must demonstrate: (1) "that they have been deprived of a right 'secured by the Constitution and the laws' of the United States"; and (2) that the defendant "deprived them of this right acting 'under color of any statute' or state law. *Flagg Bros, Inc. v. Brooks*, 436 U.S. 149, 155, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978). Where, as here, Plaintiff's Section 1983 claim is based on a First Amendment violation, she must demonstrate that: "(1) she engaged in protected activity, (2) the defendant took an adverse action against her, and (3) the protected activity was a 'substantial or motivating factor' in the adverse action." *Thomas v. East Orange Bd. of Educ.*, 998 F. Supp. 2d 338, 351 (D.N.J. 2014) (quoting *Swineford v. Snyder Cty.*, 15 F.3d 1258, 1270 (3d Cir. 1994)). In Counts III and IV, Plaintiff claims that K.C.'s First Amendment rights have been violated based on Defendants' restricting her "pig" comment and discussions regarding the Black Lives Matter movement.

It is well-settled that the First Amendment guarantees "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977). This being said, "[w]hile school students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,' a school's need to control student behavior will necessarily result in limitations on student speech." *Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 276 (3d Cir. 2003) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969)). "Restrictions on speech during a school's **[*10]** organized, curricular activities are within the school's legitimate area of control because they help create the structured environment in which the school imparts basic social, behavioral, and academic lessons." *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 96 (3d Cir. 2009).

The basic framework for analyzing First Amendment claims, in the public school context, is set forth in four Supreme Court cases: *Tinker*, 393 U.S. at 506; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988); and *Morse v. Frederick*, 551 U.S. 393, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007). *Tinker* established the general rule that "regulation of student speech is generally permissible only when the speech would substantially disrupt or interfere with the work of the school or the rights of other students." *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001) (discussing *Tinker*, 393 U.S. at 503-08). "Since *Tinker*, the Supreme Court has identified three 'narrow' circumstances in which the government may restrict student speech even when there is no risk of substantial disruption or invasion of others' rights." *B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293, 304 (3d Cir. 2013). First, under *Fraser*, a public school may "categorically restrict vulgar, lewd, profane, or plainly offensive speech in schools, event if it would not be obscene outside of school." *Id.* (citing *Fraser*, 478 U.S. at 683, 685). Second, under *Hazelwood*, "a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern." *Saxe*, 240 F.3d at 214 (citing **[*11]** *Hazelwood*, 484 U.S. at 273). Finally, under *Morse*, a school may "restrict speech that 'a reasonable observer would interpret as advocating illegal drug use' and that cannot 'plausibly be interpreted as

commenting on any political or social issue.'" *B.H.*, 725 F.3d at 304 (quoting *Morse*, 551 U.S. at 422, 403).

"The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." *Fraser*, 478 U.S. at 683. This makes sense, since these officials are in a better position to understand the "age, maturity, and other characteristics of their students far better than judges." *B.H.*, 725 F.3d at 308. While "discomfort" or "unpleasantness" does not justify restricting speech, "if a school can point to a well-founded expectation of disruption--especially one based on past incidents arising out of similar speech--the restriction may pass constitutional muster." *Saxe*, 240 F.3d at 212.

Here, Defendants cite to and rely on extraneous documents, beyond what is alleged in the Complaint, to support their contention that Plaintiff's "pig" reference is not protected speech. However, as noted above, at the Motion to Dismiss stage, the Court will only consider the factual allegations set forth within the four corners of the Complaint. When reviewing the Complaint, the Court is **[*12]** satisfied, at this stage, that Plaintiff's "pig" comment may constitute protected speech that was allegedly wrongfully infringed. While Defendants contend that her punishment was based on complaints of bullying and the school's overall concern for preventing disruptive behavior, there is nothing alleged in the Complaint to support same. Second, with regards to the Plaintiff's conversation surrounding the Black Lives Matter movement, it can hardly be argued that discussions involving political or social justice matters do not fall within the protections afforded under the First Amendment. *See, e.g., Mills v. Alabama*, 384 U.S. 214, 218-19, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966). In sum, at this stage, the Court limits its review to the factual allegations set forth in Plaintiffs Complaint. In doing so, the Court is satisfied that there are sufficient facts alleged supporting Plaintiffs free speech claims in Counts III and IV, and, therefore, denies Defendants' Motion to Dismiss on this basis.

2. Hostile School Environment

Defendants next seek dismissal of Counts I and II of Plaintiff's Complaint, wherein she asserts claims of hostile school environment under Title IV of the Civil Rights Act of 1964 and NJLAD.

a. Title VI

In Count I, Plaintiff avers that the March 22, 2017 investigation, **[*13]** wherein racial and homophobic slurs were directed towards her, created a hostile environment, contrary to Title VI, 42 U.S.C. § 2000d. Title VI states, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

Under Title VI, "a plaintiff may sue a school for money damages for its failure to address a racially hostile environment." *Whitfield v. Notre Dame Middle Sch.*, 412 F. App'x 517, 521 (3d Cir. 2011). "In order to establish liability based on a hostile environment for students under Title VI, a plaintiff must demonstrate 'severe or pervasive' harassment based on the student's race and 'deliberate indifference to known acts of harassment.'" *L.L. v. Evesham Twp. Bd. of Educ.*, 710 F. App'x 545, 549 (3d Cir. 2017) (quoting *Castleberry v. STI Grp.*, 863 F.3d 259, 264 (3d Cir. 2017); *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999)). "Discrimination under Title VI is not limited to

being excluded from, or denied the benefits of, a particular school program"; rather, courts have understood Title VI to protect students from "an academic environment free from racial hostility." *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665-66 (2d Cir. 2012) (citing *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 750 (2d Cir. 2003)).

Here, contrary to Defendants' contention, Plaintiff's Complaint sufficiently sets forth allegations giving rise to a hostile environment claim. On two separate occasions, **[*14]** Plaintiff was subjected to what could be interpreted as racially charged slurs, for purposes of this motion. According to Plaintiff, on March 8, 2017, O'Leary remarked that some people are "lucky enough to have light enough skin to 'pass' as Caucasian, which K.C. construed as comments directed towards her. (*Id.* ¶¶ 23-24). Second, throughout the March 13, 2017 HIB investigation, Plaintiff claims that both O'Leary and Spuckes used a racially charged slurs in front of her ("nigger"), despite her objections. These allegations constitute severe conduct that could give rise to a hostile environment. *See Castleberry*, 863 F.3d at 265-66 (holding that a supervisor's use of a racially charged slur in front of the plaintiffs and their co-workers constituted severe conduct). As such, for purposes of this motion, the Court is satisfied that Plaintiff has pled a plausible claim of a hostile environment; therefore, Defendants' motion to dismiss Count I is denied.

b. NJLAD

In Count II, Plaintiff claims that Defendants discriminated against her based on her sexual orientation, contrary to NJLAD, N.J.S.A. § 10:5-1, *et seq.* NJLAD provides:

> All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, **[*15]** and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, nationality, sex, gender identity or expression or source of lawful income used for rental or mortgage payments, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

N.J.S.A. § 10:5-4. These protections apply to public schools and extend to harassment based on a student's perceived sexual orientation. *L. W. ex rel. L.G. v. Toms River Reg'l Schs. Bd. of Educ.*, 189 N.J. 381, 915 A.2d 535, 549 (N.J. 2007). "[T]o state a hostile school environment claim under the NJLAD, an aggrieved student must allege (1) 'discriminatory conduct that would not have occurred 'but for' the student's protected characteristic,' (2) 'that a reasonable student of the same age, maturity level, and protected characteristic would consider sufficiently severe or pervasive enough to create an intimidating, hostile, or offensive school environment, and' (3) 'that the school district failed to reasonably address such conduct.'" *Thomas*, 998 F. Supp. 2d at 348 (quoting *L. W.*, 915 A.2d at 550). However, "isolated schoolyard **[*16]** insults or classroom taunts are [not] actionable." *Id.*

Here, Plaintiff relies principally on the HIB investigation, wherein O'Learly and Spuckes purportedly uttered homophobic slurs ("fag") towards K.C. As with Count I, the Court is satisfied, at this juncture, that there are sufficient facts pled to support Plaintiff's NJLAD claim. According to Plaintiff's Complaint, K.C. is a homosexual individual, O'Leary and Spuckes directed homophobic

slurs towards her and no measures have been taken by the District to reprimand this type of behavior. As such, when construing the Complaint in Plaintiff's favor, Plaintiff asserts a cognizable claim under NJLAD for hostile environment.

This being said, to the extent these claims are asserted against Spuckes, O'Leary, and Matlack, individually, Plaintiff's NJLAD claim fails since she does not allege that these individuals aided or abetted the discriminatory conduct. Under NJLAD, "employers" are liable for acts of discrimination and hostile work environment. *Cicchetti v. Morris Cnty. Sheriff's Office*, 194 N.J. 563, 947 A.2d 626, 643 (N.J. 2008) (citing N.J.S.A. § 10:5-12(a)). In addition, NJLAD extends liability beyond employers to individuals who "aid, abet, incite, compel or coerce the doing of any of the acts" that create a hostile environment. *See Mann v. Estate of Meyers*, 61 F. Supp. 3d 508, 529 (D.N.J. 2014) (citing **[*17]** N.J.S.A. § 10:5-12(e)). As such, it follows that, "individual liability of a supervisor for acts of discrimination or for creating or maintaining a hostile environment can *only* arise through the 'aiding and abetting' mechanism that applies to 'any person." *Cicchetti v. Morris Cty. Sheriff's Office*, 194 N.J. 563, 947 A.2d 626, 645 (N.J. 2008) (emphasis added). Here, being that the Complaint fails to assert that the aforementioned Defendants acted as aiders or abettors, Count II is dismissed as to these individuals.

3. Punitive Damages

Finally, Defendants seek to dismiss Plaintiff's request for punitive damages. "In order to recover punitive damages, the plaintiff must prove that the defendant's conduct was wantonly reckless or malicious." *Domm v. Jersey Printing Co.*, 871 F. Supp. 732, 739 (D.N.J. 1994) (citing *Grossman v. Club Med Sales*, 273 N.J. Super. 42, 640 A.2d 1194, 1200 (N.J. Super. Ct. App. Div. 1994)). In addition, whether to award punitive damages "is a fact question which should be decided by a jury." *Id.; see also Weiss v. Parker Hannifan Corp.*, 747 F. Supp. 1118, 1135 (D.N.J. 1990). As such, given that this matter is at the pleadings stage, the Court finds it premature to resolve this issue at the present time. Therefore, Defendants' motion is denied without prejudice and may be renewed at a later point.

ORDER

Having carefully reviewed and taken into consideration the submissions of the parties, as well as the arguments and exhibits therein presented, and for good cause shown, and for all of the foregoing reasons, **[*18]**

IT IS on this 8th day of August, 2018,

ORDERED that Defendants' Motion to Dismiss (ECF No. 10) is DENIED; and it is further

ORDERED that Count II (NJLAD Hostile Environment) is GRANTED without prejudice as to Defendants O'Leary, Spuckes, and Matlack, and DENIED as to Hackettstown Public School District; and it is further

ORDERED that Defendants' Motion to Dismiss Plaintiff's request for punitive damages is DENIED WITHOUT PREJUDICE; and it is further

ORDERED that Plaintiff has thirty days from the date of this Memorandum and Order to file an Amended Complaint.

/s/ Peter G. Sheridan

PETER G. SHERIDAN, U.S.D.J.

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EXHIBIT C

Melynk v. Teaneck Bd. of Educ.

United States District Court for the District of New Jersey

November 22, 2016, Decided; November 22, 2016, Filed

Civil Action No. 16-0188

Reporter
2016 U.S. Dist. LEXIS 161524 *; 2016 WL 6892077

REGINA MELYNK, Plaintiff, v. TEANECK BOARD OF EDUCATION, BARBARA PINSAK, DENNIS HECK and NAOMI CONKLIN, Defendants.

Core Terms

teacher, matter of public concern, classroom, rights, harassment, disruption, vague, First Amendment, color, gender, reasonable person, protected speech, public school, school board, Intimidation, regulating, prohibits, speaking, courts, public high school, motion to dismiss, anti-harassment, overbroad, hostile, argues, orderly operation, national origin, Fourteenth Amendment, circumstances, overbreadth

Counsel: **[*1]** For REGINA MELNYK, Plaintiff: F. MICHAEL DAILY, JR., LEAD ATTORNEY, SENTRY OFFICE PLAZA, WESTMONT, NJ.

For TEANECK BOARD OF EDUCATION, BARBARA PINSAK, DENNIS HECK, Defendants: DAVID B. RUBIN, LEAD ATTORNEY, METUCHEN, NJ.

For NAOMI CONKLIN, Defendant: ISABEL MACHADO, LEAD ATTORNEY, Machado Law Group, LLC, Clark, NJ.

Judges: Hon. Madeline Cox Arleo, UNITED STATES DISTRICT JUDGE.

Opinion by: Madeline Cox Arleo

Opinion

THIS MATTER comes before the Court on Defendants Teaneck Board of Education ("the School Board"), Barbara Pinsak, and Dennis Heck's motion to dismiss Plaintiff Regina Melnyk's ("Melnyk" or "Plaintiff") Complaint. Dkt. No. 8. The Court considered the motion without oral argument pursuant to Federal Rule of Civil Procedure 78 and Local Civil Rule 78.1. Defendant Naomi Conklin (together with the Board, Pinsak and Heck, "Defendants") joined in the motion. Dkt. No. 10. For the reasons stated below, Defendant's motion is **GRANTED**.

I. Background

In this action brought under 42 U.S.C. §1983, Plaintiff Regina Melnyk alleges that Defendants violated her First and Fourteenth

Amendment rights by disciplining her pursuant to an overbroad anti-harassment policy.

A. Plaintiff's Expressions

The underlying facts are undisputed. Regina Melnyk is a tenured teacher of Literature and Creative Writing at Teaneck High School, **[*2]** where she has been employed since September 2001. Compl. ¶¶ 9-10. On December 6, 2013, as part of the approved curriculum for her Creative Writing class, Melnyk led a class discussion of the essay "Six to Eight Black Men" by David Sedaris. Id. ¶ 12. The essay concerns the Dutch holiday tradition of people dressing up the Zwarte Piete character, a black man, who accompanies Santa Claus. Id. ¶ 13. Melnyk, who is of Dutch ancestry, and still had relatives living in the Netherlands, told her class that this tradition still persists in the Netherlands. Id. ¶ 14. She showed them a picture on her cell phone of her relatives dressed in black face. Id. An African-American student, R.C., responded that she found the picture to be racist and offensive. Id. ¶ 15. Melnyk responded that it was more a reflection of "cultural differences." Id. ¶ 16. When the student reiterated that the picture was offensive, Melnyk responded "in defense of her family . . . that it was a culture difference," and that the Dutch had abolished slavery long before the United States. Id. ¶ 17.

Later that day, R.C. reported these events to another teacher. Id. ¶ 19. The teacher then informed an Assistant Principal, who relayed **[*3]** it to Principal Dennis Heck. Id. ¶ 20. Heck then informed Superintendent Barbara Pinsak. Id. R.C. remained in Melnyk's class for the rest of the year. Id. ¶ 18.

B. Defendant's Disciplinary Actions and Appeal

Naomi Conklin, the Teaneck School District's anti-bullying specialist, was assigned to conduct a formal investigation to determine if Melnyk had violated the district's Harassment, Intimidation, and Bullying Policy (the "HIB Policy"). Id. ¶ 21. After conducting interviews with R.C., Melnyk, a substitute teacher who was in her classroom at the time, R.C.'s other teacher, and Heck, Conklin issued a report on January 4, 2014. Id. ¶ 23. She found that Melnyk had displayed a picture that was "reasonably perceived as motivated by race or color," and that it "created a hostile environment for [the student]." Id. ¶¶ 24-25.

On January 15, 2014, Barbara Pinsak informed Melnyk via letter that she was found to have violated the HIB Policy. Id. ¶ 27. The letter noted in particular that "[t]he depiction of your relatives in 'black face' . . . is reasonably perceived as being motivated by race or color, took place in school, substantially interrupted the student(s) school day, and interfered with the **[*4]** rights of African-American students." Id. ¶ 28. The consequence for this violation was a written reprimand to be placed in Melnyk's personnel file. Id. ¶ 29.

Melnyk immediately sought to appeal the decision, but was advised that no right to appeal existed. Id. ¶ 30. She then filed a grievance under the collective bargaining agreement between her union and the School Board that went to binding arbitration. Id. ¶¶ 31-32. On January 31, 2015, the arbitrator found in favor of Melnyk, ordering the School Board to remove the written warning from her personnel file. Id. ¶¶ 32. On May 29, 2015, the New Jersey Superior Court confirmed the arbitrator's decision, ordering the School Board to remove the reprimand from Melnyk's file. Id.

C. Anti-Harassment Policy

Teaneck Board of Education Policy #5512, under which Melnyk was charged, prohibits Harassment, Intimidation and Bullying, which

is defined as:

> 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 motivated by either any actual or perceived characteristic, such as race, color, religion, ancestry, national **[*5]** origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability; or by any other distinguishing characteristic; 2. Takes place on [s]chool property . . . as provided for in N.J.S.A. 18A:37-15.3; 3. Substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. A reasonable person should know, under the circumstances, that the act(s) will have the effect of physically or emotionally harming at student...or placing the student in reasonable fear of physical or emotional harm to his/her person or damage to his/her property; or
>
> 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 a student's education or by severally or pervasively causing physical or emotional harm to the student.

Compl. ¶ 35; N.J.S.A. 18A:37-14.

D. Procedural History

Melnyk brought this action on January 12, 2016, alleging that Defendants' actions violated her First and Fourteenth Amendment rights. Specifically, Melnyk asserts an as-applied First Amendment challenge to the School Board's anti-harassment policy, a facial First Amendment challenge, as well as a Fourteenth Amendment challenge that the anti-harassment policy violates **[*6]** due process. Compl. ¶¶ 42-55. Melnyk seeks monetary damages and injunctive relief declaring the HIB Policy null and void. Id. Defendants then moved to dismiss all counts.

II. Legal Standard

In considering a Rule 12(b)(6) motion to dismiss on the pleadings, the Court accepts as true all of the facts in the complaint and draws all reasonable inferences in favor of the plaintiff. Phillips v. Cnty. of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008). Dismissal is inappropriate even where "it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits." Id. However, the facts alleged must be "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id. Accordingly, a complaint will survive a motion to dismiss if it provides a sufficient factual basis such that it states a facially plausible claim for relief. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

III. Discussion

A. As-Applied First Amendment Challenge

Defendants first assert that Melnyk's as-applied challenge must be dismissed because her in-classroom expression was not protected speech under the First Amendment. Namely, she was not speaking on a matter of public concern. The Court agrees. **[*7]**

As a general rule, public employees "do not relinquish their First Amendment rights to comment on matters of public interest as a condition of their government employment." Brown v. Armenti, 247 F.3d 69, 74 (3d Cir. 2001) (citing Pickering v. Board of Education, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)); see also Connick v. Myers, 461 U.S. 138, 142, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) ("[I]t has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression."). Likewise, teachers and students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines School District, 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1968).

However, states also have a paramount interest in regulating their own speech, or expression which may be construed as state-sponsored speech. The Supreme Court has noted that employers "have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences." Garcetti v. Ceballos, 547 U.S. 410, 422, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006); see also Miller v. Clinton County, 544 F.3d 542, 547 (3d Cir. 2008) ("[P]ublic employers . . . have the same concern for efficiency and the need to review and evaluate employees as any other employer in order to ensure that the actions of employees do not interfere with the performance of public functions."). As such, public employees' protected speech is limited to circumstances where an employee is speaking as a citizen on a matter **[*8]** of public concern. Id. at 417 (citations omitted). In a public school context, courts must balance "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 568.

The Supreme Court has established a two-step inquiry to determine whether a public employee's speech is protected under the First Amendment. First, a court must determine whether the employee spoke as a citizen on a matter of public concern. If so, the court then uses a balancing test to ascertain whether the government entity had an "adequate justification" for treating the employee differently from a member of the general public. Garcetti, 547 U.S. at 418 (citing Pickering, 391 U.S. at 568); Munroe v. Central Bucks School Dist., 805 F.3d 454, 466 (3d Cir. 2015). These determinations are questions of law for the court. Baldassare v. State of N.J., 250 F.3d 188, 195 (3d Cir. 2001) (citing Waters v. Churchill, 511 U.S. 661, 668, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994)). Here, Defendants assert that Plaintiff's speech was not on a matter of public concern.

1. Matter of Public Concern

"[S]peech implicates a matter of public concern when it can be fairly considered as relating to any matter of political, social or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern **[*9]** to the public." Munroe, 805 F.3d at 467 (internal quotations omitted). The content of speech on a matter of public concern "generally addresses a social or political concern of the community," including broad social or policy issues, speech that implicates the discharge of public responsibilities by a government agency, and speech that relates to the way in which a government office is serving the public. Borden v. School Dist. of Tp. of East Brunswick, 523 F.3d 153, 169-70 (3d Cir. 2008).

But content alone does not determine whether

speech is a matter of public concern. A court must also consider the "form [ ] and context of a given statement, as revealed by the whole record." Connick, 461 U.S. at 147-48. Courts may not "'cherry pick' something that may impact the public while ignoring the manner and context in which that statement was made." Miller v. Clinton Cnty., 544 F.3d 542, 550 (3d Cir. 2008). As such, courts have found that speech made in private forums is non-protected speech. See Borden, 523 F.3d at 171 (football coach's expressions made during invitation-only dinner and in closed locker room was not on matter of public concern because they were made in private "for the consumption of the football team only"); Miller 544 F.3d at 550 (while content of probation officer's letter to county court judge included matters of public concern, the letter did not rise to the level of protected **[*10]** speech because it focused on the writer's personal grievances and was privately delivered in the form of a letter).

Taking form and context into consideration, courts have found that in-classroom speech made by an educator pursuant as part of a curriculum is not speech on a matter of public concern. See Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 (3d Cir. 1998) ("a public university professor does not have a First Amendment right to decide what will be taught in the classroom"); Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990) ("Although a teacher's out-of-class conduct . . . is protected, her in-class conduct is not.") (internal citations omitted); see also Lee v. York Cnty. School Div., 484 F.3d 687, 700 (4th Cir. 2007) (under Pickering, a school board did not infringe the rights of a teacher when it ordered him to remove religious material from a classroom bulletin board); Miles v. Denver Public Schools, 944 F.2d 773 (10th Cir. 1991) (holding teacher's in-classroom comments about a rumor regarding two of his students was not protected speech, noting "we distinguish between teachers' in classroom expression and teachers' expression in other situations that would not reasonably be perceived as school-sponsored").

Here, Melnyk's speech fits squarely within the framework of non-protected, curricular speech. Assuming the content of Melnyk's expressions implicated a public, social issue (the legitimacy of the Zwarte Piet tradition), **[*11]** the context in which she made it indicates the expression is not a matter of public concern. Melnyk was admittedly speaking as an employee when she commented on the Zwarte Piet tradition during the course of a classroom discussion. Melnyk herself emphasizes that she was speaking as a teacher, and made the at-issue expressions "as part of the approved curriculum for her Creative Writing class." Compl. ¶ 12. As such, she was speaking as an agent of the school. Mayer v. Monroe Co. Comm. Sch. Corp., 474 F.3d 477 (7th Cir. 2007) ("the school system does not regulate teachers' speech as much as it hires that speech"). Though Melnyk was not speaking from a school provided script, her improvised display of pictures from her phone and subsequent answers to her student's questions bore the imprimatur of the school as it took part during an authorized discussion. Courts have noted a public school's significant interest in controlling its curriculum because the state may make content-based choice when acting as the speaker. Edwards, 156 F.3d 488, at 491-92 ("when the state is the speaker, it may make content-based choices") (quoting Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)); see also Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 273, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988) ("[W]e hold that educators do not offend the First Amendment by exercising control over the style and content of student speech in school-sponsored expressive activities **[*12]** so long as their actions are reasonably related to legitimate pedagogical

concerns.").

In addition, Melnyk's expressions were made in a non-public setting. Her classroom was a private forum engaged in the exclusive purpose of educating her students. Public school classrooms, during school hours are typically regarded as non-public forums. Busch v. Marple Newtown School Dist., 567 F.3d 89, 95 (3d Cir. 2009) ("[I]n classrooms, during school hours, when curricular activities are supervised by teachers, the nonpublic nature of the school is preserved."). While public school classrooms are not per se private fora, they only become public when the school "intentionally open[s]" its facilities for "public discourse." Hazelwood, 484 U.S. at 267. No such invitation was made here. Plaintiff argues that the school created a "limited forum"[1] when it "approve[d] the presentation of a story and invites discussion about it by the teacher and students." Pl.'s Br. at 9. But this construction would render every public school classroom a limited public forum at all times. This is inconsistent with courts' prior applications of the limited public forum doctrine. Typically, a limited public forum is only found where a government entity has encouraged all members of a relevant community to participate. See Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242, 1260 (3d Cir. 1992) (public library **[*13]** is limited public forum for purposes of reading, studying and using library materials because it is open to the public without discrimination); Rosenberger, 515 U.S. at 828-29 (school required to provide funding to all student clubs regardless of religious viewpoint). Here, the only community member permitted to speak in the course of instruction was Melnyk, her student, and a substitute teacher who was observing the class. Compl. ¶ 21. Neither members of the public, nor even members of the school community in general were invited to participate.[2]

2. Academic Freedom

Finally, Melnyk urges the Court to consider "academic freedom" when deciding whether her First Amendment rights were violated. She

[1] A government entity may not discriminate based on viewpoint in a limited public forum. Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 828-29, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995).

[2] Defendants argue that the Supreme Court's decision in Garcetti requires courts to first consider whether the public employee's speech was made pursuant to his official duties. If it was, then his speech was not protectable and the inquiry ends. Defs.' Br. at 6. However, in Garcetti, the Supreme Court explicitly reserved the issue of "whether the analysis . . . would apply in the same manner to a case involving speech related to scholarship or teaching." Garcetti, 547 U.S. at 425. While the Third Circuit has not explicitly adopted Defendants' proposed test in its post-Garcetti cases on speech made in the course **[*14]** of scholarship or teaching, it has conducted a similar inquiry by considering the context of the speech under Pickering. See Munroe, 805 F.3d at 468 (3d Cir. 2015) (applying Pickering, teacher's comments on a personal blog was a matter of public concern because she made the blog available to the public and used it air grievances about the school); Borden v. School Dist. of Tp. of East Brunswick, 523 F.3d 153 (3d Cir. 2008) (under Pickering, football coach's participation in team prayer was not a matter of public concern because it occurred in a private locker room); compare Dougherty v. School Dist. of Philadelphia, 772 F.3d 979 (3d Cir. 2014) (applying Garcetti where teacher's expression was not made in the course of scholarship or teaching). As such, regardless of the application of the proposed Garcetti test, Melnyk was not speaking as a citizen on a matter of public concern when she made the expression at issue. See Borden, 523 F.3d at 171, n.13 (declining to apply Garcetti where speech failed first prong of the Pickering test). If Garcetti applied to the instant matter, Melnyk's speech would not be protected as it was made within the scope of her employment as a teacher. See Borden, 523 F.3d at 171, n.13 (even if Garcetti does apply in an educational context, a coach's participation in team prayer was not protected "as it was made pursuant to his official duties as a coach . . . and not as an ordinary citizen"); Johnson v. Poway Unified School Dist., 658 F.3d 954, 970 (9th Cir. 2011) **[*15]** (signs on a teacher's classroom walls identifying his religious affiliation not protected speech because it owed its existence to teacher's duties as an employee); Evans-Marshall v. Board of Educ. of Tipp City Exempted Village School Dist., 624 F.3d 332 (6th Cir. 2010) (public high school teacher's selection of texts for instruction was not protected speech because it was made pursuant to her duties as an employee).

points to a case recognizing the significance of academic freedom in a university setting. See Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967) (academic freedom "is . . . a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom"). But university cases are inapposite. It is well accepted that a state has a greater interest in regulating K-12 education than universities. The Third Circuit has noted four key distinctions between public high schools and universities: (1) "the pedagogical missions of public universities and public elementary and high schools are undeniably different" because the latter prioritizes the inculcation of societal values while universities "encourage teachers and students to launch new inquiries into our understanding **[*16]** of the world; (2) public high school administrators have a responsibility to act in loco parentis; (3) public high schools face "special needs of school discipline"; and (4) public high school administrators must consider the maturity level of their young students. McCauley v. Univ. of the Virgin Islands, 618 F.3d 232, 243-47, 54 V.I. 849 (3d Cir. 2010).

Because the Court finds that Melnyk expressions did not constitute speech on a matter of public concern, the Court does not consider the Pickering balancing test.

B. Facial Claim

Defendants next argue that Melnyk's facial challenge to the School Board's must be dismissed because it is neither vague nor overbroad. The Court agrees.

1. Overbreadth

Melnyk first asserts that the HIB policy at issue is facially overbroad. The proper inquiry for an overbreadth challenge is whether the policy "prohibits a substantial amount of protected expression." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002). "Courts will not strike down a regulation as overbroad unless the overbreadth is "substantial in relation to the [regulation's] plainly legitimate sweep." McCauley, 618 F.3d at 242 (3d Cir. 2010) (quoting Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 258 (3d Cir. 2002)). The overbreadth doctrine is "strong medicine" that is only typically employed "only as a last resort." Los Angeles Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 39, 120 S. Ct. 483, 145 L. Ed. 2d 451 (1999). As such, "[e]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." Sypniewski, 307 F.3d at 259 (internal **[*17]** quotation omitted).

The Court looks to four factors to determine the breadth of a statute or policy: (1) "'the number of valid applications," (2) "the historic or likely frequency of conceivably impermissible applications," (3) "the nature of the activity or conduct sought to be regulated," and (4) "the nature of the state interest underlying the regulation.'" Borden, 523 F.3d at 165 (citing Gibson v. Mayor & Council of Wilmington, 355 F.3d 215, 226 (3d Cir. 2004)).

Here, the HIB policy at issue prohibits any expression or conduct that "is reasonably perceived as being motivated by either any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender identity, and expression, or a mental, physical or sensory disability; or by any other distinguishing characteristic." Compl. ¶ 35. Melnyk argues that the final clause of that provision, "by any other distinguishing characteristic" is overbroad. Pl.'s Br. at 11. Specifically, she argues that there is no standard by which one could judge when speech derogatory as to some distinguishing characteristic. This is an unreasonable

construction of the policy.

On its face, the HIB Policy requires that several factors must be met before an expression can be found to be harassment. First, the communication **[*18]** must be "reasonably perceived as motivated" by an actual or perceived characteristic. That is to say, the comment must be objectively perceived to a reasonable person as motivated by a characteristic. Second, the communication must take place on school property. Third, the expression must have the effect of "substantially" disrupting or "interfe[ring] with the orderly operation of the school or the rights of other students." Finally, the expression must also have one of three effects: (1) the expression must be so objectively severe that "a reasonable person" should know that it will have the "effect of . . . emotionally harming" the student; or (2) that a student is actually insulted or demeaned; or (3) that a hostile work environment is created. It is well established that schools may regulate speech that "would substantially disrupt school operations or interfere with the right of others." Saxe v. State Coll. Area School Dist., 240 F.3d 200, 214 (3d Cir. 2001) (citing Tinker v. Des Moines Independent Comm. School Dist., 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969)). This is precisely what the HIB Policy does. It is difficult to think of any protected speech that would fall under this construction, and Melnyk has pointed to none.

Her only example plainly falls outside the scope of the policy. Melnyk claims that under the policy, a health teacher would be chilled **[*19]** from teaching that a balanced diet includes meat for protein where a vegan student is in the class. Pl.'s Br. at 12. No reasonable person would find that a teacher's statement advocating eating meat for protein can be "perceived as motivated" by his student's vegan characteristic. Even if one could find such a motive, the statement would also need to cause substantial disruption or interference with the "orderly operation of the school or the rights of . . . students." It is difficult to imagine how a discussion on the topic of protein diets could possibly lead to a disruption of the school or interference with the rights of any students.

Melnyk relies on the Third Circuit's ruling in Saxe, where the court struck down a public school district's anti-harassment policy for overbreadth. 240 F. 3d at 215. However, the language of the School Board's policy here is markedly different. The anti-harassment policy in Saxe provided that:

> Harassment means verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's **[*20]** educational performance or creating an intimidating, hostile or offensive environment.
>
> According to state law (18 Pa.C.S.A. § 2709), an individual commits the crime of harassment when, with intent to harass, annoy or alarm another person, the individual subjects, or attempts or threatens to subject, the other person to unwelcome physical contact; follows the other person in or about a public place or places; or behaves in a manner which alarms or seriously annoys the other person and which serves no legitimate purpose.

Id. at 218 (emphasis added).

It went on to define types of harassment in a definitions section. For example, "racial or color harassment" was defined as including "unwelcome verbal, written, or physical conduct directed at the characteristics of a person's race or color . . . ." Id. at 220. There,

the Third Circuit first noted that the policy exceeded what is constitutionally permissible under Tinker by not only prohibiting speech that led to actual interference of a student's educational environment, but also speech that was merely made with the purpose of causing such disruptions. Id. at 217. Second, the court noted that even if the "purpose" language was ignored, the examples of prohibited "harassment" contained in **[*21]** the policy do not rise to the level of substantial disruption. Id. Third, the Saxe policy prohibited speech that either had the purpose or effect of creating substantial interference or created a hostile educational environment. Id.

The HIB Policy contains none of these flaws. First, it only prohibits speech that actually causes substantial interference. Second, it does not prohibit harassment as "unwelcome" communication, but as communication "reasonably perceived" as motivated by a characteristic. Third, it can also prohibit speech that creates a hostile educational environment, but only if the speech creates a substantial interference with students' educational rights first. In short, the HIB Policy falls within the Tinker test. Accordingly, the Court finds that the valid number of applications is limited to speech that would be offensive to a reasonable person.

The Court also finds that the third and fourth Gibson factors weigh heavily in favor of Defendants' position. As discussed above, the Third Circuit has consistently recognized a public grade school's interest in regulating the classroom environment, especially any speech that "substantially disrupts" the orderly operation **[*22]** of the school. See McCauley, supra, (outlining the special circumstances of a public grade school environment including the public school's duty to act in loco parentis, "special needs of school discipline," and students' maturity level).

The Court finds that, on balance, the Gibson factors favor a finding that the HIB policy is not overbroad.

2. Vagueness

"A statute is unconstitutionally vague when 'men of common intelligence must necessarily guess at its meaning.'" Borden, 523 F.3d at 167 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 607, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)). The inquiry is conducted on a case-by-case basis. Id. A plaintiff bears the burden of showing that the statute was vague as applied to him. Id.

Melnyk argues that the HIB Policy is vague because it is "'victim' determinative"—that is to say, whether or not a violation occurs is based on the victim's perception of the expression. Compl. ¶ 55. This construction of the statute is misplaced. As explained supra II, B, 1, the HIB Policy requires that several objective factors be met before expression is found to rise to the level of prohibited harassment. The expression must be "reasonably perceived" as motivated by an actual or perceived characteristic. It must also cause substantial disruption or interference of the school's orderly **[*23]** operation or students' rights. The "reasonably perceived" test is an objective one that has withstood constitutional scrutiny. For example, in the copyright context, the Supreme Court has applied the "reasonably perceived" test to determine whether work constitutes a non-infringing parody. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 582, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994) (where a defendant presents a parody defense, the relevant inquiry is "whether a parodic character may be reasonably perceived"). Similarly, whether activity at a public school implicates the Establishment Clause turns on if the activity is "reasonably perceived" to have been endorsed by the school. Busch v. Marple Newtown School

Dist., 567 F.3d 89, 99 (3d Cir. 2009).[3]

Melnyk relies on State v. Pomianek, where the New Jersey Supreme Court found that a provision of the state's criminal **[*24]** bias-intimidation statute was vague because it required that a defendant who did not belong to a particular ethnic or racial group predict the reaction of a reasonable member of that group. 221 N.J. 66, 90, 110 A.3d 841 (2015). However, the statute there was explicitly focused on the victim's perspective. It provided that a person was guilty of bias intimidation if he committed certain prohibited acts:

> under circumstances that caused any victim of the underlying offense to be intimidated and the victim, considering the manner in which the offense was committed, reasonably believed either that (a) the offense was committed with a purpose to intimidate the victim or any person or entity in whose welfare the victim is interested because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity, or (b) the victim or the victim's property was selected to be the target of the offense because of the victim's race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity.

Id. at 81 (emphasis added). The statute required inquiry into whether the victim—and the victim alone—reasonably perceived a defendant's actions **[*25]** as conducted with a motive to intimidate based on a protected characteristic of the victim. In contrast, the HIB Policy does not require a speaker to place himself in the shoes of a recipient. It prohibits expression that any reasonable person would perceive as being motivated by protected characteristic.

One component of the HIB Policy that relies more on the victim's perspective is subsection B, which prohibits language that "[h]as the effect of insulting or demeaning any student or group of students." Taken alone, this could arguably lead to a ban of any expression that insults just one student. However, this provision must be read in conjunction with the rest of the HIB Policy, which requires that the expression be "reasonably perceived" as motivated by a characteristic and cause substantial disruption or interference.

C. Due Process

Melnyk argues that the HIB Policy violated her due process rights. In the context of school district policies, the Third Circuit applies the same test for vagueness to a procedural due process claim. Borden, 523 F.3d at 173. "[A] rule prohibiting conduct must not be in terms so vague that people of common intelligence must guess as to its meaning." Id. (internal quotation omitted). **[*26]** As discussed above, the Court finds that the HIB Policy is not unconstitutionally vague. Without such a finding, a plaintiff "must point to a fundamental right that he has which the policy infringed upon in order to establish a due process violation." Id. at 173-74. Melnyk has not done so here. She argues that her Equal Protection rights were violated because the HIB Policy "permits school administrators to subjectively create a class of favored speakers who are deemed politically correct and another class who [are] deemed bullies because their speech maybe politically incorrect." Compl. ¶

[3] Defendants argue the HIB Policy is not vague because it only prohibits speech that "a reasonable person should know, under the circumstances," would have harmful effects on a victim. Defs.' Br. at 49. Defendants' reading is too narrow. Defendants take this language from subsection A of the statute. However, subsection A must be read disjunctively with subsections B and C. Thus, assuming that subsections 1-3 are met, a violation of any subsection A through C would constitute a violation of the HIB Policy.

56.

Under the Equal Protection clause of the Fourteenth Amendment, a government entity "may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 96, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972) (ordinance regulating speech on school property resulted in viewpoint discrimination where protestors about racial discrimination were treated worse than other protestors). As such, the Court must first determine the nature of the relevant forum. See OSU Student Alliance v. Ray, 699 F.3d 1053, 1062 (9th Cir. 2012) (university practiced viewpoint discrimination where it selectively destroyed copies of a conservative newspaper). Here, the forum is a non-public classroom. For reasons **[*27]** discussed above, a public high school is free to regulate school-sponsored speech made during the course of regular classroom use. See supra, III A. Accordingly, Melnyk's Equal Protection claim is dismissed.

Having found that the application of the HIB Policy did not violate Melnyk's First Amendment or Fourteenth Amendment rights, the Court does not reach the issue of qualified immunity as against individual Defendants.

IV. Conclusion

For the reasons set forth above, Defendants Teaneck Board of Education ("the School Board"), Barbara Pinsak, Dennis Heck, and Naomi Conklin's motion to dismiss, Dkt. No. 8, is **GRANTED**. An appropriate Order accompanies this Opinion.

Dated: November 22, 2016

/s/ ***Madeline Cox Arleo***

Hon. Madeline Cox Arleo

United States District Judge

ORDER

THIS MATTER comes before the Court on Defendants Teaneck Board of Education ("the School Board"), Barbara Pinsak, Naomi Conklin, and Dennis Heck's motion to dismiss Plaintiff Regina Melnyk's ("Melnyk" or "Plaintiff") Complaint, Dkt. No. 8;

and the Court having considered the parties' briefing in support of and in opposition to the motion;

and for the reasons set forth in the accompanying Opinion;

IT IS on this 22nd day of November, 2016,

ORDERED that Defendant's Motion **[*28]** to Dismiss, Dkt. No. 8, is **GRANTED**.

/s/ Madeline Cox Arleo

Hon. Madeline Cox Arleo

United States District Judge

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EXHIBIT D

2013 N.J. AGEN LEXIS 525

Commissioner of Education

October 7, 2013, Decided October 07, 2013, Date of Mailing

OAL DKT. NOS. EDU 5974-12 and EDU 6047-12 (consolidated); AGENCY DKT NOS. 106-4/12 and 107-4/12

Reporter
2013 N.J. AGEN LEXIS 525 *

IN THE MATTER OF THE TENURE HEARING OF BRIGITTE GEIGER, SCHOOL DISTRICT OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY. AND IN THE MATTER OF THE TENURE HEARING OF SHARON JONES, SCHOOL DISTRICT OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY.

Core Terms

tenure, teacher, credibility, conversation, unbecoming, locker room, mount, negro, reply, racial slur, rebuttal, stress

Syllabus

[*1]

The Board certified tenure charges of unbecoming conduct against Brigitte Geiger and Sharon Jones - tenured physical education teachers employed at Mount Olive High School - for allegedly engaging in a verbal exchange that was racially derogatory and overheard by students. Respondents denied making the alleged comments, and contended that the students had fabricated their story based on biases against the respondents. The Board argued that the respondents' conversation in the girl's locker room, during school hours, amounted to conduct unbecoming of teachers, and sought removal of respondents from their tenured positions.

The ALJ found, inter alia, that: teachers are required to exercise a high degree of self-restraint and controlled behavior as they are entrusted with the custody and care of children; based on examination of the evidence and the demeanor of the witnesses at hearing, the students who overheard the respondents' conversation were credible witnesses, while the respondents were not; respondents' admissions of frustration with certain African- American students at the school lends credibility to the student witnesses; respondents exhibited a lack of professional **[*2]** judgment when they engaged in a racially derogatory verbal exchange on March 2, 2012 that was witnessed by students; they thereby compromised confidence in the educational environment; each teacher was equally culpable for acting in an unbecoming manner, and - as experienced teachers - should have known that their remarks fell well below the acceptable standard of conduct for an educational institution; the respondents failed to take responsibility

for their actions, denied making the statements and attempted to shift the blame to the student accusers. Accordingly, the ALJ concluded that the respondents' conduct warrants dismissal from their tenured positions.

Upon full consideration and review of the record, the Initial Decision of the OAL, the respondents' exceptions and petitioner's reply thereto, the Assistant Commissioner - to whom this matter was delegated pursuant to N.J.S.A. 18A:4-34 - adopted the Initial Decision as the final decision in this matter. In so deciding, the Assistant Commissioner found that the respondents' racially derogatory remarks create ongoing concerns about negative impacts on the educational environment, and necessitates **[*3]** termination of respondents' employment. Accordingly, the respondents were dismissed from their tenured positions and a copy of this decision was forwarded to the State Board of Examiners for action as that body may deem appropriate.

Counsel

[NO COUNSEL IN ORIGINAL]

Opinion

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to N.J.A.C. 1:1-18.4 by respondents and the Board of Education (Board) as well as the respective replies thereto.

This consolidated case involves tenure charges brought by the Board against espondents, Brigitte Geiger and Sharon Jones, two teachers in the Mount Olive School District. The Board charged the respondents with unbecoming conduct based on a conversation that they had in the locker room that was overheard by two students, G.H. and Z.C., during which the respondents both used a racially derogatory comment in reference to a group of students. Specifically, it is alleged that respondent Jones said something to the effect of "these Negros think they are tough shit" to which respondent Geiger replied "yeah, that is what they **[*4]** are a bunch of Negros, Negros, Negros." The Administrative Law Judge ("ALJ") found that the respondents were guilty of unbecoming conduct, and recommended that they be dismissed from their tenured positions with the Mount Olive School District.

In its exceptions, the Board contends that the ALJ wrongfully determined that it was only necessary to adjudicate Charge One because the remaining charges were also based on the same incident. Although the Board agrees with the ALJ's determination with regard to Charge One, it requests that if the Commissioner finds the conduct as alleged in Charge One is insufficient to warrant the respondents' dismissal from employment, the Commissioner also finds that Charges Two through Six were also substantiated for the reasons outlined in the Board's post-hearing submission. In reply, the respondents maintain that the Board sets forth no legal or factual authority for its position, and that the Commissioner should not replicate the error committed by the ALJ by penalizing the respondents repeatedly for the same conduct.

In their exceptions the respondents provided a summary of the hearing testimony and exhibits, and substantially reiterated the substance **[*5]** of their post-hearing submission at the OAL - recasting the arguments therein to support the contention that the ALJ erroneously sustained the Board's charges. [1] First, the respondents contend that despite acknowledging Aml Alhiyek's testimony in her opinion, the ALJ improperly and unreasonably disregarded it by ignoring the inherent credibility of Alhiyek's testimony and characterizing it in a fashion unsupported by the record. The respondents claim that Alhiyek, who was a friend of G.H., testified that G.H. told her she thought she heard the teachers say something during the locker room conversation but wasn't sure. The respondents further state that Alhiyek recalled G.H. saying, "I don't know why we did that, it's not true." Additionally, the respondents state that the only reason the ALJ offers to disbelieve Alhiyek is that "she was not an eyewitness to the alleged statements [in the locker room] ." (Initial Decision at page 22) The respondents contend that this statement reflects the ALJ's improper shifting of the burden of proof to the respondents. The respondents also stress that the record is devoid of any reason whatsoever to doubt Alhiyek's testimony, and in fact, Alhiyek **[*6]** was reluctant to testify because it was inconvenient in light of her college classes and because her friend G.H. told her things in confidence. The respondents further contend that without explanation, the ALJ wrongfully concluded that G.H. credibly and consistently rebutted Alhiyek's claim.

Thpondents also argue that the ALJ erred because the credibility findings as to G.H. and Z.C. were not supported by the record. Specifically, the respondents contend that the ALJ made the following unsupported conclusions: that G.H.'s story "closely matched Z.C.'s;" that Z.C.'s version of the events was also consistent with G.H.'s; and that the record does not support the respondents' assertion that the students' stories were rife with inconsistencies. (Initial Decision at page 21) **[*7]** The respondents maintain that the case law directs that student testimony against a teacher must be viewed with great caution and scrutiny, and that the ALJ was required to view the students with suspicion - especially because the Board's case is entirely dependent upon their testimony.

Further, the respoe resndents contend that the ALJ disregarded the prior inconsistent statements of both G.H. and Z.C. that were made by the students when they were interviewed by Kevin Stansberry, the principal of Mount Olive High School and the vice principal, James Kramer. For example, the respondents allege that the students made inconsistent statements regarding whether the students actually saw the respondents in the locker room; whether respondents saw the students in the locker room; whether they reacted in shock upon seeing the students; and whether either of the respondents also used the f-word. The respondents assert that the inconsistencies in both G.H. and Z.C.'s accounts of the event, and their communications after the incident, calls into question their credibility. Additionally, the respondents contend that the ALJ's reliance on the administrators' endorsements of G.H. and Z.C.'s credibility, **[*8]** which themselves were not based on evidence in the record, was improper.

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[1] Most of the arguments made by the respondents in their exceptions were considered by the ALJ and addressed in the Initial Decision. Additionally, the respondents' exceptions were 94 pages and will not be summarized at length herein.

The respondents also contend that the ALJ erred by repeatedly permitting and ignoring the violation of the respondents' rights to due process. The respondents assert that the ALJ ignored the Board's attempt to coerce admissions from the respondents in violation of their civil rights; the Board's admitted violation of the investigatory procedures required by its own Harassment, Intimidation, and Bullying (HIB) policy; the Board's failure to review evidence produced by its investigation prior to certifying tenure charges; and the fact that the Board's defective investigation resulted in the contamination of evidence. The respondents assert that the Board's failure to abide by its own investigatory procedures and the formal requirements of HIB resulted in the absence of scrutiny of G.H. and Z.C.'s allegations, and impeded their ability to cross-examine and impeach the witnesses because reports were not generated, statements were not memorialized and the witnesses were never separated. The prejudice to the respondents was further exacerbated by the Board's dilatory behavior in discovery and the ALJ's refusal to do **[*9]** anything about it.

Additionally, the respondents assert that the ALJ erred by shifting the burden of proof to the respondents. In deciding to substantiate the Board's allegations, the ALJ ultimately determined that "the lack of motive to lie renders G.H. and Z.C. more credible than Jones and Geiger." (Initial Decision at 23) The respondents maintain that by rendering her decision on this basis, the ALJ effectively shifted the burden of proof to the respondents by requiring them to prove that the students had a motive to lie. Moreover, the respondents argue that the ALJ punished them for attempting to present evidence as to why the students would fabricate the allegations by declaring that the respondents' "attempts to shift the blame to the students only further demonstrates their insensitivity to preserving the learning environment." (Initial Decision at 29-30). The respondents contend that because of the ALJ's reasoning, the only way they could have escaped the penalty of tenure revocation was by not challenging the tenure charges filed against them, which is a violation of their due process rights.

Finally, the respondents argue that even if the Commissioner finds that they engaged **[*10]** in unbecoming conduct, such conduct does not merit suspension or the revocation of their tenure. The respondents stress that the ALJ's imposition of an excessive penalty due to the respondents' challenge to the tenure charges constitutes a violation of their due process rights. The respondents argue that the case law relied on by the ALJ to support her recommendation of removal involved more severe conduct by teachers and have an absence of mitigating factors that make them distinguishable from the circumstances in this case. The respondents also cited to various cases in support of their argument that a penalty of suspension is more appropriate based on the conduct and mitigating circumstances. The respondents further emphasize that they made no attempt to justify the nature of the alleged comments and there was no deliberate exposure of the comments to students, parents, and the public at large. Even if true, the alleged offensive comments were uttered between two teachers who believed no students were present - not in the midst of an academic lesson. Additionally, both of the respondents have unblemished records of approximately 30 years with strong teaching and coaching evaluations **[*11]** and no disciplinary records. Therefore, the respondents contend that the severe anguish concomitant with being subject to this tenure proceeding is sufficient to impress upon the respondents the seriousness of the alleged conduct and no further penalty should be imposed on them.

In reply the Board urges the adoption of the Initial Decision as the final decision in this matter, arguing that the respondents' exceptions merely reiterate arguments which were previously raised before the ALJ and fully taken into account and properly dismissed. [2] The Board maintains that in their exceptions, the respondents generally mischaracterize the testimony presented at hearing in an overt attempt to draw baseless suspicion onto the ALJ's findings. Moreover, after a reasoned review of the hearing transcripts and evidence in the record, it is clear that the ALJ's determinations concerning witness credibility had ample support. Further, contrary to the respondents' assertions, at no time did the ALJ shift the burden of proof to the respondents and, in fact, the ALJ specifically referenced the Board's burden of proof in the Initial Decision. The Board also argues that the additional exhibits attached **[*12]** to the Certification of Terel Klein - which was submitted with the respondents' exceptions - should not be considered because certain attachments were never made part of the record or introduced as evidence at the hearing. Finally, the Board provided a specific response to each exception submitted by the respondents.

In reply to the respondents' assertion regarding the testimony of Alhiyek, the Board contends that the respondents contradict themselves because on one hand they argue that the ALJ disregarded the testimony and on the other hand they argue that the ALJ improperly found that she was not credible. Additionally, the Board pointed out several inconsistencies with Alhiyek's testimony and cited to the transcripts in support of its argument that G.H. offered testimony that rebutted nearly every aspect of Alhiyek's testimony. The Board also stresses that Alhiyek was not present in the locker room and the hearsay nature of her testimony, in light of the rebuttal testimony by G.H. - an actual eyewitness to the incident - lends further credence to the ALJ's credibility determinations. In response to the respondents claim that the ALJ erred by not striking the rebuttal testimony **[*13]** of G.H., the Board contends that there was no evidence that the Board violated the sequestration order or that G.H.'s rebuttal testimony was in any way tainted by her conversation with the Board attorney. The Board also notes that G.H.'s testimony on rebuttal was consistent with her testimony given six months prior, particularly with respect to her allegations that the respondents used racially offensive language.

The Board also contends that the respondents' argument that the testimony of G.H. and Z.C. was neither credible nor supported by the record is misplaced. A review of the testimony and documents in evidence reveals that G.H. and Z.C.'s testimony was consistent with each other and with their prior written statements. If there were any differences or discrepancies in their testimony, they were minor and of no consequence, as they had no bearing on the ultimate question of whether the respondents engaged in the conversation. **[*14]** The Board cited to the transcript to support its assertion that the students did not waiver in their recollection of the facts and that their written statements, prepared shortly after the incident, contained substantially similar information. The Board also stresses that each Board administrator testified that G.H. and Z.C.'s recollection of the event remained consistent and credible, despite having been interviewed several times. Therefore, the Board contends that the ALJ did not ignore any discrepancies or any other testimony presented by G.H. and Z.C., but rather the record reveals the neither G.H. nor Z.C. provided any contradictory statements or testimony on the salient facts regarding the conversation at issue.

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[2] The Board's reply was 55 pages and also will not be summarized at length here.

The Board also maintains that the respondents were granted full due process throughout the investigation and subsequent tenure proceedings. The Board further argues that the respondents' allegation that the Board's investigation was flawed has no bearing on the true crux of this matter which is whether the respondents actually engaged in the conduct at issue. Further the respondents offer no support for their contention that the Board's presumption of guilt for the respondents **[*15]** constitutes a due process violation. The respondents refused to answer questions about the incident, and as a result the Board filed tenure charges and complied with the requirements outlined in N.J.S.A. 18A:6-10, et seq.

Finally, the Board asserts that the ALJ properly found that, due to their conduct and the attendant consequence of same, the respondents should be dismissed from their tenured positions. The Board maintains that the ALJ's consideration of the fact that the respondents did not take responsibility for their actions is not unfair but simply one factor that plays into the ALJ's penalty determination. Additionally, the Board argues that the case law not only supports a penalty of dismissal, but also supports the fact that the use of a racial slur by a tenured teacher constitutes a single incident of misconduct sufficient to warrant dismissal. Conversely, the cases cited by the respondents in support of their claim that they should not be dismissed from their position are inapplicable to the current matter. The Board stresses that the respondents engaged in a racially inflammatory conversation - overheard by two students - during which the teachers **[*16]** used derogatory terms to refer to an entire subset of district students. As a result, the Board requests that the Initial Decision be adopted as the final decision in this matter.

Upon a comprehensive review of the entire record in this matter - which included the transcripts from the nine days of hearings conducted at the OAL between October 3, 2012 and March 7, 2013 - the Commissioner [3] concurs with the ALJ that the Board has established that the respondents are guilty of unbecoming conduct. [4] The Commissioner finds respondents' exceptions unpersuasive, largely reflecting arguments and objections previously raised before the ALJ and taken into account by her in weighing the testimony and in concluding that the record supported the Board's charges. The Commissioner also finds no basis in the record to reject either the ALJ's recitations of testimony or her determinations of witness credibility. The ALJ had the opportunity to assess the credibility of the various witnesses who appeared before her and made findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

[*17]

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. [N.J.S.A. 52:14B-10(c)].

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[3] This matter has been delegated to the undersigned Assistant Commissioner pursuant to N.J.S.A. 18A:4-34.

[4] The Commissioner acknowledges the argument advanced in the Board's exceptions concerning the fact that the ALJ did not rule on Charges Two through Six. The Commissioner agrees with the ALJ that since the Board proved the respondents engaged in unbecoming conduct, it is not necessary to evaluate whether the other charges that allege violations of Board policy and are based on the same conversation serve as an alternate ground for a finding of unbecoming conduct.

In this case all of the facts related to the alleged unbecoming conduct were in dispute; the teachers denied using the racial slur and the students who were present **[*18]** in the locker room during the alleged conversation testified that the teachers did in fact use the racial slur. As a result, witness testimony and ultimate credibility is the only means available to make a determination as to the veracity of the charges. For the reasons thoroughly outlined on pages 21 to 24, the ALJ found that the students were more credible than the teachers.

In their exceptions the respondents assert that the students made several inconsistent statements in connection with the alleged conversation that were improperly ignored by the ALJ. It should be noted that the ALJ did acknowledge the respondents' argument in the Initial Decision, but she found that the respondents' assertion that the students' stories were rife with inconsistencies was not supported by the record. Additionally, a review of the record reveals that the respondents never wavered on the fact that they heard both the teachers use the word "Negro" during their conversation. Therefore, the Commissioner finds that the ALJ's fact-finding analysis and conclusions as to the truth of the Board's allegations and the characterization of respondents' behavior as unbecoming conduct to be fully supported by **[*19]** the record and consistent with applicable law.

The Commissioner is mindful that factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, any evidence as to provocation, the teacher's prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring. In re Hearing of Ostergren, Franklin School District, 1966 S.L.D. 185; In re Hearing of Kittell, Little Silver School District, 1972 S.L.D. 535, 541; In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). It is also well recognized that by virtue of the unique position they occupy educators must be held to an enhanced standard of behavior. As was succinctly stated in

In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, 1972 S.L.D. 302, 321

> [Teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. **[*20]** This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.

Despite the fact that the respondents have been teachers for approximately 30 years, the Commissioner finds that the respondents' inexcusable use of racially derogatory remarks to refer to students in the district necessitates the termination of their employment. It is well established that "unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant." Fulcomer, supra, 93 N.J. Super. at 421 (citations omitted). The use of such an inappropriate expression to refer to a group of students is completely unprofessional and reveals a total lack of self restraint on the part of the teachers. Further, the fact that the

respondents did not use the more egregious form of the racial slur does not negate the severity of the conduct and undoubtedly elicits the same type of outrage and offense. [5]

[*21]

Unlike the circumstances In the Matter of the Tenure Hearing **[*22]** of Lauren Cooke, School District of the Township of Egg Harbor, Commissioner Decision No. 503-10, decided November 22, 2010, the respondents use of the racial slur was not only heard by the students but it was specifically directed at students in the school. [6] Notwithstanding the respondents' assertion that there was no deliberate exposure to the students or the public at large, the reality is that students did in fact hear the respondents using the inflammatory term. As a result there was a direct impact to the school environment. Moreover, the ALJ found that respondent Geiger's demeanor during parts of her testimony revealed evidence of disdain and contempt for a group of African-American students, and similarly respondent Jones' emotionally testified about her frustration with several African-American students. Therefore, the ALJ found that a potential negative impact on the school community remains an ongoing concern. As a result, the Commissioner finds that the respondents are unfit to discharge the duties and functions of their positions as teachers in the Mount Olive School District.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. **[*23]** The respondents are hereby dismissed from their tenured positions with the Mount Olive School District. This matter will be transmitted to the State Board of Examiners for action against respondents' certificates as that body deems appropriate.

IT IS SO ORDERED. [7]

End of Document

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[5] There was discussion in the post-trial submissions and the exceptions as to whether G.H. testified on rebuttal that the "N" word was in fact used by the respondents. Apparently the parties used different companies to transcribe the hearing testimony and there was confusion because one of the transcribers mistakenly heard the word wrong. A review of the record reveals that the students consistently testified that the word used by the respondents was "Negro".

[6] The respondents cite to In the Matter of the Tenure Hearing of Barbara Emri, School District of the Township of Evesham, Burlington County, Commissioner Decision No. 371-02, decided October 12, 2002, to support their argument that the removal of their tenure is not warranted on this case. That case is routinely cited by respondents on tenure matters to support their assertion that the conduct in their case was not as egregious as in Emri, supra, where the teacher only received a suspension. It should be noted that the Commissioner does not consider the decision in Emri, supra, to be controlling precedent and in fact if the same unbecoming conduct was proven today, the penalty imposed would most likely be significantly different. The adherence to precedents in administrative proceedings is "subject to the basic notion that experience is a teacher and not a jailer." In re Masiello, 25 N.J. 590, 598-599 (1958) (citations omitted).

[7] This decision may be appealed to the Appellate Division of the Superior Court pursuant to P.L. 2008, c. 36. (N.J.S.A. 18A:6-9.1)