NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RYAN DWYER by and through his parents, Kevin Dwyer and Rosanne Dwyer, Plaintiff, v. OCEANPORT SCHOOL DISTRICT, et al., Defendants.	Civ. No. 03-6005 (SRC) **O P I N I O N**

CHESLER, District Judge

This matter comes before the Court on the motion of Plaintiff Ryan Dwyer and the cross-motion of Defendants Oceanport School District, et al. (the "Defendants") for summary judgment.

BACKGROUND:

In April 2003, Plaintiff Ryan Dwyer ("Ryan" or "Plaintiff") was a fourteen-year-old 8th grade student at Maple Place School ("Maple Place") in Oceanport, New Jersey. At that time, he created an "I Hate Maple Place" website from his home, outside of school hours. The website was accessible to anyone on the Internet from April 4, 2003 to April 7, 2003, when Ryan and his father took it down.

Ryan's website contained various sections, including (1) a "Home" page, (2) an "About" page, (3) a "Favorite Links" page, (4) a "What's New" page, (5) a "Guestbook" page, and (6) a

"Custom" page.

The Home page bore the legend "Welcome to the Anti-Maple Place - Your Friendly Environment." The Home page stated, among other things, "DOWN WITH MAPLE PLACE," and "This page is dedicated to showing students why their school isn't what its cracked up to be. You may be shocked at what you find on this site." (J-1)[1](emphasis and typos in original). The Home page also stated "This page protected by the U.S. Constitution," and it depicted a picture of the school with an anarchy symbol drawn on it and a big "X" over it. (J-1).

The About page contained some of Ryan's written comments regarding the school and its teachers. In particular, it stated that:

> 1) The worst teacher is Mrs. Hirshfield because she has a short temper.
> 2) The Principal, Dr. Amato is not your friend and is a dictator.
> 3) It's fun to disrupt class especially in Mrs. Hirshfields room!
> 4) Mrs. Fiascanaro is the coolest teacher because she is actually nice and has a brain.
> 5) Start protests, they aren't illegal. But, it is illegal to get students in trouble for starting them.
> 6) MAPLE PLACE IS THE WORST SCHOOL ON THE PLANET!
> 7) No one likes to go to school, especially at Maple Place, it is just downright boring.
> 8) Wear political t-shirts to annoy the teachers.
> 9) Use your First Amendment Right wisely.
> 10) Make stickers that say "I hate Maple Place." You can't get in trouble for wearing them!
> 11) THIS PAGE PROTECTED BY THE US CONSTITUTION
> Don't even try to make me take my website down because it is illegal to do so!
> 12) I HATE MAPLE PLACE
> (J-1) (emphasis and typos in original).

The About page also featured a photographic negative of Principal Amato with his head flipped upside down, and a story entitled "Dr. Amato Flips Out 4/3/2003." (J-1, J-2).

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[1] J-1 refers to Joint Exhibit 1, submitted on consent.

The Favorite Links page contained links to Internet search engines, music groups, a site devoted to body piercing, the website's Guestbook, and sites devoted to the constitutional rights of public school students. It also had a picture of a stick figure holding a sign that said "I Hate School." (J-1).

The What's New page contained a copy of an article posted to a "libertarian rock" website entitled "web page leads to student's suspension." (J-1).

The Guestbook page contained an online form with which visitors to the website could post their own messages and comments. On the Guestbook page, Ryan posted the warning, "Please sign my guestbook but NO PROFANITY AT ALL!!!!!!! NO PROFANITY (thats curse words and bad words) and no threats to any teacher or person EVER. If you think it may be a bad word or it may be threatening DO NOT TYPE IT IN." (J-1)(emphasis and typos in original).

Several visitors left comments in the Guestbook from April 4 to April 7, 2003. The comments from people other than Ryan included, among others:

> 1) add more sh*t and maple place sucks!
> 2) yeah.. thats right. i cant wait to leave this sh*t hole.. i say we take hirsh's wig on graduation. lol.. nice site ry
> 3) I f*ckin hate maple place. DaMaGeD coming this summer watch out casue the TPC is gonna knock your socks off!!!!!!!!!! This page is sponsored by the TPC & Oceanport Militia ahahahahahahahahahahahhhhhhhhahahahahah
> 4) school sucks major a** . were finally getting out of this damn hell hole
> 5) maple place is gay gay gay... but its gayer to make a webpage about it..u guys r gunna geyt ur a**es kicked next year at shore u p*ssy's
> 6) mp sux, but not as bad as that dirty jew, hirsh - nice page, good idea ryan
> 7) let amato pull the plug go ahead let him we'll get mps last day of school they wont no what hit em
> 8) Amato is a fat piece of crap. He should walk his fat a** into oncoming traffic. Flynn's a p*sy. This site is very funny.
> 9) hey a i was only kidding about the last day of school threat i realize this is a profanity-free site and ryan said that includes threats o well w/e
> 10) Yeeea...MPS can suck mah ballz...MPS sux nd so does the Hirsh...we gotta

pull the plug on them, ndtake down MPS
(J-1)(emphasis and typos in original, asterisks added).

Ryan had no control over the messages other students would post on the website. He could not edit their messages because of limitations imposed by his Internet Service Provider. The only way Ryan could have deleted messages would have been to delete the entire Guestbook section of his website.

Defendant School Principal Dr. John Amato (the "Principal") and Defendant Superintendent James DiGiovanna (the "Superintendent") first became aware of the website on Saturday, April 5, 2003. The Principal first saw the website for himself at home on Sunday, April 6, 2003. On Monday morning, April 7, 2003, the Principal called the Superintendent and described the website to him over the phone. The Superintendent directed the Principal to call the police.

At Maple Place, two police officers responded to the Principal's call, reviewed the website, and printed a paper copy. The Principal and the Superintendent confronted Ryan with a paper copy of the website. Ryan acknowledged that the website was his, and said he knew about the comments in the Guestbook. Ryan admitted to being 80% responsible for creating the website.

The Principal and Superintendent met privately with Ryan and his father, and told them it was possibly a criminal matter. With input from the Board of Education counsel, the Principal and Superintendent decided to discipline Ryan. Later that day, the Principal called Ryan's mother and described how Ryan would be disciplined. She then contacted the Superintendent to say she did not agree with the discipline.

The Principal did not file a complaint with the police, nor did he ask the police to charge Ryan with a crime. He did not want the police to refer the website to the prosecutor.

Ryan's discipline consisted of: (a) an out-of-school suspension for five days, (b) suspension from the school baseball team for one month, and (c) exclusion from the eighth grade class trip to Philadelphia.

The Dwyers submitted a letter to the Board of Education on April 9, 2003, requesting a meeting to appeal the disciplinary measures against Ryan and a stay of the enforcement of those measures pending that meeting. The following day, the Superintendent responded to the Dwyers with a letter denying the request for a stay and stating that a meeting with the Board would be arranged. The Board itself sent a letter to Ryan's father stating that it would consider the Dwyers' request for a review of the actions taken against Ryan at a meeting on April 14, 2003.

At the April 14 meeting, the Dwyers were told that the Board would discuss the entire matter, including the request for a stay, with counsel before rendering a decision. By letter dated April 16, 2003, the Board notified the Dwyers that it affirmed the disciplinary measures taken against Ryan and that the Board's attorney would contact them regarding questions they raised.

On May 1, 2003, the Board informed Ryan by letter that they decided to take no action regarding the disciplinary measures taken against Ryan.

DISCUSSION:

I. First Amendment Analysis:

To maintain a cause of action under 42 U.S.C. § 1983, Plaintiff must: (a) allege a violation of a Constitutional right and (b) show that the alleged deprivation was committed by a

person "acting under the color of state law." West v. Atkins, 487 U.S. 42, 48 (1988); Suarez v. Camden County Bd. of Chosen Freeholders, 972 F.Supp. 269, 274 (D.N.J. 1997).

Plaintiff argues that by disciplining him for creating a publicly accessible website, Defendants, while acting under the color of state law, violated his First Amendment right to free speech. The Court, therefore, must first determine whether Ryan's conduct is protected by the First Amendment.

A. Plaintiff's Responsibility for Other Individuals' Comments

The Court must first distinguish between what Ryan himself wrote/created on his website and the postings that were made by other individuals in his Guestbook.

The Communications Decency Act, 47 U.S.C. § 230 states in subsection (c)(1) that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Subsection (f)(2) defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet...." Id. Subsection (f)(3) defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." Id.

In the context of the instant case, everyone who posted messages in Ryan's Guestbook was an "information content provider" within this definition, as they were responsible, at least in part, for the "creation or development of information" on Ryan's website, which was clearly on

the Internet. Furthermore, Ryan himself was clearly an "information content provider" as well under this definition, for the same reason.

The Third Circuit recognized that 47 U.S.C. § 230 provides immunity to computer service providers in their role as publishers or speakers of information originating from other information content providers. In Green v. America Online, the Court of Appeals held that § 230 "precludes courts from entertaining claims that would place a computer service provider in a publisher's role, and therefore bars lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone, or alter content." 318 F.3d 465, 471 (3d Cir. 2003)(internal citations omitted). Thus, it is clear that if Ryan was an "interactive computer service provider," then he could not lawfully be held responsible for comments posted by other "information content providers" on his website.

In Batzel v. Smith the Ninth Circuit noted that several courts to reach the issue decided that a "website is an 'interactive computer service.'" 333 F.3d 1018, 1030 (9th Cir. 2003). The Superior Court of New Jersey recently reached the same conclusion in Donato v. Moldow, 374 N.J. Super. 475 (N.J. Super. Ct. App. Div. 2005). The court there reasoned that the website creator was the "provider of a website ... which is an information service or system that provides or enables computer access by multiple users to a computer server." Id. at 487. The court there further opined that it is "not relevant to immunity status that the website is not commercially operated or is directed at a relatively limited user base." Id. Under this persuasive reading of the statute, Ryan, as a website creator, should be deemed a "provider" of an "interactive computer service."

Furthermore, as the Ninth Circuit pointed out in Batzel, there is "no need here to decide whether a ... website itself fits the broad statutory definition of 'interactive computer service,' because the language of § 230(c)(1) confers immunity not just on 'providers' of such services, but also on 'users' of such services." 333 F.3d at 1030. The Superior Court of New Jersey agreed with this reasoning as well, and concluded that the website creator at issue was covered by the immunity provision of § 230 as a user as well as a provider of an "interactive computer service." Donato, 374 N.J. Super. at 489. The rationale for this construction is that the website creator is the "user" of the website's electronic host that provides or enables access by multiple users to a computer server, and he is also the "user" of an Internet Service Provider (ISP), which provides him access to the Internet. Id. at 487. This Court agrees that the plain language of § 230 specifically includes the word "user" with the intention of providing immunity to Internet users for content created by other individuals on the Internet. Thus, regardless of whether Ryan, as creator of his website, is deemed a "provider" or merely a "user" of an interactive computer service, it is clear that the immunity conferred by § 230 was intended to cover individuals in his situation.

In addition, as described above, Ryan posted the warning "Please sign my guestbook but NO PROFANITY AT ALL!!!!!!! NO PROFANITY (thats curse words and bad words) and no threats to any teacher or person EVER. If you think it may be a bad word or it may be threatening DO NOT TYPE IT IN" on the Guestbook page of his website. Other than warning visitors not to post profane or threatening comments in the Guestbook, Ryan had no other means of screening or deleting comments made by other individuals on his website. Thus, the intention for the immunity granted by § 230, i.e. to "preclude[] courts from entertaining claims that would

place a computer service provider in a publisher's role" seems especially pertinent to this case. See Green v. America Online, 318 F.3d at 471.

The Court concludes that Ryan, as a publisher of a website that functioned as a forum for other individuals to post comments on the Internet, and as a user of an electronic host and Internet Service Provider, cannot be "treated as the publisher or speaker of any information provided" by anyone, other than himself, who posted material on his website. Therefore, Defendants could only have lawfully disciplined Ryan for statements and other content created and provided by him, and not for any comments made by other individuals in his Guestbook.

B. True Threats

The first threshold issue in this case is whether Plaintiff's statements on his website constitute "true threats" unprotected by the First Amendment. If the statements Plaintiff made on the website constituted "true threats," then Plaintiff's claims must fail under § 1983.

Both parties have cited to Tinker v. Des Moines Independent School District, 393 U.S. 503, 509 (1969) for its holding that schools can punish student conduct that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" without violating the First Amendment. Id. Threats of physical violence, however, are not protected by the First Amendment either in school or outside of school. Thus, if Plaintiff's conduct constituted a true threat, Defendants could discipline Plaintiff based on his website, without violating his First Amendment free speech rights, regardless of whether the conduct occurred on or off campus.

In Watts v. United States, 394 U.S. 705 (1969), the Supreme Court recognized that

threats of violence fall within the realm of speech that the government can proscribe and are not protected by the First Amendment. The Court believed that the government has an overriding interest in "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992). "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." Virginia v. Black, 538 U.S. 343, 344 (2003). Furthermore, in light of the violence prevalent in schools today, school officials are justified in taking very seriously student threats against faculty and other students. See Lovell v. Poway Unified Sch. Distr., 90 F.3d 367 (9th Cir. 1996) (citing United States v. Lopez, 514 U.S. 549, 619-20 (1976). Courts must, therefore, distinguish true threats from constitutionally protected speech.

The Supreme Court, however, has not set forth a bright-line test for distinguishing a true threat from protected conduct, leaving the lower courts to ascertain when a statement that rings of a threat actually triggers First Amendment protection. Courts that have established a test to determine whether speech constitutes a threat or is protected conduct have consistently adopted an objective standard that focuses on whether a reasonable person would interpret the purported threat as a serious expression of an intent to cause a present or future harm. See Doe v. Pulaski County Special School District, 306 F.3d 616, 622 (8th Cir. 2002). These courts have primarily diverged into two camps in determining from whose viewpoint the statement should be interpreted.

The Eighth Circuit analyzes the issue from the viewpoint of a reasonable recipient and

asks how a reasonable person standing in the shoes of the *listener* would view the alleged threat. See id. The Eighth Circuit further set forth a non-exhaustive list of factors relevant to how a reasonable recipient would view the purported threat. These factors include: (1) the reaction of those who heard the alleged threat; (2) whether the threat was conditional; (3) whether the person who made the alleged threat communicated it directly to the object of the threat; (4) whether the speaker had a history of making threats against the person purportedly threatened; and (5) whether the recipient had a reason to believe that the speaker had a propensity to engage in violence. See id.

The Ninth Circuit, on the other hand, asks whether a reasonable person, standing in the shoes of the *speaker*, would have foreseen that his words would be interpreted by the listener as a serious expression of intent to harm or assault. See United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990); see also Lovell (finding that an angry student telling a school counselor, "If you don't give me this schedule change, I'm going to shoot you," was a true threat undeserving of First Amendment protection), Id. Furthermore, the Ninth Circuit considers the entire factual context surrounding the threat, including the surrounding events and the reaction of the listeners. See id. at 372.

Other Circuits have distinguished protected speech from threats as well. The Second Circuit, in United States v. Kelner, 534 F.2d 1020 (2d Cir. 1976), found that "only unequivocal, unconditional and specific expression of intention immediately to inflict injury . . ." may be punished as true threats. Id. at 1027. The Sixth Circuit, in United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997), found that "[a]lthough it may offend our sensibilities, a communication objectively indicating a serious expression of an intention to inflict bodily harm cannot constitute

a threat unless the communication also is conveyed for the purpose of furthering some goal through the use of intimidation." Id. at 1495.

The Third Circuit, in United States v. Kosma, 951 F.2d 549 (3d. 1991), set its own non-exhaustive list of factors relevant in determining whether a statement was a "true threat." In finding that a Defendant's letters to the President clearly constituted true threats and were not protected expression under the First Amendment, the Court pointed to the fact that: (1) there was no overtly political context for the letters; (2) the letter specified a precise date, time and place for carrying out the threat; (3) the letters were sent directly to the President and; (4) the letters did not deal with any matter of public concern. Id. at 553-54. The Kosma Court, like many of the courts already discussed, also adopted a reasonable person standard in analyzing a statement purported to be a threat. Id. The Third Circuit, however, has not, to this point, specifically adopted either the Ninth Circuit's reasonable listener standard or the Eighth Circuit's reasonable speaker standard. This Court, therefore, will analyze the facts of the present case under both viewpoints, keeping in mind the Eighth Circuit's well reasoned argument that the analysis, whether from the reasonable listener or the reasonable speaker, should produce the same result barring unusual circumstances.

> The debate over the approaches appears to us to be largely academic because in the vast majority of cases the outcome will be the same under both tests. The result will differ *only* in the extremely rare case when a recipient suffers from some unique sensitivity *and* that sensitivity is unknown to the speaker. Absent such a situation, a reasonably foreseeable response from the recipient and an actual reasonable response must, theoretically, be one and the same.

Pulaski, 306 F.3d at 623.

Defendants point to S.G. v. Sayreville Board of Education, where the Third Circuit

recognized that a "school's authority to control student speech in an elementary school setting is undoubtedly greater than in a high school setting." 333 F.3d 417, 423 (3d Cir. 2003). The court there dealt with a kindergartner who said to his friends, "I'm going to shoot you," and found that the school did not violate his First Amendment rights by suspending him. Id. at 422. This Court recognizes that age is a factor to be considered, but notes that there is also a significant difference between a kindergartner and an 8th grader. Furthermore, there is no allegation that Plaintiff said anything analogous to the direct threat, "I'm going to shoot you," on his website. Therefore, the court's holding in S.G. is not sufficiently on point to be controlling here.

In J.S. v. Bethlehem Area School District, a student was expelled for creating a website that included several pages dedicated to a particular teacher. 569 Pa. 638 (Pa. 2002). One such page was captioned "Why Should She Die?" and then requested the reader to "Take a look at the diagram and the reasons I gave, then give me $20 to help pay for the hitman." Id. at 645. Another page morphed a picture of the teacher's face into that of Adolph Hitler. Id. Another page depicted a "diminutive drawing of [the teacher] with her head cut off and blood dripping from her neck." Id. Yet, the Supreme Court of Pennsylvania concluded that the statements made by J.S. did not constitute a true threat because it did not "reflect a serious expression of intent to inflict harm," despite the fact that the named teacher was offended by it. Id. at 658.[2]

Defendants in this case make the valid point that school administrators are in an acutely difficult position after recent school shootings in Colorado, Oregon, and other places. The court in Emmet v. Kent School District No. 415 dealt with a student's website, in the wake of those

[2] The court there did, however, find that the website constituted a material disruption and was therefore not protected by the First Amendment. This issue will be dealt with *infra*.

shootings, that posted mock "obituaries" of at least two students, and allowed visitors to the site to vote on who would "die" for the next obituary. 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000). The court there noted that "Web sites can be an early indication of a student's violent inclinations, and can spread those beliefs quickly to like-minded or susceptible people." Nonetheless, the court determined that the defendant in that case "presented no evidence that the mock obituaries and voting on this website were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever." Id. at 1090. Therefore, the court there enjoined the school district from suspending the student website creator. Similarly, Defendants in the case at bar have presented no evidence that the material Ryan put on his website was intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever.

Applying the standard set by the Third Circuit in Kosma and other cited caselaw, it is clear that Ryan's website did not constitute a true threat undeserving of constitutional protection. The only content created by Plaintiff on his website that is even arguably threatening is the statement "down with Maple Place," a picture of the school with an anarchy symbol drawn on it and a big "X" over it, and an image of Principal Amato with his head flipped upside down. The Court is satisfied that no reasonable person would find this content constituted a serious expression of intent to harm or assault anyone.

Indeed, Defendants did not point to any content created by Ryan that anyone found to be particularly threatening. It is telling that Defendants' Opposition Brief attempts to distinguish the instant case from the passive political speech in Tinker by pointing out that "[h]ere, the plaintiff overtly encouraged students to disrupt class and set up a guestbook wherein students made

comments that were violent and threatening the safety and well-being of the students, staff and building." (Dft. Opp. Br. p.4). Defendants further claim that Ryan "set the wheels in motion for other students to act out by words and comments contrary to school behavior and anti-harassment policies." (Id. at 17). However, the evidence clearly shows that Ryan in fact warned website visitors not to make any such threatening or profane comments. Essentially then, Defendants' argument is that Plaintiff initiated true threats by encouraging class disruption and creating a forum for other students to voice their views of the school.

As discussed above, the comments made by other individuals in the Guestbook are not attributable to Ryan as creator of the website. Therefore, because Ryan did not himself publish any material which constituted a true threat, he could not be disciplined on that basis without violating the First Amendment right to free speech.

C. School Disruption

The next threshold issue in this case is whether Plaintiff's statements on his website caused a substantial disruption or material interference with school activities. If they did, then Plaintiff could be disciplined for them, and his claims must fail under § 1983.

As discussed above, the Supreme Court in Tinker v. Des Moines Independent School District held that schools can punish student conduct that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" without violating the First Amendment. 393 U.S. 503, 509. Thus, even if Ryan's conduct was not a true threat, he could lawfully be subject to discipline if it was sufficiently disruptive to the school.

In Saxe v. State College Area School District, the Third Circuit explained that under Tinker, "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. As subsequent federal cases have made clear, Tinker requires a *specific and significant fear of disruption, not just some remote apprehension of disturbance*." 240 F.3d 200, 211 (3d Cir. 2001) (emphasis added). The court then summarized the only recognized exceptions to this general rule. One such exception is that a school may categorically prohibit lewd, vulgar, or profane language. Id. at 212-14 (citing to Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986)). The other is that a school may regulate speech that a reasonable observer would view as the school's own speech on the basis of any legitimate pedagogical concern. Id. (citing to Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)). It cannot seriously be argued that a reasonable observer would view Ryan's website as a school-sponsored publication. This is clear from a first glance at the Home page legend, "Welcome to the Anti-Maple Place - Your Friendly Environment." Furthermore, although there was profanity present on Ryan's website, no such language is attributable to Ryan himself, and he specifically warned that no profanity was allowed. In addition, while the Court in Fraser dealt with obscenity in the classroom and school assemblies, Ryan's website was created at his home, outside of school hours. Thus, in sum, in order for Ryan's speech to be constitutionally regulated, Defendants must have had a specific and significant fear of disruption, and not just some remote apprehension of disturbance.

Moreover, the Third Circuit further elaborated that "disruption for purposes of Tinker must be more than the discomfort and unpleasantness that always accompany an unpopular viewpoint." Sypniewski v. Warren Hills Regional Board of Education, 307 F.3d 243, 265 (3d

Cir. 2002). This is because, "as a general matter, protecting expression that gives rise to ill will – and nothing more – is at the core of the First Amendment," and the "mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." Id. at 264-65.

The court in Killion v. Franklin Regional School District, 136 F. Supp. 2d 446 (W.D. Pa. 2001) dealt with a student who sent out an email making fun of a faculty member, which ended up being circulated at school. The court there recognized that other courts have applied the Tinker analysis "where off-campus speech makes its way to the campus, even if by some other student." Id. at 454. However, applying Tinker and its progeny, the court there found that defendants failed to adduce any evidence of actual disruption, and that the speech, although upsetting, was not threatening. Id. at 455. In particular, the court focused on the lack of evidence that any teachers were incapable of teaching or controlling their classes because of the student's actions, the fact that the material was on school grounds for several days before the administration became aware of its existence, and that at least one week passed before the school took any action. Id. Therefore, the court concluded that defendants failed to satisfy Tinker's substantial disruption test, and the student's suspension violated the First Amendment. Id.

As noted above, the Supreme Court of Pennsylvania in J.S. v. Bethlehem Area School District, 569 Pa. 638 (Pa. 2002) concluded that while the statements made by J.S. on his website did not constitute a true threat, the conduct was still not protected by the First Amendment because it constituted a material disruption. Id. at 658, 675. The court there noted that while an "actual material disruption of the school environment would permit a school district to take action, the Court in Tinker also made clear that school officials do not have to wait for possible

harm or material disruption to come to pass before taking appropriate steps." Id. at 661 (quoting Tinker's language that school officials may justify their decision to suppress speech by demonstrating "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." Tinker, 393 U.S. at 514). In J.S., the court found that the student's website in fact disrupted the entire school community – teachers, students and parents. Id. at 673. The teacher who was the main target of the website was unable to complete the school year and took a medical leave of absence for the next year as a result of the website. Id. at 674. Some students expressed anxiety about the website and for their safety, and some visited counselors. Id. The "atmosphere of the entire school community was described as if a student had died." Id. In sum, the court found that the "website created disorder and significantly and adversely impacted the delivery of instruction." Id. Therefore, the court concluded that the disciplinary action taken against J.S. did not violate the First Amendment. Id. at 675.

Once again, it is imperative to distinguish between the content posted by Ryan himself and the comments posted by visitors to his website. Ryan wrote "Down with Maple Place" and drew an anarchy symbol on a picture of the school and had a large "X" over it. He posted a picture of the school principal with his head flipped upside down, and wrote "I hate school." He also posted comments criticizing Ms. Hirshfield and Dr. Amato, and encouraging students to disrupt class, start protests, and wear political t-shirts to annoy teachers.

Defendants do not point to any material disruption as a result of Ryan's website as a whole, let alone the content which Ryan himself actually created. They do claim that Mrs. Hirshfield felt "threatened and intimidated," "fearful," "shaken and very upset" as a result of

viewing the website. However, they do not and cannot seriously contend that this was a result of Ryan's comments regarding her.[3] The Court is convinced that the fact that Mrs. Hirshfield was a "savvy veteran teacher" (Dft. Opp. Br. p.12) was not the reason why she did not feel the need to take any leave of absence as a result of Plaintiff's innocuous comments.

Defendants contend that school officials were forced to take preventative action because the facts reasonably led them to "forecast substantial disruption of or material interference with school activities." Tinker, 393 U.S. at 514. However, when making this argument, they constantly refer to the lewd and arguably threatening comments posted by the other students. The only statement made by Ryan which Defendants seem to point out as predictive of a material disruption is "It's fun to disrupt class especially in Mrs. Hirshfield's room!" The Court is not satisfied that such a comment, or any other material posted by Ryan could reasonably cause a "specific and significant fear of disruption, [and] not just some remote apprehension of disturbance." Saxe, 240 F.3d at 211. Therefore, because Ryan did not himself publish any material which caused or could reasonably be expected to cause a material and substantial disruption to the operation of the school, he could not be disciplined on that basis without violating the First Amendment right to free speech.

II. Qualified Immunity for School Officials:

Defendants Principal Amato and Superintendent DiGiovanna argue that they are entitled to qualified immunity for their decision to discipline Plaintiff for his website.

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[3] Specifically, "the worst teacher is Mrs. Hirshfield because she has a short temper," and "it's fun to disrupt class especially in Mrs. Hirshfield's room!"

Defendants cite to the objective standard set forth by the Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800 (1982), that

> ... [G]overnment officials performing discretionary functions generally are shielded for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Id. at 817.

Defendants emphasize that the Defendant Oceanport Board of Education was a signatory to the Uniform State Memorandum of Agreement Between Education and Law Enforcement Officials. (Dft. Opp. Br. p.31). However, as the very language cited from Harlow makes clear, any reliance placed upon a school board's policy will not shield them from civil damages if their conduct violated a "clearly established statutory or constitutional right[] of which a reasonable person would have known." Id. Therefore, the sole issue before this Court is whether or not Defendants Amato and DiGiovanna's conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known.

It is not sufficient that the general proposition that government may not abridge the freedom of speech is clearly established. Rather, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Saucier v. Katz, 533 U.S. 194, 202 (2001).

In S.G. v. Sayreville Board of Education, the Third Circuit held that the defendants were entitled to qualified immunity "because there was no clearly established law to the contrary." 333 F.3d 417, 423 (3d Cir. 2003). The court reasoned that the "school officials could reasonably believe they were acting within the scope of their permissible authority in deciding that the use of

threatening language at school undermines the school's basic educational mission." Id. Therefore, the court there found that the "determination of what manner of speech is appropriate properly rests with the school officials" and held that the "officials did not act contrary to any established law." Id.

Although this Court finds that Defendants Amato and Digiovanna violated Plaintiff's First Amendment rights by disciplining him for his speech, the Court is nonetheless satisfied that in light of the spectrum of caselaw governing this particular area, there was no "clearly established" law defining the parameters as to when a child may or may not be properly disciplined for speech. In light of the arguably threatening and profane language contained on Ryan's website, this Court cannot conclude that a reasonable person would have known that based on existing caselaw at that time, it was clearly unconstitutional to punish Plaintiff for it.

However, the Court's finding that Defendants Amato and Digiovanna are entitled to qualified immunity from civil damages does not mean that they are shielded from other, non-monetary damages as well. While the Court will deny summary judgement the issue of relief, it notes that the qualified immunity granted to these defendants will not protect them from the injunction, declaratory relief, statutory attorney's fees, and costs requested in the complaint. See Pulliam v. Allen, 466 U.S. 522, 541-43 (1984) ("judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity.... [Congress intended] that an attorney's fee award be available even when damages would be barred or limited by immunity doctrines and special defenses available only to public officials."); Hewitt v. Helms, 482 U.S. 755, 766 (1987) (Marshall, J., dissenting) ("[the District Court's finding of qualified immunity] precluded any remedy in damages against petitioners, but by no means prevented the

ordering of declaratory or injunctive relief or a grant of attorney's fees"); Ralston v. Zats, 1997 WL 560602 at 9 n.8 (E.D. Pa. 1997) ("[the] doctrine [of qualified immunity] would protect them only from money damages and not from the injunction, declaratory relief, or statutory attorney's fees and costs requested in the complaint.").

III. Oceanport School District and Board of Education:

Defendants Oceanport School District and Board of Education argue that they, as public entities, are protected from liability under Monell v. Department of Social Services, 436 U.S. 658 (1978).

In Monell, the Supreme Court held that local government entities may not be held liable for constitutional deprivations on the theory of *respondeat superior*. Rather, such entities may be held liable only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." Id. at 694. Indeed, the Third Circuit specifically held that a "school board can be held responsible for a constitutional violation of a teacher only if the violation occurred as a result of a policy, custom or practice established or approved by the board." C.H. v. Olivia, 226 F.3d 198, 202 (3d Cir. 2000), *cert. denied*, 533 U.S. 915 (2001).

However, the Supreme Court also clarified that a local government entity may be held liable for constitutional deprivations made by the entity itself. As the Court stated in Kentucky v. Graham, "a governmental entity is liable under § 1983 [] when the entity itself is a 'moving force' behind the deprivation." 473 U.S. 159, 166 (1985). As Monell explicated, this is true when the entity's policy or custom inflicts the injury. Monell, 436 U.S. 694. However, this is

also clearly the case if the entity itself has a hand in making the determination to deprive a person of his or her constitutional rights.

In this case, the Dwyers appealed the decisions of Principal Amato and Superintendent DiGiovanna to the Board of Education on several occasions, and the Board specifically considered those decisions and affirmed them. For example, in a letter dated April 16, 2003, Sam Bulvanoski, writing as Board President of the Oceanport Board of Education, informed Mr. and Mrs. Dwyer that "After a review of the information provided by the administrators and yourself, the Board of Education has affirmed the action referenced in the classroom behavior notice. Further, the Board of Education denies your application for a stay." (J-12).

It is clear to the Court that the School District, for which Defendant DiGiovanna was the Superintendent, and the Board of Education were not merely involved in this matter in an employer-employee relationship. Rather, through their thoroughly considered actions, these Defendants were affirmatively involved in disciplining Plaintiff in violation of the First Amendment. Therefore, the entities' claim for Monell immunity is denied.

CONCLUSION:

For the foregoing reasons, the Court will grant Plaintiff's motion summary judgment as to liability, except as to his claims for money damages against Defendants Amato and DiGiovanna. The Court will also deny Defendants' cross-motion for summary judgment, except as to Defendants Amato and DiGiovanna's motion to dismiss monetary damages claims based upon qualified immunity. The issues of monetary damages as to all other Defendants, and non-monetary damages (including the requested injunction, declaratory relief, attorney's fees, and

costs) as to all Defendants, will be reserved for trial.

s/
Stanley R. Chesler, U.S.D.J.

Dated: March 31st, 2005