IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

A.M., a minor, by and through her mother SHAEL NORRIS Plaintiff, v. CAPE ELIZABETH SCHOOL DISTRICT; DONNA WOLFROM; Superintendent of Cape Elizabeth Schools, JEFFREY SHEDD, Principal of Cape Elizabeth High School; and NATHAN CARPENTER, Vice Principal of Cape Elizabeth High School, Defendants.	CIVIL NO. ___

PLAINTIFF'S MOTION FOR EMERGENCY TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, WITH INCORPORATED MEMORANDUM OF LAW

Pursuant to Rules 7 and 65 of the Federal Rules of Civil Procedure, Plaintiff A.M., by and through her mother, Shael Norris, files this motion for an emergency temporary restraining order or preliminary injunction to prevent the Defendants from implementing a three-day suspension against A.M., scheduled to commence on Tuesday, October 15, 2019, for speaking out about sexual violence in her school.

Sexual violence is pervasive, underreported, and carries lifelong consequences for survivors of all genders. Porter Decl. ¶ 9. Laws against sexual assault are chronically under-investigated and under-enforced. Out of every 1,000 allegations of sexual assault, 230 are reported to the police, 46 reports lead to arrest, and 5 arrests lead to a felony conviction. In comparison, out of every 1,000 allegations of robbery, 619 are reported to the police, 167 reports lead to arrest, and 22 arrests will lead to a felony conviction. *Id.* ¶¶ 9-10. Given this reality—that

authority figures may not provide justice for sexual assault—survivors, activists, and allies often resort to alternative outlets to speak out against rape and other forms of sexual violence.[1] *Id.* ¶ 11. This speech is protected by the First Amendment and federal law. By suspending A.M. for stating "there's a rapist in our school"—without identifying anyone—Defendants impermissibly retaliated against protected speech. And contrary to Defendants' claims, Maine's bullying statute does not deprive this speech of its protection because A.M.'s statement was not "directed at a student" as required by law but rather was directed at the administration. *See* 20-A M.R.S. § 6554. Accordingly, we respectfully request that the Court order the school to grant an emergency temporary restraining order to allow A.M. to attend school this coming Tuesday; as well as preliminary injunctive relief to lift the suspension, allow A.M. to continue to engage in protected expression, and otherwise protect the status quo while the parties litigate this claim.

BACKGROUND

I. A.M. Is An Experienced Advocate for Survivors of Sexual Assault

A.M. is an award-winning advocate for victims and survivors of sexual assault and is generally politically engaged. Complaint, ¶19. A.M. was nationally recognized for her activism by U.S. Cellular as one of "16 under 16" in 2019, and she used the $10,000 from that award to help fund a student-led conference on sexual assault in schools, called Consent: The Way Life Should Be, which was attended by approximately 750 students. The conference included "know your rights" presentations on Title IX of the Education Amendments Act of 1972, which protects against sex-based discrimination in schools, as well as discussions of substance abuse, consent within relationships, and sexual assault on college campuses. Complaint, ¶ 20.

[1] Social media provides one—but by no means the only—outlet for such speech, including the #MeToo, #TimesUp, and #WhyIDidn'tReport hashtags on Twitter.

[2] *See also* Porter Decl. ¶¶ 24-26 (stating that activists "tend to define the terms 'rape' and 'rapist' broadly").

[3] Although many cases in the U.S. Court of Appeals for the First Circuit address First Amendment retaliation in the

Because of her activism and her public stance as an ally for victims and survivors of sexual violence, other young people frequently approach A.M. and share their personal stories of sexual assault with her. Complaint, ¶21. In those situations, A.M. urges students to find a trusted adult to speak with about their experiences, whether it is a parent, a teacher, a coach, or a therapist. Complaint, ¶22. A.M. believes that students in the District are sometimes reluctant to speak to school officials about sexual violence, in part because they are afraid that school officials will punish them if they admit to using alcohol or drugs. Complaint, ¶24.

On June 11, 2019, A.M. and two other students raised their concerns about inadequate responses to sexual violence to the CESD school board. Complaint, ¶25. A.M. told the board that the district had no policy describing how to report sexual harassment and assault, and she asked that the board work with students on a comprehensive policy that would encourage reporting and support students who self-report sexual assaults. Complaint, ¶25-26. The school board never followed up with A.M. about working with her and the other students at the board meeting to improve school policies. Complaint, ¶27.

II. The September 16 Leafleting

On September 16, 2019, A.M. decided to take her activism in a new direction, in part due to her frustration with the lack of response to her overtures to the school made through official channels of communication. Complaint, ¶28. A.M. wrote on a post-it note, "There's a rapist in our school and you know who it is." She placed this note, a modern-day leaflet, in the second floor girl's bathroom at Cape Elizabeth High School (CEHS) and took a picture of herself standing in front of it. Complaint, ¶29. A.M. did not direct the note at any person; the "you" in the note referred to the school administration that was insufficiently attentive to the needs of survivors of sexual violence. Complaint, ¶30. A.M. did not intend the note to only refer to one

person, and she believed (and continues to believe) that there are a number of people who have committed various forms of rape in the CEHS community, all of whom were described by the note.[2] Complaint, ¶31.

III. A.M. Speaks to the Press and is Suspended from School.

On October 4, 2019, the Portland Press Herald published a story about the post-it note that included criticisms of the CESD and CEHS administrations. A.M. was quoted in the story, stating: "I don't feel like my school deals with the issue of sexual assault in a good way. . . . I feel there are a number of survivors in our school who have told me they have reported, whether through the guidance process or to other staff members, and no steps been taken to address those issues or steps have been taken where the response to those accusations hasn't been great." Complaint, ¶57.

Hours after the Portland Press Herald published this story on October 4, Principal Shedd and Vice Principal Carpenter notified A.M. that she was suspended for three days for bullying. Complaint, ¶59, Att. B. In their letter informing A.M. of her suspension, Principal Shedd and Vice Principal Carpenter also imposed additional penalties, including that A.M. is "warned that any future actions of this sort, directed to the student who was targeted or any other student, maybe result in further and more severe consequences up to and including suspension and possible expulsion." Compl. Att. B.

On October 9, 2019, A.M. appealed the punishment to Superintendent Donna Wolfrom, arguing that her actions were not bullying because they were never directed any single individual and did not refer to any one person. Complaint, ¶ 74-75. A.M. argued that the purpose of her posting the note in the bathroom and in speaking to the press about the climate at CEHS was to raise awareness of the problem of sexual violence and to prompt a conversation about the

[2] *See also* Porter Decl. ¶¶ 24-26 (stating that activists "tend to define the terms 'rape' and 'rapist' broadly").

school's handling of sexual assault complaints, including school policies and practices that discouraged victims from reporting. Complaint ¶75.

On the afternoon of October 11, 2019, the Superintendent upheld A.M.'s suspension scheduled to commence on October 15, the Tuesday morning after the holiday weekend. Complaint, ¶78-79. The timing of this decision necessitated the filing of this emergency motion.

DISCUSSION

A temporary restraining order (TRO) is a provisional remedy designed to maintain the status quo pending more complete review of the facts and legal arguments in a preliminary injunction hearing. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974). "To determine whether to issue a temporary restraining order, the Court applies the same four-factor analysis used to evaluate a motion for preliminary injunction." *Animal Welfare Inst. v. Martin*, 665 F. Supp. 2d 19, 22 (D. Me. 2009) "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits; that he is likely to suffer irreparable harm in the absence of preliminary relief; that the balance of equities tips in his favor; and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008).

I. A.M. Is Likely to Succeed on the Merits

As discussed below, A.M. is likely to prove that her three-day suspension constitutes impermissible retaliation against protected free speech and Title IX reporting. Additionally, the discipline imposed by Defendants is unconstitutional because it disproportionately targets speech on the basis of content and viewpoint. Finally, the school's prohibition on A.M. engaging in "future actions of this sort" is unconstitutionally vague and overbroad and chills a broad swath of plainly protected speech. *See* Att. B.

A. The Suspension Constitutes First Amendment Retaliation

Defendants retaliated against A.M. because of her protected speech in posting the sticky note and speaking to the press. "To state a First Amendment retaliation claim, a plaintiff must establish that: (1) [her] speech or conduct was protected by the First Amendment; (2) the defendant took an adverse action against [her]; and (3) there was a causal connection between this adverse action and the protected speech." *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 272 (2d Cir. 2011) (citing *Scott v. Coughlin*, 344 F.3d 282, 287 (2d Cir.2003); *see also Kuck v. Danaher*, 600 F.3d 159, 168 (2d Cir.2010)).[3]

As discussed below, A.M. has engaged in two types of protected speech: posting the sticky note, the modern-day equivalent of leafleting; and speaking to the press about her concerns with the school's handling of sexual assault complaints. Both types of speech are protected by the First Amendment and do not qualify as bullying under school policy or state statute. Additionally, there can be no dispute that Defendants took an adverse action against A.M. by suspending her from school for three days and forbidding her from "any future actions of this sort." Compl. Att. B. Nor is there any dispute that they imposed this discipline because of A.M.'s protected speech in posting the sticky notes.[4] Moreover, the timing of the suspension—issued hours after the first story broke in the news media—as well as the severity of the punishment imposed supports the additional inference that the school intended to retaliate against A.M. for speaking out in the press.

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[3] Although many cases in the U.S. Court of Appeals for the First Circuit address First Amendment retaliation in the employment context, "actionable retaliation may occur outside the employment context altogether." *Barton v. Clancy*, 632 F.3d 9, 28 (1st Cir. 2011) (citing, e.g., *El Dia, Inc. v. Governor Rossello*, 165 F.3d 106, 109–10 (1st Cir. 1999) (retaliatory withdrawal of government advertising from newspaper infringes on First Amendment rights); *Nestor Colon–Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 40–41 (1st Cir.1992) (retaliatory denial of land use permit violates First Amendment)).

[4] Defendants openly admit that they suspended A.M. because of her speech in posting the sticky notes. *See* Compl. Att. B.

1. The Sticky Note Is Protected Speech

A.M. has the free speech right to speak out about matters of public concern, including her school's handling of sexual assault claims.[5] A.M. wrote and posted the note to raise the concern that there were survivors and perpetrators of sexual assault in the school and to reiterate the message that A.M. had relayed at June 2019 school board meeting: that survivors in the school and reporters of sexual assault need better reporting procedures and other support from the school. *See, e.g.*, Compl.¶ 31. School administrators likewise understood the note to criticize of the school. *See* Compl. at ¶¶ 82-83, 86

Although "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," "[s]tudents do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007) (internal quotation marks omitted). As a general rule, a school cannot punish a student for her speech without violating the First Amendment unless the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[6] *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 509 (1969) (internal quotation marks omitted).

In *Tinker*, the Supreme Court upheld the right of students to right to wear black armbands as a sign of protest against the hostilities in Vietnam. *Tinker*, 393 U.S. at 508. The Court found this expression was "akin to pure speech." *Id.* Although "a few students made hostile remarks to

[5] Although student speech need not be on a topic of public concern to be protected, *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 766 (9th Cir. 2006), student speech is even more strongly protected when it touches on topics of public concern, *Morse v. Frederick*, 551 U.S. 393 (Alito and Kennedy, JJ., concurring).

[6] While the Supreme Court has identified three other narrow circumstances in which the government may restrict student speech—broadly, lewd speech, speech advocating illegal drug use, and school-sponsored speech—none of those is relevant here. *See B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 304 (3d Cir. 2013) (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683, 685 (1986); *Morse*, 551 U.S. at 422 (Alito, J., concurring); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)).

the children wearing armbands," the Court found that the speech was "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners." *Id.* As in *Tinker*, A.M.'s sticky note qualifies as "pure speech"—arguably even more so because A.M. engaged in literal speech instead of wearing expressive clothing as in *Tinker*. *See id.*

A.M.'s speech also receives protection as core speech on a political or social issue. The Supreme Court "has frequently reaffirmed that speech on public issues is entitled to special protection," *Connick v. Myers*, 461 U.S. 138, 145 (1983), and that "it is a prized American privilege to speak one's mind," *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). Accordingly, even when one of the exceptions to student speech could arguably apply (*e.g.*, in the case of "ambiguously lewd speech"), a school may not categorically restrict speech that "could also plausibly be interpreted as expressing a view on a political or social issue." *B.H. ex rel. Hawk v. Easton Area Sch. Dist*., 725 F.3d 293, 309 (3d Cir. 2013). The same analysis applies here, where A.M. spoke out about a political and social issue—the crisis of sexual assault in public schools and the importance of appropriate school procedures to address it. *See* Porter Decl. ¶¶ 9-13. A.M.'s conduct is also eligible for special protection as the modern-day equivalent of leafleting— a historically important vehicle "for the dissemination of ideas." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 162 (2002).

Nor does student speech lose protection merely because it is critical of the school. To the contrary, protecting such speech is one of the core reasons for the First Amendment: "The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information." *El Dia, Inc. v. Governor Rossello*, 165 F.3d 106, 109 (1st Cir. 1999) (quoting *New York Times Co. v. United States*, 403 U.S. 713, 723–24 (1971) (Douglas, J., concurring)); *see also Pickering v. Bd. of Ed. of Twp. High Sch. Dist.*

205, 391 U.S. 563, 570 (1968) ("unequivocally" rejecting the claim that a public employee could be disciplined for comments on matters of public concern "if sufficiently critical in tone"). The same is true in the context of student speech. For a school "to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. Here, the school understood the sticky note to suggest that "adults in the school knew [about alleged rape in the school] and implied [they] would be indifferent." Complaint, ¶ 50-51; Att. A. The principal himself interpreted the note as criticizing the administration's handling of sexual assault claims, stating that "the insinuation of the notes is 'pretty clear even though it doesn't say the administration isn't doing anything and 'you' aren't doing anything . . . . That was my inference absolutely." Compl. ¶ 54. Although the school may not like hearing that critical message, students are protected in expressing it.

Nothing in this case deprives A.M.'s speech of protection. As in *Tinker*, A.M.'s speech in posting a sticky note in a bathroom was "a silent, passive expression of opinion." *Tinker*, 393 U.S. at 508. It occurred outside of class, and did not disrupt the functioning of the school. *See* Compl. ¶¶ 1, 97. Indeed, even in issuing the suspension, the school did not rely on any theory that A.M.'s speech was in any way "disruptive" to the operation of school.[7] Compl. Att. B. Instead, the school's discipline of the speech rests exclusively on whether A.M.'s speech qualified as "bullying." As discussed below, it does not.

[7] Although the sticky note lead to an investigation in which school administrators pulled many students out of class, the sticky note was "unaccompanied by any disorder or disturbance on the part of [A.M.]." *See Tinker*, 393 U.S. at 508. To the extent that the sticky note resulted in missed class or other disruptions triggered by the school's investigation into new and old reports of potential sexual assault, it would be inappropriate to discipline the reporting student for the resources to investigate a complaint that the student believed in good faith to be true. Nor has the school disciplined students for other conduct, such as student walk-outs, that caused students to miss class.

2. The Sticky Note Was Not Bullying

The Supreme Court has not yet considered the extent to which a bullying statute may allow a school to restrict otherwise protected speech. However, other courts to consider school anti-bullying statutes have recognized the potential need to regulate speech that "'collid[es] with' or 'inva[des]' 'the rights of others.'" *Kowalski v. Berkeley Cty. Sch*., 652 F.3d 565, 571–72 (4th Cir. 2011) (citing *Tinker*, 393 U.S. at 513). In *Kowalski*, for example, a court held that a student's conduct in creating a webpage for the express purpose of ridiculing a fellow student was not protected speech. *Id.* at 567, 571-72.

In this case, however, A.M.'s speech does not qualify as bullying under the plain terms of the bullying statute or school policy on bullying.[8] The school policy provides that "bullying" has "the same meaning in this policy as in Maine law. Policy JICK (Bullying and Cyberbullying Prevention in Schools); *see also* 20-A M.R.S. § 6554(2)(B). Under the policy:

> "Bullying" includes, but is not limited to a pattern of written, oral or electronic expression or a physical act or gesture or any combination thereof *directed at a student or students* that:
>
> A. Has, or a reasonable person would expect it to have, the effect of:
>
> 1. Physically harming a student or damaging a student's property; or
>
> 2. Placing a student in reasonable fear of physical harm or damage to his/her property;
>
> B. Interferes with the rights of a student by:
>
> 1. *Creating an intimidating* or hostile *educational environment for the student*; or
>
> 2. Interfering with the student's academic performance or ability to participate in or benefit from the services, activities or privileges provided by the school; or
>
> C. Is based on:
>
> [1.] A student's actual or perceived characteristics identified in 5 MRSA § 4602 or 4684-A (including race; color; ancestry; national origin; sex;

[8] Because the bullying statute does not apply to A.M.'s speech, there is no need for the Court to consider whether the bullying statue itself is unconstitutional.

sexual orientation; gender identity or expression; religion; physical or mental disability) or other distinguishing personal characteristics (such as socioeconomic status; age; physical appearance; weight; or family status); or

[2.] A student's association with a person with one or more of these actual or perceived characteristics or any other distinguishing characteristics; and that has the effect described in subparagraph A. or B. above.

Id. By policy, bullying is prohibited at Cape Elizabeth High School. *Id.*

There are two primary reasons why the bullying statute does not apply here. *First*, A.M.'s speech was not "directed at" any student, nor did it name any alleged perpetrator. A.M.'s note was directed at those who "know" about, but have not adequately responded to, allegations of sexual violence; it is not directed at any specific perpetrator. Compl. ¶ 81. Accordingly, the message of the note was to criticize the administration's handling of sexual assault claims, and was not directed at a particular student.

The school nonetheless argues that A.M. admitted she was targeting a single person, *see* Compl. Att. C, but that is untrue. To the contrary, A.M. has repeatedly explained that numerous people had reached out to her about their sexual assaults and the lack of an adequate response from the school administration, and that A.M. was concerned about multiple survivors in the school. *See, e.g.*, Compl. ¶¶ 31, 72.

In reaching its conclusion about the supposed target of A.M.'s note, the school appeared to rely on rumors that *other students* shared with school administrators and information already in the possession of the administration. Compl. ¶86; *see also* Compl. Att. C (referencing "47 interviews" with students).[9] The bullying statute, however, targets communications "directed at" a student, but does not hold a speaker responsible for third-party speech. 20-A M.R.S. § 6554.

[9] The First Amendment generally forbids allowing or disallowing speech depending on the reaction of the audience. *See Tinker*, 393 U.S. at 509 (holding that school discipline based on students making hostile remarks in response to the plaintiff's armbands was unconstitutional); *see also Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) (discussing the First Amendment-based ban on the "heckler's veto").

The school's reading of the bullying statute would make A.M. solely responsible for the conduct of others who spread rumors about a particular student—which is surely too broad a reading. Nor can the school explain how it would apply the bullying statute any differently if—all else being equal—A.M. had stated even more generally: "There has been a sexual assault at our school. You know that there was."[10] Like this general comment, A.M.'s sticky note was not directed at any particular student and, thus, cannot qualify as bullying.[11]

Second, the school cannot demonstrate that A.M.'s sticky note itself created an intimidating or hostile educational environment, as required by the applicable section of the bullying statute. 20-A M.R.S. § 6554. "In the school context, the [Maine Human Rights] Commission has interpreted a hostile educational environment as involving harassment that a reasonable student of the same age and maturity as the student being harassed would consider *severe or pervasive enough to create an intimidating, hostile, or offensive school environment*."[12]

The school does not even attempt to argue that A.M. engaged in such "severe and pervasive" harassment. Instead, in response to A.M.'s argument on appeal that her sticky note was not "severe and pervasive," Superintendent Wolfrom responded that "neither the statute nor the Cape Elizabeth School Department policy use that phrase." Compl. Att. D. Superintendent

[10] This hypothetical is intended to control for the school's reaction to the term "rapist," which school administrators appeared to define very narrowly, in contrast to activists like A.M. who tend to apply broad definitions to the terms "rape" and "rapist." *See* Porter Decl. ¶¶24-26. This apparent miscommunication demonstrates yet another reason why the best way forward is to pursue increased cooperation and education with stakeholders like A.M., rather than imposing discipline.

[11] The school does not argue that A.M. started any rumors naming a specific individual. Nor do they argue that A.M. was one of the "peers" who "ostracized" the individual. *See* Compl. Att. D. Nevertheless, school administrators lay the blame at A.M.'s feet for the culture of gossip in the school that more likely results from a mistrust of the school's handling of sexual-misconduct complaints, and would be better handled through more education rather than through excessive discipline against A.M.

[12] Interpretation of the Education Provisions of the MHRA, Guidance by the Maine Human Rights Commission, available at https://www.maine.gov/mhrc/sites/maine.gov.mhrc/files/inline-files/20160113_g.pdf (emphasis added); *cf. Blake v. State*, 2005 ME 32, ¶ 8, 868 A.2d 234, 237–38 (stating that an employment environment is "hostile" when there is "repeated or intense harassment sufficient to create an abusive working environment'") (quoting *Doyle,* 2003 ME 61, ¶ 23, 824 A.2d 56)); *Watt v. UniFirst Corp.*, 2009 ME 47, ¶ 23, 969 A.2d 897, 903; *Bowen v. Dep't of Human Servs.*, 606 A.2d 1051, 1054 (Me. 1992).

Wolfrom's legal position is incorrect, however, because the term "intimidating or hostile environment" incorporates the "severe and pervasive test." *See supra* n.12.

3. Defendants Retaliated on the Basis of A.M.'s Press Communications

A.M. also engaged in a second act of protected free speech—speaking to the press about her concerns with the school's handling of sexual assault claims. Compl. 56-57, 71-72. The timing of her suspension suggests that the school retaliated against A.M. based on this protected speech as well.

In the lead-up to the suspension on October 4, 2019, A.M. spoke to a reporter at the Portland Press Herald about her concerns with the school's handling of sexual assault claims, and about how the sticky note was an attempt to lift up that message. In the early morning hours on October 4, 2019, the Portland Press Herald issued an article on the topic. Rachel Ohm, *Cape Elizabeth students fault school system's handling of sexual assault allegations*, Portland Press Herald (Oct. 4, 2019), https://www.pressherald.com/2019/10/04/cape-students-critique-handling-of-sexual-assault-allegations/?rel=related.

Before the article came out, school administrators assured A.M. and others that those responsible for the sticky notes would not be punished, Compl. ¶ 41, stating that "[w]e don't even have detentions in this building. It's about conversations and how do we move forward." Compl. ¶55. But hours after the article came out, later, school administrators pulled A.M. into their conference room to notify her that she was suspended for three days. Compl. ¶59.

The timing of the suspension supports a strong inference that the school retaliated against A.M. for her communications with the press. For example, in another case where students were suspended "less than a day after they spoke out" against a school official, the Court concluded that the timing "allow[ed] an inference of causation." *Eck v. Oley Valley Sch. Dist*., No. CV 19-

1873, 2019 WL 3842399, at *5 (E.D. Pa. Aug. 15, 2019). Like the students in *Eck*, A.M. alleges "an unusually suggestive temporal proximity to establish a causal link between [her] protected conduct and the retaliatory conduct." *Eck v. Oley Valley Sch. Dist*., No. CV 19-1873, 2019 WL 3842399, at *5 (E.D. Pa. Aug. 15, 2019).[13]

4. The Discipline Discriminates Based on Content and Viewpoint and Is Overbroad

Finally, the discipline imposed by Defendants is unconstitutional because it disproportionately targets speech on the basis of content and viewpoint, and is so overbroad that it chills a broad swath of plainly protected speech.

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (citing *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 96 (1972)). "Discrimination against speech because of its message is presumed to be unconstitutional." *Id.* (citing *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 641–643 (1994)). In this case, school administrators targeted conduct that happened on a single day and was entirely motivated by a desire to improve CEHS's response to sexual violence. *See, e.g.*, Compl. Att. C. The anti-bullying statute suggests "a series of graduated consequences" even for substantiated findings of bullying, 20-A M.R.S. § 6554, and the school administrators admit that suspension is very rare. *See* Compl. Att. C. Yet here the school imposed a three-day suspension without starting with any lesser disciplinary option, and without imposing any discipline on similarly situated students. Indeed, the school imposed no discipline at all on students known to school administrators who

[13] Numerous comments by CEHS administrators also support that they were particularly concerned about speech that could undermine the school's sterling image in the community. For instance, in meetings with A.M. and a letter to the community, school administrators repeatedly cited the concern that her speech was critical of the school's handling of complaints. Compl. at 54; Att. A. And in multiple communications with parents, Principal Shedd referenced the "Cape Elizabeth bubble'—the idea that communities like ours are so unaffected by the outside world that our children grow up in sheltered bubble"—and lamented the negative national attention associated with the press. *See* Att. A, Att. C (Sept. 20 email and Oct. 9 letter).

had spread rumors or ostracized the relevant student. *See* Att. A (referencing "rumors spread by Snapchats, texts and Instagrams"); Att. D (noting that the student "was ostracized by his peers"). Instead, the school targeted A.M., an advocate who had simply attempted to raise awareness about the school's handling of sexual assault claims. Such targeted and disproportionate discipline discriminates against the content and viewpoint of the speech.

The discipline is also vague and overbroad, warning A.M. that "any future actions *of this sort* . . . may result in further and more severe consequences up to and including suspension and possible expulsion." *See* Compl. Att. B (emphasis added). In the First Amendment context, plaintiffs may "argue that a statute is overbroad" when it "is unclear whether it regulates a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 304 (2008). Here, the prohibition on "any future actions of this sort' is impermissibly vague and appears to sweep in a broad array of speech criticizing the school's handling of sexual assault claims, or advocating on behalf of survivors. Moreover, the prospective threat of expulsion is akin to a prior restraint on speech that presents an extreme risk of silencing constitutionally protected speech on an important topic of public concern.[14]

B. The Suspension Constitutes Title IX Retaliation

Defendants admit that they treated the sticky note as an anonymous Title IX report, yet retaliated against A.M. for posting it.[15] Under Title IX, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" 20 U.S.C. § 1681. Title IX creates an implied right of action for intentional sex discrimination,

[14] "If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

[15] Ken & Mike Radio Show (Oct. 9, 2019), available at https://wgan.com/morning-news/cape-elizabeth-school-department/ (the Title IX coordinator at Cape Elizabeth High School stating they treated the sticky note as an anonymous Title IX report).

which incorporates a claim of retaliation for protected reporting of alleged violations of Title IX. *See Jackson v. Birmingham Bd. of Educ*., 544 U.S. 167, 173 (2005) (citations omitted).

"Title IX's private right of action encompasses suits for retaliation, because retaliation falls within the statute's prohibition of intentional discrimination on the basis of sex." *Jackson*, 544 U.S. at 178, 180. This is just as true for survivors who report sexual assault as it is for allies and others who report sexual assault and discrimination. *Id.* at 179. "The statute is broadly worded; it does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint." *Id.* "Without protection from retaliation, individuals who witness discrimination would likely not report it, indifference claims would be short circuited, and the underlying discrimination would go unremedied." *Id.* at 180-81. "Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel." *Id.* at 178, 180.

"A plaintiff establishes a prima facie case of retaliation [under Title IX] by showing 'that: 1) [s]he engaged in a protected activity; 2) [s]he [subsequently] suffered an adverse employment decision; and 3) there was a causal link between the protected activity and the adverse employment decision.'" *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1064 (9th Cir. 2002). The same analysis applies when determining whether school officials have retaliated against a student for protected activity. "[P]roximity in time between the protected action and the allegedly retaliatory employment decision" can create an inference that the adverse action was caused by an employee's engagement in protected activities. *Id.* (internal quotations and citations omitted).

Defendants openly admit that they treated A.M.'s sticky note as an anonymous Title IX reporting event,[16] which is a protected activity under Title IX. *Jackson v. Birmingham Bd. of Educ*., 544 U.S. 167, 179, 125 S. Ct. 1497, 1507, 161 L. Ed. 2d 361 (2005). Yet after investigating the note, and determining that "there is not a rapist" at the school (a statistical near-impossibility in a school of 550 students), administrators disciplined A.M. for making the report.[17] This suspension constitutes prohibited Title IX retaliation.

II. A.M. Will Suffer Irreparable Harm Absent Relief

Plaintiff will suffer immediate and irreparable harm if the Court does not temporarily enjoin the suspension from going forward on October 15 and lift the prohibition on other speech "of this sort." *See* Compl. Att. B. "'Irreparable injury' in the preliminary injunction context means an injury that cannot adequately be compensated for either by a later-issued permanent injunction, after a full adjudication on the merits, or by a later-issued damages remedy." *Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 76 (1st Cir. 2005). "Irreparable harm is easily, though not automatically, satisfied in cases where a plaintiff would otherwise be prevented from exercising his constitutional right to free speech. 'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *McMahon v. City of Panama City Beach*, 180 F. Supp. 3d 1076, 1111 (N.D. Fla. 2016) (quoting *KH Outdoor v. City of Trussville*, 458 F.3d 1261, 1271–72 (11th Cir. 2006); *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

[16] Ken & Mike Radio Show (Oct. 9, 2019), available at https://wgan.com/morning-news/cape-elizabeth-school-department/ (the Title IX coordinator at Cape Elizabeth High School stating they treated the sticky note as an anonymous Title IX report).

[17] Ray Routhier, *Cape High School student appealing suspensions over 'rapist in the school' notes*, Portland Press Herald (Oct. 5, 2019), https://www.pressherald.com/2019/10/05/cape-high-school-student-appealing-suspension-over-rapist-in-the-school-notes/ ("Both Wolfrom and Shedd said they were confident there was not a rapist in the school.").

Here, A.M. faces an imminent suspension starting on October 15, 2019, for constitutionally protected speech, and also remains under a school warning "that any future actions of this sort . . . may result in further and more severe consequences up to and including suspension and possible expulsion." Compl. Att. B. Such loss of First Amendment freedoms has a chilling effect for A.M. and other students, and cannot be compensated by money damages. *See* Porter Decl. ¶¶ 27-28.

III. The Balance of the Equities Favors Preliminary Injunctive Relief

The balancing of the equities favors A.M. Granting preliminary injunctive relief would ensure that A.M. does not suffer retaliation and chilling of her First Amendment rights during the pendency of this lawsuit. By contrast, Defendants suffer no harm whatsoever by any order lifting the suspension until the Court can rule on the serious constitutional and statutory issues raised by A.M.

IV. The Injunction Is In the Public Interest

Finally, the public interest also supports granting preliminary injunctive relief. "Surely, upholding constitutional rights serves the public interest." *Newsom Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003); *Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980); *Reinert v. Haas*, 585 F. Supp. 477, 481 (S.D. Iowa 1984) (the public is "always well served by protecting the constitutional rights of all of its members.").This suspension impermissibly censors protected speech about an issue—sexual assault in public schools—that is central to the safety of youth in our society. *See* Porter Decl. ¶ 28. We all lose out when the government silences the speech of the very people who are most affected—the students themselves. There are already too many reasons for students not to report sexual assault, including, but not limited to, "fear of hostile treatment by authorities." *See* Porter Decl. ¶¶ 14-15. The discipline imposed in this case simply

reinforces that fear and discourages others from speaking out. *Id.* ¶¶ 27-28. In recent years, high school students have already revolutionized the conversations about gun violence and climate change. Ensuring that students like A.M. can also speak freely about their concerns with sexual assault will advance the public interest. *See generally* Porter Decl.

V. Ex Parte Relief Is Appropriate Until Defendants Have the Opportunity to Respond

Plaintiff learned of the Superintendent's decision to uphold the suspension on Friday afternoon, October 11, and two days later, on October 13, filed a complaint and emergency motion for injunctive relief to challenge the suspension that is set to begin on October 15. To the extent Defendants are unable to respond before October 15, when the suspension will begin, we respectfully request that the Court grant ex parte relief until Defendants' counsel has the opportunity to respond. *See* Fed. R. Civ. P. 65(b).

Counsel for the plaintiff has made reasonable efforts to give notice to the other side. Hours before filing the complaint on October 13, 2019, counsel contacted Melissa Hewey, Esq., of Drummond Woodsum, attorney for Defendants, to notify her of the plan to file this lawsuit and the request for injunctive relief. Additionally, undersigned counsel has sent Ms. Hewey copies of the complaint and motion for temporary injunctive relief by e-mail.

CONCLUSION

For these reasons, we respectfully request that the Court issue a TRO or preliminary injunction lifting the suspension and otherwise maintaining the status quo during litigation of Plaintiff's claims.

Dated: October 13, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that she has electronically filed this date the foregoing PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, WITH INCORPORATED MEMORANDUM OF LAW with the Clerk of the Court at newcases.portland@med.uscourts.gov, and has sent notification of such filing to Melissa Hewey, Esq., at mhewey@dwmlaw.com.

Dated: October 13, 2019

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