UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THOMAS SYPNIEWSKI, JR., MATTHEW SYPNIEWSKI, and BRIAN SYPNIEWSKI,

Plaintiffs,

- against -

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WARREN HILLS REGIONAL BOARD OF EDUCATION, PETER MERLUZZI, in his personal and official capacity as Superintendent of the Warren Hills Regional Board of Education, BETH GODETT, in her personal and official capacity as Principal of the Warren Hills Regional High School, RONALD GRIFFITH and PHILIP CHALUPA, in their personal and official capacities as Vice Principals of the Warren Hills Regional High School, and ELIZABETH AMES, MARCY MATLOSZ, RAY BUSCH, SUYLING HEURICH, JAMES T. MOMARY, NANCY FALLEN, WILLIAM MILLER, BRADLEY BRESLIN and SCOTT SCHANTZENBACH, each in his or her official capacity as a member of the Warren Hills Regional Board of Education,.

Defendants.

MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTIVE RELIEF

This Memorandum of Law is submitted in support of Plaintiffs' motion for a preliminary injunction restraining Defendants from enforcing the Dress Code and Harassment Policy (as hereinafter defined) and from taking disciplinary action against Plaintiffs on the basis of constitutionally protected speech, until Plaintiffs' claims can be resolved on the merits.

FACTUAL BACKGROUND

Matthew Sypniewski ("Matt") is a student of the Warren Hills Regional High School (the "High School") and the Warren County Technical School (Matt Sypniewski Aff. ¶ 1). Brian

Sypniewski ("Brian") was, during the school year of 2000-2001, a student of the Warren Hills Regional Middle School (the "Middle School"), and is due to enter the High School in September, 2001 (Brian Sypniewski Aff. ¶ 1). Matt and Brian's brother, Thomas Sypniewski, Jr. ("Tom"), was a student of the High School until his graduation on June 15, 2001 (Tom Sypniewski Aff. ¶ 1).

Both the High School and the Middle School operate under a student handbook, adopted by the Warren Hills Regional Board of Education (the "Board"), which includes a section on prohibited clothing (the "Dress Code") (Complaint Exhibit A). As here relevant, the Dress Code prohibits:

> Clothing displaying or imprinted with nudity, vulgarity, obscenity, profanity, double entendre pictures or slogans (including those related to alcohol, drugs and tobacco), or portraying racial, ethnic, or religious stereotyping.

In addition to the Dress Code, on March 6, 2001, the Board adopted a policy concerning racial harassment (the "Harassment Policy") (Complaint Exhibit B), which states, in relevant part:

> District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications or any item that denotes Ku Klux Klan, Arayan [*sic*] Nation - White Supremacy, Black Power, Confederate flags or articles, Neo-Nazi or any other "hate" group. This list is not intended to be all inclusive.)

The Board adopted the Harassment Policy after, the Board asserts, a series of racially charged incidents in the High School during the 2000-2001 school year. None of these incidents involved any of the plaintiffs, and none of the incidents led to the suspension of the perpetrators.

Tom, Matt, and Brian are fans of Jeff Foxworthy, whose first album, "You Might Be A Redneck If...," sold more copies than any other comedy album in history. In his routine, Mr. Foxworthy makes fun of himself and others like him for enjoying country music, having a southern accent, and driving a pickup truck. Mr. Foxworthy is particularly popular in areas that, like Warren County, comprise primarily agricultural or undeveloped land. In appreciation of Mr. Foxworthy's comedy, Brian bought a T-shirt bearing a Foxworthy joke (the "T-shirt"). He gave an identical T-shirt to Matt and one to Tom as gifts (Matt Sypniewski Aff. ¶ 2, Brian Sypniewski Aff. ¶ 2, Tom Sypniewski Aff. ¶ 2). The joke on the T-shirt reads as follows:

Top 10 Reasons you might be a Redneck Sports Fan if . . .

10. You've ever been shirtless at a freezing football game.
9. Your carpet used to be part of a football field.
8. Your basketball hoop used to be a fishing net.
7. There's a roll of duct tape in your golf bag.
6. You know the Hooter's menu by heart.
5. Your mama is banned from the front row at wrestling matches.
4. Your bowling team has it's own fight song.
3. You think the "Bud Bowl" is real.
2. You wear a baseball cap to bed.
1. You've ever told your bookie "I was just kidding".

Each of the three plaintiffs wore the T-shirt to his respective school multiple times during the school year of 2000-2001. No one in either the High School's or the Middle School's administration ever objected to or even remarked on the T-shirt's content before March 22, 2001 (Matt Sypniewski Aff. ¶ 4, Brian Sypniewski Aff. ¶ 4, Tom Sypniewski Aff. ¶ 4).

Nevertheless, on March 22, 2001, when Tom again wore the "Redneck Sports Fan" T-shirt to school, he was directed by Vice Principal Ronald Griffith to change his shirt or turn it inside-out, because, Mr. Griffith asserted, the word "Redneck" was "offensive" and violated the Dress Code (Tom Sypniewski Aff. ¶¶ 7, 9). When Tom respectfully declined to remove his shirt, Mr. Griffith – having discussed the matter with Peter Merluzzi, the Superintendent of the Warren Hills Regional Board of Education – issued a disciplinary report suspending him for three days (Complaint Exhibit D). The report cites the Dress Code only, and does not even mention the Harassment Policy.

On the day after Tom was disciplined for wearing the T-shirt, Brian wore the identical T-shirt to the Middle School (Brian Sypniewski Aff. ¶ 4). The vice principal, Robert Griffin, discussed this matter with Mr. Merluzzi. Despite his opposite conclusion on the day before, Mr. Merluzzi concluded that the T-shirt was not "offensive," and therefore that it did ***not*** violate the Dress Code (Brian Sypniewski Aff. ¶ 4).

Tom submitted a formal appeal to the Board on March 26, 2001 (Tom Sypniewski Aff. ¶ 9) (Complaint Exhibit E). In a Board meeting, Tom reasoned that the T-shirt was not offensive and did not violate either the Dress Code or the Harassment Policy.

The Board, however, upheld Tom's suspension (Tom Sypniewski Aff. ¶ 9). In a letter to Tom's parents dated April 20, 2001 (Complaint Exhibit F), the Board stated that its decision was based on Tom's "insubordination in failing to follow the school's dress code." The letter did not contain any reference to the Harassment Policy. In the letter, the Board also stated that it based its decision in part on the conclusion that Tom "intended his shirt to convey a message."

Simultaneously with the mailing of the letter to the Sypniewski family, the Board faxed a press release to local newspapers (Complaint Exhibit G). The press release included a "Chronology of Events Leading Up to the Adoption of the Racial Harassment or Intimidation Policy of the Warren Hills Regional Board of Education," and it placed Tom within this "climate of racial harassment and intimidation" by stating that, "because of the history of racial intimidation, this conduct will not be tolerated." The press release concluded that, by wearing the Foxworthy T-shirt, Tom "was attempting to portray a message of racial stereotyping."

Neither the letter to Tom's parents nor the press release provided ***any*** evidence that displaying the word *redneck* would materially interfere with the requirements of appropriate discipline in the operation of the High School, that it caused "disruption in the classroom," that it was "racially divisive," or that it created "ill will or hatred." There was not even a finding that the word *redneck* portrayed "racial, ethnic, or religious stereotyping." In fact, all three boys had worn the identical shirt to school multiple times throughout the school year without any resulting disruption and without anyone finding the T-shirt inappropriate in any way.

As a result of the Board's pronouncements to the press, the Sypniewski family has been subjected to hateful comments and, ironically, to ethnic/racial harassment. Within days after the Board announced to the press its decision to uphold Tom's suspension, Tom received an anonymous letter in the mail, saying "YOU STUPID POLLACK [*sic*]" (Tom Sypniewski Aff. ¶ 15). Also as a result of the suspension, Tom had to take final examinations from which he otherwise would have been exempt, and was deprived of his parking space at school (Tom Sypniewski Aff. ¶¶ 16-17).

Despite the Board's decision to uphold Tom's suspension, and its statement that this conduct will not be tolerated," neither the Dress Code nor the Harassment Policy has been enforced in a consistent manner. In the weeks since Tom was suspended, students have worn the following T-shirts to school without being apprehended or disciplined in any way:

- When in doubt, pull it out – literally violating the Dress Code's prohibition on "double entendre pictures or slogans."

- Budweiser – literally violating the Dress Code's prohibition on "double entendre pictures or slogans (including those related to alcohol, drugs and tobacco)."

- A crucifix within a "PROHIBITED" road sign – literally violating the Dress Code's prohibition on "religious stereotyping" and the Harassment Policy's prohibition on written material that "creates ill will or hatred."

- Malcolm X – literally violating the Dress Code's prohibition on "racial stereotyping" and, arguably, the Harassment Policy's prohibition on written material that is "racially divisive."

- A Confederate flag – explicitly prohibited by the Harassment Policy.

(Tom Sypniewski Aff. ¶ 12).

Similarly, Philip Chalupa, another vice principal of the High School, stated that a bumper sticker on a student car that read "Discourage inbreeding—Ban Country music" was a matter of opinion, not offensive, and therefore permissible (Tom Sypniewski Aff. ¶ 13). Only days later,

two security guards forced the owner of the car to remove the sticker, because they did find it offensive.

Both Matt and Brian intend to wear their T-shirts again during the 2001-2002 school year (Matt Sypniewski Aff. ¶ 6, Brian Sypniewski Aff. ¶ 7). However, they face disciplinary action if they do so (Matt Sypniewski Aff. ¶ 5, Brian Sypniewski Aff. ¶ 6). Moreover, both are uncertain what other clothing and other written material may be found "offensive" by the school's administrators. Until these issues may be resolved on the merits, Matt and Brian need the Court's protection in the form of a preliminary injunction.

ARGUMENT

Brian and Matt have demonstrated all the requirements for issuance of a preliminary injunction. Because their speech is constitutionally protected, and because the Dress Code and Harassment Policy are unconstitutional on their face, plaintiffs are likely to succeed on the merits. The chilling effect on their exercise of a fundamental constitutional right is presumed to be an irreparable injury. By contrast, the defendants would not be harmed if they were required to comply with constitutional requirements by making specific findings that speech to be banned is disruptive or harassing. Finally, the public interest strongly favors protection of speech.

I. The Standard for a Preliminary Injunction.

In deciding whether to issue a preliminary injunction, a district court weighs four factors:

(1) whether the movant has shown a reasonable probability of success on the merits;

(2) whether the movant will be irreparably injured by denial of the relief;

(3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and

(4) whether granting the preliminary relief will be in the public interest.

ACLU v. Reno, 217 F.3d 162, 172 (3d Cir. 2000) ("*ACLU v. Reno II*") (affirming grant of preliminary injunction). Here, all these factors weigh in favor of granting a preliminary injunction.

II. Plaintiffs Have a Reasonable Probability of Success on the Merits.

Once the Court considers the merits of this case, it is likely to find that both the Dress Code and the Harassment Policy are impermissibly content- and viewpoint-based, and too carelessly tailored to pass strict scrutiny. Both reach a substantial amount of protected speech, allow arbitrary enforcement, and create a chilling effect on students' speech. Additionally, the Court is likely to find that they are unconstitutional as applied to the plaintiffs' speech, because the speech is protected, and is neither disruptive nor harassing.

A. The Dress Code and Harassment Policy Are Unconstitutional on Their Face Because They Are Content- and Viewpoint-Based.

The Dress Code and the Harassment Policy are both content- and viewpoint-based, in that they prohibit apparel and other written material strictly on the basis of whether it portrays "racial, ethnic, or religious stereotyping," or "is racially divisive or creates ill will or hatred." While racism is highly offensive to most Americans – including all three Sypniewski brothers, who dispute that the T-shirt expressed any racism – prohibiting speech that expresses racism runs afoul of the constitutional right to free self-expression. Such content- and viewpoint-based regulations are presumptively void. *Saxe v. State College Area School District*, 240 F. 3d 200,

209 (3d Cir. 2001) (holding that a public school district's anti-harassment policy violated the First Amendment because it discriminated against certain subject matter and opinions).

Banning potentially offensive speech in order to protect listeners is impermissible, under both the New Jersey State Constitution[1] and the Federal Constitution. "[I]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414, 109 S. Ct. 2533 (1989). The Supreme Court there invalidated a state statute that prohibited burning the American flag or otherwise desecrating certain "venerated object[s]." The Court noted that the First Amendment not only protects offensive speech, it virtually invites it. *Id.* at 408. To prohibit the expression of opinions that are considered offensive, while allowing the expression of more popular opposing views, would be to prescribe an orthodoxy. *See id.* at 417.

To ensure that government does not impose a particular orthodoxy of opinion, the First Amendment affords the highest protection even to "[h]arassing or discriminatory speech, although evil and offensive," *Saxe*, 240 F. 3d at 209 (2001) (internal quotation marks omitted), and even to "statements that impugn another's race or national origin or that denigrate religious beliefs." *Id.* at 206.

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[1] The New Jersey constitution is "more sweeping in scope than the language of the First Amendment," and may guarantee speech rights beyond the extent of the Federal Constitution. *State v. Schmid*, 84 N.J. 535, 423 A.2d 615 (N.J. 1980) (invalidating a private university regulation under the New Jersey Constitution, even though it was unclear whether the regulation was permissible under the Federal Constitution).

For example, the Supreme Court struck down a municipal ordinance that prohibited speech that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S. Ct. 2538 (1992). Although the ordinance was limited to fighting words, the Supreme Court determined that it impermissibly targeted the subject matter of "race, color, creed, religion or gender." Like the ordinance in *R.A.V.*, the Dress Code and Harassment Policy target "racial, ethnic, or religious" subject matter and viewpoints that are "stereotyping" or "racially divisive." And like the ordinance in *R.A.V.*, these regulations are void.

Under limited circumstances, government may prohibit particular messages, but such content-based regulations are "subject to the most exacting First Amendment scrutiny." *Saxe*, 240 F.3d at 207. The prohibition must be necessary to further a compelling state interest, and it must place the least possible burden on speech. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 1886 (2000) (invalidating statute that limited the transmission time of sexually-oriented programming, because government failed to show that a less restrictive alternative, under which viewers could block the programming on a household-by-household basis, was ineffective).

While the Dress Code and Harassment Policy were allegedly adopted to further admittedly compelling interests, they burden substantially more speech than is necessary to achieve those interests. To be valid, a school speech restriction must be limited to speech that causes "material and substantial interference with schoolwork or discipline." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 511, 89 S. Ct. 733, 739 (1969) (holding that students could not be suspended for wearing black armbands in protest of the Vietnam War). Moreover, the school must demonstrate "a specific and significant fear of disruption, not just

some remote apprehension of disturbance." *Saxe*, 240 F.3d at 212. Likewise, while preventing harassment is a compelling interest, only "harassment that objectively denies a student equal access to a school's education resources" may be prohibited. *Saxe*, 240 F.3d at 210.

Thus, for example, a history of racial incidents justified a school policy prohibiting racial harassment and intimidation through slurs or symbols of "racial hatred or prejudice." *West v. Derby Unified School District No. 260*, 206 F.3d 1358 (10th Cir. 2000). In contrast, there could be no justification for a policy that prohibited speech that created "an intimidating, hostile or offensive environment,"[2] because there was no requirement of evidence of pervasiveness or severity establishing an interference with learning. *Saxe*, 240 F.3d at 217.

Unlike the situation in *West*, but much like the situation in *Saxe*, the Dress Code and Harassment Policy burden substantially more speech than necessary to promote an effective educational environment or to protect students' equal access to educational resources. There is no evidence that the High School or Middle School cannot function properly without a blanket ban on "racial, ethnic, or religious stereotyping," and on material that is "racially divisive" or "creates ill will or hatred."

By limiting students' freedom of expression to those opinions that the schools' administrators find acceptable, the Dress Code and Harassment Policy collide with the constitutional requirement that government remain strictly neutral with respect to content and

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[2] The Third Circuit gave the regulation a narrowing construction and held that, as narrowed, the policy was acceptable to the extent that it prohibited speech that would "substantially interfer[e] with a student's educational performance," and unacceptable to the extent that it prohibited speech that would create a hostile environment.

viewpoint. Further, by burdening speech beyond what is necessary to promote any compelling government interest, these regulations fail strict scrutiny and are facially void.

B. The Dress Code and Harassment Policy Are Overbroad and Prohibit Constitutionally Protected Speech.

The Dress Code and Harassment Policy have an impermissibly wide sweep. A regulation is invalid on its face if it reaches a substantial amount of protected speech. *See, e.g., ACLU v. Reno II*, 217 F.3d at 177 (invalidating restriction on web content that effectively required web publishers to accede to the most conservative community's standards and thus be deprived of the right to publish material that would otherwise be permitted in some communities).

The regulations here reach core First Amendment communications about students' identity, the nature of their community, and their beliefs. For example, some messages that contain a stereotype also connote pride in one's ethnic or racial identity, such as "When Irish Eyes Are Smiling." Some messages that are racially divisive also effectively comment on the racially divided nature of American society, such as "It's a Black Thing." And every utterance could potentially create ill will in someone: a discussion of evolution or a stated preference for red meat may be intolerable to devout members of some religions.

Simply put, the Dress Code and Harassment Policy do not stop at speech that would disrupt the classroom or other students' ability to learn; they also extend into the realm of constitutionally protected speech. The prohibition on written material that "creates ill will or hatred" could reach every imaginable utterance. Indeed, a student in the High School was required to remove a bumper sticker that stated, "Discourage inbreeding—Ban Country music," because two security guards found it offensive. The defendants' excessive zeal in keeping such core constitutional discourse pleasant for everyone is precisely what the First Amendment is

intended to forestall. The Dress Code and Harassment Policy extend beyond the Board's permissible interests and are therefore unconstitutionally overbroad.

C. The Dress Code and Harassment Policy Are Impermissibly Vague and Tend to Chill Constitutionally Protected Speech.

Not only do the regulations at issue reach constitutionally protected speech, they also do not make clear just where their reach ends. A statute is vague and void on its face if it (i) does not give fair warning as to what conduct is forbidden or (ii) leaves it open to arbitrary and discriminatory enforcement. *See City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S. Ct. 1849, 1859 (1999) (invalidating ordinance that prohibited gang members from loitering "with no apparent purpose" in a public space, because its application depended on whether police officers discerned an "apparent purpose" in each case); *Smith v. Goguen*, 415 U.S. 566, 572-73, 94 S. Ct. 1242, 1247 (1974) (invalidating statute that imposed criminal liability on one who publicly "treats contemptuously" the United States flag, because it did not distinguish casual treatment that was criminal from casual treatment that was permitted). The regulations at issue here violate the First Amendment on both grounds.

An unclear statute may encourage citizens to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S. Ct. 1316,1323 (1964) (internal quotation marks and citations omitted) (voiding statute that required public employees to swear to "promote . . . undivided allegiance to the government of the United States"). The vagueness doctrine is intended to prevent this chilling effect on the exercise of constitutionally protected rights. *Id.*

The vagueness doctrine also guarantees non-discriminatory application of the laws. For example, a statute prohibiting contemptuous treatment of the American flag troubled the

Supreme Court in part because the state admitted that a war protestor and a member of the American Legion who used a flag to protect themselves from rain would be treated differently. *Goguen*, 415 U.S. at 575, 94 S. Ct. at 1248.

In light of this well-established and oft-repeated law, the Dress Code and Harassment Policy cannot pass constitutional muster, as their language is purely subjective. School employees may perceive some – but not all – racial messages as "stereotyping" or "racially divisive;" and the same message may be perceived as stereotyping by one employee but not by another. What may be found to create "ill will or hatred" is even more individual. In fact, school officials were unable to agree on whether the "Redneck Sports Fan" T-shirt violated the Dress Code. They apparently concluded that the message constituted racial stereotyping in March 2001, but not in February 2001; and only when worn in the High School, not when worn in the Middle School. The arbitrary and subjective nature of the regulations is further highlighted by school employees' divergent treatment of the message "Discourage inbreeding—Ban Country music" based on whether they individually found it "offensive" or not.

As a result of the vague language of the Dress Code and Harassment Policy, students are left guessing at what speech is and is not forbidden. In order to avoid disciplinary action, they may not express themselves even as to matters that are permissible. The threat of suspension chills dialogue on racial issues and other topics, and is thus impermissible.

D. The Dress Code and Harassment Policy Are Unconstitutional as Applied to Plaintiffs' Speech.

The defendants suspended Tom – and threaten to discipline Brian and Matt if they wear the T-shirt to school in the fall – even though there is ***no*** evidence that the T-shirt disrupted classroom activities or that it harassed anyone. In fact, the evidence points to the contrary. All

three boys wore the T-shirt multiple times over the school year without incident. Even on the day Tom was suspended, he had worn the T-shirt all day without disruption to any educational activity. Hence, the T-shirt is neither harassing nor disruptive, and is constitutionally protected speech, and the Dress Code is unconstitutional as applied to it. *Cf. Saxe*, 240 F.3d at 210.

Although Tom was suspended solely on the basis of the Dress Code, the defendants clearly relied on the Harassment Policy to justify the suspension. In the Board's press release, it cited the Harassment Policy and the events that led to its adoption. In addition, the timing of the suspension – less than two weeks after the Harassment Policy was adopted, rather than on one of the multiple previous occasions when the plaintiffs had worn the T-shirt while the Dress Code was in effect – implicates the Harassment Policy in the decision. Thus, the Harassment Policy also has been applied to the T-shirt unconstitutionally.

E. Summary

Both the Dress Code and the Harassment Policy impose punishment on certain types of messages and on certain viewpoints. They burden speech far beyond what is necessary to ensure the smooth functioning of the High School and Middle School. Along with the actual disruptive or harassing speech that they are intended to target, they encompass a great deal of core First Amendment speech. Finally, they allow arbitrary enforcement and create a chilling effect on students' self-expression. Because they are content-based, overbroad, vague and subject to discretionary enforcement, there is a strong likelihood that the Court will invalidate them on their face once it considers the merits. In addition, the Dress Code and Harassment Policy are unconstitutional as applied to the plaintiffs' T-shirt, because there is no evidence that the T-shirt threatened to disrupt the school or harassed anyone, and because it is protected speech.

III. Plaintiffs' Injury Is Presumed to Be Irreparable.

Brian and Tom are certain to suffer irreparable injury if the Dress Code and Harassment Policy are enforced in the fall. "[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690 (1976). Specifically, a preliminary injunction should issue when a regulation is likely to chill the exercise of speech rights.

Irreparable harm is presumed whenever state action has a chilling effect on constitutionally protected speech. *See ACLU v. Reno II*, 217 F.3d at 180. Because any statute that is overbroad or vague could chill protected speech, irreparable injury almost always exists when there is a likelihood of success on the merits. *See ACLU v. Reno*, 929 F. Supp. 824, 866 (E.D.Pa. 1996), *aff'd*, 521 U.S. 844, 117 S. Ct. 2329 (1997) ("*ACLU v. Reno I*") ("in a First Amendment challenge, a plaintiff who meets the first prong of the test for a preliminary injunction will almost certainly meet the second").

In addition, any regulation that directly penalizes speech is deemed to chill the exercise of speech rights. *See Waterman v. Verniero*, 12 F. Supp. 2d 364, 377 (D.N.J. 1998). There, the court preliminarily enjoined enforcement of a statute restricting prisoners' access to pornographic materials, based on a determination that the statute was vague and overbroad.[3] The court stated that the threat of sanctions would discourage the plaintiffs from viewing even

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[3] The court ultimately permanently enjoined the state from enforcing the statute. *Waterman v. Verniero*, 12 F. Supp. 2d 378 (D.N.J. 1998). The state subsequently narrowed the statute's scope, rendering it constitutional. *Waterman v. Farmer*, 183 F.3d 208 (3d Cir. 1999).

permissible material, such as movies in which two adults are shown kissing, and thus justified a preliminary injunction.

Here, the Dress Code and Harassment Policy impose direct penalties on speech by allowing the High School and Middle School to suspend students for wearing certain clothing or possessing certain written material. Such penalties have a presumed chilling effect on constitutionally protected speech. *See Waterman*, 12 F. Supp. 2d at 377. If the regulations are enforced in the fall, Matt and Brian will have to refrain from wearing the T-shirt, and all students may refrain from engaging in protected speech. This deprivation of a fundamental right cannot subsequently be remedied. The injury is irreparable and should be avoided by a preliminary injunction.

IV. There Is No Hardship to the Defendants in Being Required to Comply with Constitutional Constraints.

No harm would befall the defendants if they are enjoined from enforcing the unconstitutional provisions of the Dress Code and Harassment Policy, because they would still be empowered to prevent disruption or harassment. Specifically, the Dress Code allows school officials to "impose limitations on student participation in the regular instructional program where there is evidence that inappropriate dress causes disruption in the classroom." And the schools have always punished "harassment," as evidenced by the High School's form disciplinary report (Complaint Exhibit D).

Thus, the defendants could still promote the school district's legitimate interests. For example, the Board's extensive findings, issued along with the press release, would probably justify a continuing prohibition on the Confederate flag. *Cf. West, supra*, 206 F.3d 1358. The defendants would be prevented only from targeting certain opinions without specific findings

that the expression of those opinions "causes disruption in the classroom." If there is no evidence of disruption, there is no reason to believe that any harm could result.

V. The Public Interest Strongly Favors Protection of Constitutionally Protected Speech.

In cases concerning First Amendment rights, the public interest weighs in favor of constitutional protection, even when balanced against important countervailing interests such as the protection of minors, *see ACLU v. Reno II*, 217 F.3d at 180-81, and the rehabilitation of prisoners. *See Waterman*, 12 F. Supp. 2d at 378. "[T]he public interest weighs in favor of having access to a free flow of constitutionally protected speech" and "neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." *ACLU v. Reno I*, 929 F. Supp. at 851, 866; *see also Telco Communications, Inc. v. Barry*, 731 F. Supp. 670 (D.N.J. 1990) ("the public has a compelling interest in the preservation of First Amendment rights"). Because fundamental speech rights are implicated in this case, the public interest factor weighs in favor of granting a preliminary injunction.

VI. The Bond Requirement Should Be Waived.

While Rule 65(c) of the Federal Rules of Civil Procedure generally requires that an applicant for a preliminary injunction post a security bond, the court may waive the requirement under appropriate circumstances. *McCormack v. Township of Clinton*, 872 F. Supp. 1320, 1328 (D.N.J. 1994) (granting a preliminary injunction and waiving the bond requirement). In determining whether to waive a bond, a court balances the hardship to the plaintiff if a bond is required against the hardship to the defendant if it is not. *Temple Univ. v. White*, 941 F.2d 201, 219 (3d Cir. 1991), *cert. denied sub nom., Snider v. Temple Univ.*, 502 U.S. 1032, 112 S. Ct. 873 (1992) (affirming waiver of bond where plaintiff faced financial collapse and defendant faced

"virtually no risk"). The court should consider whether plaintiff seeks to enforce a significant right or a matter of public interest. *Id*. (noting that plaintiff was enforcing its rights under Medicaid statute). The court also may waive the security bond if the defendant would not suffer monetary harm. *Id.* n. 3.

Here, the hardship to Matt and Brian in posting a bond would be substantial. As discussed above, there is no harm to the school in being enjoined from enforcing only the unconstitutional provisions of the Dress Code and Harassment Policy. Moreover, plaintiffs seek to prevent enforcement of a content-based regulation. This is "both a significant right and a matter of tremendous public significance." *McCormack*, 872 F. Supp. at 1328. Finally, any harm that could befall the defendants would not be monetary, and the defendants therefore do not require security.

VII. Conclusion.

This is a case about good intentions and bad policies. In an attempt to protect minority students, the defendants have created a school environment that is intolerant, discriminatory, and destructive of fundamental rights. Certain views are deemed inherently unacceptable, and are perceived to be lurking everywhere – even in the plaintiffs' innocuous, self-deprecating T-shirt. While this lawsuit is pending, hundreds of students – Brian and Matt among them – face direct penalties for the expression of any views that the administration finds "divisive" or "offensive." They need a preliminary injunction to protect their speech rights.

WHEREFORE, Matthew Sypniewski and Brian Sypniewski request that the Court enter a preliminary injunction enjoining the defendants in this action, while this lawsuit is pending, from:

1. enforcing the Dress Code to the extent that it prohibits clothing "portraying racial, ethnic, or religious stereotyping" without requiring evidence that the particular message being prohibited "causes disruption in the classroom,"
2. enforcing the Harassment Policy to the extent that it prohibits "written material … that is racially divisive or creates ill will or hatred," and
3. taking any disciplinary action against Matthew Sypniewski and/or Brian Sypniewski if they wear their T-shirt to the High School.

In addition, the plaintiffs request that the Court waive any security bond generally required under Rule 65 of the Federal Rules of Civil Procedure.

Dated: June 25, 2001

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