IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

J.M. and R.M., individually and as parents and natural guardians of R.E.M., a minor, Plaintiffs,	:	No. 18-4082
	:	The Honorable Gerald J. Pappert
v.	:	
SPRINGFIELD TOWNSHIP SCHOOL DISTRICT, NANCY HACKER AND CHARLES RITTENHOUSE, and SCOTT ZGRAGGEN, Defendants.	:	

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO STRIKE AVERMENTS PURSUANT TO FED.R.Civ.P. 12(f) AND MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT PURSUANT TO FED.R.Civ.P. 12(b)(6)

Defendants, Springfield Township School District, Nancy Hacker, Charles Rittenhouse and Scott Zgraggen, (hereafter collectively referred to as "Defendants"), by and through their attorneys, King, Spry, Herman, Freund and Faul, LLC, move pursuant to Fed.R.Civ.P. 12(f) and 12 (b)(6) to Strike Enumerated Averments and Dismiss the Amended Complaint of Plaintiffs, and in support thereof aver and submit the following brief.

I. STATEMENT OF THE CASE

On or about September 20, 2018, Plaintiffs filed a six (6) count Complaint alleging that the School District and the individual defendants had impinged upon and retaliated against the minor plaintiff (hereinafter "R.E.M.") in violation of the First Amendment when they disciplined her by means of a five day out of school suspension after viewing a Snapchat video made by R.E.M. that had been distributed throughout the student body. See Exhibit "A" attached hereto. Plaintiffs further allege R.E.M. was defamed by the publication of "implied references" because she was identifiable as the owner of the account, though she voluntarily appeared in it, in an email and a Smart Board message sent to students and parents addressing the issue.

On or about December 17, 2018 Defendants filed a Motion to Dismiss the original Complaint. On April 17, 2019, this Honorable Court granted the Motion regarding Plaintiffs' First Amendment and substantive due process claims. See Exhibit "B" attached hereto. The Court also ruled that the Plaintiffs' claims as to defamation, false light and invasion of privacy were too general and insufficient and in any event would be barred by Pennsylvania's Political Subdivision Tort Claims Act, (hereafter the "Tort Claims Act") 42 Pa.C.S. §8541, et seq. Lastly, the Court permitted Plaintiffs to replead against defendants Rittenhouse and Zgraggren but only in their capacities . On or about May 3, 2019, Plaintiffs filed an Amended Complaint containing substantially the same exact allegations save the inclusion of the text of R.E.M.'s actual statement and the inclusion of additional case quotations and First Amendment legal commentary. See Exhibit "C" attached hereto.

Specifically, Plaintiffs' Amended Complaint alleges that "R.E.M." was a high school student when she appeared in a Snapchat video on or about April 3, 2018 in which she stated "I hate black people, especially girls". The video was subsequently posted, sent to numerous students and eventually brought to the attention of the school administration by members of the public and other students who were upset.

After the video generated a disturbance among the school's students and staff, the administration investigated the video and determined that the comments were racially disruptive. There were concerns for safety expressed by some students and counselors were utilized to speak with other students. The administration then responded with an email to the parental community and an internal Smart Board email message to the students regarding the video.

It is clear from the email attached to Plaintiffs' original complaint that the administration was genuinely concerned about the imminent disruption that the comments were having on the

student body and noted that they were fulfilling their responsibility to "educate" and that they were focused on addressing the "school community". The communications stated that the video had been reviewed by "**numerous students, parents and staff and specifically noted that there were [other] students who have been hurt**". Of note, neither the email nor Smart Board identify the plaintiff or make any references to her identity.

On the same day, the Defendants, issued a five (5) day out-of-school suspension on the basis that the administration had determined R.E.M. had violated the school discipline policy based on her inappropriate behavior The suspension was sent to R.E.M.'s parents and carbon copied only to the student's file and the school guidance counselor. Several follow-up meetings between R.E.M., her parents and the administration occurred regarding the nature of the discipline. *Complaint, ¶¶ 11,8,38 and 44.*

Though the community email, Smart Board message, disciplinary letter and Amended Complaint do not identify R.E.M., Plaintiffs allege that she was nonetheless identifiable by her classmates. Plaintiffs' make this assertion despite the fact that the posting of the video was from R.E.M.'s Snapchat account and she herself appears in the video. *Complaint, ¶ 8*

Plaintiff has alleged that by issuing the school communications, the Defendants defamed her though she has yet to plead what statement was untrue in either the community email or the Smartboard message. Moreover, she does not deny the racist nature and content of her own video. Plaintiffs' Complaint further avers that as a result of this alleged defamation, she has suffered emotional distress, been cast in a false light, embarrassment, humiliation, limited admittance ability to college and possible impacted future earnings capacity. *Complaint, ¶¶ 11,13,25 and 32.* The Complaint Counts are as follows:

Cause of Action I: First Amendment – All Defendants;

Cause of Action II: 42 U.S.C. §1983 – All Defendants;

Cause of Action III: Defamation – All Defendants;

Cause of Action IV: First Amendment – Defendant Nancy Hecker (as a policy matter-*Monell*);

Cause of Action V: First Amendment – Defendant Charles Rittenhouse;

Cause of Action VI: First Amendment – Defendant Scott Zgraggen.

Though several of the individual counts were couched in terms of a violation of civil rights, each count either directly avers that the Defendants collectively committed torts or alleges damages that are based on state law tort claims theories. It should be noted that this Honorable Court has previously ruled that Plaintiff's state law claims for defamation and invasion of privacy, which includes false light, were barred under the Tort Claims Act and that Defendant Hacker enjoyed governmental immunity as she is considered a high public official.

II. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 12(f), upon a motion by either party, the "court may strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.P. 12(f). The purpose of a Rule 12(f) motion to strike is to "clean up the pleadings, streamline litigation, and avoid necessary forays into immaterial matters." United States v. Educ. Mgmt. Corp., 871 F.Supp.2d 433, 460 (W.D.Pa. 2012). Courts possess considerable discretion in disposing of a motion to strike. Bloom v. Shalom, 2014 U.S. Dist. LEXIS 12012 at *6 (W.D.Pa.2014).

A complaint must be dismissed under Fed.R.C.P. 12(b)(6), if it does not allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S.

544, 570(2007). The plaintiff must aver "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662(2009). "[W]hen presented with a motion to dismiss for failure to state a claim,….[the] Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions." Fowler v. UPMC Shadyside, 578 F.3d 203, 2010-11(3d Cir.2009)(*citing* Iqbal, 556 U.S. at 678). The "Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Id.* at 211.

District courts confronted by a motion to dismiss should engage in a two-step analysis. First, the district court should accept all well-pleaded facts as true, but should reject mere legal conclusions. Second, the district court should then determine whether the facts as asserted establish a "plausible claim for relief." Iqbal, 556 U.S. at 678. Thus, a complaint must "show an entitlement for relief with facts, as a mere allegation that a plaintiff is entitled to relief is insufficient to withstand a motion to dismiss. *See* Phillips v. Co. of Alleghany, 515 F.3d 224, 234-35(3d Cir. 2008).

As the Supreme Court noted in Iqbal, [w]here the well-pleaded facts do not permit the court to infer more than the mere possibility of the misconduct, the complaint has alleged-but it has not show[n]-that the pleader is entitled to relief." Iqbal, 556 U.S. at 678. This "plausibility" determination will be a "context specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*; *see also* Fowler, 578 F.3d at 210-11.

In this case, Plaintiff's Amended Complaint fails to meet the pleading standards of the cited Rules of Civil Procedure and controlling case law.

III. ARGUMENT

A. 12(f) MOTION TO STRIKE PARAGRAPHS 8-11, 13, 14, 16-23, 25, 29, 30, 32, 33, 35, 40, 41, 44, 46, 49, 50, 51, 55 and 56 OF PLAINTIFF'S AMENDED COMPLAINT AS THEY FAIL TO COMPLY WITH FED.R.Civ.P. 8(A) AND FED.R.Civ.P. 10(b).

Initially, it should be noted that Plaintiff is in violation of Fed.R.Civ.P. 12(f) and 12(b)(6) for failure to state a claim for which relief can be granted as many of the averments in Plaintiff's complaint consists of a recitation of law rather than facts. 12(b)(6) does not stand alone but implicates Rules 8 and 10. *See* U.S. ex rel. Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1171(10th Cir. 2010)(Rule 8(a) and Rule 10(b) join to form pleading requirements).

The paragraphs identified above contained in Plaintiffs' complaint should be dismissed for failure to comply with Federal Rules of Civil Procedure 8(a) and 10(b). "…[a] civil rights complaint must comply with Federal Rule of Civil Procedure 8(a).." Atwater v. Shaffer, 2014 U.S. Dist. LEXIS 87463, *3, 2014 WL 2892387 (M.D.Pa. 2014). Federal Rule of Civil Procedure 8(a)(2) dictates that a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2).

Federal Rule of Civil Procedure 10(b) requires a party to "state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances." Fed.R.Civ.P. 10(b). The purpose of this requirement is to create clarity in pleadings and provide the defendants with "a point of reference for responding." Spence v. Schaffer, 2013 WL 1364025, at *4 (W.D.Pa. 2013). Despite this requirement, Plaintiffs' Amended Complaint includes numerous paragraphs of compound factual assertions intertwined with judicial quotations. For example, paragraphs 8, 9, 10, 11, 18-21 and 56 are narratives coupled with constitutional theories and general statements of legal doctrine more akin to a brief than a pleading.

In a recent case reviewed by this Honorable Court, Matthew B. v. Pleasant Valley School District, 2018 WL 4924013(M.D.Pa.)October 10, 2018), Plaintiffs' filed a complaint replete with "what are essentially stand-alone legal conclusions and arguments that far exceed what is necessary to state a cause of action…" Matthew B. at *3. The Court found that "Plaintiffs' Complaint presents assertions that constitute conclusory statements which run afoul of *Twombly* and *Iqbal." Id.* The Court continued to opine:

> "The Third Circuit in *Santiago*, 629 F.3d at 131, held that courts 'may disregard any legal conclusions' in a complaint.
> As such, Plaintiffs' legal conclusions are not entitled to the same deference as the well-pleaded facts in the Complaint. Thus the Court will disregard the conclusory assertions that it identified in Plaintiff's Complaint.
> Throughout the Complaint, Plaintiff's insert unnecessary statutory language and case law citations…It is unacceptable by any standard of legal practice for complaints to 'contain[]whole paragraphs of legal argument, quotations, and citations…' *Moore v. McCalla Raymer, LLC*, 916 F.Supp.2d 1332, 1342 (N.D.Ga.2013). As noted, Plaintiffs' Complaint is more akin to a legal brief or legal memorandum."

Matthew B. at *3

This Honorable Court has already found that many of the averments, which are being replead verbatim, were too general and insufficient. These averments were identified as legal conclusions and entirely conclusory thus warranting the Court's decision to initially dismiss numerous counts of the original complaint. Plaintiff fails to even attempt to comply with Federal Rules of Civil Procedure 8(a), 10(b) and the standards of pleading set forth in Twombly as the Amended Complaint is replete with bald conclusions of law, judicial commentary and explanatory notes on First Amendment jurisprudence. Accordingly, Defendants respectfully request that paragraphs identified as containing legal conclusions and legal argument, specifically paragraphs 8-11,13, 14, 16-23, 25, 29, 30, 32, 33, 35, 40, 41, 44, 46, 49, 50, 51, 55 and 56 of Plaintiff's amended complaint, be stricken pursuant to Fed.R.Civ.P. 12(f)(2).

B. PLAINTIFF'S AMENDED COMPLAINT MUST BE DISMISSED AS PLAINTIFFS HAVE FAILED TO ASSERT A VALID FIRST AMENDMENT VIOLATION

Plaintiffs allege that R.E.M.'s First Amendment Rights to free speech were violated after she was videotaped by a friend making a racist message on Snapchat that was published on the internet and spread throughout the School District and community. *Complaint, ¶¶8, 11*. In the video, Plaintiff is pictured and says, "I hate black people, especially girls!".[1] As is evident from Exhibit B attached to Plaintiffs' original complaint, Defendants believed the statement did and would continue to cause imminent disruption.

Initially, Plaintiffs' Amended complaint should be dismissed pursuant to the Twombly/Iqbal standard. Plaintiffs make the general conclusory statements that "R.E.M. was suspended according to the School District policy designed to punish political incorrect speech". (*Complaint ¶9)*; that Defendants "punishment of R.E.M. was a result of the constitutionally protected expression of her opinion in a video made off of school property" *(Complaint ¶18)*; and the "characterization of R.E.M.'s behavior and her subsequent suspension, is not only void for vagueness and overbreadth, but is a pretext used by the Defendants to sanction R.E.M. for the valid exercise of her First Amendment Rights" *(Complaint, ¶20)*. Plaintiffs have not alleged facts sufficient to show that the plaintiff has a 'plausible claim for relief.'" under the Iqbal and Twombly standard. Iqbal at 211.

As to the substance of Plaintiffs' First Amendment claims, it is undisputed that, for a private citizen to establish a First Amendment violation against a government official, the following elements must be proven: 1) the plaintiff engaged in protected expression; 2) the public official responded with adverse action sufficient "to deter a person of ordinary firmness" from exercising her First Amendment rights; and 3) the protected expression and adverse action

[1]

were causally related. See Ashton v. City of Uniontown, 459 F. App'x 185, 187 (3d Cir. 2012)(citing Thomas v. Independence Twp., 463 F.3d 285, 296 (3d Cir.2006)); and see also Suppan v. Dadonna, 203 F.3d 228, 235 (3d Cir. 2000).

Plaintiffs' Complaint fails to meet the elements set forth by controlling case law.

Plaintiff did not engage in protected expression

First, there is no protected expression even alleged in the Complaint. Not all expressions of opinion are considered speech or are entitled to First Amendment protection. There are no allegations that R.E.M. intended to share the video publicly or that its contents were made for the purposes of publication of her views on race. In fact, Plaintiffs' Amended Complaint seems to wrongly imply that it was the District who disseminated R.E.M.'s message by "publishing" that a video had been made. (Complaint ¶ 11) Speech on matters of public opinion is what is at the heart of the First Amendment's protections. Snyder v. Phelps, 562 U.S. 443, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011). In Snyder, the Supreme Court opined:

> " '[N]ot all speech is of equal First Amendment importance,'" however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous. *Hustler, supra, at 56, 108 S.Ct. 876 (quoting Dun & Bradstreet, supra, at 758, 105 S.Ct. 2939)*; see *Connick, supra*, at 145-147, 103 S.Ct. 1684. That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest; "[T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas"; and the "threat of liability" does not pose the risk of a "a reaction of self-censorship" on matters of public import. *Dunn & Bradstreet, supra, at 760, 105 S.Ct. 2939."*
> Snyder at 1215

Private messages published to yourself are clearly not a public expression. Likewise producing statements that do not merit or warrant publication are not automatically entitled to be considered speech. The United States Supreme Court in Snyder has held that speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social or other concern to the community," or when it is "a subject of legitimate news interest;

that is, a subject of general interest and of value and concern to the public." Snyder at 1216 *quoting* Connick at 103 S.Ct. 146; San Diego v. Roe, 543 U.S. 83-84 (2004). The Snyder court also stated that the "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." Snyder *quoting* Ranking v. McPherson, 483 U.S. 378(1987)

In this case, the Plaintiffs mistakenly assume that any off campus speech is automatically protected under the First Amendment. The most instructive case here is the Third Circuit case J.S. v. Blue Mountain School District, 650 F.3d 915(2011). However, a close reading of J.S. reveals that the Third Circuit did not identify the off-campus aspect of the speech as the *sine qua non* of the constitutional test under Tinker but rather does identify the off campus origin of student speech as the essential element under the test in Bethel School District v. Frasier, 478 U.S. 657 (1986). J.S. is determined under Fraser not Tinker.

Moreover, where a student's out of school social media post leads to a situation where administration has a concern about the safety and well-being of other students, such allegations do not prevail as a free speech claim violation. See, A.N., a Minor, by and through Niziolek v. Upper Perkiomen Sch. Dist, 228 F.Supp.3d 391 (E.D. Pa. 2017).

In A.N., the District Court determined that a student's out-of-school social media posts reasonably led school officials to forecast a substantial description of, or a material interference with school activities, such that the suspended student was unlikely to prevail on the merits and the facts alleged did not support the granting of an injunction sought by the student. Much like in the instant action, the student in A.N., had filed §1983 Action and First Amendment claims against the School District, the superintendent and the principal. Save the request for injunctive

relief, A.N. is factually identical on the merits such as to be considered controlling precedent for the instant matter.

As Plaintiffs fail to allege the first element of their First Amendment claim, their claim must fail. Accordingly, causes of actions I, II, IV, V and VI, all alleging violations of R.E.M.'s First Amendment claim must fail.

C. THE SECOND CAUSE OF ACTION OF THE AMENDED COMPLAINT SHOULD BE DISMISSED AS PLAINTIFFS HAVE FAILED TO PLEAD VALID PROCEDURAL AND SUBSTANTIVE DUE PROCESS VIOLATION CLAIMS

Plaintiffs have alleged that the School District violated her substantive and procedural due process rights. They alleged that Plaintiff R.E.M. was "denied any hearing by the District before punishment was exacted." *Complaint*, ¶28. As set forth in a reading of her very own amended complaint, Plaintiff R.E.M. received all the process that was due. As Plaintiffs have failed to plead any viable procedural or substantive due process violation and §1983 alone cannot provide substantive support for a cause of action, the Plaintiffs' second cause of action should be stricken.

Plaintiff R.E.M. received a five day out of school suspension upon completion of the investigation conducted by the Administration. The Pennsylvania Public School Code allows a District to suspend a student for up to five (5) days without a hearing. 22 Pa. Code. §12.6. Beyond that time period the Code requires only that the student and parent be given an informal hearing. 22 Pa. Code §12.6(b)(ii). The Code explains that: a) the student must be informed of the reason for the discipline and b) given an opportunity to respond. Lastly, the Code dictates that the principal or person in charge of the school is entitled to make the disciplinary decision and that the parents be notified immediately in writing 12.6 (b)(1)(i) and (iii).

The United States Supreme Court in Goss v. Lopez, 95 S.Ct. 729, (1975) set forth the due process procedure for suspensions ten (10) days and under. The Court found that notice and an informal hearing, essentially an opportunity to present his or her side of the story, is all the process that is due. *Goss at 740.*

In the instant action Plaintiffs' own pleading concedes of all of these procedural steps were taken. *See Complaint ¶ 38, 44,59 and 52-54.* In fact paragraph 53 of the Complaint notes that the parents had three separate meetings with the Administration regarding the disciplinary response. *Complaint ¶54.* As a result, not only were the Plaintiffs provided the totality of the procedural process to which they were entitled, the District went to great lengths and exceeded what the law required.

Substantive due process protects individuals against majoritarian policy enactments that exceed the limits that the government has a right to rule over. That a school district does have a right to regulate and even punish some expressions of speech is beyond contention. See *Bethel School District v. Fraser*, 478 U.S. 675 (1986); *Hazelwood v. Kuhlmeir*, 484 U.S. 260 (1988); and *Morse v. Frederick*, 551 U.S. 393 (2007). (Recognizing that school districts have a right to punish students for certain sexual innuendo-based speech, speech inconsistent with their basis educational mission and speech even off grounds if they promote "illegal drug use".)

Plaintiffs have not pled that the school district has no constitutional right or ability to assess discipline when warranted. Likewise, Plaintiffs have not averred that either the Pennsylvania School code or the District Policy violated any specific fundamental right under the U.S. Constitution. As such, Plaintiffs' substantive due process claim must fail.

It is also a standard tenet of constitutional law that §1983, in and of itself, does not confer or provide any civil rights but is merely a means to enforce other violations. Accordingly, the second cause of action of Plaintiffs' Amended Complaint should be dismissed.

D. THE AMENDED COMPLAINT MUST BE DISMISSED AGAINST ALL INDIVIDUAL DEFENDANTS UNDER THE DOCTRINE OF QUALIFIED IMMUNITY

The Supreme Court has held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity, therefore, applies even in instances where rights are clearly established when it was objectively reasonable for the official to believe that his acts did not violate those rights. Klemka v. Nichols, 943 F.Supp. 470 (M.D. Pa. 1996) (citing Frank v. Relin, 1 F.3d 1317, 1328 (2d Cir.), cert. denied, 510 U.S. 1012 (1993)).

In the instant matter, Plaintiffs have not adequately pled that the Administration's belief that the content would cause emotional pain to the other students leading to a material disruption was unreasonable. *See* Complaint. Moreover, as the District email indicates, the administration acted after they realized that the video was in fact having an effect on other students that they deemed disruptive. As there was no pleading of objective unreasonableness in the response of the administration to the effect that the video was already having on the students the Complaint fails to set forth any set of facts that indicate that the Defendants acted unreasonably and irresponsibly in their perceived reaction of other students. Furthermore, the District did not over react in that they did not identify R.E.M. or discipline her without reviewing the posting first. As

such, all the individual defendants are entitled to enjoy the protection of qualified immunity under the facts as re-pled.

E. DEFENDANT, HACKER IS ENTITLED TO HAVE THE AMENDED COMPLAINT DISMISSED PURSUANT TO THE DOCTRINE OF HIGH PUBLIC IMMUNITY (FOURTH CAUSE OF ACTION).

The doctrine of High Public Official immunity "exempts a high public official from all civil suits for damages arising out of false defamatory statements and even from statements or actions motivated by malice, provided the statements are made or the actions are taken in the course of the official's duties or powers." Smith v. Borough of Dunmore, 633 F.3d 176, 181 (3d Cir. 2011) (quoting Lindner v. Mollan, 677 A.2d 1194, 1195 (Pa. 1996)) (internal quotation marks omitted). 677 A.2d at 1198. Superintendents qualify as "high public officials" for purposes of this doctrine. Byars v. Sch. Dist. of Philadelphia, 942 F. Supp. 2d 552, 562-63 (E.D. Pa. 2013); Smith v. Sch. Dist. of Phila., 112 F.Supp.2d 417, 425 (E.D.Pa.2000).

In this matter, the allegations raised in Plaintiffs' tort claims are limited to statements made and actions taken by Superintendent Hacker in connection with School District business. Plaintiffs' Amended Complaint against Defendant Hacker in Cause of Action IV attempts to also attach liability pursuant to a *Monell* theory, casting her as a policy maker-enforcer. There is nothing pled in the Complaint that Superintendent Hacker formulated either the District's: 1) disruption/inappropriate behavior policy; 2) confidentiality policy or 3) disciplinary policy. In fact, in Pennsylvania, school district policies are set by the Boards of Directors not the Superintendents.

To the extent that any liability might flow as a result of being a policy enforcer, that would only occur when the official acted outside of the scope of their authority. In the instant case as outlined above, Defendant Hacker was not only acting at all times within the scope of her

official position, there has been absolutely no pleading by the Plaintiffs to the contrary. Equally important, Defendant Hacker was not sued in her individual capacity and as such suits against her are duplicative of those against the District and should be dismissed.

F. PLAINTIFF'S THIRD CAUSE OF ACTION FOR DEFAMATION (FALSE LIGHT) AS WELL AS THE EMOTIONAL DISTRESS AND LOSS OF EARNINGS CLAIMS UNDER ALL OF THE COUNTS MUST BE DISMISSED AGAINST ALL DEFENDANTS UNDER PENNSYLVANIA'S TORT CLAIMS ACT

Each of the counts in Plaintiff's Amended Complaint assert the torts of defamation, emotional distress, and loss of earnings with causes of actions IV, V and VI specifically noting that those counts are being pursued in tort. See ¶¶41, 46 and 55. All of the allegations raised in Plaintiff's tort claims are limited to statements made and conduct taken in connection with School District business.

Under 42 Pa. C. S. §§ 8541–8542, Tort Claims Act, local agencies, such as the School District, are immune from liability for injuries caused by an act of the agency, its employees, or any other person. See Byars v. Sch. Dist. of Philadelphia, 942 F. Supp. 2d 552, 562 (E.D. Pa. 2013) Municipal employees and officials are, to the same extent as the local agency, immune from civil damages on account of any injury to a person or property caused by acts of the employee which are within the scope of his office or duties. See 42 Pa. C. S. § 8545; see also Sanford v. Stiles, 456 F.3d 298, 315 (3d Cir. 2006). There are eight exceptions to the Tort Claims Act, none of which are applicable.

The Eastern District Court has consistently held that "state law claims raised against a public official in his official capacities are necessarily barred by the Political Subdivision Tort Claims Act, 42 Pa.C. S. § 8545, because such an official necessarily acts within the scope of his office or duties, entitling him to official immunities." Kane v. Chester Cnty. Dep't of Children,

Youth & Families, 10 F. Supp. 3d 671, 695 (E.D. Pa. 2014); DeVatt v. Lohenitz, 338 F.Supp.2d 588, 599 (E.D.Pa.2004); Damron v. Smith, 616 F.Supp. 424, 426 (E.D.Pa.1985).

Here, as fully set forth, supra, the defamation, false light, emotional claims and loss of earnings are all based on communications undertaken by Defendants acting in their official capacity. None of the above causes of actions or damage claims qualify under any recognized exception to governmental immunity in Pennsylvania. The Tort Claims Act, therefore, protects all of the Defendants from suit. Equally important Pennsylvania courts have broadly construed the doctrine of governmental immunity in favor of protecting public officials against personal liability. Edmondson v. Zetusky, 674 A.2d 760 (Pa. Cmwlth. 1996). As such, all the Defendants are immune from Plaintiff's tort based causes of action and damage claims in their individual and professional capacities, are protected by governmental immunity.

Moreover, Plaintiffs' pleading fails to identify a District published "statement" that was false (the offensive statement was made and distribute by R.E.M. herself), that the District intended the statement to be applied to R.E.M. (the District never identified R.E.M. its communications) or that they abused a conditional privileged occasion.

Additionally, the defamation/false light pleadings are insufficient as the courts in this District have long recognized that actual malice is always required to recover for false light. Graboff v. Colleran Law Firm, 744 F.3d 128, 126 (2014). See also Straub v. CBS Broadcasting, 2016 WL 943954 (2016). A review of the Amended Complaint indicates that Plaintiffs never averred that the Defendants acted with malice as to the Defamation/False Light claims. Paragraph 33 of the Amended Complaint which specifically details the alleged basis for the sole state claim fails to aver and therefore satisfy the malice requirement.

Accordingly, all causes of actions and claims based on damages for defamation (false light), emotional distress and loss of earnings asserted against all Defendants, in their municipal, individual and professional capacities, should be dismissed with prejudice.

CONCLUSION

This Honorable Court has previously dismissed the majority of Plaintiffs' claims but granted them leave to amend which they did. The Amended Complaint, which closely mirrors, the original pleading, fails to cure the deficiencies noted by the Court. For the reasons set forth herein the Defendants respectfully request that this Honorable Court dismiss Plaintiff's Amended Complaint with prejudice. Alternatively, Defendants respectfully request that this Honorable Court effectuate any relief deemed necessary and/or proper or to which Defendants are justly entitled.

Respectfully submitted,
King, Spry, Herman, Freund, & Faul, LLC

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial Systems of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, Brian J. Taylor, attorney for Defendants hereby certifies that a true and correct copy of the foregoing document has been electronically filed and is available for viewing and downloading from the ECF system in accordance with the local Federal Rules of Civil Procedure and has been served electronically upon the following counsel of record on this day, May 22, 2019:

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BY: /s/ Brian J. Taylor, Esquire
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