United States District Court
District of New Jersey

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Edward Lee, Sr., and Leeanne Lee on behalf of their minor son E.L.,

-against-

Lenape Valley Regional Board of Education,

and

Douglas deMarrais, sued in his official and personal capacity,

Defendants.

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CV 06-04634 (DMC)

Oral Argument Requested
Return Date: Sept. 22, 2008

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Bennet Zurofsky
Reitman Parsonnet, P.C.
744 Broad Street
Suite 1807
Newark, NJ 07102
(973) 642-0885

Rebecca Houlding
On the Brief
Joshua Friedman
Law Office of Joshua Friedman
25 Senate Place
Larchmont, NY 10537
(212) 308-4338

Table of Authorities

Cases

Preliminary Statement[1]

Through multiple failures, Lenape Valley Regional School District ("LVRSD") and Principal Douglass deMarrais ("deMarrais") deprived Eddie Lee of his civil rights – his right to have school administrators take steps that were not clearly unreasonable in response to harassment; his right to attend school, not be thrown out without due process. They violated Title VI, the NJLAD and the NJCRA, and deprived him of his 14th Amendment right to due process and equal protection. Myriad disputed issues of fact exist.

14-year old Eddie Lee transferred to Lenape Valley Regional High School ("LVHRS") in November 2004 as a bi-racial, learning disabled student entering a 96% Caucasian school. Defendants were deliberately indifferent when Eddie and his parents began complaining – almost immediately - that students were racially harassing him by calling him "nigger." They were deliberately indifferent when they did not investigate and did not discipline his harassers or prevent future harassment. They were deliberately indifferent when they allowed the harassment to continue unremedied. They were deliberately indifferent when, as the harassment was on-going and Eddie began to act out, instead of offering him counseling or other means of dealing with the emotions he was feeling, they removed him from his mainstream classes. They were deliberately indifferent by refusing to impose discipline in nine of 11 incidents of harassment.

[1] All of the factual assertions herein are either undisputed or disputed by defendant.

They violated his Constitutional right to due process when, as the harassment escalated, and his angry feelings escalated, Defendants summarily told him he could not come back to school, and expelled him without process, instead of addressing the harassment and its ill effects. Summary judgment should therefore be denied.

Brief Factual Background[2]

Eddie Lee is bi-racial. His father is African American, and his mother is Caucasian. (Exh. "A," E.Lee 91/15-18) He was 14 years old when he transferred from Newton High School to a virtually all white school in mid-year (Exh. "C," Lubieski 62/8-11; Exh. "B," deMarrais 58/1-8; 63/18-22) None of the school's administrators explained to Eddie that the school had a policy against harassment on the basis of race or what to do if he felt harassed or experienced discrimination. (Plaintiffs' Rule 56. 1 Statement, par. 57)

Almost immediately after he started at Lenape, a Caucasian student "C.C."[3] called Eddie "nigger" on the school bus. Mrs. Lee immediately reported the harassment to the School. In spite of a clear mandate in the School's harassment policy to "investigate all alleged complaints" and the defendant's own requirement that it "**will maintain a record** of each investigation", and report back the findings to Mrs. Lee (among other things

[2] Plaintiffs' incorporate by reference the facts in Plaintiffs' Rule 56.1 Statement. Record citations have been included for ease of reference. However, all facts contained in the memorandum of law are supported in the Plaintiffs' Rule 56.1 Statement ("Plaintiffs' Statement").

[3] Witnesses who were underage at the time of the incidents are referred to by their initials.

mandated by the Policy), Defendants never got back in touch with her, never investigated, and did not discipline the harasser. (Exh. "E," L. Lee 118/8-120/2; Exh. "C," Lubieski 155/20-156/2; 157/9-15; Exh. "F," p. 5 of 8)[4]

A short time later, "S.C." called Eddie "nigger" on the school bus. Plaintiffs again reported the incident immediately. Defendants never got back in touch with Mrs. Lee, and did not discipline the harasser. Defendant failed to create any written record in violation of their own policy. (Exh. "A," E. Lee 88/15-89/2; Exh. "E," L. Lee 120/16-121/11; Exh. "C," Lubieski 35/1-9) Within a few months of the S.C. incident, V.E. called Eddie "nigger" several times on the bus. A pattern of deliberate administrative inattention to ongoing racial harassment was clearly emerging, as Plaintiffs immediately reported each incident to the school. Alarmingly, despite this third incident in a short while and the requirements of their own official policies, Defendants never got back in touch with Mrs. Lee, made no record and did not counsel or discipline the harasser. (Exh. "A," E. Lee 95/6-97/12, 104/1-19; Exh. "E," L. Lee 122/12-16; Exh. "H," V.E. 19/6-9, 23/15-24/4; Exh. "C," Lubieski 45/24-46/4; 160/19-163/3)

Within a few months of the V.E. harassment, P.W., a basketball player, called Eddie a "black piece of shit" on the court. (Exh. "A," E. Lee 107/19-25) While the Coach

[4] For a complete description of all the incidents of harassment, see Plaintiffs' Statement, par. 86.

suspended P.W. for one game and revoked his captainship,[5] the Coach failed to follow school policy requiring that the harassment be reported to administration and a written record be created of the investigation. (Exh. "Q," Grillo 27/25-28/10; Exh. "B," deMarrais 99/5-100/3)

In the same time period, three Caucasian girls called Eddie an "Alabama porch monkey." The Lees again immediately reported the incident to no avail. (Exh. "E," L. Lee 143/22-145/9) Defendants never got back in touch with Mrs. Lee, never investigated, created no written record and did not discipline the harassers. (Exh. "C," Lubieski 51/16-21; 164/12-166/13)

Prior to the racial harassment Eddie had not been subjected to any discipline for fighting and had not had a problem with alcohol. Unsurprisingly, the harassment was taking its toll on Eddie. He and his parents followed the rules, and reported all the harassment to the school. Yet time after time, the school did nothing. During the summer between his freshman and sophomore years, he began drinking. (Exh. "A," E. Lee 184/9-16)

When he returned to school in September 2005, the harassment immediately resumed. In the first week or so of school, S.C., who had the year before called him a "nigger," told Eddie words to the effect, "you think you're 'ghetto' or 'gangster' with that

[5] It is ironic that the sole meaningful disciplinary response to any of 13 incidents of racial abuse came from an athletic coach. It is not an overstatement to say that the mere use of common sense could have avoided much of the harm Eddie suffered.

hat on." Eddie and S.C. exchanged words, S.C. pushed him, and Eddie hit him back. (Exh. "A," E. Lee 137/21-138/8) Although Defendants suspended Eddie for fighting, Defendants did not discipline (or even counsel) S.C. for his racially offensive language. Mrs. Lee complained about the incident to the school, arguing that S.C.'s language was racially offensive, particularly coming from a kid who had called Eddie a "nigger." (Declaration of L. Lee, par. 16) Indeed, Defendants engaged in disparate treatment by refusing to punish S.C. for fighting.

Less than two weeks later, D.Z. told Eddie while in study hall that Eddie would be "picking his cotton." Eddie went to the Assistant Principal, Lori Lubieski, ("AP Lubieski") and reported the harassment, even though he did not know D.Z.'s name at the time. AP Lubieski did not do any investigation, or follow the school's policy in any way. (Exh. "C," Lubieski 63/22-67/23; Exh. "T," Incident Notes) Just a week later, D.Z. called Eddie a "nigger" in study hall. Again, Eddie reported it to AP Lubieski. (Exh "T," Exh. "C," Lubieski 128/18-129/8) When Mrs. Lee found out about it she came to school. Defendants told her that D.Z. was going to get an administrative detention. Only after Mrs. Lee threatened to go to the media and hire a lawyer did the school decide to impose a four day suspension. (Exh. "E," L. Lee 159/7-161/8) Even after D.Z.'s suspension, harassment continued. Specifically, the Lees reported that D.Z. and his friends were threatening to beat Eddie up, and Eddie was fearful. AP Lubieski did nothing, leaving Eddie to fend for himself. (Exh. "C," Lubieski 129/9-132/23)

The very next day, V.E. again called Eddie "nigger," repeatedly. She was suspended for five days allegedly for the prior year's incident and the second offense.[6] (Exh. "B," deMarrais 148/22-149/7) Around this time, in discussions between deMarrais and the Lees about the school's failure to respond to repeated instances of racially harassment, deMarrais told Mrs. Lee he would "take the blame for last year." (Exh. "B," deMarrais 168/6-18) In other words, he admitted that he and the school had not responded to the harassment and that failure had caused the same student to lash out at Eddie again.

By September 2005 the administration and Eddie's Child Study Team had heard the Lees complain often and vociferously that Lenape was not responding to the racial harassment, and that Lenape had damaged Eddie psychologically and educationally. (See generally Plaintiffs' Statement, pars. 140-149, and accompanying exhibits)

Defendant's anti-harassment policy—report, investigate, document and punish—was based on the principal of specific and general deterrence and the creation of an institutional memory to insure repeat offenders received more severe punishment. (Exh. "F.") What was required at this point was a forceful response to the discrimination through the enforcement of defendant's own policy, so that Eddie was assured there would be no more harassment, but that if it should happen, he had a meaningful way of dealing with it.

[6] Whether she was suspended in response to the prior school years harassment at all is a disputed material issue of fact. Plaintiff includes defendant's position to provide context for defendant deMarrais party admission.

Instead, defendant put Eddie in a "resource room," where he learned nothing, but no one could call him a nigger. The Child Study Team urged the change be made to protect Eddie from his harassers, rather than take action to prevent harassment. (Decl. of L. Lee, par. 17) For many years, notwithstanding significant learning disabilities, Eddie had been getting average grades in mainstream classrooms. (Exh. "A," E. Lee 82/8-83/23; compare Exhs. "LL," "FF," "EE;" see Plaintiffs' Statement, par. 157) This change was in direct contravention of New Jersey law requiring that students be mainstreamed whenever possible, but the worst part about it was it told Eddie no one was willing to prevent the racial abuse.

As a result of the on-going racial harassment, Eddie was experiencing significant distress. He felt that no one at the school "had his back." He started drinking frequently and smoking marijuana. (Exh. "A," E. Lee 201/11-15; Exh. "E," L. Lee 102/3-16; 146/14-148/4) He had insomnia, and cried at night. (Exh. "E," L. Lee 173/8-179/24; 211/7-14) Leeann Lee had to soothe her 15 year old son to sleep. (Exh. "E," L. Lee 186/9-24) His grades dropped significantly. (Plaintiffs' Statement, par. 157) He was angry. By January 2006, he had enrolled in a treatment facility for substance abuse. (Exh. "E," L. Lee 102/3-16; 146/14-148/4)

At the end of January 2006, at lunch one day, a student at his table, J.F., called Eddie a "nigger." They ended up fighting. Although this time they were both suspended

for fighting, J.F. was not disciplined for calling Eddie "nigger." (Exh. "A," E. Lee 167/23-168/12; Exh. "B," deMarrais 184/1-7)

Less than two weeks later, Defendants called the Lees to come pick Eddie up from school. They claimed Eddie needed to "cool off." When the Lees arrived, they were ambushed. In a meeting with Defendant deMarrais, AP Lubieski, the Child Study Team and others, deMarrais told the Lees Eddie could not come back to Lenape – *ever*. (Exh. "B," deMarrais 191/16-24, 192/11-194/2; Decl. of L. Lee, pars. 19-20) They said they did not know what to do with him. The issue was not educational, and, despite claims that he was put out because of his behavior, he had been in only two physical altercations at school, an unremarkable number. (Id.) Even though Eddie clearly had a right to due process before being suspended for a significant period or expelled, *Goss v. Lopez*, *infra*, Section II(A), the school told him in summary fashion that he was being put on home instruction until an out of district placement could be found. He did not receive any home instruction for at least ten days. Ultimately, he was sent to Lakeland Andover, a school for children with behavioral problems, out of the Lenape Valley school district. (See Plaintiffs' Statement, pars. 117-139)

Not only did the school not follow its very clear anti-harassment policies when it came to Eddie, there is evidence that staff were not trained on the policies or complaint procedures. (Exh. "O," Answorth 14/24-15/10) Students were only told that bullying and harassment were not allowed, they were never given the school policy on racial

harassment. (Exh. "C," Lubieski 21/6-24) They were never given instruction on how to make a complaint or told how to determine when they were being harassed in violation of the school policy. (Exh. "H," V.E. 30/19-31/21;see generally, Plaintiffs' Statement, pars. 60-67, and Exhs. "I" and "J")

At the same time that the School was giving up on Eddie and ridding itself of an annoying reminder of its own failure, it was confronted with additional evidence of widespread racial harassment. As with the Lees, an African American student's parents complained their daughter was being harassed and called "nigger." Written statements indicated a clear, widespread pattern of racial harassment, including references to the hanging of an African-American student. (Exhs. "X," "Y," pp. 5, 6, 14) As with Eddie, no one was disciplined, there was no investigation, no record was made and the defendants ignored their own policies. (Exh. "B," deMarrais 211/5-14; 213/16-25; 216/10-217/18)

Lenape Valley and Principal deMarrais gave up on Eddie. For the thirteen months he experienced racial harassment Defendants ignored it. Instead of punishing the harassers, Defendants punished Eddie.

Arugument

Summary judgment should be used sparingly when, as is often the case in … harassment claims, state of mind or intent are at issue, and the court must draw all reasonable inferences-including issues of credibility-in favor of the nonmoving party.

Sabol v. Montclair State University, 2008 WL 2354553, 4 (D.N.J.2008) (Cavanaugh, J.)(denying summary judgment in a sexual harassment employment claim), (citations omitted).

I. PLAINTFFS' TITLE VI CLAIM AGAINST LVRSD EASILY SURVIVES DEFENDANTS' MOTION

A. Defendants misstate the intent standard under Title VI; "deliberate indifference" standard applies

Defendant LVRSD incorrectly claims that Plaintiffs did not plead or offer evidence of intentional discrimination, and asserts that the "deliberate indifference" standard articulated by the Supreme Court for student-on-student harassment claims does not apply.[7] This is simply incorrect. In *Davis v. Monroe County Bd. of Educ.,* 526 U.S. 629, 641 (U.S. 1999), ruling on student-on-student sexual harassment under Title IX, the Court explained that the intentional conduct by the defendant which the plaintiff was required to prove was deliberate indifference to sexual harassment:

> We disagree with respondents' assertion, however, that petitioner seeks to hold the Board liable for G. F.'s actions instead of its own. Here, petitioner attempts to hold the Board liable for its *own* decision to remain idle in the face of known student-on-student harassment in its schools. In *Gebser,* we concluded that a recipient of federal education funds may be liable in damages under Title IX where it is deliberately indifferent to known acts of sexual harassment by a teacher. . . . In particular, we concluded that *Pennhurst* does not bar a private damages action under Title IX where [as here] the funding recipient *engages in intentional conduct that violates the clear terms of the statute.*

[7] See generally Defendants' Memo of Law, Sec. III, at p. 28-31

Title VI was the model for Title IX and Supreme Court case law under Title IX is equally applicable. *Davis*, *supra*; *Cannon v. University of Chicago,* 441 U.S. 677 (1979).[8] The two statutes have been consistently interpreted and applied. *Barnes v. Gorman, 536 U.S. 181, 186 (2002).* [9]

B. Plaintiffs Have Adduced Abundant Evidence From Which The Jury May Find LVRSD Acted With Deliberate Indifference

The deliberate indifference standard applies to Plaintiffs' Title VI claim against Lenape Valley. Defendant is liable for intentional discrimination because it failed to

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[8] "The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years." *Cannon*, at 694-95. *See also, Bryant v. Independent School Dist. No. I-38 of Garvin County, OK*, 334 F.3d 928, 932 -933 (10th Cir. 2003) (remanding Title VI peer harassment claim for evaluating under *Davis* standard); *AP ex rel. Peterson v. Anoka-Hennepin Independent School Dist. No. 11*, 538 F.Supp.2d 1125, 1146 (D.Minn.,2008) (given the close connection between Title IX and Title VI, deliberate indifference is a condition of recovering money damages under Title VI, as under Title IX); *Rodriguez v. New York University*, 2007 WL 117775, *6 (S.D.N.Y. 2007) (applying "deliberately indifferent" standard in race harassment case) (collecting cases). *See also, Gant v. Wallingford Bd. of Educ.,* 195 F.3d 134 (2d Cir. 1999) (importing "deliberate indifference" standard from Title IX cases to equal protection claim based on racial discrimination).

[9] Defendant's authority in support of its claim that the deliberate indifference standard is inapplicable is inapposite. Misapprehending both the factual questions presented and the law, Defendants rely primarily on *Pryor v. National Collegiate Athletic Ass'n* and *Alexander v. Sandoval* for the proposition that the "deliberate indifference" standard has been "expressly rejected as a theory of relief under Title VI." Defs. Memo of Law, at p. 29, citing 288 F. 3d 548, 567-68 (3d Cir. 2002) and 532 U.S. 275, 281 (2001). *Pryor* and *Sandoval* only concern disparate impact claims. Those cases hold only that there is no private right of action for disparate impact claims under Title VI, even when claiming deliberate indifference to that disparate impact. *See also Bryant,* 334 F.3d at 932 (*Pryor* and *Sandoval* (infra) were limited to disparate impact claims. Similarly, *Jackson v. Katy Independent School Dist.,* 951 F. Supp. 1293, 1299 (S.D. Tex. 1996), (decided in any event before *Davis*), related solely to Plaintiffs' (in)ability to prove that a student was treated differently than non-minority students. Id., at 1299. Notably, however, the Court separately addressed a "deliberate indifference" theory under Section 1983, and assumed without deciding that such a theory was available. *Id.*

respond to known and repeated acts of peer harassment in a manner that was clearly unreasonable. *Davis*, 526 U.S. at 649. Movant has not met its burden in establishing that summary judgment is warranted.[10]

In *Davis,* the Supreme Court noted that the school district's response to a male student's fondling and suggestive behavior toward a female student, which did not include disciplining the student, separating him from her or establishing a sexual harassment policy or procedure, suggested deliberate indifference. *Id.* at 654. Deliberate indifference is often a "fact-laden question, for which bright line rules are ill-suited." *Tesoriero v. Syosset Central School Dist.*, 382 F.Supp.2d 387, 399 (E.D.N.Y. 2005).

Doing merely "something" in response to known acts of harassment is not enough to avoid liability under the deliberate indifference standard. The Court in *Vance v. Spencer County Public School District,* specifically rejected the suggestion of the Spencer school district that, as long as it "does something in response to harassment, it has satisfied the standard." 231 F.3d 253, 260 (6th Cir.2000). "Where a school district has actual

[10] Defendant LVRSD has not even met its initial burden of demonstrating that Defendants were not deliberately indifferent. There is a striking absence of case law in Defendants' brief, despite the fact that there is a substantial body of law applying the deliberate indifference standard. Plaintiffs request that the Court infer from the absence of citations that there are no cases that specifically advance Defendants' position. *See C.T. v. Liberal School Dist.,* 2008 WL 2358667, 17 (D.Kan.,2008) (defendant failed to present legal authority in support of its factual argument that harassment was not sexually charged; consequently, the court, which disagreed, refused to "delve any further into the issue of the extent to which this type of harassment is actionable").

knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances." *Id.* at 261.

In *Vance*, the court upheld a jury verdict for plaintiff where one student's harassing conduct culminated in stabbing plaintiff in the hand. Aside from talking to the student, there was no evidence that defendant took any other action. On another occasion, two male students tried to assault the plaintiff. The only "response" was that a classroom teacher spoke to the boys and the plaintiff. The boys were not disciplined. On another occasion, plaintiff's mother filed a complaint with the Title IX coordinator. There was no investigation. The Court found that talking to students was insufficient, and these three incidents alone reflected a "deliberate indifference" in light of the known circumstances. I*d.,* at 261-62.

A Western District of Pennsylvania court relied on *Vance* to deny summary judgment on the issue of deliberate indifference in *Jones v. Indiana Area School Dist.,*397 F.Supp.2d 628, 644-646 (W.D.Pa. 2005). There was evidence that, although aware of student harassment, the School District's response was limited to "talking to" the harasser, changing his homeroom and moving his locker, even though these responses accomplished nothing. The District eventually began taking actions such as assigning aides to "tail" the harasser, pursing the idea of transferring him to another school district and proposing the

notion of homebound instruction for the plaintiff. The Court refused to say that the response was "not clearly unreasonable as a matter of law." *Id.,* at 646.

The rule common to Title VI and Title IX cases is that refusing to impose discipline and/or simply talking to harassers is generally insufficient to entitle defendant to summary judgment on fact specific issue of deliberate indifference. *See Vance, Jones, supra*. *See also M. v. Stamford Bd. of Educ.*, 2008 WL 2704704 (D.Conn. 2008) (denying summary judgment on Title IX claim, where the school responded to notice of harassment by investigating the harasser's placement in the school and his academic record, and put the boy on home instruction , but imposed no discipline, resulting in continued harassment).

Here, the sole response to nine incidents of harassment—not even the defendants' response, it was the coach's—was to require one student to sit out a game of basketball and be stripped of his captainship. While responses of equal or greater magnitude would plainly have deterred all of the repeat offenses and probably some of the first offenses, there was literally no response whatsoever to the other eight incidents that were reported. *Supra*, and Plaintiffs' Statement at par. 86.[11] Defendant did nothing in response to C.C. calling Eddie the "n" word. In the next incident, S.C. testified that he was not counseled or disciplined. After two nearly identical incidents in a few weeks, the School District was aware that

[11] Plaintiff is entitled to the better of this debate for purposes of summary judgment, however, even if, as Defendant claims, it counseled S.C., *that* response was clearly ineffective, since V.E. engaged in identical behavior. As *Vance* and *Jones* counsel, repeating ineffective responses constitutes deliberate indifference.

doing nothing was not going to solve the problem. A short time later, another student called Eddie the "n" word. The School did not conduct a peer mediation between Eddie and V.E., and no one counseled or disciplined her for the incident. Moreover, Lenape did not investigate at all the three female students who called Eddie an "Alabama porch monkey," even though the Lees told the School the girls' names. S.C. was not punished either for fighting Eddie or for telling Eddie he was not "ghetto" or "gangster," in September 2005, even though Mrs. Lee reported the incident and wanted it investigated. D.Z. was not punished after telling Eddie he would be picking his cotton. There was no investigation after Eddie reported the incident. It was clearly unreasonable to ignore the incident simply because Eddie did not know D.Z.'s name. AP Lubieski could have simply gone to Eddie's study hall the next day to find out who he was or could have asked those who were around whether they knew the culprit. Doing nothing resulted in D.Z. calling Eddie the "n" word just one week later. Lenape also refused to investigate or take action in response to Eddie and his mom's complaint that D.Z. and his friends were intimidating and threatening him after D.Z. was suspended for harassment. Finally, a jury could find J.F. was not disciplined at all for calling Eddie "nigger" in January 2006.

The fact that there was little or no discipline is sufficient to defeat summary judgment. Even where a district takes some measures to end harassment, when the harassment continues, and the victim continues to feel intimidated, summary judgment should be denied. See *Doe ex rel. Doe v. Hamden Bd. of Educ.,* 2008 WL 2113345, 5 -7

(D.Conn. 2008)("Deliberate indifference may be found both when the defendant's response to known discrimination is clearly unreasonable in light of the known circumstances, and when remedial action only follows after a lengthy and unjustified delay")

In *Hamden,* the plaintiff reported being sexually assaulted by a fellow student. After, she was exposed to her harasser at school, and her harasser's friends intimidated her and made harassing comments, interfering with her educational opportunities. Even though the police responded to her complaints of student harassment, the School provided an escort for Mary to feel safe going to class, and verbal assaults ceased after the police spoke to the offending students and their parents on February 6, 2006, there was evidence that plaintiff continued to feel intimidated and fearful at school after that date. The fact that the harasser was allowed to graduate without facing any disciplinary action could be considered by a reasonable jury to have been unreasonable. *Id. See also C.T. v. Liberal School Dist*., 2008 WL 2358667, 6 (D.Kan. 2008) (lack of "meaningful[] discipline" of harassers amounted to deliberate indifference at summary judgment).

Here, Eddie continued to experience harassment, since only two of his harassers were ever disciplined and that was only after almost a year of being harassed, and felt intimidated throughout his time at Lenape. *See also Cleveland v. Blount County School Dist.,* 2008 WL 250403 (E.D.Tn. 2008) (in a Title VI case, a school district's response to racial graffiti and slurs, among other things, could be considered deliberately indifferent,

where continuing escalations of racial tensions raised a genuine issue of material fact as to indifference).

Sticking Eddie in a "resource room" as a response to racial harassment is *per se* indifferent. *Doe v. East Haven Bd. of Educ*., 200 Fed.Appx. 46, 49, 2006 WL 2918949, 2 (2d Cir. 2006)(although plaintiff was allowed to "miss class and work in the guidance office, was offered a private room in the guidance office when she felt uncomfortable with other students there, was offered full home-bound instruction or a security-guard to accompany her whenever she was in school, and was offered free psychological counseling and evaluation," the jury could find the defendant was deliberately indifferent)

Defendants' state of mind is further exemplified by the fact that no one ever sat down with the Lees and went over the harassment policy, followed up with the Lees to see if Eddie was continuing to experience problems, or offered him counseling to deal with his feelings resulting from the harassment.

After the first few incidents, the District did not hold additional training for students and staff about racial harassment, how to report it, and what the school would do in response. See no evil hear no evil enforcement is anathema to a policy which depends on punishment for deterrence. This evidence easily creates a jury issue as to the School District's deliberate indifference.

Defendants continually argue that some of the harassers did not engage in repeated conduct, or that some of the harassers did not repeat their conduct until the following

school year, as if that proved the school district's response must have been effective. The fact, however, is that the harassing behavior *was* repeated throughout Eddie's freshman and sophomore years, demonstrating the ineffectiveness of Defendants' actions. Had the District responded in a manner that was not clearly unreasonable for such a long time, it would have been absolutely clear to students that racial harassment was intolerable. In any event, lack of recurrence does not mean that Defendant's response was reasonable, especially when in most instances in this case, there was no response at all. *Williams v. Bd. of Regents of the Univ. Sys. of Ga.,* 477 F.3d 1282, 1297 (11th Cir.2007). (Title IX discrimination can occur even after a student withdraws from school where the university fails to timely respond or take precautions to prevent further attacks).[12]

C. Plaintiffs Access To His Education Was Hindered

Defendant LVRSD claims offhandedly there is no evidence to suggest Eddie's access to education was hindered. (Defs. Mem. of Law, pp. 31-32) Once again, Defendant provides no caselaw, or even context, for its argument. Not having provided any legal support for its position, Defendant has waived the argument. In any event, the un-remedied harassment "detract[ed] from [Eddie's] educational experience, [such] that [he was] effectively denied equal access to an institution's resources and opportunities." *Davis,*

[12] Here, a jury could conclude that much of the time the District was simply lucky that individuals did not engage in repeated harassment, having done nothing to remediate or prevent future conduct. To conclude otherwise would result in a situation where districts could avoid liability for a rampant racially hostile environment created by multiple students, if each student only engaged in one act of harassment.

526 U.S. at 651 (citation omitted). Plaintiffs need not "show physical exclusion" from school. *Id.*

> It does not take an educational psychologist to conclude that being referred to by one's peers by the most noxious racial epithet in the contemporary American lexicon, being shamed and humiliated on the basis of one's race, and having the school authorities ignore or reject one's complaints would adversely affect a Black child's ability to obtain the same benefit from schooling as her white counterparts.

Cleveland, 2008 WL 250403, *10 (internal quotations omitted). The denial of equal access can take many forms, including drops in grades, *Doe v. Erskine College*, 2006 WL 1473853 (D. S.C. 2006), or depression, or withdrawal from school. *Hawkins v. Sarasota School Board*, 322 F. 3d 1279 (11th Cir. 2003); *M. v. Stamford Bd. of Educ.*, 2008 WL 2704704, 9 (D.Conn. 2008)(denial of access where plaintiff could not sleep, had nightmares, took medication for sleep problems, and lost weight due to diminished appetite).

Here, Plaintiffs have demonstrated that Eddie was denied access to his education. He suffered depression, insomnia, crying spells, significant drop in grades, behavior problems and substance abuse, which led to exile in a "resource room,"[13] and ultimately, expulsion. He first denied and then placed on home instruction involuntarily, and then banished to a school for children with severe behavioral problems, which had less

[13] It is irrelevant to the issue of denial of access that Mrs. Lee signed an IEP. A jury could find Defendants' refusal or failure to remedy the harassment to be the reason Eddie moved to the Transitions Classroom.

challenging academics. (See Section II(A)). This easily suffices to demonstrate denial of access to Eddie's education.

II. *DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON COUNT III - VIOLATION OF 42 USC 1983*

A. Defendants LVRSD and deMarrais Violated Plaintiffs' Due Process Rights In Violation of the 14th Amendment[14]

Suspensions and expulsions without due process violate the 14th Amendment of the Constitution. *Goss v. Lopez,* 419 U.S. 565 (1975).

> [E]ducation is perhaps the most important function of state and local governments,' and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child.

Id. at 576 (quotation omitted). Despite this clear pronouncement as well as unmistakable District Board Policy providing procedures for due process hearings in advance of suspensions and expulsion (exh. "cc"), Defendants arbitrarily and with no process informed Plaintiffs that LVRHS would no longer school Eddie. The decision was not made for education-related reasons, but allegedly because of his behavior. The jury is entitled to conclude on these facts that Defendants were simply tired of hearing Plaintiffs'

[14] It is not clear whether Defendant LVRSD moved for summary judgment on Plaintiffs' due process claim. The argument concerning the due process violation is briefed in Defendants' Memo of Law, at Section II(A)(1)(b)(i), which refers solely to Defendant deMarrais' motion for summary judgment. In Section II(B), Defendant LVRSD separately moved for summary judgment as to Plaintiffs' equal protection claim under Section 1983, not due process. The Court should find that LVRSD did not move for summary judgment as to the Section 1983 due process claim. If any event, as explained *infra*, a jury could find both LVRSD and Defendant deMarrais deprived Plaintiffs of due process.

complaints of racism that they did not know how, or did not wish, to respond to. Because this action violated the Lees' Constitutional rights, Defendants are not entitled to summary judgment as to Count III of plaintiffs' complaint.

Both Constitutional due process and Board Policy 5620 require an opportunity for a formal hearing , including written notice of the time and place, and substance of the charges, an opportunity to be heard, and for cross-examination, representation by counsel, and a written transcript. (Exh. "CC;" Exh. "B," deMarrais 198/20-24). It is undisputed that none of this occurred.

Instead, Eddie Lee was suspended and expelled. *Government of Virgin Island In Interest of K.O.,* 2004 WL 3558508, 2 (Terr.V.I. 2004) (School's failure to allow student to attend school for two months, for pretextual reasons, was an expulsion in violation of the Due Process and the Board of Education's rules, because the entitlement to a public education had been removed without the minimum procedures required); *Priester v. Starkville School Dist.*, 2005 WL 2347285, 2 -5 (N.D.Miss.,2005) (denying summary judgment on a due process claim under Sec. 1983 where African-American student alleged, among other things, that a School Board's revocation of a previously allowed transfer to a high school without hearing could constitute *de facto* expulsion).

The facts here suffice to permit a jury to infer that Defendants violated Plaintiffs' Constitutional right to due process by informing the Lees Eddie could not come back to school, unilaterally putting him on home instruction, failing to provide home instruction for

ten days, resulting in a suspension, and expelling him by forcing an out-of-district placement.

Specifically, Defendants called Mrs. Lee on February 7, 2006, and told her to pick up Eddie. (Declaration of L. Lee, par. 22) When she arrived, she was ambushed by Defendant deMarrais, Ms. Lubieski, Ms. Answorth and Ms. DeSaye for an unscheduled meeting. Defendant deMarrais admits he told the Lees that Eddie could not come back to school. (Id; deMarrais 193/23-194/2; 193/6-12; L. Lee 184/13-19) Defendants did not remove Eddie from school for educational reasons. (deMarrais 191/25-192/6; 193/4-12; Lubieski 207/8-24). LVRSD and deMarrais told the Lees that they were putting Eddie on home instruction because "Lenape was [not] appropriate for him anymore." There was no alternative placement available or proposed at the meeting:

> Everybody got together. It wasn't even -- it wasn't -- nothing was on paper. I didn't get a copy of anything. All I did was walk, me and my husband walked into a room and they were all sitting around the table and this is what I was told. I was told that my son can't come back to Lenape, put on home instruction and going to find other placement for him.

(L. Lee 187/19-188/12) The Director of Special Education confirmed that *no matter whether Plaintiffs signed an IEP*, Eddie was not going to be allowed to return to school, (DeSaye 82/22-83/2), thus the child's educational needs were not a factor in the decision.

It is undisputed that at the meeting the Lees were "very upset," "repeatedly discussing 'racism' issues and dissatisfaction with LVRHS." (Notes, Exh. "DD". Defendants knew that Mrs. Lee "remain[ed] upset with out-of-district placement decision."

(Exh. "DD," p. 2, 2-22-06), It was very clear that Mrs. Lee was angry at the School District for failing her son. "Basically, I asked Mr. deMarrais how he could sleep at night knowing that he created -- they created something they didn't know what to do with it, rather than help the situation, they get rid of it." (L. Lee 185/6-13)

Defendants' argument, which at summary judgment should be rejected, centers on the fact that Mrs. Lee *ultimately* signed an IEP changing Eddie's educational program to home instruction[15] pending an out of district placement, and later signed an IEP changing Eddie's educational program to Lakeland-Andover, a school for children with behavioral issues. That Mrs. Lee signed off on the IEPs and did not appeal the decision does not preclude Plaintiffs' claims. At most, it creates a factual dispute for the jury.

First, Defendants have not provided any legal authority for their argument that signing an IEP precludes a due process claim, and it does not. *C.f. Williams v. Board of Regents of University System of Georgia*, 477 F.3d 1282, 1297 (11th Cir. 2007) (plaintiff's decision to withdraw from school following rape does not foreclose argument that defendant continued to subject her to discrimination)

Second, Defendants ignore the fact that a week prior to the IEP meeting that formally changed Eddie's program to Home Instruction, the Lees had already been told in

[15] Notably, New Jersey requires Home Instruction only when all other least restrictive programs have been considered and rejected and prior notification of the intent to provide Home Instruction has been given to the Department of Education. N.J.A.C. 6A:14-4.8. There is no evidence this occurred.

no uncertain terms that Eddie could not come back to school, and in fact he had by then been out for a week.[16]

When Mrs. Lee ultimately signed off on the IEP to provide home instruction, she had no choice but to sign.[17] She needed her son to be educated. Defendants had already confirmed that regardless of whether the Lees agreed to home instruction, Eddie was not coming back to school. She could not provide home schooling, and without signing the IEP, her son would not receive *any* education. (L. Lee Decl., par. 19-22)

Ultimately, Mrs. Lee ended up contacting Lakeland Andover because at that time, she did not have any options: "My son was out of school." (L. Lee 189/2-4). Her only other options were home schooling or a school that would have required two hours of commuting each way. (L. Lee Decl., par. 19-22) She did not have a choice but to agree,

[16] Just weeks before his suspension and expulsion, a school social worker wrote "[Edward] is particularly sensitive to his bi-racial heritage. Edward has been the victim of bias and racist remarks in the high school. This has led to an increased level of frustration for Edward as well as his parents. … Edward reported that there were several incidents of racism that he experienced during his freshman year of school at Lenape. He stated that … 'nothing was ever done.' Similarly with incidents that were reported to the principal. Edward still has a lot of feelings as a result of these incidents. He reports his belief that he is 'picked on because I'm Black." (Exh. "II") Rather than do something proactive to assist Eddie and provide him with some relief, the School closed its doors to him.

[17] The 2-13-06 IEP relating to Home Instruction notes, "Mr. and Mrs. Lee report changes in Ed's behavior and motivation since the suspensions of 9/05 and additional suspensions in January 2006. Parents have remained upset with last year's reported incidents of racism. These incidents were not resolved to the parents' satisfaction. Mr. and Mrs. Lee report that Ed has significant emotional issues as a result of these incidents. … Mr. and Mrs. Lee report that [a] majority of incidents involving Edward's disciplinary referrals involve racism. Mrs. Lee noted the fighting on campus incidents were related to racism." (Exh. "EE") Defendants had by this point washed their hands of the family, doing nothing in response to the Lee's observations and complaints.

even though she did not want him there. (L. Lee 189/10-15) (That's my answer. I didn't have a choice."); (L. Lee 188/24-189/1). In March 2006, Mrs. Lee eventually signed an IEP transferring Eddie to Lakeland Andover. (L. Lee 189/1-22; 220/5-22)

Consistent with the way in which Defendants have tried to blame Eddie for bringing the racial harassment on himself, and the problems it caused, Defendants also blame Mrs. Lee for not appealing Defendants' actions. Mrs. Lee did not know she could file an action with the Commissioner of Education objecting to the out of district placement.[18] (L. Lee 190/3-6) In spite of her lack of knowledge, she actually wrote to many agencies, including the Office of Special Education Programs, which is the agency to which IEP complaints are to be directed. (Decl. of L. Lee, Exh. "A"). Nothing came of her letter. (Lee Decl., par. 23)

Defendants also argue that Eddie was not expelled because Eddie was still in the District, even when he attended Lakeland-Andover, citing NJSA 18A:46-21 for the proposition that a student who attends an "out of district placement" remains a student of the "sending district," which pays to the tuition to the out of district placement. (Defs' Memo of Law, p. 9). The statute does not stand for the proposition asserted; it speaks to the tuition rate to be paid by a sending district.

[18] Defendants argue that Plaintiff had already retained an attorney and could have found out her appeal rights. However, Plaintiffs did not retain their current attorneys until May 2006, after the transfer to Lakeland. In any event, the fact that the IEP was not appealed does not alter the fact that Plaintiffs were entitled to due process and did not receive it.

In light of Defendants' unequivocal action putting Eddie out of school without a hearing, without charges, without any procedures provided in advance of the decision, and given Defendants' undisputed knowledge that Plaintiffs did not want Eddie home schooled or transferred to Lakeland Andover, a jury is entitled to find Eddie was suspended for the period that he was on home instruction without receiving instruction, and expelled from the District. A jury could determine that as of February 7, 2006, no matter what the Lees did, Eddie was not going to be allowed back at LVRHS or anywhere in the district. A jury could further determine that the decision to not allow Eddie back into school violated the Lees' due process rights since the Lees were not given any options, notice, procedures, written charges, a hearing, or anything that would have put them in a position to make a case for their son in advance of a decision being made.

B. Plaintiffs' 42 USC 1983 Equal Protection Claim Against Defendant deMarrais In His Individual Capacity Is Not Pre-empted By Title VI[19]

Defendant deMarrais is seeking dismissal of Plaintiffs' individual capacity Section 1983 claim, arguing that it is barred under the *Sea Clammers* doctrine. *Sea Clammers* precludes resort to 42 USC 1983 when another federal statute provides a comprehensive remedial scheme for the same conduct. *Middlesex County Sewage Auth. v. Nat's Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981). However, claims brought against deMarrais in

[19] This section corresponds to Defendants' Memo of Law, Section II(A)(1)(a) and ii(A)(1)(B)(ii)(A).

his individual capacity for Constitutional violations are not pre-empted. *K.R. v. School Dist. of Philadelphia,* 2007 WL 2726236 (E.D.Pa. 2007); *Jones v. Indiana Area School Dist.,* 397 F.Supp.2d 628, 647 (W.D.Pa. 2005). Defendant's citation to *A.W. v. Jersey City Public Schools*, 486 F.3d 791 (3d Cir. 2007), a Rehabilitation Act claim that applied the *Sea Clammers* doctrine to bar a Sec. 1983 claim based exclusively on Sec. 504 of the Rehabilitation Act, is not to the contrary.

1. Plaintiffs' claims are Constitutionally – not statutorily – based, and are not pre-empted

In *K.R.,* the Court distinguished *Jersey City Public School*, because it mandated dismissal only of claims *predicated* on violations of the IDEA and Sec. 504. In other words, where a Sec. 1983 claim is solely a vessel for bringing a claim under another statute that already has a comprehensive remedial scheme, it will usually be barred. Because K.R. alleged independent *constitutional* violations based on equal protection and due process, *Jersey City* did not mandate dismissal. *K.R.,* 2007 WL 2726236, 3., *accord, James S. ex rel. Thelma S. v. School Dist. of Philadelphia* , 2008 WL 2357190, 19 (E.D.Pa. 2008) (race discrimination claim under Sec. 1983 based on equal protection not pre-empted under *A.W.* because of independent constitutional basis); *Blunt v. Lower Merion School Dist.,559 F. Supp. 2d 548* (E.D.Pa. 2008)*; Koehler ex rel. Koehler v, Juniata County School Dist.,*2008 WL 1787632 (disability discrimination).

In this case, plaintiffs' claims against deMarrais are based on independent violations of the 14th Amendment right to equal protection and due process.[20] *See generally*, Plaintiffs' Complaint, Count III. Plaintiffs' claims are not statutorily based, but rather, Constitutional in nature and not pre-empted.

2. Individual capacity claims based on Title VI are not barred

In any event, the *Sea Clammers* doctrine is not applicable to individual capacity suits. The Court in *Jones v. Indiana Area School Dist.,* refused to bar an individual capacity suit brought via Sec. 1983. 397 F.Supp.2d at 647. *Jones* noted the absence of Third Circuit law concerning pre-emption of claims against *individuals*. Noting the Supreme Court's explicit language in *Gebser v. Lago Vista Indep. Sch. Dist.,*(where the Court held there is no individual liability under Title IX itself), that its decision "*does not affect any right of recovery that an individual may have ... against the teacher in his individual capacity under state law or under 42 U.S.C. § 1983,*" *Jones* permitted an individual capacity suit enforcing Title IX through Sec. 1983. *Jones*, at 647. *Miller v. Kentosh*, 1998 WL 355520, *3(E.D.Pa. 1998) (*Sea Clammers* doctrine does not pre-empt Sec. 1983 claim against individuals).

[20] Title VI does not provide a remedy for due process violations. The Lees' Section 1983 claim against Defendant deMarrais (and LVRSD) for a due process violation is not implicated. Defendant has not argued otherwise.

3 The Supreme Court granted certiorari on a related claim

The Supreme Court recently granted certiorari of a Title IX case to resolve a circuit split over whether institutional Sec. 1983 claims are pre-empted by Title IX. *See Fitzgerald et al v. Barnstable School Committee, et al*., Sup. Ct. Docket No. 07-1125 (petition granted June 9, 2008). Title VI, by analogy, (see Section I(A)) will be decided as well. Although the Court granted certioriari to resolve a circuit split as to the pre-emption of equal protection claims brought via Sec. 1983 against institutions,[21] a decision will likely give guidance as to the treatment of 1983 claims against individuals as well. The Court should permit this claim to go forward until the Supreme Court determines what extent to which (if at all) equal protection claims are pre-empted by Title IX/Title VI.

C. Defendant deMarrais Is Not Entitled To Qualified Immunity On Plaintiffs' Equal Protection Claim

Defendant deMarrais is not entitled to qualified immunity with respect to Plaintiffs' personal capacity suit under 42 U.S.C. 1983, for violation of the Equal Protection Clause. Defendant deMarrais has the burden of establishing entitlement to such immunity.[22] *Ryan v. Burlington County,* 860 F.2d 1199, 1204 n. 9 (3d Cir.1988), *cert. denied,* 490 U.S. 1020 (1989). He must show that his conduct did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v.*

[21] http://www.yale.edu/supremecourtclinic/briefs/fitzgerald_yale.pdf

[22] Defendant deMarrais could not and did not argue that he is entitled to qualified immunity for violating Plaintiffs' Constitutional right to due process.

Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Under the *Harlow* test, reasonableness is measured by an objective standard; arguments that the defendant desired to handle or subjectively believed he had handled the incidents properly are irrelevant. *Anderson v. Creighton,* 483 U.S. 635, 641, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). Movant deMarrais failed to meet his burden. Moreover, given that deMarrais ignored Lenape's own school policy and regulations for dealing with peer harassment, he could not have believed his conduct comported with legal standards.

Defendant deMarrais is only entitled to qualified immunity if reasonable officials in his position at the relevant time could have believed, in light of clearly established law that their conduct comported with established legal standards. *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720, 726 (3d Cir. 1989) *citing Anderson,* at 3039. (The Court must first determine whether Plaintiffs' rights were violated. *McKee v. Hart,* 436 F.3d 165, 169 (3d Cir. 1996). In that regard, Plaintiffs incorporate by reference Sections IB and IID which demonstrate facts from which a jury could hold deMarrais' liable under Sec. 1983)

There is no requirement that the Supreme Court or Third Circuit have decided an identical set of facts; it is the right that must have been clearly established, not the exact circumstances presented to the administrator in question.[23] *Anderson v. Creighton,* 483 U.S. 635, 640 (1987).

[23] Thus, deMarrais' framing of the question – "whether reasonable administrators in Mr. deMarrais' position would have known that the administration's investigations of the allegations

The unlawfulness of failing to respond to known acts of harassment was clear at the time of Defendant's actions. Plaintiffs' right has been clearly established (as evidenced by the fact that this District had an established policy on this very question) in both the Equal Protection and Title VI contexts for years. The equal protection clause prohibits intentional discrimination on the basis of race. *Shaw v. Reno,* 509 U.S. 630, 642 (1993). "Discriminatory intent 'implies that the decision-maker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.'" *Antonelli v. New Jersey*, 419 F.3d 267, 274 (3d Cir. 2005), quoting *Personnel Adm'r of Mass. v. Feeney,* 442 U.S. 256, 279 (1979). *See also*, *Pollack v. City of Philadelphia,* 2008 WL 3457043 (E.D.Pa. 2008) (denying qualified immunity in Sec. 1983 case for race-based equal protection claim and importing Title VII's analytical framework for hostile work environment claims to prove discriminatory intent); *Barmore v. Aidala*, 419 F.Supp.2d 193, 203 (N.D.N.Y. 2005) (the right to be free from race-based discrimination in school decisions has been clearly established for years). It is abundantly clear that race discrimination by state actors violates the equal protection clause. Further, Defendant deMarrais was on notice at least as early as 1999 that deliberate indifference to peer harassment violates the law. *Davis*, 526 U.S. 629.

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and the discipline being doled out to the offending students violated Plaintiff's rights pursuant to Title VI and the 14th Amendment" – is too narrow.

Defendant deMarrais' argues his "actions were objectively reasonable in light of the circumstances." This relates to his position that he did not violate the law, not whether the right to not be subject to racial discrimination was clearly established. Additionally, there is an appreciable lack of law in Defendant's argument, as deMarrais has not cited a single case where qualified immunity has been granted in the equal protection context.

Further, Defendant's fact-based argument[24] repeatedly fails to view the evidence in the light most favorable to plaintiffs.[25] Defendant deMarrais has offered no controlling authority to meet his burden of showing that the right to equal protection, and the concomitant obligation to respond reasonably to peer harassment, was not clearly established by 2004 when Eddie enrolled at LVRHS.

D. Plaintiffs' Have Sufficient Evidence Of A Custom of Discrimination In Violation of Section 1983

Plaintiffs' evidence is sufficient to survive summary judgment as to Count III, Plaintiffs' Sec. 1983 claim against Defendants for violation of the Equal Protection Clause. The School District may be liable for racial harassment where the evidence shows

[24] Plaintiffs address these fact based arguments more in Sections I(B)

[25] For example, contrary to deMarrais' contention, S.C. and V.E. were not counseled for the first offenses of racially harassing language. Defendant argues three students were suspended. However, only two repeat offenders were suspended for engaging in racial harassment. With respect to the "porch monkey" incident, it is irrelevant that there was no repeated conduct; what is relevant is defendant took no action at all, the definition of indifference. Defendant claims the basketball player was appropriately "disciplined." However, no discipline was imposed, and defendant failed to follow its own policy requiring Eddie's coach to report the incident to deMarrais for investigation and documentation. Finally, the September 2005 incident with S.C. *was* racially motivated according to plaintiffs, and it is undisputed that S.C. was not disciplined at all. Moreover, Defendant's reliance on "unrebutted expert testimony" is irrelevant to qualified immunity.

Defendants had a custom of violating the Equal Protection Clause by encouraging racial harassment and condoning it, when Defendants failed to take reasonable measures to stop known harassment. *See Andrews v. City of Philadelphia,* 895 F. 2d 1469, 1481 (3d Cir. 1990) (discussing municipal liability for custom of discrimination). "An actionable custom is one in which a municipality exercises deliberate indifference to individuals' constitutional rights by ignoring a "pattern of underlying constitutional violations." *Carswell v. Borough of Homestead,* 381 F.3d 235, 244 (3d Cir.2004). Here, Plaintiffs have demonstrated deliberate indifference to Eddie's rights as set forth in Section I(B).

III. HAVING MET THE MORE ONEROUS DELIBERATE INDIFFERENCE STANDARD, PLAINTIFFS ARE ENTITLED TO A TRIAL UNDER THE LOWER NJLAD STANDARD

A. Lenape failed to institute effective preventive and remedial measures

As Defendant acknowledges, the NJLAD has a lower threshold than Title VI for a school district's liability for peer harassment. The standard was articulated recently in *L.W. v. Toms River Reg'l Schools Bd. of Educ.*, importing the hostile work environment standard to peer harassment claims. 189 N.J. 381, 402-403 (N.J. 2007). Defendant is liable for "harassment that creates a hostile educational environment when the school district knew or should have known of the harassment, but *failed to take action reasonably calculated to end the harassment.*" *Id.,* at 407 (emphasis supplied). Defendant is obligated to "implement effective preventive and remedial measures to curb severe or pervasive discriminatory mistreatment." *Id.*

Because Defendant did not analyze the facts under this lower standard, Defendant has failed to meet its burden at summary judgment. Even if the Court finds Defendant has met its initial burden, Plaintiffs have come forward with sufficient evidence demonstrating a jury issue as to whether Defendant had effective preventive and remedial measures.[26] *Joyce v. City of Sea Isle City*, 2008 WL 906266, 23 (D.N.J. 2008).

The fact-finder "must determine the reasonableness of a school district's response to peer harassment in light of the totality of the circumstances." *Joyce v. City of Sea Isle*

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[26] Defendant did not argue that the harassment in this case was not severe or pervasive enough to create an intimidating, hostile or offensive environment. Presuming the Court finds that Plaintiffs have met their burden of showing that Defendant failed to take "effective preventive and remedial measures," summary judgment should be denied as to the NJLAD claim. In any event, the New Jersey Supreme Court has held that one incident may create a hostile environment, *Taylor v. Metger, et al*, 152 N.J. 490 (1998) ("This Court has described the goal of the LAD as being 'nothing less than the eradication of the cancer of discrimination.'") (quotations omitted). "The connotation of the epithet itself can materially contribute to the remark's severity. Racial epithets are regarded as especially egregious and capable of engendering a severe impact. *Id.,* at 502 (citing Robert J. Gregory, *You Can Call Me a 'Bitch' Just Don't Use the "N-word."*). *Rodgers v. Western-Southern Life Ins. Co.,* 12 F.3d 668, 675 (7th Cir. 1993) (the term 'nigger' is an unambiguously racist epithet). "[J]ungle bunny" is a"patently a racist slur, and is ugly, stark and raw in its opprobrious connotation," and in combination with the fact that it was used in the employment context by the plaintiff's supervisor, sufficient to create hostile environment. *Taylor,* at 502-03. *See also, Kwiatkowski v. Merrill Lynch* 2008 WL 3875417, 15 (N.J.Super.A.D.,2008) (one comment, "stupid fag," was sufficiently severe to create hostile environment). Here, students called Eddie the "N" word on multiple occasions. He was also called "Black Piece of Shit," and "Alabama Porch Monkey." All of the offensive terms were patently racial slurs, and not only were severe in and of themselves, but happened with an alarming frequency. Defendant admitted that Eddie was harassed on an "inordinate" number of occasions. In sum, despite Defendant's failure to argue that the harassment was not severe or pervasive, it is evident that there is a triable issue as to severity and/or pervasiveness. *See also, Harmon v. Bemis Co., Inc.,* 2005 WL 1389174 (N.J. Super. 2005) (six incidents of racially discriminatory conduct, including slurs, over eighteen months, were severe or pervasive enough to withstand summary judgment). Here, there were elevent incidents over thirteen months, plainly pervasive enough to go to trial.

City, 2008 WL 906266, 23 (D.N.J. 2008), *citing Lehman v. Toys R Us, Inc.*, 132 N.J. 587, 551, 626 A.2d 445 (NJ 1993). In *Joyce*, a student's classmates called him racially derogative names. Although it occurred in the presence of teachers, no one did anything to stop it. There was also evidence that the harassment was reported, but the response was "ineffective." *Id*., at *5. The Court denied summary judgment.

Although there are few cases under the NJLAD for peer harassment, the hostile work environment cases provide guidance. For example, the leading case, *Lehmann v. Toys R Us, Inc*., 132 N.J. 587, 621-622 (N.J. 1993) discusses preventive measures to be taken, the need for well-publicized and enforced anti-harassment policies, and "effective formal and informal complaint structures, training, and/or monitoring mechanisms." The absence of these mechanisms does not result in automatic liability, but the existence of effective preventative mechanisms provides evidence of care. The effectiveness of the policies and complaint structures must be "backed up by consistent practice." *Id.*, quotation omitted. *Hargrave v. County of Atlantic*, 262 F.Supp.2d 393, 432 (D.N.J. 2003) (disputed issues of fact about the efforts to educate employees and supervisors about harassment policies and complaint mechanisms precluded summary judgment). *See also*, *Erickson v. Marsh & McLennan Co., Inc.,* 117 N.J. 539 (1990) (holding employers are obligated to investigate claims of harassment).

In *Woods-Pirozzi v. Nabisco Foods,* the Court reinstated a hostile work environment claim, finding evidence that defendant was unresponsive to initial complaints

of harassing conduct. 290 N.J.Super. 252, 272-273, 675 A.2d 684, 694 (N.J.Super.A.D.,1996) Only after several months of improper behavior did the employer investigate and eventually fire the harasser. *Id.* The delay in providing any remedial action was enough to warrant a jury trial.

Here, Plaintiffs have adduced evidence that Defendant actually knew Eddie was being harassed within the first weeks of his transfer, but failed to respond, allowing it to continue unremedied. Defendant's failure to effectively prevent additional harassment is also evident. There were eleven incidents over the course over thirteen months of school. Each one was reported to either Defendant deMarrais or AP Lubieski. Unlike in Woods where the employer eventually took remedial action, with respect to nine of eleven incidents, Lenape never imposed any discipline. Only for second offenses did Defendant impose discipline the offenders. See Section I(B), and Plaintiffs' Statement at par. 86. The lack of discipline is demonstrative of defendant's failure to use effective remedial measures.

Further, although there were very specific policies in place that governed harassment and bullying, the policies were never followed. See Section I(B), and Plaintiffs' Statement at par. 86. For example, AP Lubieski and Defendant deMarrais did not follow the investigation procedure set out in the Policy and Regulation (exhs. "f" and "g") by failing to document the complaints, failing to conduct thorough investigations, failing to document the outcome of the investigations, failing to inform the Lees or the

individuals accused of harassment of the outcome, failing to alert most of the harassers' parents of the incidents, failing to explain the Policy to the harassers or to the Lees, and failing to follow up with Eddie to see how he was doing, to see if harassment was continuing or to offer counseling or other services.

Defendants similarly failed to provide effective training to staff or students on complaint procedures or indeed training on what would be considered racial harassment. This failure is evident both with respect to the annual meetings Defendant deMarrais and AP Lubieski had with students in September, and in response to harassment directed at Eddie and others. For instance, even though Eddie was one of a handful of minorities in a school of 900 children, and even though Defendants admit Eddie was harassed on an "inordinate" number of occasions, Lenape did not provide school-wide training in response to his harassment. Similarly, around the time that Eddie was being summarily told he could not come back to school, Lenape took no remedial measures in response to another serious problem of a racially harassing environment. See generally, exhs. "x" and "y", concerning the rampant use of racially harassing language and threats to hang an African American student. While Superintendent Palek, who at the time was not aware of these complaints testified that something programmatic "absolutely" should have been done, and there should have been suspensions, Defendant did not provide training or programs to students, no one was suspended or disciplined for racial harassment, and deMarrais testified that he "missed it." A jury could easily find under the totality of the circumstances

Defendant failed to implement effective preventive and remedial measures to curb severe or pervasive discriminatory mistreatment. *Toms' River, supra.*

B. Plaintiffs' NJLAD Claim May Go Forward Without A Liability Expert

Citing *dicta* in the *Toms River* case that "expert evidence *may* be required to establish the reasonableness of a school district's response to student-on-student harassment," *L.W. v. Toms River*, 189 N.J.at 409- 410, Defendants argue Plaintiffs' NJLAD claim is barred because Plaintiffs did not retain a liability expert to establish that Defendants did not take action reasonably calculated at ending the harassment. *Toms River* also says, however, that "[c]ommon sense will often signal the unreasonableness of inaction by a school district faced with systemic and persistent peer harassment. … In … more contentious circumstances, factfinders *may be* assisted by expert opinion regarding educational theories and principles." *Id*., at 410. Thus, in addition to being *dicta*, on its face, Toms River does not *require* expert testimony. Defendant has not shown that this case requires it, and it is not necessary.

Indeed, in the Title IX and Title VI context, liability expert testimony has been circumscribed or excluded. *See Jones v. Indiana Area Sch. Dist.,* 2006 WL 5277385, *2 (W.D. Pa. 2006) (Dr. Dragan's testimony limited so as not to usurp jury function); *King v. Orange County School Board*, Docket No. 06:02 CV 745 (M.D. FL 2004) (Title IX employment case, accord). *See also, Combs v. School Dist. Of Philadelphia,* 32 Fed. Appx. 653 (3d Cir. 2002) (in Sec. 1983 action for state created danger, District Court

properly excluded plaintiff's expert testimony on liability as unnecessary for "commonplace" issues).[27]

IV. PLAINTIFFS' NJ CRA CLAIM SURVIVES SUMMARY JUDGMENT

Plaintiffs incorporate by reference their arguments concerning the NJLAD, 42 USC 1983, and Title VI. Although no cases yet interpret the New Jersey Civil Rights Act ("NJCRA") having established a right to a jury trial on Plaintiffs' other claims, given that the NJCRA is supposed to be read more broadly than Sec. 1983, it should go forward as well. (*See infra* at Sec. IVB)

Defendants move for dismissal of Plaintiffs' claim under the NJCRA on the grounds that it requires proof of a threat, intimidation or coercion and Plaintiffs have not alleged that Eddie was deprived of his rights by such means. The statute on its face, however, imposes no such requirement: "[A]ny person who has been deprived of … [rights], **or** whose exercise or enjoyment of those [rights] has been interfered with or attempted to be interfered with, by threats, intimidation or coercion," may bring an action. N.J.S.A. 10:6-2(c). Looking at that language in connection with subparts (a) and (b), which discuss claims brought by the Attorney General for **either** type of violation, it is clear the statute permits a direct action for an actual deprivation of rights, or an *attempt* to deprive a person of rights if done by threats, intimidation or coercion. *See also*, *Owens v. Feigin,* which implicitly suggests there is no threat or coercion requirement. 394

[27] As stated supra, Plaintiffs will be requesting a Daubert hearing to preclude Dr. Dragan from testifying.

N.J.Super. 85, 87, 925 A.2d 106, 107–108 (N.J.Super.A.D. 2007) (evaluating notice of claim requirement in connection with CRA, where the facts do not indicate a deprivation resulting from "threats, coercion or intimidation."[28]

V. PUNITIVE DAMAGES

Defendants move to dismiss Plaintiffs' punitive damages claim. It is premature to assess whether Plaintiffs' evidence sufficiently demonstrates an entitlement to punitive damages, and the Court should wait until the close of the trial. *Lindsey v. New Jersey Dep't of Corr.*, 2007 WL 836667 (D.N.J. 2007). In any event, with respect to Plaintiffs' Sec. 1983 claims, by virtue of showing "deliberate indifference," Plaintiffs are necessarily entitled to a punitive damages instruction. *See Tatch-Corbin v. Feathers,* 2008 WL 2234638 (W.D. Pa. 2008). Under the NJLAD, the evidence demonstrates LVRSD was willfully indifferent to the wrongdoing, and the misconduct was especially egregious. *Rendine v. Pantzer,* 141 N.J. 292, 661 A.2d 1202, 1215 (N.J.1995); *Llerena v. J.B. Hanauer & Co.*, 368 N.J.Super. 256, 263-264, 845 A.2d 732, 736 (N.J.Super. 2002).[29]

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[28] Without actually citing the legislative history, Defendants also claim the CRA is modeled on Massachusetts' and Maine's Civil Rights Acts, both of which have explicit threat requirements. Defs' Memo of Law, p. 36, *citing* M.G.L.A. 12 § 11H; 5 M.R.S.A. § 4681. Although resort to the legislative history is not needed, because the statute itself is clear, the NJCRA's Sponsor's Statement indicates that the bill is meant to provide *more* remedies than under Section 1983, not restrict the remedies. http://www.njleg.state.nj.us/2004/Bills/A2500/2073_I1.PDF (goal is to "address any potential gaps" that exist under current law).

[29] With respect to the NJCRA claim, while the statute does not delineate the damages that are available, it appears the Legislature contemplated a host of damages, when it indicated, "In addition to *any* damages, civil penalty, injunction or *other appropriate relief* …." N.J.S.A. 10:6-2(f). Given that Sec. 1983 claims allow for punitive damages against individual municipal defendants, the Court should allow Plaintiffs' NJCRA punitive damages claim to go forward.

CONCLUSION

For all the foregoing reasons, Defendants' motion should be denied in full.

BY:

/s/ Bennet D. Zurofsky___

Bennet D. Zurofsky
Reitman Parsonnet, P.C.
744 Broad Street
Suite 1807
Newark, NJ 07102
(973) 642-0885
bzurofsky@reitpar.com

/s/ Rebecca Houlding
Rebecca Houlding
Joshua Friedman
Law Office of Joshua Friedman
25 Senate Place
Larchmont, NY 10538
(212) 308-4338
Rebecca@joshuafriedmanesq.com