

SUPERIOR COURT OF NEW JERSEY
SOMERSET, HUNTERDON & WARREN COUNTIES
VICINAGE 13

YOLANDA CICCONE
ASSIGNMENT JUDGE



SOMERSET COUNTY COURT HOUSE
P.O. BOX 3000
SOMERVILLE, NEW JERSEY 08876
(908) 231-7069

August 3, 2015

V.B., a minor by his parent and guardian, L.B. and L.B., individually
v.
Flemington-Raritan Regional Bd. Of Education, Hunterdon Central Regional High School
Bd. Of Education

v.
C.W. and/or his/her parents,
J.B. and/or his/her parents,
C.E. and/or his/her parents,
J.A. and/or his/her parents,
T.M. and/or his/her parents,
C.K. and/or his/her parents,
D.W. and/or his/her parents,
D.B. and/or his/her parents,
J. Ma. and/or his/her parents,
J.Me. and/or his/her parents, and
K.I. and/or his/her parents.

HNT-L-95-13

*DEFENDANTS/ THIRD PARTY PLAINTIFFS' MOTION FOR A PRIMA FACIE CASE;
THIRD PARTY DEFENDANTS' K.I. AND/OR HIS OR HER PARENTS, J.MA. AND/OR
HIS OR HER PARENTS, AND J.B. AND/OR HIS OR HER PARENTS MOTION TO
DISMISS THE THIRD PARTY COMPLAINT*

PARTIES

Brian M. Cige, Esq. of Cige Law for the Plaintiff V.B., a minor by his parent and guardian, L.B. and L.B., individually.

Robert F. Gold, Esq. (of counsel) and Kevin M. Eppinger, Esq. (on the brief) of Gold, Albanese & Barletti, LLC for Defendant and Third Party Plaintiff Hunterdon Central Regional High School Board of Education.

Cherylee O. Melcher, Esq. of Hill Wallack, LLP for Defendant and Third Party Plaintiff Flemington-Raritan Regional Board of Education.

John P. Gilfillan, Esq. (of counsel), Katherine Lyons, Esq. (of counsel and on the brief) and Kersten Kortbowi, Esq. (of counsel and on the brief) of Carroll, McNulty & Kull, LLC for Third Party Defendants J.Ma. and/or his/her parents.

Steven K. Parness, Esq. (of counsel and on the brief) and Kegan S. Andeskie, Esq. (on the brief) of Methfessel & Werbel, Esqs. For Third Party Defendants C.W. and/or his/her parents.

Steven D. Farsiou, Esq. of Kelly, Trinity & Farsiou, LLC for Third Party Defendants K.I. and/or his/her parents.

Brian G. Stellar, Esq. of Connell Foley for Third Party Defendants J.A. and/or his/her parents.

Michael Della Rovere, Esq. of O'Toole, Couch & Della Rovere, LLC for Third Party Defendants T.M. and/or his/her parents.

Richard J. Williams, Jr., Esq. (of counsel and on the brief) and Michael D. Celentano, Esq. of McElroy, Deutsch, Mulvaney & Carpenter, LLP for Third Party Defendants J.B. and/or his/her parents.

Gregory W. Boyle, Esq. (of counsel and on the brief) and Stephen R. Catanzaro, Esq. of Ronan, Tuzzio & Giannone for Third Party Defendants D.W. and/or his/her parents.

Brian S. Davis, Esq. of Hardin, Kundla, McKeon & Poletto for Third Party Defendants C.K. and/or his/her parents.

John J. Shotter, Esq. of O'Toole, Fernandez, Weiner Van Lieu, LLC for Third Party Defendants J.Me. and/or his/her parents.

Lewis M. Markowitz, Esq. (of counsel) and Lauren B. DiSarno, Esq. (on the brief) of Gutterman, Markowitz & Klinger, LLP for Third Party Defendants D.B. and/or his/her parents.

George Goceljak, Esq. for Third Party Defendants C.E. and/or his/her parents.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The School District Defendants ("District(s)") move on the direction of the Court for a prima facie case against the Third Party Defendants. All of the Third Party Defendants oppose the application. Third Party Defendants K.I. and/or his or her parents, J.Ma. and/or his or her parents, and J.B. and/or his or her parents move to dismiss the Districts' Complaints for Failure to State a Claim.

The third party matter arises out of an action filed on or about February 28, 2013 by Plaintiff V.B. and his mother, L.B. against the Defendant Districts which alleges violations of the New Jersey Anti-Bullying Bill of Rights Act ("Anti-Bullying Act" or the "Act"), N.J.S.A. 18A:37-13 et seq.

and the New Jersey Law Against Discrimination (“LAD”), N.J.S.A. 10:5-2 et seq. On or about August 13, 2013, Plaintiffs filed a Second Amended Complaint. Plaintiffs’ complaint alleges that from the time V.B. was in fourth to the eleventh grade he was subject to a hostile environment where he was bullied. V.B. alleges that he suffered, and continues to suffer, emotional distress. Plaintiffs allege that the “lack of remedial action” by Hunterdon Central and its employees led to Plaintiff’s hospitalization. (Second Amended Complaint, ¶ 59). Plaintiffs allege that Hunterdon Central failed to accommodate V.B. by modifying his educational needs. (Id, ¶¶ 60-68).

On or about September 11, 2013, the Defendant District Hunterdon Central filed its Answer to the Second Amended Complaint complete with crossclaims for indemnification and contribution from eleven students who allegedly “bullied” V.B. while a student within the two Districts and their parents. On September 26, 2013, Defendant District Flemington-Raritan also filed an Answer complete with similar crossclaims against the minor students and their parents. As against the parents, the Districts allege that they were made aware of the conduct of their children and intentionally or negligently refused to take any action. Plaintiffs’ Complaint was not filed against any of the Third Party Defendants brought in by the Districts.

Some of the Third Party Defendants then moved to dismiss the Third Party Complaints on the basis that, *inter alia*, the Anti-Bullying Act does not provide for individual liability against the Third Party Defendants; therefore, no claim for indemnification and/or contribution could be made. The Third Party Defendant minors and their parents also alleged that no claim of contribution could be premised upon any alleged liability of the Districts under the LAD since such liability is strictly limited to those acts of discrimination by one or more in a supervisory capacity. The Third Party Defendant parents further argued that they are immune from liability through the Doctrine of Parental Immunity absent a showing of a willful or wanton failure to supervise.

During Oral Argument before the Court on the motions, the Districts abandoned their argument that contribution was permissible under the Act and the LAD and argued that their contribution claims were cognizable pursuant to the Joint Tortfeasors Contribution Law.

On March 12, 2014, the Court issued a written opinion where it analyzed whether the Districts’ claims for contribution and indemnification upon any liability for statutory violations, premised upon alleged common law tortious conduct, were cognizable. The Court, citing the lack of discovery, reasoned that “that Plaintiff[s]’ sole cause of action...is for statutory violations, does not alter the fact that their underlying conduct was potentially negligent...” and that a claim of contribution could be premised.

On April 28, 2014, the Court then issued a Case Management Order directing that discovery of the Third Party Complaint be held in abeyance until the Third Party Plaintiffs have successfully demonstrated a *prima facie* case in support of their allegations or until they demonstrated a compelling need for particular discovery requested.

The Court conducted numerous Case Management Conferences throughout the period of discovery conducted between the primary parties. The discovery of the primary parties was received by the Third Party Defendants on a rolling basis. The Court directed the Districts to make a *prima facie*

case by motion returnable on June 24, 2015. Ten of the Third Party Defendants timely opposed the motion and appeared for Oral Argument before the Court on June 24, 2014. Defendants C.E. and/or his/her parents filed opposition on June 25, 2015 and did not appear for Oral Argument.

ARGUMENTS OF THE DISTRICTS

Hunterdon Central argues that all that it is required to show is that there is an allegation of some act of harassment, intimidation or bullying where a juror could conclude that the conduct contributed to V.B.'s damages. It argues that the level of culpability is irrelevant for these motions. It argues that a summary judgment standard is inapplicable here and that the Court should only look at the allegations "on their face."

It argues that there is evidence of some acts by all of the minor Third Party Defendants and "some evidence" regarding the claims against the parents. Hunterdon argues that D.W.'s parents were aware of conduct in the 7th grade yet it continued. It argued that evidence showed that K.I.'s parents were aware of a HIB complaint but would not allow K.I. to give a statement due to the instant action. It argues that this is the reason why the HIB came back in the negative. It argues that there is evidence that the parents of J.B. and C.W. were aware that their child was harassing either V.B. or other children. As for the rest of the parents, Hunterdon Central asks the Court to keep the parents in the action to obtain the necessary discovery.

Hunterdon Central argues that it has a right of contribution from each of the Third Party Defendants regardless of when the alleged harassment took place as the residual effects of that bullying contributed to V.B.'s alleged damage. It further argues that V.B. would not have a claim against Hunterdon Central for failing to modify V.B.'s curriculum once he was diagnosed with Anorexia Nervosa if not for each one of the alleged earlier harassments.

Flemington Raritan also argues that the "on its face" standard is applicable here. It, too, argues that the level of culpability is irrelevant for this motion as long as the Board alleges some negligent conduct. Flemington Raritan concedes that there is no prima facie case against the minors' parents. Flemington Raritan is willing to stipulate a dismissal without prejudice.

Both Districts allege the same actions on behalf of each of the minor Third Party Defendants:

- K.I.
 - 5th grade- derogatory weight comments (2-4x/ week)
 - V.B. alleges that these comments caused him/her to eat only half of what he normally ate.
 - 6th grade- comments about weight and clothing in the hallway & on bus (1-4x/week)
 - 7th grade- derogatory weight and homosexual comments (1-2x/ week).
 - 8th grade- derogatory weight and homosexual comments (2-3x/ week)
 - 10th grade- while V.B. was receiving in patient and out-patient treatment for an eating disorder, K.I. would repeatedly ask where V.B. was when he was absent from class. (4-6x per week.
 - 11th grade- comments about V.B. suing the school (3 occasions/ 10-13 times on each occasion
 - As a result, English teacher Ms. Mongi filed a Harassment Intimidation and Bullying (HIB) report with the school regarding KI's behavior.
- C.K.
 - 6th grade- comments (2-3x per week).
 - C.K. "tasered" V.B. 10-20 times during one month.

- C.K. would then comment that V.B. was “walking funny” while trying to prevent being tasered in his sides.
- C.K. commented on V.B.’s clothing.
- 11th grade- C.K. “bullied” V.B. regarding the fact that he was suing the school.
- C.E.
 - 6th grade- C.E. paid a student to act as V.B.’s girlfriend/boyfriend.
 - C.E. then told V.B. that it was a set-up.
 - C.E. continued to make comments about the fake relationship.
 - 7th grade- C.E. made comments about V.B.’s clothing.
 - Homosexual slurs (1-2x per week).
 - C.E. continued to make comments about the set up relationship.
 - C.E. made comments about V.B.’s appearance.
 - This continued into the 10th grade.
- T.M.
 - 8th grade- homosexual slurs (1-2x per week)
 - 9th grade- T.M.’s younger sibling (J.M.) left a comment on V.B.’s Facebook wall containing a derogatory homosexual slur.
 - Other people then commented with other homosexual comments on the Facebook wall.
 - After V.B.’s mother reported the incident to the school, V.B.’s mother had a meeting with T.M, J.M. and T.M.’s father to discuss the post.
 - J.M. stated that he made the post when his parents were asleep.
- C.W.
 - 5th grade- Comments about V.B.’s weight in the hallway (7-10x per week).
 - 6th grade- weight comments.
 - 6th grade- called names 2-4 times per week.
 - C.W. would continue when V.B. would ask C.W. to stop the name calling.
 - During a basketball game- C.W. would moan and groan on the field when V.B. missed the ball.
 - C.W. continued to make weight comments in 6th grade.
 - V.B. only played 2 games of baseball because he was harassed.
 - C.W. was sent to the office when he made a comment regarding V.B.’s clothing.
 - Plaintiff L.B. wrote a letter to Dr. Suchorski complaining about C.W.’s harassment where she had to pull V.B. out of baseball.
 - There is a guidance counselor note that C.W. is a bully, speaks unkind words, is sneaky, disrespectful and that his parents have no control.
- J.Me.
 - 6th grade- called V.B. “poseur” based on his new clothing from Abercrombie & Fitch. (2-3x/ week).
 - J.Me. then threw pasta & spaghetti on V.B., ruining his new clothes.
- D.B.
 - 6th grade- called V.B. “poseur” based on his new clothing from Abercrombie & Fitch. (1-2x/ week for one month).
 - Weight comments during baseball.
 - Comments about the fake girlfriend/boyfriend.
 - D.B. pulled down V.B.’s pants exposing his buttocks and genitals.
 - D.B. then began to make comments about V.B.’s clothing.
- J.Ma.
 - 6th grade- called V.B. “poseur” based on his new clothing from Abercrombie & Fitch. (1-2x/ week).
 - J.Ma. would also taser V.B. in the hallways.
 - J.Ma. would also pinch V.B. (10-17x during the 6th grade).
 - J.Ma. would joke about the fake girlfriend/boyfriend incident.

- J.Ma. participated in the pantsing incident.
- J.B.
 - 7th grade- homosexual slurs on a daily basis.
 - Chain text message stating that if he did not pass along the message that something bad would happen.
 - 8th grade- homosexual slur based on length of V.B.'s hair and clothing.
 - 8th grade- J.B. reminded V.B. that his pants were pulled down in 6th grade.
- J.A.
 - 7th grade- homosexual comments on a daily basis.
- D.W.
 - 7th grade- called him/her a caveman and a homosexual based on the amount of hair on his legs.
 - Threw dodgeballs repeatedly at his groin and chased him around the gym.
 - V.B. testified that his genitals were swollen and in pain.
 - D.W. was suspended for 2 days for the incident.
 - 8th grade- comments about V.B.'s hair and perceived homosexuality.

The term “taser” or “tasing” has been employed by the parties to describe the jabbing of one or more fingers into another person’s side, which sometimes involves pinching.

ARGUMENTS OF THE THIRD PARTY DEFENDANTS

In general, the Third Party Defendants argue that the Districts need to provide a legally viable cause of action to assert a claim of contribution. Miraglia v. Miraglia, 106 N.J. Super. 266, 270 (App. Div. 1969). They argue that neither District has set forth any specific common law tort allegation against the minor Third Party Defendants or their parents.

They argue that isolated school yard incidents and name calling is insufficient to support any common law cause of action. They argue that the conduct of each student must be measured in light of his or her capacity to exercise care under all circumstances. Berberian v. Lynn, 179 N.J. 290, 298 (2004). They argue that the law adheres to the proposition that liability for IIED “clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions or other trivialities.” Taylor v. Metzger, 152 N.J. 490 (1988). They further argue that the acts alleged are not so outrageous and extreme in degree where liability can attach. They argue that public policy should preclude a school district from maintaining a cause of action against their students for whose actions they are mandated to protect against.

The Third Party Defendants argue that there can be no prima facie case set forth against the parents since the Districts are responsible for the students while they are in school, pursuant to the *In Loco Parentis* Doctrine. Frugis v. Bracigliano, 177 N.J. 250 (2003). They argue that the parents are entitled to parental immunity which relieves parents from liability from alleged acts of their children. Zuckerbrod v. Burch, et al., 88 N.J. Super. 1, 5 (App. Div. 1965). They further argue that parental immunity precludes liability in cases of negligent supervision unless the injury was caused by the parents’ willful or wanton failure to supervise his or her child. Foldi v. Jeffries, 93 N.J. 533 (1983).

In addition to the arguments above that were generally set forth by each of the Third Party Defendants, below are arguments specific to each:

Counsel for K.I. cross moves to dismiss.

Counsel for D.B. argues that the entire file of D.B. shows no mention of bullying or the like. Counsel argues that the allegations against D.B. concerns one instance during the 6th grade, beyond the name calling. Counsel further argues that 'pantsing' produces no physical harm. Counsel argues that it is incorrect to use Titus v. Lindberg, 49 N.J. 66 (1967) in the reverse to establish liability of one student for harm that occurred as a result of liability for the failure of the school board to supervise another of its students. Counsel argues that the legislature intended for the schools to bear responsibility for the students' actions.

J.Ma. cross moves to dismiss. Counsel for J.Ma. argues that the actions of J.Ma. amount to such a short span of time that it is unreasonable to hold him/her liable. Counsel argues that J.Ma.'s actions are different than that of the student in Titus who had an enduring propensity for behavior that the school reasonably should have anticipated placed others at risk of harm. Counsel argues that the act of tasing was not the type of conduct that a 12 year old boy/girl might reasonably perceive to have placed Plaintiff at risk of serious physical injury or the type of harm that V.B. alleges.

Counsel for J.A. argues that neither of the Districts allege that name calling constitutes a specific common law tort for which they can seek indemnification or contribution because mere name-calling without any physical assault or injury is wholly insufficient to sustain a claim of negligence. Counsel argues that the "Zone of danger" rule permits recovery in the absence of physical contact where there are purely emotional damages and where the Plaintiff suffers "fear of immediate personal injury." Counsel argues that V.B. did not suffer fright from a reasonable fear of immediate personal injury. Counsel argues that Titus is distinguishable, as J.A. never touched V.B.

Counsel for T.M. argues that there is no proof that T.M.'s parents negligently supervised their son/daughter. It argues that the mere existence of an incident causing injuries is not alone sufficient to authorize an inference of negligence. Long v. Landy, 35 N.J. 44 (1961). It argues that the Facebook post was posted by T.M.'s sibling.

Counsel for C.W. argues that the Court should employ a summary judgment standard. There are no allegations that V.B. was assaulted or that C.W. attempted to assault V.B. so as to place him/her in fright from a reasonable fear of immediate personal injury. Falzone v. Busch, 45 N.J. 559 (1965). Counsel for C.W. further argues that under New Jersey's Joint Tortfeasors Contribution Act, the term "joint tortfeasors" means "two or more persons jointly or severally liable in tort for the same injury to person or property." N.J.S.A. 2A:53A-1. Thus, while there may be contribution for joint liability, even though the wrongs may not be common or concurrent, Neveroski v. Blair, 141 N.J. Super. 365, 385 (App.Div.1976), the statute makes clear that liability must be made for the "same injury." Where the pleadings show separate torts, severable as to time and breaching different duties, rather than a joint tort, dismissal of the third-party action is appropriate. Tesch v. United States, 546 F. Supp. 526, 530 (E.D.Pa.1982); Finderne Management Co., Inc. v. Barrett, 355 N.J. Super. 197, 208-209 (App.Div. 2002).

J.B. cross moves to dismiss. Counsel for J.B. argues that "[a]s a general proposition, a claim of contribution pursuant to the Joint Tortfeasors Contribution Act...necessitates a showing that the party from whom contribution is sought is liable for at least some measure of Plaintiff's alleged

damages.” Indeed, while the Act provides a procedural mechanism by which to obtain an allocation of fault among joint tortfeasors, it is fundamental that a legally viable cause of action is an essential prerequisite to asserting a claim of contribution. “Miraglia v. Miraglia, 106 N.J. Super. 266, 270 (App. Div. 1969). J.B. argues that the text message sent to V.B. was sent to multiple people and did not include a specific threat against V.B. J.B. further argues that repeated name calling is not the type of outrageous conduct to give rise to a claim of intentional infliction of emotional distress. Taylor, supra, 152 N.J. at 509; 49 Prospect St. v. Sheva Gardens, Inc., 227 N.J. Super. 449, 472 (App. Div. 1988); Farrell v. Toys R Us, Inc., 2012 WL 4069515, at *9 (App. Div. 2012).

Counsel for D.W. argues that every employee of Flemington Raritan testified that there was never another incident with D.W. aside from the incident in 7th grade gym class where D.W. allegedly threw balls at V.B.’s groin. Counsel further argues that V.B. alleges that his injuries are the result of 8 years of continued alleged bullying. Therefore, counsel argues, the gym class incident is not directly attributable to harm suffered by V.B.

Counsel for C.K. argues that V.B. confirmed to Mr. Cooley that he did not feel threatened by C.K.’s alleged name calling in the hallways although he previously informed the principal that he felt threatened. Counsel for C.K. argues that contribution can only be sought for an identical injury. Where the pleadings show separate torts, a dismissal is appropriate.

Counsel for J.Me. argues that the Plaintiffs failed to exhaust all administrative remedies under Title 18A. The District’s claims fail as they were not filed within the 2 year statute of limitations. Spilling pasta on someone is not outrageous.

Counsel for C.E. provided opposition papers the day after the return date and did not attend the oral argument.

ANALYSIS

I. Standard of Review

The Districts argue that the level of culpability of the Third Party Defendant minors is irrelevant for the motion and that all that is needed is some evidence of alleged conduct. They argue that prima facie means “first look” or “on its face” and that the Court must look at all of the evidence, giving all favorable inferences to the movant, to see if there can be a judgement sustained in favor of the movant.

The Third Party Defendants do not agree on the standard of review. Some propose the standard governing motions to dismiss. Others propose a summary judgment standard; while some argue that the motions must be denied regardless of what standard the Court chooses to employ.

The Joint Tortfeasors Contribution Act requires a showing that the party from whom contribution is sought is liable for at least some measure of a plaintiff’s alleged damages. N.J.S.A. 2A:53A-3. While the Act provides a procedural mechanism by which to obtain an allocation of fault among joint tortfeasors, it is fundamental that a legally viable cause of action is an essential prerequisite

to asserting a claim of contribution. Indeed, the Act defines “joint tortfeasors” as “two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.” Miraglia v. Miraglia, 106 N.J. Super. 266, 270 (App. Div. 1969).

Comment b of the Restatement (Second) of Torts § 5 is instructive. Restatement (Second) of Torts § 5, comment. b. That a defendant is “subject to liability” is not the equivalent of “saying that the conditions stated are such as, if proved, will make him “prima facie liable.” While the facts may clearly show that a defendant is “subject to liability”, the defendant may escape for one of two reasons, such as the conduct was not the legal cause of the alleged harm or the plaintiff had precluded himself from recovery through his or her own contributory negligence. “Thus, where a particular privilege is a matter to be alleged and proved by way of affirmative defense, the mere proof of an act which but for the privilege would name the defendant liable is sufficient to establish a “prima facie case.”” Id.

While the Districts are correct that “[t]he evidentiary burden at the prima facie stage is rather modest” Marzano v. Computer Science Corp., 91 F.3d 497, 508 (3d Cir.1996), “not onerous” and “easily made out”[,], Massarsky v. Gen. Motors Corp., 706 F.2d 111, 118 (3d Cir.) “negligence must be proved and will never be presumed.” Buckelew v. Grossbard, 87 N.J. 512, 525 (1981).

The Districts must demonstrate that the alleged conduct satisfies the elements of a cause of action such that they should be permitted to pursue them as joint tortfeasors and to engage in discovery against them. A prima facie case is made upon the evaluation of “any evidence including all favorable inferences to be drawn therefrom which could sustain a judgment in plaintiff’s favor...dismissal is appropriate when no rational jury could conclude from the evidence that an essential element of the plaintiff’s case is present....the judicial function on a motion for an involuntary dismissal under this rule is quite a mechanical one. The trial court is not concerned with the worth, nature, or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the [movant here.]” Pressler, Current N.J. Court Rules, comment 2.1 on R. 4:37-2(b) (2015). Ordinarily, the motion for a prima facie case should be granted if the case “rests upon the credibility of a witness.” Id. citing Ferdinand v. Agricultural Ins. Co. of Watertown, N.Y., 22 N.J. 482 (1956).

The Court’s opinion dated March 21, 2015 directs that at the time, very little discovery existed. The Court merely decided that the Third Party Defendant minors and their parents could be “subject to liability” and that contribution *could* be available. The Court, through a Case Management Order dated April 28, 2014 directed that discovery of the Third Party Complaint be held in abeyance until the Third Party Plaintiffs have successfully demonstrated a prima facie case. The reasoning behind this was to allow for an evaluation of the evidence presented by the primary parties to see if any cause of action, as to the minors and their parents, could be sustained as a matter of law. This would reduce the burden upon the Third Party Defendants from engaging in discovery concurrent with the primary parties and conserve judicial resources. If, upon the prima facie motions, the Districts claims survive as cognizable under the law, then discovery of the Third Party Complaint be conducted.

The Districts’ moving papers baldly argue that the allegations and “discovery obtained to date demonstrates a prima facie case of *tortious conduct* by each minor third party Defendant...”

(Hunterdon Central, Brief in Support, p. 4) Not one specific tort, nor any element of any tort, is mentioned by either District in their direct moving papers. Only upon the Third Party Defendants' opposition to the failure of the Districts to allege actual claims, do the Districts then "describe in greater detail...prima facie claims for multiple causes of action against each third party Defendant..." In their replies and at Oral Argument, the Districts argued that although over 2,000 pages of discovery has been exchanged between the primary parties, that a lack of discovery has frustrated their ability to allege with specificity any individual tort. They further argue that it is "premature for the Third Party Defendants to demand a specific cause of action." (Hunterdon Central, Brief in Reply, p. 12; Flemington-Raritan, Brief in Reply, p. 10. 25). Flemington-Raritan only addresses Negligence, Assault, Battery, and Negligent and Intentional Infliction of Emotional Distress in their Reply Brief. Hunterdon Central, in addition to those torts, addresses the tort of Defamation.

Comment 1 to New Jersey Court Rule 4:5-2 provides that "...a pleading must allege sufficient facts as give to rise to a cause of action; mere conclusions and an intention to rely on discovery are inadequate." (Cmt. 1, Rule 4:5-2, citing Glass v. Suburban Restoration Co., 317 N.J. Super. 574, 582 (App. Div. 1998)). The Court will therefore analyze whether Districts have made a prima facie case as to the the torts addressed within their reply briefs and at oral argument.

II. Whether the Third Party Complaint is Cognizable

The Court's opinion dated March 12, 2014 directs that "under the principles of joint liability,...the negligent supervisor could obtain contribution from those they failed to supervise when they are both responsible for the same harm." Judge Ciccone, letter op., March 12, 2014, p. 11.

The Anti-Bullying Act seeks to prevent disruptive or violent behaviors and foster a civil and safe learning environment "necessary for students to learn and achieve high academic standards[.]" N.J.S.A. 18A:37-13. The Act directs districts to adopt policies concerning harassment, intimidation or bullying. N.J.S.A. 18A:37-15. However, the Act "does not create or alter any tort liability[.]" N.J.S.A. 18A:37-18. Whether the Plaintiffs can assert an affirmative duty on behalf of the Districts to prevent bullying, despite § 37-18, though the word "shall" with §37-15.2 is not presently before the Court.

Plaintiff's presumed liability of the Districts for violations of the Anti-Bullying Act are couched in their alleged breach of a presumed statutory duty to *prevent and reduce* the bullying. State of New Jersey, 210th Legislature, Assembly No. 1526, Bill Statement, (2002). The resulting harm is bullying that allegedly manifested itself as emotional non-economic damages. The Districts' Third Party Complaint against the students seeks contribution and indemnification for the alleged bullying. As the Districts seek contribution for harm that is identical to the harm caused by their failure to prevent the bullying, the contribution claim is cognizable. Therefore, the Third Party Complaint is cognizable if the Plaintiff is awarded damages for violations of the Anti-Bullying Act.

On the other hand, the LAD provides that

All persons shall have the opportunity to ... obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation ... without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, nationality, sex or source of lawful income used for rental or mortgage payments. . This opportunity is recognized as and declared to be a civil right. N.J.S.A. 10:5-4.

The Supreme Court of New Jersey in L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ., 189 N.J. 381, 401 (2007) held that “the LAD permits a cause of action against a school district for student-on-student harassment based on an individual’s perceived sexual orientation *if the school district’s failure to reasonably address the harassment has the effect of denying any student any of a school’s accommodations, advantages, facilities or privileges.*” Id. at 402 quoting N.J.S.A. 10:5-12(f) (internal quotations omitted, emphasis added).

The Plaintiff’s presumed liability of the Districts for violations of the LAD is couched within a failure to *accommodate* the student resulting in an *effective denial* of the school’s advantages, facilities or privileges. The Districts’ Third Party Complaint against the students seeks contribution and indemnification for the alleged bullying. The Districts do not and cannot allege that the students cooperated in the Districts’ failure to accommodate the disability of V.B. as the students do not have the authority or the required supervisory capacity to administratively accommodate V.B. within the walls of the school. Therefore, the harm for which the Districts seek contribution is different and the contribution claim for the District’s presumed liability to the Plaintiff under the LAD is not cognizable.

Accordingly, the District’s Third Party Complaint for contribution and indemnification is only cognizable for the liability sought based upon violations of the Anti-Bullying Act. Therefore, contribution and indemnification sought by the Districts with respect to the Plaintiff’s count for violations of the LAD is untenable.

III. Whether Hunterdon Central Can Seek Contribution for Acts Allegedly Committed by Students Within the Walls of Flemington-Raritan

Hunterdon Central argues that it has a right of contribution from each of the Third Party Defendants regardless of when the alleged harassment took place, as the residual effects of that bullying contributed to V.B.’s alleged damage. It further argues that V.B. would not have a claim against Hunterdon Central for failing to modify V.B.’s curriculum once he was diagnosed with Anorexia Nervosa, if not for each one of the alleged earlier harassments. (Hunterdon Central, Brief, p. 4) Hunterdon Central essentially argues that it has a claim against a tortfeasor who proximately caused the disability of a child who years later is damaged by a failure to accommodate that exact disability.

This argument fails because the Plaintiffs can only premise liability of Hunterdon Central based on acts committed or not committed by Hunterdon Central. Plaintiffs cannot allege that Hunterdon Central violated the LAD and Anti Bullying Act while the students were at Flemington Raritan. Hunterdon Central can only be liable for *its* violations of the alleged statutory duties. Therefore, it

does not need to seek indemnification for alleged damages of V.B. that were proximately caused by Flemington-Raritan's alleged breaches of alleged statutory duties.

Moreover, as detailed above, if Hunterdon Central is liable for its failure to accommodate V.B.'s disability, no contribution can be premised upon the minor Third Party Defendants because their alleged acts caused a different harm. That the Plaintiff's alleged damages manifested as the same or similar emotional non-economic damages is immaterial, as the harm for a failure to accommodate is different than harm from bullying. Therefore, that V.B.'s anorexia was allegedly caused by both past bullying and then present bullying within the walls of Hunterdon Central is irrelevant.

Accordingly, Hunterdon Central cannot seek indemnification and contribution based on alleged acts that took place within Flemington-Raritan.

IV. Whether the Districts have stated a claim for any common law tort

a. Intentional Infliction of Emotional Distress

To set forth a claim for Intentional Infliction of Emotional Distress ("IIED"),

the plaintiff must establish intentional and outrageous conduct by the defendant, proximate cause, and distress that is severe....Initially, the plaintiff must prove that the defendant acted intentionally and recklessly. For an intentional act to result in liability, the defendant must intend both to do the act and to produce emotional distress. Liability will also attach when the defendant acts recklessly in deliberate disregard of a high degree of probability that emotional distress will follow. Buckley v. Trenton Sav. Fund Soc., 111 N.J. 355, 366 (1988) (citing Hume v. Bayer, 178 N.J. Super. 310 (Law Div. 1981), Restatement (Second) of Torts §46 comment. d, and M. Minzer, Damages in Tort Actions, vol. I, § 6.12[4] at 6-49 to 6-50 (1987) (Minzer)) (internal citations omitted).

The law requires that a defendant's alleged conduct be both "extreme and outrageous." Id. The required conduct must be "something more than that which is merely offensive[.]" Piantadosi v. Public Serv. Elec. & Gas Co., 2011 N.J. Super. Unpub. LEXIS 2034, *37, 2011 WL 3177318 (App. Div. July 28, 2011) The conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community...[and] so severe that no reasonable man could be expected to endure it." Buckley, supra, 111 N.J. at 366, (citing Hume v. Bayer, 178 N.J. Super. 310 (Law Div. 1981), Restatement (Second) of Torts §46 cmt. d.). Our courts have held that it is

not enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice" or a degree of aggravation which would entitle the plaintiff for punitive damages for another tort.....The liability clearly

does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities...There is no occasion for the law to intervene in every case where someone's feelings are hurt. Restatement (Second) of Torts, §46 comment. d (1965).

While the severity of the alleged emotional distress is a matter of "both law and fact", whether the alleged conduct reaches the "extreme and outrageous" threshold is a matter of law: "By circumscribing the cause of action with an elevated threshold for liability and damages, courts have authorized legitimate claims while eliminating those that should not be compensable." Buckley, *supra*, 111 N.J. at 367.

Although the Supreme Court did not reach the issue of whether the defendant bank's wrongful dishonor of a check tendered by an allegedly aggrieved plaintiff was sufficiently extreme and outrageous not tolerable within a civilized society, the Supreme Court in Buckley endeavored to "balance the rights of the bank and its customers" to determine whether the emotional distress was sufficiently "severe." *Id.* at 368.

The Districts fail to present, and after a diligent search, the Court has failed to find a *single* authority, within or outside of the Third Circuit or the Superior Court of New Jersey, finding liability of a *child* for any infliction of emotional distress. The Eastern District of New York has held that an *adult employee* defendant's "provocative" touching, unwanted hugging, unsolicited spankings, offensive remarks, following of the plaintiff, and repetitive pinching where marks were left on the plaintiff's body "fell well short of the substantial threshold required as a matter of law to show outrageous conduct." Clarke v. UFI, Inc., 98 F. Supp. 2d 320, 328 (E.D.N.Y. 2000).

The Eastern District of Pennsylvania has held that an offending employee's "acts of sexual harassment" including touching, grabbing and pinching of the "plaintiff's groin, nipples, buttocks and genitals", eavesdropping under the stalls when the plaintiff would go to the bathroom, creeping up behind the plaintiff, thrusting of his hips against the plaintiff's buttocks, and simulations of sexual acts were egregious and constituted outrageous conduct, in light of the fact that the defendant employer failed to do anything upon the plaintiff's complaint of the conduct. Warmkessel v. E. Penn Mfg. Co., 2004 U.S. Dist. LEXIS 7028, *3, 2004 WL 838133 (E.D. Pa. Mar. 19, 2004).

The Court is well aware, that "danger lies in the arbitrary enforcement of this tort. In particular, factfinders may confuse outrageous conduct with unpopular [conduct] so that fear of tort judgments might chill constitutionally protected (or at least socially important) behavior." John J. Kircher, The Four faces of Tort Law: Liability for Emotional Harm, 90 MARQ. L. REV. 789, 803 (2007) citing and quoting Daniel Givelber, The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct, 82 COLUM. L. REV. 42, 51-53 (1982). Therefore, IIED is sufficiently alleged in four common categories: (1) an abuse of

a position of power"; (2) emotionally harming a plaintiff known to be especially vulnerable; (3) repeating or continuing conduct that may be tolerable when committed once but becomes intolerable when committed numerous times; and (4)

committing or threatening violence or serious economic harm to a person or property in which the plaintiff is known to have a special interest.” Id. citing Dan B. Dobbs, The Law of Torts, 824, 827 (2000).

The Supreme Court of New Jersey detailed that while mere, picayune insults or racial epithets spoken on the street “must be tolerated in our rough-edged society”, racial epithets spoken in the workplace will not be tolerated where the “power dynamics of the workplace contribute to the extremity and the outrageousness of [a high ranking official’s] conduct.” Taylor v. Metzger, 152 N.J. 490, 511 (1998). The District Court of New Jersey has held that sexist comments, although “rude and inappropriate” are “insufficient to establish the extreme and outrageous element of an intentional infliction of emotional distress.” Bodnar v. Imagistics Int’l, Inc., 2006 U.S. Dist. LEXIS 12439, *19, 2006 WL 758306 (D.N.J. Mar. 20, 2006). Nor are invasive personal comments such as “your panties are showing”, “I can see the prints of your privates” or “are you wearing your daughter’s clothes” the kind to lead to liability of emotional distress. Marrero v. Camden Cty. Bd. of Social Serv., 164 F.Supp. 2d 455, 480 (D.N.J. 2001).

Third Party Defendants similarly argue that premising liability upon children whose actions began when they were 11 or 12 for even repetitive name calling or alleged non-stop taunting would be contrary to public policy.

The Court agrees and finds that, as a matter of law, the alleged acts, taken with all inferences to the Plaintiff, do not constitute outrageous conduct. While the Court certainly sympathizes with the Plaintiff, it cannot find that mere insults such as the name calling, although alleged to be overly repetitive and annoying, routine poking on the Plaintiff’s sides, repeated insinuations that he was a homosexual, the onetime throwing of food, the exposing of the Plaintiff’s genitals and buttocks on two occasions, and the aiming of dodgeballs at the Plaintiff’s groin. Pursuant to Clarke, supra, 98 F. Supp. 2d at 328, each of these actions fall short of the mark, even if the minor Third Party Defendants had effectuated these actions as an *adult employee*. The alleged touchings do not amount to any sort of personal contact similar to caressing, grinding, bruising, thrusting or pinching of the Plaintiff’s groin or nipples. That the Third Party Defendants may have acted with malice to allegedly humiliate or embarrass V.B. does not alter the Court’s finding.

Moreover, although it can be said that “a pattern of grossly abusive, threatening and degrading conduct...” could form the basis for a finding of outrageousness, Gte Southwest v. Bruce, 998 S.W.2d 605, 613 (Tex. 1999), it would be illogical and unfair to do so when there is more than one actor involved in the conduct; especially when there are eleven *minor* actors and that the alleged acts seem to be uncoordinated and occurring at different time periods and for different durations (i.e., V.B. had no problems with D.B. in 5th, 7th, 8th grades or in high school, while C.W. engaged in name calling in the 5th, 6th, and 8th grades; J.Ma.’s conduct only occurred over a duration of two months, etc.).

The Districts zealously argue that Ward v. Zelikovsky, 136 N.J. 516, 529 (1994) stands for the proposition that name calling is actionable as it is “perhaps injurious to a person...” Id. at 529. The statement in Ward does not stretch as far as the Districts argue it does, as the word “injurious” is not a synonym for “actionable”. Therefore, this Court understands this prelude to the Supreme

Court's holding, that name calling does not legally constitute defamation, to mean that while name calling may be hurtful or insulting, it is not actionable.

The Court also must balance the rights and interests of students within a school setting. Buckley, *supra*, 111 N.J. at 367. As argued by Counsel for J.Ma., "children are not just small adults." Children indeed "have a known proclivity to act impulsively without thought of the possibility of danger...it is precisely that lack of mature judgment which makes supervision so vital." Jerkins v. Anderson, 191 N.J. 285, 294-95 (2007). The Court, as a matter of law, finds that name calling, abusive language, the coining of the term "pickle-f***er", the exhaustion of the words "lardo" "fattie" and "fa**ot" by 11 and 12 year olds, even into their teenage years, cannot be deemed so outrageous to allow for personal liability, especially in light of the Legislature's intention to place a responsibility to curtail bullying and offensive conduct on educators. State of New Jersey, 210th Legislature, Assembly No. 1526, Bill Statement, (2002). Doing so would certainly unreasonably curtail the First Amendment rights of children over the age of 7. John J. Kircher, *supra*, 90 MARQ. L. REV. 789, 803 (2007).

The Court similarly finds that the sending of a text message to be forwarded to multiple people with a zombie-like image constitutes, if anything, a minor annoyance, not outrageous in nature and not something that must not be tolerated within a civilized society. In fact, the exchange of chain text messages is sometimes an invited activity.

Notwithstanding the fact that authority supports the finding that the alleged conduct is not outrageous in character, even if carried out by an adult, allowing this conduct to become actionable is contrary to public policy. If the Court were to permit liability to be placed upon a child, it would be substituting itself for the school and the parents. The Supreme Court of the United States has held that right of a parent to rear its child is indeed fundamental. Paris Adult Theatre v. Slaton, 413 U.S. 49, 65 (1973); Carey v. Population Science Int'l, 431 U.S. 678, 684-86 (1977).

While the actions of the minor Third Party Defendants are inexcusable and may constitute moral wrongs, a determination of that kind is irrelevant to the Court. The Court is only tasked with evaluating legal wrongs. That the conduct of the minors might be deserving of discipline is not a determination to be adjudicated by the Judiciary.

Accordingly, absent a finding that the actions constitute outrageousness not to be tolerated within a civilized society, the Districts' allegations fail to establish prima facie case for IIED: "[C]ases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous." Restatement (Second) of Torts, §46, cmt. d (1965) (citations omitted).

b. Negligent Infliction of Emotional Distress and Negligence

A claim for Negligent Infliction of Emotional Distress ("NIED") "involves traditional concepts of duty, breach and causation." Williamson v. Waldman, 150 N.J. 232, 239 (1997) citing Caputzel v. the Lindsay Co., 48 N.J. 69, 74-75 (1966). An individual may maintain a tort action for NIED by establishing that the defendant's conduct placed the plaintiff in a "reasonable fear of immediate personal injury" which gives rise to emotional distress that results in "substantial bodily injury or

sickness” or by stating a bystander claim for NIED based on Portee v. Jaffee, 84 N.J. 88 (1980). Jablonowska v. Suther, 195 N.J. 91, 103 (2008).

Determining the scope of tort liability has traditionally been the responsibility of the courts. The actual imposition of a duty of care and the formulation of standards defining such a duty derive from considerations of public policy and fairness. [The court] must carefully restrain from treating questions of duty in a conclusory fashion, recognizing that whether a duty exists is ultimately a question of fairness. Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993) citing Kelly v. Gwinnell, 96 N.J. 538, 552 (1984); quoting Weinberg v. Dinger, 106 N.J. 469, 485 (1987) (internal quotations and citations omitted).

Tort law “depends on whether defendant owed a duty of care to the plaintiff, which is analyzed in terms of foreseeability.” Decker v. Princeton Packet, Inc., 116 N.J. 418 (1989). Likewise, “the emotional distress must be reasonably foreseeable.” Williamson, *supra*, 150 N.J. at 240. Foreseeability regards “the knowledge of the risk of injury to be apprehended. The risk reasonably to be *perceived* defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account determining the existence of the duty to exercise care.” Hill v. Yaskin, 75 N.J. 139, 144 (1977) (emphasis added) quoting Leon Green, Rationale of Proximate Cause (1927); See, Palsgraf v. Long Island R.R. Co., 248 N.Y. 339 (1928).

The standard of care for children embodies the notion that “the younger the child, the greater the risk, for younger children are less able- and less likely- to discern danger.” Jerkins, *supra*, 191 N.J. at 295 citing Bush v. N.J. & N.Y. Transit Co., 30 N.J. 345, 355 (1959). While children under seven are “protected by a rebuttable presumption that they are incapable of negligence[,]...[a]bove this seven-year-old line of demarcation, our law applies a fact-sensitive and context-specific approach, examining the age and other characteristics of the defendant minor, and the surrounding circumstances.” C.J.R. v. G.A., 438 N.J. Super. 387, 397 (App. Div. 2014). Of important consideration is the child’s “child’s *capacity to understand and avoid the danger* to which he was exposed in the actual circumstances and situation in this case.” New Jersey Model Jury Charge, 7.11A (emphasis added).

Whether the alleged harm was perceived or the risk discernable by a defendant is a matter of law. Decker v. Princeton Packet, Inc., 116 N.J. 418, 431 (1989) (that “any serious and substantial distress on the part of Ms. Decker and her family” was not “particularly foreseeable... dictate[d] rejection of the claim for the negligent infliction of emotional distress ...as a matter of law.”)

In other words, as a matter of law, the Court must analyze whether the emotional distress allegedly suffered by V.B. was reasonably foreseeable where the minor Third Party Minor Defendants were able to perceive, discern, understand and/or comprehend the such danger and risk.

Not one authority holding a child liable for emotional distress was presented by the parties, nor discovered by the Court. However, the Supreme Court has instructed that “a child’s conduct should be measured in light of his or her capacity to exercise care under all attendant circumstances.” Berberian v. Lynn, 179 N.J. 290, 298 (citing Cowan v. Doering, 111 N.J. 451, 459 (1988)).

That sentiment is echoed by the Supreme Court of Michigan's holding in Fire Ins. Exch. v. Diehl, 450 Mich. 678 (1996), which sheds light on this issue. There, the defendant's insurer sought a declaratory judgment that it had no obligation to defend the defendant in a different action alleging, *inter alia*, that the minor defendant "forced the female child victim to perform fellatio on him" on numerous occasions, on the basis that the insurer had no obligation to defend intentional acts. *Id.* The court held that Michigan's "intent to injure" presumption placed on adults who sexually abuse children did not apply to the minor defendant, who was 6 or 7 years of age at the time of the first incident and 9 at the time of the second incident. *Id.* at 689-90. It directed that "[b]ecause of a child's developmental status, it is likely that many minors may be exposed to aspects of sexual activity, attempt to experiment with such activity, and yet not have the capacity to understand the consequences of their sexual acts[,] nor do they perceive the harm. *Id.* at 690-91. The acts undertaken by the 9 year old minor defendant is much more pervasive than the actions alleged in this case, which amount to name-calling in person, poking and pinching V.B.'s sides, pulling down his pants exposing his genitals on two occasions, throwing food at him on one occasion, and aiming dodge balls at his groin on one occasion.

The Court finds that as a matter of law that the adolescents did not perceive the risk that V.B. could or would suffer emotional injury in the form of an exacerbation, continuation or worsening of his pre-existing depressive and eating disorders that began in the 3rd grade. (Eppinger cert., Plaintiff's Expert Report, p. 7, ¶ 2). The Court agrees with the Third Party Defendants that the danger to be discerned here- development of an eating disorder or depressive disorder- is not so readily discernable and requires a certain maturity and sensibility to appreciate it. As no duty was owed, liability for negligence or NIED cannot lie.

Accordingly, the Court finds that the Districts have failed to establish a *prima facie* case against any of the Third Party Defendants for the tort of Negligence nor NIED.

c. Defamation

"The law of defamation exists to achieve the proper balance between protecting reputation and protecting free speech. The threshold inquiry in a slander lawsuit is "whether the language used is reasonably susceptible of a defamatory meaning." Ward v. Zelikovsky, 136 N.J. 516, 528 (1994) citing Kotlikoff v. Community News, 89 N.J. 62, 67 (1982). The Restatement (Second) of Torts § 559 directs that a defamatory statement is one that "tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.* (internal citations omitted.) "Whether the meaning of a statement is susceptible of a defamatory meaning is a question of law for the court. *Id.* citing Kotlikoff, *supra*, 89 N.J. at 67. To successfully prove defamation, the plaintiff must establish that the utter or publisher of the statement concerning the plaintiff was communicated to a person other than the plaintiff and was false. Gray v. Press Communications, LLC, 342 N.J. Super. 1, 9 (2001).

The Court must consider the verifiability, the context and the content of the statement. *Id.* A threshold issue is whether the language utilized is "reasonably susceptible of a defamatory meaning." Gray, *supra*, 342 N.J. Super. at 9. Where a statement is capable of more than one

meaning, where one meaning is defamatory, the question of whether the statement is defamatory is an issue of fact. Id.

Regarding content, the Court begins its review by examining the plain meaning to be understood by a reasonable person of ordinary intelligence. Ward, supra, 136 N.J. at 529, citing Romaine v. Kallinger, 109 N.J. 282, 290 (1988). “[N]ame calling does not have a defamatory content such that harm to reputation can be shown [as] [t]he First Amendment does not embrace the trite wallflower politeness of the cliché that if you can’t say anything good about a person you should say nothing at all.” Ward, supra, 136 N.J. at 529. Epithets, abusive language, name calling, vulgarities or obnoxious statements, although insulting, are not actionable. Id.

The issue of verifiability regards the truth of the statement and whether it was an opinion. If the statement is not verifiable, the speaker will not be held liable for a statement that he or she could not know was false. Therefore, opinion and truthful statements are given “substantial protections under the law[, as] there is no such thing as a false idea.” Id. at 530, quoting Gertz, supra, 418 U.S. at 339. However, an opinion statement is redressable when it implies “underlying facts that are false.” Id. at 531, citing Milkovich, supra, 497 U.S. at 18.

Regarding context, the Court must consider the “impression created by the words used as well as the general tenor of the expression as experienced by a reasonable person.” Id. at 532. (internal citations omitted.)

An additional “component of a statement’s defamatory nature—and thus an element of a prima facie case- if that plaintiff must have been harmed by the alleged defamation.” McLaughlin v. Rosanio, Bailets & Talamo, 331 N.J. Super. 303, 313 (App. Div. 2000) citing Ward, supra, 136 N.J. at 539-42; Rocci v. Ecole Secondaire MacDonald-Cartier, 323 N.J. Super. 18, 23-24, 731 A.2d 1205 (App. Div. 1999). The plaintiff

must raise a sufficient question of fact as to actual injury to his or her reputation. For example, a plaintiff must adduce “concrete proof” that third parties lowered their estimation of the plaintiff and that he or she suffered emotional or pecuniary harm as a result. It is not sufficient that the plaintiff’s own feelings were hurt or that he or she suffered embarrassment. Rather, the focus is on the effect of the alleged defamatory statement on third persons, that is, whether they viewed the plaintiff in a lesser light as a result of hearing or reading the offending statement. Id.

The damages element of the prima facie case is waived “when the defamation is oral and can be categorized as slander per se.” Id. Only four types of statements constitute slander per se: an accusation that another committed a criminal offense, engaged in serious sexual misconduct, had a loathsome disease, or engaged in conduct incompatible with his or her occupation or business. Id.

When a plaintiff establishes the publication or utterance of a qualifying statement, to make out a prima facie case the plaintiff must then show that the defendant was at fault in publishing or uttering the statement. Id. citing Feggans, supra, 291 N.J. Super. at 391. “If the plaintiff is a private

person, he or she need only show that the defendant was negligent[,]” rather than that they acted with actual malice. Id. at 314.

Here, it is alleged that the adolescent Third Party Defendants called V.B. “tightey whites”, “pickle f***er”, “gay”, a “f***ot”, a “fag”, a “poseur”, “lardo”, “flubber”, “caveman”, asked if his parents were suing the school, told him that he walked “funny” and told other jokes pertaining to weight and sexuality.

i. Homosexuality statements

The content of the comments concerning the Plaintiff’s homosexuality can be interpreted by a reasonable person who overheard the comment to mean that V.B. was a homosexual. The Appellate Division has held that “a false accusation of homosexuality is reasonably susceptible to a defamation meaning.” Gray, supra, 342 N.J. Super. at 10. The statement is potentially verifiable as V.B. is either a homosexual or not. The Plaintiff alleges that the minor Third Party Defendants uttered the statements in a context to embarrass or shame V.B.

While the allegation regarding the Facebook comment was made against T.M., the actual comment was posted by his sibling, who is not a party to the action. Accordingly, that allegation cannot be attributed to T.M.

Whether the statements were false cannot be discerned from the deposition transcripts. V.B., dep., T2:111:9-12; T6:206:20-207:8; T6:209:6-9; T217:9-15; T5:78:4-11; 167:18-168:7.

However, V.B. and the Districts have failed to offer any proof, let alone “concrete proof”, that the Third Party minors lowered the estimation of V.B. within the community. It is not sufficient that V.B.’s feelings were hurt or that he suffered embarrassment. Neither V.B. nor the Districts have set forth information that any third party viewed the Plaintiff in a lowered estimation.

The damages requirement is not waived although the statements were made orally. Damages are presumed and do not have to be proven only when the statement is oral and the statement constitutes slander per se. Here, comments about V.B.’s sexuality do not consist of an allegation that V.B. committed a criminal offense, engaged in serious sexual misconduct, have a loathsome disease, or committed an act incongruent with his profession.

ii. Statements regarding V.B.’s weight

No other meaning can be given to a comments made regarding V.B.’s perceived weight. The content of the comments are indeed uttered to define V.B. as overweight. However, words defining weight are not verifiable, as thoughts regarding one’s or another’s weight, while maybe objective, are also subjective and certainly qualifies as opinions that are not actionable. Ward, supra, 136 N.J. at 529.

Moreover, as comments regarding V.B.’s weight do not constitute slander per se, the Districts are required to set forth evidence of damage. V.B. and the Districts have not set forth any evidence

satisfying the damages requirement. They have failed to offer any “concrete proof” that third persons lowered their estimation of V.B. after overhearing the alleged comments.

iii. Other comments

The alleged insult of “poseur” is a statement of opinion and not verifiable. It therefore cannot qualify as a defamatory statement.

The name “caveman” is a mere insult. V.B. understood that the Third Party Defendants called him caveman because he had “hairy legs” and long hair. V.B., dep., T2:80:11-81:1; T2:85:7-13. Therefore, the context of the comments cannot be interpreted to mean that V.B. *literally* lived in a cave. Moreover, the movants have failed to offer any concrete evidence that any third parties lowered their estimation of V.B. upon the hearing of the alleged “caveman” comment.

V.B. testified that the nickname of tightey whites began when his underwear were exposed during the “pantsing” incident. V.B., dep., T1:271:9-273-16. He testified that he “had tightey whites on.” Id. As V.B. terms his underwear that day as “tightey whites”, the comments do not have a false nature. Furthermore, this is nothing more than a mere insult and further name calling that is not actionable. Movants have again failed to present any evidence that third parties lowered their estimation of V.B. upon hearing V.B. being called “tightey whites”.

The Court finds that these comments made, although undoubtedly embarrassing and frequent, cannot become actionable in light of the Legislature’s preference to place a duty to curb bullying upon school districts. Permitting liability to be placed upon minors who utter schoolyard insults and indignities will undoubtedly lead to a voluminous amount of actions that have no place within a Courtroom. The proper venue to curb this type of behavior starts at home and at school.

Accordingly, the Court finds that the Districts have failed to establish a prima facie case against any of the Third Party Defendants for the tort of Defamation.

d. Assault

Liability for assault will lie if he or she intends to cause an offensive or harmful contact with another or intends to cause an “imminent apprehension of such a contact, and ...the other is thereby put in such imminent apprehension.” Leang v. Jersey City Bd. Of Educ., 198 N.J. 557, 591 (App. Div. 2009) quoting Wigginton v. Servidio, 324 N.J. Super. 114, 129 (App. Div. 1999).

V.B. alleges that on one occasion in 7th grade, D.W. threw various balls at him in gym class. V.B. testified that he tried to “run away from [D.W.] while he was doing it.” V.B., dep., T2:81:8-82:7. Therefore, V.B. alleges imminent apprehension of offensive or harmful contact. V.B. alleges that D.W. intentionally aimed the balls at his person. V.B., dep., T2:81:8-17.

V.B. alleges that while in 6th grade, D.B. and J.Ma. each came up “behind him” and “pants-ed” him on close in time, but different occasions, exposing his genitals and underwear. V.B., dep., T1:272:2-22. As D.B.’s contact with V.B. originated by D.B. “walk[ing] up from behind” him, this cannot constitute an assault as no imminent apprehension of contact is alleged. Similarly, V.B.

testified that he “was not expecting” J.Ma. to then pull his pants down again; thus there is no assault alleged.

V.B. testified that in 6th grade, J.Me. once threw a plate of pasta at him which “went all over his shirt.” V.B., dep., T1:240:9-241:3; T1:243:12-16. V.B. testifies that he saw J.Me. raise his hand with the plate of pasta “in his hand.” V.B., dep., T1:240:9-11. Therefore, the facts support the allegation that V.B. had an imminent apprehension of contact with his person and that such contact was intended by J.Me.

V.B. alleges that he was “tasered” by C.K. beginning in February and March of 6th grade but that it ended in high school. V.B., dep., T1:250:4-15. V.B. alleges that J.Ma began to “taser” him in May of the 6th grade. V.B., dep., T1:256:2-4. Although V.B. alleges that C.K. would “sneak up from behind” him and taser him, it is alleged that C.K. would first whisper “[p]ease out, chubs” before jabbing his fingers into V.B.’s sides. V.B., dep., T1:253:9-16. Therefore, it is possible that V.B. had an imminent apprehension of C.K.’s tasing at the time he would utter a statement to V.B.

V.B. alleges that J.Ma.’s tasing conduct was “silent” where he would “sneak up” on V.B. V.B., dep., T1:256:21-24. V.B. has failed to allege any imminent apprehension of contact by J.Ma.

The Court finds the alleged actions of D.W., J.Me., and C.K. satisfy the elements of the tort of assault, however, given that these acts took place during the 6th and 7th grades, only Flemington-Raritan Regional Board of Education’s sufficiently alleges the prima facie case against these students.

Both Districts have failed to make out a prima facie case of assault against D.B. and J.Ma, and the other students who did not cause any apprehension of imminent contact.

e. Battery

A battery is defined as a “nonconsensual touching.” Leang, supra, 198 N.J. at 591. As discussed above, D.W., D.B., J.Ma., J.Me., and C.K. allegedly caused nonconsensual contact with V.B.’s person beginning in 6th grade but not continuing into High School. Accordingly, Flemington-Raritan has made a prima facie case of battery against these 5 students.

Hunterdon Central’s prima facie case against all of the students fails as no contact is alleged to take place during high school.

V. Whether the Districts’ have asserted a prima facie case against the Third Party Defendant parents

Flemington-Raritan concedes that there is no case against the minors’ parents. It is willing to stipulate a dismissal without prejudice. Hunterdon Central provides allegations for some of the parents but asks the Court to grant its motion as to all of the parents so that discovery can be conducted.

“This emphasis on the responsibility of school officials to maintain school discipline in order to protect immature students from their irresponsible peers is no more than a restatement of the time-honored in loco parentis concept. Such procedure is fundamental to the maintenance of an educational atmosphere and indeed antedates the Fourth Amendment by a good many years.” In re State in Interest of C., 121 N.J. Super. 108, 116 (Juv. & Dom. Rel. Ct of N.J. 1972)

“The law imposes a duty on children to attend school and on parents to relinquish their supervisory role over their children to teachers and administrators during school hours. While their children are educated during the day, parents transfer to school officials the power to act as the guardians of those young wards.” Frugis v. Bracigliano, 177 N.J. 250 (2003).

During oral argument, the Court asked the Districts if there were any allegations as to the minors outside of the school day. The Districts responded in the negative. In response to the in loco parentis argument set forth by the Third Party Defendants, counsel for Hunterdon Central argued that the job of a parent does not end when their child is at school and that the job must be shared by the parents and the school. However, this argument fails to rebut the arguments of the Third Party Defendants that the Districts are responsible for the acts of the child during the school day.

The Supreme Court of New Jersey, in Foldi v. Jeffries, 93 N.J. 533 (1983), directed that parents can only be liable for acts of their children if they “willfully or wantonly failed to watch over his or her child.” *Id.* at 547. However, the Court finds that as a matter of law, the failure to prevent or supervise over a single Facebook posting containing a homosexual slur is not actionable as there is no evidence of a pattern of this behavior by T.M.’s sibling, and since T.M.’s sibling cannot be held accountable for this posting through the law of defamation, as discussed above, even if he were a party to this action.

Accordingly, the Court DENIES the District’s prima facie motions as to the parents.

VI. Conclusion

For reasons stated within this opinion, the Court finds that Hunterdon Central has failed to establish a prima facie case and DENIES Hunterdon Central’s motion. The Court DISMISSES WITH PREJUDICE Hunterdon Central’s Third Party Complaint.

The Court finds that Flemington Raritan has not established a prima facie case for indemnification and contribution for liability it faces on the direct complaint alleging violations of the LAD. The Court DENIES that part of the motion and DISMISSES WITH PREJUDICE Flemington Raritan’s Third Party Complaint that sought indemnification and contribution for any liability that it may face, on the direct complaint, for violation(s) of the LAD.


As for the counts within Flemington-Raritan’s Third Party Complaint that seeks contribution and indemnification for its alleged liability on the direct claim by the Plaintiffs for violations of the Anti-Bullying Act, the Court finds that Flemington Raritan has established a prima facie case for contribution and indemnification for the common law tort of battery *only* as against D.W., D.B., J.Ma., J.Me., and C.K. and for the common law tort of assault against *only* D.W., J.Me., and C.K. The Court GRANTS Flemington Raritan’s motion in that regard.

Flemington Raritan's has failed to establish a prima facie case as to the parents and K.I., C.E., T.M., J.A., C.W., J.B. The Court DENIES the motion in that regard and DISMISSES WITH PREJUDICE the Third Party Complaint with respect to all of the parents and as to K.I., C.E., T.M., J.A., C.W., J.B.

The Court GRANTS K.I. and/or his/her parents' motion to dismiss. The Court also GRANTS J.B. and/or his/her parents' motion to dismiss.

The Court GRANTS IN PART J.Ma. and/or his/her parents' motion to dismiss with respect to the parents, only. The Court DENIES IN PART the motion to dismiss as to J.Ma.

Very Truly Yours,



Hon. Yolanda Ciccone, A.J.S.C.