FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LAURA DePINTO, individually abd [sic] as Guardian Ad Litem of M.D., a minor, and MICHAEL LaROCCO and ROBIN LaROCCO, individually and as Guardians Ad Litem of A.L., a minor,	:	
Plaintiffs,	:	Civil Action No. 06 - 5765 (JAG)
v.	:	**OPINION**
BAYONNE BOARD OF EDUCATION, CATHERINE QUINN, JANICE LORE and PATRICIA McGEEHAN,	:	
Defendants.	:	

APPEARANCES:

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For Plaintiffs Laura DePinto, individually and as Guardian Ad Litem of M.D., and Michael LaRocco and Robin LaRocco, individually and as Guardians Ad Litem of A.L.

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GREENAWAY, JR., U.S.D.J.

This matter comes before the Court on the motion for a preliminary injunction by Plaintiffs Laura DePinto ("DePinto"), individually and as guardian ad litem of M.D., a minor, and Michael and Robin LaRocco (the "LaRoccos"), individually and as guardians ad litem of A.L., a minor (collectively "Plaintiffs"), seeking to enjoin Defendants Bayonne Board of Education ("Bayonne BOE"), Catherine Quinn ("Quinn"), Janice LoRe ("LoRe") and Patricia McGeehan ("McGeehan") from imposing sanctions on M.D. and A.L. for wearing a button to school, featuring a photograph of members of the Hitler Youth. For the reasons set forth below, the motion for a preliminary injunction is granted.

INTRODUCTION

This case is about buttons. Two fifth grade students attending two separate elementary schools in the Bayonne School District (the "District") wore a button to protest the District's mandatory uniform policy (the "Button"). The Button bears the phrase "No School Uniforms" and a slashed red circle. The writing overlays a historical photograph that appears to portray the Hitler Youth. The picture depicts dozens of young boys dressed in the same uniforms and all facing the same direction. There are no visible swastikas or any other definitive indication that the boys are members of the Hitler Youth; however, the parties do not appear to contest that the picture portrays an assemblage of the Hitler Youth.

Following the days on which M.D. and A.L. wore the Button, the District sent identical letters home to each student's parents. The letters stated that "[t]he background images on this badge are considered objectionable[,] are offensive to many Bayonne citizens[,] and do not constitute free speech according to Mr. Kenneth Hampton, attorney for the Bayonne Board of

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Education." (Verified Complaint Exs. B and C.) The letters threatened suspension in the event that M.D. and A.L. wore the buttons again. The parents of M.D. and A.L. filed this suit alleging violation of the First Amendment right of free speech.

DISCUSSION

I. Governing Legal Standards

A. Standard for Preliminary Injunction

The grant of injunctive relief is an "extraordinary remedy, which should be granted only in limited circumstances." Instant Air Freight Co. v. C. F. Air Freight, Inc., 882 F.2d 797, 800 (3d Cir. 1989) (quoting Frank's GMC Truck Center, Inc. v. General Motors Corp., 847 F.2d 100, 102 (3d Cir. 1988)). Generally, in determining whether to grant a preliminary injunction or a temporary restraining order, courts in this Circuit review four factors:

> (1) whether the movant has a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denying the injunction; (3) whether there will be greater harm to the nonmoving party if the injunction is granted; and (4) whether granting the injunction is in the public interest.

Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 252 (3d Cir. 2002) (citing Highmark, Inc. v. UPMC Health Plan, Inc., 276 F.3d 160, 171 (3d Cir. 2001)); see also Continental Group, Inc. v. Amoco Chem. Corp., 614 F.2d 351, 356-57 (3d Cir. 1980) (the four factors listed above are known as the Continental factors).

The applicant must meet its burden on the first two factors before the Court will consider the third and fourth factors. See Reebok Int'l Ltd. v. J. Baker, Inc., 32 F.3d 1552, 1555-56 (Fed. Cir. 1994) ("Because, irrespective of relative or public harms, a movant must establish both a likelihood of success on the merits and irreparable harm . . ., the district court may deny a

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preliminary injunction based on the movant's failure to establish either of these two crucial factors without making additional findings respecting the other factors."). "[C]onsideration of these factors by the district court requires a 'delicate balancing.'" Delaware River Port Auth. v. Transamerican Trailer Transp., Inc., 501 F.2d 917, 920 (3d Cir. 1974). "[T]he district court's grant or denial of a preliminary injunction will be reversed only for an abuse of discretion." Delaware River, 501 F.2d at 920; see also Frank Russell Co. v. Wellington Management Co., LLP, 154 F.3d 97, 101 (3d Cir. 1999) ("A court then balances these four Continental factors to determine if an injunction should issue.").

II. ANALYSIS

A. Reasonable Probability of Success on the Merits

1. Supreme Court Precedent

Since 1988, the basic framework for analyzing First Amendment right to free speech issues within the public school context has been set forth in a trio of cases: Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); and Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988). Most recently, the Supreme Court of the United States revisited this issue in Morse v. Frederick, --- U.S. ----, 127 S. Ct. 2618 (2007).

In Tinker, students protested the Vietnam War by wearing black arm bands. In holding that the school district violated the students right to free speech by prohibiting the use of the arm bands, the Court set forth the test for free speech limitation in schools. A student may not be punished for merely expressing views unless the school has reason to believe that the speech or expression will "materially and substantially disrupt the work and discipline of the school."

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Tinker, 393 U.S. at 513. Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Id. at 506. In Tinker, there was "no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be left alone." Id. at 508. Subsequent Third Circuit precedent makes clear that Tinker requires a "specific and significant fear of disruption, not just some remote apprehension of a disturbance." Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 211 (3d Cir. 2001) (Then Circuit Judge Alito wrote for the Court, holding that a school district's Anti-Harassment Policy was unconstitutionally overbroad under Tinker's substantial disruption test. The Anti-Harassment Policy prohibited, as summarized by the Saxe Court, any speech which satisfied the elements "(1) verbal or physical conduct (2) that is based on one's actual or perceived personal characteristics and (3) that has the purpose or effect of either (3a) substantially interfering with the student's educational performance or (3b) creating an intimidating[,] hostile, or offensive environment." The Third Circuit held that "3a" complied with Tinker, but that "3b" "appear[ed] to cover substantially more speech than could be prohibited under Tinker . . . .").

The Supreme Court refined its Tinker analysis a generation later, in Fraser. In Fraser, the school district disciplined Matthew Fraser, a high school student, for a speech to an assembly of students, teachers, and administrators, in which he persistently referred to an extended sexual metaphor (although no blatantly sexual words were spoken) viewed by the school administrators as lewd. The School District suspended Fraser for three days, and removed him from a list of candidates for speaker at the school's commencement ceremony. Fraser, 478 U.S. at 678. Fraser's Father, as guardian ad litem, brought suit against the school district, alleging violation of

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