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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

CLM, by and through **MICHAEL McNEIL**,
guardian *ad litem*; **MICHAEL McNEIL** and
JULIE McNEIL, individually,

Plaintiffs,

v.

SHERWOOD SCHOOL DISTRICT 88J,
HEATHER H. CORDIE, KEN BELL,
BRIAN BAILEY, PETER MILLER and
GARY BENNETT,

Defendants.

Case No. _____

COMPLAINT
Civil Rights Violations 42 USC §1983 and
Related Tort Claims

INTRODUCTION

1.

This United States constitutional free-speech case presents two basic issues:

- (1) Does the First Amendment permit a school district to expel a student from all educational programs and related school activities and ban the student from school property for any purpose, under

threat of criminal prosecution, where the student, in the privacy of a home bedroom, wrote a hit list in a personal journal which was never revealed, copied, reproduced, disclosed or otherwise communicated in any fashion by the student; was not brought upon school premises nor to a school-related activity; and, was not acted upon in any manner by the student?

- (2) Does the Fourteenth Amendment permit the long arm of a school district to discipline a student for out-of-school, off-campus, non-criminal conduct that does not cause a substantial disruption of school activities?

CLM, by and through Michael McNeil, seeks: a) a declaration that the Sherwood School District, its agents and representatives acted in violation of these constitutional provisions; b) an injunction against the Sherwood School District, its agents and representatives prohibiting retaliation, punishment and further disciplinary action; c) recovery of damages for tortious conduct and violation of civil rights; and, d) expungement from official school records and transcripts of all reference to the expulsion and related disciplinary action. Michael McNeil and Julie McNeil seek recovery of damages for the Sherwood School District's tortious conduct and violation of their constitutionally protected parental rights and prerogatives.

PARTIES

2.

CLM is the minor child of Michael and Julie McNeil and at all times relevant resided in the family home in Sherwood, Oregon, within the boundaries of the Sherwood School District. CLM attended and was regularly enrolled in Sherwood schools beginning in 2002 until expelled,

as set forth hereafter, on September 24, 2014.

3.

Michael McNeil is CLM's father. Mr. McNeil brings this action on behalf of CLM and, individually, in his own name. Julie McNeil is CLM's mother and brings this action in her own name.

4.

Sherwood School District 88J ("SSD") is a political subdivision of the State of Oregon and is organized and operates pursuant to the constitution, statutes and administrative rules of the State of Oregon. SSD is required by federal and state law to provide all children, within its boundaries, a free and appropriate education. SSD may not discriminate against, or otherwise deprive its students and patrons of their civil rights in violation of the United States Constitution.

5.

Heather H. Cordie ("Cordie") serves as Superintendent, Clerk and chief executive officer of SSD. All schools, personnel and departments of SSD serve under her supervision, at her direction and upon her authorization. Cordie is responsible to ensure that SSD and its officials act in conformity with the United States Constitution and applicable state and federal law. At all times herein, Cordie acted under color of law. Cordie is being sued in both her individual and official capacity.

6.

Ken Bell ("Bell") is principal of Sherwood High School ("SHS"). Bell has responsibility for all students and staff at SHS. At all times herein Bell acted under color of law. Bell is being sued in both his individual and official capacity.

7.

Brian Bailey (“Bailey”) is associate principal at SHS. Bailey is delegated responsibility for, among other things, disciplinary matters for 11th grade students at SHS. At all times herein Bailey acted under color of law. Bailey is being sued in both his individual and official capacity.

8.

Gary Bennett (“Bennett”) is the Chief Academic Officer of SSD. Bennett is responsible for curriculum and instructional programs at SSD, including oversight of expulsions. At all times herein Bennett acted under color of law. Bennett is being sued in both his individual and official capacity.

9.

Peter Miller (“Miller”) is a former principal in the SSD now under contract with SSD to act as a hearings officer. Miller was delegated authority from and designated by Cordie to act in her stead to conduct CLM’s expulsion hearing as set forth hereafter. At all times herein Miller acted under color of law. Miller is being sued in both his individual and official capacity.

10.

All actions by and on behalf of the SSD and SHS, as set forth herein, were undertaken under color of state law and pursuant to the policies, customs and practices of the SSD and SHS.

JURISDICTION AND VENUE

11.

This action seeks to vindicate rights protected by the First and Fourteenth Amendments to the United States Constitution and arises under 42 USC §1983. This court may properly award Plaintiffs their prevailing party attorney fees pursuant to 42 USC §1988(b).

12.

This court has jurisdiction of this civil rights cause of action under the provisions of 28 USC §§1331 and 1343(a). This court has supplemental jurisdiction of pendent state law claims under 28 USC §1367(a). This court has jurisdiction pursuant to 28 USC §§2201(a) and 2202 to declare the rights of the parties and to grant such further relief as found necessary and proper.

FACTUAL BACKGROUND

13.

In August 2014 CLM enrolled as an eleventh grade (junior) student at SHS. To that point in time CLM had fully and satisfactorily completed all course work, instruction and requirements for advancement and placement within the SSD. CLM was not subject to any IEP, discipline, or other restricted educational program. CLM had consistently demonstrated outstanding citizenship at school and was on track to graduate from SHS in June, 2016.

14.

On or about September 12, 2014 Mr. and Mrs. McNeil were informed by and received a letter from Bailey, copied to Bell and Cordie, informing them that CLM “was placed on suspension, pending an expulsion hearing, and will not be allowed to return to school.” The letter stated that “[t]he reason for this removal from school was Threats of Violence that have caused a distinct and substantial disruption to the school environment.” Mr. and Mrs. McNeil were told CLM was not allowed on any SSD property nor permitted to attend school-sponsored activities under threat of being prosecuted “for violation of Oregon Criminal Trespass laws (ORS 164.265).” Although, ostensibly, no expulsion decision had been made, Bennett proposed that CLM look for an alternative educational program and they work to “find the proper placement for . . . [CLM’s] education” outside SHS.

15.

On September 15, 2014 Bailey wrote a second letter to Mr. and Mrs. McNeil, copied to Cordie and Bell, confirming his earlier communications and stating “[t]his letter is to provide additional information about the basis for the Principal’s [Bell] recommendation of expulsion. . . . [t]he ‘Hit List’. . . is considered a threat of violence in violation of the Student Code of Conduct. In addition, this threat of violence has caused a distinct and substantial disruption to the school environment.” Again, Bennett proposed alternative educational placement outside SHS.

16.

SSD, through its elected Board of Directors, has adopted and operates under the following policies (hereafter “the Policies”):

“JFC – Student Conduct – . . . Students shall comply with the district’s written rules . . . and conduct themselves in an orderly manner at school during the school day or during school-sponsored activities. . . . A student code of conduct, developed under the leadership of the district administration, . . . will be made available and distributed to parents and students outlining student conduct expectations and possible disciplinary actions, . . . Students in violation of Board policy, administrative regulation and/or code of conduct provisions will be subject to discipline up to and including expulsion.”

“JG – Student Discipline - . . . The superintendent will develop rules, procedures, and standards whereby those students who are disruptive of the educational setting or who endanger the safety of others will receive corrective counseling and/or be subject to disciplinary sanctions. A student whose conduct or condition is seriously detrimental to the best interests of the school may be suspended or expelled in accordance

with administrative procedures and rules established by the superintendent.”

“**JGE – Expulsion** – Only the superintendent or designee and/or the Board has the authority to expel a student according to the provisions of regulations approved by the Board. . . . If as a result of the hearing the superintendent decides to expel the student, the superintendent will so notify the parent and the Board.”

In adopting the Policies the SSD acted under delegated authority pursuant to ORS 332.072, ORS 332.107, ORS 339.240 and ORS 339.250.

17.

Pursuant to the Policies, the SSD published the “Sherwood School District Student Body Handbook” (hereafter, “the Handbook”). The Handbook was reviewed, approved and adopted by Cordie. Cordie instructed all SSD staff, including Bell, Bailey and Bennett to implement and act upon the Handbook. The Handbook contains a section entitled Student Code of Conduct, which provides in pertinent part that, “[o]ff campus conduct and outside of school time conduct that violates the district’s Student Code of Conduct may also be the basis for discipline up to expulsion if it has the *potential* to disrupt or impact the safe and efficient operation of the school or interfere with the rights of others. Students will be subject to discipline . . . for the following, . . . threats of violence or harm; . . .” (Emphasis added).

18.

On September 22, 2014, an expulsion hearing was held for CLM at the direction and under the authority of Cordie with Miller, her designee, presiding. Also present at the hearing were Bell, Bailey, Bennett, CLM, Mr. and Mrs. McNeil and legal counsel. Unrebutted testimony at the hearing established the following:

- a) CLM kept a personal journal in a spiral notebook stored in a bedroom

closet or nightstand at the McNeil residence. In or about May 2014, while in the bedroom, CLM wrote a list of 23 individuals in the journal under the notations “I am God” “My Hit List” and “All these people must die” (the “Hit List”). That same day the personal journal notebook was closed and returned to CLM’s nightstand drawer. CLM wrote the journal Hit List entry out of frustration with classmates and their rude and unkind behavior. CLM did not, thereafter, re-open, refer to or add further writing to the journal Hit List page.

b) In September 2014, as Mrs. McNeil was cleaning and sorting through clothes, books and papers near CLM’s open bedroom nightstand. She found the personal journal notebook. Mrs. McNeil read portions of the journal and discovered the Hit List page. Mrs. McNeil decided to inquire of her therapist, later that week, whether she should be concerned and how she might best respond to CLM’s writings. During the prior 4 months, there had been no comment about, communication regarding or disclosure of the Hit List by CLM to any person.

c) Following Mrs. McNeil showing the journal Hit List page to her therapist, the Sherwood police were contacted. The police went to the McNeil home and searched for contraband and weapons. None were found. Upon Mrs. McNeil’s direction, CLM voluntarily surrendered to the Sherwood police and, after being questioned, was removed to a local hospital for evaluation. Following examination at the hospital, CLM was released and returned home.

d) Following a complete investigation by the Sherwood police and legal review by the Washington County District Attorney it was determined that they “did not have any criminal charges.”

e) The Sherwood police contacted the SSD advising of the Hit List found in the personal journal. Thereafter, the SSD contacted each of the named students' parents and advised them that their child's name appeared on the Hit List. On September 10, 2014, SSD issued a press release stating:

“Sherwood School District was notified by the Sherwood Police Department this morning that a Sherwood High School student had created a Hit List containing 23 names. The parents of the students named on the list have been contacted.

“Sherwood police completed their investigation and no criminal charges were filed. Officers have established that the home where the student resides is safe.

“Because the Sherwood School District takes student safety seriously, the student will not be returning to school until the situation is further evaluated.”

f) CLM was 16 years old when these events occurred. CLM has always been known by teachers and other students as easy going and non-confrontational. CLM incurred no disciplinary actions at any time prior to September 2014. Both CLM and Mr. and Mrs. McNeil have been fully cooperative with the SSD, providing whatever access was required, and responding to all inquiries.

g) The Hit List journal page was part of CLM's ongoing personal journaling to cope with “a bad day at school;” the musings of teenage angst which CLM stated was “a dumb thing to do” and “probably should have talked with somebody about it.” CLM had forgotten about the Hit List journal entry until Mrs. McNeil's follow-up inquiry and questioning by the police. CLM did not communicate the substance of the Hit List to

others, and had no intention of revealing the Hit List or making public any threat to harm others. The personal journal with the Hit List remained buried in a nightstand drawer and was not shared with any other person, either physically or verbally; never scanned, emailed, copied or reproduced; never brought onto school premises; and never acted upon, in any fashion.

19.

Following the expulsion hearing Bennett issued a letter on September 24, 2014, copied to Bell and Bailey, stating that Miller, found that “[t]he ‘Hit List’ . . . is considered a threat of violence in violation of the Student Code of Conduct. In addition, this threat of violence has caused a distinct and substantial disruption to the school environment.” According to Bennett, Miller ruled that CLM “is immediately expelled from Sherwood High School for the remainder of the 2014-15 school year.” Miller further directed that “[d]uring [the] expulsion . . . [CLM] is not allowed to participate in any school-sponsored activities or athletic programs. . . . not allowed on school grounds. . . .[and if] found loitering on campus or visiting for any purpose may be prosecuted for violation of Oregon Criminal Trespass Laws (ORS 164.265).”

20.

The only communication about or disclosure of CLM’s personal journal Hit List to students, patrons and staff at SHS was by SSD personnel including Cordie, Bell, Bailey and Bennett. Any disruption in the SHS environment in connection with CLM’s personal journal entries was exclusively attributable to the Defendants’ conduct.

21.

As part of their cooperation with SSD, Mr. and Mrs. McNeil allowed CLM to undertake a psychological evaluation by a forensic clinical psychologist retained by SSD. The November 28,

2014 report from Eric M. Johnson, Ph.D. concluded that: “[b]ased on the totality of information gathered during the course of this evaluation, there is currently no evidence to indicate that . . . [CLM] poses a risk of harm to others. As such, I consider . . . [CLM] safe to remain in the community and return to school . . .” Dr. Johnson further found that:

a) “[T]here is no evidence that [CLM] ever engaged in any . . . planning preparation, or rehearsals to carry out an act of targeted violence;”

b) “[T]here is no evidence” that CLM has ever “engaged in covert acts of attack-related behavior;”

c) The Hit List being written “at the end of the 2013-2014 school year . . . underscores the likelihood that . . . [it] was a fantasy or symbolic method of acting out . . . [with] no history of trying to behaviorally follow through;”

d) CLM “is not impulsive and . . . displays good control over . . . behavior . . . also does not have delinquent orientation, . . . is not overtly aggressive, and . . . has no prior history of contact with police or law enforcement;”

e) CLM “does not have a substance abuse disorder or a mental health disorder that would lead to disinhibition;” and,

f) “It is important to note that . . . [CLM] has not made an overt threat and the manner in which the hit list was disclosed indicates that . . . [CLM] had no intention of disclosing the hit list or making a public threat to harm others.”

22.

Notwithstanding Dr. Johnson’s report exonerating CLM from making any threat or being a risk, SSD failed and refused to alter, modify or re-consider the expulsion decision of September 24, 2014. Despite protests by Mr. and Mrs. McNeil, following expulsion, the only

educational option offered CLM by Defendants was on-line classes supplemented by 3-4 hours of tutoring each week.

23.

As a result of the expulsion, CLM's educational, social and life preparation experiences have been impaired, diminished and limited in the following:

- a) Deprived of the opportunity of elective coursework, viz, music, art, photography/jewelry and drama;
- b) Deprived of the opportunity to take specialized coursework, viz, engineering, architecture, woods and construction, welding and fabrication;
- c) Deprived of the opportunity to participate in hands-on skill training with yearbook, newspaper, publications and school store;
- d) Deprived of the opportunity to be involved in sports and social events like prom and homecoming;
- e) Deprived of the opportunity to participate in clubs and associations, i.e., FFA, FBLA, Key Club, Model UN, Chess Club, etc.; and,
- f) Deprived of the opportunity to enroll in advanced coursework, AP classes and college prep, including preparation for ACT and SAT testing.

24.

As a consequence of Defendants' actions herein CLM's educational opportunities have been and will continue to be disadvantaged, limited and prejudiced in the following:

- a) Diminished likelihood of being accepted into a 4 year college;
- b) Diminished likelihood of scoring well on ACT and SAT testing;
- c) Diminished ability to secure employment and career opportunities;

- d) Loss of peer support, friends and companionship; and,
- e) Diminished self-confidence, social access and patronage.

25.

As a consequence of Defendants' actions herein CLM experienced and will continue to endure mental suffering and emotional trauma including feelings of hopelessness, fear, guilt, embarrassment, anxiety, depression, lost sense of well-being and confidence, morosity, lack of trust in society, institutions and adults, social avoidance, psychosocial stress, social stigmatization, resentment, sadness, self-consciousness and anger. Further, CLM has suffered injury to reputation, been subjected to ridicule and deprived of expressive associations.

FIRST CAUSE OF ACTION

(Violation of the Constitutional Right of Free Speech)

26.

Plaintiffs reallege and incorporate herein the allegations contained in paragraphs 1 through 25, above.

27.

CLM's personal journal writing is a form of self-expression and speech protected by the First Amendment. The personal journal Hit List entry did not constitute a "true threat." CLM did not intend that the personal journal Hit List entry reach SSD's domain. CLM's journaling did not disrupt or interfere with the SSD and SHS programs, mission or educational function nor was it reasonably foreseeable that such would occur. SSD does not have the authority, otherwise, to regulate off-campus speech.

28.

Defendants' actions deprived CLM of and imposed state sanctions upon CLM's

fundamental right to self-expression and free speech all in violation of the First Amendment of the United States Constitution and 42 USC §1983. Defendants' wrongful acts chilled CLM's personal expression and speech and caused CLM to suffer impeded educational progress with damages and compensable injuries, as herein alleged, in the amount of not less than \$200,000.00.

29.

Pursuant to 42 USC §1988 CLM is entitled to recover attorney fees, cost, expenses and expert witness fees as the prevailing party herein.

SECOND CAUSE OF ACTION

(Violation of the Constitutional Right to Equal Protection of the Law)

30.

Plaintiffs reallege and incorporate herein the allegations contained in paragraphs 1 through 25, 27 and 28, above.

31.

Other SSD students similarly situated to CLM, i.e., having engaged in personal journal expression are not subjected to SSD discipline and sanctions. Defendants' vindictive actions sought to proscribe and impose an arbitrary orthodoxy of acceptable expression for individual belief, thoughts, and feelings. Defendants actions violated CLM's rights of equal protection under the Fourteenth Amendment of the United States Constitution and 42 USC §1983.

32.

Defendants' wrongful acts deprived CLM of the freedom of personal expression and caused CLM to suffer impeded educational progress with damages and compensable injuries, as herein alleged, in the amount of not less than \$200,000.00.

33.

Pursuant to 42 USC §1983 CLM is entitled to recover attorney fees, cost, expenses and expert witness fees as the prevailing party herein.

THIRD CAUSE OF ACTION

(Violation of Constitutional Right of Due Process)

34.

Plaintiffs reallege and incorporate herein the allegations contained in paragraphs 1 through 25, 27, 28 and 31, above.

35.

CLM is entitled to a free and appropriate education with the SSD and at SHS. As part of such free and appropriate education, CLM is entitled access to and the opportunity for participation in those educational, social and life preparation experiences set forth at paragraph 22, above. This entitlement is a property interest protected by the due process clause of the Fourteenth Amendment of the United States Constitution and 42 USC §1983.

36.

The Handbook, Code of Student Conduct, over-reaches and is beyond the scope of the Policies and their authorizing state statutes. The Policies and statutes allow discipline only when a student is actually disruptive of the educational process or actually endangering the safety of others -- a "true threat." Whereas, the Handbook, Code of Student Conduct, provides that a student may be expelled "if it [the student's conduct] has the *potential* to disrupt or impact the safe and efficient operation of the school or interfere with the rights of others." (Emphasis added). The Handbook extends the disciplinary arm of the SSD and SHS in a vague and uncertain manner allowing Defendants to act arbitrarily and capriciously. Defendants' actions

thereunder deprived CLM of procedural due process protected by the Fourteenth and Fifth Amendments of the United States Constitution.

37.

Defendants' wrongful acts deprived CLM of a free and appropriate public education which hindered and continues to impede CLM's educational progress causing CLM to suffer damages and compensable injuries, as herein alleged, in the amount of not less than \$200,000.00.

FOURTH CAUSE OF ACTION

(Ultra Vires Governmental Action)

38.

Plaintiffs reallege and incorporate herein the allegations contained in paragraphs 1 through 25, and 36, above.

39.

The SSD has authority to regulate the conduct of students during such times as they are under Defendants' supervision or when they are in attendance at school sponsored events and functions. The SSD does not have the authority to otherwise regulate off-campus student conduct, unless such conduct is a "true threat" intended to reach the school, its students, faculty or programs. Defendants' disciplinary action against CLM for conduct that occurred off school grounds, exceeded the authority granted the SSD and its agents by law and is, therefore, *ultra vires*.

40.

Defendants' acts were extra-statutory and outside the Policies' delegated authority. The Handbook, Code of Student Conduct, provision regarding discipline for student off-campus conduct is *ultra vires*, in violation of constitutional provisions, as set forth above, and void.

FIFTH CAUSE OF ACTION

(Constitutional Due Process – Parental Care, Custody and Management)

41.

Plaintiffs reallege and incorporate herein the allegations contained in paragraphs 1 through 25, 27, 28, 31 and 36, above.

42.

The parent-child relationship lies at the heart of the constitutionally protected familial relationships or intimate associations. Defendants' disciplinary action against CLM for constitutionally protected speech and their continued violation of equal protection and due process rights interfered and continues to interfere with Michael and Julie McNeil's fundamental liberty interest as parents in the care, custody and management of their minor child all in violation of their rights under the Fourteenth Amendment to the United States Constitution and 42 USC §1983.

43.

Defendants' actions subjected Mr. and Mrs. McNeil to embarrassment, humiliation and emotional trauma. They have been deprived of the love, association and confidence of their child and had imposed upon them the burden of securing alternative schooling, trying to compensate for lost educational, social and life preparation experiences and dealing with the destabilizing impact upon the family of the SSD's disciplinary actions.

44.

Defendants' wrongful acts deprived Mr. and Mrs. McNeil of their protected family rights and associations and caused them to suffer damages and compensable injuries, as herein alleged, in an amount not less than \$100,000.00.

45.

Pursuant to 42 USC §1983 Mr. and Mrs. McNeil are entitled to recover attorney fees, cost, expenses and expert witness fees as the prevailing party herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request this court to enter an order, declaration and judgment as follows:

1. That Defendants' actions are invalid, offensive to and in violation of the First and Fourteenth Amendments of the United States Constitution; that the Defendants' actions in subjecting CLM to expulsion for protected personal expression deprived CLM of a free and appropriate public education in violation of the Fourteenth and Fifth Amendments of the United States Constitution; that Defendants' actions violated CLM's due process and equal protection rights; and, that the Handbook, Code of Student Conduct, in so far as it provides for disciplinary action based upon a student's off-campus, non-criminal actions having the "potential" to disrupt school operations or interfere with others' rights, is *ultra vires* and unenforceable.

2. That Defendants, jointly and severally, in their individual and official capacities pay CLM \$200,000.00 compensation for general damages and Michael and Julie McNeil \$100,000.00 for general damages;

3. That Defendants, jointly and severally, in their official capacities expunge from CLM's educational records any reference to the suspension, expulsion and circumstances surrounding the disciplinary proceeding alleged herein.

4. That Defendants, jointly and severally, in their official capacities and personally be restrained from any retaliation and further disciplinary action against Plaintiffs;

5. That Defendants, jointly and severally, in their individual and official capacities

pay CLM's and Mr. and Mrs. McNeil's reasonable attorney's fees, costs and expert witness fees incurred in prosecution of this action; and

6. Such other and further relief as the court deems just, equitable, necessary and appropriate.

DATED this 18th day of June, 2015.

HARRIS BERNE CHRISTENSEN LLP

By: /s/Roger K. Harris

Roger K. Harris, OSB #780461
Of Attorneys for Plaintiffs