

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

**CHARLES PATRICK PRATT and
A.E.P. through her parents and next friends
Bobbi Lynn Petranchuk and Todd Edward
Petranchuk,**

Plaintiffs,

**ATTORNEY
DECLARATION
7:09-cv-411
(GTS/GHL)**

v.

**INDIAN RIVER CENTRAL SCHOOL
DISTRICT; INDIAN RIVER CENTRAL
SCHOOL DISTRICT BOARD OF
EDUCATION; JAMES KETTRICK,
Superintendent of Indian River Central School
District, in his official and individual
Capacities; TROY DECKER, Principal of
Indian River High School, in his official and
Individual capacities; and JAY BROWN,
JOHN DAVIS, KENDA GRAY, AMABLE
TURNER and PATRICIA HENDERSON, IN
their individual capacities,**

Defendants.

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:

I, FRANK W. MILLER, do hereby declare and affirm:

1. I am an attorney at law duly licensed to practice law in the State of New York and the principal of the Law Firm of Frank W. Miller, attorneys for the Defendants Indian River Central School District, Indian River Central School District Board of Education, James Kettrick, Superintendent of Indian River Central School District, in his official and individual

Capacities, Troy Decker, Principal of Indian River High School, in his official and individual capacities, and Jay Brown, John Davis, Kenda Gray, Amable Turner and Patricia Henderson in their individual capacities, (hereinafter, collectively referred to as “the Defendants”) and represent them in connection with the above-referenced matter.

2. I submit this attorney declaration in support of the Defendants’ motion to dismiss and for summary judgment pursuant to FRCP Rules 12(b)(1), 12(b)(2), 12(b)(6), and 56.

3. The Complaint fails to state a claim. The causes of action brought pursuant to state law are barred by the applicable statute of limitations and further barred by the Plaintiffs’ failure to file a notice of claim, or plead compliance with the notice of claim filing requirements. Additional grounds for dismissal are set forth below, and in the accompanying papers.

4. The Defendants bring the instant combined motion to dismiss/motion for summary judgment to obtain an order dismissing the Plaintiffs’ Complaint with prejudice.

5. The relevant procedural background in this matter is as follows. Prior to commencing this suit, the Plaintiffs did not file any notice of claim, as required in order to pursue the claims brought under state law. *See* Affidavit of James Kettrick (“Aff. of Kettrick”). The Plaintiffs filed the instant civil action on April 8, 2009. *See* Ex. “A” attached hereto. The Answer was filed on May 4, 2009. *See* Ex. “B.” Pre-trial discovery has not yet been completed. The Complaint contains the following claims for relief:

First claim for relief – Equal Access Act (EAA), 20 U.S.C. § 4071, *et seq.*, brought by Plaintiff Charles Pratt (“Pratt”) alleging a violation of the EEA by defendants school board, school district, and Kettrick in his individual and official capacity;

Second claim for relief- EAA brought by Plaintiff, AEP against defendants school board, school district, and Kettrick in his individual and official capacity, Decker in his individual and official capacity, and Brown in his individual capacity.

Third claim for relief – U.S. Constitution, Amendment I, denial of free speech and free association brought by Plaintiff Pratt against defendants school board, school district, and Kettrick in his individual and official capacity.

Fourth claim for relief - U.S. Constitution, Amendment I, denial of free speech and free association brought by Plaintiff AEP against defendants school board, school district, and Kettrick in his individual and official capacity, Decker in his individual and official capacity, and Brown in his individual capacity;

Fifth claim for relief – U.S. Constitution, Amendment XIV, denial of equal protection on the basis of sexual orientation brought by Plaintiff Pratt against defendants school board, school district, and Kettrick and Decker in their individual and official capacities, and Davis, Turner and Gray in their individual capacities;

Sixth claim for relief - U.S. Constitution, Amendment XIV, denial of equal protection on the basis of sex brought by Plaintiff Pratt against defendants school board, school district, and Kettrick, and Decker in their individual and official capacities, and Davis, Turner and Gray in their individual capacities;

Seventh claim for relief – Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, discrimination on the basis of sex brought by Plaintiff Pratt against defendants school board and school district;

Eight claim for relief – New York State Constitution, Article I, § 8 denial of free speech, brought by Plaintiff AEP against defendants Ketrick and Decker in their individual and official capacities, and Brown in his individual capacity ;

Ninth claim for relief – New Human Rights Law, Executive Law § 296(6), discrimination on the basis of sexual orientation, brought by Plaintiff Pratt against defendants, Turner, Gray, Henderson and Davis in their individual capacities;

Tenth claim for relief - New Human Rights Law, Executive Law § 296(6), discrimination on the basis of sex, brought by Plaintiff Pratt against defendants, Turner, Gray, Henderson and Davis in their individual capacities;

Eleventh claim for relief – New York Civil Rights Law §§ 40-c, 40-d discrimination based on sexual orientation brought by Plaintiff Pratt against defendants, Turner, Gray, Henderson, and Davis in their individual capacities;

Twelfth claim for relief - New York Civil Rights Law §§ 40-c, 40-d discrimination based on sex brought by Plaintiff Pratt against defendants Turner, Gray, Henderson, and Davis in their individual capacities;

Thirteenth claim for relief – New York Human Rights Law, New York Executive Law § 296 discrimination on the basis of perceived sexual orientation and/or anti-gay animus brought by Plaintiff AEP against defendants school district, board of education, Ketrick and Decker in their official and individual capacities, and Brown in his individual capacity;

Fourteenth claim for relief - New York Civil Rights Law § 40-c, discrimination on the basis of perceived sexual orientation and/or anti-gay animus, brought by Plaintiff AEP against Defendants school district, board of education, Ketrick and Decker in their official and individual capacities, and Brown in his individual capacity.

6. The relevant factual background is as follows. Pratt's date of birth is August 16, 1988, hence, he turned 18 years old on August 16, 2006. *See* Kettrick Aff. Pratt attended kindergarten, primary school (grades 1-4), middle school (grades 5-8) in the District. *See* Aff. of Kettrick. Pratt also attended high school in the District for a limited period of time. *See* Aff. of Kettrick. Pratt entered high school in the ninth grade in the fall of 2002. *See* Aff. of Kettrick; *see also* Ex. "A," para. 39. During the 2002-2003 school-year, Pratt did not attend school in the District after May 4, 2003 and did not return to the District until the start of the next school-year in September of 2003. *See* Kettrick Aff. Pratt started 9th grade in the District for the second time in the fall of 2003, and his last day attending the District during the 2003-2004 school year was January 4, 2004. *See* Aff. of Kettrick. Pratt did not attend one day of school in the District's high school after January 4, 2004 until the start of the 2004-2005 school-year in September of 2004. *See* Aff. of Kettrick. Pratt did not attend summer school during the summer of 2003 or the summer of 2004. *See* Aff. of Kettrick. The summer vacation period in the District for the summer immediately preceding the 2003-2004 school-year started immediately after graduation, which took place on June 27, 2003, and lasted until September 3, 2003. *See* Aff. of Kettrick. The summer vacation period in the District for the summer immediately preceding the 2004-2005 school-year started immediately after graduation on June 25, 2004, and lasted until September 7, 2004. *See* Aff. of Kettrick. Pratt returned very briefly to the District in the fall of 2004. *See* Aff. of Kettrick; *See* Ex. "A" para. 16 (alleges Pratt attended the District for approximately three weeks in the fall of 2004). After the fall of 2004, Pratt never returned to the District. *See* Aff. of Kettrick. AEP is currently a sophomore in the District's high school. *See* Ex. "A", para. 9. A "Gay Straight Alliance," club of the type referenced in the Complaint currently exists in the District's high school. *See* Aff. of Kettrick.

7. The following exhibits are attached hereto in support of the Defendants' motion:

Exhibit A: Complaint;

Exhibit B: Answer.

8. Also submitted in support of the Defendants' motion is the affidavit of James Kettrick, and the Defendants' Statement of Material Undisputed Facts.

9. Upon information and belief, all state law claims in the Complaint must be dismissed because the Plaintiffs failed to file a timely and proper notice of claim prior to commencing the instant civil action.

10. Upon information and belief, all of the state law claims in the Complaint must be dismissed because the Plaintiffs failed to plead compliance with the statutory notice of claim requirements.

11. Upon information and belief, all of the state law claims in the Complaint asserted by Pratt must be dismissed because they are time barred.

12. Upon information and belief, the state law claims in the Complaint asserted by Pratt, in addition to being subject to dismissal for the reasons stated above, must be dismissed because they otherwise fail to state a claim for the reasons set forth in the accompanying memorandum of law.

13. Upon information and belief, the claims in the Complaint brought pursuant to U.S. Constitution and federal statutes are subject to dismissal for failure to state a claim for reasons set forth in the accompanying memorandum of law.

14. Upon information and belief, the District's Board of Education is not a proper party in this proceeding and should be dismissed from this action.

15. Upon information and belief, the alleged conduct fails to satisfy the applicable severe or pervasive standard for hostile environment claims, and therefore the Title IX claims should be dismissed.

16. Upon information and belief, the EAA claims and the claims brought pursuant to the First Amendment to the U.S. Constitution are moot and should be dismissed as a “Gay Straight Alliance” club of the type described in the Complaint is currently operating in the District.

17. Upon information and belief, the EAA does not provide for the award of compensatory and punitive damages against the Defendants.

18. Upon information and belief, Title IX cannot be relied upon to support a cause of action seeking recovery on the basis of sexual orientation.

19. Upon information and belief, the Title IX claims must be dismissed because the Complaint does not allege that members of the opposite sex who were similarly situated to Pratt were treated more favorably than Pratt.

20. Upon information and belief, the Title IX claims must be dismissed because the Complaint does not identify any District policy that discriminates against students on the basis of sex.

21. Upon information and belief, the Fourteenth Amendment claims are subject to dismissal as the Complaint does not allege the existence of any school district policy aimed at homosexual students that would render a Fourteenth Amendment claim plausible.

22. Further, upon information and belief, the Fourteenth Amendment claim also fails as it does not identify others who are similarly situated in all material ways who were allegedly treated more favorably than the Plaintiffs.

23. For all of the reasons set forth above and in the Defendants' accompanying moving papers, the Defendants respectfully request that the Complaint be dismissed with prejudice.

Dated: June 12, 2009
East Syracuse, New York

Respectfully submitted,

The Law Firm of Frank W. Miller

By: **s/Frank W. Miller, Esq.**
Bar Roll No.: 102203
Attorneys for Defendants
Indian River Central School District, et. al.
Office and Post Office Address:
6575 Kirkville Road
East Syracuse, New York 13057
Telephone: 315-234-9900
Facsimile: 315-234-9908
fmiller@fwmillerlawfirm.com

TO: Michael Kavey, Esq.
Attorneys for Plaintiffs
Lambda Legal Defense Fund, Inc.
120 Wall Street, Suite 1500
New York, NY 10005-3904
mkavey@lamdalegal.org
Via electronic filing

Hayley J. Gorenberg, Esq.
Attorneys for Plaintiffs
Lambda Legal Defense and Education Fund
120 Wall Street, Suite 1500
New York, NY 10005
hgorenberg@lambdalegal.org
Via electronic filing

Sudwiti Chanda, Esq.
Attorneys for Plaintiffs
Kirkland & Ellis, LLP
153 East 53rd Street
New York, NY 10022-4611
schanda@kirkland.com
Via electronic filing

Adam T. Humann, Esq.

Attorneys for Plaintiffs
Kirkland & Ellis, LLP
153 East 53rd Street
New York, NY 10022-4611
adam.humann@kirkland.com

Via electronic filing

Clerk

United States District Court
Northern District of New York
Syracuse, New York

Via electronic filing