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ARENDT'S THEORY OF JUDGMENT: "AN INABILITY TO THINK?"

L.W. v. TOMS RIVER REGIONAL SCHOOLS AND HANNAH

ARENDT'S THEORY OF JUDGMENT: "AN INABILITY TO THINK?"

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By

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ABSTRACT

L.W. v. Toms River Regional Schools and Hannah

Arendt's Theory of Judgment: "An Inability to Think?"

While the New Jersey State Legislature created the nation's first state anti-discrimination law in 1945, the protections that the statute affords the state's citizens has evolved over the years. The Law Against Discrimination was written with the explicit intent to protect the civil rights of New Jersey's citizens. The protections against discrimination that the statute provides are expansive and cover virtually any protected characteristic imaginable, including "affectional or sexual orientation." In a landmark anti-discrimination case, *Lehmann v. Toys R Us, Inc.*, the New Jersey Supreme Court established legal standards by which an employer could be held liable for discrimination under the LAD by creating a hostile work environment. However, the Court had not established these same LAD protections for student-on-student harassment based on sexual orientation.

School leaders face many challenges daily, not the least of which is harassment, intimidation and bullying. The victims of these incidents are from various protected classes, including those students who are, or who are perceived to be queer. Often, school leaders simply are not equipped to practice good judgment when dealing with these issues and make poor decisions. Often, the poor judgment and the resulting decisions have dire legal consequences to school districts. I have conducted a study that not only chronicles the events that led to the establishment of LAD protections for students who are victims of bias-based peer harassment, but I've also analyzed the thinking, judging and acting of the various adults involved in this case. The following research questions guided this study: 1) What was the chain of events in the Louis

White case that ultimately led to the establishment of LAD protections for students who are victims of bias-based peer harassment? 2) To what extent do the decisions and actions of lawmakers, school administrators, jurists and the Director of the Division on Civil Rights embody the characteristics of Arendtian judgment? I pursued these research questions using a historical legal case study. My specific issue of judging, deciding and acting within an Arendtian theoretical framework, is bounded within a contemporary political history of the Toms River School District.

I have conducted a study chronicling the fourteen-year legal saga of a former student in Toms River Regional Schools who was harassed and bullied from the time he was in fourth grade until his freshman year of high school. The data collection leaned heavily on primary sources such as federal and state statute, administrative code, rules of court, administrative rulings and copious amounts of case law. Using traits of Arendt's theory, I analyzed the endeavors of each major individual in the case. The traits that emerged included common sense, invisibles, action, meaningfulness, liberation and freedom, discussion and debate, particulars and universals, thinking for the prevention of evil, moral judgment and reflective judgment. I found that all of the players in this saga possessed some Arendtian traits of thinking and judging, but the legislators, Director, appellate court judges and Supreme Court justices exhibited the greatest number of these traits. In other words, these individuals practiced "good judgment". Although these findings are not generalizable, they are meaningful and have implications for researchers, policy makers and practitioners.

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Finally, I dedicate this project to my parents, Frederick Millard Harrison and Maxie Harrison, who passed away during the writing of this dissertation. Though neither ever completed college, they both taught me the value of education and the importance of working hard in order to achieve one's goals. I am saddened that they cannot share in this accomplishment, but I know they are very proud of me.

TABLE OF CONTENTS

CHAPTER ONE: SETTING THE STAGE.....	1
Introduction.....	1
Research Question.....	3
Conceptual Framework.....	5
Hannah Arendt on Education.....	7
Hannah Arendt on Judgment.....	12
Judgment as Thinking.....	14
Universality, Generalities and Particulars.....	16
Moral Judgment.....	17
Reflective Judgment.....	20
Theory of Action and Judgment.....	23
Toms River Regional Schools: Profile and Brief History.....	27
Summary of Literature Review.....	29
Methodology.....	32
Data Collection.....	33
Limitations of Study.....	35
Chapter Summary.....	36
 CHAPTER TWO: THE LAW AGAINST DISCRIMINATION AND ARENDT’S THEORY OF JUDGMENT.....	 38
The Law Against Discrimination.....	38
Arendt’s Theory of Judgment and the LAD.....	50
Common Sense.....	50
Thinking and Judging.....	51
Action.....	52
Meaningfulness.....	53
Liberation and Freedom.....	54
Presence of Others.....	55
Discussion and Debate.....	55

Work and Labor.....	57
Particulars and Universals.....	58
Thinking for the Prevention of Evil.....	60
Moral Judgment.....	62
Reflective Judgment.....	63
Chapter Summary.....	68

CHAPTER THREE: THE LONG ROAD AHEAD

LOUIS WHITE FIGHTS BACK.....	73
Introduction.....	73
The Office of Administrative Law.....	73
ALJ's Initial Decision.....	75
Procedural History.....	76
Findings.....	77
Testimonial Review.....	89
Schuster's Legal Analysis.....	92
Conclusion and Order.....	97
The ALJ's Initial Decision and Arendtian Judgment.....	98
Common Sense.....	98
Invisibles: Things that are absent.....	99
Action.....	100
Meaningfulness.....	101
Liberation and Freedom.....	102
Presence of Others.....	103
Discussion and Debate.....	103
Speech and Natality.....	104
Work and Labor.....	104
Particulars and Universals.....	107
Thinking for the Prevention of Evil.....	110
Moral Judgment.....	111
Reflective Judgment.....	112
Judgment and District Administrators.....	115

Common Sense.....	116
Invisibles: Things that are absent.....	119
Action.....	119
Meaningfulness.....	121
Liberation and Freedom.....	122
Discussion and Debate.....	124
Work and Labor.....	125
Particulars and Universals.....	129
Thinking to Prevent Evil.....	131
Moral Judgment.....	133
Reflective Judgment.....	134
Chapter Summary.....	136
 CHAPTER FOUR: THE DIRECTOR INTERVENES.....	 152
Introduction.....	152
The Director's Findings, Determination and Order.....	153
Exceptions and Replies of the Parties.....	153
The Director's Factual Determinations.....	157
The Legal Standards and Analysis.....	165
Remedies.....	189
The Director and Arendt's Theory of Judgment.....	199
Common Sense.....	199
Invisibles: Things that are absent.....	201
Action.....	202
Meaningfulness.....	203
Liberation and Freedom.....	204
Presence of Others.....	205
Discussion and Debate.....	206
Speech and Natality.....	206
Work and Labor.....	207
Particulars and Universals.....	210
Thinking for the Prevention of Evil.....	212

Moral Judgment.....	215
Reflective Judgment.....	217
Chapter Summary.....	219

CHAPTER FIVE: THE CASE GOES TO THE NEW JERSEY

STATE COURTS FOR FINAL RESOLUTION.....	233
Introduction.....	233
The Opinion of the Superior Court.....	234
Creating a Precedent.....	234
Title IX and the LAD.....	237
Review of Equitable Relief and Damages.....	239
Hostile School Environment.....	239
Liability.....	241
Equitable Remedies.....	246
Compensatory Damages.....	249
The Superior Court and Arendt's Theory of Judgment.....	252
Common Sense.....	253
Invisibles: Things that are absent.....	255
Action.....	256
Meaningfulness.....	257
Liberation and Freedom.....	258
Presence of Others.....	259
Discussion and Debate.....	260
Natality.....	261
Work and Labor.....	261
Particulars and Universals.....	264
Thinking for the Prevention of Evil.....	267
Moral Judgment.....	269
Reflective Judgment.....	271
Toms River Appeals to the New Jersey Supreme Court.....	274
Oral Arguments Before the Court.....	275
Toms River's Oral Argument.....	275

Oral Argument on Behalf of the Whites.....	283
The New Jersey Supreme Court’s Opinion.....	289
Legal Analysis.....	290
A Cause of Action Under the LAD.....	291
Standard of Liability.....	294
Assessing Reasonableness.....	299
The Court Remands the Case.....	301
Arendt’s Theory of Judgment and the Supreme Court.....	303
Common Sense.....	303
Invisibles: Things that are absent.....	306
Action.....	307
Disruptive Action.....	308
Meaningfulness.....	309
Liberation and Freedom.....	310
Presence of Others.....	311
Discussion and Debate.....	312
Natality.....	313
Work and Labor.....	314
Particulars and Universals.....	317
Thinking for the Prevention of Evil.....	320
Moral Judgment.....	322
Reflective Judgment.....	325
Chapter Summary.....	328
 CHAPTE SIX: CONCLUSIONS.....	346
Louis Finally Obtains Resolution.....	346
Revisiting the Research Questions.....	348
The Writings of Hannah Arendt.....	349
The Law Against Discrimination.....	352
The ALJ’s Initial Decision.....	357
The Administrators and Arendtian Judgment.....	366
The Director and Arendtian Judgment.....	372

The State Courts and Arendtian Judgment.....	385
Limitations of Study.....	401
Implications for Research, Policy and Practice.....	404
Future Research.....	404
Policy and Practice.....	406
Final Thoughts.....	409
BIBLIOGRAPHY.....	413

CHAPTER ONE: SETTING THE STAGE

“The sad truth is that most evil is done by people who never make up their minds to be either good or evil.” -- Hannah Arendt, *The Life of the Mind*

Introduction

"I set out on what I wanted to do, to set precedent in the state of New Jersey that no kid should have to go through that..."¹ These are the words of Louis White after learning that the New Jersey Supreme Court had ruled in his favor. White had endured anti-queer harassment from the time he was in fourth grade until his freshman year of high school when he left the school district, frustrated at administration's inability to stop his torture. Louis and his mother, after years of futile efforts to get the district to end the harassment, on March 12, 1999 filed a complaint with the Division on Civil Rights seeking a cause of action against the Toms River Regional Schools for unlawful discrimination. The Whites' were seeking relief under the state's Law Against Discrimination. Although case law in the state had clearly and repeatedly established protections against discrimination in the workplace, the courts had yet to establish these same protections against bias-based peer harassment in the public schools. The landmark decision created an important precedent that has impacted every school district in the state of New Jersey. Ultimately for Toms River, the district was found to be liable for unlawful discrimination and was forced to pay Louis White damages for emotional distress in the amount of over \$68,000, as well as statutory fine of \$10,000 and the state's legal fees.²

¹ "Workplace law also protects gay students," *New Jersey Record* (N.J.), February 22, 2007 (Westlaw).

² "Toms River board of education to pay former student \$68K in bullying case," *The Star Ledger*, February 28, 2013 (Westlaw).

News reports and our courts are often populated with educators whose decision-making, judgment and actions are questionable. While America's public schools are not immune to poor judgment among its leaders, the research literature that has examined the ethics of school leadership is rather sparse. Waite and Allen describe corruption as "the misuse of public power for private and personal benefit."³ Heyneman expands the definition to include the realm of education by stating "because education is an important public good, its professional standards include more than just material goods; hence the definition of education corruption includes the abuse of authority for personal as well as material gain."⁴ The author explains that an education system free of corruption values fairness in obtaining educational goods and services and high professional standards of conduct by those who lead and teach in our schools.⁵

Poor decision-making in our schools does not always mean financial impropriety. There have been several instances in American public schools where school administration made poor decisions that benefited them at the expense of students. In Midland, Texas, a high school senior possessed photographs that implied that the married principal might have been involved in an inappropriate relationship with one of his teachers. The principal demanded the student turn over the photographs and write a letter of apology, but the student refused. As a result, the principal expelled the student and the student was barred from graduating. The school board subsequently upheld the principal's decision. The student was sent to an alternative school for students with behavioral issues. The student later sued the district, which the district eventually settled for

³ Duncan Waite & David Allen, "Corruption and Abuse of Power in Educational Administration," *The Urban Review*, 35 (4), 2003: 281.

⁴ Stephen P. Heyneman. "Education and Corruption," *International Journal of Educational Development*, 24, 2004: 637.

⁵ Heyneman, 638.

\$150,000.⁶ Other examples of corruption within the public schools include using school property for private business purposes, harassing or discriminating against a certain class of students, unequal treatment of students, just to name a few.⁷ Of course unethical financial dealings such as misappropriation of public property and bribery related to public procurement by public school administrators also occur.⁸ Reading some of these headlines, one may be left wondering, “What were they thinking?” The answer very well be that they were not thinking at all.

Research Question

While these incidents would fulfill the generally accepted notion of poor judgment, Hannah Arendt does not advocate such a dichotomous analysis of these school leaders’ judgment. This dissertation presents a historical and legal case study of the Toms River School District’s handling of the Louis White case. As the fourth largest district in New Jersey, and the largest suburban district in the state, I posit that examining the responses and endeavor of district leaders is worthy of study.⁹ The role of judgment in school leaders’ decision-making appeals to my own sensibilities as an educator who is convinced that providing a high-quality education to all children is an imperative, and that practicing reflective judgment on the part of school leaders is inextricably linked to this imperative. School leaders are called upon to use their judgment to make hundreds of decisions a day. These administrators do not operate in a vacuum. The field of

⁶ Waite and Allen, 286-287.

⁷ Heyneman, 644.

⁸ *Ibid*, 645.

⁹ New Jersey Department of Education, *Report Cards Narrative, Toms River Regional*, <http://education.state.nj.us/rc/rc11/narrative/29/5190/29-5190-000.html> (September 20, 2012) and Toms River Regional Schools, *The History of Our School District*, <http://www.trschools.com/administration/schoolhistory.asp> (September 20, 2012).

education is heavily influenced by policy makers, government officials, legislatures and the courts. Often, the decisions that school leaders make have a significant impact on the lives of many students. In addition, some of the judgments and decisions administrators make can have dire legal consequences for their school districts. Operating in this legal and political “education ecosystem” can be challenging for school leaders.

As the basis of my conceptual framework, I used the political thought of Hannah Arendt. Arendt is generally recognized “as one of the most original and influential political thinkers of the twentieth century...”¹⁰ For the purposes of this study, I attempted to provide an in-depth analysis of the Louis White case, of which the legal battle began in 1999 and was concluded in 2013 when Louis finally recovered damages for the discrimination that he suffered. I analyzed various aspects of each stage of this legal saga through the lens of Arendt’s *Theory of Judgment*.

Arendt’s political theorizing has received much scholarly attention over the last thirty years. Over this time, political theorists have sought “in her theory of judgment a viable account of how diverse modern societies can sustain a commitment to dialogue in the absence of shared basic principles.”¹¹ Through this project, I present a history and analysis of the various aspects of Louis’s struggle. It is my hope that this work will contribute to this ongoing dialogue. I intend to address the following research questions:

¹⁰ Dana Villa, “Introduction: the development of Arendt’s political thought,” in Dana Villa, ed., *The Cambridge Companion to Hanna Arendt* (Cambridge, UK: Cambridge University Press, 2000), 1.

¹¹ David L. Marshall, “The Origin and Character of Hannah Arendt’s Theory of Judgment,” *Political Theory* 38(3), (2010): 367.

1. What was the chain of events in the Louis White case that ultimately led to the establishment of LAD protections for students who are victims of bias-based peer harassment?
2. To what extent do the decisions and actions of lawmakers, school administrators, jurists and the Director of the Division on Civil Rights embody the characteristics of Arendtian judgment?

Arendt strongly rejected the notion of applying generalities to particulars. She asserted that one cannot subsume the particular under the universal, and therefore there is no moral law in which to judge all particulars.¹² It is not my intent to in any way suggest that my analyses are generalizable. My hope is, however, that by writing a historical and legal case study using Arendt's political writings on judgment to analyze events in one particular case with one particular district, I have demonstrated the utility of the humanities in developing reflective educational leadership practice.

Conceptual Framework

For the purposes of this dissertation, though many political scientists have built their academic careers studying Hannah Arendt, and scholars have written about decision-making in school leadership, I have found no research literature focused on educational leadership and administration that has employed the canonical writings of the prolific political theorist. There is a cadre of researchers who are currently studying Arendt's teachings related to various facets of

¹² Seyla Benhabib, "Judgment and the Moral Foundations of Politics in Arendt's Thought," *Political Theory*, 16(1) (1988): 37.

Educational Administration, but at this stage using her work in this aspect of education research would be considered a cottage industry at best.

One might take a critical view of the conceptual framework I am proposing; applying the teaching of a political theorist to analyze a case study on a school system—especially a theorist who was notoriously skeptical of politics shaping public education. Nevertheless, I posit that using political theory to analyze the decisions, actions and events of a school system may be *the* most appropriate method to undertake such a scholarly endeavor. Schools and school districts are political institutions. Tyack and Cuban, while writing on school reform, state “... (school) reform blends political and institutional analysis. A political perspective shows how groups become mobilized to publicize problems, devise remedies and secure the adoption of policies by school boards and legislatures.”¹³ Based on this statement one can see that schools are political machines internally and are a part of a broader American political landscape. Michael Fullan alludes to this external political pressure from the public when he states that, “the public influences school systems in major ways that are unpredictable.”¹⁴ Policy makers tend to claim to take the politics out of schools, but in the process of their decision-making, they gain substantial power, and only infuse politics deeper into the work of schooling. This power allows the policy elites “to set the agenda of reform, to diagnose problems, prescribe solutions and often to influence...” things that aren’t part of the original agenda.¹⁵ Pauline Lipman states that schools are “contested terrains, crucial arenas in which the struggle over ideas, values and power in society are acted out. In the politics of everyday life in schools, in the ideology and practice of

¹³ David Tyack and Larry Cuban, *Tinkering Toward Utopia: A Century of Public School Reform*, (Cambridge, MA: Harvard University Press, 1995), 7.

¹⁴ Michael Fullan, *What’s Worth Fighting for in the Principalship?* (Teachers College Press: New York, 1997), 5.

¹⁵ Tyack and Cuban, 8.

curriculum and social interaction, dominant social relations are both reproduced and contested influencing curricular and policy decisions and institutional norms and values.”¹⁶ Though these scholars all are writing from various perspectives regarding education and educational research, one thing is obvious; schools are political systems. Therefore, using the concepts of a political theorist like Hannah Arendt is a legitimate approach to analyzing the decision making of legislators, state government officials, jurists and school leaders in regards to a student-on-student harassment case.

Hannah Arendt on Education

What is somewhat ironic is that Arendt herself was skeptical of the marriage of education and politics. She used the Little Rock incident to make this point clear. Arendt’s famous piece, “Reflections on Little Rock” (1959), one of only two essays devoted exclusively to education, drew a strong reaction due to her apparently conservative stance on school desegregation. Arendt criticized integration because it prematurely introduced children to the harshness of the world.¹⁷ Arendt strongly opposed the use of children, the students, in a political battle.¹⁸ She viewed thrusting children into the fight for desegregation as unfair; that the responsibility for political change was the adults’--not children.¹⁹ Arendt also believed that by involving children in the fight for desegregation, American public schools were attempting to prepare students for an

¹⁶ Pauline Lipman, *Race, Class, and Power in School Restructuring*, (State of New York University Press: Albany, NY, 1998), 6.

¹⁷ Natasha Levinson, “A “More General Crisis”: Hannah Arendt, world-Alienation, and the Challenges of Teaching for the World *As It Is*. *Teachers College Record*. 112 (2), (2010): 468.

¹⁸ Hannah Arendt, *Responsibility and Judgment*, (New York: Random House, 2003), 193.

¹⁹ *Ibid*, 194.

integrated world that did not exist.²⁰ Mackler points out that in *The Human Condition*, Arendt presents a kind of world that no longer exists, yet in *Crisis* she implores educators to introduce students to the world as it is.²¹ Arendt also questioned the idea of educating children to become part of a democracy, and even stated this was impossible because of the conflict of a child's concurrent exposure to the state and the home.²² Nevertheless, I argue that Arendt's theory of judgment is an ideal tool to evaluate the decisions of the leaders of the one political system that virtually every American experiences--the public school.

While scholars in other disciplines have studied Arendt, few have been focused on Arendt's thoughts on education.²³ Following Arendt's essay on the incident at Little Rock, she wrote *The Crisis in Education* (1958), in part to explain and clarify her thinking in regards to public education in America. The Little Rock piece and *Crisis* are the only works that Arendt devoted exclusively to the topic of education. Recently, however, educational philosophers have taken up the task of analyzing other Arendt writings, particularly *The Human Condition* (1958) and *The Life of the Mind* (1971) to lend insight to Arendt's views on education.

The crisis in education, as Arendt saw it, was part of a larger crisis in modern society: alienation from the world due to modernity.²⁴ Arendt did not claim that her analysis was timeless, but instead focused on the specific current state of education in the United States in

²⁰ Levinson, 468.

²¹ Stephanie Mackler, "And Worldlessness, Alas, Is Always a Kind of Barbarism: Hannah Arendt and the Challenges of Educating in Worldlessness Times," *Teachers College Record*. 112 (2), (2010): 510.

²² *Ibid*, 197.

²³ Chris Higgins, "Education, Crisis, and the Human Condition: Arendt after 50 Years," *Teachers College Record*. 112 (2), (2010): 375.

²⁴ Hannah Arendt, *Between Past and Future*, (New York: The Viking Press, 1961), 173.

1958.²⁵ She was particularly critical of politics infiltrating education.²⁶ Arendt stated, “We must decisively divorce the realm of education from the others, most of all from the realm of public, political life.”²⁷ The essence of her thinking is that the purpose of education is “devoted to the safe introduction of the natality of the young...into the existing conventional world.”²⁸

According to Arendt, education does not belong in the public realm so therefore it must remain apolitical, but this does not mean that education belongs in the private realm either.²⁹ As Higgins explains, Arendt’s view is paradoxical. On the one hand we need the fresh perspectives of the next generation, or rituals and symbols become “rote” and “hollow.” Without a new generation, tradition devolves into “dead traditionalism.” At the same time innovation needs tradition to provide meaning and context. “The young cannot express their natality...” without either of these.³⁰ Arendt’s view is that we must allow the new to emerge but also guard the world “from being overrun and destroyed by the onslaught of the new that burst upon the world with each new generation.”³¹ This conservatism protects the revolutionary nature, the radical possibilities of newness.³²

²⁵ Higgins, 377.

²⁶ Gert Biesta, “How to Exist Politically and Learn from It: Hannah Arendt and the Problem of Democratic Education,” *Teachers College Record*. 112 (2), (2010): 558.

²⁷ Arendt, 195.

²⁸ Higgins, 378.

²⁹ Biesta, 562.

³⁰ Higgins, 378.

³¹ Arendt, 186.

³² Biesta, 563.

Arendt condemns progressive education for contributing to the more general problem of world alienation. The crux of her criticism is that schools have moved away from teaching students about the world and instead focused on teaching them about life.³³ American education has always understood that its primary purpose was to prepare the young for a new world. The problem is that schools have moved away from this to educating children about life and living, which has contributed to wordlessness. Academics have been subordinated to life skills, socialization and education as a means of preparing students for a vocation.³⁴ Life, for Arendt, is the space and social organization in which life's needs are housed and fulfilled and life is the activities that sustain life. Arendt did not have an issue with life, but that by subordinating the world to life places life as the main point of human existence, which contributes to world alienation.³⁵ To focus on life places emphasis on work and labor at the expense of action. Arendt considered action to be the essence of human existence. The world comes into existence through action.³⁶ So, without action there is worldlessness.

Arendt developed a hierarchy of human essence. The lowest form is labor. These are life-sustaining activities. It is a necessity to maintain our biological existence. Yet, labor does not create anything.³⁷ What labor produces is consumed and nothing is left behind.³⁸ Unlike action, labor and work do not need the presence of others.³⁹ A society obsessed with labor contributes to

³³ Levinson, 465.

³⁴ *Ibid*, 472.

³⁵ *Ibid*, 474.

³⁶ Mackler, 515.

³⁷ Hannah Arendt, *The Human Condition*, (Chicago: University of Chicago Press, 1958), 143.

³⁸ *Ibid*, 87.

³⁹ *Ibid*, 22.

world alienation because it is elevated above other activities, and as a result necessity rules existence.⁴⁰ Our conventional view of history with its determinism elevates labor, which in turn takes away natality, the unpredictable nature of man. Events are inevitable and predictable and no action of man can change them. This removes man's ability to change the course of events in unpredictable ways.⁴¹ Consumerism expands the realm of necessity and therefore elevates the importance of labor.⁴² Work creates objects that endure for a time beyond the men who created them. Work is focused on producing.⁴³ The product of work helps man labor, but these objects must be maintained, and these objects have an end goal when created. Work is characterized as something with purpose and instrumentality.⁴⁴ As Biesta explains, "work...has to do with the ways in which human beings actively change their environment and through this create a world that is characterized by durability."⁴⁵

Action, the human endeavor that Arendt held as the pinnacle of the existence of mankind, has many characteristics. Action is an end in and of itself, and it is closely related to freedom. For Arendt, to act means to begin something that did not previously exist into the world. A human is a "beginning and a beginner."⁴⁶ Everyone has a body, but what makes us unique is our

⁴⁰ Levinson, 476.

⁴¹ *Ibid*, 478.

⁴² *Ibid*.

⁴³ Biesta, 559.

⁴⁴ Chris Higgins, "Human Conditions for Teaching: The Place of Pedagogy in Arendt's Vita Activa," *Teachers College Record*. 112 (2), (2010): 413.

⁴⁵ Biesta, 559.

⁴⁶ Arendt, Hannah, "What is Freedom?" In *Between Past and Future*. Harmondsworth: Penguin, 1977), 170.

capacity to do something that has never been done before.⁴⁷ Speech is the product of private thinking and becomes permanent and part of the public world. Action's meaning is rendered through speech;⁴⁸ action can be formed through speech. Some scholars interpret Arendt's concept of action as political action, but Higgins suggests that action need not be political.⁴⁹ Arendt uses the word "deeds" to describe action. She described action as singular and unpredictable. There is a sense of theatrics with action/deeds. Action must be witnessed by others; their reactions are the beginning of a chain reaction of actions. Action is a product of natality; we insert ourselves into the world by way of action.⁵⁰ Arendt believed that action reveals who we are.⁵¹ She states "Whatever men do or know or experience can make sense only to the extent that it can be spoken about...men in so far as they live and move and act in this world, can experience meaningfulness only because they can talk with and make sense to each other and to themselves."⁵²

Hannah Arendt on Judgment

Originally from Germany and of Jewish decent, Arendt fled her home country in 1933 because of Hitler's rise to power, she lived in France until 1940, and finally settled in the United States with her mother and husband. Until her death in 1975, Arendt thought and wrote extensively about the nature of man in relation to the *polis*, totalitarianism, the nature of evil,

⁴⁷ Biesta, 559.

⁴⁸ Mackler, 520.

⁴⁹ Higgins, 415.

⁵⁰ Hannah Arendt, *The Human Condition*, (Chicago: University of Chicago Press, 1958), 176.

⁵¹ *Ibid*, 175.

⁵² *Ibid*, 4.

judgment and many other topics related to political theory. Perhaps her most widely-read work is *Eichmann in Jerusalem: A report on the Banality of Evil*, which was published in 1963. In this book, Arendt chronicles the trial of Adolph Eichmann, Nazi leader who played a major role in carrying out Hitler's "final solution of the Jewish question." Eichmann was kidnapped by Israeli intelligence in Argentina and brought to the District Court of Jerusalem to answer for his crimes.⁵³

Arendt asserts that the ultimate evil is the inability to think critically and reflectively about one's actions.⁵⁴ She claims that the atrocities committed by Eichmann were rooted in his lack of thinking. In her later writings, Arendt states:

However monstrous the deeds were, the doer was neither monstrous nor demonic, and the only specific characteristic one could detect in his past as well as in his behavior during the trial and the preceding police examination was something entirely negative: it was not stupidity but a curious, quite authentic inability to think.⁵⁵

This idea of thoughtlessness and its relation to evil is a problem that occupied much of Arendt's thought, especially in her later years.⁵⁶ Biskowski points out that Arendt never provided a concrete description of a judicious political agent, or how this person should orient and behave in the absence of universal standards. He speculates that the completed theory may have provided guidance for these activities.⁵⁷ Biskowski also believes that Arendt's theory could "have

⁵³ Hannah Arendt *Eichmann in Jerusalem: A Report on the Banality of Evil*, (New York: Viking Press, 1963), 5.

⁵⁴ Peter J. Steinberger, "Hannah Arendt on Judgment," *American Journal of Political Science* 34(3), (1990): 803 and Arendt, 1963.

⁵⁵ Hannah Arendt, "Thinking and Moral Consideration," *Social Research*, 38(3), (1971): 417.

⁵⁶ Steinberger, 803.

⁵⁷ Lawrence J. Biskowski, "Practical Foundations for Political Judgment: Arendt on Action and World," *The Journal of Politics* 55(4), (1993): 867.

important implications for a number of vital issues facing contemporary, post-Nietzschean political theory.”⁵⁸

Judgment as Thinking

Arendt’s concern with the connection of thoughtlessness and evil led her to begin formulating a theory of judgment. Unfortunately, Arendt never finished her complete account of this theory. The third volume of *The Life of the Mind*, which she planned to title *Judging*, was never written due to her death in 1975.⁵⁹ The Academy has seen “an explosion of interest in the phenomenon,” particularly in the field of political theory.⁶⁰ Scholars have spent the last three decades trying to piece her theory together. Biskowski states, “What Arendt might have written about the faculty of judgment can only be inferred and reconstructed from posthumously collected lecture notes, suggestive references in works addressed primarily to other topics and various other fragments.”⁶¹

For example, David Marshall argues that Arendt turned to the political philosophy of Kant.⁶² Marshall explains that Arendt claimed that Kant never really wrote a political philosophy, but one could glean a valuable account of politics from his writings. Based on Kant’s third critique, Arendt theorized “that the faculty of judgment could facilitate a thick description of political communities that join individuals together and habituate them to

⁵⁸ Biskowski, 868.

⁵⁹ Steinberger, 803.

⁶⁰ Matthew C. Weidenfeld, “Visions of Judgment: Arendt, Kant, and the Misreading of Judgment,” *Political Research Quarterly*, June (2012): 1.

⁶¹ Biskowski, 867.

⁶² David L. Marshall, “The Origin and Character of Arendt’s Theory of Judgment,” *Political Theory*, 38(3) (2010): 372.

considering things from points of view other than their own.”⁶³ Arendt adopted two of Kant’s definitions; using judgment to consider the particular in terms of the universal and the idea of “common sense” as the ability to engage with the possible and actual judgments of others.⁶⁴

Steinberger relies less on her ruminations on Kant, but instead leans on Arendt’s later writings to derive characteristics of her judgment theory. “In Arendt’s terms, thought in the service of political action comes to be identified as judgment.”⁶⁵ Though Arendt in *Thinking and Moral Considerations* distinguishes thinking from judgment, it seems that she implies that judging is a particular type of thinking that exists in the political world.⁶⁶ Arendt states, “Thinking deals with invisibles, with representations of things that are absent; judging always concerns particulars and things close at hand.”⁶⁷ Yet she also blends the two concepts by asserting that judging is a by-product of the “liberating effect of thinking.” The following quote makes it quite clear that Arendt equated judging with thinking. “The manifestation of the wind of thought is no knowledge; it is the ability to tell right from wrong, beautiful from ugly.”⁶⁸ Within the political arena, Arendt associated judgment with thinking. Steinberger states, “It seems not too much to suggest, then, that judging in fact is a particular species of thinking, the form that thinking takes in the political world.”⁶⁹ Richard Bernstein views Arendtian judgment as having the character of “autonomy...and its intimate relations with thinking.”⁷⁰ Even though at times

⁶³ *Ibid*, 368.

⁶⁴ *Ibid*, 367.

⁶⁵ Steinberger, 812.

⁶⁶ Jean Yarborough and Peter Stern, “Vita Activa and Vita Contemplativa: Reflections on Hannah Arendt’s Political Thought in *The Life of the Mind*, *Review of Politics*, 43:3 (1981): 323.

⁶⁷ Hannah Arendt, “Thinking and Moral Consideration,” *Social Research*, 38(3) 446.

⁶⁸ *Ibid*, 446.

⁶⁹ Steinberger, 812.

⁷⁰ R.J. Bernstein, “Judging-the Actor and the Spectator,” in *Philosophical Profiles*, (Philadelphia: University of Pennsylvania Press, 1986), 221.

Arendt's writings seem paradoxical and even contradictory, for the purposes of this review and dissertation the term thinking is used to mean political thought which manifests itself as judgment. Though some will take issue with this, I will therefore use thinking and judging somewhat interchangeably.

Universality, Generalities and Particulars

Arendt held fast to the idea that both thinking and judging operate in the realm of the particulars, and not generalities. Judgment assumes that there are no pre-established consensuses in response to a phenomenon and that politics is essentially concerned with negotiating differences of opinion.⁷¹ Judgment does not seek "truth" in politics, but rather it seeks thinking and decision.⁷² This means that the goal of judgment is not universal certainty or rational truth. Instead the goal is only "general communicability" and agreement.⁷³ A constant characteristic of Arendtian judgment is that there are no "banisters for thought." Judgment cannot include the particular under the universal, but must actually "think" the particular.⁷⁴ Steinberger notes that "To judge something well is simply to know it in the light of a particular context."⁷⁵ The validity of judgment is not universal but specific and particular. Judgment is always about a single thing; an object, an event, a person, and has no implications for any other thing.⁷⁶ Given Arendt's aversion to universals, it is not surprising that she would never develop a systematic theory of

⁷¹ Marshall, 369.

⁷² Steinberger, 812.

⁷³ Hannah Arendt, *Lectures on Kant's Political Philosophy*, (Chicago: University of Chicago Press, 1982), 40.

⁷⁴ Marshall, 384.

⁷⁵ Steinberger, 814.

⁷⁶ *Ibid*, 813.

judgment. Because judgments are beyond the realm of proof, one cannot use a universal theory or principal to validate judgment and can only make a specific claim about a specific phenomenon. Arendt related this idea of thinking only in particularities to the prevention of evil. She asked, “Could the activity of thinking as such, the habit of examining and reflecting upon whatever happens to come to pass, regardless of specific content and quite independent of results, could this activity be of such a nature that it ‘conditions’ men against evil doing?”⁷⁷ In other words, she suggests that thinking about specific phenomenon, on a case-by-case basis, can lead to “good” judgment.

Arendt derived this notion of the particulars at least in part from her reading of Kant. In *Thinking and Moral Considerations*, she states “...if Kant is right and the faculty of thought has a ‘natural aversion’ against accepting its own results as ‘solid axioms,’ then we cannot expect any moral propositions or commandments, no final code of conduct from the thinking activity least of all a new and now allegedly final definition of what is good and what is evil.”⁷⁸ Arendt went on to explain that thinking has a destructive effect that undermines all established values and measurements of good and evil. Thinking destroys customs and rules of conduct related to ethics and morals.⁷⁹

Moral Judgment

Arendt, ever perplexing and self-contradictory, was very hesitant to associate judgment with morality. She went radically against traditional western thought by disassociating morality

⁷⁷ Hannah Arendt, “Thinking and Moral Consideration,” *Social Research*, 38(3), (1971): 418.

⁷⁸ *Ibid*, 425.

⁷⁹ *Ibid*, 434.

and judgment, beginning with her coverage of the Eichmann trial.⁸⁰ Arendt fundamentally separated the moral from political action. “Purity of heart...” has no place in politics.⁸¹ Judgment is the most political of human actions. She explains in *Thinking and Moral Considerations* “the faculty of judgment...is the most political of man’s mental abilities.”⁸² In *On Revolution* Arendt supports this claim by citing that the French revolutionaries’ main goal was to establish a republic of virtue; a very “moral” goal, but instead established a republic of terror.⁸³

Again, referring to Arendt’s partial reliance on Kant in formulating her thoughts on judgment, one finds a stark contrast between Kant and Arendt; all the while evoking Kant’s thought to formulate her own. Kant clearly asserted that judgment was at least in part “the ability to tell right from wrong.” He posited that judgment was a matter of practical reason, not reflective judgment that “ascends from particulars to generals or universals.”⁸⁴ Kant states judgment “as the faculty of thinking the particular under the universal” is determinative and particulars are subsumed under the universal.⁸⁵ Moral law is the universal that guides moral action in all particulars, and is not reflective but determinative. Arendt, as noted above, asserts that one cannot subsume the particular under the universal, and therefore there is no moral law in

⁸⁰ Seyla Benhabib, “Judgment and the Moral Foundations of Politics in Arendt’s Thought,” *Political Theory*, 16(1) (1988): 30.

⁸¹ Hannah Arendt, *On Revolution*, (New York: Viking, 1969), 68,81.

⁸² Hannah Arendt, “Thinking and Moral Consideration,” *Social Research*, 38(3), (1971): 446.

⁸³ Benhabib, 46.

⁸⁴ R.J. Bernstein, “Judging-the Actor and the Spectator,” in *Philosophical Profiles*, (Philadelphia: University of Pennsylvania Press, 1986), 221-23.

⁸⁵ Immanuel Kant, *Critique of Judgment*, trans. and with analytical index by J. C. Meredith, (Oxford: Clarendon Press, 1964), 10.

which to judge all particulars.⁸⁶ Arendt flatly rejected determinative judgment as a meaningful form of judgment because it was based on a moral agent who has moral imperatives and only has to apply these set of rules, which are unchanging, while always responding to very unstable and different challenges.⁸⁷ Arendt used the example of English and Roman legal system as reflective judgment in action. Because these systems rely on the logic of precedent, they used reflective judgment because these systems do not begin with a precise set of static, unequivocal rules that could be used with any of the particularities faced in court.⁸⁸ She continues by stating that any determinative judgment is preceded by reflective judgment. To first see if a law applies to a certain case, the case must be studied and then the particularities of the case are then extrapolated into a law using reflective judgment.⁸⁹ In the end, all decisions, all judgments ultimately can be traced back to reflective judgment.

While Kant distinguishes the morally right from the morally good, Arendt makes no such distinction. Morally right actions conform to the moral law. However, only actions that are intended to conform to the moral law and motivated by the desire to conform to this universal law are considered morally good. In other words it is possible to take the right action for “wrong” or self-serving reasons.⁹⁰ While Arendt clearly dismissed Kant’s concept of “two-world metaphysics” and the abominable human behavior that she asserted resulted from it, Arendt interpreted his doctrine of reflective judgment more than just aesthetic judgment, as many

⁸⁶ Benhabib, 37.

⁸⁷ Marshall, 380.

⁸⁸ *Ibid*, 380.

⁸⁹ *Ibid*, 380.

⁹⁰ *Ibid*, 38.

scholars have suggested. Instead she viewed Kant's reflective judgment as a mode of thinking that could be applied to judgment in general. Arendt found a way to gain "intersubjective validity" for this type of judgment in the public realm.⁹¹ Kant wrote in his *Critique of Judgment* that reflective judgment was:

...a critical faculty which in its reflective act takes account (a priori) of the mode of representation of everyone else, in order, as it were to weigh it's judgment with the collective reason of mankind, and thereby avoid the illusion arising from subjective and personal conditions which could readily be take for objective...⁹²

But how is this intersubjectivity attained? Kant states "...This is accomplished by weighing the judgment, not so much with actual, as rather with the merely possible, judgment of others, and by putting ourselves in the position of everyone else."⁹³ Arendt's concept of reflective judgment was obviously heavily influenced by her reading, and re-reading, of Kant. A clear distinction between the two is that Kant emphasized the individual while Arendt emphasized the community, or *polis*.

Reflective Judgment

For Arendt, as is evident from the previous section, the only type of judgment that matters is reflective judgment. Biskowski claims that it is clear that Arendt aspired to base her theory on Kant's noncognitivist faculty of aesthetic judgment, which dismisses "objective validation of truth-claims" and instead emphasizes subjective consensus based on community

⁹¹ *Ibid*, 39.

⁹² Kant, 151.

⁹³ Kant, 151.

standards.⁹⁴ Kant's reflective judgment is not concerned with agreement with others but with the individual. Also, his reflective judgment is not for action, but only for thought and appreciation of beauty.⁹⁵ Arendt on the other hand viewed reflective judgment, political judgment, something that could only happen in the presence of others. For real judgment to occur there has to be the potential for agreement, and the result of this agreement must lead to some action. Judgment must move away from conversations with the self and move to the public realm. Arendt argued that one must filter private ruminations and go public in order to "transcend individual limitation."⁹⁶ Judgment is not like the thought process of pure reasoning, which consists of a dialogue between the self, but that in judging, while having that inner dialogue, one always has in mind the idea of the persuasion of others. Arendt states:

From this potential agreement judgment derives its specific validity. This means, on the one hand, that such judgment must liberate itself from the "subjective private conditions, "that is form the idiosyncrasies which naturally determine the outlook of each individual in his privacy and are legitimate as long as they are only privately held opinions but which are not fit to enter the market place, and lack all validity in the public realm. And this enlarged way of thinking, which as judgment knows how to transcend its individual limitations, cannot function in strict isolation or solitude; it needs the presence of others "in whose place" it must think, whose perspectives it must take into consideration, and without whom it never has the opportunity to operate at all.⁹⁷

⁹⁴ Lawrence J. Biskowski, "Practical Foundations for Political Judgment: Arendt on Action and World," *The Journal of Politics* 55(4), (1993): 868.

⁹⁵ Benhabib, 39.

⁹⁶ Arendt, Hannah.. "The Crisis in Culture." In *Between Past and Future*. Harmondsworth: Penguin, 1977), 220-221.

⁹⁷ *Ibid*, 221.

Benhabib explains that Arendt did not explore her differences from Kant in the matter of judgment and morality because she viewed Kant's 'enlarged mentality' as a model for "intersubjective validity" that could possibly be obtained in the public realm.⁹⁸ In fact, Benhabib points out that Arendt goes to great pains to separate moral considerations from political action, and in fact Benhabib argues that Arendt's thinking was flawed in approaching morality so conceptually narrow.⁹⁹ She observes that Arendt's "characterization of action through the categories of plurality, natality and narrativity provides us with an illuminating framework for analyzing judgment as a moral faculty..."¹⁰⁰ Biskowski seems to agree when he states that Arendt's concept of world, and one's love for that world provide "substantive moral content."¹⁰¹ Marshall reconciles Arendt's differences with Kant by stating "even as it does not moralize political discourse, Arendtian judgment contributes to ethical practice."¹⁰² Though it seems that Arendt had great disdain for the concept of morality in the realm of politics, nonetheless some of her writings seem to imply that judgment has some characteristics of a moral faculty.

Indeed to Arendt, all judgment is reflective judgment. She states that reflective judgment is the mental operation where "only the particular is given and judgment has to find the universal for it."¹⁰³ Arendt viewed reflective judgment as an informed account of all those judgments that bring events into focus for the sake of the political community. The goal of judging is not to eliminate differences of opinion. Instead, it aspires to improve perception by constantly making

⁹⁸ Benhabib, 40.

⁹⁹ *Ibid*, 46.

¹⁰⁰ *Ibid*, 31.

¹⁰¹ Biskowski, 870.

¹⁰² Marshall, 384.

¹⁰³ *Ibid*, 384

one aware of what distinguishes a particularity from all those other particulars that share some prior characteristics. Perhaps this explains why community is so important to Arendt.

Under the influence of Karl Jaspers, who was her dissertation advisor, Arendt's rereading of Kant spurred her emphasis on reflective judgment. She began to categorize and differentiate the various types of judgment; determinative, reflective, aesthetic, teleological, cognitive, and prudential.¹⁰⁴ Arendt rejected determinative judgment as a significant form because it presupposed a moral agent who is driven by a set of moral imperatives. This agent simply has to work on a correct application of a set of rules. Arendt characterized these set of rules as static, which makes them useless in an unstable world with various challenges.¹⁰⁵ Rather, judgment is a faculty of locating the similarities and differences between one's own judgments and those of others. Arendt states "what the presence of the universal-the a priori in reason- is for 'determinative judgment,' so the presence of other is for 'reflective judgment.'"¹⁰⁶ Clearly, a prerequisite for reflective judgment is the presence of others; judging cannot be "done" alone.

Theory of Action and Judgment

Some writers have looked beyond Arendt's incomplete theory of judgment to help formulate a more complete version of the theory. Biskowski argues that too much emphasis has been placed on Arendt's romanticized vision of Greek politics, and that the most important qualities Arendt drew from this source is her theory of action.¹⁰⁷ As stated earlier, Benhabib focuses on Arendt's deconstruction of action to characterize judgment as a moral faculty.

¹⁰⁴ Marshall, 380.

¹⁰⁵ *Ibid.*

¹⁰⁶ Quoted in Marshall, 381

¹⁰⁷ Biskowski, 869.

Biskowski continues by explaining that standards of judgment, political judgment, are associated with the political tradition, not the philosophical tradition. Judgment and the basis of judgment, according to him, is a political ethic.¹⁰⁸ D’Entreves seems to concur when he states “...judgment, especially moral and political judgment, is closely bound to the sphere of action...”¹⁰⁹ In *The Life of the Mind* Arendt states that as a spectator one can truly understand the truth behind an event, but the price of that truth is a withdrawal from the world as an actor.¹¹⁰ In *On Revolution*, she posits that the freedom to remove oneself from politics is “one of the most important negative liberties...”¹¹¹ Here she seems to give us permission to choose to be a spectator instead of an actor. Garsten notes that this is a surprising stance for Arendt considering she is best known as promulgating theories that propose action.¹¹² According to Arendt, these spectators include poets, historians etc. who fit facts and events into stories and judge them.¹¹³

Though perhaps an oversimplification, some scholars characterize Arendt’s writings on judgment as two theories; the actor and spectator, or *vita activa and vita contemplative*. Biskowski notes that Beiner claims Arendt gives us a concept of political judgment appropriate to political actors and another that is appropriate for observers. These observers are often

¹⁰⁸ *Ibid.*

¹⁰⁹ Maurizio Passerin D’Entreves, “Arendt’s theory of judgment,” in Dana Villa, ed., *The Cambridge Companion to Hanna Arendt* (Cambridge, UK: Cambridge University Press, 2000), 245.

¹¹⁰ Hannah Arendt, *The Life of the Mind* (New York: Harcourt, Brace, 1971), 93.

¹¹¹ Hannah Arendt, *On Revolution* (New York: Viking Press, 1963), 283.

¹¹² Bryan Garsten, “The Elusiveness of Arendtian Judgment,” in Seyla Benhabib, *Politics in Dark Times: Encounters with Hanna Arendt* (Cambridge, UK: Cambridge University Press, 2010), 317.

¹¹³ Jerome Kohn, “Freedom: the priority of the political,” in Dana Villa, ed., *The Cambridge Companion to Hannah Arendt* (Cambridge, UK: Cambridge University Press, 2000), 117.

referred to as spectators.¹¹⁴ Beiner supposes that the spectator concept position marks a shift in Arendt's thinking toward judgment. He characterizes this as a change in her focus from judgment as political action to the concept of judgment as the realm of the solitary, individual thinker.¹¹⁵ These individual thinkers, after 1971, had replaced the political agents acting in the community, who spent time thinking as a group about what decisions and judgments they should make.¹¹⁶ Now Arendt's judgment, according to Beiner, is no longer based on the deliberations of political actors trying to decide on the future, but instead judgment is instead a reflection on what has already taken place.¹¹⁷ Yet this is a perfect example of the complexity of Arendt's often contradictory writings on the same concept. In *Between Past and Future* Arendt states, "The capacity to judge is a specifically political ability."¹¹⁸ In this same volume, Bernstein notes that Arendt acknowledges "the fundamental and flagrant contradictions" in many of her most admired theorists and writers.¹¹⁹ Bernstein then goes on to use this as his thesis for criticizing Arendt for her own contradictions concerning judging, acting and thinking.¹²⁰

Arendt posits that, "debate constitutes the very essence of political life."¹²¹ Bernstein points out that debate is a form of action and goes on to state that action is the act of speech in

¹¹⁴ Biskowski, 870.

¹¹⁵ *Ibid*, 871.

¹¹⁶ *Ibid*.

¹¹⁷ Ronald Beiner, "Hannah Arendt on Judging." In Ronald Beiner ed. *Lectures on Kant's Political Philosophy*, (Chicago: University of Chicago Press, 1982) 109.

¹¹⁸ Hannah Arendt, *Between Past and Future*, (New York: The Viking Press, 1961), 221.

¹¹⁹ R.J. Bernstein, "Judging-the Actor and the Spectator," in *Philosophical Profiles*, (Philadelphia: University of Pennsylvania Press, 1986), 221.

¹²⁰ *Ibid*, 221-237.

¹²¹ Arendt, *Between Past and Future*, 241.

public.¹²² Arendt says action and speech, in *The Human Condition*, “are so closely related because the primordial and specifically human act must at the same time contain an answer to the question of every newcomer: ‘Who are you?’ Arendt goes on to say “Speechless action would no longer be action because there would no longer be an actor, the doer of deeds, is possible only if he is at the same time the speaker of words.”¹²³ I argue that if debate is action, and Arendt claims that debate is the highest form of political action, then one can analyze the political actor’s judgment based on this construct. We can use the actor’s words to discern her/his judgment. Recall Arendt’s major tenet of reflective judgment is that it is done in the presence of others; sharing ideas, listening etc.; in other words through debate.

In fact Biskowski thinks there’s evidence that creating a dichotomy between *vita active* and *vita contemplativ* is a fallacy. He asserts that, “The life of the mind and the life of action are best thought of not as ‘lives’ at all, but rather as dimensions or moments of human existence.”¹²⁴ Biskowski goes on to explain that as moments of human existence, as is obvious in Arendt’s writings, acting and thinking are interrelated in many ways.¹²⁵ Representative thinking plays a large role in judgment, and Arendt makes a distinction between the acting judgment (actor) and the thinking judgment (spectator). Biskowski goes on to explain “Through the faculty of judgment, we take a stand with respect to the people, events, objects and stories we reflect upon...By making judgments, we take a stand with respect to what we have seen, heard, and

¹²² Bernstein, 222.

¹²³ Hannah Arendt, *The Human Condition*, (Chicago: University of Chicago Press, 1958), 158.

¹²⁴ Biskowski, 872.

¹²⁵ *Ibid.*

reflected upon.”¹²⁶ This quality of judgment, of taking a stand, is essential to both the story teller, reflecting on the past, and the agents that participate in politics. Based on this characterization of Arendt’s thoughts on judgment as it relates to actor and spectator, one can use both to analyze contemporary political action, such as I am proposing for this dissertation.

Toms River Regional Schools: Profile and Brief History

The Toms River Regional School District is a K-12 district of approximately 17,000 students located along the central coast of Ocean County New Jersey.¹²⁷ The district is comprised of twelve elementary schools, three intermediate schools and three high schools. Toms River Regional School District is the largest suburban school district in the state.¹²⁸ Children from the towns of Beachwood, Toms River, Pine Beach, and South Toms River attend the school district. According to the NJDOE website, current superintendent of schools Frank Roselli states:

Toms River Schools are pupil centered. We recognize the school as a place where unexplored abilities, interests and traits are discovered and given opportunity for growth; and where the entire school population is offered visions of new and wider fields of knowledge and experience that make all life richer and more satisfying. These principles are basic in our vision.¹²⁹

¹²⁶ *Ibid*, 873.

¹²⁷ New Jersey Department of Education, *Report Cards Narrative, Toms River Regional*, <http://education.state.nj.us/rc/rc11/narrative/29/5190/29-5190-000.html> (September 20, 2012).

¹²⁸ *Ibid*.

¹²⁹ *Ibid*.

The narrative also states that the district takes considerable pride in the neighborhood school concept because this approach provides high-quality educational programs to all students from each sending town.

The roots of public education in Toms River reach back over 100 years. Originally, public education in this region consisted of one-room school houses in Cedar Grove, Chadwick Beach, East Dover, North Dover, Silverton, West Dover and downtown Toms River.¹³⁰ In 1891 the region produced its first high school graduating class. The Toms River Consolidated School District was formed by the voters of Dover Township (Toms River Township) and included the boroughs of Beachwood, Pine Beach and South Toms River in 1949. Previously, students paid tuition to matriculate in the district. After World War II, the area experienced substantial population growth, which necessitated new schools. As a result, “the sending district arrangement became absolute.”¹³¹ On December 8, 1964, voters in Dover Township (now Toms River Township) and the Boroughs of Beachwood, Pine Beach and South Toms River approved the formation of the current Toms River Regional School District.

Eight schools comprised the newly organized district: T.R. High School (the current building which is now South) opened in 1951, Intermediate East (1962), the former Toms River Elementary School built in 1925 and closed in 1982, the elementary schools at East Dover (1954), North Dover (1956), Pine Beach (1953), Washington Street (1960), and West Dover (1963). Since that time, 11 more schools have been built: Toms River High Schools North (1969) and East (1979), Intermediate North (formerly Intermediate West) (1974), Intermediate

¹³⁰ Toms River Regional Schools, *The History of Our School District*, <http://www.trschools.com/administration/schoolhistory.asp> (September 20, 2012).

¹³¹ *Ibid.*

South (2005), and the elementary schools at Cedar Grove (1971), Hooper Avenue (1965), Silver Bay (1972), South Toms River replacing Toms River Elementary (1982), Walnut Street (1965), Beachwood (1988), and Joseph A. Citta Elementary (1999). The Toms River Regional School District is the fourth largest in New Jersey, and is “a unique kindergarten through 12th grade regional district.”¹³²

Summary of Literature Review

In the political arena that is the American public schools, many vital decisions and choices that affect thousands of students are made by a few very powerful people. Hannah Arendt’s political thought is a relevant companion with which to think about and analyze the thinking, decisions and judgments of these individuals.

Arendt’s writing on education per se is sparse. One main point of emphasis for her is that education has contributed to modern society’s continued alienation from the world. She felt very strongly that politics should be kept separate from education, and this was particularly true for public education—although in the U.S. Arendt’s stance could be seen as anachronistic. In Arendt’s view, schools have moved away from teaching students about the world to teaching about life. This has led to wordlessness because the emphasis on life has subordinated the world and action to work and labor.

Arendt spent most of her professional life focusing on how thinking relates to evil. In essence, she believed that evil results from the inability to think reflectively about one’s actions. This line of thinking is what led to Arendt’s controversial conclusions about the Nazi atrocities. For Arendt, sound judgment cannot occur without thinking and when judgment occurs without

¹³² *Ibid.*

thinking, individuals make poor decisions, sometimes with tragic consequences. Drawing from Kant, Arendt theorizes that using sound judgment can help political entities facilitate decisions based on the consideration of diverse viewpoints. This position relates to Arendt's conception of "common sense," which she views as the ability to engage with the judgments of others.

Arendtian thinking and judging are inextricably linked, yet at the same time separate and distinct. Arendt proposes that judging is a certain type of thinking that occurs in the political realm. She also views judging as a byproduct of thinking. In short, Arendtian judgment can be thought of as thinking in the political world. One crucial aspect of Arendt's theories is that both thinking and judging operate in the realm of the particulars and not in the realm of universals. Judgment occurs without any pre-established notion in response to a particular situation. An Arendtian thinker is not in pursuit of a universal truth or certainty, but rather "general communicability" and agreement within a plurality. Judgment is therefore only about one particular situation and has no implication for any other situation. As a result, we cannot create any "moral propositions or commandments, no final code of conduct."

Arendt did not think of judgment and its consequences in moral terms. This stance was very different than the accepted Western notion of good and evil. Arendt was adamant that morality had no place in politics. This is where Kant and Arendt parted ways, since he believed that the purpose of judgment was to discern right from wrong. When Arendt refers to judgment, she is referring to reflective judgment. This is yet another point where Arendt and Kant differ. Whereas Kant's reflective judgment focuses on the individual, Arendt's reflective judgment is based on consensus. This reflective judgment is synonymous with political judgment, and it can only happen in the presence of others. Real judgment requires the potential for agreement, which must then lead to action. For Kant, reflective judgment is merely for thought, appreciation and

contemplation. For Arendt, real judging has to happen in public and result in some political action.

Since Arendt closely links judgment with action, it makes sense that some writers have turned to Arendt's theory of action to piece together a more complete theory of judgment. In order to do this one must concede that judgment is more closely associated with the political tradition than the philosophical. For Arendt, action is defined as political action so it stands to reason that Arendt's concept of judgment is closely tied to action rather than mere contemplation. Thinking is not the end, but rather the means by which one practices Arendtian judgment, which ultimately leads to action.

Some argue however that Arendt's later writings mark a shift of emphasis from actor to spectator. These writers propose that after 1971, Arendt's concept of judgment was no longer focused on the deliberations of political action but rather judgment as reflection on what has already taken place. One approach to reconcile these dichotomous and frankly perplexing contradictions is to view thinking and judging as integral parts of debate. I argue that speech itself is political action. If debate is action, and Arendt is correct that debate is the highest form of political action, then one can analyze political actors' judgments based on this construct. When attempting to use Arendt's thought on judgment and analyze the contemporary political realm, it may be a more complete approach to use her idea of both actor and spectator, which may lead to a richer portrayal of events.

Methodology

The research question I pursued is best analyzed through a historical lens. A historical analysis is a useful method to obtain knowledge of previously unexamined areas.¹³³ I conducted this study using a “New History” perspective.¹³⁴ However, positioning this dissertation within the perspective of “New History” is complex. The traditional model of written history has focused on politics.¹³⁵ This study is a contemporary political history, and according to Burke “politics is present history.”¹³⁶ What makes this study part of the “New History” movement is that it focuses on the local. Traditional history, while focused on politics, has concerned itself with matters of the nation-state.¹³⁷ Yet, while a school or school district could be considered local or grass roots, it is also part of the official state. What makes this study truly part of the new tradition is that it does not simply provide a narrative of events, but rather offers “the analysis of structures.”¹³⁸ Political history as a form of scholarship is generally divided between historians who are focused on the “centres of government and those interested in politics at the grassroots.”¹³⁹ This dissertation will follow the traditions of the latter. Burke explains that historians following this approach are interested in exploring the struggle for power at a more

¹³³ Catherine Marshall and Gretchen B. Rossman, *Designing Qualitative Research*, (Thousand Oaks, CA: Sage Publications, 2006), 119.

¹³⁴ Peter Burke, “Overture: the New History, its Past and its Future.” In Peter Burke ed. *New Perspectives on Historical Writing* (University Park, Pennsylvania: The Pennsylvania State University Press, 1992)

¹³⁵ Burke, 1.

¹³⁶ Burke, 3.

¹³⁷ *Ibid*

¹³⁸ Burke, 4.

¹³⁹ Peter Burke, “Overture: the New History, its Past and its Future.” In Peter Burke ed. *New Perspectives on Historical Writing* (University Park, Pennsylvania: The Pennsylvania State University Press, 1992) 1.

local level.¹⁴⁰ My specific issue of judging, deciding and acting within an Arendtian ethical framework, is bounded within a contemporary political history of the Toms River School District.

Data Collection

This study is a political, legal and educational history based on the analysis of various documents. A history is a story of an event or a series of events.¹⁴¹ Marshall and Rossman suggest that a researcher should consider such primary sources such as contemporary records, business and legal papers, public reports, including newspaper reports and government documents.¹⁴² Both primary and secondary sources were used in this study. Political histories often draw on statutes, case law, law review articles, history, research literature in education and political science, just to name a few.¹⁴³

For this dissertation some of the primary sources included news accounts from newspapers, periodicals, newswire services, as well as case law, statutes, and judicial decisions. I examined policy making, and the resulting procedures, as well as the politics within a school district, and as Lugg notes, both of these are heavily influenced by the law.¹⁴⁴ I consulted law review journals that contain commentary on the litigation in question. Though I have several key

¹⁴⁰ *Ibid*

¹⁴¹ Marshall and Rossman, 119.

¹⁴² *Ibid*.

¹⁴³ Catharine A. Lugg, "On Politics and Theory: Using an Explicitly Activist Theory to Frame Educational Research," in Vincent A. Anfara and Norma T. Mertz, ed. *Theoretical Frameworks in Qualitative research* (Thousand Oaks, CA: Sage, 2006), 181.

¹⁴⁴ Lugg, 180.

contacts within the district that could have possibly enriched this study, I did not pursue personal interviews since many of these contacts are still currently employed by the district, and occupy leadership positions at the highest level. Speaking on record could possibly jeopardize their careers and expose them to possible litigation.

The primary tool I employed for coding and analyzing the data is through the theoretical lens of Arendt's work on judgment. The overarching concept by which all events were analyzed is through the cornerstone of her theory; reflective judgment. My intent was to match any of the themes that emerged from the data with various aspects of Arendt's theory. The following categories of Arendt's thought were used:

- Particulars versus universals
- Invisibles
- Action in relation to natality
- Meaningfulness
- Liberation and freedom
- Discussion and debate
- Moral Judgment
- Arendt's concept of "common sense,"
- Thinking for the prevention of evil
- Judgment manifested as thought through political action
- "banisters of thought"
- The "positive" destructive nature of thinking
- Labor, work and action

- Reflective Judgment

I used both the original writings of Hannah Arendt, along with the many scholars who, in numerous academic journal articles and books, have attempted to untangle Arendt's sometimes seemingly disparate theory.

Limitations of Study

Like all studies, there are limitations to this research project. I acknowledge that foregoing interviews of key players in the district is a limitation of my study. In addition, using a historical analysis, generally speaking, has its limitations. This type of research cannot use direct observation as a method of data collection, and one cannot test a hypothesis using a historical case study.¹⁴⁵ There is also the possibility that documents were inadvertently misinterpreted by the writer. To the best of my ability, I have heeded Marshall and Rossman's recommendation that the historian maintain a healthy dose of skepticism as she or he conducts a historical study.¹⁴⁶ Finally, I am examining one legal case in one school district focused on one state statute, albeit a substantial and expansive one. This is a relatively narrow analysis in relation to public education in the United States. Also, my data analysis method is relatively narrow in that I'm using a political theorist's rather abstract theory, and Arendt's theory of judgment was never "completed." Despite these limitations, I think this history can be useful in continuing the discourse related to the decision-making of school leaders.

¹⁴⁵ Marshall and Rossman, 119.

¹⁴⁶ *Ibid.*

Chapter Summary

While there have been articles and books written using Hannah Arendt's political thought as a framework, very little has been written analyzing problems and issues in educational leadership. The scholarly work that currently exists focuses on her political theory as it relates to educational philosophy, the role of democracy in education and political education; pedagogy, and educational research methodology. Overwhelmingly this body of work links Arendt's thought primarily to teachers, teaching and the classroom. The purpose of this dissertation is to analyze a landmark anti-discrimination case involving a large suburban school district in New Jersey. This district has labored under a reputation as a somewhat corrupt system; a district that has not been a stranger to less-than-flattering media attention. In short, using the generally agreed upon perception of what is evil; what is poor judgment, the judgment exercised by the administrative leaders, the board of education, and the greater Toms River school community has been suspect over the course of the last several years. Of course, Hannah Arendt would take issue with anyone operationalizing her theory of judgment to condemn the leaders of Toms River. My hope is that by recording and analyzing the events that took place in the district as well as the subsequent legal battle, I may contribute to the ongoing dialogue of what constitutes good judgment as it relates to educational leadership. Citizens of this state, as well as those who follow education closely unfortunately are accustomed to school leaders' questionable judgment in the poorer urban districts, such as Camden, Trenton, and Newark. Toms River, however, is neither poor nor urban, and yet the actors that serve as leaders exhibited questionable judgment in the White case. The missteps that ultimately landed Toms River Regional Schools on the losing end of anti-discrimination case as well as the judgments and actions of lawmakers, state

agency officials and administrator have created an opportunity to contemplate the role of thinking and judging in our society today, thus making this a subject worthy of study.

While Hannah Arendt vehemently opposed any semblance of an ordered, systematic theory of judgment, universalities, and “banisters of thought,” an analysis of one school system’s behavior using her principles of judgment is a worthwhile pursuit. Though I am not suggesting that such a study can provide a “blueprint” of thinking, judging and acting in school leadership, it is my hope that the practice of educational researchers, policy makers and school administrators may be informed. However, it is important to raise the consciousness of educational leaders in this state regarding their judgment, decisions and actions. In the era of accountability it is important that society also hold school leaders to the high highest of standards.

CHAPTER TWO: THE LAW AGAINST DISCRIMINATION AND ARENDT'S THEORY OF JUDGMENT

This landmark case involving the Toms River School District is an ideal setting in which to analyze district leaders', as well as other actors' judgment through the lens of Hannah Arendt. The precedent-setting case of Louis White resulted in the New Jersey Supreme Court declaring that the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, applied to not only the work place, but also the public schools, and the law protected school-age children. This case made it clear that the protections provided under the LAD go beyond those provided by federal law.¹ In addition to analyzing the decisions of school leaders as well as the director, the ALJ, the appellate judges and ultimately the New Jersey Supreme Court justices, it is also illuminating to analyze the statute itself, both in terms of process and product, using the lens of Hannah Arendt's Theory of Judgment. First, however, it is important to flesh out the statute itself, and most importantly the provisions that would prove vital to *L.W. v. Toms River*.

The Law Against Discrimination

On April 16, 1945, the New Jersey legislature passed and Governor Walter E. Edge signed a bill enacting the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to 10:5-49, and creating the Division Against Discrimination. The LAD entitled the division as the "Division on Civil Rights."² This bill gave the division the "power to prevent and eliminate discrimination

¹ Edward Barocas, "Students' rights and the New Jersey Constitution," *New Jersey Lawyer, the Magazine*, 233, 233, 39-43, 5 (2005).

² N.J.S.A. 10:5-5.1.

in the manner prohibited by this act against persons because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender identity or expression, familial status, nationality, disability, or sex or because of their liability for service in the Armed Forces of the United States.”³ The bill was sponsored by Dr. James O. Hill who served as State Assemblyman for Newark. Dr. Hill drafted the law to prevent discrimination based on race, creed, color, and national origin or ancestry. The LAD was the nation's very first state-wide civil rights statute.⁴ Since its enactment, the statute has been amended “hundreds of times” to include newly recognized categories such as age, sex, disability and sexual orientation and gender identity or expression.⁵

When the LAD was first enacted, the legislature discussed which department would oversee its administration and enforcement. Some thought that it should be housed with the Department of Labor since it was related to employment. Another thought was to house it with law enforcement by having the Office of the Attorney General oversee the law. Governor Edge, however, thought that disputes could be resolved through ‘education, persuasion, and conciliation,’ and thus he assigned the Division to the Department of Education. In 1963 the Division was moved to the Department of Law and Public Safety, which is under the auspices of the Office of the Attorney General.⁶ The DCR is the agency responsible for investigating discrimination complaints and address illegal discrimination in New Jersey. Investigators,

³ N.J.S.A. 10:5-6.

⁴ State of New Jersey Office of the Attorney General, *New Jersey Against Discrimination: April 16, 1945-2005* "Comments of J. Frank Vespa-Papaleo, http://www.state.nj.us/lps/dcr/happy_bday_lad.html (accessed January 31, 2015).

⁵ *Ibid.*

⁶ *Ibid.*

attorneys, and professional support staff make up the Division. The Division's website states "We serve as a fair and impartial forum for addressing claims that the LAD or the Family Leave Act has been violated." The main focus of the DCR is to investigate claims of discrimination in employment, housing, and places of public accommodation including schools.⁷

The Division on Civil Rights is made up of the Attorney General and the Commission on Civil Rights. The Attorney General is appointed by the governor, and who is then approved by NJ Senate. The commission consists of seven members who are appointed by the governor and approved by the Senate, for five-year terms. These terms are staggered so that a member is replaced using the same procedure but only for the unexpired term. Members of the commission are not compensated, but are reimbursed "for necessary expenses incurred in the performance of their duties."⁸ The first chairman of the commission was designated by the governor but thereafter, the chairperson shall be elected by the members' each year.

The commission's actual powers are quite limited. The statute states that the commission "shall consult and advise the Attorney General in respect the work of the division."⁹ It is also charged to "support and study the operations" of the division. On occasion, the commission is to report to the legislature on the operations of the division "at such times as it may deem in the public interest."¹⁰ The remainder of this section of the act explains that mayors and other municipal leaders can appoint local commissions under the tenets of the LAD. These local

⁷ State of New Jersey Office of the Attorney General, *Overview*, <http://www.nj.gov/oag/dcr/about.html> (accessed February 8, 2015).

⁸ N.J.S.A.10:5-7.

⁹ N.J.S.A.10:5-10.

¹⁰ *Ibid.*

commissions can similarly advise and make recommendations to create policies and procedures that will help foster non-discrimination practices on the community level.¹¹

In sharp contrast to the commission, the attorney general has broad and extensive powers and duties as they relate to the Law Against Discrimination. In addition to administering all work of the division, the attorney general is responsible for exercising “all powers of the division not vested in the commission.”¹² The law requires the attorney general to organize the division into sections, including a section that receives and investigates claims of discrimination and acts on these complaints. The law also requires that the AG create another section that “shall... study recommend, prepare and implement, in cooperation with such other departments of the State Government or any other agencies, groups or entities both public and private, such educational and human relations programs as are consonant with the objectives of this act; and prescribe the organization of said sections and the duties of his subordinates and assistants.”¹³

The attorney general is required to appoint a director of the Division on Civil Rights. This director is empowered to act on behalf of the attorney general, with all the powers of the AG. The director appointment must be approved by the commission and the governor. In addition to the director, the attorney general must appoint a deputy director, assistant directors, field representatives and assistants “as may be necessary for the proper administration of the

¹¹ *Ibid.*

¹² N.J.S.A. 10:5-8.

¹³ *Ibid.*

division...”¹⁴ Each of these positions, including the director, are not subject to the Civil Service Act and may be terminated at the will of the attorney general.

The statute gives the attorney general, and thereby the director, broad powers to facilitate the conducting of investigations of complaints. The law states that the AG “may make rules as to the issuance of subpoenas by the director.” The director is authorized to use essentially any of the discovery procedures that are allowed in a court of law. For example, she/he can “subpoena witnesses, compel their attendance, administer oaths, and take the testimony of any person, under oath...” take interrogatories and oral depositions and require the production for examination of any documents related to investigation. Failure to comply with any of these demands is punishable through the Superior Court of New Jersey “in the same manner as such failure is punishable by such court in a case therein pending.”¹⁵

The LAD is the “law of the land” for the state of New Jersey and in the early sections of the statute, the legislature makes clear that the law was intended to cover a broad swath of society and is meant to be used liberally. The statute states the enactment of this law is “... an exercise of the police power of the State for the protection of the public safety, health and morals and to promote the general welfare and in fulfillment of the provisions of the Constitution of this State guaranteeing civil rights.”¹⁶ Based on this phrasing, it seems indisputable that the law was intended to cover practically every aspect of life in the quintessential pluralistic society that is the state of New Jersey. Yet, the Toms River Regional Schools strenuously disputed this tenet in the Louis White case.

¹⁴*Ibid.*

¹⁵ *Ibid.*

¹⁶ N.J.S.A.10:5-4.

The LAD includes N.J.S.A. 10:5-3 entitled “Legislative Findings and Declarations.” Because of the explicit and powerful language, I believe it is worthwhile to provide some of the actual text from this section of the statute. The first part of this provision establishes the fact that matters concerning discrimination are concerns of the state government. This section goes on to enumerate each class of citizen protected under the law, including “sex, gender identity or expression, affectional or sexual orientation.” In addition, the legislature declared “that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State...”¹⁷ The legislature then proceeds to formally state its opposition to such discrimination “...declares its opposition to such practices of discrimination when directed against any person by reason of...” and again naming the protected classes, including “sex, gender identity or expression, affectional or sexual orientation.”¹⁸

Finally, N.J.S.A 10:5-3 explains why and how discrimination is harmful to our society. In addition to “personal hardships” the state itself also “suffers grievous harm.” Again, the weight of the statute’s language is notable. This section then lists some of the actual possible harms including, “economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable...career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act.” Common law has typically provided relief for such harm through legal remedies including compensatory and punitive damages.¹⁹ The legislature made it clear that these legal remedies

¹⁷ N.J.S.A. 10:5-3.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

would be readily available to all people protected by the act, and that, “this act shall be liberally construed in combination with other protections available under the laws of this State.”²⁰ Clearly the lawmakers in Trenton wanted to insure that the LAD had the “teeth” to be effectively enforced.

These “teeth” were the result of several 1990 Assembly and Senate bills which amended the law. Assembly bills 2872, 2118 and 2228 created several crucial additions to the statute. Due to a 1989 New Jersey Supreme Court case, *Shaner v. Horizon Bancorp*, 116 N.J. 433, which found that plaintiffs did not have a right to a jury trial under LAD, the legislature amended the law in 1990 to give injured parties this relief. The Assembly also added language to the findings section that enumerated some of the hardships one could suffer such as “economic loss” and “emotional trauma.” The bill also added language stating that the LAD should be “liberally construed so that all common law remedies, including compensatory and punitive damages, are available to persons protected by the LAD.” Senate Bill No. 3758 amended this section of the law in 1991 to expand the provisions of the LAD to include discrimination on the basis of “affectional or sexual orientation.”²¹ In other words, prior to this amendment, people who suffered discrimination as defined by the LAD were not entitled to a jury trial, nor were they entitled monetary damages. These two changes in the law in the early nineties would have an enormous influence on the Louis White case a decade later.

N.J.S.A 10:5-5 provides very precise definitions to key terms used in the law. Several of these are germane to the White case. One section lists over 60 specific types of places where the LAD prohibits discrimination including public schools. ‘A place of public accommodations’

²⁰ *Ibid.*

²¹ *Ibid.*

shall include, but not be limited to... any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey.”²² This section also stated that private educational institutions, and those operated by religious organizations could set certain criteria as long as it was not based on “...gender identity or expression or affectional or sexual orientation in the admission of students.”²³ The most relevant parts to this section of the law is defining clearly that a public school is indeed “a place of accommodation,” and making clear that “affectional orientations” is a protected class. Again, the nature of the language and the specificity used by lawmakers supports the idea that the law is intended to be wide-ranging in its application.

One other interesting aspect of this section of the LAD is the fact that it defines “affectional orientation.” According to the statute, this term “means male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation.”²⁴ The key term in this definition is “perceived, presumed or identified by others” because Louis White was the target of harassment due to the *perception* of others that he was queer.

Included in the LAD is N.J.S.A. 10:5-13, which ascribes the methods by which a complainant can seek relief from alleged discrimination. There are two possible pathways that an aggrieved party may pursue. Either personally or through an attorney, one may file a

²² N.J.S.A. 10:5-1 (l).

²³ *Ibid.*

²⁴ N.J.S.A. 10:5-1 (hh).

“verified complaint in writing” with the Division on Civil Rights. The complaint must be filed within 180 days of the alleged discrimination.²⁵ This filing must list the name and address of the alleged violator of the statute. The Division’s initial response will be a notice from the director informing the complainant of their rights under the law, including the right to file a complaint in Superior Court for a hearing in front of a jury.²⁶ The attorney general, Commissioner of Labor or Commissioner of Education may also file a motion in the same court on behalf of the complainant.

Under the LAD, the complainant may also file in Superior Court without first filing a complaint with the Division. Once this suit is filed, then a jury trial decides the validity of the claim. The same remedies that are available in common law tort cases if the plaintiffs are successful. These remedies are additive to any remedies provided by any other applicable statute.²⁷ Pursuit of this type of suit in Superior Court, however, prevents complainants from filing a complaint with the Division or any other court while the outcome of the suit is pending. After six months of the initial filing with the Division, a complainant may request that the Director file a motion with the Office of Administrative Law. This can only happen if the Director of the Division has not ruled that there is no probable cause in the alleged allegations.²⁸

The LAD also spells out the duties and responsibilities of the Attorney General as they relate to the statute. After the filing of a complaint, the AG is obligated to investigate the matter promptly. “During the period beginning with the filing of such complaint and ending with the

²⁵ N.J.S.A. 10:5-18.

²⁶ N.J.S.A. 10:5-13.

²⁷ *Ibid.*

²⁸ *Ibid.*

closure of the case or 45 days from the date of a finding of probable cause, the Attorney General shall, to the extent feasible, engage in conciliation with respect to such complaint.”²⁹ The Attorney General, director or any of their agents may disclose any discussion between the Attorney General or a representative and the respondent, except when disclosing the terms of a settlement offer to the complainant anyone on whose behalf the complaint was filed. After the filing of the complaint the Attorney General may proceed against the accused in a “summary manner” in Superior Court to “compel compliance” with the provisions of the act. The AG can also proceed in order to prevent violations or attempted violations of any provisions, or to prevent attempts to interfere with or hinder the enforcement of any provisions of the law.³⁰

After the complainant has filed a verified complaint, the director will review it. If the director determines probable cause, the case in support of the complaint is presented before the director by the attorney for the division. The respondent files a “written verified answer” to the complaint and appears, with or without counsel, before the director to submit testimony. The complainant is allowed to present testimony in person. Testimony at the hearing is taken under oath and a “verbatim record” is created.³¹ The director or the complainant can “reasonably...amend” the complaint and the respondent can also amend his answer. The director is not bound by the strict rules of evidence used in civil actions in state courts.³²

The statute spells out how findings, conclusions and the order from the director are administered. After weighing all of the evidence, if the director finds that the respondent has

²⁹ *Ibid.*

³⁰ N.J.S.A. 10:5-14.1.

³¹ N.J.S.A. 10:5-16.

³² *Ibid.*

engaged in any unlawful employment practices or unlawful discrimination in violation of the act, she/he will state the findings and then issue a “cease and desist” order directing the respondent to stop the unlawful actions. In addition, the respondent is required to “take affirmative action ... hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership, in any respondent labor organization, or extending full and equal accommodations, advantages, facilities, and privileges to all persons..” The respondent is required to submit a report detailing how they are complying with the order.³³

If the violations resulted in an economic impact on the complainant, the director may award “three-fold damages” to those “aggrieved” by the violations.³⁴ The act allows for any financial remedies that are available in all common law tort cases. These damages include the replacement of what was actually lost as well as damages due to emotional distress caused by the violations. On the other hand, if after considering all evidence the director’s findings indicate that there was no unlawful practices or discrimination, her/his findings of fact and conclusions will be stated and the complainant will receive an order stating that the case is being dismissed.³⁵ The statute also has a provision that offers parties that are “aggrieved by a final order of the director” may appeal the ruling to the Appellate Division of state Superior Court.³⁶

The LAD also delineates how these cases can be resolved and what penalties may be imposed. For any respondent who the director or court determines violated any of the provisions of the Law Against Discrimination can be compelled to take affirmative action provided by law

³³ N.J.S.A. 10:5-17.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ N.J.S.A. 10:5-21.

and be liable for several penalties. They must pay a fine of not more than \$10,000 if they have not been found to have violated the statute in the preceding five years.³⁷ If the respondent has been found to have committed another violation of the law in the last five years then they can be fined \$25,000. If the respondent has been found to have committed two or more violations in the previous seven years then they can be fined \$50,000. The penalties are determined by the director based on the facts of the case, and these penalties are a part of the final order. Any penalties collected are made payable to the state treasury and will be used for the general purposes of the state.³⁸ The law allows the reimbursement of attorney's fees if the complainant prevails. Respondents can only be awarded attorney's fees if it is determined that the complaint was filed in "bad faith."³⁹

The Law Against Discrimination is the underpinning of the Louis White case. As the first state anti-discrimination law enacted in the United States, the statute provides extensive protections to members of the various protected classes. It established the administrative unit known as the Division on Civil Rights and gave the division the "power to prevent and eliminate discrimination..." based on a host of protected characteristics, including "sex, gender identity or expression, affectional or sexual orientation."⁴⁰ The legislature added affectional or sexual orientation as a protected class through amendment in 1991. Not only is the law very specific as to whom it protects and to what extent, but it also provides remediation by way of extensive penalties for those found to have violated the LAD. The legislature saw fit to provide "teeth" to

³⁷ N.J.S.A. 10:5-14.1 (a).

³⁸ *Ibid.*

³⁹ N.J.S.A 10:5-27.1.

⁴⁰ N.J.S.A. 10:5-6.

this law. The legislature made it very apparent that the purpose of the law is to completely eliminate discrimination from our society. The LAD clearly states that unlawful discrimination is prohibited in any space considered a public accommodation, including the state's public schools. Perhaps most importantly, the LAD granted the Director of the Division on Civil Rights extensive powers to enforce the law, even to the point of modifying or rejecting the decision of an administrative law judge. These powers would prove crucial in the Louis White case.

Arendt's Theory of Judgment and the LAD

Common Sense

Arendt's notion of reflective judgment can be used to analyze the law for evidence of thinking and judging. New Jersey's Law Against Discrimination can be characterized as the quintessence of Arendtian judgment and thinking. Arendt adopted two of Kant's definitions; using judgment to consider the particular in terms of the universal and the idea of "common sense" as the ability to engage with the possible and actual judgments of others.⁴¹ Arendt stated "that the faculty of judgment could facilitate a thick description of political communities that join individuals together and habituate them to considering things from points of view other than their own."⁴² The New Jersey governor and legislature exhibited thinking for the sake of political action, which is judgment, when they enacted the law in 1945. Here is a "political community" which indeed considered points of view that reflected a human existence that was not necessarily their own. We can assume that the governor and state lawmakers in 1945 America overwhelmingly belonged to a privileged class (white, male, middle to upper-middle class etc.).

⁴¹ David L. Marshall, "The Origin and Character of Arendt's Theory of Judgment," *Political Theory*, 38(3) (2010): 368.

⁴² *Ibid*, 367.

These representatives were most likely not victims of discrimination themselves. Therefore, in order to conceive, write, pass and enact this groundbreaking statute, the legislators had to consider the points of view of others.

Other evidence that the governor and lawmakers were “considering things from points of view other than their own,” is the specific classes of people who are explicitly protected by the law. In each subsection of the law, the wording is extremely specific in regards to who is protected. In addition, the number of protected classes is extensive and broad. Over time, the following wording is included: “practices of discrimination against any of its inhabitants, because of race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, disability or nationality...”⁴³ Again, the pillars of power in federal and state government were not known for their diversity or inclusion of traditional marginalized members of society. This list of protected classes represents those traditionally targeted for discrimination and/or those most vulnerable to such treatment. In Arendtian terms, this is clearly representative of considering the plights and point of views of others.

Thinking and Judging

The LAD is a marriage of the concepts of thinking and judging. In *Thinking and Moral Considerations*, Arendt attempts to distinguish the two, but it is clear that judging is a particular type of political thinking.⁴⁴ The conception and materialization of the LAD reflects both thinking, which Arendt associated with “invisibles” and “things that are absent,” and judging,

⁴³N.J.S.A. 10:5-5.

⁴⁴ Hannah Arendt, “Thinking and Moral Consideration,” *Social Research*, 38(3) 446.

which Arendt asserted was always focused on “particulars and things close at hand.”⁴⁵ The legislature contemplated the societal need of protecting all citizens from harmful discrimination. Discriminatory practices were/are invisibles to those who are not on the receiving end of these practices. We can assume discrimination was “absent” in the vacuum that is the rule-making body. Yet in writing the law, the lawmakers tried to imagine as many particulars as possible that the law could address.

So while the creation and enactment of the LAD can be thought of as a product of Arendtian thinking, because the legislature also attempted to anticipate and imagine future particulars, the LAD also reflects Arendtian judgment. Of course, true Arendtian judgment occurs when these and other laws are applied, tested and challenged in the courts. Arendt even highlights the English legal system as an example of judging using particulars instead of only focusing on the universals that make up the law. If we only used universals, there would be no need for particulars, and therefore, no need for courts of law, judges or juries. We would simply read the law and mechanically apply the universal “truths” therein to the particular case at hand.

Action

This blending of thinking and judging is also apparent in the Law Against Discrimination *vis a vis* Arendt’s concept of action which is vital to her ideas of thinking and judging. Arendt says that judging is a by-product of the “liberating effect of thinking.”⁴⁶ Arendt related thinking to freedom through action, which is the pinnacle of mankind’s existence. To act is to begin

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

something that did not previously exist.⁴⁷ A human is a “beginning and a beginner.”⁴⁸ Everyone has a body, but what makes us unique is our capacity to do something that has never been done before.⁴⁹ This law did not exist before. The lawmakers may have acted and had their beginning through other aspects of their professional lives, but by proposing, debating and finally passing the LAD they were beginners and beginning. They achieved natality through this law. Speech is the product of private thinking, and renders actions meaning and even *creates* (my emphasis) action.⁵⁰ The New Jersey legislature engaged in action via speech by creating the LAD. Evidence of this is the law itself.

Meaningfulness

This concept of meaningfulness through action is born out in the LAD. Arendt posits that action reveals who a human being really is. She states man “can make sense only to the extent that it can be spoken about...men in so far as they live and move and act in this world, can experience meaningfulness only because they can talk with and make sense to each other and to themselves.”⁵¹ Through discussion and debate, the legislators came to conclusions, made judgments that revealed who they truly were and gave meaning to their lives. Until the idea of anti-discrimination legislation left the private realm of the mind and thought and was spoken in the chambers of the state legislators, there was no action. These thoughts did not make sense, did

⁴⁷ Gert Biesta, “How to Exist Politically and Learn from It: Hannah Arendt and the Problem of Democratic Education,” *Teachers College Record*. 112 (2), (2010): 559.

⁴⁸ Arendt, Hannah, “What is Freedom?” In *Between Past and Future*. Harmondsworth: Penguin, 1977), 170.

⁴⁹ Biesta, 559.

⁵⁰ Stephanie Mackler, “And Worldlessness, Alas, Is Always a Kind of Barbarism: Hannah Arendt and the Challenges of Educating in Worldlessness Times,” *Teachers College Record*. 112 (2), (2010): 520.

⁵¹ *Ibid*, 4.

not have meaning, until they were parsed out through the legislative process. By doing so, the legislators were also able to make sense of the world that had allowed institutionalized, de facto discrimination to exist in the public realm of the state's society.

Liberation and Freedom

Thinking and judging is also liberating in another sense of the word. Arendt argued that thinking has a destructive effect that undermines all established values and concepts of good and evil. This destructive nature is also liberating because it frees man and society from being enslaved by established "truths" that are often accepted en masse without much consideration. Thinking destroys customs and rules of conduct related to ethics and morals.⁵² An accepted truth at the time in 1945 was that certain classes of citizens were vulnerable to discrimination. This was not challenged via statute or case law, and therefore discrimination was de facto institutionalized by the state government. The authentic thinking and judging exhibited by the leaders of the state were a disruptive and liberating force to change this.

Even more telling, however, is a close examination of the wording of the law. For instance, in the section entitled "Legislative Findings and Declarations," the law states "The legislature finds and declares that practices of discrimination against any of its inhabitants...are matters of concern to the government of the State..."⁵³ This is a powerful statement of action because it memorializes and legitimizes these behaviors as something that the state cares about and will not tolerate. These words represent true Arendtian action and are a product of thinking and judging for two primary reasons. First, this law did not previously exist. The explicit

⁵² Hannah Arendt, "Thinking and Moral Consideration," *Social Research*, 38(3), (1971): 434.

⁵³ N.J.S.A. 10:5-3.

protections afforded in the law were unprecedented in New Jersey, and throughout most of the United States. Also, the law was disruptive in nature because it challenged the idea of discrimination, which was universally accepted in much of society. Therefore, this particular law is “liberating” because it promotes and extends freedom.

Presence of Others

Arendt’s concept of action also dictates that it can only take place around other people and must be witnessed. This law began as a bill that was discussed, debated and ultimately enacted during legislative sessions. Arendt asserts that when action occurs in the presence of others, it triggers a chain reaction of additional actions.⁵⁴ On an ongoing basis, the LAD stands as is and its existence continually triggers the actions of people and entities in power to either not act in a discriminatory manner, or to do so. If the powerful choose to discriminate, this in turn triggers a complaint to the Director who assesses the merits to find cause, and then it moves to an Administrative Law Judge and possibly on to the appellate courts. This ecosystem of acting and judging is consistent with Arendt’s theories.

Discussion and Debate

The discussions and debates that are the hallmark of any legislative process are what Arendt would characterize as the essence of true action. She explains that “debate constitutes the very essence of political life.”⁵⁵ Bernstein points out that to Arendt, debate is a form of action and goes on to state that action is the act of speech in public.⁵⁶ Of course, over the course of

⁵⁴ Hannah Arendt, *The Human Condition*, (Chicago: University of Chicago Press, 1958), 176.

⁵⁵ Arendt, *Between Past and Future*, 241.

⁵⁶ Bernstein, 222.

creating this law, the legislators engaged in much public speaking. This act of speaking relates to Arendt's concept of natality, of emerging onto the world. In essence, the lawmakers who created this law and uttered the words that ultimately led to the written law, came into existence when the law came into existence. Arendt explains action and speech, in *The Human Condition*, "are so closely related because the primordial and specifically human act must at the same time contain an answer to the question of every newcomer: 'Who are you?'" She continues by saying "Speechless action would no longer be action because there would no longer be an actor, the doer of deeds, is possible only if he is at the same time the speaker of words."⁵⁷ Since speech is action, and the legislature exists to and through debate, one can assess the lawmaking body's judgment based on this debate, and the product of this debate, which is the laws it produces, which in this case is the LAD.

One can look at the LAD as judgment because the law represents political action. This can be done by illustrating what the law is not; work or labor. Labor is composed of activities that are life sustaining. Labor is necessary to maintain our biological existence.⁵⁸ As important as the LAD is in creating a more just society, its creation cannot be viewed as life sustaining. Labor does not actually create anything. What labor produces is consumed and nothing is left behind.⁵⁹ The process of establishing the LAD created an everlasting document. This law has and will outlive most of its original authors. The LAD, unlike products of labor, will leave something behind.

⁵⁷ Hannah Arendt, *The Human Condition*, (Chicago: University of Chicago Press, 1958), 158.

⁵⁸ *Ibid*, 143.

⁵⁹ *Ibid*, 87.

Work and Labor

One can also contrast the LAD as action as opposed to the Arendtian concept of work. This is another aspect of Arendt's thinking that becomes somewhat slippery. Work creates objects that endure for a time beyond the men who created them. Work is focused on producing.⁶⁰ Men produced the LAD. As mentioned before, the statute is something that will outlive its creators. In this respect, the production of the LAD could be characterized as work. Arendt also says work helps man labor.⁶¹ In other words, the product of work helps sustain life. The LAD does not do this, per se. Arendt also says the objects produced by work must be maintained. The LAD has been maintained in the form of numerous amendments over the last six decades. Work creates objects with an end goal with purpose and instrumentality.⁶² The LAD certainly fits this description. The statute's end goal, purpose and instrumentality is both implied and explicit; to eliminate discrimination from our society. Biesta explains that work involves human beings actively changing their environment in order to create a durable world.⁶³ Many of these descriptors can be applied to the LAD.

One section of the law in particular can be classified as work. In N.J.S.A 10:5-3 the legislators describe the potential harm people can suffer due to discrimination. The statute states

... because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness

⁶⁰ Biesta, 559.

⁶¹ Chris Higgins, "Human Conditions for Teaching: The Place of Pedagogy in Arendt's Vita Activa," *Teachers College Record*. 112 (2), (2010): 413.

⁶² *Ibid.*

⁶³ Biesta, 559.

or other irreparable harm resulting from the strain of employment controversies... career, education, family and social disruption...⁶⁴

So, not only the process of the lawmakers creating the law has work characteristics, but the purpose and resulting product can be characterized as such. Arendt explains that work helps man labor.⁶⁵ The product of work helps sustain life. Personal hardships, economic loss, homelessness can all result in a situation where it is difficult to sustain life. Discriminatory treatment in the workplace can result in the loss of the ability to make a living, and thus sustain life. Ultimately, I cannot definitively say that the process of creating the LAD is only action. The process simply has too many characteristics of both work and action, and thus this reveals another confounding and paradoxical portrayal of Arendtian judgment.

Particulars and Universals

The legislative and judicial branches of government, and their interdependence, epitomize Arendt's view of judgment regarding particulars and universals. Arendt held fast to the idea that both thinking and judging operate in the realm of particulars and not universals. Judgment assumes no pre-established consensus to a phenomenon, and politics is essentially negotiating differences of opinion and power.⁶⁶ The state legislature is a body that, at least in theory, is devoted to considering the opinions of the various members, and ultimately making decisions that result in the final version of state statutes. Though the LAD is a broad and

⁶⁴ N.J.S.A. 10:5-3.

⁶⁵ Chris Higgins, "Human Conditions for Teaching: The Place of Pedagogy in Arendt's Vita Activa," *Teachers College Record*. 112 (2), (2010): 413.

⁶⁶ David L. Marshall, "The Origin and Character of Arendt's Theory of Judgment," *Political Theory*, 38(3) (2010): 369.

sweeping piece of legislation, and thus somewhat universal in nature, it does leave plenty of room for the particular.

The legislative process in general and the passage of the LAD in particular reflect thinking. The outcome of that thinking is judgment and decision. There is a preponderance of evidence of thinking in this law. The outcome, the decision was/is to formally declare that discrimination is wrong, harmful and most importantly was no longer acceptable in the state of New Jersey. The law states that discrimination "...threatens not only the rights and proper privileges of the inhabitants of the state but menaces institutions and foundation of a free democratic State..."⁶⁷ Decision is also evident in that the law lays out a clear course of action for anyone who feels they have been the target of discrimination, along with substantial punishments for those determined to have done so. In other words, the law was not just a stance against this treatment based on principal, but the legislature used Arendtian thinking and judgment to make sure this law could be enforced.

The whole process of pursuing an action through the courts is focused on the particulars. The judge or jury considers the particulars of a case and then decides if the law, which is the universal, has been violated. This is the essence of having to "think" the particular.⁶⁸ Steinberg notes that for Arendt, "To judge something well is simply to know it in the light of a particular context."⁶⁹ The particular context for the courts relative to the LAD is the nature of the verified complaint. Arendt's aversion to the universal makes it impossible for the courts to comply completely with the tenets of Arendtian judgment. She insisted that because judgments are

⁶⁷ N.J.S.A. 10:5-3.

⁶⁸ Marshal, 384.

⁶⁹ Steinberger, 814.

beyond the realm of proof, one cannot use a universal theory or principal to validate a judgment, but rather can only make a specific claim about a specific phenomenon. In a court, or even the Director's final determination, the ruling must be based on some semblance of proof. This is a perfect illustration of how Arendt is so slippery on the subject of judgment, which makes using her theory to analyze a particular case very challenging.

Thinking for the Prevention of Evil

Arendt believed there was a strong relationship between thinking and the prevention of evil. She asserted that evil itself is the inability to think critically and reflectively about one's actions.⁷⁰ It is easy to argue, therefore, that the New Jersey Legislature was trying to prevent "evil" from occurring by creating the Law Against Discrimination. So not only does the process and the wording of the law evidence Arendtian thinking, but the dispositions and philosophical foundations that led to the motivation and purpose of the law represents Arendt's definition of thinking and judging. The LAD was motivated by a desire to eliminate current discrimination practices and discourage them from occurring in the future. Under "Notes of Decision" and "Purpose" the law states, "The essential purpose of the Law Against Discrimination (LAD) is the eradication of discrimination." This additional statement follows, "The Law Against Discrimination is remedial social legislation whose overarching goal is to eradicate the cancer of discrimination; as such, it should be liberally construed."

A careful reading of Arendt's analysis of the Eichmann trial supports the argument that thinking and judging are designed to, or result in, the prevention of evil. She writes:

⁷⁰ *Ibid.*

However monstrous the deeds were, the doer was neither monstrous nor demonic, and the only specific characteristic one could detect in his past as well as in his behavior during the trial and the preceding police examination was something entirely negative: it was not stupidity but a curious, quite authentic inability to think.⁷¹

If Arendt concludes that evil doing is the result of not thinking, then it reasons that taking action as a result of thinking and judging results in the prevention of evil. This is precisely the case with the genesis of the LAD.

Arendt also relates the idea of thinking in particularities to the prevention of evil. She asked, “Could the activity of thinking as such, the habit of examining and reflecting upon whatever happens to come to pass, regardless of specific content ... could this activity be of such a nature that it ‘conditions’ men against evil doing?”⁷² In other words, Arendt suggests that thinking about specific phenomenon on a case-by-case basis can result in good judgment and the prevention of doing evil.

The legislature’s use of the word “cancer” creates a powerful metaphor that reflects Arendt’s insistence on judging the particulars. Cancer is not just one disease. There are hundreds of forms and iterations. In addition, these cancers produce a myriad of outcomes, and some more hideous than others. Just as there are countless forms of literal cancer, the cancer of discrimination takes on many forms, with varying degrees of devastation. The differences are found in the particulars of each case. The goal is the same regardless of the particular form; to rid the body and our society of this potentially terminal disease. Based on the type of cancer, an oncologist will choose a therapy that has been shown to be most effective. The LAD’s wide and

⁷¹ Hannah Arendt, “Thinking and Moral Consideration,” *Social Research*, 38(3), (1971): 417.

⁷² Arendt, (1971) 418.

expansive scope, with 49 sections and numerous subsections, attempts to provide the Director and the courts with various options to fight discrimination.

Moral Judgment and the LAD

Analyzing the LAD using Arendt's thought in relation to morality is problematic. Arendt was very hesitant to associate judgment with ethics and morality. If we view the LAD through the lens of traditional western thought, it is easy to conclude that a law that combats discrimination is morally and ethically sound. Yet Arendt went radically against the traditional two-world metaphysics that characterizes western philosophy. This can be seen in vivid color in her work on the Eichmann trial.⁷³ Arendt adamantly believed that morality must be separated from politics. "Purity of heart...has no place in politics."⁷⁴ Arendt considered judgment to be the most political of all human actions, "...the faculty of judgment...is the most political of man's mental abilities."⁷⁵ As an example of the disastrous effect of mixing morality and politics Arendt cited the French revolution, which had as its main goal to establish a "republic of virtue" but instead created a republic of terror.⁷⁶ It is difficult to argue that the LAD does not have a moral and virtuous objective. Therefore, when examining this law through the lens of Arendt's views on moral judgment, one must conclude that in this respect state leaders were not practicing thinking and judgment.

⁷³ Seyla Benhabib, "Judgment and the Moral Foundations of Politics in Arendt's Thought," *Political Theory*, 16(1) (1988): 30.

⁷⁴ Hannah Arendt, *On Revolution*, (New York: Viking, 1969), 68,81.

⁷⁵ Hannah Arendt, "Thinking and Moral Consideration," *Social Research*, 38(3), (1971): 446.

⁷⁶ Benhabib, 46.

Morality can be detected by a close examination of the phrasing of various sections of the law. When referring to the right to obtain employment and equal access to public accommodations, the LAD states, “This opportunity is recognized as and declared to be a civil right.”⁷⁷ Even the concept and phrase “civil right” evokes the idea of morality. The statute literally uses the word “morals.” It states, “The enactment of this law is “...for the protection of public safety, health and morals and to promote general welfare...guaranteeing civil rights.”⁷⁸ Not only does the term “civil right” appear again and again, the statute explicitly states that its very purpose is to safeguard the morality of our society. Both in terms of our conventional understanding of politics, as well as Arendt’s somewhat more nebulous concept of politics, the legislature and its actions are political. Thus it is apparent that in this particular case, politics and morality do indeed mix. This flies in the face of Arendt’s thinking on judgment. Even though the LAD’s formation may have used a form Arendtian thinking and judgment, the obvious presence of morality does not pass as judgment. Yet, Arendt herself hints at the moral aspects of judgment. For Arendt, good judgment is the key to the prevention of evil. In a sense, isn’t the prevention of evil, through the act of judging, a moral endeavor? It can be argued that the absence of evil is a moral state of being.

Reflective Judgment

For Arendt, the only valid type of judgment was reflective judgment, which she also equated to political judgment. Arendt believes that this judgment could not occur in isolation, but rather could only occur in the presence of others.⁷⁹ This thinking and reflection leads to

⁷⁷ N.J.S.A. 10:5-4.

⁷⁸ *Ibid.*

⁷⁹ Arendt, Hannah.. "The Crisis in Culture." In *Between Past and Future*. Harmondsworth:

judgment. The New Jersey legislature practiced reflective judgment when it created this law. The LAD was not created in isolation. It did not occur in an individual's mind in privacy, as perhaps would be the case using Kant's noncognitivist faculty of aesthetic judgment. If this law was not allowed to germinate through the legislative process and had not been considered, debated etc., it might have stayed in the private realm. This would be in keeping with Kant, who was not concerned with consensus and agreement, but rather the individual.⁸⁰ This is also essentially the antithesis of Arendt's reflective judgment.

At some point, the idea of anti-discrimination legislation occurred in the mind of an individual. At this stage, Arendt would consider this just the thought process of pure reasoning, which consists of dialogue between the self.⁸¹ Next, this individual would eventually have moved beyond this dialogue with the self and began considering how this idea could be shared and agreed upon by others. If there is no potential for agreement, then there can be no true judgment. The conversation must move from one with the self to the public realm. Arendt would argue that the author of the bill that led to the LAD eventually had to filter private ruminations and go public to "transcend individual limitations..."⁸² By proposing and discussing this through the legislative process, the perspectives of others, both the individuals present in those halls, as well as the people they represented, and the people who are subject to discrimination were

Penguin, 1977), 220-221.

⁸⁰ Lawrence J. Biskowski, "Practical Foundations for Political Judgment: Arendt on Action and World," *The Journal of Politics* 55(4), (1993): 868.

⁸¹ Arendt, 221.

⁸² *Ibid.*

considered. Without the consideration of others' perspectives, true, reflective judgment "never has the opportunity to operate at all."⁸³

Arendt viewed reflective judgment as an informed account of all those judgments that bring events into focus for the sake of the political community. The legislators, in considering this law, took into account the history of discrimination in the state. All the judgments of the members, which also represented the viewpoints and perspectives of their constituents, in theory at least, were taken into considerations. The LAD is a result of an informed account of all these collective judgments. These judgments brought into focus the problem of discrimination for the sake of the political community; the state of New Jersey.

As Marshall explains, Arendt believed that the goal of judging is not to eliminate differences of opinion. Instead real judgment aspires to improve perception by constantly making one aware of what distinguishes a particular from all those other particulars that share some prior characteristics.⁸⁴ As the legislature discussed and debated, this discourse moved toward improving perceptions regarding the problem of discrimination. The fact that this body recognized discrimination, and stated that discrimination was a matter of concern for the state is evidence that this process was improving perception. The statute states "The Legislature finds and declares the practices of discrimination against any of its inhabitants...are matters of concern to the government of the state."⁸⁵ This section of the law reflects the crystallization of improving perceptions.

⁸³ *Ibid.*

⁸⁴ Marshall, 384.

⁸⁵ N.J.S.A 10:5-3.

The process of filing a complaint also exhibits characteristics of reflective judgment. A complainant can file with the Division on Civil Rights, or directly in Superior Court.⁸⁶ Given judgment's goal is to improve perception by distinguishing one particular from another, it demands multiple perspectives. The first perspective to emerge is the alleged victim of discrimination. She/he has her/his viewpoint, his/her private judgment, heard through the written verified complaint. Then the director considers the complainant's viewpoint, and then issues her/his perspective of the complaint. Assuming the director finds probable cause, the respondent; the party alleged to have committed unlawful discrimination, has their perspective considered through a "written verified answer" and can appear in person before the director to submit testimony.⁸⁷ The case is then submitted to an ALJ, and she/he considers all perspectives through evidence and testimony, and submits her/his own perspective. If the Director disagrees with the ruling, she/he can set it aside, again in consideration of all perspectives, including the ALJ's. If either party is not satisfied, they can appeal and then the appellate courts consider all perspectives and ultimately submit their own. This process of adjudication is the very act of distinguishing particularities from all other particulars that share some prior characteristics, thus qualifying as reflective judgment in this respect.

This idea of distinguishing a particular from all other particulars that share some prior characteristics is important. The LAD is very specific as to what classes of people are protected, which locations are considered subject to public accommodation provisions, and what types of actions are considered discriminatory. This specificity begs for judgment in the particular, not the universal, yet by designing the law so specifically, the law also seeks to universally protect

⁸⁶ N.J.S.A 10:5-13.

⁸⁷ N.J.S.A. 10:5-16.

from discrimination and universally expunge discrimination from the society of the State. Perhaps this is yet another example of the dichotomous nature of Arendt's thinking.

In addition, the legislature included all of these specifics based on past practices. In other words, the law was written with this level of specificity because these types of violations had been observed and suffered in the past. For example, one section of the law lists over 60 specific places where discrimination is prohibited, including public schools.⁸⁸ Therefore, it can be surmised that these locations share some prior characteristics; namely they were/are places where discrimination most likely took place in the past. If it had not occurred, these places share similar characteristics with places where discrimination, in the form of denial of access, has occurred in the past. This Arendtian concept of reflecting on characteristics of prior particulars is evident in this section of the law.

Another section of the LAD that demands reflection on characteristics of prior particulars is in the definitions section. "Affectional orientation" is referenced as a protected class again and again in the law. In addition to being the most critical aspect of the LAD as it relates to the White case, a close examination of the wording reveals reflecting on prior particulars. The law states that affectional orientation "means male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, or identified by others as having such orientation."⁸⁹ When delineating who is protected, the law recognizes that the history of sexual orientation or even the historical perception of others needs to be considered. The LAD language is replete with the concept of examining prior characteristics.

⁸⁸ N.J.S.A. 10:5-1 (l).

⁸⁹ N.J.S.A. 10:5-1 (hh).

Chapter Summary

The case of *L.W v. Toms River Regional Schools* is a landmark case that forever changed the way schools in New Jersey respond to student-on-student harassment. The backbone of this case is the Law Against Discrimination. Essentially the courts determined that the LAD not only protects employees in the workplace, but also students in the New Jersey public schools. Despite aggressive efforts by the school district to quash the case, Louis White and his mother doggedly pursued their action, insisting the LAD indeed protected students from harassment by their peers. Ultimately the Supreme Court of New Jersey agreed, and as a consequence, every school district in the state was compelled to reexamine their harassment policies, especially those that addressed harassment based on sexual orientation or perceived orientation.

The original law, enacted in 1945, was the first statewide anti-discrimination statute in the country.⁹⁰ The legislation created the Division on Civil Rights, which was empowered by the law to prevent and eliminate discrimination. The Division is composed of the Commission and the state's attorney general. While the commissions' role seems to be limited, the law grants the attorney general broad and extensive powers and duties. The attorney general investigates all claims of discrimination. He/she appoints a director of the division who is empowered to act on the behalf of the attorney general. The law gives the director broad powers to facilitate the investigation of complaints. Essentially she/he is authorized to use any of the discovery

⁹⁰ State of New Jersey Office of the Attorney General, *New Jersey Against Discrimination: April 16, 1945-2005* "Comments of J. Frank Vespa-Papaleo, http://www.state.nj.us/lps/dcr/happy_bday_lad.html (accessed January 31, 2015).

procedures that are allowed in a court of law.⁹¹ In short, the director through the attorney general is equipped with the power and authority to enforce the LAD.

The LAD was intended to be the “law of the land” in the state and cover a broad swath of society. The legislature also made it clear that the statute was intended to be used liberally. The lawmakers who created the original law intended to eradicate current discriminatory practices and also prevent future mistreatment. Essentially every class of marginalized citizens, as well as every public space, is covered by the law.⁹² The LAD not only renders discriminatory practices illegal, the law contains provisions to make sure the statute could and would be enforced. For example, provisions added through amendments insure that victims of discriminations would have a right to a jury trial and damages, both compensatory and punitive. The LAD also imposes fines for those who are found to have violated the law.⁹³ These amendments insured that if anyone engaged in discriminatory practices, they would pay for it.

Another important aspect of the LAD is that it provides a broad definition of public accommodation. One section lists over 60 specific types of places where the LAD prohibits discrimination and this includes public schools.⁹⁴ In this particular section, it is made clear that a public school is a place of accommodation, and that “affectional orientations” is included as a protected class of citizens.⁹⁵ This is a term that the lawmakers went to great lengths to

⁹¹ N.J.S.A. 10:5-8.

⁹² N.J.S.A. 10:5-3.

⁹³ *Ibid.*

⁹⁴ N.J.S.A. 10:5-1 (l).

⁹⁵ N.J.S.A. 10:5-1 (hh).

specifically define. The inclusion of affectional orientations would prove crucial in the eventual outcome of the Louis White case.

The LAD contains provisions that clearly delineate the procedures for filing a discrimination claim. A claimant can initiate an investigation in two ways. The complainant can seek relief by filing a claim in Superior Court or through the Division on Civil Rights. If a complaint is filed with the director, as Louis White did, then the director must decide if there exists probable cause. The accused, or respondent, then has to answer the complaint. If the director rules in favor of the complainant, the respondent must “cease and desist,” and if the violations resulted in an economic impact, the director may award damages. If either party is not satisfied with the final order of the director, they may appeal the ruling to the Appellate division of the State Superior Court.⁹⁶

One can detect many characteristics of Arendt’s concepts of thinking and judging. Arendt’s reflective judgment has two main characteristics; judging in terms of the particular and the idea of “common sense,” which is the ability to engage with the judgments of others.⁹⁷ The enactment of the law in 1945 is an example of how the legislature engaged in thinking and judging. This entire process involved considering points of view other than one’s own. These lawmakers considered the perspectives of their fellow lawmakers as well as the various classes of people the LAD is intended to protect. In writing the law, the legislature tried to imagine as many particulars as possible that the law could address mainly by being very specific in regards to what particular forms of discrimination the law covered.

⁹⁶ N.J.S.A. 10:5-21.

⁹⁷ David L. Marshall, “The Origin and Character of Arendt’s Theory of Judgment,” *Political Theory*, 38(3) (2010): 368.

Arendtian thinking and judging can also be detected in the LAD by considering her concept of action. To Arendt, judging is a byproduct of the “liberating effect of thinking.”⁹⁸ She relates thinking to freedom by way of action. Acting is beginning something new that didn’t previously exist.⁹⁹ The LAD can be viewed as action because it was a beginning; it did not previously exist, nor did its protections. The process of creating the law is also action. Speech is a byproduct of thinking and speech gives action meaning. Speech is used during debate, and one can reasonably assume the lawmakers debated through speech during the construction of the law. Perplexingly, the law also exhibits some features that would also characterize it as Arendt’s idea of work. This is yet another example of how difficult it is to neatly classify human phenomena using Arendt’s theories.

Arendt insisted that both thinking and judging operate in the realm of particulars and not universals. The entire legislative process embodies this notion. As a representative governing body, it considers the opinions of both its members as well as the constituents the lawmakers represent. In addition, in relation to the LAD, the focus on the particulars is spelled out in a verified complaint. Arendt insists that thinking about the specific phenomenon results in good judgment and the prevention of evil. Clearly, the very purpose of the LAD is the prevention of evil.

Yet, viewing any phenomenon, including the process and product of this statute in moral terms proves problematic for Arendt. She posits that judgment and thinking have nothing to do with morality, and she argues against the concept of moral judgment. When maintaining an argument that the LAD is representative of Arendtian thinking and judging, it is difficult to argue

⁹⁸ Hannah Arendt, “Thinking and Moral Consideration,” *Social Research*, 38(3) 446.

⁹⁹ *Ibid.*

that the law does not have a moral and virtuous objective. The phrasing of certain sections of the law implies morality. For example, the phrase “civil right” is used throughout the law, and the statute contains the word “morals.” It is clear that in this aspect, with the obvious presence of morality, one cannot easily assert that the LAD is representative of Arendtian thinking and judging.

Dismissing moral judgment, Arendt asserts that the only valid type of judgment is reflective judgment, which she equates to political judgment. Judgment cannot be practiced in isolation, but rather, only in the presence of others. Through the process of creating the LAD, the New Jersey legislature practiced reflective judgment. Anti-discrimination legislation began in the mind of an individual, but eventually this concept became the subject of discourse and debate. This evolution from private to public is the genesis of reflective judgment in relation to the construction of the LAD. This process represents an informed account of all those judgments, all those particulars that came before. These particulars, and the resulting judgments, would prove to be absolutely vital in Louis White’s quest for justice.

CHAPTER THREE:THE LONG ROAD AHEAD

LOUIS WHITE FIGHTS BACK

Introduction

After years of suffering physical and emotional abuse at the hands of his classmates, Louis White and his mother filed a verified complaint with the Division on Civil Rights on March 12, 1999. The Whites stated that Louis endured a pattern of harassment, including physical attacks, by fellow students throughout his time in the Toms River School District. After repeated efforts to compel the district to protect Louis, the mother, referred to as L.G. in court documents, ultimately filed a complaint and removed him from the district. This initial move began a legal battle that lasted fourteen years and resulted in the highest court in New Jersey forcing every district in the state to revisit their harassment policies. This decision ultimately guaranteed that students would be protected from abuse from their peers by the Law Against Discrimination. It would not be until 2013 that Louis was finally awarded monetary damages. Although this battle was initiated with the Director, the first genuine legal test came with the hearing before the Administrative Law Judge.

The Office of Administrative Law

The Office of Administrative Law (OAL) was established in 1979 to establish an independent agency by the state legislature that can conduct hearings, “thus promoting due process, expediting the just conclusion of contested cases, and improving the quality of administrative justice.”¹ The OAL employs numerous Administrative Law Judges (ALJ) to hear cases from the various state agencies. These judges also issue initial decisions. The Director and

¹ State of New Jersey Office of Administrative Law, *About The Office of Administrative Law (“OAL”)*, <http://www.state.nj.us/oal/about/about/> (accessed March 3, 2015).

the Chief Administrative Law Judge are in charge of all functions of the office and report directly to the Governor.²

Litigants are not allowed to file a request for a hearing with the OAL. Only the director of a state agency may do so. Neither party of the contested case is bound by the rules of evidence. All relevant evidence is admissible, but the ALJ does have some discretion as to what is admissible and what is not. The judge can deny the admission of evidence if she/he finds its “probative value” is “substantially outweighed” by the chance that the admission of the evidence will consume too much time or create “undue prejudice or confusion.”³ To obtain a “full and true disclosure of the facts,” all parties in a contested case may submit oral and “documentary” evidence. They may also submit rebuttal evidence and cross-examine witnesses at the discretion of the ALJ.

After the conclusion of the hearing, the ALJ will issue a “recommended report and decision” and findings of fact and conclusions of law based on “sufficient, competent, and credible evidence” no later than 45 days of the conclusion of the hearing.⁴ This is a *recommendation*, but is not binding or a final decision. This recommendation is sent to the director of the agency who filed the complaint with the OAL, and then she/he evaluates this report, and either “adopt, reject or modify the recommended report and decision” within 45 days of receipt.⁵ The director must clearly state the reasons for modifications or rejection, and these reasons must be based on evidence and facts. She/he may not reject the findings and conclusions

² *Ibid.*

³ N.J.S.A. 52:14B-10 (a) (1).

⁴ N.J.S.A. 52:14B-10 (c).

⁵ *Ibid.*

based on the credibility of witnesses, unless it has been found that these are not reliable and are supported by “sufficient, competent, and credible evidence in the record.” If the director accepts the recommendations without modifications, then these are adopted as the final decision of the director of the agency.⁶

ALJ’s Initial Decision

The initial decision of John Schuster III resulted in no expansion of protections for students under the LAD. The following account is taken from the judge’s recommended report decision, findings of facts and conclusions of law. Louis White referred to in the court documents and the media simply as LW at the time due to his status as a minor, was the target of taunting, anti-gay epitaphs, physical attacks, social isolation and ultimately was forced to change high schools.⁷ After repeated attacks and abuse, ultimately the mother, L.G. filed a verified complaint with the Director of the New Jersey Division on Civil Rights on March 12, 1999.⁸ The complaint alleged that White was subjected to repeated harassment, which included physical assault, by fellow students. These attacks were based on the “perceived sexual orientation...” of Louis White.⁹ The initial filing also claimed that the Toms River School District did not take corrective actions despite repeated complaints by White to school administrators. The claim also alleged that the district violated the Law Against Discrimination by denying White the right to public accommodation by not taking sufficient action dealing with the harassment. As a result,

⁶ *Ibid.*

⁷ Tina Kelley, “Court Rules that Schools in New Jersey Must Take Steps to Stop Harassment of Gay Students,” *The New York Times*, February 22, 2007.

⁸ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, page 1.

⁹ *Ibid*, page 2.

the district failed to protect his civil right to attend public school and “receive all the benefits of an educational opportunity.”¹⁰ Judge Schuster defined the issue to be decided as whether or not the district took sufficient steps to prevent White’s right to a public accommodation being violated.¹¹

Procedural History

On August 11, 1999, nearly five months after the White’s filing, the school district filed a response denying the allegations of discrimination. On July 10, 2000, the director of the Division found probable cause, and determined that the district’s initial responses to the incidences of abuse “were not sufficiently prompt, effective or remedial.”¹² Toms River subsequently filed a Notice of Motion on June 19, 2002 trying to limit the jurisdiction to the allegations and damage claims to White. This motion was denied by Joseph F. Martone, Administrative Law Judge, on July 24, 2002.¹³ The hearing subsequently took place on March 26, April 1 and April 15, 2003 in the Mercerville offices of the OAL, and oral arguments were heard by the Honorable John Schuster III, Administrative Law Judge. Both parties submitted evidence after the hearings. White attempted to introduce into evidence notes “allegedly” written by some classmates of his brother in his yearbook, but Judge Schuster would not consider these. In his decision, Schuster

¹⁰ LW v. Toms River Regional Schools BOE, John Schuster III, ALJ April 26, 2004.

http://njlaw.rutgers.edu/collections/oal/html/initial/crt08535-01_1.html (accessed October 18, 2015).

¹¹ Schuster, 2.

¹² *Ibid.*

¹³ *Ibid.*

stated, “I did not consider these notes, as the evidentiary record had closed and the notes were inherently unreliable as double hearsay.”¹⁴

Findings

Next, Schuster described his observations of witnesses and stated his findings as to the reliability and credibility of the testimony. L.W. testified that he was seventeen years old at the time of the hearing and attended South Toms River School through sixth grade. While at the school, he was picked on and called names because of his perceived sexual orientation. White testified that when he made the school staff aware of this name-calling, they would counsel the offending students, and as a result the teasing stopped.¹⁵ He then moved on to Toms River Intermediate West to attend seventh grade. Early in the school year, White testified that several incidents took place. He was called names regularly and one time found a note in his locker in which the author called him a “faggot” and urged him to leave the school. White explained that he did not report to school authorities any of these incidences at the time they happened.¹⁶

Louis White’s abuse continued into the winter months. In January of 1999 he was slapped on the head and called a fag by a student, whom White had called an “asshole” earlier in the day, called him a “fag” and a “homo.” This incident lasted about thirty seconds, and the offending students were disciplined immediately by a staff member who was on cafeteria duty. Louis White left school following the incident, which was reported to Raymond McCusker, the eighth-grade vice principal. When White returned to school, he met with Irene Benn, who was

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Schuster, 3.

the seventh-grade vice principal at the time. At this point, White informed Ms. Benn of the prior name-calling and the note he found in his locker. That same month, January of 1999, White testified that another incident occurred where a student called him an inappropriate name. Because White and this student were in the school play together, he asked Ms. Benn to not take any disciplinary action.

Several other incidents occurred during the remainder of White's seventh grade year. Shortly after the incident in January, another student, R.G., called White a name, and subsequently Louis reported this event to administration. White testified that school administrators addressed the student, R.G. apologized immediately afterward, and there were no other incidents involving this student. At about the same time, another student, D.M., struck Louis several times with a playbill. White reported this incident to Ms. Benn and subsequently D.M. apologized to Louis, and he and no further problems with D.M.¹⁷

March marked the third straight month in which Louis reported at least one incident. Louis actually initiated this when he slapped a girl on her bottom. The girl's brother then retaliated by slapping White in the face and calling him a "fag." Another student simultaneously struck Louis on the neck with a chain. White reported the incident to school officials and then went home because he feared for his safety. In this same month, yet another incident occurred. While Louis was standing in line, a fellow student, M.S., came up behind him and humped White in his genital area. This time, in addition to reporting the occurrence to Assistant Principal

¹⁷ Schuster, 4.

Benn, Louis also filed a police report. White also spoke to his guidance counselor about this incident, who told him “to toughen up and turn the other cheek.”¹⁸

At this point, several of the school’s administrators met with Louis, his mother and his aunt. Mr. Regan, principal of the seventh grade, Ms. Benn, the vice principal of the seventh grade, Anne Baldi, the affirmative action officer and Mr. McCusker, the principal of the eighth grade were in attendance. At this meeting, according to White’s testimony, the administrators assured White and his family that the school would take immediate action in response to any reported incidents. Shortly thereafter there was a follow up meeting and this policy was reiterated to the Whites. In April of 1999, Louis reported the final incident of that school year. Four boys called White names, were immediately disciplined and apologized to Louis.

White testified that during the 1999-2000 school year, as an eighth-grader, he did not suffer any physical attacks. He did note that he was aware of occasional verbal comments, but he did not report any of these to school officials. Louis also noted that the security guard was aware of his plight and “had kept an eye on him during that school year.”¹⁹

In the fall of 2000, White entered Toms River High School South as a freshman. Almost immediately, Louis encountered more abuse. He was the recipient of negative, biased comments based on his perceived sexual orientation. In September of 2000, White was assaulted on two different occasions. Both of these incidents happened off campus. The first of these incidents occurred a few blocks from Louis’s home. As White walked home, three teenagers verbally assaulted him, and one of the three punched him and threatened his life. White filed a police

¹⁸*Ibid.*

¹⁹ *Ibid.*

report and reported the incident to school officials. The student who physically assaulted Louis was summarily suspended from school. A few weeks later, on September 23, 2000, White left campus and went to the 7-Eleven for lunch. Louis was physically assaulted in the store's parking lot. White stated that he reported the attack to school officials and never returned to South in fear of his safety. The administrators encouraged Louis to stay at the high school and use the school's buses for transportation and the cafeteria for lunch, where he was told that he would be protected.

Following this incident, White transferred to Red Bank Regional High School; which has a "recognized" performing arts department.²⁰ Toms River agreed to pay tuition and a transportation stipend. The following year Louis transferred to the Career and Technical Institute (CTI) in Ocean County, which was much closer to his home in Toms River. White was required to retake his freshmen classes, but was able to pursue his passion and participate in the school's performing arts program. At the time of Louis's testimony, he went to South every day to take the bus to CTI, and he did not experience any abuse. Louis also testified that he was not allowed to participate in after-school activities at South, which bothered him. He stated that this and the fact that he was now one grade behind his peers also troubled Louis. He felt that he was "missing out" on his high school experience.²¹ This concluded the ALJ's summary of the testimonial review based on Louis's statements.

The next witness to testify on Louis's behalf was a fellow student, E.C. This student had been a close friend of Louis's since they were in seventh grade. E.C. testified that she witnessed the final incident at the 7-Eleven. She also stated that Louis did nothing to provoke the attack.

²⁰ Schuster, 5.

²¹ *Ibid.*

E.C. noted that the beginning of the school year assemblies focused on sexual harassment.

Finally, E.C. noted that Louis was regularly referred to by the other students as the “gay kid.”²²

Louis’s mother L.G. testified once E.C. was finished. She explained that Louis’s harassment started when he was ten years-old and in fifth grade. L.G. reported an occurrence to the teachers, and the class wrote letters of apology to White. Louis’s mother also stated that she was familiar with the middle school handbook and its stated sexual harassment policy. She did not make any claims of harassment until after the humping incident in the cafeteria. Louis’s mom also testified that she attempted to speak to Ms. Benn about the incident, but Ms. Benn told her “she was too busy.”²³ Instead L.G. wrote a letter explaining the situation and a few days later Ms. Benn informed her that she had spoken to the student and would address the problem. Louis’s mother stated that she spoke with Ms. Benn several times following an incident, but her impression was that the assistant principal was not addressing the situation to the extent that it deserved. Ms. Benn informed L.G. that she had spoken to the students who had allegedly harassed her son, and with the students’ parents, but Ms. Benn would not share the details of those conversations nor the discipline that was issued to the students. L.G. stated that she had noticed that Louis had become more withdrawn and angry throughout the tumult, and she also noted that one of Louis’s teachers had also noticed a similar change in Louis. His mother added that she did not feel like the school was doing enough.

Louis’s mother continued her testimony by describing the incidents of physical assault that occurred at the beginning of White’s freshmen year at South. She stated that on September 11, 200 Louis was physically attacked on the way home from school. The mother informed the

²² *Ibid.*

²³ *Ibid.*

vice principal, Lawrence McCauley, and he told her that he would speak with the boys involved. McCauley also suggested that Louis take the bus home so he could be protected. Louis decided not to take the bus and continued walking home. L.G. also explained that after the 7-Eleven incident that occurred on September 23, 2000, she went to the school and administration told her that if Louis stayed on school property for lunch that he “could and would” be protected.²⁴ Louis did not think this was an acceptable option. School administrators then proposed that Louis take his core classes at South as a part-time student and then attend CTI for his performing arts classes. Louis and his mother also rejected this offer.

L.G. stated that when Louis enrolled in South, he did not experience any abuse on school property, nor did she and Louis report any problems to the on-site administrators. With that said, the mother still did not feel like South was a safe place for her son and decided not to allow Louis to return after the September 23 incident. L.G. arranged for Louis to enroll at Red Bank Regional, and Toms River paid the out of district tuition and some transportation cost. After Louis’s mother testified, his aunt testified. She noted that she was very close to the family and attended the March 15, 1999 meeting when Louis was in seventh grade. The aunt characterized administrators as “cavalier” concerning Louis’s plight.²⁵ In her opinion, school officials simply did not understand the family’s problems. Finally Louis’s aunt testified that he was initially excited about attending high school at South, but that after the two assaults, “he did not like going...”²⁶

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

At this point in the hearing, district officials began testifying. Anne Baldi, the district's affirmative action officer, was responsible with dealing with student-to-student issues. She stated that the district does have an anti-sexual harassment policy which is posted in the schools and is also published in the student handbook; the school district's manual and is explained on a local television station. Baldi explained that the regular policy practice of the district is to explain to grade seven students why harassment is wrong and to discipline students for repeated behaviors. Ms. Baldi also attended the March 15, 1999 meeting to help resolve this issues facing Louis. The school official stated that she thought Louis's mother wanted a "guarantee of safety" for her son.²⁷ Ms. Baldi noted that L.G. was frustrated and disturbed over Louis's treatment, but at the same time, the mother did not express dissatisfaction with the plan that Ms. Benn presented at that meeting.

Ms. Baldi explained the five components of the plan. She stated that Louis was told that he should report any occurrence immediately; he would have a free pass to go to the main office if harassed; Ms. Benn would inform teachers of the problem so they could be vigilant of any problem; that if there were problems in the cafeteria, Louis should go to the lunch monitor and finally that offenders would be counseled for a first offense. Punishment would progress in severity for repeat offenses. It was Ms. Baldi's impression that both Louis and his mother were satisfied with this plan.²⁸

At this meeting, Ms. Baldi assured Louis that he could call her any time if there were concerns. She testified that she was never contacted again by Louis's mother. Ms. Baldi did contact Ms. Benn later in Louis's seventh grade year and was told there had been no new

²⁷ Schuster, 7.

²⁸ *Ibid.*

incidents. Ms. Baldi also stated that she followed up with the school during Louis's eighth grade year and was informed that there had been no problems reported. The affirmative action officer said that the next time she was contacted concerning Louis was in September of his freshmen year when he suffered the first assault. Ms. Baldi confirmed that the offending student was counseled and suspended for calling Louis names and for the assaulting him. She offered to meet with L.G. and Mr. McCauley after this incident since it was the first such since Louis's seventh grade.²⁹

Irene Benn, the assistant principal for seventh grade at Intermediate West during the 1998-1999 school year, was the next district official to testify. She stated that school rules are published in the student handbook, which is reviewed with students at assemblies at the beginning of the school year. During these assemblies administrators explain to students that harassment based on "sex" or "sexual preference" is not permitted. Ms. Benn explained that she did not believe the phrase "sexual orientation" was mentioned during the assemblies.³⁰ The assistant principal also stated that Louis's ongoing situation was the only case she was aware of that the school had confronted. She explained that she first became aware of Louis's troubles on January 22, 1999 after the humping incident in the cafeteria. Benn proceeded to chronicle the sequence of incidents previously noted, and her testimony was consistent with Louis's.

Ms. Benn continued by describing the incident when Louis was slapped. She explained that Louis initiated this incident when he called another student a "whore," which resulted in that student slapping him on his head and calling him a "faggot."³¹ She spoke to the students

²⁹ *Ibid.*

³⁰ Schuster, 8.

³¹ *Ibid.*

involved and explained why this type of behavior is wrong and explained to the students the consequences that would occur if there was a repeated offense. Benn testified that she noticed that both students “left the office amicably.”³² Ms. Benn then proceeded to describe another incident in which Louis was called names by a student who was subsequently counseled. After Ms. Benn explained the consequences of future incidents, no other problems were reported involving this student. Following this occurrence, Ms. Benn asked Louis if another student had been involved or had bothered him, and Louis did not identify any additional students or problems.

Ms. Benn stated that she became aware of L.G.’s January 22, 1999 letter on January 29 and contacted the mother immediately. Louis’s mother described another incident during this phone call, but she asked Ms. Benn not to address the offending student. Ms. Benn respected her wishes and did not pursue any disciplinary action. Ms. Benn also spoke with the mother on February 22 of the same year when L.G. visited the school to review her son’s cumulative file. The mother was upset because the file did not contain any reports of incidents that occurred while Louis was attending elementary school. At the meeting, Ms. Benn noted that L.G. did not report any further problems. Three days later, on February 25, 1999, L.G. called to complain about Louis’s guidance counselor. During this conversation, the mother informed Ms. Benn of another incident in which a student called Louis a name. Louis responded by calling the student a “simple face” and threw a playbill at the student. Both Louis and the other student were counseled, and Louis was told that some of his actions were also inappropriate. After the

³² *Ibid.*

counseling, the name caller's mother called and apologized to Louis's mother. Louis did not have any more problems with this student.³³

A few weeks later, on March 3, 1999, Louis met with Ms. Benn and reported an incident in which some students had "verbally harassed" him during gym class. Louis's mother also called Ms. Benn and confirmed Louis's report. Again, Ms. Benn counseled the offending students. On March 8, Ms. Benn was informed that some students had made derogatory comments about Louis, but did not directly address him. She decided to speak to these students nonetheless.

On this same day, March 8, 1999, Louis reported that a male student was "rubbing" against him. When the mother called concerning the incident, she referred to the student's movement as "humping."³⁴ Ms. Benn was out of her office dealing with the incident when L.G. called. She was not successful in reaching the mother when she returned the call. When Ms. Benn met with Louis that same day, she noted that, "he was calm and not distressed." Shortly after the incident, Louis's mother went to the school upset and angry. Ms. Benn said L.G. was so upset that "she would not be talked to or reasoned with." The mother yelled at Ms. Benn, exclaiming "...nothing you say will make a difference. You haven't done enough."³⁵ The mother then told Ms. Benn that she was calling the ACLU and she informed the assistant principal that Louis would not return to school until Ms. Benn could guarantee that he would be safe. Ms. Benn informed the assistant superintendent and Ms. Baldi of the prior incidents and how she had handled them. Next, Ms. Benn chronicled the March 15 meeting. She noted that

³³ *Ibid.*

³⁴ Schuster, 9.

³⁵ *Ibid.*

Louis's mother was still upset and inquired as to what disciplinary action had been taken. Ms. Benn didn't disclose this information. She also admitted that the early part of this meeting did not go well. After lunch, Louis joined the meeting and the group resolved how he would report future incidents and how the school would handle them. Ms. Benn agreed to inform all teachers in the school of Louis's situation. Teachers would actively monitor student conduct in this regard. At the conclusion of this meeting, Ms. Benn testified that "all parties were happy and congenial."³⁶

Ms. Benn stated that Louis reported additional incidents on March 16 and 17. She explained that students were counseled, given detention and/or parents were contacted. She also explained that on March 17, 18 and 24 she checked in with Louis to confirm that there had been no other problems, at which point Louis indicated everything was fine. The vice principal testified that no other incidents were reported until April 13 when Louis reported to her verbal abuse by one student and being struck with the chain. She explained that because of the physical attack, the student who hit Louis was suspended for five days. The name-caller received counseling. Louis was not disciplined for touching the student's sister's bottom. Louis expressed concern over retaliation by the suspended student upon his return to school. Ms. Benn spoke to Louis's mother and assured her that she had spoken to the student and "defused any potential situation to alleviate L.W.'s concerns."³⁷ Ms. Benn concluded her testimony by stating that the balance of the school year saw no additional incidents reported by Louis.

Raymond Camporeale, a safety officer for the Toms River School District testified that he had been with the district since September 1999, and prior to his appointment as such, he had

³⁶ *Ibid.*

³⁷ *Ibid.*

served for twenty-three years as a police officer in Lacey Township. From September 1999 until January 2000, he worked at Toms River High School North. From January 2000 until September 2000, he worked at Intermediate East. In September of that year he was transferred to Toms River High School South. As a result, Camporeale was able to observe Louis interacting with students at both of these schools. He testified that during both Louis's eighth-grade year at Intermediate West and the beginning of his freshmen year at South, he observed Louis talking to other students. He remarked that he never saw any problems and that Louis "always appeared to be at ease and did not demonstrate any fears or concerns."³⁸

Following the security officer's testimony, another district employee, Lawrence McCauley, an assistant principal at Toms River High School South during the 2000-2001 school year, testified. In his role as assistant principal, Mr. McCauley was the main disciplinarian for the freshmen class. He testified that he had no knowledge of Louis White prior to his enrollment in September of 2000. When he was made aware of the September 11, 2000 incident, he summarily suspended the offending student for ten days. Mr. McCauley suggested to Louis that he use the bus provided by the district for transportation to and from school, "as a way of controlling behavior of other students."³⁹ When McCauley was informed of the September 23, 2000 incident at the 7-Eleven during lunch, he immediately suspended that offending student for ten days as well. The assistant principal also advised Louis to stay on campus during lunch because the school could not provide security for him off-campus. In addition, Mr. McCauley contacted the district's affirmative action officer because he suspected discrimination was involved in the incident. Like Ms. Benn, Mr. McCauley explained that the school conducted

³⁸ *Ibid.*

³⁹ *Ibid.*

assemblies to review the student handbook at the beginning of each school year. These assemblies covered harassment and sexual harassment, and students were told their responsibilities regarding expected behavior.

The last witness to testify was John Gluck, who was the assistant superintendent of high schools for the Toms River Regional School District. He first heard of Louis's plight when L.G. called Gluck in September 2000 to inform him that she was withdrawing Louis from the school system. Later that same month, the mother called Gluck again and requested that the district pay the tuition for Louis to attend Red Bank Regional High School. At the time, L.G. said that she would arrange her own transportation. Mr. Gluck testified that the board of education agreed to pay the tuition. Louis's mother contacted Mr. Gluck again in November 2000 and requested that the district provide transportation. The board of education agreed to provide transportation aid in the amount of \$700. Then in June 2001, L. G. contacted Mr. Gluck and stated that she wanted to transfer Louis to Ocean County Career and Technical Institute because the school was starting a performing arts program. He also stated that Louis would have been allowed to participate in extracurricular activities at South if the mother would have requested it. Finally, Mr. Gluck testified that he could arrange for Louis to graduate with his original class.

Testimonial Review

The next section, the Testimonial Review, reads like a list. Judge Schuster proceeded with the Findings of Fact. The Student Parent Handbook, which included rules, regulations and policies, is distributed to the students and parents of Intermediate West at the beginning of each new school year. The Affirmative Action Overview and the Multi-Year Equity Plan "are maintained: by the district, but are not given to parents and students. The next part chronicled

Louis's time as a student in the district up until his withdrawal during his freshmen year. The judge then described Louis's out of district placement at Red Bank Regional High School and subsequently the Career and Technical Institute in Ocean County.

Schuster then proceeded to delineate what he "found to be the credible testimony and reliable evidence presented."⁴⁰ He also stated that he judged these to be relevant to the case. He briefly summarized Louis's experience in elementary school. Schuster stated that Louis attended South Toms River through grade six. He then explained that Louis "was teased..." due to the perception that he was a homosexual.⁴¹ The school staff counseled the offending students and the teasing stopped.

The judge then moved to Louis's years at Toms River Intermediate West during seventh and eighth grade. He first summarized how the school reviewed various rules and procedures relevant to facts of Louis's case. As described during the district officials' testimony, early in the school year, students were lectured on the rules of the school and the behavioral expectations at Intermediate. Included in these presentations was the policy concerning harassment, including harassment based on sex or sexual preference. School officials made it clear that such conduct would not be tolerated in addition to this lecture, students and parents were given a handbook that contained the harassment policy.

Judge Schuster then chronicled the events in the sequence in which they occurred throughout Louis's time spent at Intermediate West. The judge noted that while Louis was at the intermediate school, the administrators addressed every reported incident. The school used the

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

progressive discipline approach, which called for counseling for first-time verbal abuse. Students we explained why their behavior was wrong and that future offenses would result in detention points, parent phone calls and suspension if a third offense occurred. The administrators also made it clear that any physical assault would result in immediate suspension.

Next, Judge Schuster explained Toms River High School South's protocol when dealing with harassment and discrimination. As was stated by witnesses during testimony, the high school begins the school year by providing an information session to student to explain the "nonharrassment/nondiscrimination policy," including sexual harassment.⁴² Students were told that they will be disciplined if they violate this policy. Like the intermediate school, the high school used a progressive discipline approach and has a "zero-tolerance policy" for physical assault.⁴³ Such violations garnered an immediate suspension. The judge noted that the discipline policy included counseling students as to why they were being punished and why their behavior was wrong. Schuster then noted that the district acted on every reported incident at the high school. He stated that the district used the progressive discipline approach just as it was designed. The judge pointed out that minor offenses were addressed accordingly, and the districted intensified punishment for repeat offenders. Physical assault resulted in immediate, severe punishment. Schuster stated, "This was an appropriate response to the circumstances."⁴⁴ Judge Schuster concluded the "findings of Fact" section of his decision by summarizing the events at South in September of 2000, and Louis's subsequent out of district placement.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

Schuster's Legal Analysis

The next section of the decision is “Legal Analysis.” In it, the judge announced his finding and explained the legal doctrine that supported these findings. Schuster ruled in favor of the district stating “I FIND that I do not have the authority to create a cause of action under the Law Against Discrimination (LAD) based on student-on-student harassment.”⁴⁵ He then stated that the complainants do have an “avenue of redress” for a claim based on negligence. The judge cited *S.P. v. Collier High School* as precedent of the state recognizing a district’s negligence “for inappropriate student conduct that adversely affects another student’s learning experience.”⁴⁶ This is a 1999 case heard by the Appellate Division of New Jersey Superior Court. The court found that the boards of education as well as the principal of a high school were negligent for not preventing the sexual harassment of a female student by a male student.⁴⁷ This case supports Schuster’s acknowledgment that a school district can be held liable for student-on-student harassment, but then he used *K.P. v. Corsey* to support his supposition that the *Title IX* standards should be used to judge Louis’s case, as opposed to using the LAD. In *Corsey*, a student sued the Deptford Township Board of Education as well as the accused track coach, William Corsey, claiming that Corsey sexually harassed her, and that the district was liable for violating the LAD, *Title IX*, and denying her due process. The federal district court found that the LAD applied to sexual harassment in schools by creating a hostile environment and schools are covered because they are places of public accommodation.⁴⁸ At the time, the New Jersey Supreme Court had not

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *S.P. v. Collier High School*, 319 NJ Superior Court 452 (Appellate Division, 1999).

⁴⁸ *K.P. v. Corsey*, 229 F. Supp. 2d 547,550 (D.N.J. 2002).

yet extended the LAD's protections against student-on-student sexual harassment to the context of public schools. The district court, however, while finding the track coach personally negligent, sided in favor of the school board. Schuster used the logic in *Corsey* to justify not creating a cause of action against Toms River.

In *Corsey*, the district court was sensitive to the fact that the N.J. Supreme Court had not ruled on an LAD case involving the schools. Judge Joseph Irenas noted that when this is the case, it is the federal court's responsibility to "predict how the New Jersey Supreme Court would interpret the law in similar circumstances, without expanding the law beyond what precedent suggest would be supported by the New Jersey Supreme Court."⁴⁹ The court said it was obvious that the intent of the legislature when creating the LAD included preventing sexual harassment in schools, not just the work place or other areas of public accommodations. This court also looked at the New Jersey Supreme Court's landmark workplace harassment case, *Lehmann v. Toys R Us, Inc.*, and noted that in that decision, New Jersey's highest court looked at federal precedent used in interpreting *Title VII* claims. Judge Irenas explained, however, that *Title VII* is strictly an employment related statute. Because the New Jersey Supreme Court used a federal statute, *Title VII*, for a discrimination case in the workplace, the court predicted that the New Jersey court would use another federal statute, but one related to education, Title IX, for a harassment case involving the schools. The judge explained "In order to hold a school district liable under *Title IX* for the sexual harassment of a student by a teacher...there must be actual notice and deliberate indifference on the part of an appropriate person at the school district."⁵⁰ Judge Irenas also noted that the U.S. Supreme Court had rejected the use of agency principles, such that are used in *Title*

⁴⁹ *K.P. v. Corsey*, 229 F. Supp. 2d 547,550 (D.N.J. 2002).

⁵⁰ *Ibid.*

VII cases when determining a district's liability under *Title IX* cases. Therefore, unlike *Title VII* claims, like in *Lehman*, agency does not impute a school district without extreme neglect on the district's part, under Title IX. Judge Schuster leaned on this precedent and used *Title IX* standards to support his decision.

Judge Schuster explained that he found no cause of action for two reasons. First, the complainant is "virtually making a recognized *Title IX* claim since they are alleging that L.W. was deprived the educational benefits provided by the school..."⁵¹ The second reason Schuster provided is a quote from the U.S. Supreme Court Title IX case involving student-on-student sexual harassment. In *Davis v. Monroe County Board of Education*, the court stated that children in school will do and say things in school that would not be expected with adults in the workplace.⁵² Schuster continued by stating that the complainants' reliance on *Corsey* is misplaced because the decision dealt with whether the state or federal courts should decide state issues and not on the merits of the case. He also pointed out that *Corsey* involved a teacher sexually harassing a student and not student-on-student harassment.⁵³

Judge Schuster went on to say that under Title IX, a district is liable when student-on-student harassment if they show "deliberate indifference" and the harassment is so extensive that it denies the victim the educational benefits the district provides. Also, the harasser has to be in circumstances that the school has control, and the harassment must be "persistent and severe"

⁵¹ L.W. v. Toms River Regional Schools BOE, John Schuster III, ALJ April 26, 2004.

⁵² Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 631, 119 S. Ct. 1661, 1665, 143 L. Ed. 2d 839 (1999).

⁵³ *Ibid.*

resulting in the victim being deprived of educational benefit.⁵⁴ The judge ruled that Toms River did not show deliberate indifference. In fact, school officials acted quickly on each claim of harassment. Schuster explained that the schools consistently used a progressive discipline approach when addressing the offenders. He stated that this was “an appropriate response by the school.” At this juncture in the decision the judge explained that elementary age children are immature and often “socially ignorant.”⁵⁵ Also, the more serious incidents involving physical abuse resulted in immediate suspensions. Schuster noted that the fact that there were only a few repeat offenders is proof that Toms River’s use of progressive discipline procedures was successful.

While the written decision acknowledged that what happened to Louis was intolerable, the judge relieved the school district of some responsibility due to some of the choices that both Louis and his mother made. Schuster wrote that the two incidents that occurred in the beginning of Louis’s freshmen year happened off campus and “not in areas under the control of the respondent.”⁵⁶ Even though this was the case, the district suspended the offenders immediately and then attempted to offer Louis safer alternatives. The judge stated that Louis refused to take district provided transportation and did not stay on campus during lunch “where he could be observed and protected...”⁵⁷ Schuster said that he voluntarily withdrew from school and therefore now cannot claim that he was deprived educational benefits.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

Schuster then turned his attention to the district's nondiscrimination policy. He explained that the Whites argue that this policy was not clearly conveyed to the student body. They claim that the district failed to specifically state the words "sexual harassment" and therefore the policy as it relates to the case was not clear. The Antidiscrimination Policies and Procedures referred to "gender" and "sex." Schuster continued by stating that the claimants also argued that the lectures to the elementary students at the beginning of the school year were not adequate. The implication that words like "sexual orientation" and "sexual preference" would have prevented the verbal abuse. The judge explained that he disagrees and argues that using these phrases may have actually resulted in calling attention to Louis, which was what his mother was trying to avoid.

Judge Schuster then commented on the nature of the policies and procedures. He explained that the student handbook, rules and procedures are not static, but are rather living and evolve over time. Both the intermediate school handbook and the high school handbook state the relevant policy of the district. It is the district's policy to create and sustain "an institutional and working environment that is free from harassment of any kind. It shall be a violation of this policy for students to harass other students...through conduct or communications of a sexual nature."⁵⁸ Schuster then stated another finding that Louis's case was the first of its kind in the Toms River School District, and he cited "uncontroverted testimony" that the district had not dealt with student-on-student harassment based on a student's perceived homosexuality.⁵⁹ He then minimized the importance of the contents of the handbook by explaining that the defining issue was not what is in the handbook, but rather how the school responded once it was made aware of the harassment.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

The last subject in this section focused on the discipline procedures the district used. Schuster explained that the complainants argued that the district did not discipline students sufficiently. The judge disagreed and noted that this argument overlooks the fact that the schools have a responsibility to educate students on appropriate behavior. Schuster also noted that this argument ignores a key component of the district's progressive discipline policy; serious first-time offenses, serious harassment results in substantial penalties such as out of school suspension. The judge added that the offending students' parents were often contacted. He also noted that on one occasion Louis's mother asked that an offending student not be disciplined. The judge then explained that the complainants need to recognize that at this age students are immature and that the "social ignorance" of the harassers must not only be addressed from a disciplinary standpoint, but also an educational one. Finally, Schuster pointed to the fact that there were few repeat offenders, the harassment stopped within three months, and the entire eighth grade year was incident free as evidence that the district's approach to discipline was a success.

Conclusion and Order

The last section of Schuster's written decision is the "Conclusion and Order." In it, he repeats the he finds no cause of action against the school district under the Law Against Discrimination for student-on-student harassment. He added that based on the evidence that Toms River Regional School District took the appropriate actions to stop the harassment once it was reported. Schuster added that the district provided appropriate accommodations to Louis and immediately addressed the misconduct. He states "I ORDER that complainants' action be

DISMISSED.”⁶⁰ The written decision concludes with a summary of the next steps the ALJ must take in accordance with statute. Schuster files his initial decision with the Director on Civil Rights for review. The Director can then adopt, modify or reject the judge’s recommended decision.⁶¹

The ALJ’s Initial Decision and Arendtian Judgment

Arendt’s notion of reflective judgment can be used to analyze the various aspects of Judge Schuster’s initial decision, and so I will attempt to look at the judge’s decision through the filter of Arendtian judgment. This analysis will include the decisions and action of all of the adults involved in the case as well. I am not asserting that these individuals consciously followed Arendt’s theory, but rather I will attempt to answer the following question: After the fact, do the decisions and actions of these individuals embody the qualities associated with Arendt’s theory of judgment?

Common Sense

One key aspect of Arendt’s theory of judgment involves considering the particular in terms of the universal and the idea of “common sense,” which is the ability to engage with the possible and actual judgment of others.⁶² Arendt states “that the faculty of judgment could facilitate a thick description of political communities that join individuals together and habituate them to considering things from points of view other than their own.”⁶³ On the one hand, the

⁶⁰ *Ibid.*

⁶¹ N.J.S.A. 52:14 B-10.

⁶² David L. Marshall, “The Origin and Character of Arendt’s Theory of Judgment,” *Political Theory*, 38(3) (2010): 368.

⁶³ *Ibid.*, 367.

very nature of these proceeding reflects at least a surface level degree of thinking because the judge inherently considers things from other's point of view. This is done through the taking of testimony from the representatives of the school district and the White contingent. Thinking for the sake of political action is what Arendt equates with judgment. All of the "political community" participates in this. The judge, the complainant and the respondents make up this community. Then on another level, the administrators, students, and staff make up a school community, which is part of our larger society. When these groups come together for this hearing, they formed a political community. Arendt would exclude, because of their status as minors, students from this political community.

Judge Schuster defined the major issue of the case as whether or not the school district took sufficient steps to prevent White's right to a public accommodation being violated.⁶⁴ Also paramount was whether this right to a public accommodation and a public education are protected under the Law Against Discrimination. He then also summarized what he had determined to be reliable and credible testimony. These two statements represent his perspective and point of view. This process involves a rather lengthy exposition on the part of Schuster describing each witness's testimony. These statements reflect what Schuster determined to be what occurred. By doing this, the judge provides evidence that he considered the points of view of others. In this sense, there is evidence that Schuster applied Arendtian judgment to this case.

Invisibles: Things that are absent

Judge Schuster approached this case with an eye toward dealing with the "invisibles" and "things" that are absent." This conforms to Arendt's notion of judgment as a particular type of

⁶⁴ LW v. Toms River Regional Schools BOE, John Schuster III, ALJ April 26, 2004, page 2, http://njlaw.rutgers.edu/collections/oal/html/initial/crt08535-01_1.html (November 16, 2015).

thinking. To Arendt, this species of thinking is associated with phenomena that are not present in the physical sense.⁶⁵ The judge did not experience what Louis and his mother experienced. He did not experience the maltreatment of peers or the heartache and frustration of L.G. as a parent. Schuster did not witness the administrators' response to Louis's complaints. To the ALJ, these phenomena are invisible. They are things that are absent. Only through the various witness' testimony could he contemplate these events. The judge was not present nor did he experience the challenge of responding to these incidents the way administrators were required to respond. Judge Schuster had to consider these invisibles as things that are absent. Engaging in these invisibles characterizes Arendtian thinking, and ultimately, judging.

Action

When considering Arendt's concept of action, Judge Schuster does not measure up. Arendt's idea of action is vital to her concepts of thinking and judging. Arendt posits that judging is a by-product of the "liberating effect of thinking."⁶⁶ In turn, she relates thinking to freedom through action, which Arendt characterizes as the pinnacle of mankind's existence. To act is to begin something that previously did not exist.⁶⁷ A human is a "beginning and a beginner" and what makes us unique is our capacity to do something that has never been done before.⁶⁸ Judge Schuster's ruling does not qualify as Arendtian action. Schuster had the opportunity to be a beginner. He opted not to do something that had never been done before and

⁶⁵ Hannah Arendt, "Thinking and Moral Consideration," *Social Research*, 38(3) 446.

⁶⁶ *Ibid.*

⁶⁷ Gert Biesta, "How to Exist Politically and Learn from It: Hannah Arendt and the Problem of Democratic Education," *Teachers College Record*. 112 (2), (2010): 559.

⁶⁸ Arendt, Hannah, "What is Freedom?" In *Between Past and Future*. Harmondsworth: Penguin, 1977), 170.

he said as much when he stated “I FIND that I do not have the authority to create a cause of action under the Law Against discrimination based on student-on-student harassment.”⁶⁹ The judge leaned on the fact that New Jersey courts had yet to address whether harassment by a fellow student was covered under the LAD. He was not willing to be the first. Schuster reasoned that he did not have the positional “authority” to create what would have been a new precedent.

This precedent would have been something that did not exist before. By uttering the previously quoted statement, the ALJ passed on an opportunity to take disruptive action. Instead, he relied on traditional thought and practice by relying on the precedent of using Title IX standards to support his decision, which only maintained the status quo. Because Schuster did not act, he did not achieve natality or freedom. He engaged in speech, which Arendt says is a product of private thinking, and also renders action meaning and creates action.⁷⁰ Though Schuster used speech, his inability to create newness prevented true action. Because the judge refused to engage in genuine, Arendtian action, he also did not engage in genuine thinking. Arendt’s insistence that action, thinking and judging are all interconnected also supports the conclusion that, at least in this particular aspect, Schuster did not apply Arendtian judgment.

Meaningfulness

Arendt also claims that we create meaningfulness through action. The concept of a certain type of speech as action actually reveals who we are as humans. Arendt states that man “can make sense only to the extent that it can be spoken about...men in so far as they live and move and act in this world, can experience meaningfulness only because they can talk with and

⁶⁹ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004 page 17.

⁷⁰ Biesta, 559.

make sense to each other and to themselves.”⁷¹ This is a bit confounding because clearly Judge Schuster used the spoken and written word to come to his conclusions. Because the judge did not engage in true action, his speech in this regard did not enable him to achieve meaningfulness. While his speech may have helped him “make sense” to himself, it certainly did not make sense to the Louis White camp. Perhaps this speech also made sense to the respondents. This begs the question; if speech “makes sense” and creates meaning for the speaker and some but not all of the others involved in the “debate,, does this qualify as meaningfulness through action in Arendtian terms? *I posit that if it does not make sense to all stakeholders, then said speech may not achieve meaningfulness.* And because Schuster did not make sense, he did not achieve natality or freedom. Viewing the judge’s words from this vantage offers yet another argument that Schuster did not engage in action, thinking or judging.

Liberation and Freedom

The ALJ also missed an opportunity to create liberation and freedom through destruction. Arendt argues that thinking and subsequent judgment has a destructive effect that undermines all established values and concepts of good and evil. This destructive nature of thinking and judging is also liberating because it frees man and society from the enslavement of established “truths” that are often accepted en masse without much consideration. Thinking destroys customs and rules of conduct related to ethics and morals.⁷² This is a major danger of not thinking. Without engaging in the Arendtian concept of thinking and judging, man/society often accepts horrific conditions as the norm, just and right. It only reasons then that lack of thinking and judging can

⁷¹ Mackler, “And Worldlessness, Alas, Is Always a Kind of Barbarism: Hannah Arendt and the Challenges of Educating in Worldlessness Times,” *Teachers College Record*. 112 (2), (2010): 520.

⁷² Hannah Arendt, “Thinking and Moral Consideration,” *Social Research*, 38(3), (1971): 434.

lead to missed opportunities to upset the status quo, destroy well-established but harmful conditions, create something new and prevent evil. Judge Schuster encountered an opportunity to liberate through destruction when he was handed this case, but he chose not to do so. If he had found a cause of action and afforded Louis and thereby all New Jersey school children the protections provided by the LAD, he would have destroyed the accepted thinking, which deferred to federal statute and Title IX, when dealing with student-on-student discrimination.

Presence of Others

Arendt's concept of action also dictates that it can only occur around other people. Action must be witnessed. Throughout this hearing, both complainant and respondent were present while this case was argued and ultimately decided. Arendt asserts that when action occurs in the presence of others, it triggers a chain reaction of additional actions.⁷³ Both sides of this case were present, and as the judge as well as the attorneys spoke, questioned and responded, their utterances triggered the actions of others. This in turn led to responses and questions from all parties present. Again, based on the idea of creating something new, Schuster did not truly act, but his interactions did contain the trait of speech in the presence of others.

Discussion and Debate

The judge's decision can also be studied in the light of discussion and debate. Discussion and debate are inherent throughout any legal proceeding. The complainant initiates this debate by filing a complaint with the director or directly in Superior Court. This in turn prompts a hearing where the respondent and complainant argue or debate their perspective. The judge also is an active participant who usually poses questions to both parties. Arendt states that, "debate

⁷³ Hannah Arendt, *The Human Condition*, (Chicago: University of Chicago Press, 1958), 176.

constitutes the very essence of political life.”⁷⁴ Discussion and debate are the very essence of true action. Bernstein explains that to Arendt, debate is a form of action and that the act of speech in public is a form of action.⁷⁵ Schuster and all parties involved in this proceeding engaged in discussion, debate and argument. This aspect of the judge’s decision, as well as the very process by which he arrived at his decisions exhibits this Arendtian trait of action through public speech.

Speech and Natality

This act of speaking in the presence of others is closely related to Arendt’s concept of natality. When man achieves natality, she/he emerges onto the world. Arendt explains in *The Human Condition* that action and speech “are so closely related because the primordial and specifically human act must at the same time contain an answer to the question of every newcomer: “Who are you?” Arendt posits that speechless action is not really action because without speech there is no actor, or “doer of deeds.” The actor must simultaneously be a speaker.⁷⁶ While Schuster engaged in speech, it can be argued that since nothing new was created, he did not achieve natality. As a result, in the case of Schuster, he did not engage in action in this regard.

Work and Labor

One can also assess the ALJ’s decision in terms of work and labor. Viewed in relation to action, labor and work, Schuster’s decision would not qualify as work. According to Arendt, labor is composed of things that sustain life. Labor is necessary in order to maintain our

⁷⁴ Arendt, *Between Past and Future*, 241.

⁷⁵ Bernstein, 222.

⁷⁶ Hannah Arendt, *The Human Condition*, (Chicago: University of Chicago Press, 1958), 158.

biological existence.⁷⁷ Clearly, the decisions and speech of the judge does not contribute to the sustainment of life. It could be argued, however that by not creating new protections for students, he could have contributed to unprotected students being victimized or even threaten their physical safety. In addition, denying these protections could also result in a student not obtaining an appropriate education, which could lead to them not securing gainful employment. This could in turn result in them not being able to obtain what they need to sustain life. In addition, labor does not create anything. What labor produces is consumed and nothing is left behind.⁷⁸ Because Judge Schuster's initial decision was ultimately rejected by the Director and the courts, it did not last. He did not create anything with his ruling. The decision did not last and it was consumed by way of the appellate process provided by the state legislature. In short, in relation to the interdependence of Arendtian action, work and labor, it can be argued that Schuster's decision was not labor.

One can also assess Schuster's decision through the Arendtian concept of work. Viewing the interrelationship of Arendt's action, labor and work often creates more confusion than illumination. Work is yet another aspect of Arendt's thinking that is somewhat elusive. Arendt posits that work creates objects that endure for a time beyond the men who created them.⁷⁹ When looking at Schuster's decision, one can argue that the decision doesn't qualify as work in this respect because it did not last longer than Judge Schuster. Schuster rendered his decision on April 26, 2004. When the Director on Civil Rights reviewed the ALJ's recommendation, he

⁷⁷ *Ibid*, 143.

⁷⁸ *Ibid*, 87.

⁷⁹ Biesta, 559.

rejected it in an order issued just 90 days after Schuster's ruling.⁸⁰ One can argue that at that point, the judge's decision was "consumed" and therefore did not endure for who a time beyond the man who created it. On the other hand, as of this writing in December of 2015, this decision still exists in the form of a historical, legal document; as a matter of record. Also, Schuster's decision is an indelible part of this case and part of Louis's story. The ALJ's initial decision in essence is part of the final NJ Supreme Court decision which extended the protections of the LAD to K-12 students. In this sense, Schuster's decision could arguably be considered work.

Arendt also argues that work creates objects with an end goal, a purpose and instrumentality.⁸¹ She also states that objects that are produced by work must be maintained. The process by which a state agency refers matters to an ALJ implies that there is an end goal, a purpose. The goal and purpose of having an ALJ issue an initial decision is to potentially settle a contentious matter between claimant and respondent. Schuster was trying to determine if there was a cause of action in the case of Louis White. More broadly, the judge's purpose was to settle the question of the applicability of the LAD's protections to student-on-student harassment. So while Arendtian work has the goal of producing, whatever is produced must also be maintained.

The question is: Was Judge Schuster's decision maintained? Again, the obvious answer is no. The decision was rejected by the director. The impact and effect of his decision was only maintained for 90 days during the time which the Director was reviewing the judge's recommendations. Once the director rejected Schuster's decision, it can be argued that it was no longer being maintained. Once again though, when one considers the judge's decision as a

⁸⁰ LW v. Toms River Regional Schools BOE, J. Frank Vespa-Papaleo, Director, Division on Civil Rights July 26, 2004.

⁸¹ Chris Higgins, "Human Conditions for Teaching: The Place of Pedagogy in Arendt's Vita Activa," *Teachers College Record*. 112 (2), (2010): 413.

historical, legal document, as well as a vital piece of the entire Louis White case, it can be argued that in this sense, the judge's decision has been maintained and will ultimately outlive its creator, which is one trait of Arendtian work. As is consistent with using Arendt's work, Schuster's decision exhibits too many characteristics of work and action for one to draw any reasonable, definitive conclusion.

Particulars and Universals

As is often the case when attempting to apply Arendt to the Louis White case, and in particular to Judge Schuster's decision, some aspects of the decision share traits with Arendtian judgment, while others do not. This is once again the case when looking at Arendtian judgment as it relates to the concepts of particulars and universals. Arendt consistently insisted that both thinking and judging operate in the realm of particulars and not universals. Judgment assumes no pre-established consensus to a phenomenon, and politics is essentially negotiating differences of opinion and power.⁸² Any judicial procedure is dedicated in part to hearing the viewpoints of others and the particulars that they share. Yet at the same time, legal decisions, as well as administrative rulings such as those of an ALJ rely heavily upon precedent.

In chapter two I argue that the courts epitomize focusing on the particulars, however, it can be argued that precedent is the consummate universal. Precedent is composed of a specific ruling, or several rulings that have specific characteristics that are used and applied to future, similar cases. This begs the question; are these precedents universals or particulars? An argument can be conceived for both. The use of precedent in judicial proceedings relies on very specific aspects of former rulings. These could be considered particulars due to their specificity. In

⁸² David L. Marshall, "The Origin and Character of Arendt's Theory of Judgment," *Political Theory*, 38(3) (2010): 369.

addition, these specifics are applied to the particular of a singular case, and on a case-by-case basis. This seems to be the essence of considering the particulars. On the other hand, judges and justices adopt universal truths based on legal theory that emerge from these precedents. In this sense, precedents have universal application to specific classes of similar cases. If the same legal question is posed, then precedent is applied by focusing on the specifics of the case at hand and the precedent. This is applied, however, universally to cases attempting to answer the same legal question.

Just as I argue in chapter two that the LAD is applied universally to the particulars of a case, so too can it be said of precedent. The argument that this legal process focuses on the particulars goes something like this. The judge or jury considers the particulars of a case and then decides if the “law,” which is universal, has been violated. The law can be statute, such as the LAD, or it can be case law, which hinges on precedent. This can be viewed as the essence of having to “think” the particulars as Marshall asserts that Arendt demands.⁸³ Steinberg notes that for Arendt, “To judge something well is simply to know it in the light of a particular context.”⁸⁴ The particular context relative to Schuster’s decision is the facts of the White case. Because Arendt’s adamant aversion to the universal, it is almost impossible for Judge Schuster, or any court, to fully comply with her notion of thinking the particular versus the universal, at least in its purest form. Arendt insisted that because judgments are beyond the realm of proof, one cannot use a universal theory to validate a judgment, but rather can only make a specific claim about a specific phenomenon. This is what complicates the notion of using precedent universally in Arendtian terms.

⁸³ Marshall, 384.

⁸⁴ Steinberger, 814.

Not only did the judge tend to favor universal thinking through his overreliance on precedent, but he also conveniently ignored a legal precedent set by none other, than the federal courts. This case could have supported Schuster's reliance on federal precedent and statute to rule in favor of Louis. Schuster justified his ruling by insisting on using provisions found in federal statute, *Title IX*. He refused to extend state-based protections of the LAD to student-on-student harassment. In *Corsey*, the federal District Court was hesitant to set a state precedent that they felt should be left to the New Jersey Supreme Court. Their logic was that in *Lehman*, the New Jersey Supreme Court used a federal statute, Title VII, and therefore the District Court predicted that the state court would also use a federal law or precedent in a similar case involving student-on-student harassment. As a result, they used Title IX provisions. Schuster relied on this same legal theory in the White ruling.

It seems that Schuster made a conscious decision to ignore federal precedent that could have justified a favorable ruling for Louis. There existed at the time a 1996 U.S. Court of Appeals case, which was very similar to the White case. In *Nabozny v. Podlesny*, a former gay student sued his school district, as well as several administrators for equal protection and due process violations.⁸⁵ Nabozny lost in federal District Court and the appealed to the Seventh Circuit, which ruled in favor of Nabozny on his equal protection claim. In short, there was a federal precedent that Schuster could have used to provide relief to Louis. If the judge was intent on relying on federal precedent and statute, he could have used one. Schuster, however, selectively chose to ignore *Nabozny* and focused on *Corsey*, which supported his legal analysis and his denial of a cause of action for the Whites. So even if one argues that precedent is the quintessence of thinking the particular, Judge Schuster, by ignoring *Nabozny*, chose not to focus

⁸⁵ *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir.) (1996).

on a particular that could have helped protect Louis and many other students throughout New Jersey.

Thinking to Prevent Evil

One can generalize that Schuster's decision complies with Arendt's notion of thinking as the inoculation to prevent evil. She asserted that evil itself is the inability to think critically and reflectively about one's actions.⁸⁶ The judge presided over or moderated a proceeding that one could argue was intended to prevent evil. The Louis White contingent had filed a complaint because Louis had suffered the consequences of evil. It is safe to say that the verbal, emotional and physical abuse he suffered at the hands of his peers is the result of evil, or at the very least the acts themselves are evil. Judge Schuster had an opportunity to engage in this type of thinking that could prevent such future evil to Louis, as well as thousands of other students throughout the state of New Jersey.

While it is much simpler to argue that the architects of the LAD exhibited thinking for the sake of preventing evil, as I did in chapter two, it is much more difficult to come to that same conclusion for Schuster's decision. Arendt argues that evil is the result of not thinking so it reasons then that taking action; deciding, judging as a result of thinking yields the prevention of evil. While so much of Arendt's traits for thinking and judging seem to focus on the process and intentions of man, in this case it seems that one must analyze both the process and the outcome in order to decide whether the judge exhibited true Arendtian thinking and judging. Arendt also relates the idea of thinking in particularities to the prevention of evil. She asks, "Could the activity of thinking as such, the habit of examining and reflecting upon whatever happens to

⁸⁶ *Ibid.*

come to pass, regardless of specific content ... could this activity be of such a nature that it 'conditions' men against evil doing?"⁸⁷ As discussed earlier in this chapter, Schuster did consider the particulars of the case. It can be argued that he reflected, considered the viewpoints of others, but in the end, his decision leaves one to conclude that he chose not to prevent evil. So is Arendt correct? Does thinking prevent evil? Perhaps this is an example of someone engaging in the activity of thinking, but still not preventing evil. In this instance one can argue that thinking occurred, but evil was not prevented because the final outcome, Schuster's decision, didn't afford LAD protections to students.

Moral Judgment

When writers attempt to use Arendt's work in relation to moral judgment, it becomes problematic. Arendt was very reluctant to associate judgment with ethics and morality. If we view this case through the lens of traditional western thought, it is reasonable to conclude that expanding the protections afforded through the LAD to student-on-student harassment is morally and ethically sound. Traditional thought would support the argument that not interpreting the LAD liberally and broadly enough could be considered morally unsound. In general, in our society, we want to protect our children. For Arendt, it is not so black and white. She went radically against the traditional two-world metaphysics that characterizes western philosophy, as can be seen in her coverage of the Eichmann trial.⁸⁸ Arendt believed strongly that morality must be separated from politics. "Purity of heart...has no place in politics."⁸⁹ She also believed that

⁸⁷ Hannah Arendt, "Thinking and Moral Consideration," *Social Research*, 38(3), (1971): 418.

⁸⁸ Seyla Benhabib, "Judgment and the Moral Foundations of Politics in Arendt's Thought," *Political Theory*, 16(1) (1988): 30.

⁸⁹ Hannah Arendt, *On Revolution*, (New York: Viking, 1969), 68, 81.

judgment was the most political of all human actions.⁹⁰ So while some might rely on traditional concept of morality and conclude that Schuster did not make a morally sound decision, Arendt might not have agreed. Even though the outcome of this initial decision could be considered morally unjust, there is no evidence of morality in Schuster's words or in his rationalization and justification of his decision. Considering that Schuster seems to have kept morality separate from politics and his decision does not consider morality, this would support an argument that Schuster approximated Arendtian thinking and judgment as it relates to this trait.

Reflective Judgment

For Arendt, the only type of judgment was reflective judgment, which she equated to political judgment. As noted previously, Arendt asserts that this judgment cannot occur in isolation, but only in the presence of others.⁹¹ Schuster's decision seems to comply with this one aspect of Arendtian judgment. Due to the nature of the ALJ's position, the genesis of the idea did not begin with him as an individual. This Arendtian action was formed in the private realm of the individual, namely Louis White vis-a-vis his mother, L.G. As Arendt explains, however, true judgment, which manifests itself through action, involves an idea leaving the private realm, the mind of the individual and being introduced to the world.⁹² Once the Whites moved this internal dialogue from the self to others, this action caused a reaction; action from others. By bringing this claim, they prompted others to consider the idea and possibly agree upon it. In this case, both Schuster and Toms River are the "others" to which Arendt refers. This potential for agreement

⁹⁰ Hannah Arendt, "Thinking and Moral Consideration," *Social Research*, 38(3), (1971): 446.

⁹¹ Arendt, Hannah. "The Crisis in Culture." In *Between Past and Future*. Harmondsworth: Penguin, 1977), 220-221.

⁹² *Ibid*, 221.

opens up the possibility for true judgment. Arendt posits that the conversation must move from one with the self to the public realm. The doer must go public to “transcend individual limitations...”⁹³ This occurred when the Whites introduced this claim to the Director, and subsequently to Schuster for consideration. Once in the public realm, the judge considered the perspectives of others through testimony. Both the claimant, Louis White, and the respondent, the school district, were represented and offered their perspective for consideration. The consideration of others, this emergence of an idea into the public realm, allows one to argue that Schuster’s process for deciding the case was reflective judgment. Arendt explains that without the consideration of others’ perspectives, true reflective judgment “never has the opportunity to operate at all.”⁹⁴ Applying this Arendtian trait to Schuster’s decision offers evidence that he practiced true, reflective judgment.

In general terms, the process of filing a complaint also exhibits characteristics of reflective judgment. A complainant can file with the Division on Civil Rights for review by the Director, or directly in Superior Court.⁹⁵ Given judgment’s goal is to improve perception by distinguishing one particular from another. Judgment demands multiple perspectives. The first perspective to emerge is the alleged victim of discrimination. She/he has her/his viewpoint, his/her private judgment, heard through the written verified complaint. Then the director considers the complainant’s viewpoint, and then issues her/his perspective of the complaint. Assuming the director finds probable cause, the respondent; the party alleged to have committed unlawful discrimination, has their perspective considered through a “written verified answer”

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ N.J.S.A 10:5-13.

and can appear in person before the director to submit testimony.⁹⁶ The case is then submitted to an ALJ, and she/he considers all perspectives through evidence and testimony, and submits her/his own perspective. If the Director disagrees with the ruling, she/he can reject the judge's recommendation, again in consideration of all perspectives, including the ALJ's. If either party is not satisfied, they can appeal, and then the appellate courts consider all perspectives and ultimately submit their own. This process of adjudication is the very act of distinguishing particularities from all other particulars that share some prior characteristics, thus qualifying as reflective judgment in this respect.

One can view the ALJ's role in the adjudication of complaints as a process by which differences of opinion are not eliminated, but simply made clearer, or better understood; an improved clarity. Arendt believed that the goal of true, reflective judgment is not to convince everyone to believe the same way. She asserts that true judgment's goal is to improve perception by consistently making one aware of what distinguishes one particular from all other particulars that share some prior characteristics.⁹⁷ In the proceedings concerning the White case, the testimony, questioning, cross examining, and redirecting all contributed to improving perceptions regarding Louis White's complaint. Just by the nature of the delineation of facts, memorializing the events that led to the complaint, and examining and contemplating whether to extend LAD protections in and of itself moved toward improving perceptions. At the very least, this process forced all parties to examine their perceptions. For Judge Schuster, he was afforded the opportunity to reflect on his perceptions regarding the LAD, the particulars of Louis's plight and the legal precedents that were germane to the case. Louis and his mother were exposed to the

⁹⁶ N.J.S.A. 10:5-16.

⁹⁷ Marshall, 384.

perceptions of the district by way of their response to the claim. The school district was forced to contemplate Louis's struggles with a personal and legal context, and reflect on their policies and procedures related to student harassment. By simply being exposed to other parties' perspectives via an intense examination of the facts of the case, all parties, including the judge, were able to improve their respective perceptions. Improving perceptions is a vital component of Arendt's reflective judgment, and this trait appears to have been present during this proceeding.

It would be quite simple to view Judge Schuster's decision as "bad judgment." Many modern, progressive thinkers would consider increasing the level of freedom of all members of our society to be the preferred path to take. From the traditional, western philosophical tradition, one that tends to look for things in absolutes, universals and either as "right or wrong," one cannot possibly do so using Arendt's theory. There are simply too many variables and subtleties in her thought. Much of Arendt's thinking resides in the margins; the gray. For Arendt, things are just not simply black and white. And as such, it is quite impossible, I posit, for one to definitively say that Judge Schuster practiced "good judgment." Applying some of Arendt's traits results in the judge's decision qualifying as Arendtian judgment. At the same time, when one applies some of her other traits of judgment, Schuster's decision does not qualify as such. Once again, this reader of Arendt is left somewhat frustrated at not being able to draw a definitive conclusion in regards to Judge Schuster's role in Louis White's saga. Next, I will attempt to analyze the district administrators' role based on the testimony recorded in Schuster's written decision.

Judgment and the District Administrators

In this section, I will attempt to examine the district administrators' role in Louis's case. Because ultimately Judge Schuster decided what the accurate facts were, I will examine the

actions of the administrators based on the judge's "Findings of Fact" as opposed to the summary of each witness's testimony. The understanding is that the judge's decision is based on his findings, so I believe these findings, flawed or not, are on which the analysis should focus. Throughout the five-plus years of Louis's ordeal, the administrators used progressive discipline when addressing his tormenters. The basic concept behind this approach is that students receive less severe consequences for first, minor offenses and repeat offenses result in an escalation of consequences. This usually begins with counseling for a first offense, discipline points and a parent phone call for a second, minor offense. A third offense results in suspension. Any physical assault results in immediate suspension.⁹⁸

Common Sense

A basic tenet of Arendt's theory of judgment demands that one consider the particulars in terms of the universal and the idea of "common sense," which is the ability to engage with the possible judgments of others.⁹⁹ One must consider things from others point of view. On the one hand, the administrators in Toms River did this. When Louis and/or his mother reported an incident, the administrator was considering Louis' point of view. Additionally, the assistant principals who handled these incidents would then speak with the alleged offender and consider her or his point of view. For example, on January 22, 1999, Louis and his mother complained that a student, R.G. had called Louis names. Ms. Benn summoned this student, listened and counseled him. She considered both Louis's and his mother's point of view as well as the point

⁹⁸ Schuster, 15.

⁹⁹ David L. Marshall, "The Origin and Character of Arendt's Theory of Judgment," *Political Theory*, 38(3) (2010): 368.

of view of R.G.¹⁰⁰ This protocol was followed each time Louis reported an incident to an administrator.

On the other hand, one can argue that the administrators did not fully consider the viewpoint of Louis White and L.G. As previously stated, the administrators used a progressive discipline approach, which is a standard practice among many districts. One primary tenet of this approach is that first offenses for misconduct are handled the same regardless of the particular circumstances. If the infraction is deemed minor, the first offenses are addressed with counseling by an administrator. Students are warned that repeated infractions would result in harsher consequences. When the administrators deemed the first offense perpetrated against Louis as minor, they were no longer considering the viewpoints of others. The treatment that Louis was subjected to was not run of the mill name-calling. Louis was singled out and various epithets were hurled at him based on a distinguishing characteristic—his perceived homosexuality. This is different from a standard argument or typical *tete-a-tete* between two students. Yet, the district treated these first offenses like any standard first offense. *Because of the nature of Louis's abuse*, the administrators should have classified these offenses as major, which would have resulted in harsher, first-offense punishment, not unlike that which is dispensed for a physical attack. By taking a more aggressive stance, the district may have stopped the harassment all together through deterrence. This may have prevented the incidents from escalating to physical violence and the ultimate exit of Louis from the Toms River Regional School District. If the administrators would have approached these infractions by considering Louis's viewpoint, then this would qualify, base on this one trait, as Arendtian judgment. It is safe to say that from Louis's and L.G.'s viewpoint, these incidents were not minor.

¹⁰⁰ Schuster, 12.

One can also look at the example of Louis White and possibly generalize about district administrators. While the administrators listened to all students involved in a dispute, perhaps that is not enough to say definitively that they considered the viewpoints of others. Because there is a standard protocol for discipline, all first time “minor” offenses are treated in the same manner; students are counseled and receive a warning. However, this universal approach does not consider the diverse nature of the district’s student body. Today’s schools, specifically in New Jersey, are very culturally diverse. The makeup of the students represents various classes based on ethnicity, race, religion, socio-economics, sexual orientation and gender. To attempt to apply a universal standard to determine what is a “minor” offense is challenging to say the least. An anti-Islamic epithet exchanged between two Christian students, for example, even where it is meant as an insult, does not constitute the same level of offense as compared to a similar exchange between a Christian and a Muslim. For the former students, this could be viewed by administration as a minor offense, but for the latter, from the viewpoint of the minority, it could be perceived as a major first offense. It is noted in the decision that Toms River had a zero-tolerance policy regarding physical violence.¹⁰¹ Perhaps having this same stance against biased language would better reflect a district that considers the viewpoints of ALL students. By applying a universal concept of “minor” offenses when dispensing discipline, administrators in Toms River were not fully considering the viewpoint of others, and therefore, at least in this respect, were not practicing Arendtian judgment.

¹⁰¹ Schuster.

Invisibles: Things that are absent

This inability to consider other points of view ultimately prevented the administrators from judging the particulars and things close at hand, which Arendt defines as thinking.¹⁰² Arendt emphasizes thinking as dealing with “invisibles” and “things that are absent.”¹⁰³ Whereas Arendt at times makes the distinction between thinking and judging, and at times equates the two, looking at the administrators’ role in the White case separately may be illuminating. If one considers thinking as considering the invisible and things that are absent, then it can be argued that the administrators did engage in Arendtian thinking. Louis White’s treatment was invisible to the administrators. They did not witness it in the present. His abuse was absent. Nevertheless, the administrators did consider these invisibles when they attempted to address his abuse. It can be argued that judging was absent because they were not able to focus on the particulars and things “close at hand.” The specifics, the particulars of the first, minor offenses suffered by Louis were handled following a universal protocol, and the administrators failed to treat the particulars, which could possibly have resulted in them viewing these incidents in the particular, as major offenses, thus making them “close at hand”. If the administration would have done so, they would have engaged in Arendtian judgment.

Action

One can also examine the administrators’ decisions and behaviors by considering Arendt’s concept of action. Throughout Arendt’s writing, the interconnectedness of thinking and judging is often apparent. Arendt asserts that judging is a by-product of the “liberating effect of

¹⁰² Hannah Arendt, “Thinking and Moral Consideration,” *Social Research*, 38(3) 446.

¹⁰³ *Ibid.*

thinking.”¹⁰⁴ Arendt also relates thinking to freedom, which is achieved through action, and Arendt considers to be the pinnacle of human endeavors. To act is to begin something that did not previously exist.¹⁰⁵ Man is both a “beginning and a beginner.”¹⁰⁶

The school leaders involved in the Louis White ordeal had multiple opportunities to “begin” and be a beginner. When Louis presented them with his complaints, they had a chance to begin something that did not previously exist. This beginning could have been creating a school climate focused on protection and inclusion, dignity and humanity for all students, including those who are perceived as having a sexual identity other than mainstream heterosexual. This could have been done if the administrators had not handled these attacks as just another infraction that needed to be addressed with a standard boiler-plate response. If they had recognized Louis’s situation as quite unique, that his abuse was the direct results of his attackers’ perception that he was gay, this could have changed the entire climate of the school district for the LGBTQ community. The school leaders had the opportunity to commence Arendtian action by creating something new. Instead, most of the “minor” infractions were treated as such, and the administrators did not engage in real action. Because there was no action, the liberating effect of thinking, of which judging is a byproduct, did not occur because there was no freedom through action. The administrators did not achieve freedom for themselves, Louis White, the school district or our society as a whole. This opportunity was missed because the administrators, like Judge Schuster, refused to do something that had never been done before.

¹⁰⁴ Hannah Arendt, “Thinking and Moral Consideration,” *Social Research*, 38(3) 446.

¹⁰⁵ Gert Biesta, “How to Exist Politically and Learn from It: Hannah Arendt and the Problem of Democratic Education,” *Teachers College Record*. 112 (2), (2010): 559.

¹⁰⁶ Arendt, Hannah, “What is Freedom?” In *Between Past and Future*. Harmondsworth: Penguin, 1977), 170.

One glaring example of opportunity lost is on March 8, 1997 when Ms. Benn met with the students involved in the humping incident. Even though there was physical contact, perhaps even sexual assault, Ms. Benn once again chose to not “begin.” She did not create something new. “Ms. Benn immediately had the three offenders brought to her office for counseling with respect to what was not appropriate conduct...”¹⁰⁷ In other words, the assistant principal did what had always been done, regardless of the circumstances. She handled this incident, clearly motivated by Louis’s perceived membership in a now-protected class, as if it was just another minor, first-time offense. Ms. Benn treated this situation as if it was just “kids being kids” or “boys being boys.” Her response simply maintained the status quo. The administrator chose not to begin something new. She did not act, think, or judge.

Meaningfulness

The school leaders also had an opportunity to achieve meaningfulness through action, and this is another example of missed opportunity. Arendt asserts man can only make sense through speech. Meaningfulness can be experienced only when one can talk with each other and make sense to each other and themselves.¹⁰⁸ Through both their testimony at the hearing, and their spoken words when addressing Louis’s situation, the administrators had the opportunity to experience meaningfulness. The administrators obviously used speech during the hearing, as well as in dealing with Louis’s incidents. However, because the leaders did not engage in true action, this speech did not enable them to achieve meaningfulness. While this speech may have helped the administrators make sense to themselves, and each other, it certainly did not make

¹⁰⁷ Schuster, 13.

¹⁰⁸ Stephanie Mackler, “And Worldlessness, Alas, Is Always a Kind of Barbarism: Hannah Arendt and the Challenges of Educating in Worldlessness Times,” *Teachers College Record*. 112 (2), (2010): 520.

sense to Louis. As I posited earlier, since this speech did not make sense to all stakeholders, then said speech did not achieve meaningfulness. Since the school leaders did not make sense, they did not achieve natality or freedom.

Viewed through the concept of meaningfulness and sense making, the school leaders did not engage in action, thinking or judging. Thinking and judging are not only related to freedom through Arendt's concept of action. They can be liberating in another sense as well. Arendt argues that thinking has a destructive effect that challenges all established values and understandings of good and evil. Thinking is destructively liberating because it frees humankind from being enslaved by established truths. These so-called truths are generally accepted without much consideration. Thinking destroys customs and rules of conduct related to ethics and morals.¹⁰⁹ This is a major danger of not thinking. Without engaging in Arendtian thinking and judging, society often accepts awful conditions as the norm. If man is lulled into this thoughtless acceptance, it only reasons that the lack of thinking and judging can lead to missed opportunities to challenge the status quo, destroy well-established yet harmful "truths," create something new and prevent evil.

Liberation and Freedom

The administrators were given an opportunity to liberate through destruction each time they were faced with addressing Louis's abuse at the hands of his peers. These leaders, however, chose not to do so. If they had viewed these "minor" first offenses differently, through the light of Louis White as perceived homosexual, then perhaps they would not have handled the incidents as status quo. The administrators had a chance to treat these biased-based attacks as

¹⁰⁹ Hannah Arendt, "Thinking and Moral Consideration," *Social Research*, 38(3), (1971): 434.

major offenses, on par with a physical attack. This would have had a destructive effect on the norm. Instead of just counseling, warnings and detention, an acceleration of major discipline, such as suspension, may have disrupted the notion that verbally attacking someone because of their perceived sexuality is only a minor offense. If school leaders had taken this stance, the perceived acceptable behavior would have become unacceptable, thus destroying the old norm. This would have had a liberating effect, not just for Louis and others in this protected group, but for the entire community of the Toms River Regional School District.

This constructive destruction cannot occur unless there is action, and this action must occur around other people. Others must witness it. Throughout the ordeal, the administrators operated in the public realm. Whenever the administrators responded to an incident involving Louis, they did so in the presence of others. They responded to Louis and related information to him and his mother. They listened and spoke to the assailants. The administrators not only worked with Louis's mother, L.G., but also many of the abusive students' parents. Presumably, the administrators consulted with each other when handling Louis's situation. During the various meetings with Louis's mother, there were several administrators in attendance. For example, on March 15, 1999, "Mr. Regan, the principal of the seventh grade, Ms. Benn, the vice-principal of the seventh grade, Anne Baldi, the affirmative action officer, Mr. McGusher, the principal of the eighth grade..., his mother and aunt..." held a meeting to discuss Louis's plight.¹¹⁰ There is ample evidence that the administrators operated in the public realm. They meet this requirement for Arendtian action. At the hearing itself, the administrators were present, along with the judge and other witnesses. Their speech, questions and answers were uttered in the presence of others, and led to the reaction of both the judge and the opposing party. Arendt asserts when action

¹¹⁰ Schuster, 4.

occurs in the presence of others, it triggers a chain reaction of additional actions.¹¹¹ Both during the ordeal in the Toms River Schools, and at the hearing, the administrators' interactions did contain the Arendtian trait of speech in the presence of others.

Discussion and Debate

Discussion and debate are the very essence of true action. Bernstein explains that according to Arendt, debate is a form of action and the action of speech in public is a form of action. Throughout the day to day operations of a school, staff regularly interact and discuss various aspects of their jobs. When handling discipline, administrators conduct investigations, question students and seek the input of teachers and other administrators. When building administrators were engaged with a discipline issue involving the White case, they engaged in discussion. During conversations with students and parents, it is normal for there to exist disagreement. This type of discussion is a form of debate. In addition, according to the court document, there were several occasions where the administrators and L.G. were at odds. The document states "L.G. testified that she met or spoke with Ms. Benn a number of times, usually after an incident occurred...but felt that Ms. Benn wasn't giving the situation the attention it deserved."¹¹² During the hearing, through testimony, questioning, and cross-examination, the administrators participated in discussion and debate. In this sense, the administrators/s activities exhibited the Arendtian trait of action through public speech.

¹¹¹ Hannah Arendt, *The Human Condition*, (Chicago: University of Chicago Press, 1958), 176.

¹¹² Schuster, 5.

Work and Labor

One can also access the activities of the administrators in terms of work and labor. The behavior of the Toms River administrators would not qualify as work or labor. According to Arendt, labor is composed of things that sustain life. Labor is necessary in order to maintain our biological existence.¹¹³ Clearly, the decisions and speech of the administrators do not contribute to the sustainment of life. Just as with the judge's decision, it could be argued that by not recognizing the gravity of Louis's situation and going beyond the ordinary discipline protocol to protect him, the administrators' deeds put Louis's physical safety at risk. Their inaction creates a situation where Louis's life, and its sustainment, is in jeopardy. Also, by not affording Louis ample protection, the administrators contributed to a school/district climate that was hostile to queer students, or those perceived to be so. In addition, because of this climate, Louis transferred schools. By not protecting all students and ensuring the safety of all, it is possible that the administrators' "ineffectiveness in this regard, could result in a student not obtaining an appropriate education, which could result in these students not being able to secure gainful employment. This could in turn result in these students not being able to obtain what is needed to sustain life. Given all of the social safety nets in place in our society, it is unlikely that this chain of events would occur. In short, this argument borders on the absurd. Therefore, I posit that this is not a strong argument in support of a claim that the administrators' endeavors constituted labor.

According to Arendt, labor does not create anything that is lasting. What labor produces is consumed and nothing is left behind.¹¹⁴ In the White case, the administrators did not create

¹¹³ Hannah Arendt, *The Human Condition*, (Chicago: University of Chicago Press, 1958), 143.

¹¹⁴ *Ibid*, 87.

anything that lasted. Much of their endeavors were consumed or simply tossed aside. The discipline that they dispensed to students was consumed, and for the most part, ineffective. Louis's abuse continued. Schuster argued that the administrators' approach to discipline was effective, that there were few repeat offenses, and the abuse stopped.¹¹⁵ He contributed this to the school leaders' administration of justice. However, Louis's abuse continued practically until the time he withdrew from school. The abuse stopped because Louis transferred out of the Toms River school system; not because of the district's discipline protocol. The discipline was dispensed and consumed by students and parents, but it did not last. Ultimately, the discipline approach as it relates to the harassment did not last. Once the New Jersey Supreme Court ruled that Toms River's approach was ineffective in handling student-on-student harassment grounded in bias, this policy and the accompanying procedures did not last. Other than as a matter of record to this case, these policies and procedures did not last. They were consumed through the adjudication of this case.

The district's claims and legal stance in this case also did not stand the test of time. It was consumed by the legal process; a process that ultimately found in favor of Louis. The district's claim that they were not at fault, that they did not violate the LAD and did not discriminate against Louis, did not last. The official response in this case was rejected by the Director, and the district appeal's to both the superior court and the New Jersey Supreme Court were rejected. Their stance that the LAD did not protect school children from student-on-student harassment was rejected. Their claim was consumed. This philosophical and legal claim did not last, and therefore nothing was created with their legal response. In relation to Arendt's concept of action,

¹¹⁵ Schuster, p. 18.

work and labor, it can be argued that the district, via the administrators' endeavors, were not labor.

One can also assess the administrators' behavior through Arendt's concept of work. Arendt asserts that work creates objects that endure for a time beyond the men who created them.¹¹⁶ Using this idea of permanence as it relates to the district's handling of this case is tricky. One must take the liberty of viewing policies, procedures and responses as "objects". Using this latitude, it is evident that the administrators did not engage in work. Essentially none of these "objects" achieved any degree of permanence. Due to the ultimate rejection of the way Toms River handled the White affair, nothing the district did endured. Because of the decisions of the higher courts, one can view the district's policies, procedures and responses to student-on-student, bias-based harassment as obsolete. As a result of the final decision of the New Jersey Supreme Court, the district was forced to rewrite its policy in regards to this type of harassment. The Department of Education's guidance requires school districts to evaluate and amend their policies and procedures as needed in order to comply with the ruling and the LAD.¹¹⁷ Based on this final ruling, the district's responses no longer existed and did not endure for a time beyond its creator. Just as with Schuster, once the Director and the higher courts sided with Louis, the district's mode of response was "consumed." Just as with the judge's decision, the administrators' endeavors now only exist as a matter of record. There is evidence that the administrators' response would not qualify as Arendtian work in this regard.

¹¹⁶ Biesta, 559.

¹¹⁷ Final Decision and Order, L.W., A Minor, By his Parent and Guardian, L.G., and L.G. Individually v. Toms River Regional School Board of Education, Craig Sashihana, Director, NJ division on Civil Rights. February 25, 2013, p. 14.

Arendt also asserts that work creates an end goal, a purpose and instrumentality.¹¹⁸ The administrators' and district's behavior in regards to the White matter focused on an end goal in two distinct ways. First, the district did attempt to address Louis's plight, albeit inadequately. As Judge Schuster points out, the administrators responded to each of Louis's complaints, as well as to L.G.'s concerns. In his decision, Schuster states the district "acted on each claim of harassment almost immediately after it was reported by investigating the allegation and apply the principle of progressive discipline to offenders."¹¹⁹ Giving the administrators the benefit of the doubt, they attempted to alleviate Louis's torment. In addition, the district had policies and procedures in place to address harassing behavior. One can argue that this was an end goal and a purpose, both of which are characteristics of Arendtian work.

In addition to their responses to Louis's situation, as it was occurring, the district also endeavored to respond to the Whites' discrimination claim. The district opposed Louis's attempt to hold the district responsible, and the district fought his efforts at every stage of the legal process. This was clearly an end goal, and had purpose and instrumentality. This was the district's attempt to maintain what it produced, which is one of Arendt's tenets regarding work. When one applies the maintenance test to what Toms River produced; their policies, procedures, responses to the abuse and their response to the lawsuit, none of these was maintained. Once the Director and the courts ruled against the district, their "objects", like Schuster's decision, ceased to exist. They were not maintained.

¹¹⁸ Chris Higgins, "Human Conditions for Teaching: The Place of Pedagogy in Arendt's Vita Activa," *Teachers College Record*. 112 (2), (2010): 413.

¹¹⁹ Schuster, 18.

Particulars and Universals

The administrators' and district's endeavors related to Louis White can also be examined through the lens of Arendt's theory in terms of particulars and universals. As is the case when analyzing both the LAD and legal precedent, the district's responses share characteristics of both the particular and the universal. Arendt is adamant in her insistence that both thinking and judging operate in the realm of particulars and not universals. Judgment assumes no pre-established consensus to a phenomenon, and politics is essentially negotiating differences of opinion and power.¹²⁰ When school administrators in Toms River respond to a discipline case they follow an established protocol. As noted earlier, the district follows a progressive discipline approach. For a minor, first offense, students are counseled and receive a warning. This is where an administrator must use her/his judgment in determining whether a particular behavior is minor, or if the behavior warrants an immediate, harsher consequence, as in the case of physical violence. When an administrator confers with a student on a discipline matter, she/he focuses on the particulars of the situation. Judging the situation based on the particulars, an administrator dispenses discipline by issuing a warning and counseling the student, assuming he or she deemed the offense minor, and not repeated. This process seems to epitomize thinking the particular.

Just as I argue in chapter two that the process of adjudication in the courts is the quintessence of focusing on the particulars, and has characteristics of the universal, so does the progressive discipline approach. Like court decisions, an administrator's judgment in these matters is heavily influenced by prior, similar discipline cases. If such discipline is administered consistently, a precedent is comprised of a specific treatment of a discipline case or cases that

¹²⁰ David L. Marshall, "The Origin and Character of Arendt's Theory of Judgment," *Political Theory*, 38 (3) (2010): 369.

have specific characteristics that are used and applied to future, similar discipline cases. So are these prior discipline cases universals or particulars? One can conceive an argument for both. The use of prior discipline cases relies on very specific aspects of a former case. Just as with legal precedent, these could be considered particulars due to their specificity. In addition, these specific characteristics are applied to the discipline matter at hand, and this is presumably done on a case-by-case basis. This seems to be the essence of considering the particulars. On the other hand, administrators gradually adapt universal tendencies based on a certain way of thinking that emerges from these prior discipline cases. In this sense, the precedents set by the handling of prior, similar discipline matters have universal application to a specific class of offenses. If the same rule is violated, then prior treatment of a similar case is applied by focusing on the specifics of the discipline situation at hand as well as the precedent that has been set. This is applied, however, universally to a discipline matter that is similar in nature to prior, similar offenses. In short, the administrators did not think the particulars, a tenet that is crucial to true Arendtian judgment.

One cannot only analyze the administrators' response during Louis's ordeal while in school, but one can also consider the behavior of the district once the Whites filed their complaint. The district made efforts to stop Louis's harassment. The only thing, however, that truly ended his torture was his own physical removal from the district. So the district failed to end Louis's abuse. White and his mother ended the abuse by transferring Louis to another educational setting. Perhaps a major factor contributing to the district's failure to end the abuse was the administrators' insistence on using a universal application of discipline to a very specific and unique situation. Once Louis left Toms River and finally filed his complaint, the school district continued to operate in the universal. When the district chose to fight the legal action, this

was a strident effort to protect their systems, which is, I argue, the essence of universal thinking. The district was defending its status quo, even after witnessing the failure of its universal application of policies and procedures. Even their legal argument, with which Judge Schuster agreed, was characterized by universal thinking. The district argued that Louis's case was a Title IX case, and not one covered under the LAD.¹²¹ Title IX is even broader, vaguer and provides few specific protections compared to New Jersey's LAD. In *Davis v. Monroe County Board of Education*, the United States Supreme Court determined that under Title IX, a district must receive actual notice of the discriminatory behavior on behalf of one of its agents, and must then ignore, or display "deliberate indifference" to the discrimination.¹²² Toms River was aware that the "deliberate indifference" standard under Title IX would render it virtually impossible for Louis to prevail. Although Toms River failed to protect Louis, their repeated attempts to do so would make it difficult to argue that the district acted with deliberate indifference. Advocating the use of such a broad and stringent standard to this case is evidence of thinking the universal. This strengthens the argument that the district did not engage in Arendtian judgment.

Thinking for the Prevention of Evil

At first glance, one might assume that the district endeavored to prevent evil. That is, Toms River took steps in an attempt to end Louis's harassment and protect him. Arendt asserts that thinking can prevent evil and that evil itself is the inability to think critically and reflectively about one's actions.¹²³ In general, school administrators' charge is to keep all students safe. When reading the ALJ's decision, it is apparent that the administrators made several attempt to

¹²¹ *K.P. v. Corsey*, 229 F. Supp. 2d 547,550 (D.N.J. 2002).

¹²² *Davis v. Monroe County Board of Education*, Supreme Court of the United States, May 24, 526 U.S. 629.

¹²³ Steinberger, 814.

help Louis. One could argue that the administrators had in place and followed policies and procedures designed to prevent evil. Louis had suffered at the hands of evil under the care of these administrators. Within the framework of the district's approach to discipline, the administrators were given an opportunity to engage in the type of thinking that, according to Arendt, would prevent future evil to Louis as well as other students throughout the Toms River Regional School District.

Where as it was much simpler to argue that the creators of the LAD exhibited thinking for the sake of preventing evil, just as it is with Schuster, it is much more difficult to come to that same conclusion regarding the administrators' handling of Louis's situation. Arendt argues that evil is the result of not thinking so it reasons then that taking action, deciding, judging as a result of thinking yields the prevention of evil. And while so much of Arendt's traits for thinking and judging seem to focus on the process and intentions of man, in this case, just as with Schuster, it seems that one must analyze both the process and the outcome in order to decide whether the administrators exhibited Arendtian thinking and judging as it relates to the prevention of evil. Arendt again returns to the particularities in that thinking that helps prevent evil. She asks "Could the activity of thinking, the habit of examining and reflecting upon whatever happens to come to pass, regardless of specific content...could this activity be of such a nature that it 'conditions' men against evil doing?"¹²⁴ As discussed earlier, the administrators considered certain particulars of Louis's ordeal. It can be argued that they reflected and considered the viewpoints of others, but in the end, the outcome of their endeavors fell short. The district did not protect Louis, and therefore the administrators failed to prevent evil. Again, the only thinking that prevented more of this similar variety of evil that Louis endured was his and his mother's

¹²⁴ Hannah Arendt, "Thinking and Moral Consideration," *Social Research*, 38(3), (1971): 418.

decision to leave the Toms River schools. Whereas Schuster chose not to prevent evil, as evidenced by his conclusions and findings in his decision, the district administrators almost seem incapable of doing so, despite their efforts. In the end there is strong evidence that the administrators did not engage in the type of thinking that Arendt believed would prevent evil.

Once Louis filed the complaint, the district went on the defensive and ceased making attempts to prevent evil. At that point, any approximation of thinking the particulars was lost. Although I argue that the administrators did a poor job of considering the viewpoints of others, of considering the particulars of each discipline case, any pretense of doing so vanished when they decided to fight the Whites' claim, as opposed to settling. Fighting Louis's claim only solidified the district's stance of maintaining the status quo and treating Louis's abuse as just another discipline issue, as opposed to what it really was; bias-based hate crimes. Clearly this treatment was evil, and the district's inability and ultimately unwillingness to think reflectively inhibited the administrators' ability to prevent evil.

Moral Judgment

Just as at first glance one might consider expanding LAD protections to student-on-student harassment as good judgment based on moral grounds, the district's failure to protect Louis can be viewed as morally deficient. As noted earlier, however, trying to utilize Arendt's thought in terms of moral judgment is highly complex. Arendt adamantly opposed the traditional two-world metaphysics that characterizes western philosophy.¹²⁵ Since Arendt considers judgment to be the most political of all human actions, and her belief that morality has no place in politics, it is easy to see how challenging it is to use her thinking when assessing the judgment

¹²⁵ Seyla Benhabib, "Judgment and the Moral Foundations of Politics in Arendt's Thought," *Political Theory*, 16(1) (1988): 30.

of others.¹²⁶ In this respect, the administrators complied with Arendt's tenet that judgment needs to be morality-free. Through examining Schuster's written decision, none of the testimony evidence moral decision-making on the part of the administrators. While deciding what is right and wrong in terms of student behavior is something administrators do on a daily basis. The testimony during the hearing does not exhibit any moralizing on the part of school officials. In response to each complaint, the administrators mechanically investigated and followed the established policies and procedures through their progressive discipline approach. Perhaps it can even be argued that the progressive discipline procedures are the antithesis of moralizing. Even those that are clearly guilty of an offense, and some could argue a rather egregious, anti-gay, hate-filled offense, the administrators treated a first offense in virtually the same regard as tardiness to class. So even though the district's failure to protect Louis, and their subsequent adamant denial of wrongdoing might be characterized by traditional thinking as morally wrong, there is no evidence of morality in the administrators' words or deeds. In other words, the administrators seem to have kept morality separate from politics, and their endeavors did not consider morality. This would support an argument that the district approximated Arendtian thinking and judgment as it relates to this trait.

Reflective Judgment

The only true judgment, according to Arendt, is reflective judgment. As discussed previously, this type of judgment cannot occur in isolation, but only in the presence of others.¹²⁷ Though the beginnings of this saga was not formed in the private realm of any administrator,

¹²⁶ Hannah Arendt, "Thinking and Moral Consideration," *Social Research*, 38(3), (1971): 446.

¹²⁷ Arendt, Hannah. "The Crisis in Culture." In *Between Past and Future*. Harmondsworth: Penguin, 1977), 220-221.

they, as well as the district, were a part of this possible reflective judgment paradigm. Though the Arendtian concept of action began with Louis, via his mother, L.G., the district did respond. The administrators were part of the chain reaction of action that results from an idea leaving the private realm. Once Louis's mother began dialogue with the administrators in an effort to stop Louis's abuse, they became immersed in a reaction to L.G.'s going public with her ideas. Before this situation moved to the Director and ultimately the courts, the district was asked to consider the viewpoint of others and potentially agree with this viewpoint. This potential agreement presents the possibility of true judgment. Providing the Whites with obligatory due process could be viewed as evidence that the administrators considered the viewpoint of others for possible agreement.

Arendt posits that judgment's goal is to improve perception by distinguishing one particular from another. Judgment demands multiple perspectives. As discussed in detail earlier, the administrators considered multiple perspectives during the investigation of the various incidents. The question is, did this consideration result in improved perceptions. As noted, Arendt suggests that true reflective judgment does not demand the elimination of differences of opinion. The goal is simply to make those opinions clear or better understood.¹²⁸ The idea is to improve perception by consistently making one aware of what distinguishes one particular from all other particulars that share prior characteristics.¹²⁹ I assert that the administrators attempted to do this when investigating the incidence of harassment, and when they responded to L.G.'s concerns. Again, this was an attempt, but a futile one because the administrators failed to see the uniqueness of Louis's circumstances. Also, once the "difference of opinion" entered the legal

¹²⁸ Marshall, 384.

¹²⁹ *Ibid.*

realm, Toms River no longer sought to improve perceptions. At that point, the only goal was to convince judges and justices to side with the district. At that point, Toms River was attempting to eliminate differences of opinion, which is in direct opposition to Arendt's concept of reflective judgment.

Chapter Summary

Since elementary school, Louis White had suffered persistent harassment at the hands of his classmates. Finally, frustrated by the district's inability to end Louis's abuse, L.G. filed a complaint with the Division on Civil Rights on March 12, 1999. Within the first few weeks of his high school career, the harassment had escalated to physical attack. At this point, Louis's mother had lost all confidence that Toms River Regional Schools could keep her son safe, and so she withdrew Louis from the school system. The initial legal filing began a legal battle that lasted eight years, and with the New Jersey Supreme Court's favorable ruling for the Whites, every school district was compelled to revisit their harassment policies. This decision extended the protections afforded by the Law Against Discrimination to student-on-student harassment, essentially granting school children the same protection that the law provides to adults in the workplace.

This case began once the Director determined that the Whites had a cause of action and subsequently referred the case to the Office of Administrative Law (OAL). The OAL is an independent agency created to expedite due process in administrative proceedings. These proceedings are heard by Administrative Law Judges (ALJ), and cases are referred to this office by the various agencies that make up the executive branch of the New Jersey state government. An ALJ only hears cases referred by a director of one of these agencies. Litigants cannot file a

request for a hearing directly. Oral arguments, as well as documents may be submitted as evidence, and contestants may cross-examine witnesses and submit rebuttal evidence if the ALJ allows it. Once the hearing concludes the ALJ issues a recommendation to the referring director to review. This decision is not final or binding, and the director can adopt the decision as is, modify it or outright reject it within 45 days of receipt.

It was within the confines of the Office of Administrative Law that Louis White truly began to fight back. While the outcome of Judge Schuster's initial decision was disappointing to the Whites, it does signify a turning point in Louis's saga. As a result of Schuster's decision, in which he found in favor of Toms River, there was no expansion of LAD protections to students. This, however, was only a temporary setback. Eventually the Director on Civil Rights would reject Schuster's decision. That phase of Louis's story will be discussed in chapter four.

Louis and his mother, referred to in court documents as L.G., filed a verified complaint with the Director on Civil Rights on March 12, 1999. The complaint claimed that Louis was the subject of repeated harassment by fellow students, and that this harassment was based on Louis's perceived sexual orientation. The claim also state that the Toms River Regional School district did not take corrective action in response to multiple complaints reported by White to school administrators. The Whites also claimed that the district violated the state's Law Against Discrimination by denying White access to public accommodation due to the district's inaction. As a result, the district failed to protect Louis's civil right to attend public school and "receive all the benefits of an educational opportunity."¹³⁰

¹³⁰ *LW v. Toms River Regional Schools BOE*, John Schuster III, ALJ April 26, 2004.
http://njlaw.rutgers.edu/collections/oal/html/initial/crt08535-01_1.html (accessed November 20, 2015).

On August 14, 1999, five months later, the Toms River School District responded by filing an answer denying the allegations of discrimination. The Director of the Division on Civil Rights found probable cause on July 10, 2000, and noted that the district's initial responses to the abuse "were not sufficiently prompt, effective or remedial."¹³¹ The hearing with the Administrative Law Judge (ALJ), the Honorable John Schuster III, took place on March 26, April 1 and April 15, 2003. Both parties submitted evidence and provided witnesses.

In the section of Schuster's written decision entitled "Testimonial Review," the judge described his observation of witnesses and stated his findings as to the credibility and reliability of the testimony. Schuster then went on to summarize the testimony of each witness representing both sides in the case. The judge began with Louis's testimony, which chronicled the abuse he suffered from his time at the elementary school, South Toms River School, through his short tenure at Toms River High School South, his transfer to Red Bank Regional High School and finally the Career and Technical Institute in Ocean County.

Louis's mother, his aunt and a long-time friend of Louis testified. Louis's mother emphasized that his abuse started when he was ten years-old and in fifth grade. An incident in fifth grade resulted in the class writing letters of apology. She said she was aware of the middle school handbook's stated sexual harassment policy, and that she did not make any claims of harassment until after the humping incident. L.G. requested a meeting with school administrator, but the administrator responded that she was too busy to meet. L.G. resorted to writing a letter to Ms. Benn concerning the incident. L.G. testified that she felt that the administrator was somewhat indifferent, and in general, she did not think the school was doing enough to remediate

¹³¹ Schuster, 2.

the harassment. L.G. also described the incidents of physical assault that occurred at the beginning of Louis's first year of high school. She spoke to the vice-principal, who told her he would administer discipline to Louis's attackers, and he also suggested that Louis take the bus home instead of walking. After the last physical attack at the 7-Eleven, the school suggested that Louis stay on campus for lunch so that the school could protect him. L.G. testified that she no longer felt that the Toms River Schools could keep Louis safe so she withdrew Louis from the district.

The written decision then goes on to chronicle the testimony of district officials. Ann Baldi, the district's affirmative action officer, testified that the district does have a written anti-sexual harassment policy, which is presented in school and published in the student handbook, as well as the district's manual. Baldi also noted that the seventh grade students were lectured on the policy. Baldi explained the safety plan upon which L.G. and the administrators agreed, and she stated that both Louis and L.G. seemed satisfied with the action. Baldi testified that she followed up during Louis's eighth grade year and did not hear of an incident again until the attacks in September of Louis's first year of high school.

Ms. Benn, the vice-principal, also discussed the handbook rules regarding harassment and discipline, as well as the accompanying assemblies at the beginning of each school year. She stated that administration explained that abuse based on sex or sexual preference was explained to the students during the assemblies. Benn also noted that Louis's case was the only case she was aware of that the school had encountered. She explained that she did not become aware of Louis's plight until the humping. Benn then proceeded to chronicle the sequence of incidents, and her description was consistent with Louis's account.

The last two witnesses for Toms River were Lawrence McCauley, assistant principal at the high school, and John Gluck, assistant superintendent of high schools for the district. McCauley detailed the September incidents. He explained that he had not been briefed on Louis's history of abuse, and did not have any knowledge of Louis until the September 11, 2000 incident. He explained that he immediately suspended the violent student and offered busing to Louis. Again, when McCauley was made aware of the 7-Eleven incident, he suspended the offending student for ten days. At that point, he recommended that Louis eat lunch on campus, and McCauley suspected discrimination so he contacted the affirmative action officer. He then stated the procedure of presenting the harassment policy to students at the beginning of the school year. Gluck's testimony indicated that he knew nothing of Louis's plight until he received the request for transfer from L.G. He also arranged, upon the approval of the board of education, to pay for some of the transportation cost for Louis's commute to Red Bank. Gluck informed L.G. that Louis could still participate in extracurricular activities at South, and he could arrange for Louis to graduate with his original class.

In the "Findings of Facts," section of his written decision, Judge Schuster states what he finds as the reliable facts based on the testimony and other evidence. This essentially summarizes all of the testimony. In subsequent phases of this legal saga, the Director and appellate courts take issue with some of his findings. For the purpose of this chapter of the dissertation, these findings are what I have used for my analysis.

In the "Legal Analysis" section of Schuster's decision, he states his decision and explains that he does not have the authority to create a cause of action under the LAD in the White case. To support his decision, Schuster cites *S.P. v. Collier High School* as a precedent where the state recognizes a district's negligence for student-on-student conduct that negatively affects a

student's educational experience. At the same time, Schuster cites *K.P. v. Corsey* to support his claim that Title IX standards should govern Louis's case, as opposed to the LAD. *Corsey* did not involve student-on-student harassment, but rather a district employee harassed K.P. The court found Corsey, the student's track coach, liable, but did not find the district liable. Since *Corsey* was decided in federal district court, and not in the New Jersey state courts, the federal judge in the case was hesitant to abandon a federal standard. The judge in the *Corsey*, Joseph Irenas, explained that since the state court had not expanded the LAD protections to the schools, the federal court had to predict what the New Jersey Supreme court would do if faced with this case. As a result, Irenas looked at the state court's decision in *Lehman v. Roys R Us, Inc.* In this landmark workplace harassment case, the New Jersey Supreme Court relied heavily on Title VII, part of a federal statute. Therefore, Irenas predicted that the state court would also rely heavily on federal statute if it were to hear *Corsey*, and therefore used Title IX in determining its ruling. Judge Irenas set a precedent in student harassment cases by applying the much broader Title IX standards to student-focused sexual harassment. The "notice and deliberate indifference standard" was used to determine the district's liability in *Corsey*, and as a result, the district was not found liable. Only Mr. Corsey, their agent, was found at fault. Judge Schuster chose to use this federal standard, as opposed to the much stricter LAD standards, in the White case. Therefore, he ruled in favor of the Toms River Regional School District.

When analyzing Judge Schuster's legal decision in light of Arendt's theory of judgment, it is difficult for one to declare unequivocally that the judge's endeavors do or do not qualify as Arendtian judgment. Arendt insisted judgment had to involve her concept of "common sense." This term, as Arendt defines it, is the ability to engage with the possible and actual judgments of others. At first glance, the judicial proceeding would encompass considering things from points

of view other than one's own. A judge inherently considers things from other's point of view. Schuster considered the testimony of many players. He defined the issue at hand as if the district did enough to prevent Louis's right to public accommodation being violated. The other big question to be decided was whether the right to public accommodation and a public education are protected under the Law Against Discrimination. When he summarized what he determined to be reliable and credible testimony, these statements represent his perspective and viewpoint. These statements also show evidence that he considered the viewpoints of others via their testimony. This is an Arendtian trait of judging.

Schuster also approached the case with an eye toward dealing with the invisibles and things that are absent. Arendt asserts that the notion of judgment is a particular type of thinking. This type of thinking is associated with phenomena that are not physically present (read out loud). Schuster was dealing with invisibles. He did not witness the abuse, the administrator's responses, L.G.'s responses, or the impact that this abuse had on Louis. This forced the judge to consider things that are invisible and absent.

Because Arendt links thinking and judging with acting, it is important to assess Schuster's endeavors in light of Arendt's concepts of action, labor and work. Arendt claims that action is a by-product and an effect of thinking. In turn, she relates thinking to freedom through action, which Arendt considers the zenith of human existence. To act is to begin something new; to do something that has never been done before. Judge Schuster had an opportunity to engage in Arendtian action. By ruling in favor of White, he could have created new protections for students guaranteed by the LAD, but he chose not to do so. Deciding in Louis's favor also would have created an important legal precedent that did not previously exist. Arendt asserts that speech is the product of private thinking, creates action and gives action meaning. Even though Schuster

engaged in speech, he did not truly act or judge. Although he used speech in the presence of others and engaged in discussion and debate, that speech was meaningless because Schuster did not create anything new.

Viewing Schuster's decision in light of Arendt's concepts of labor and work offers more perspective. Arendt explains that work creates objects of relative permanence, things that outlive their creator. Schuster's decision endured for only 90 days. Once the Director rejected his decision and sided with White, that which Schuster created no longer existed, other than as a matter of legal and historic record. Though his decision had purpose and instrumentality, the fact that it was overturned by the Director renders this purpose and instrumentality void. Regarding labor, Schuster's endeavors do not qualify as such. Labor creates things that sustain life. Clearly, the judge's decision does not do this. On the other hand, labor does not create anything and is consumed. Once Schuster's decision is nullified, it became nothing, and in a sense, it was "consumed" by due process. In short, Schuster's decision does not qualify as Arendtian work, labor or action.

Another important aspect of Arendtian judgment is the concept of particulars and universals. Judgment demands focusing on the particulars. There are no universals to guide judgment and decision-making. Arendtian judgment rejects the notion of pre-established consensus to a phenomenon. Legal proceedings are somewhat dichotomous in this regard. Judicial proceedings are dedicated in part to hearing viewpoints of others and the particulars they share. At the same time, legal decisions rely heavily on precedent, which was the case with the ALJ's decision in the White case. Judicial procedures, like the one which is the focus of this dissertation, share traits of both the particular and the universal. The use of precedent relies on very specific aspects of former rulings. These could be considered particular due to their

specificity. These specifics are applied on a case-by-case basis through the careful examination of the particulars of the case in question. Perhaps this is the essence of thinking the particular. On the other hand, judges adopt universal truths based on legal theory that emerge from precedents. In this sense, precedents have universal application to specific cases. These shared characteristics are confounding and complicate any assessment of Schuster's decision in terms of particulars and universals.

When considering Arendt's notion of using thinking to prevent evil, as it related to the Schuster decision, one can make a definitive claim. Schuster, through his ruling, chose not to prevent evil. Louis had suffered unequivocal evil at the hands of his peers. Whether or not Schuster's endeavors qualify as Arendtian thinking and judging is not as clear-cut, it is clear that the outcome of Schuster's decision failed to prevent evil. The ALJ had the opportunity to engage in the type of thinking that could have prevented similar future evil from occurring in schools throughout New Jersey. Schuster chose not to do so. If one focuses on the outcome of Schuster's analysis, as opposed to the process by which he arrived at his decision, it is clear that the judge did not engage in the type of Arendtian judgment that would prevent evil. Despite a modicum of evidence of Arendtian thinking during these proceedings by the ALJ, Schuster chose not to use this process to prevent evil. In regards to morality, Schuster seems to have complied with Arendt's insistence that morality has not place in practicing good judgment. Ironically, though traditional thinking would equate preventing evil with sound moral judgment, Schuster's decision not to prevent evil complies with Arendt's tenet that thinking and judging must remain free of moralizing.

For Arendt, the only true judgment is reflective judgment. Schuster's endeavors share some traits of Arendt's idea of reflective judgment. Schuster's decision did not occur in isolation,

but rather in the presence of others. Although the ALJ did not initiate Arendtian action due to the nature of a judge's role, once the Whites went public with their idea, the judge did become a part of Arendtian action. Once initiated, Schuster reacted. He considered the viewpoint of others through testimony. There existed the potential for agreement. Arendt explains that judgment's goal is not complete agreement but to improve perceptions by examining phenomenon in the light of particulars. The process in which Schuster engaged did just that. The very nature of adjudication thro the Office of Administrative Law is about considering the particulars.

Differences of opinion are not eliminated, but those opinions are made clearer. Throughout the hearing, perceptions were enhanced. All parties involved, including Schuster, were offered the opportunity to reflect and improve perceptions. In the end, it is simply not possible to make a definitive claim, one way or the other, whether Schuster practiced pure Arendtian judgment.

One can also consider the district administrators' endeavors through the lens of Arendtian judgment. The concept of considering particulars as opposed to universals in order to engage in "common sense" is an important aspect of Arendt's theory of judgment. On the one hand, administrators did this. Whenever Louis or his mother lodged a complaint, the administrators listened and considered their point of view. Then, when they addressed the alleged perpetrators and their parents, the administrators considered their point of view. On the other hand, the administrators did not thoroughly consider Louis's point of view. The school leaders mechanically followed the district's progressive discipline policy. For a first offense, if it was deemed a minor infraction, students were simply counseled and issued a verbal warning. When administrators deemed those first offenses that Louis endured as "minor," they were no longer considering the viewpoints of others. Louis's treatment was anything but minor. This was not simple name-calling or teasing. These acts were based on a perception associated with Louis's

very essence. The nature of these first offenses qualifies as major, and should have been addressed by administration as such. If these “minor” offenses had been handled more aggressively by the administrators, then perhaps this would have deterred the torture Louis continued to endure. Truly considering the viewpoints of Louis and L.G., and those of all marginalized members of the student community would have led the administrators to a similar conclusion. This inability to consider other points of view, specifically Louis’s, ultimately prevented the administration from judging the particulars and things close at hand, which Arendt defines as thinking.

Considering Arendt’s judgment is so inextricably tied to her notions of action, work and labor, it is important to analyze the administrators’ endeavors through these lenses. Action creates freedom. To act is to begin something that did not previously exist. The administrators had multiple opportunities to begin something that did not yet exist. When Louis first presented them with his complaints, as well as with each subsequent incident, administrators could have taken the first step in creating a school climate focused on inclusion, dignity and humanity. The school leaders, by not acting, also missed an opportunity to achieve meaningfulness. There was no constructive destruction. By treating these incidents of abuse with the care that was warranted, the vice-principals and principals could have ended Louis’ torture early on. This could have been a transformative beginning. Taking action such as this would have been true Arendtian action as a result of thinking and judging. Yet, the administrators, despite some effort, failed to begin. By treating these incidents as minor, the administration missed an opportunity to engage in Arendtian action.

Some of the administrators’ endeavors however, possess some traits of Arendtian action. Action cannot occur in isolation. It must happen in the presence of others. All of the

administrators' activities occurred in the presence of others. The administrators engaged in speech during their investigations, meetings and during the hearing with the ALJ. All of this was done in the presence of others. In addition, during this entire process, the school leaders engaged in discussion and debate, which are also traits of Arendtian action.

If one is to use Arendt's concept of action, one must do so in relation to her ideas of work and labor. The district's activities would also not qualify as work or labor. Labor encompasses activities that sustain our biological existence. Regarding work, Arendt argues that work creates objects that endure for a time beyond the men who created them. The "objects" the administrators created did not last. The policies, procedures and decision that endured during Louis's ordeal did not last beyond the New Jersey Supreme Court's final decision. The district's various responses to each development involving Louis White did not endure for a time beyond the existence of their creators. The administrators' endeavors do not qualify as Arendtian work or labor.

The administrators' activities can also be examined through the lens of particulars and universals. The progressive discipline approach the district used has characteristics of both the universal and the particular. When an administrator faces a discipline situation, she or he must examine the specifics of that particular situation and make a decision. Their decision is based on the particular of the situation at hand. At the same time, the administrators use a systematic approach to discipline, with first, minor offenses usually addressed with a warning and repeat offenses and serious first offenses resulting harsher punishment. Following a uniform system such as this also implies the universal. In addition, like legal precedent, administrators gradually adopt universal tendencies based on a certain way of thinking that emerges from these prior discipline cases. As a result, the precedents set by the handling of prior and similar discipline

matters have universal application to a specific class of offenses. In short, the administration did not think the particulars during the Louis White crisis. Once Louis and L.G. filed their complaint with the Director, the district chose to fight the legal action. This was a strident effort to protect their systems, which I posit is the essence of universal thinking.

When assessing Toms River in terms of Arendt's concept of thinking for the prevention of evil, there is evidence that the district approached this ideal, but failed. Once Louis and L.G. filed their complaint, any semblance of thinking to prevent evil was lost. Arendt's theory as to the cause of evil is somewhat controversial, and it was particularly so in post-war United States and Europe when she first espoused her ideas. She defines evil as the inability to think critically and reflectively about one's own actions. So at first glance, one can surmise that the district was trying to prevent evil by keeping all students safe. The district had policies and procedures in place that were designed to prevent harassment, a favorite form of evil for adolescents. The administrators made numerous attempts to help Louis and end the harassment. The bottom line though is that the administration could not and did not end it. The administrators failed to reflect on their actions when following their progressive discipline approach. By reflecting critically, the administration could have realized that following their boilerplate procedures was not working, yet they continued applying the same approach again and again. The administration had the opportunity to engage in this type of Arendtian thinking and prevent evil, but they failed to do so. The only thing that ended Louis's torment was L.G.'s decision to remove her son from the school system. The administrators failed to engage in thinking to prevent evil.

The administrators did not exhibit any moralizing during this ordeal. Arendt asserts that morality has no place in politics or judging. It is quite simple to use traditional thinking and assess Toms River's behavior as morally deficient. Yet, if one is to hold fast to an analysis that

complies with Arendt's theory, then arriving at a dichotomous "right or wrong" assessment is not possible. Based on Judge Schuster's written decision, none of the administrators' testimony exhibits any moral decision-making. The district's personnel mechanically followed the established progressive discipline protocol, which left little room for moralizing.

While the administration did consider the viewpoints of others, their perceptions were not improved. L.G. created a chain reaction when she brought her private idea, Louis's abuse, then reacted. They engaged in dialogue and listened to various viewpoints. These are all traits of Arendt's reflective judgment. However, judgment's ultimate goal is to improve perception by examining and distinguishing one particular from another. Perhaps it can be argued that the administrators attempted this type of reflective judgment, but failed because they never truly understood, or were willing/able to truly consider L.G. and Louis's viewpoint. Ultimately, they failed to improve their own perception. Once the ordeal entered the legal realm, Toms River was no longer trying to improve perceptions, but rather they were trying to eliminate difference of opinion, which is not the goal of Arendtian judgment.

Despite the fact that my analysis has illustrated that the judge's activities do exhibit some traits of Arendtian judgment, overall it would not be accurate to claim that Schuster exercised Arendtian judgment during his handling of the Louis White case. Ultimately Schuster chose not to expand the protections of the LAD to student-on-student harassment. He claimed he didn't have the authority to do so. Schuster determined that Louis case should be decided based on Title IX and not the LAD. While the judge listened to viewpoints of others, did he actually consider them? I argue that he did not, or he would have understood Louis's unique situation and applied the LAD as opposed to Title IX. Schuster really did not engage in Arendtian action, which is closely linked to judgment. By maintaining the status quo with his ruling, Schuster refused to

begin something new. Even though he engaged in speech, it was meaningless because it was not true action. Although there is some evidence of the ALJ considering the particulars, his conclusions reflect universal thinking more so than the thinking the particulars because of his overwhelming reliance on precedent rooted in Title IX. Regarding the notion of using reflective judgment to prevent evil, Schuster clearly failed. Granted, he did operate in public; his decisions were in public, yet Arendtian judgment's goal is not to eliminate disagreement, but rather to improve perception. Schuster's decision was meant to eliminate disagreement. When weighing all factors and considering the various Arendtian traits, Schuster did not engage in this type of thinking and judging.

Like Schuster, the endeavors of the administrators displayed some traits of Arendtian judgment, but overall there is not enough evidence to claim that they practice this type of judgment. The school leaders attempted to invoke common sense by considering the viewpoints of others. They listened to Louis, his mother, the accused students and their parents. By deeming Louis's attackers' offenses as minor, the administrators failed to truly consider Louis's unique point of view the administrators also had an opportunity to engage in Arendtian thinking and judging via action. Again, however, they did not. These men and women had a chance to create something that didn't formally exist, but failed to do so. While these administrators considered the specifics of the various incidents, their thinking and decision-making appears to have been driven more by the universal through the mechanistic use of their progressive discipline policy. The administrators also failed to use thinking for the prevention of evil. One can argue that they approached this, but ultimately failed. Morality does not seem to have been present in their activities, which does comply with Arendt's theory. Ultimately, while they did not operate in isolation, and the viewpoints of others were heard, the administrators ultimately did not improve

perceptions, and ultimately shifted their goals to changing the minds of others, which is evidence by their attempt to fight the White's claim in court.

Although Louis's initial attempt to seek justice was temporarily thwarted by both the ALJ and the district, subsequent efforts on the Louis's part would pay off. The Director's rejection of Schuster's initial decision would set in motion a chain of events that would see Louis ultimately prevail. The director, the appellate court and ultimately the New Jersey Supreme Court found much at fault in both Schuster's legal decision and the district's handling of Louis's situation. These subjects will be discussed in detail in subsequent chapters.

CHAPTER FOUR: THE DIRECTOR INTERVENES

Introduction

After exhaustive attempts to compel the Toms River Regional School District to protect her son, L.G. filed a complaint with the Division on Civil rights. After the Director found probably cause, and in accordance with state statute, referred the matter to the Office of Administrative Law. The Administrative Law Judge (ALJ), the Honorable John Schuster III, heard the case and issued an initial decision in favor of Toms River, dismissing the Whites' complaint. Fortunately for Louis, the director of a division of the New Jersey state government has the authority to reject or modify an ALJ's decision. On July 26, 2004, J. Frank Vespa-Papaleo, Director, New Jersey Division on Civil Rights, issued his Administrative Action Findings, Determination and Order in response to Schuster's initial decision.

The specific New Jersey statute renders an ALJ's initial decision as a recommendation, and the decision is non-binding. Barring an appeal to the New Jersey Superior Court, the Director has final say in administrative matters. After the conclusion of the hearing, the ALJ will issue a "recommended report and decision" and findings of fact and conclusions of law based on "sufficient, competent, and credible evidence" no later than 45 days of the conclusion of the hearing.¹³² This is a *recommendation*, but is not binding or a final decision. This recommendation is sent to the director of the agency which filed the complaint with the OAL, who then evaluates this report, and either "adopt, reject or modify the recommended report and decision" within 45 days of receipt.¹³³ The director must clearly state the reasons for

¹³² N.J.S.A. 52:14B-10 (c).

¹³³ *Ibid.*

modifications or rejection, and these reasons must be based on evidence and facts. She/he may not reject the findings and conclusions based on the credibility of witnesses, unless it has been found that these are not reliable and are supported by “sufficient, competent, and credible evidence in the record.” If the director accepts the recommendations without modifications, then these are adopted as the final decision of the director of the agency.¹³⁴

The Director’s Findings, Determination and Order

Judge Schuster, after three extensions of time, issued his initial decision on April 26, 2004. The director used one extension of time and rendered his final determination on July 26, 2004, 90 days from Schuster’s decision and nearly five years since the Whites filed their verified complaint with the Division.¹³⁵ After giving a brief introduction and procedural summary, which included a statement indicating that he was rejecting the ALJ’s dismissal of the case, Vespa-Papaleo briefly summarized the ALJ’s factual determinations. The Director then summarized Schuster’s analysis and conclusions of law. Each of these summaries reflected the same information that was discussed in chapter three of this dissertation.

Exceptions and Replies of the Parties

The next section of the Director’s written decisions, entitled “Exceptions and Replies of the Parties,” details both the complainant’s exceptions to the ALJ’s initial decision and the respondent’s reply to those exceptions. A New Jersey statute that enumerates the procedure in OAL cases permit such a filing, “...an opportunity shall be afforded each party of

¹³⁴ *Ibid.*

¹³⁵ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004 page 2.

record to file exception, objections and replies thereto, and to present argument to the head of the agency...”¹³⁶ First, the Whites challenged several factual findings that the ALJ made, including the way in which Schuster characterized certain conduct, as well as some of the judge’s legal conclusions. Concerning factual findings, the Whites took exception to the judge’s determination that Louis’s teasing in elementary school stopped after staff counseled the students involved. They also challenged the notion that annual lectures and handbooks distributed to students and parents stated that sexual preference-based harassment was prohibited. The Whites also took exception to the claim that the district had never previously confronted harassment based on perceived sexual orientation. The White’s also asserted that the district’s claim that they offered Louis the option of taking his core classes at South and performing arts classes at CTI. Louis and L.G. also took exception to Toms River’s claim that they offered any remedies other than staying on school property during lunch and not walking home. The Whites asserted that the finding that Louis left the district as a result of only two incidents at South is inaccurate. Instead, they assert that Louis withdrew from the district because of the “cumulative effect of all the harassment he suffered...”¹³⁷

The Whites also had trouble with the way the judge characterized some of the harassment. They claimed that there is undisputed testimony regarding particular incidents to support their assertion that Schuster’s use of certain terms such as “name-calling,” “teasing” and “insensitive comments” minimized the serious nature of the abuse. They also assert that using

¹³⁶ N.J.S.A. 52:14B-10 (c).

¹³⁷ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004 page 6.

these terms changed the depiction of what really happened and “failed to fully depict the gravity, persistence and scope of the harassment.”¹³⁸

In addition to the exceptions, the Whites requested that the Director make additional factual findings based on the testimony transcript and include supplemental evidence that Schuster refused to accept. Specifically, the Whites requested that the Director find as fact that the district had no written protocol to follow when dealing with harassment complaints. They also requested that the Director find that the district does not maintain coordinated records of harassment of particular students when said students move on to another school in the district. The complainants also requested that the Director find that the district did not advise the Whites that they could file a formal grievance under Toms River’s existing affirmative action policy.¹³⁹

When this matter was with the Office of Administrative Law, both parties were allowed post-hearing submissions of additional evidence. The Whites requested to supplement the record with notes written in Louis’s brother’s yearbook.¹⁴⁰ These notes did not exist at the time of the hearing. Schuster, however, did not allow this additional evidence, noting that the notes were “inherently unreliable as double hearsay.”¹⁴¹ Included in the Whites’ submitted exceptions was a request for the Director to allow and consider this additional evidence. The Whites argued that the notes should be admitted because they obtained them after the hearing and they “are

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ LW v. Toms River Regional Schools BOE, John Schuster III, ALJ April 26, 2004, page 2.

http://njlaw.rutgers.edu/collections/oal/html/initial/crt08535-01_1.html

¹⁴¹ *Ibid.*

probative of the continued harassing culture in the school district.” Louis and L.G. also asserted that the yearbook notes were not “hearsay.”¹⁴²

In addition to the exceptions to Schuster’s findings of fact, the Whites also filed exceptions to the ALJ’s legal conclusions. They argued that the judge erroneously concluded that there is no cause of action against a school district for student-on-student harassment under the Law Against Discrimination (LAD). The complainants also took exception to Schuster’s assertion that if there was cause, the standard set forth in *Lehman v. Toys ‘R Us* would not apply to student-on-student harassment. Finally, even using the much narrower standards set forth by Title IX, the district would still be liable because the administrator’s conduct constituted deliberate indifference to Louis’s abuse.¹⁴³

State statute also allows the respondent in a contested case to submit a reply to the exceptions filed by the complainant.¹⁴⁴ Regarding the ALJ’s factual findings, as expected, Toms River contended that the judge’s factual findings were accurate and depicted the incidents reported to them by Louis. The district also claimed that the events in elementary school merely serve as background and should not be considered as a part of the complaint.¹⁴⁵ They also claimed that the first time they learned about the additional incidents during seventh and eighth grade was during Louis’s testimony at the administrative hearing. The district explained that if

¹⁴² L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004 page 6.

¹⁴³ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004 page 7.

¹⁴⁴ N.J.S.A. 52:14B-10 (c).

¹⁴⁵ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004 page 7.

these incidents had been reported at the time they occurred, the administrators would have addressed them promptly. Regarding the anti-sexual harassment policy, Toms River asserted that the testimony of Ms. Benn clearly shows that she disseminated it to students and parents. They also stated that Louis was the only seventh-grade student who reported sexual harassment during the 1998-1999 school year. The district also reiterated that they responded to each reported incident and took quick “remedial action.”¹⁴⁶ Regarding Schuster’s legal conclusions, Toms River argued that he applied the appropriate legal standards, and that the LAD does not imply liability on a school district for student-on-student harassment, and even if the law does, the differences between the workplace and school environment make applying Title IX’s deliberate indifference standard when deciding a cause of action more appropriate. Finally, the district asserted that administration did not violate the deliberate indifference standard or the hostile workplace environment standard developed through the state courts and the LAD.¹⁴⁷

The Director’s Factual Determinations

The next section of the written decision enumerates the Director’s factual determinations, which were markedly different than Judge Schuster’s. Although New Jersey statute authorizes the director of a state agency to modify or reject the ALJ’s findings of fact and conclusions of law, she or he cannot do so arbitrarily and must clearly state her or his reason for doing so. The agency head cannot reject or modify findings of facts due to credibility issues of “lay witness testimony” unless a review of the records show that the ALJ’s findings are arbitrary and not

¹⁴⁶ *Ibid.*

¹⁴⁷ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004 page 8.

supported by evidence.¹⁴⁸ When a director does modify or reject findings of fact, she or he must state clearly “with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent and credible evidence in record.”¹⁴⁹ The Director explained the administrative code that dictates this stipulation, cited case law that supports this procedure and then proceeded to detail his modifications and rejections of Schuster’s findings. Vespa-Papaleo began by addressing each exception that the Whites filed. First, he agreed with the Whites that there is no evidence that the teasing stopped in elementary school after the staff counseled the offending students. The Director noted that his independent review of the hearing transcripts did not reveal any testimony that supports this finding. He then pointed out that since there is no testimony to support this finding, it was not based on a credibility determination and therefore it is permissible for the director to reject the finding.¹⁵⁰

Vespa-Papaleo also took issue with the lectures and handbooks discussing the prohibition of harassment based on sexual preference. He agreed with the Whites that the documents labeled “Toms River Intermediate West Student-Parent Handbook” “Toms River Intermediate School West Student Rules, Regulations and Policies” and “Toms River High School South Student Parent Handbook 2000-2001” do not state that discrimination or harassment based on “sexual preference” or “sexual orientation” is prohibited.¹⁵¹ Rather these documents state that discrimination based on gender or sex is prohibited. The district’s “Affirmative Action Overview” document states that discrimination based on sexual orientation is prohibited, but

¹⁴⁸ N.J.S.A. 52:14B-10 (c).

¹⁴⁹ *Ibid.*

¹⁵⁰ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004 page 8.

¹⁵¹ *Ibid.*, 9.

neither students nor parents receive this document. The Director also explained that his review of the testimony and other evidence provided no evidence to support the district's claim that parents or students received policy statements prohibiting discrimination or harassment based on sexual preference or orientation. Vespa-Papaleo state that "based on the undisputed evidence in the record, and without disturbing any credibility determinations..." he rejected Schuster's finding that Toms River distributed policy prohibiting harassment or discrimination based on sexual preference.¹⁵²

The Director also rejected Schuster's finding that administrators verbally told student that this type of harassment was not permitted. He focused on the testimony of Irene Benn, the seventh grade assistant principal during Louis's seventh grade year, to support his findings. The transcripts show that Ms. Benn's initial testimony claimed that she explained to students that harassment based on sexual preference was prohibited. Here is a portion of the transcript of Ms. Benn's testimony:

Q: Did you explain that sexual harassment – you just couldn't discriminate against anybody based upon sex, correct?

A: That's correct.

Q: There was no fine definition of words sexual harassment, sexual orientation. You simply indicated you don't bother people or harass them based upon their sexual preference.

A. That's correct.¹⁵³

¹⁵² *Ibid.*

¹⁵³ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, page 10.

Based on the questioning from the district's counsel, Thomas E. Monahan, it appears that Ms. Benn did warn students that harassing other students based on their pereceived sexual preference was prohibited. When questioned by Deputy Attorney General James R. Michael during cross examination, however, Ms. Benn contradicts herself:

Q. When you addressed the students at the beginning of the year, did you actually use the term "sexual preference," that students couldn't be discriminated against because of their sexual preferences?

A. I will not say that I used those exact words. We're talking again to seventh and eighth graders. Although their language may allow us to think that they have a great understanding of that topic, it was terms of sexual harassment, inappropriate language related to that is unacceptable in our schools.

Q. So isn't it true that you never actually dealt with sexual orientation issues?

You never used the term sexual - - did you ever use the term sexual orientation when addressing the students?

A. Sexual harassment. No.

Q. Okay.

A. Not sexual orientation.¹⁵⁴

¹⁵⁴ *Ibid.*

Ms. Benn initially agreed with Monahan’s statement that she advised students that they were not allowed to harass others based on sexual preference; she clarified when the Deputy Attorney General cross-examined her. Ms. Benn’s lectures addressed sexual harassment, but she never used the phrases “sexual orientation” or “sexual preference”. The district did not advise students in writing or verbally that harassment based on sexual preference would not be permitted. As a result, the Director modified the ALJ’s finding to state that students were told that harassment for any reason, including on the basis of sex, was not permitted, and they were given written policies consistent with this message, but discrimination “based on sexual orientation, sexual preference or homosexuality were not specifically addressed in lectures or written materials.”¹⁵⁵

Another finding that Vespa-Papaleo modified was the ALJ’s determination that the Toms River Regional Schools “had never dealt with harassment based on perceived homosexuality” prior to the harassment of Louis.¹⁵⁶ Ms. Benn testified that Louis’s sexual harassment complaints were the only ones she received or addressed during Louis’s seventh grade year. The Director pointed out, however, that Ms. Benn did not testify as to whether she received sexually harassment complaints in previous years. More to the point, two other district administrators testified that they had both dealt with prior incidents of harassment based on perceived sexual preference. Lawrence McCauley, assistant principal, testified that he had dealt with incidents of harassment based on orientation during the two years prior to Louis’s arrival at South. In addition, Toms River’s affirmative action officer, Anne Baldi, testified that the district, during that same two-year time period used the district’s progressive discipline approach “on behalf of a

¹⁵⁵ *Ibid*, 11.

¹⁵⁶ *Ibid*.

student” at another of the district’s high schools who was harassed for being a cross-dresser.¹⁵⁷

As a result of this evidence, the Director modified the ALJ’s findings to indicate that the district’s high school administrators had dealt with previous, additional complaints of harassment based on sexual orientation, but that Ms. Benn received no sexual harassment complaints other than Louis’s during the 1998-1999 school year.

Judge Schuster found that school officials offered Louis the option of taking his core classes at South and his performing arts classes at CTI on a part-time basis. The Director modified this finding also. He noted that the testimony supports the ALJ’s finding that the high school administrators suggested that Louis take his lunch on school property and take the bus home instead of walking. Based on the testimony of the assistant superintendent, John Gluck, it was Louis’s mother, L.G., and not the district who suggested that Louis attend Red Bank Regional and subsequently CTI. This was not the district’s suggestion, though the district did cooperate with the transfer arrangements.¹⁵⁸

Vespa-Papaleo again disagreed with the ALJ in regards to what drove L.G. to remove her son from the Toms River Regional Schools. The judge found that Louis withdrew because of the two assaults that took place during September 2000 of Louis’s freshman year. Louis’s testimony, however, indicates that those two incidents were just the last straw. He testified that he and his mother decided he should withdraw after the two incidents because they had already given administration “chances” in the seventh grade, and “it didn’t work.”¹⁵⁹ Louis explained further

¹⁵⁷ *Ibid.*

¹⁵⁸ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, page 12.

¹⁵⁹ *Ibid.*

that he withdrew from South because in grade seven comments progressed to physical harassment and in the ninth-grade it began with physical assault, and Louis “had enough of it.”¹⁶⁰ Vespa-Papaleo explained that there is no testimony to contradict that the Whites did not withdraw Louis just based on the two incidents of September 2000. The Director characterized Louis’s testimony as “undisputed” and found that Louis withdrew from Toms River High School South “as a result of the cumulative impact of the harassment that began in the 7th grade.”¹⁶¹

After the hearing, Louis’s brother found comments in his yearbook that exhibited a harassing climate in the school, even after Louis had left. By statute, an ALJ may reopen the record to supplement evidence based on extraordinary circumstances.¹⁶² Since these notes did not exist and were not obtained until shortly after the hearing, the Whites attempted to submit them, but Schuster denied this request. As mentioned previously, the Whites requested the Director to consider this evidence as a part of their exceptions to the ALJ’s finding. The Director agreed with the complainants and found that Schuster “erred in denying Complainants’ motion to supplement the record with pages from L.W.’s brother’s 2003 school yearbook.”¹⁶³ Vespa-Papaleo noted that the ALJ never ruled as to whether the yearbook pages met the extraordinary circumstances requirement or not, but denied their inclusion as evidence based on his determination that the notes were unreliable and were “double hearsay.”¹⁶⁴ The Director noted that New Jersey administrative code permits the admission of hearsay evidence in administrative

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² N.J.A.C. 1:1–18.5

¹⁶³ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, page 12.

¹⁶⁴ LW v. Toms River Regional Schools BOE, John Schuster III, ALJ April 26, 2004, page 2.

hearings unless that evidence is privileged, or the judge determines that the evidence “will necessitate undue consumption of time or will create a substantial danger of undue prejudice or confusion.”¹⁶⁵ Vespa-Papaleo also noted that even if the hearsay exclusion were applicable to administrative proceedings, the yearbook pages would not qualify as excludable hearsay because the notes were not offered as evidence of the truth of the statements written on the page. The notes were not offered to prove whether or not the comments about Louis were true. “Thus, if a proper foundation were presented to support the reliability of the evidence, it would have been admissible at the hearing.”¹⁶⁶

Vespa-Papaleo then moved to the question of whether there were extraordinary circumstances to warrant admission of the evidence after the conclusion of the hearing. The Director noted that the notes did not exist, the complainants filed the motion only a week after the parties submitted post-hearing briefs, and the ALJ had not yet issued a recommended decision based on the existing record, nor would Schuster do so for a year after the last hearing date. Toms River opposed the motion to supplement the record not only because of the circumstance in which the yearbook notes were made, but also suggested that the district would be prejudiced if the evidence was admitted without a chance for them to cross-examine witnesses “who could lay a proper foundation for the evidence.”¹⁶⁷ Vespa-Papaleo noted that if the ALJ had made a timely ruling there would have been an opportunity for cross-examination and the presentation of rebuttal evidence. The Director found that the excluded notes did meet the extraordinary circumstances standard for reopening the record because it is relevant and “non-

¹⁶⁵ N.J.A.C. 1:1-15.1 and N.J.A.C. 1:1-15.5

¹⁶⁶ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, page 13.

¹⁶⁷ *Ibid.*

duplicative” evidence.¹⁶⁸ Vespa-Papaleo, however stated that there was no need for remandment back to the ALJ because the existing evidence warrants the reversal of the ALJ’s decision without the additional evidence. For this reason, the excluded evidence did not factor into the Director’s decision to modify and reject the ALJ’s decision, nor did it factor into his determination of “emotional distress damages or statutory penalties imposed against Respondent.”¹⁶⁹

The Legal Standards and Analysis

The next section of the Director’s written decision focused on the legal grounds by which he rejected and modified much of Schuster’s decision. The LAD prohibits both “direct and indirect” discrimination based on sexual orientation in places of public accommodations including K-12 public schools.¹⁷⁰ The law defines sexual orientation to include being perceived or indentified by others as gay.¹⁷¹ These three sections of the LAD read “All persons shall have the opportunity...to obtain all the accommodations, advantages, facilities and privileges of any public accommodation...without discrimination because of...affectional or sexual

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ N.J.S.A. 10:5-12 (f).

⁴⁰N.J.S.A. 10:5-4.

⁴¹N.J.S.A. 10:5-5(l).

⁴²N.J.S.A. 10:5-5 (hh).

orientation...”¹⁷² It is obvious that Louis belongs to one of the protective classes delineated in the law. The LAD also defines what constitutes a public accommodation. “A place of public accommodation shall include...any kindergarten, primary and secondary school...”¹⁷³The Director also made sure to point out that sexual orientation includes being perceived or identified by others as homosexual. This is wording from the LAD. “Affectional or sexual orientation means male or female...homosexuality’ or “having a history thereof or being perceived, proved or identified by others as having such an orientation.”¹⁷⁴

Vespa-Papaleo goes on to explain that the LAD prohibits harassment and other forms of “differential treatment based on a protected characteristic.”¹⁷⁵ He cited New Jersey case law, both *Lehman v. Toys ‘R Us, Inc.*, and *Taylor v. Mertzger*. In the context of the workplace, the state courts have recognized that discrimination based on protected characteristics, such as sex, creed and race can create a hostile work environment, and the courts have established legal standards to determine if such harassment violates the LAD. The courts have established that harassment violates the LAD when the harassing treatment would not have occurred save for the employee’s protected characteristic. The standard also requires that the harassment is so severe and pervasive “to make a reasonable person” of that same protected class perceive the conditions of employment were altered, and the working environment has become abusive or hostile.¹⁷⁶

¹⁷⁵ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 14.

¹⁷⁶ *Ibid.*

For public accommodations, the New Jersey courts have interpreted the LAD very liberally, casting a wide net in order to deter and punish all forms of discrimination. Even if hostile statements do not prevent the person of a protected class from accessing the accommodation, merely creating an atmosphere that could discourage a person from using a facility at any time in the present or future is considered discrimination under the LAD.¹⁷⁷ The state courts have used this standard to steadfastly prevent discrimination. Vespa-Papaleo noted a case in which an appellate New Jersey Superior Court found that making a single statement intimating that a customer was not welcome because of her disability was held by the court to constitute a “prima facie” basis for an LAD claim. This statement was made to the daughter of the disabled person; the mother did not hear the comment herself.¹⁷⁸ A prima facie basis “is a cause of action or defense that is sufficiently established by a party’s evidence to justify a verdict in his or her favor.”¹⁷⁹ Therefore, a single comment, which was not directly received by the victim can constitute a claim under the LAD. The Director also cited another New Jersey State Superior Court Appellate Division case, which found that a series of racially hostile comments during one transaction in a donut shop would violate the LAD if the comment were made with the intent to discourage present or future access to the accommodation by the victim or a member of the protected class to which the victim belongs.¹⁸⁰

After establishing that both a single statement as well as a single occurrence can constitute a violation of the LAD, Vespa-Papaleo discussed how this provision would also apply

¹⁷⁷ *Ibid.*

¹⁷⁸ *Franek v. Tomahawk Lake Resort*, 333 N.J. Superior Court 206, 216 (Appellate Division 2000).

¹⁷⁹ www.law.cornell.edu/wex/prima_facie accessed 12/16/2015

¹⁸⁰ *Turner v Wong*, 363 N.J. Superior Court 186,213 (Appellate Division 2003).

to the public schools. He cited the quote from another New Jersey Supreme Court case in which the court interpreted the purpose of the LAD as “nothing less than the eradication of the cancer of discrimination.”¹⁸¹ By creating the LAD, the New Jersey legislature created a “uniform scheme” for eliminating discrimination, and they created a range of remedies and ways to enforce the law in both places of public accommodation and places of employment.¹⁸² The Director pointed out that the LAD has prohibited discrimination since 1945 in the state of New Jersey, and the state Department of Education was responsible for enforcing the law until 1963. The legislature’s long-held intent is to ensure that all children of the state have equal access to a public education, and has gone so far as to aggressively make discrimination in the public schools a violation of civil rights. Based on the very straightforward public policy, as well as a significant body of case law, the Director concluded that harassment based on a protected characteristic violates the LAD when it creates a hostile environment in a public accommodation, including a public school. Vespa-Papaleo, speaking of Louis’s situation, then stated “Such a hostile school environment existed here.”¹⁸³

The Director also concluded that applying the standards used by the New Jersey Supreme Court in *Lehman* is appropriate to determine whether bias-based harassment of a student violates the LAD. Based on the legal standards established by the state courts, Vespa-Papaleo determined that harassment of a public school student will violate the LAD when the harassment is based on a student’s protected characteristic, and is “severe and pervasive enough that a reasonable student” in that same protected class would find the school environment hostile

¹⁸¹ *Fuchilla v. Layman*, 109 N.J. 219, 334 (1998).

¹⁸² L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 14.

¹⁸³ *Ibid*, 15.

or abusive.¹⁸⁴ In turn, a school district will be liable if school administrators knew or should have known that the harassment was taking place and failed to take effective measures to stop it. “When this happens, a hostile school environment has been created.”¹⁸⁵ Therefore, Vespa-Papaleo rejected Schuster’s determination that even if student harassment warrants a cause of action under the LAD, the standards set forth by Title IX established by the courts should be used to determine liability. He noted that the only case in existence that explored the question of what standards should be applied to student harassment claims was *K.P. v. Corsey*, in which the court applied the Title IX standards. The Third Circuit Court of Appeals, however, reversed that decision. The Third Circuit determined that the District Court should have remanded the case to the state courts “to address the novel and complex issue of what standards should be applied.”¹⁸⁶ That court noted that the “general tone” of the New Jersey Supreme Court in its recent opinion in *Frugis v. Bracigliano*, which determined standards for school administrators’ duty of care to students, implied some doubt as to whether the state courts would use Title IX standards in an LAD case.¹⁸⁷ In other words, it cannot be assumed that the state courts would apply Title IX standards to a state anti-discrimination claim based on state statute. The Director noted that the question remains as to what standards should be applied to a student claim of peer harassment under the LAD.¹⁸⁸

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*, 16.

¹⁸⁷ *Frugis v. Bracigliano*, 177 N.J. 250 (2003).

¹⁸⁸ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 16.

Judge Schuster provided two reasons to support his decision to apply Title IX standards to this case. First he stated that the Whites were essentially making a Title IX claim. Vespa-Papaleo counters by pointing out that even in the context of workplace discriminations where evidence supporting an LAD claim are the same to those using Title VII, or the Americans with Disabilities Act (ADA), the state courts have used the LAD to “provide broader protections for discrimination victims” than the protections provided by federal law. To support this observation, Vespa-Papaleo referred to a quote from the third circuit appeals court, “The LAD is a remedial statute in some respects broader and more flexible than Title VIII...”¹⁸⁹ As an example, the Director noted that the LAD holds liable employers for the discriminatory actions of their employees. Federal law does not impose strict liability in that regard. Also, under the LAD , an employer’s anti-harassment policy and their preventative and remedial procedure must meet much high standards in order to provide a defense to a workplace harassment claim. Vespa-Papaleo also compared the protections of the ADA to those provided by the LAD. For discrimination cases based on a disability, the LAD had been interpreted much more broadly than the equivalent protections provided by the ADA, and concerning employees who have no protections under the ADA, such as those with temporary disabilities and disabilities that “do not substantially limit a major life activity.”¹⁹⁰ Therefore, although the state courts have not provided an explicit legal standard to apply to bias-based peer harassment in the schools, one cannot automatically assume that those courts would use the less protective federal standards to address harassment that is in violation of the LAD in a non-employment setting.¹⁹¹

¹⁸⁹ *Hurley v. Atlantic City Police Department*, 174 F. 3d 95, 121, n. 19 (3rd Circuit 1999).

¹⁹⁰ *Viscik v. Fowler Equipment Co. Inc.*, 173 N.J. 1, 16 (2002).

¹⁹¹ *L.W. v. Toms River Regional Schools Board of Education*, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 17.

There are fundamental differences between the federal anti-discriminations statutes and those of New Jersey. Those differences indicate that Title IX is not appropriate to use for student harassment claims under the LAD. The New Jersey legislature created far-reaching anti-discrimination statute that applies to both the workplace and public accommodations. In contrast, Congress addressed discrimination against a student in the school setting in a very limited manner compared to Congress's work with Title VII of the Civil Rights of 1964, which created significant prohibition of employment discrimination and broad private right of action. Title IX created a much narrower private cause of action for discrimination against students. Title IX prohibits only local educational agencies receiving federal funds from discriminating against students on the basis of sex. Because these two federal statutes are so different, the United States Supreme court has refused to apply the stricter Title VII standards to Title IX cases, and in turn has established more limited standards for deciding liability of a school district for sexual discrimination of students. A victim of discrimination can only recover damages under Title IX when school officials act with "deliberate indifference to known acts of harassment in its programs or activities," and the harassment must be "so severe, pervasive, and objectively offensive, that it effectively bars the victim's access to an educational opportunity or benefit."¹⁹² In creating the actual notice/deliberate indifference standard the Supreme Court relied on the much narrower Title IX, as opposed to Title VII. Congress clearly prohibited discrimination in the workplace, but only prohibited sexual discrimination of students in school districts that receive federal funding.

¹⁹² 20 U.S.C.A. 1681

Based on the explicit language of Title VII, an employer can be held for acts of discrimination committed by one of its agents. On the other hand, the Supreme Court has rejected any agency-based liability under Title IX. Applying Title IX, if a student has been sexually harassed by a teacher, student or other employee, the school district can only be held liable of its own actions. In this case, the district is only liable if the third-party discrimination occurred in a situation under the district's control, and it failed to respond to the discrimination.¹⁹³ Title VII uses a standard for negligence that imposes liability on an employer if they knew or should have known about the discrimination. A Title IX recipient of funds may be held liable only where "it had actual, rather than constructed, notice that a student was being sexually harassed."¹⁹⁴ It appears that the LAD has much more in common with Title VII than Title IX. The Director continued building the case for applying the LAD to the White case. He explained that based on the broader reach of the public accommodation provisions in the LAD relative to those found in title IX, there is support for applying the LAD to student-on-student bias-based harassment claims, rather than using Title IX standards. The LAD is a remedial statute intended to be interpreted liberally to serve its purpose, and this included the explicit prohibition of discrimination based on sexual orientation in the public schools.¹⁹⁵ The purpose of the LAD was to enforce the guarantee of civil rights provided by the New Jersey Constitution.¹⁹⁶ This is in sharp contrast to the Supreme Court's interpretation of Title IX as essentially a contract in which funding recipients receive their funds in exchange for complying with the conditions set

¹⁹³ *Davis v. Monroe County Board of Education* 526 U.S. 629 (1999).

¹⁹⁴ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 18.

¹⁹⁵ N.J.S.A. 10:5-3; N.J.S.A. 10:5-5 (I).

¹⁹⁶ N.J.S.A. 10:5-2.1

forth by the federal statute.¹⁹⁷ Akin to a breach of contract, a school that received federal funding can only be held liable for violating conditions it “affirmatively accepted” and based on prior, clear notice from Congress of potential liability. The United States Supreme court has explained that it has created the significantly high deliberate indifference/actual notice standards so that school districts cannot be held liable for the independent actions of others, as opposed to their own official decisions and actions.¹⁹⁸

The Director concluded his rationale for rejecting the ALJ’s use of Title IX by stating that the New Jersey Legislature has equated student discrimination claims with employment discrimination claims under the LAD, and by doing so has provided the same broad rights and remedies for both types of discrimination. He then contrasted Congress’s choice not to provide the same protections to students as it does to employers under Title VII, and has essentially equated a funding recipient’s duty to prevent discrimination as a contractual obligation and condition to receive federal monies. Congress provided a solid reason for applying stricter liability standards in federal school discrimination cases than those applied to federal workplace discrimination cases. A similar rationale, *Vespa-Papaleo* quips, is not available to justify setting a more restrictive standard of liability for discrimination against students under the Law Against Discrimination. In addition, the broader reach of the public accommodation provisions of the LAD relative to those provided under Title IX further support applying LAD standards to student bias-based harassment claims.¹⁹⁹

¹⁹⁷ *Davis v. Monroe County Board of Education* 526 U.S. 629 (1999).

¹⁹⁸ *Ibid.*

¹⁹⁹ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 20.

Vespa-Papaleo then moved to Schuster's second rationale for applying Title IX's less protective standards. The ALJ leaned heavily on a statement from the U.S. Supreme court in *Davis v. Monroe County Board of Education*, which reads "courts...must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults."²⁰⁰ The Director noted that there is merit to the fact that the immaturity of children most likely increases the chances that students will be exposed to hurtful behavior, it is also important to remember that schools also have a responsibility to teach children what types of behavior are acceptable and unacceptable. He also noted that in *Davis*, the court conceded that school administrators have a greater ability to control and impact student behavior than employers in the workplace.²⁰¹

This responsibility to teach includes helping students learn what constitutes discrimination, as opposed to immature and insensitive behavior that is not bias-based. The Director then quotes *Lehman*, which states "conduct considered normal and non-discriminatory twenty years ago may well be considered discriminatory today."²⁰² For example, schools have made great progress in teaching children to avoid biases based on race, ethnicity and religion. Biases they may have learned elsewhere in society. Vespa-Papaleo cautioned that school administrators must make the same efforts to teach student that bias-based harassment is equally wrong, especially when administrators discover that a student may have been the victim of this type of harassment or bullying.²⁰³ The state legislature amended the LAD to cover sexual

²⁰⁰ *Davis v. Monroe County Board of Education* 526 U.S. 629 (1999).

²⁰¹ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 20.

²⁰² *Ibid.*

²⁰³ *Ibid.*

orientation in 1991. This recent amendment recognizes that people need and deserve protection from discrimination based on their sexual orientation and that to this end, schools need to make similar efforts “to create a culture of acceptance, and to affirmatively reject the bigotry and biases that still permeate some aspects of our society.”²⁰⁴ Schools are in the best position to educate our students in order to eliminate discrimination based on sexual orientation in our schools.

In addition, the Director noted that boards of education and school administrators have a duty to protect the children in their care from harm. To support his point, Vespa-Papaleo quoted a recent New Jersey Supreme court negligence case brought against a principal. The Court pointed out that parents relinquish their supervisory role to administrators. School personnel are guardians, and there exist no greater obligation than protecting the children under their care. School officials must “protect the children in their charge from foreseeable dangers, whether those dangers arise from the careless acts or intentional transgressions of others.”²⁰⁵ The Director stated that even though *Frugis* was a common law negligence case and not an LAD claim, a district’s duty to protect students from predictable discrimination is relevant when determining liability standards for an LAD claim.²⁰⁶

While Vespa-Papaleo recognized that students may need guidance as to what constitutes discriminatory behavior, and schools may not be able to protect students from all harassment by

²⁰⁴ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 21.

²⁰⁵ *Furgis v. Bracigliano*, 177 N.J. 250, 268 (2003).

²⁰⁶ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 21.

peers, administrators have a duty to protect students from foreseeable, bias-based harassment.²⁰⁷ Embracing this duty will also encourage both victims of bias-based bullying and harassment as well as observers of such behaviors to report these incidents to the appropriate school officials. This duty of care is vital for students because harassed students are virtually trapped in an institution that they are required to attend by law. This is in contrast to harassed employees who have the option of leaving the hostile environment by getting another job. The law enacted in 2002 declares that harassment, intimidation and bullying will not be tolerated. This law also requires each district to adopt and disseminate a policy prohibiting harassment, intimidation and bullying based on a protected or other distinguishing characteristic. The Director asserted that this was further evidence that the legislature recognized that schools have a duty to protect students from bias-based harassment at the hands of their fellow students.²⁰⁸ Vespa-Papaleo then stated that for these reasons, he concludes that even though society's expectation for student behavior in a school setting is different than those for the workplace, this is not a valid reason for using Title IX's "deliberate indifference" standard as opposed to the more protective LAD standards established in *Lehman*.²⁰⁹

Vespa-Papaleo noted that although the state courts have not yet explicitly applied the LAD to bias-based student-on-student harassment, based on the substantial body of anti-discrimination law that the state courts have developed and the recent HIB law created by the legislature and governor, it is appropriate to determine that this type of harassment violates the LAD when the harassment is "severe or pervasive enough that a reasonable student of the

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 22.

victim's protected class would find the school environment hostile or abusive."²¹⁰ A school district will be held liable if it knew, or should have known about the harassment and failed to stop it.

Based on the evidence, Vespa-Papaleo explained that whether one applied the *Lehman* standards or the deliberate indifference standard, Louis was subjected to bias-based harassment that violates the LAD, and Toms River Regional Schools is liable for that harassment. The Director also stated that based on Schuster's factual finding, and the undisputed testimony concerning the verbal harassment and physical assaults, Louis was the recipient of harassing statement and acts due to the perception that he was queer. In addition, this harassment was severe and pervasive enough that a reasonable student who shares Louis's protected characteristics would believe that his school environment was hostile and abusive. The Director noted that the record from the administrative hearing supports the conclusion that the harassment was based on the perception that Louis is gay. Louis testified that every reported incident was accompanied by some reference to his sexual orientation, including using the terms "faggot," "gay" and "homo".²¹¹

Vespa-Papaleo also noted that the record reflects that the harassment was severe and pervasive enough that a reasonable student would find the school environment abusive or hostile. Within a period of less than four months, Louis was subjected to at least nine incidents of bias-based harassment, including two that included some sort of physical assault, and one incident involved physical touching and a simulated sex act. The series of incident took place from

²¹⁰ *Ibid.*

²¹¹ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 213.

January 21, 1999 through April 13, 1999. Regarding the severity, the director noted that some of these incidents were severe enough to compel L.G. to keep her son out of school for one or more days.²¹²

In determining the severity of Louis's harassment, Vespa-Papaleo noted that the ALJ's description of the incident did not include any of the actual statements that were directed at Louis. As a result, the judge left out the references to the bias-based, anti-gay nature of the incidents. For example, Schuster, in his findings, noted that a student "had called L.W. names." Another student "was picking on L.W.". "There was name calling back and forth." "Some students were making comments and taunting L.W." Students were "making insensitive comments," and three other students "were heard making comments about L.W."²¹³ The Director, however, pointed out that the record of testimony clearly provided details that support his conclusion "that the harassment was bias-based, severe and pervasive."²¹⁴ Again, Vespa-Papaleo pointed out that he has merely used the testimony to paint a clear picture, and he does not reject any of Schuster's findings on the basis of the credibility of witnesses. Judge Schuster had ample, specific statements to include in his findings, but he did not do so.

The Director then proceeded to provide the comments by Louis during the hearing, which accompanied each incident. For example, Louis testified that he reported an incident in the gym locker room when a student stated in front of a group of students, "If you had a pussy I'd fuck

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ *Ibid.*

you up and down.”²¹⁵ At play practice, one student called Louis “fag” and “homo” and another student repeatedly hit him on the head with a play program and called him “faggot” and “homo”. In the school cafeteria line, a student called Louis “gay” and “faggot” and grabbed Louis’s genitalia and humped him while asking “Do you like it, do you like it like this?” In a moment this same student returned and repeated the spectacle. In another incident, a student slapped Louis in the face and told him he shouldn’t be touching his sister because Louis is a “fag” and simultaneously another student hit him in the neck with a chain, laughed and said “faggot...get out of here, we don’t want you here.” A group of boys called him “faggot” and “homo” in gym class. During his brief tenure in high school, three students attacked Louis while he was walking home from school. One of the students asked him if he was a ‘faggot” and another explained to Louis that he and his family do not like “faggots” right before he knocked Louis down and punched him in the face. Finally, during lunch recess at the local 7-11 store, a student, with several other students, grabbed Louis’s shirt, pushed him down on the ground and kicked mulch in his face, while threatening Louis that if he ever had a crush on him or one of his friends he would beat him up.²¹⁶

Next, the Director addressed the Whites’ exception regarding Judge Schuster’s use of various terms which they believed minimized the severity of Louis’s harassment. He gave as examples the phrases “name-calling” and “insensitive comments.” Vespa-Papaleo explained that it is not clear why Schuster used such innocuous terms; whether he intended to portray the harassment as less than severe, or did not want to repeat offensive language during the hearing.

²¹⁵ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 24.

²¹⁶ *Ibid.*

Either way, the bias-based nature of the language used during Louis's harassment is relevant when assessing the severity of the harassment. This is akin to a situation where someone is being harassed based on their race. Racially hostile comments would be relevant in determining the severity of that brand of harassment as well.²¹⁷ Based on the ALJ's findings, and the "undisputed testimony", the Director concluded that Louis's harassment was pervasive, severe and based on his perceived status as queer. Vespa-Papaleo also concluded that Louis "did not react to the harassment in a hypersensitive or idiosyncratic manner," and that any reasonable student would find his school environment to be hostile or abusive. Of course, regarding the bias-based physical assaults Louis endured during the first two weeks of high school, any reasonable student would find these hostile or abusive.²¹⁸

Once the Director had established the fact that Louis had suffered bias-based, severe and pervasive harassment, he next turned to determining if the Toms River Regional Schools was liable for unlawful discrimination. Since Vespa-Papaleo had already established the appropriate legal standards to use earlier in his written decision, he then began applying these standards. Therefore, he began this process by explaining that it is appropriate to look to the standards established for imposing liability on an employer due to the actions of a harassing co-worker to the actions of a harassing peer student, and therefore equated a school district with an employer. Vespa-Papaleo explained that under the LAD, an employer is liable for harassment "committed by its supervisory employees as well as co-workers of the discrimination victim."²¹⁹ The LAD the court determined in *Lehman*, holds employers liable on agency principles or a direct liability

²¹⁷ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 25.

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

for the employer's failure to act. In essence, the court determined that if an employer knew, or should have known about the harassment and "fails to take effective measures to stop it" then the employer becomes a partner in the harassment and contributes to the hostile environment.²²⁰ By failing to take action, the employer sends the message to the perpetrator that the behavior is acceptable and that management supports the harasser. The court explained that "effective" measures are those that are "reasonably calculated" to stop the harassment. The "reasonableness" is determined by the ability of the employer to stop the harassment.²²¹ In other words, if the actions taken by the employer stop the harassment, then those measures were reasonably calculated. In Louis's case, it is rather obvious that the actions of the administration were not reasonably calculated because they never stopped Louis's harassment.

To make that very point, Vespa-Papaleo once again referenced New Jersey case law. He explained that the process by which an employer determines the discipline imposed on a harasser is an element that one analyzes when determining the effectiveness of remedial measures. If the investigative and remedial procedure is not initiated promptly or the procedure "unnecessarily and unreasonably leaves the employee exposed to continued hostility in the workplace" then it is not an effective remedial plan.²²² Deciding whether an employer is liable for bias-based harassment is dependent heavily on whether the employer had "effective preventative mechanisms" in place. If an employer does not, this is strong evidence of an employer's negligence.²²³ Again citing *Lehmann*, the Director asserted that there is strong evidence of such

²²⁰ *Lehmann v. Toys R Us, Inc.* 132 N.J. 587, 626 (1993).

²²¹ *Ibid.*

²²² *Payton v. New Jersey Turnpike Authority*, 148 N.J. 524, 537 (1997).

²²³ *L.W. v. Toms River Regional Schools Board of Education*, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 26.

negligence if an employer fails “to have in place well-publicized and enforced anti-harassment policies, effective formal and informal complaint structures, training and/or monitoring mechanisms...”²²⁴ Vespa-Papaleo then explained why it is appropriate to apply the same type of criteria when evaluating a school district’s liability for bias-based, peer harassment of its students. He noted that the New Jersey Supreme Court drew comparisons between the standards for protecting students and the *Lehman* standards for workplace harassment. The court encouraged districts to put in place effective training and reporting mechanisms “based on their *parens patriae* role” to ensure students’ safety, which will also decrease the likelihood that districts will have to defend against sexual abuse lawsuits.²²⁵ In this comparison, the court cited *Lehman* holding that employers can be held liable for supervisors’ sexual harassment if the employer is negligent in failing to implement an explicit anti-harassment policy, including effective investigative and remedial procedures.

As Vespa-Papaleo noted, Toms River’s preventative measures “were extremely limited.”²²⁶ Neither the district’s lectures to students, nor the written policy and procedures that were distributed to students and parents explicitly prohibited discrimination or harassment of students based on sexual orientation, “or actual or perceived homosexuality...”²²⁷ The district’s anti-discrimination policy was discussed along with all rules and student activities during one class period at the beginning of the school year. The written policy in the student/parent handbook states that Toms River is committed to maintaining a learning environment that is free

²²⁴ *Lehmann v. Toys R Us, Inc.* 132 N.J. 622 (1993).

²²⁵ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 26.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

from all forms of harassment, including sexual harassment. The handbook notes that sexual harassment is “unwelcome and sexual advances, request for sexual favors and other verbal or physical conduct of a sexual nature.”²²⁸ Despite the humping incident qualifying under this definition, students were not explicitly told that anti-gay harassment was prohibited. The rules section of the handbook lists a minimum penalty for 22 different offenses, including disruptions, profanity and fighting, but mentions nothing about bias-based harassment; not separately or as an example of a prohibited offense.²²⁹

Next, Vespa-Papaleo illustrated just how inadequate the administrators’ response was to Louis’s plight. Even after Louis reported at least nine incidents of bias-based harassment over a four-month period by eighteen different students, two of which occurred on two consecutive days and partially involving repeat offenders, the school leaders did not take it upon themselves to “put the student body as a whole on notice” that anti-gay harassment would not be tolerated.²³⁰ The administrators did not clearly explain what types of conduct make up bias-based harassment, how to report such harassment or that this conduct would be addressed as a violation of the school district’s anti-discrimination policies. The Director noted that especially with children, due to their lack of knowledge or experience, may not fully understand the words used in the anti-discrimination policies, the district’s “failure to monitor its anti-discrimination policies to ensure that students understood both the conduct prohibited and the procedures for seeking relief from such discrimination further impairs the effectiveness of Respondent’s anti-harassment policy.”²³¹

²²⁸ *Ibid.*

²²⁹ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 27.

²³⁰ *Ibid.*

²³¹ *Ibid.*

Again, Vespa-Papaleo referenced workplace discrimination case law, noting that just as an employer must clearly show to its employees that its anti-harassment policy is more than just words, a school district must demonstrate to its students that bias-based harassment will not be tolerated. He then stated that Toms River's preventative and remedial measures did not achieve that end.

Next, the Director discussed the steps the school administrators took in response to Louis's reports of bias-based harassment. He noted that the ALJ analyzed each incident of harassment in isolation and concluded that Toms River investigated and "imposed remedial action" appropriately for each incident.²³² Schuster noted that the administrators followed the progressive discipline approach to each harasser, which included counseling for first offenses of verbal harassment and a warning that disciplined points would be given for repeat offenses. They immediately suspended students who physically assaulted Louis. On the surface, Vespa-Papaleo noted, the school leaders administered the appropriate discipline for "hitting" and "taunting". However, it is not clear that the district addressed the anti-gay bias content that accompanied each incident.²³³

Vespa-Papaleo concluded that even if Toms River addressed each individual incident appropriately from a discipline issue standpoint, it did not appropriately address the anti-gay hostility of the school climate as a whole. The New Jersey Supreme Court, in *Lehmann*, noted that each incident of harassment has a predecessor, and the overall hostile work environment

²³² Schuster, 16.

²³³ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 28.

“created may exceed the sum of the individual episodes.”²³⁴ Even if Toms River handled each incident appropriately from a discipline perspective, it did not address its responsibility to provide Louis an education free from bias-based hostility. The fact that the administrators recommended that Louis not enjoy his privilege to walk home from school, rather than taking the bus, or enjoy his privilege to leave campus for lunch, the district treated the harassment as Louis’s problem, rather than an issue that needed to be addressed to the student body as a whole. By only addressing each individual incident, the district left Louis vulnerable to continued bias-based abuse. Toms River’s failure to provide staff with a written protocol for handling harassment or create a method of record keeping and information sharing to assure that the district “properly addressed the cumulative impact of the harassment, rather than merely addressing the individual incident, further supports the conclusion that the Toms River Regional Schools “is liable for creating an education environment that is characterized by bias-based hostility.”²³⁵

The Director went so far as to suggest that even using the much narrower standards of Title IX, Toms River should be held liable for the bias-based harassment that Louis endured. Title IX imposes liability for this type of harassment when it is “so severe, pervasive and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”²³⁶ A single act of harassment can be enough for a district to be held liable under Title IX if a school district has “actual knowledge” and its “efforts to remediate are ineffective” yet the district continues to use the same approach without success, then the district “failed to act

²³⁴ *Lehmann v. Toys R Us, Inc.* 132 N.J. 607 (1993).

²³⁵ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 28, 29.

²³⁶ *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999).

reasonably in light of the known circumstances.”²³⁷ A district will be liable where its response to student-on-student harassment “is clearly unreasonable in light of the known circumstances.”²³⁸ Vespa-Papaleo noted that the Federal Department of Education Title IX guidelines require a district to not only investigate and take steps to end the harassment at hand, but it must also “eliminate a hostile environment if one has been created, and prevent harassment from occurring again.”²³⁹

The Director concluded that the nine reported incidents over a four-month period, from January through April of 1999, including two which involved physical assault, and one that included a simulated sex act, were severe, pervasive and offensive enough to “deny Louis of an educational benefit.”²⁴⁰ Often, after suffering his torment, Louis would miss school due to the harassment. This included an absence that lasted about one week following the March 8, 1999 humping incident.²⁴¹ At the same time, the district “saw fit to enforce its rules to require L.W. to return to classes before it would permit him to attend play practice, it did not otherwise remedy or even address the fact that he was missing class time as a result of the bias-based harassment.”²⁴² On top of this, following the two physical attacks in September of his freshman year, Louis missed approximately a month of school “while his mother scrambled to research alternate school possibilities and present them...” for approval by the Toms River Regional

²³⁷ *Vance v. Spencer County Public School District*, 231 F.3d 253, 259, 6th Circuit (2000).

²³⁸ *Davis v. Monroe County Board of Education*, 526 U.S. 648 (1999).

²³⁹ OCR Title IX Guidelines, 62 Fed. Reg. at 12042; also cited in *Vance*.

²⁴⁰ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 29.

²⁴¹ *Ibid.*

²⁴² *Ibid.*

Schools.²⁴³ The district did cooperate in getting the approvals for Louis's transfer to another district, and paid for transportation, it did not explore with the Whites any alternatives to Louis's withdraw from the district; there was no offer to tutor, provide home instruction or any other interim measure to ensure that Louis was not denied the educational opportunities available to high school students in the state of New Jersey.²⁴⁴

In addition, Toms River did not provide training or instruction to students, staff or parents, nor did the district provide any written materials to ensure that students knew that anti-gay harassment would be handled as a bias-based infraction and would not be tolerated. The district did not even revise the written material distributed or the verbal information disseminated at the beginning of the year to reflect that bias-based, anti-gay harassment based on sexual orientation is prohibited by state law, and that such harassment would result in discipline as bias-based discrimination.²⁴⁵ Therefore, the Director concluded, the bias-based harassment Louis suffered was severe and pervasive enough to deprive him of educational opportunities or benefits.

The district received adequate notice. Even though the Whites stated that there were additional, unreported incidents, the administrators knew about the nine incidents in the seventh grade, and they also knew of the two assaults that took place during Louis's short stay at South. Vespa-Papleo declared that this knowledge was sufficient to constitute actual notice to the district that Louis was being harassed based on the perception that he was gay. The record also

²⁴³ *Ibid.*

²⁴⁴ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 30.

²⁴⁵ *Ibid.*

evidenced deliberate indifference on the part of the school district. This evidence includes the fact that the administrators failed to treat the individual incidents any differently than taunting or fighting, as opposed to treating them for what they were; bias-based harassment. The district also failed to do anything other than counsel, warn and discipline each individual offender. The district also failed to review and revise its policy and it failed to “affirmatively act to clarify and reinforce to the student body as a whole that anti-gay harassment would not be tolerated.” All of these factors illustrate that the district was deliberately indifferent to the fact that Louis’s educational environment “was permeated by anti-gay hostility.”²⁴⁶ Nor were the remediation efforts reasonably calculated in light of the known circumstances. Different students were responsible each time Louis reported a new incident of harassment so waiting to respond by imposing discipline on each new offender after the incident occurred “was not reasonably calculated to end the harassment.”²⁴⁷

The lack of training for staff and students about the district’s policies prohibiting harassment based on orientation, or to communicate the policies to staff, students and parents is further evidence of deliberate indifference. The training that Toms River provided was limited to its annual informational lectured that did not address harassment as it relates to sexual orientation. This was true even after prior harassment reports from other student victims, the multiple incidents that Louis reported, and the suspension of the anti-gay harasser who assaulted Louis.²⁴⁸ Citing a 9th Circuit Court of appeals ruling, that court found that it was appropriate to apply the deliberate indifference standard where a school district was aware of hostility toward

²⁴⁶ *Ibid.*

²⁴⁷ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 31.

²⁴⁸ *Ibid.*

gay students, but only provided limited training on sexual harassment. This training did not directly address sexual orientation and harassment. The court determined that a jury could conclude that the victims of discrimination suffered “highly predictable consequences” as a result of the failure of the district to provide adequate training.²⁴⁹ Vespa-Papaleo stated that in Louis’s case, his continued harassment “was a highly predictable consequence” of the district’s failure to provide appropriate training.²⁵⁰ In conclusion, the Director declared that whether one were to apply the deliberate indifference standards under Title IX, or the *Lehmann* standards under the LAD, the Toms River Regional Schools were liable for the student-on-student, bias-based harassment that Louis suffered while in the district’s care.

Remedies

At this point, the Director began to delineate the remedies that he was imposing on the district. These include corrective actions as well as statutory penalties and damages. Because Judge Schuster concluded that there was no cause of action under the LAD and that the district’s response to Louis’ complaints was appropriate, his findings and conclusions did not address damages. Vespa –Papaleo, as part of his review however, determined “that the record permits him to make certain factual findings and legal conclusions regarding damages and other relief.”²⁵¹

²⁴⁹ *Flores v. Morgan Hill Unified School District*, 324 F. 3d 1130, 1136, 9th Circuit (2003).

²⁵⁰ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 31.

²⁵¹ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 32.

According to the LAD, the director may order “affirmative relief” that is necessary in order to make available “full and equal accommodations, advantages, facilities and privileges to all persons”.²⁵² This includes requiring that the violator report the manner of compliance.²⁵³ Vespa-Papaleo concluded that in order to ensure that students are not denied full access to educational opportunities because of “actual or perceived sexual orientation...” the district must strengthen its anti-discrimination policies and procedures. The director stated that those policy revisions are the responsibility of the Board of Education and administrators can ensure that the policy and procedures are being carried out correctly.²⁵⁴

The Director also concluded that the district’s student/parent handbooks, as well as other written rules, regulations and policies must be revised to explicitly state that discrimination and harassment based on actual or perceived sexual orientation is prohibited. These written statements must include age-appropriate language that clearly defines the terms “harassment” and “sexual orientation”.²⁵⁵ He also required Toms River to create written procedures for teachers, staff and administrators providing guidance on how to address complaints of peer harassment of students based on sexual orientation. These procedures must be distributed to all staff, “as well as school bus drivers.” The Director required that the procedures be posted in student and staff areas in every school in the district. These procedures must be prominently displayed “in a large print poster format, at least one per classroom, office and meeting room

²⁵² *Ibid.*

²⁵³ N.J.S.A. 10:5-17.

²⁵⁴ L. W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 32.

²⁵⁵ *Ibid.*

space.”²⁵⁶ These procedures include reporting each incident to the district’s Affirmative Action Office, as well as an investigation by that same office, and coordinated record keeping through the Affirmative Action Office.

The Director also created stipulations for the district when addressing multiple incidents of anti-gay harassment reported in the same school, but not perpetrated by the same students. When this occurs, the district must create procedures to address harassment as a systemic problem by providing additional information, either verbally or in writing, to the school’s student body. This supplemental information should explain what types of behaviors make up unlawful harassment, the reporting procedures for the harassment, and the disciplinary action that will be taken for the bias-based harassment.²⁵⁷ The order also required Toms River to provide mandatory training to administrators, Affirmative Action Office staff, guidance counselors and school nurses focusing on how to address student complaints of student-on-student harassment based on sexual orientation.²⁵⁸

The Director also addressed the issue of harassment, intimidation and bullying as it relates to protected characteristics. The law, which was relatively new at the time of this decision, commonly referred to as HIB, specifically addresses protections as well as parent and student rights. It states “a parent, student, guardian or organization may file a complaint with the Division on Civil Rights within 180 days of the occurrence of any incident of harassment, intimidation or bullying based on membership in a protected group as enumerated in the “Law

²⁵⁶ *Ibid.*

²⁵⁷ L. W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 33.

²⁵⁸ *Ibid.*

Against Discrimination.”²⁵⁹ The Director’s order for Equitable Relief directed Toms River, if it had not already done so, to adopt and distribute a policy prohibiting harassment, intimidation or bullying based on protected characteristics including sexual orientation to all middle and high school students, parents and staff.²⁶⁰ Another section of the statute requires school districts to implement a bullying prevention training program each year.²⁶¹ This is a mandatory training program for all middle and high schools students and staff. Vespa-Papaleo ordered that the district implement such a program, which must also be offered to parents, and be provided annually for the next six school years. Copies of all revised anti-discrimination policies, procedures for filing complaints and the district’s anti-bullying policies must be distributed to all parents, students, teachers and other staff each quarter or marking period. These revised policies and procedures must be posted on the district’s homepage under a clearly marked link labeled “Anti-discrimination Policies”.²⁶² At the time of this decision, the non-discrimination/sexual harassment policy, which did not include sexual orientation, was accessible from the district’s website, but the link was labeled “News and Notes.” The Director noted that it would not be evident to a reader that the policies could be found under that heading.²⁶³

As of the writing of his decision, Vespa-Papaleo gave Toms River a little more than a month, August 31, 2004, to submit to the Division its revised documents, reporting procedures

²⁵⁹ N.J.S.A. 18A:37-15 (f).

²⁶⁰ W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 33.

²⁶¹ N.J.S.A. 18A:37-17 (a).

²⁶² W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 33.

²⁶³ *Ibid.*

and training curriculum. He also required that the district implement all mandated revisions in every school, no later than September 30, 2004. Thereafter, Toms River was required to report to the Director, on January 31, 2005 and July 30, 2005, the discrimination complaints based on sexual orientation, as well as the district's remedial action during the periods September 1, 2004 through December 31, 2004 and January 1 2005 though June 30, 2005.²⁶⁴

After carefully delineating the corrective actions required of the district, Vespa-Papaleo addressed damages. The LAD entitles victims of unlawful discrimination to recover non-economic losses such as emotional distress or mental anguish resulting from the unlawful discrimination. These types of damages are the same as those afforded in common law tort actions.²⁶⁵ These types of "awards are within the Director's discretion because they further the LAD's objective to make the complainant whole."²⁶⁶ A victim of unlawful discrimination does not have to have sought medical treatment, or other obvious manifestations of suffering. Victims are entitled to at least "a threshold pain and humiliation award" for enduring "indignity" which may be presumed to be the "natural and proximate" result of discrimination.²⁶⁷

The testimony provides a plethora of evidence of Louis's suffering and pain of all sorts; emotional, physical, mental etc. The testimony of Louis, L.G., his aunt and his friend, E.C. demonstrate that Louis suffered emotional distress as a result of the bias-based harassment. He testified that over time he learned not to trust other people immediately. He felt that this

²⁶⁴ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 34.

²⁶⁵ N.J.S.A 10:5-17

²⁶⁶ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 34.

²⁶⁷ *Ibid.*

disposition “made him miss out on his 7th, 8th and 9th grade years.” Louis was “not able to do normal teenage things.” He was devastated that he had to leave South because his entire family had attended high school there.²⁶⁸ Louis also testified that he stopped riding the school bus because he was tired of being called “fag”, “homo”, and “butt boy.”²⁶⁹ After the locker room incident, in which one of the perpetrators said “If you had a pussy, I’d fuck you up and down,” Louis testified that he was “embarrassed, vulnerable, ashamed, sick to my stomach.” Following the humping incident, he was extremely distraught, and his mother testified that she kept him home from school afterward because Louis was “totally embarrassed and humiliated”.²⁷⁰ L.G. also testified that when Louis called to report the incident, he was often crying and hysterical, and on one occasion he was crying so hard that his mother could not understand what he was saying. L.G. also noticed that over the course of his ordeal, Louis became “sullen, withdrawn and angry.”²⁷¹

Louis suffered physical as well as emotional pain. When he was punched in the face on the way home from school, he developed a bruise and it hurt when he tried to chew food. His friend, E.C., who witnessed the attack at the 7-11 during lunch, stated afterward he “was terrified, crying and upset.” Louis testified that once he entered high school, and the harassment began again, he just “couldn’t take it anymore and he just had to leave.”²⁷² As a result of the harassment, Louis found it almost impossible to focus on his learning. He had trouble paying

²⁶⁸ *Ibid.*

²⁶⁹ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 35.

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² *Ibid.*

attention and failed to do his homework. This, of course, impacted his grades. Both Louis and his mother testified that his seventh-grade science/math teacher, Ms. Jorman, telephoned L.G. because she had noticed a drastic change in Louis's performance in her class. She was concerned because in addition to his declining grades, Louis had also become disruptive in class and "he did not appear to be the same boy he was in September."²⁷³ During the ordeal, in the middle of his seventh-grade year, Louis began seeing a therapist on a weekly basis for about 18 months, until his insurance stopped paying. Louis's aunt, Constance Yerks, noticed, as a result of Louis's harassment in seventh-grade, that he became "frantic", his normally good grades dropped, and for the rest of the year Louis did not want to go to school.²⁷⁴

Vespa-Papaleo explained that the director awards damages for emotional distress "based on the extent and duration of emotional suffering experienced by each complainant."²⁷⁵ In Louis's case, his harassment included several physical assaults as well as repeated bias-based harassment by over 18 students. The harassment was severe enough for his mother to remove him from school in order to escape the harassment. They took this drastic measure even before a replacement educational plan was found, which left Louis with no schooling at all for a month. Toms River Regional Schools did not offer tutoring or home instruction during the interim. Due to this emotional trauma that the director presented to be a "natural and proximate" result of Louis's harassment, Vespa-Papaleo awarded Louis \$50,000 in emotional distress damages.²⁷⁶

²⁷³ *Ibid.*

²⁷⁴ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 36.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

Although it was later reversed by the appellate court, the Director also awarded Louis's mother, L.G., an emotional distress damages award of \$10,000. The Director provided the following rationale for the reward. L.G. has standing to bring her own action under the LAD since the statute provided that any person who has been "aggrieved by an unlawful... discrimination may...file with the division a verified complaint...."²⁷⁷ Vespa-Papaleo explained that the LAD prohibits schools from discriminating on the basis of perceived sexual orientation. Vespa-Papaleo contended that L.G. "was denied the right to the accommodations, advantages, facilities and privileges generally afforded to parents of school-aged children."²⁷⁸ Even though L.G. herself was not perceived to be gay, the Director asserted that she was denied full advantages of the public schools because her son was a member of a protected class. Again, Vespa-Papaleo turned to the liberally applied standards of the LAD found in New Jersey case law to support his reasoning. The Appellate Division of the New Jersey Superior Court found in favor of a white man who was terminated from his employment because of his romantic relationship with an African-American woman.²⁷⁹ In another case, the court found in favor of a white condominium owner who was denied the opportunity to rent his property to an African-American tenant.²⁸⁰ In both of these cases, the aggrieved parties were white males, yet the courts found that they were covered by the LAD because they suffered due to discrimination of a protected class. In essence, these two gentlemen joined a protected class in the eyes of the court and the LAD. Vespa-Papaleo thus equated L.G. as a parent who had been deprived advantages

²⁷⁷ N.J.S.A. 10:5-13.

²⁷⁸ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 36.

²⁷⁹ *O'Lone v. New Jersey Department of Corrections*, 313 N.J. Super. 249, 255 (App. Div. 1998).

²⁸⁰ *Berner v. The Enclave Condominium Association, Inc.* 322 N.J. Super. 229, 234-235 (App. Div. 1999).

and facilities of her local school district because of the perceived homosexuality of her son, as an “aggrieved person under the LAD and has standing to bring her own LAD claim.”²⁸¹ Just as Berner, the white condominium owner, was deprived the opportunity to rent his property based on race discrimination, the bias-based harassment of Louis deprived L.G. of her right to have her son educated in the school district in which she lives.²⁸² The Director noted that “per quod” damages have not been allowed by the state courts. These are damages that are suffered not by the aggrieved person, but by someone associated with the aggrieved. In one case, the spouse of a victim of age discrimination was not allowed emotional distress damages due to her husband’s discrimination because she was not personally aggrieved as a result of the age discrimination.²⁸³ Vespa-Papaleo, however, argued that L.G.’s claim is not for per quod damages based on Louis’s injuries, but rather is based on “adverse action and emotional distress” she suffered as a result of Toms River’s discriminatory activities.²⁸⁴

Vespa-Papaleo then provided evidence from the record of the emotional distress L.G. suffered due to the district’s actions, or inactions, as it were. In her first report to administration about the cafeteria incident, L.G. made several calls to Ms. Benn, but when the vice-principal finally responded, she gave L.G. very little information, stating only that the offending students had been counseled.²⁸⁵ When Ms. Benn and L.G. met after the humping

²⁸¹ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 36.

²⁸² *Ibid.*

²⁸³ *Catalane v. Gillian Instrument Corp.*, 271 N.J. Super. 476, 499-500 App. Div. (1994).

²⁸⁴ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 37.

²⁸⁵ *Ibid.*

incident, she felt that the vice-principal “was very uninterested and condescending.” At one point, Louis’s mother asked if “administration was waiting for her son to be physically maimed or injured for life before they would do something about the other students...” and Ms. Benn’s reply was that L.G. should do what she felt she needed to do.²⁸⁶ Following the first attack in September of Louis’s freshman year, L.G. testified that “I was pretty irate that this had happened...I wasn’t going to tolerate it again.”²⁸⁷ The mother also stated that it was awful to have to send her “son to school for six hours a day where he’s tortured, constantly tortured.” In a letter dated January 22, 1999, L.G. wrote “I have NO intention of allowing my son to suffer constant sexual harassment while trying to go to school, which he has a right to do like any other child. I am sure...” the district “...would not tolerate a child being taunted and tortured because the (sic) were black or because they were crippled.”²⁸⁸ The Director concluded that there was more than adequate evidence of L.G.’s suffering and therefore awarded her \$10,000 in emotional distress damages.

The Director also imposed a statutory penalty and required Toms River to pay attorney’s fees. The LAD allows the Director to impose a penalty that is payable to the New Jersey State Treasury against any respondent who is found to be in violation of the statute.²⁸⁹ The maximum penalty for the first violation is \$10,000, which is what Vespa-Papaleo imposed on Toms River. The Director also explained that punitive damages cannot be awarded in LAD actions that are filed administratively through the Division on Civil Rights. Punitive damages can only be

²⁸⁶ *Ibid.*

²⁸⁷ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 37, 38.

²⁸⁸ *Ibid.*, 38.

²⁸⁹ N.J.S.A. 10:5-14 (1a).

awarded in actions filed directly in the Superior Court. The \$10,000 statutory penalty “is the only remedy available to serve an admonitory or deterrent purpose in this case.”²⁹⁰ The LAD also permits the prevailing party to be awarded attorney’s fees. Since Louis’s case was prosecuted by the attorney for the Division, counsel fees and cost may be assessed against the Respondent.²⁹¹ Vespa-Papaleo concluded that it is appropriate to impose attorney’s fees on the Toms River Regional Schools.

The Director and Arendt’s Theory of Judgment

Arendt’s idea of reflective judgment can be used to analyze the various aspects of Director Vespa-Papaleo’s decision so I will attempt to examine his decision through the filter of Arendtian judgment. Again, I am not asserting that any of the individuals involved in making decisions throughout this saga consciously followed Arendt’s theory, rather I have attempted to answer the following question: Did the decisions and endeavors of Vespa-Papaleo embody the qualities associated with Arendt’s theory of judgment, and if so to what extent?

Common Sense

One key aspect of Arendt’s theory of judgment involved the concept of “common sense,” which is the ability to engage in the possible and actual judgment of others.²⁹² Arendt states “that the faculty of judgment could facilitate a thick description of political communities that join individuals together and habituates them to considering things from point of view other than their

²⁹⁰ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004, p. 38.

²⁹¹ N.J.S.A. 10:5-27.1

²⁹² David L. Marshall, “The Origin and Character of Arendt’s Theory of Judgment,” *Political Theory*, 38(3) (2010): 368.

own.”²⁹³ The nature of the Director’s executive function is, by design, in a position to consider the viewpoints of others. By statute, the Director has final say in administrative matters. She or he must review the recommendation of the ALJ and either accept, modify or reject the initial decision.²⁹⁴ The director must clearly site the reasons for any modification or rejection, and these must be based on evidence and facts. As a result of this requirement, the director has to carefully weigh all aspects of the record and consider the actual judgment of others; namely that of the ALJ. By reviewing the record of evidence, the director is also considering the points of view of all parties involved. In the case at hand, Vespa-Papaleo considered the testimony and evidence submitted by the district as well as the Whites. In addition, the Director also had to consider the viewpoint of Judge Schuster in order to determine whether to adopt, reject or modify the judge’s decision. Thus the political community has now expanded beyond the Whites, the school district and Schuster to now include Vespa-Papaleo, and his written decision exhibits strong evidence that he considered others points of view and genuinely engaged with the judgment of others.

Vespa-Papaleo summarized the judge’s findings and conclusions as well as his legal analysis. Even though the Director rejected the ALJ’s dismissal of the case, throughout his written decision, he highlighted evidence that although he obviously disagreed with Schuster, he had thoroughly engaged in the ALJ’s judgment. The Director was very meticulous in explaining Schuster’s decision, piece-by-piece, including the judge’s rationale. When Vespa-Papaleo modified or rejected a portion of Schuster’s initial decision, it was only after he stated the judge’s decision, including the judge’s rationale. Then the Director stated his rejection or modification and explained his rationale for doing so. For example, the Director agreed with the

²⁹³ *Ibid*, 367

²⁹⁴ N.J.S.A. 52:14B-10 (c).

White's exception to Schuster's finding that the teasing stopped in elementary school after counseling the offending student. Vespa-Papaleo noted that when he reviewed the testimony in the hearing transcripts, there was no evidence to support that finding. Since there was no support, the Director rejected the finding.²⁹⁵ This not only complies with the statutory requirements governing modifications, it is also evidences the Arendtian characteristic of considering the viewpoints of others and engaging in the judgment of others.

Invisibles: Things that are absent

Vespa-Papaleo also approached his review of Schuster's decision with an eye toward the "invisibles" and "things" that are "absent". This conforms to Arendt's notion of judgment as a particular type of thinking. To Arendt, this species of thinking is associated with the phenomena that are not present in the physical sense.²⁹⁶ The Director, like Schuster, did not experience what Louis and his mother experienced. He did not experience the torture of his peers or the heartache and frustration of L.G, as a parent. Vespa-Papaleo did not witness the school administrators' response to Louis's complaints. To Vespa-Papaleo, just as with the ALJ, these phenomena were invisible. The Director, however, is even removed one degree further than Schuster. The Director did not experience firsthand the witness testimony during the hearing, nor did he have an opportunity to ask questions of the witnesses. Vespa-Papaleo did not face the formidable task of deciding if the LAD could be applied in this case, initially, as Schuster did. All of these experiences are things that are absent for the Director. Only through the transcripts of witness testimony, documentary evidence and the exceptions and responses filed for the administrative

²⁹⁵ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004 page 8.

²⁹⁶ Hannah Arendt, "Thinking and Moral Consideration," *Social Research*, 38(3) 446.

action could the Director contemplate these phenomena. Vespa-Papaleo had to consider these invisibles as things that are absent. Engaging in these invisibles characterizes Arendtian thinking, and ultimately, judging.

Action

When considering Arendt's concept of action, one can make a strong case that Vespa-Papaleo was indeed an Arendtian actor. Arendt's idea of action is vital to her concepts of thinking and judging. Arendt posits that judging is a by-product of the "liberating effect of thinking."²⁹⁷ In turn, she relates thinking to freedom through action, which Arendt characterizes as the pinnacle of mankind's existence. To act is to begin something that previously did not exist.²⁹⁸ A human is a "beginning and a beginner" and what makes us unique is our capacity to do something that has never been done before.²⁹⁹ The Director's decision clearly qualified as Arendtian action in this regard. Like Schuster, Vespa-Papaleo had the opportunity to be a beginner and he seized it. Whereas Schuster opted not to act and grant student-on-student harassment equal footing to workplace harassment under the LAD, the director did just that. He stated "having independently reviewed the record, the Director rejects the ALJ's dismissal of the case, and instead concludes that Respondent subjected Complainant to unlawful discrimination in violation of the LAD."³⁰⁰ Schuster hid behind the fact that the New Jersey courts had yet to address whether harassment by a peer student was covered under the LAD. That was still true

²⁹⁷ *Ibid.*

²⁹⁸ Gert Biesta, "How to Exist Politically and Learn from It: Hannah Arendt and the Problem of Democratic Education," *Teachers College Record*. 112 (2), (2010): 559.

²⁹⁹ Arendt, Hannah, "What is Freedom?" In *Between Past and Future*. Harmondsworth: Penguin, 1977), 170.

³⁰⁰ L.W. v. Toms River Regional Schools Board of Education, State of NJ Department of Law and Public Safety Division on Civil Rights, July 26, 2004 page 2.

when Vespa-Papaleo made his groundbreaking ruling, yet the Director was willing to begin and be a beginner.

Vespa Papaleo initiated a legal precedent that had never existed before. Ultimately, the New Jersey courts would uphold this landmark precedent. The Director seized the opportunity to take disruptive action. Unlike Schuster, Vespa-Papaleo abandoned traditional thought and practice and rejected the reliance on precedents used under Title IX. The Director abandoned the status quo. When Vespa-Papaleo uttered and wrote these words, he engaged in speech. Because the Director engaged in action, he achieved natality and engendered freedom and liberation. In keeping with Arendt, Vespa-Papaleo engaged in speech, which she asserts is a product of private thinking, and in addition to creating action, gives that action meaning.³⁰¹ Because the Director engaged in speech, and through that speech created newness, he thus created true Arendtian action. Because Vespa-Papaleo engaged in genuine Arendtian action, he also engaged in genuine thinking. Arendt's insistence that action, thinking and judging are all interconnected also supports the conclusion that, at least in this particular aspect, the Director applied Arendtian judgment.

Meaningfulness

As was alluded to earlier, according to Arendt, one can create meaningfulness through action. The concept of a certain type of speech as action actually reveals who we are as humans. Arendt posits that man "can only make sense only to the extent that it can be spoken about...men in so far as they live and move and act in this world, can experience meaningfulness only

³⁰¹ Gert Biesta, "How to Exist Politically and Learn from It: Hannah Arendt and the Problem of Democratic Education," *Teachers College Record*. 112 (2), (2010): 559.

because they can talk with and make sense to each other and to themselves.”³⁰² In other words, humans make meaning thorough speech as action. Obviously, Vespa-Papaleo used speech to convey his thoughts. Yet his thoughts were more than mere opinion. His words rendered meaning to the Louis White case. Since the LAD protections that the Director’s words were granting had not previously been established, Vespa-Papaleo was creating something new, and part of this newness was meaningfulness and sense making. This speech certainly made sense to the Director and to the Whites. His speech was a product of his rational thinking and from a legal stance strongly supported both with clear standards established by case law, as well as the statute itself. Even if Toms River did not agree with the Director’s speech, it did make sense given its sound legal reasoning. Because Vespa-Papaleo was able to achieve meaningfulness and make sense, he achieved natality and expanded freedom. The Director’s use of speech in this context offers yet more support for the assertion that the Director engaged in action, thinking, and judging.

Liberation and Freedom

Vespa-Papaleo also seized an opportunity to create liberation and freedom through destructive thinking and judging. Arendt argues that thinking and subsequent judgment has a destructive effect that undermines all established values and concepts of good and evil. This destructive nature of thinking and judging is also liberating because it frees humans and society from the enslavement of established “truths” that are often accepted without much consideration. Thinking destroys customs and rules of conduct related to ethics and morals.³⁰³ This is a major

³⁰² Mackler, “And Worldlessness, Alas, Is Always a Kind of Barbarism: Hannah Arendt and the Challenges of Educating in Worldlessness Times,” *Teachers College Record*. 112 (2), (2010): 520.

³⁰³ Hannah Arendt, “Thinking and Moral Consideration,” *Social Research*, 38(3), (1971): 434.

danger of not thinking. Without thinking and judging, humans often accept horrific conditions as the norm, just and right. Consequently, the lack of thinking and judging can result in opportunities lost to interrupt the status quo, destroy entrenched and harmful conditions, begin something new and ultimately prevent evil. Vespa-Papaleo was presented with an opportunity to create freedom and liberation through destruction when he considered Judge Schuster's initial decision, and the Director seized this opportunity. By rejecting and modifying most of the ALJ's findings and conclusions, and creating a cause of action in favor of Louis, the Director destroyed the accepted thinking. The status quo for handling student-on-student harassment was the precedent of using federal statute and Title IX's very limited protections and narrow standards. Vespa-Papaleo's decision was destructive, liberating and promoted freedom, all traits of Arendtian action, thinking and judging.

Presence of Others

A crucial component of Arendtian action is her insistence that thinking, action and judgment occur in the presence of others. Whereas Judge Schuster operated in the presence of both the district and the Whites, Vespa-Papaleo also acted in the presence of Judge Schuster. His decision was rendered in the public realm and included all interested parties. Arendt asserts that when action occurs in the presence of others, it triggers a chain reaction of additional actions by others.³⁰⁴ The judges on the Superior Court of New Jersey, Appellate Division, reacted to Vespa-Papaleo's action by rendering a ruling that, for the most part, confirmed the Director's decision, and, as I will argue in a subsequent chapter, also engaged in Arendtian action. This action, in turn, created the opportunity for the justices on the New Jersey Supreme Court to also

³⁰⁴ Hannah Arendt, *The Human Condition*, (Chicago: University of Chicago Press, 1958), 176.

act. Vespa-Papaleo endeavored in the presence of others, acted and caused a chain reaction of actions. All of these are aspects of Arendtian thinking.

Discussion and Debate

One can also consider the Director's decision in the light of discussion and debate. Discussion and debate resulted in the ALJ's findings and conclusions. There were additional submissions that Vespa-Papaleo considered in the form of the Whites' exceptions and Toms River's response to those exceptions. Both parties had counsel present when the Director delivered his decision. He was also an active participant in the larger discussion that began when the Whites filed their complaint. Vespa-Papaleo's written decision is comprised of 41 pages of discussion laying out his rationale. This includes the testimony of both sides in the case as well as Judge Schuster's findings, conclusions, arguments and the legal standards he used to arrive at his initial decision. Arendt states that "debate constitutes the very essence of political life."³⁰⁵ Bernstein explains that to Arendt, debate is a form of action and that the act of public speech is also a form of action.³⁰⁶ Vespa-Papaleo and all parties involved in this proceeding engaged in discussion, debate and argument. This is yet another aspect of Arendtian action that the Director exhibited.

Speech and Natality

As alluded to earlier, speaking in the presence of others is also closely related to Arendt's concept of natality. When a human achieves natality, she or he emerges into the world. Arendt explains, in *The Human Condition*, that action and speech "are so closely related because the

³⁰⁵ Arendt, *Between Past and Future*, 241.

³⁰⁶ Bernstein, 222.

primordial and specifically human act must at the same time contain an answer to the question of every newcomer, “Who are you?” Arendt goes so far as to assert that speechless action is not true action because without speech there is no actor or “doer of deeds”. The actor must simultaneously be a speaker.³⁰⁷ Vespa-Papaleo engaged in speech, and that speech represented action because he created something new, as opposed to Schuster, who, even though he engaged in speech, it can be argued that since he did not create something new, he did not act and therefore did not achieve natality. Vespa-Papaleo, on the other hand, employed his speech to create action and achieved natality. Therefore, in yet another aspect, the Director engaged in Arendtian action.

Work and Labor

Work and labor, the other two components of Arendt’s hierarchy of human existence, are also helpful in assessing Vespa-Papaleo’s decision. Even though the Director’s endeavors share traits of each, viewed in its totality in relation to action, labor and work, more evidence supports the assertion that most of his efforts were action, rather than work or labor. According to Arendt’s definition of labor, it is composed of things that sustain life. Labor is necessary in order to maintain our biological existence.³⁰⁸ Based on this notion, Vespa-Papaleo’s decision is not labor, since it does not sustain life. As I suggested, one could, in a stretch, make an argument that creating new protections for students does sustain life. Because of the extension of LAD protections, the director’s decision led to the public schools being a safer space for queer students to live and learn. By providing these protections, students can access an appropriate education because they feel welcomed to continue their schooling, as opposed to Louis, who

³⁰⁷Hannah Arendt, *The Human Condition*, (Chicago: University of Chicago Press, 1958), 158.

³⁰⁸ *Ibid*, 143.

finally left school and spent over a month without any formal instruction. With proper education, these potentially vulnerable students may be able to go on to secure gainful employment, and therefore obtain what they need to sustain life. This is not to mention that the LAD protections help maintain an environment where these students' physical safety is safeguarded. One could argue that it literally is a matter of life or death, and the protections that Vespa-Papaleo's decision ultimately afforded do indeed help sustain biological existence.

In addition to sustaining life, another characteristic of labor is that it does not create anything. What labor yields is consumed and nothing is left behind.³⁰⁹ Vespa-Papaleo's action was not consumed and used up. His action ultimately created an important precedent that was upheld by the appellate courts and therefore became the law of the land in the state of New Jersey, in perpetuity. In addition, the impact of his ruling continues to have life. All schools across New Jersey are required to update and disseminate anti-discrimination policies and procedures to all stakeholders in order to comply with the outcome of this ruling. In addition, the precedent lives and has often been used in subsequent anti-discrimination cases. The Director's precedent survived the appellate process and lives on. There is strong evidence that Vespa-Papaleo's endeavors are not labor, but instead action.

Arendtian work, labor's close cousin, can also be used to examine Vespa-Papaleo's decision. In considering the interrelationship of Arendt's action, labor and work, one often leaves a close reading more confused and confounded than illuminated. Work is yet another aspect of Arendt's political thought that is somewhat slippery. Ardent asserts that work creates objects that endure for a time period beyond the humans who create them.³¹⁰ It is somewhat apparent that

³⁰⁹ *Ibid*, 87.

³¹⁰ *Ibid*, 158.

Vespa-Papaleo's decision did or will last longer than its creator. This can be true in the literal sense; these protections will most likely be in place permanently, beyond the Director's life. Also, these protections are still in force today, yet Vespa-Papaleo is no longer the Director of the division on Civil Rights. Therefore, in this sense, the affect of his decision has endured beyond his existence as the Director. In addition, as is the case with Schuster's initial decision, Vespa-Papaleo's decision still exists in the form of a historical, legal document; as a matter of record. This decision is an indelible part of this case and a part of Louis's story. At least in part, the Director's decision became a part of the final ruling of the New Jersey Supreme court, which extended the LAD protections to all K-12 students in the State of New Jersey. In addition to Vespa-Papaleo's decision qualifying as Arendtian action, it can also be said that his endeavors would also qualify as Arendtian work. Perhaps the two are not mutually exclusive.

Vespa-Papaleo's endeavors meet another requirement for Arendtian work. Arendt argues that work creates objects with an end goal, purpose and instrumentality.³¹¹ This whole process of adjudicating a complaint filed with the Division implies an end goal. When two sides cannot come to an amicable agreement, the complainant takes action by filing a complaint. The end goal of the ALJ and the Director is ultimately to resolve the issue at hand. In this case, I suggest that the end goal of the Director was to expand the protections of the LAD. In essence, the whole reason for the existence of the Division and a director that is significantly empowered by statute is to enforce the LAD and ensure that the legislature's primary goal of the complete elimination of any semblance of discrimination in our society. This is the overarching goal of the Director,

³¹¹ Chris Higgins, "Human Conditions for Teaching: The Place of Pedagogy in Arendt's Vita Activa," *Teachers College Record*. 112 (2), (2010): 413.

and he pursued that goal using the particulars of the White case. I assert that Vespa-Papaleo also had the end goal of constructing a legally sound rationale for extending the LAD protections to victims of bias-based peer harassment in the public schools. There is strong evidence that the Director's endeavors had a purpose, instrumentality and end goal. This exhibits another trait of Arendtian work in the Director's decision.

Particulars and Universals

One of the most challenging aspects of writing about Arendt is the difficulty in arriving at a definitive conclusion. When analyzing a person's endeavors, some traits of Arendtian judgment are apparent, while others are not. This is the case when viewing the Director's decision through the lens of particulars and universals. Arendt is very consistent with her insistence that thinking and judging operate in the realm of particulars and not universals. Judgment assumes no pre-established consensus to a phenomenon.³¹² Any legal or judicial proceeding, even one conducted on the administrative level and not in the courts is committed to hearing the viewpoints of others and the particulars they share during the proceeding. At the same time, legal decisions, as well as administrative rulings such as those of an ALJ or director of a state agency rely heavily upon precedent, which can sometimes be viewed as a particular, and at other times a universal.

I argue in preceding chapters that the courts epitomize focusing on the particulars; however it can also be argued that precedent is the quintessence of the universal. Precedent is composed of a specific ruling, or several rulings involving similar cases, that have specific

³¹² David L. Marshall, "The Origin and Character of Arendt's Theory of Judgment," *Political Theory*, 38(3) (2010): 369.

characteristics that are used and applied to future, similar cases. These precedents create legal standards by which future, similar cases are decided. So is precedent a universal or a particular? An argument can be constructed for both. The use of precedent in judicial proceedings relies on very specific aspects of prior rulings. These can be considered particulars due to their specificity. In other words, though there is a standard that could be viewed as having universal traits, the very specific details of each case force attorneys, jurists and juries to think the particular. Also, the specifics are applied to the particulars of a singular case, and on a case-by-case basis. This appears to be the essence of thinking the particulars. On the other hand, jurists adopt universal truths based on the legal standards and theories that emerge from precedents. In this sense, precedents have universal application to specific classes of like cases. If the same legal question is posed, then the precedent is applied and the focus of the decision shifts to specifics of the case at hand.

Just as I previously argued that the LAD is applied universally to the particulars of a case, so too can it be said of precedent. Consider the following argument. The judge, justice or jury consider the particulars of the case at hand and then decide if the “law”, which is somewhat universal, has been violated. This law can be statute or case law, with its reliance on precedent. It seems this process reflects thinking the particulars, which Arendt demands.³¹³ Steinberg notes that for Arendt, “To judge something well is simply to know it in the light of a particular context.”³¹⁴ The particular context for Vespa-Papaleo is the Louis White case. Just as it was with Schuster, Arendt’s aversion to the universal makes it almost impossible for Vespa-Papaleo, or any court of law, to fully comply with her notion of thinking the particular versus the universal,

³¹³ Marshal, 384.

³¹⁴ Steinberger, 814.

in its purest form. Arendt asserted that because judgments are outside the realm of proof, one cannot use a universal theory to validate a judgment, but rather can only make a specific claim about a specific phenomenon. In the context of the courts and society, a final judgment must be made. To a certain extent, proof must be a part of any judge's decision. As such, the notion of using precedent universally in Arendtian terms is not without its complications.

The Director thought the particular when choosing what precedents to use to support his decision. Whereas Schuster stubbornly heeded the standards from the federal cases that evoked the Title IX standards, Vespa-Papaleo chose state case law with standards grounded in the protections of the LAD. The foundation of the Director's legal analysis was the standards established in *Lehman*, the New Jersey landmark workplace anti-discrimination case from 1993. The primary standard Vespa-Papaleo used here was the idea that bias-based harassment can create a hostile work environment. If the harassment would not have occurred except for the victim's protected characteristic, and was severe or pervasive enough that alters the work environment, then this is a hostile or abusive environment that violates the LAD.³¹⁵ The Director continued by using several pieces of case law to build his case for finding a cause of action and concluding that Toms River violated the LAD at the expense of Louis White. Whereas Judge Schuster focused on the particulars of federal precedent, Vespa-Papaleo made a conscience decision to identify and use New Jersey case law to support creating more protections and ultimately more freedom. There even existed a precedent in federal case law, but Schuster chose to ignore it.³¹⁶ The Director chose to focus on the particulars of precedents that would enable destruction, liberation and freedom.

³¹⁵ *Lehmann v. Toys R Us, Inc.* 132 N.J. 507 (1993).

³¹⁶ *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir.) (1996).

Thinking for the Prevention of Evil

For Arendt, thinking and judging are not just about liberation and freedom. She also posits that thinking may well be the inoculation that prevents evil. Vespa-Papaleo's decision, as well as the process by which he reached the decision, qualify as this type of evil-preventing thinking. Arendt suggested that evil is the inability to think critically and reflectively about one's actions.³¹⁷ The Director presided over and moderated a proceeding that one could argue was intended to prevent evil. Louis White filed a complaint because he had suffered at the hands of evil and wanted it to stop, not just for him, but for others that might find themselves in his shoes. It is indisputable that the verbal, emotional and physical abuse that Louis suffered at the hands of his peers was the result of evil, or at least the abuse itself was evil. This administrative process provided by provisions in the LAD gave both Schuster and Vespa-Papaleo the opportunity to engage in the type of thinking that could prevent similar, future evil to Louis, as well as thousands of students throughout New Jersey for generations to come.

It is easy to argue that Vespa-Papaleo was trying to prevent evil by expanding LAD protections to bias-based peer harassment in the school setting. Just as the legislature was trying to prevent evil by thinking and creating the LAD, as I discussed in chapter two, so too was the Director by actively seeking sound legal precedent to extend the statute's protections and help fulfill the legislative intent of the eradication of discrimination for our society. As I have argued throughout this section, the Director's process of reaching his conclusion exhibited Arendtian thinking and judging. Unlike Schuster, however, Vespa-Papaleo's outcome or product of that process also complies with Arendt's notion of thinking for the prevention of evil. In chapter

³¹⁷ Hannah Arendt, "Thinking and Moral Consideration," *Social Research*, 38(3), (1971): 418.

three, I argued that if Arendt is correct, and evil is the result of not thinking, then it reasons that taking action, deciding and judging as a result of thinking also yields the prevention of evil. As I did with Schuster, it seems one must analyze both the process and the outcome in order to decide whether the Director exhibited true Arendtian thinking and judging in this respect.

Arendt also relates the idea of thinking the particulars to the prevention of evil. She asks, “could the activity of thinking as such, the habit of examining and reflecting upon whatever happens to come to pass, regardless of specific content...could this activity be of such a nature that it ‘conditions’ man against evil doing?”³¹⁸ Just as Schuster did, Vespa-Papaleo considered the particulars of the case. Both men also reflected and considered the viewpoints of others. In the end though, Schuster chose not to prevent evil, whereas the Director chose to do so. One key reason that both men followed the same process, much of which complies with Arendt’s requirements, but came to very different conclusions is because of the particulars on which they chose to focus. Perhaps Schuster engaged in some degree of thinking that could prevent evil, but chose not to follow through and reflect, whereas Vespa-Papaleo engaged in Arendtian thinking on a purer, deeper level, which ultimately resulted in the prevention of future evil. On the other hand, as I suggested in chapter three, perhaps Schuster is an example of someone who went through the process of thinking to prevent evil, but the final outcome was that the conditions that allowed the evil bestowed upon Louis were not changed. Nonetheless, it is evident that Vespa-Papaleo engaged in Arendtian thinking to prevent evil.

³¹⁸ *Ibid.*

Moral Judgment

When attempting to use Arendt's work in relation to moral judgment, it becomes problematic. Arendt was very reluctant to associate judgment with ethics and morality. From a traditional, morality-laden western way of thinking, it is reasonable to conclude that creating more freedom by expanding the protections of an anti-discrimination law is morally and ethically sound. Based on this mindset, progressive thinkers might quickly determine that Vespa-Papaleo's decision was the morally "right" thing to do. One cannot, however, analyze the Director's decision in this manner and remain in compliance with Arendt's theory of judgment. Arendt ran radically against traditional western thought by disassociating morality and judgment, which is one reason she received much vitriol from many critics for her coverage of the Eichmann trial.³¹⁹ She believed judgment to be the most political of actions, and that one that must be completely void of morality.³²⁰ This was one point where she abandoned Kant as she formulated her theory of judgment. He believed that judgment was at least in part "the ability to tell right from wrong."³²¹ Kant viewed judgment "as the faculty of thinking the particular under the universal" and is determinative. Therefore the particulars were subordinated to the universal.³²² Arendt took issue with this because moral law is the universal that guides moral action in all particulars, and therefore results in determinative, rather than reflective judgment. Since Arendt insisted that one cannot subsume the particular under the universal and moral law as a universal subsumes the

³¹⁹ Seyla Benhabib, "Judgment and the Moral Foundations of Politics in Arendt's Thought," *Political Theory*, 16(1) (1988): 30.

³²⁰ Hannah Arendt, "Thinking and Moral Consideration," *Social Research*, 38(3), (1971): 446.

³²¹ R.J. Bernstein, "Judging-the Actor and the Spectator," in *Philosophical Profiles*, (Philadelphia: University of Pennsylvania Press, 1986), 221-23.

³²² Immanuel Kant, *Critique of Judgment*, trans. and with analytical index by J. C. Meredith, (Oxford: Clarendon Press, 1964), 10.

particular, there can be no moral law with which to judge all particulars.³²³ Moral judgment is determinative, which Arendt wholly rejects because it is based on a moral agent who has moral imperatives and only has to apply these sets of static rules to very unstable and ever-changing challenges.³²⁴

So is there any evidence that Vespa-Papaleo acted as a moral change agent, with moral imperatives, blindly applying a static set of unbending rules to a variety of particulars? I think not. Even though the LAD has inherently moral traits; fairness, justice, inclusion, it is not applied as a set of unchanging, static rules. To the contrary, the LAD, like so many laws, evolves as the courts establish legal standards to interpret it. In addition, the Director exhibited no moralizing. His only imperative as the director of a division created to enforce the LAD is to apply, interpret and enforce the statute on a case-by-case basis. Every finding and conclusion Vespa-Papaleo presented was meticulously supported by a plethora of case law. The Director did not engage in determinative, moral judgment, but rather he engaged in reflective judgment. Arendt noted that any determinative judgment is preceded by reflective judgment. Using the English and Roman legal system as an example of reflective judgment, first one assesses whether a law applies to a certain case, and then the case is studied, the particularities of the case are extrapolated into that law using reflective judgment.³²⁵ This is precisely the process that the Director followed. Although from my modernist, progressive viewpoint, I might immediately conclude that Vespa-Papaleo made the morally just or “right” decision, Arendt would give no validation to such a dichotomous declaration.

³²³ Benhabib, 37.

³²⁴ Marshall, 380.

³²⁵ *Ibid.*

Reflective Judgment

In Arendt's world, when she writes about judgment, she is referring to reflective judgment. Reflective judgment must occur in the presence of others. It cannot happen in isolation.³²⁶ Vespa-Papaleo's decision complies with this aspect of Arendtian judgment. The Director's role in this adjudication process almost necessitates judgment in the presence of others. As mentioned in the previous chapter, the idea of pursuing litigation began in the private thoughts of Louis's mother, L.G. As Arendt explains, true action happens when an idea leaves the private realm in the mind of an individual and is introduced to the world.³²⁷ Once the Whites filed their complaint, they moved the internal dialogue from the private self to the public realm. This action causes a reaction and action from others. Once the idea was introduced into the world, others were invited to consider it and possibly agree. As we know, Toms River and Schuster did not agree, but the Director did. Again, just the potential for agreement opens the possibility for true judgment. This process, Arendt explains, involves the doer going public to "transcend individual limitations."³²⁸ The Whites offered this idea to the school district, the Director, the ALJ and then again to the Director. Both Judge Schuster and Vespa-Papaleo considered the perspective of others; Schuster through listening to testimony and evidence, and the Director through testimony, and evidence from the record of the hearing, as well as Judge Schuster's findings and conclusions. All parties including the Whites, Toms River and the ALJ offered their perspectives for consideration. The consideration of others, this emergence of an idea onto the world, into the public realm, evidences that Vespa-Papaleo's process for making

³²⁶ Arendt, Hannah. "The Crisis in Culture." In *Between Past and Future*. Harmondsworth: Penguin, 1977), 220-221.

³²⁷ *Ibid*, 221.

³²⁸ *Ibid*.

his decision was reflective judgment. For Arendt, without considering others' perspectives, true, reflective judgment "never has the opportunity to operate at all."³²⁹ I suggest that this trait is present in the Director's decision.

Arendt asserts that the goal of true reflective judgment is not to persuade everyone to believe the exact same way. She posits that judgment's goal is to improve perception by consistently heightening the awareness of what makes one particular different from all other particulars that share the same characteristics. Just as was the case with Schuster, the process that led to Vespa-Papaleo's decision involved several pieces that contributed to improving perception. The Director reviewed the record from the ALJ hearing. This included testimony, questioning, cross examining and redirecting, all of which contributed to improving perception regarding Louis's White's complaint. In addition, Vespa-Papaleo also had Schuster's findings of fact and conclusions of law, along with the legal theory and standards he used to justify those findings and conclusions. All of these factors contributed to Arendt's goal for judgment; to improve perceptions by consistently making one aware of what distinguishes one particular from all other particulars that share some prior characteristics. Then on the other hand, the Director was able to analyze this record, improve his own perceptions, and enlighten the perceptions of all participants, as well as the larger legal and educational community, including judges and justices that would eventually review his decision on appeal, legislatures and other policy makers, boards of education, superintendents, other administrators, faculty and staff, students and parents. In addition to simply being exposed to others' perspectives, Vespa-Papaleo was the recipient of perspective improvement, and then by carefully dissecting each aspect of the ALJ's findings, he was able to improve the perceptions of all stakeholders, present and future. This process of

³²⁹ *Ibid.*

improving perceptions, such a critical component of Arendtian judgment, was very much present in the Director's decision.

It would be quite simple to view Director Vespa-Papaleo's decision as "good" judgment. Many modern, progressive thinkers would probably consider increasing the level of freedom of all members of our society to be the preferred path to take. The traditional western philosophical tradition, one that is fixated on "black and white," "right and wrong," one that tends to look at things in absolutes and universals, would lead many to this conclusion, but it is more challenging to do so with Arendt's theory. There are simply too many variables and some would even say contradictions in her thought. As such, it is challenging, if not impossible, for one to definitively say that person "A" practiced "good judgment." Recall that in chapter, I concluded that this was definitely the case with Schuster. Applying some of Arendt's judgment traits renders the judge's decision as qualifying as Arendtian judgment, but when one applies some of her other traits, the ALJ's decision does not qualify as such. On the other hand, as illustrated in the preceding analysis, it is much easier to make such a broad, sweeping claim that Vespa-Papaleo's decision was Arendtian judgment. Virtually every aspect of his decision meets the many and varied demands of Arendt's theory.

Chapter Summary

Although the Whites suffered a loss in Schuster's initial decision, it would be short lived. In compliance with state statute, Director Frank Vespa-Papaleo issued his final determination regarding the ALJ's recommendation 90 days following its rendering. In short, the Director completely dismantled Schuster's opinion. Most notably, however, is that Vespa-Papaleo rejected the ALJ's dismissal of the case, and indeed did find a cause of action for Louis White.

For the first time, this decision, eventually, would lead to the extension of the same LAD protections found in the workplace to public schools, covering bias-based peer harassment. In addition, Vespa-Papaleo directed Toms River Regional Schools to implement many remedial actions, pay Louis and his mother emotional damages and pay a statutory fine to the New Jersey State Treasury. In short, a complete victory for Louis White and his mother, L.G.

For matters that are adjudicated administratively, the director of a state agency who refers a case to the Office of Administrative Law makes the final determination in the case. The ALJ's initial decision is simply a recommendation. This was the case with Vespa-Papaleo, who rejected or modified virtually every aspect of Schuster's decision. Much of the Director's written decision is devoted to refuting the ALJ's findings of facts and conclusions of law. The Director first noted the exceptions that the Whites filed after the hearing, as well as Toms River's reply to those exceptions. For the most part, the Director agreed with the Whites' exceptions, and most of these exceptions were remedied in Vespa-Papaleo's final determination and order. The Whites also filed exceptions regarding Schuster's conclusions of law. Namely, they felt the judge was wrong and that there was a cause of action against a school district for bias-based peer harassment under the LAD, and that the standard established in *Lehman v. Toys 'R Us* created that cause of action. Even not applying *Lehman*, but instead Title IX's standards, the district should still be held liable due to the deliberate indifference the district displayed to Louis's abuse. Toms River filed a post-hearing response to the Whites' exceptions, and essentially took the polar opposite stance to the Whites on each count.

The Director gave an exhaustive enumeration of his factual determinations, which were quite different than Schuster's. Vespa-Papaleo agreed with most of the exceptions filed by the Whites. There was no evidence in the record that indicated that the teasing in elementary

school stopped once it was addressed. The written material distributed to students and parents, as well as the lectures, failed to explicitly state that discrimination or harassment based on sexual preference or orientation was prohibited. Vespa-Papaleo noted that there was direct testimony from district officials that contradicted the finding that Toms River had never dealt with harassment based on “perceived homosexuality” prior to Louis’s ordeal. The Director also found no evidence that school officials offered Louis any alternative educational programming. The Director also determined that L.G. withdrew Louis as a result of the cumulative effect of years of harassment.

The bulk of Vespa-Papaleo’s written decision is devoted to tackling the legal standards and analysis, by which the Director justified his modification and rejection of Schuster’s initial decision. The Director determined that the LAD explicitly prohibits the type of discrimination and harassment that Louis suffered in places of public accommodations, including public schools. Vespa-Papaleo used the standard *Lehman* established for a hostile work environment. This standard requires that if the harassment is severe and pervasive that a reasonable member of the same protected class would also perceive the conditions of employment altered, then the work environment is considered abusive and/or hostile. For public accommodations, the courts have been very liberal in interpreting the LAD. Vespa-Papaleo argued that this liberal interpretation of the LAD also applies to the public schools, and that harassment based on a protected characteristic violates the LAD when it creates a hostile environment in a public accommodation, including public schools. The director stated that such an environment existed in Louis’s educational setting.

Vespa-Papaleo determined that the Lehman standards were appropriate to assess whether bias-based harassment of a student violates the LAD. Based on this legal standard,

harassment of a public school student will violate the LAD when the harassment is based on that student's protected characteristic and the harassment is so severe and pervasive that another student in that same protected class would find the school environment hostile or abusive. The district will be liable if administrators knew or should have known that the harassment was occurring and failed to take effective measures to stop it. Thus, Vespa-Papaleo rejected Schuster's suggestion that Title IX standards should be used to determine liability.

The Director noted that both legislative intent and case law supported abandoning the Title IX standards. Even in the context of workplace discrimination where evidence supporting an LAD claim is the same to those using Title VII or the ADA, New Jersey courts have used the LAD instead in order to provide broader protections for victims of discrimination rather than the protections provided by federal law. In addition, the differences between the LAD and Title IX make it apparent that the state legislature intended for the law to be applied in all circumstances of public accommodation in order to eliminate discrimination and protect all of the state's citizens' civil rights. Where the LAD provides many avenues of redress for a victim, Title IX's standards are very narrow and quite burdensome for the plaintiff. Title IX was created as a condition of receiving federal funding, not with the express intent to protect civil rights.

The other reason Schuster provided for rejecting the Whites' claim by employing Title IX was a statement from the U.S. Supreme Court in *Davis v. Monroe County Board of Education*. The court stated that schools are unlike the adult workplace and that children often act in ways that would not be acceptable among adults. The Director pointed out, however, that the court in that same decision emphasized the schools' responsibility to educate students, which includes, the Director asserted, the responsibility to teach school children what constitutes discrimination. Vespa-Papaleo noted that the same Court to whom Schuster referred also pointed out that

schools are in the best position to educate our students in order to eliminate discrimination based on sexual orientation.

The Director also supported his conclusion by emphasizing the duty that school administrators and boards of education have to protect the children in their care from harm. Vespa-Papaleo referenced *Frujis v. Bacigliano*, a recent New Jersey Supreme Court case that was a negligence suit against a principal. The court stated that when parents relinquish control of their children, school personnel are guardians, and there exist no greater obligation than protecting the children under their care. The crux of the court's opinion was that school officials must protect children in their care from foreseeable, predictable dangers. Vespa-Papaleo asserted that even though this was a common law case, it can still inform a determination of liability standards in an LAD claim.

Even if one were to apply the Title IX deliberate indifference standard, the Director asserted, Toms River was liable for the harassment of Louis. Administrators have a duty to protect students from foreseeable, bias-based harassment, and embracing this duty will encourage the reporting of such incidents, which will in turn help administrators eliminate and prevent this type of harassment. The legislature felt so strongly about this duty that it enacted the HIB statute in 2002. Vespa-Papaleo pointed to this initiative as further evidence that legislative intent of the LAD included the prohibition of bias-based peer harassment in public schools.

Vespa-Papaleo noted that there was substantial evidence that Louis was the subject of numerous incidents of harassment based on the perception that he was gay. This abuse was severe and pervasive enough to meet the *Lehman* standard. The testimony indicated that every incident was accompanied by anti-queer verbiage, including the terms "faggot," "gay" and

“homo”. Louis was subjected to nine incidents of harassment over a period of less than four months. Some of these incidents were so severe that his mother kept him out of school for one or more days afterward. Despite the minimizing effect of the ALJ’s characterization, the Director asserted that there was ample testimony to establish the pervasive and severe nature of the anti-queer harassment that Louis endured.

Vespa-Papaleo next turned to the task of determining if the Toms River Regional Schools was liable for unlawful discrimination. In *Lehman*, the Court determined that an employer could be found liable based on agency principles. If the employer knew or should have known that the harassment was occurring and did not stop it, then the employer becomes complicit in the harassment and contributes to the hostile environment. Effective measures to stop the harassment are those that are “reasonably calculated” to end the harassment and the measure of that reasonableness is the ability of the employer to stop the harassment. In the *Louis White* case, one would be hard pressed to determine that the steps taken by the administrators were reasonable since they failed to stop the harassment.

Another component in determining reasonableness is the effectiveness of preventative measures that were in place. If an employer has weak preventative mechanisms, and the hostile environment continues, then the employer is negligent. Failing to have well-publicized and enforced anti-harassment policies, as well as effective and formal complaint protocols, training etc., opens up an employer to liability. The New Jersey Supreme Court encouraged districts to put in place effective policies, training and reporting procedures in order to insure the safety of

the students in the administrators' care. In the same vein, the Director noted that Toms River's preventative measures "were extremely limited."³³⁰

Vespa-Papaleo was highly critical of the measures the administrators took to address Louis's harassment. The main criticism was that the administrators addressed each incident in isolation, but never attacked the systemic problem of harassment. School officials promptly dealt with each harassing student in accordance with the school's progressive discipline policy, but they did not put the student body as a whole on notice that bias-based peer harassment based on sexual orientation would not be tolerated, nor did the school leaders educate students as to what constitutes the prohibited harassment. The Director noted that there was no evidence that administrators ever addressed the discriminatory aspects of the students' behavior, nor did they address the anti-queer hostility of the school climate as a whole. By only addressing each individual incident as a discipline issue, as opposed to a discriminatory harassment issue, the administrators left Louis vulnerable to further bias-based abuse.

The Director contended that even if one applied the much narrower standards of Title IX, Toms River should still be held liable for the bias-based harassment Louis endured. Title IX imposes liability when the harassment is "so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."³³¹ Furthermore, if a school district had actual knowledge of the harassment and its "efforts to remediate are ineffective" yet the district continues to use the same approach without success, then the district "failed to act reasonably in light of the known circumstances."³³² Nine reported incidents over a

³³⁰ *Ibid*, 26.

³³¹ *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999).

³³² *Vance v. Spencer County Public School District*, 231 F.3d 253, 259, 6th Circuit (2000).

four-month period indicate that the district had actual knowledge, yet the administrators continued addressing the harassment in the same ineffective manner. The Director concluded that Louis's harassment was severe and pervasive enough to deny him educational opportunities and benefits. In short, Toms River had actual notice, did not reasonably address the harassment, and the harassment was severe and pervasive enough to deny Louis educational opportunities and benefits. Applying either the *Lehmann* standard under the LAD or the title IX standards, Toms River was liable for Louis' bias-based peer harassment.

Vespa-Papaleo then prescribed the remedies that he was imposing. These included corrective action regarding policies and procedures as well as statutory penalties and damages. The Director ordered the district to strengthen its anti-discrimination policies and procedures as well as other written material distributed to students and parents, and mandatory training for school staff. All of these types of harassment incidents must be reported to the district's Affirmative Action Office and investigated by that office. The Director's order also required additional action to address systemic, school-wide issues. Vespa-Papaleo's order included a directive that Toms River fulfill the requirements of the new HIB law as it relates to bias-based harassment.

After delineating the corrective action plan, Vespa-Papaleo addressed damages. The LAD allows victims to recover non-economic losses, such as emotional distress and mental anguish resulting from unlawful discrimination. In awarding damages, the Director noted that Louis had suffered all varieties of pain; emotional, physical and mental. The testimony clearly related his suffering to the bias-based harassment. In addition, Louis suffered physical injuries from the attacks during September of his freshman year of high school. All of this anguish ultimately led to L.G. withdrawing her son from the district. The Director found plenty of evidence to justify

awarding Louis \$50,000 in emotional distress damages, and he also awarded Louis's mother, L.G., an emotional distress award of \$10,000. Finally, the Director imposed a statutory fine of \$10,000 on the district, which is the maximum penalty prescribed by law for first-time violations of the LAD.

Obviously, Louis was the benefactor of Vespa-Papaleo's liberal construction of the legal argument in his final determination, conclusions and order. When viewed through the lens of Arendt's theory, the process and product of the Director's decision would qualify as judgment. Vespa-Papaleo engaged in the possible and actual judgment of others. He considered the district's judgment, the Whites' and the ALJ's. He considered testimony and evidence presented by the two parties, as well as Schuster's findings and conclusion. Even though he rejected much of the ALJ's initial decision, there is ample evidence that he engaged in the ALJ's judgment. Vespa-Papaleo approached his review of the ALJ's decision with an eye towards invisibles and things that are absent. This conforms to Arendt's notion of judgment as a particular type of thinking. The Director did not experience what any of the players in this saga experienced. Vespa-Papaleo, while engaging in the judgment of others, had to consider the invisibles and things that were absent.

Analyzing Vespa-Papaleo's decision through Arendt's concepts of action, work and labor also reveals the nature of his judgment. There is a strong case that the Director was indeed an Arendtian actor, which also means he engaged in Arendtian judgment. Arendt's idea of action is vital to her concepts of thinking and judging. Arendt posits that judging is a byproduct of the "liberating effect of thinking." In turn, she relates thinking to freedom through action. An actor is someone who begins something new; something that had not previously existed. Vespa-Papaleo's decision qualifies, as it resulted in the beginning of something that did not exist; LAD

protections for queer students in the New Jersey public schools. When the Director uttered and wrote the words creating a cause of action, he achieved natality, engendered freedom and liberation, and gave this action meaning. Speech in the service of action creates meaning and reveals who we are as humans. Arendt stated that to act in the world creates meaningfulness because humans can talk with each other and make sense. Vespa-Papaleo created meaning and he made sense of the Louis White case. The newness and freedom that the Director's words created were meaningful and made sense. The liberation and freedom that speech creates is destructive thinking and judging. Arendt argues that thinking and its subsequent judgment has a destructive effect on the established values and concepts of good and evil. This destruction is also liberating because it frees human from the enslavement of established truths. Vespa-Papaleo seized the opportunity to use thinking and judging to destroy traditional thinking through his rejection of the ALJ's initial decision.

Arendt also asserts that thinking, acting and judging must occur in the presences of others and involves discussion and debate. Vespa-Papaleo acted in the presence of others. His decision was rendered in the public realm and included all interested parties. This action eventually led to the action of others and the establishment of LAD protections for queer students in the public schools. While in the presence of others, the Director was a part of the discussion and debate regarding the Louis White case. He reviewed the discussion and debate of Schuster's initial decision, and this also contributed to this discussion with his 41 page written decision. All parties involved engaged in discussion and debate, and in the presence of others.

Work and labor, the other two components of Arendt's hierarchy of human existence are also helpful in formulating an Arendtian assessment of Vespa-Papaleo's decision. The Director's endeavors share some traits of work as well as action, but viewed in its totality, more evidence

supports the assertion that most of his efforts qualify as action, rather than work or labor. His decision is not labor, since labor is necessary for the maintenance of our biological existence. In addition, labor does not create anything that lasts. What labor yields is consumed and nothing is left behind. Vespa-Papaleo's decision was not consumed, but rather is now part of the law of the land in New Jersey. Arendt asserts that work creates things that endure for a time period beyond the humans who create them. Vespa-Papaleo's decision will outlast its creator; the Director and the jurists that upheld his decision. The ruling will live on as a legal precedent as well as policy and procedure in the public schools. In addition to action, it appears that the Director's decision also meets this permanence criterion for Arendtian work. Vespa-Papaleo's decision also meets another characteristic of work. Arendt states that work creates objects with an end goal, purpose and instrumentality. This entire process of adjudication had an end goal and purpose.

While the determination of the Director's decision as action is fairly clear-cut, that is not the case when looking at his decision through the lens of particulars and universals. Arendt insists that judging and thinking operate in the realm of particulars and not universals. The administrative proceeding shares many characteristics with a regular case decided in a court of law. Any legal proceeding is committed to hearing the viewpoints of others and the particulars that they have to share during the proceeding. At the same time, these proceedings rely heavily upon precedent, which can be viewed as a particular and a universal. Precedent is used as a universal in the same sense that once established, it is applied somewhat universally to similar, future cases. On the other hand, precedent also relies on the particulars because one must examine the particulars of those similar, future cases to see if those particulars have much in common with the particulars of the case in which the precedent was established. In addition, Arendt suggests that judgment is outside the realm of proof and therefore one can only make a

specific claim about a specific phenomenon. The notion of precedent in terms of the universal and the particulars is complicated. However, it can be argued that Vespa-Papaleo thought the particular when choosing which precedents to use to support his decision. And though he leaned heavily on *Lehmann* and other precedent cases, he examined the particulars of that case and created a legal argument by matching those to the particulars of the White case. Although the Director used precedent, with its universal characteristics, he focused on the particulars of that precedent as well as the particulars of the White case, and “thought” the particular, in accordance with the tenets of Arendtian thinking and judging.

Arendt also considered thinking and judgment to be the inoculations against evil. Vespa-Papaleo’s decision, and the process by which he reached that decision, qualify as this type of evil-preventing thinking. The harassment that Louis endured could be characterized as evil. The LAD and the administrative process by which the case was decided gave both Schuster and Vespa-Papaleo the opportunity to engage in this type of thinking. While Schuster passed on this, the director seized the opportunity, and through his decision, expanded LAD protections against bias-based peer harassment based on sexual orientation, in the public schools. Vespa-Papaleo meticulously chose a precedent with the particulars needed to create this new precedent in the White case. By actively building a legal argument to extend the statute’s protections, the Director helped fulfill the legislative intent of the eradication of discrimination from our society. A goal, most would agree, is virtually synonymous with the prevention of evil.

Arendt separated judgment from morality. From a traditional, western way of thinking, it is reasonable to conclude that creating more freedom by expanding the protections of an anti-discrimination law is morally and ethically sound; the “right” thing to do. One cannot analyze Vespa-Papaleo’s decision in this manner and remain in compliance with Arendt. The alternative,

for Arendt, is to bow to a universal moral law to guide moral action in all particulars. Thus, operating in the pretext, judgment becomes determinative and not reflective. Moral judgment is determinative because it is dependent on a moral change agent who has a moral imperative and so only has to apply a set of static rules to very unstable and ever-changing challenges in order to make decisions and take action. To comply with Arendt's notion of reflective judgment, Vespa-Papaleo would need to not have acted as a moral change agent. I argue that the Director did not act with a moral imperative. Even though the LAD has inherently moral traits, it is not applied as a set of unchanging, static rules. To the contrary, the LAD has evolved since 1945 through amendment and even more so through interpretation by the courts. The Director analyzed the particulars of the White case in order to apply the ever-evolving LAD. Vespa-Papaleo acted as a legal change agent with a legal imperative; not a moral change agent with a moral imperative. Therefore, the Director engaged in reflective judgment and not moral, determinative judgment. He followed our legal system, which was modeled on the English and Roman legal system; the very legal systems that Arendt holds as the exemplar of using reflective judgment.

When Arendt writes about judgment, she is referring to reflective judgment. This type of judgment must occur in the presence of others. Vespa-Papaleo's decision complied with this aspect of Arendtian judgment. This entire process was conducted in the presence of others. The Director made his decision public, through speech, and offered this idea up for potential agreement. Although Toms River did not agree, the Whites and the state courts did. The goal of this type of judgment is not to convince everyone to believe the exact same way. Judgment's goal is to improve perception by consistently heightening ones awareness of what makes one particular different from all other particulars that share the same characteristic. Just the potential for agreement opens up the possibility for true judgment. All parties, including the Whites, Toms

River and the ALJ offered their perspectives for consideration. The consideration of others, this emergence of an idea onto the world, into the public realm, evidences that Vespa-Papaleo's process for making his decision was reflective judgment. By examining the record from the ALJ hearing, the Director was exposed to and considered all perspectives for possible agreement, thus improving his perception, and ultimately society's.

The Director's decision completely changed the tide in the Louis White case. Vespa-Papaleo rejected or modified virtually every aspect of Judge Schuster's initial decision. This phase of Louis's saga was a complete and total victory for the Whites, but this decision was much bigger than just Louis. Vespa-Papaleo's decision paved the way for a landmark New Jersey Supreme Court decision that would establish an important precedent in anti-discrimination case law, and it would impact every public school district in the state. At the same time, Director Vespa-Papaleo's decision exhibited Arendtian judgment. Based on each of the traits analyzed in this chapter, there is ample evidence to support this assertion. During the next phase of the White case, Toms River would appeal the Director's decision, first to the New Jersey Superior Court, Appellate Division and ultimately to the New Jersey Supreme Court. In the subsequent chapter, I have attempted to analyze these decisions and thereby the jurists involved, through the lens of Arendt's theory of judgment.

CHAPTER FIVE: THE CASE GOES TO THE NEW JERSEY STATE

COURTS FOR FINAL RESOLUTION

Introduction

Although the Director on Civil Rights had delivered a resounding victory to the Whites by rejecting nearly every aspect of the ALJ's initial decision, the battle was far from over. After the Director's final determination found that the district had violated the Law Against Discrimination, the Toms River Regional Schools Board of Education filed an appeal in Superior Court of New Jersey, Appellate Division. The LAD provides that "Any person aggrieved by a final order of the director may take an appeal there from to the Superior Court, Appellate Division as an appeal from a State administrative agency."¹ This case drew a great deal of interest from several parties other than Toms River and the Whites. Thomas E. Monahan, Toms River's counsel, argued for the appellant, and Michael J. Gilmore was on brief. Both were from the law firm Gilmore and Monahan, Attorneys. James R. Michael, Deputy Attorney General, argued the case for the respondent, which were the Whites. This also included Peter C. Harvey, Attorney General of New Jersey, and Andrea M. Silkowitz, Assistant Attorney General, both of counsel. Mr. Michael, in addition to arguing the cause for the respondent, was also on brief.² In addition, there were several organizations represented and argued *amicus curiae*. These included the American Civil Liberties Union of New Jersey, Association for Children, New Jersey, Education Law Center, Gay Lesbian and Straight Education Network of Northern New Jersey, National Conference for Community Justice (NJ), New Jersey Family Voices, Roxbury Parents

¹ N.J.S.A. 10:5-21.

² *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 381 N.J.Super. 474 (2005).

for Exceptional Children and Statewide Parents Advocacy Network of New Jersey. Ms. Gitanjali S. Guiterrez, of the ACLU in Newark argued for amicus curiae. Lawrence S. Lustberg, Edward L. Barocas, Jeanne LoCicero and Ms. Guiterrez were all on brief. The case was argued before Judges A.A. Rodriguez, Alley and Yannotti. The opinion was delivered by Judge Yannotti.

The Opinion of the Superior Court

The judge began his delivery by explaining that Toms River was appealing the Director's final determination, which found that the district violated the Law Against Discrimination because Louis White was subjected to discrimination and harassment by other students based on his perceived sexual orientation. Yannotti then noted that the Director imposed equitable relief and awarded compensatory damages. He then stated "We affirm in part, reverse in part and remand for further proceedings."³ The remainder of section one of the opinion recounts the procedural history, the facts of the case, conclusions of law and the Director's order. Judge Yannotti's account is virtually identical to that of Director Vespa-Papaleo's and does not need to be delineated again here.

Creating a Precedent

The court first addressed the Board of Education's contention that the Director erred when he concluded that the LAD provided a cause of action against a school district for peer harassment based on sexual orientation. The Board also claimed that even if there is a cause of action, the legal standard to determine liability should be the same standard applied in a Title IX action. The court began their analysis of the language of the LAD to help determine if the statute

³ *Ibid.*

recognizes a claim against a school district for peer harassment based on sexual orientation. First, the court noted the following passage from the law: “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...affectional or sexual orientation...”⁴ The written opinion then also includes a reference to the section of the law that states that it is unlawful discrimination for any “...manager, superintendent, agent or employee...directly or indirectly refuse, withhold from or deny any person any of the accommodations, advantages, facilities or privileges there of...on account of...affectional or sexual orientation...”⁵ These protected places of public accommodations include K-12 public schools. The judges noted that the LAD, in plain language, prohibits the unlawful denial of any individual “advantages, facilities or privileges” of a public accommodation based on sexual orientation, and this includes public schools. The court declared that “We therefore are convinced that a claim against a school district may be brought under the LAD for peer harassment...based on “affectional or sexual orientation” if that harassment causes the denial of “advantages, facilities or privileges” of a public school.”⁶In short, the court recognized a cause of action under the LAD for bias based peer harassment based on orientation in the public schools. This was the first time for such recognition, and established this monumental legal precedent. Although the Director triggered this precedent, the superior court made it part of the state case law, despite the eventual appeal, for the first time in the history of the state of New Jersey.

⁴N.J.S.A. 10:5-4.

⁵ N.J.S.A. 10:5-12(f).

⁶ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 381 N.J.Super. 486 (2005).

The majority continued, stating that they were also convinced that the same principles for determining whether sexual harassment creates a hostile work environment should also be applied to similar harassment among students that occurs in the public schools. The court referenced *Lehmann*, which held that sexual harassment is a type of unlawful discrimination when it is severe and pervasive that it changes the conditions of employment and creates “an intimidating, hostile or offensive working environment.”⁷ The claim is established if the victim can prove the harassment would not have occurred if the victim were not a member of a protected class, and the harassment was severe and pervasive enough that a reasonable person in that same protected class would believe that the conditions of employment were changed and the environment was hostile or abusive.⁸ The Superior Court recognized that there are aspects of school life that differ from the adult workplace, and children interact in ways that would be unacceptable among adults in the workplace, as the U.S. Supreme Court noted in *Davis*.⁹ However, this court noted, they did not believe that the New Jersey Legislature intended for students not to have the same protection from bias-based harassment than adults in the workplace. This conclusion would be at odds with the strong public policy that requires school officials to protect children when they attend school. The court here referenced *Frugis v. Bracigliano*, in which the New Jersey Supreme Court stated, “No greater obligation is placed on school officials than to protect the children in their charge from foreseeable dangers, whether these dangers arise from the careless acts or intentional transgressions of others.”¹⁰

⁷ *Lehmann v. Toys R Us, Inc.* 132 N.J. 603, 626 (1993).

⁸ *Ibid*, 604-07.

⁹ *Davis v. Monroe County Board of Education* 526 U.S. 651 S.Ct. (1999).

¹⁰ *Frugis v. Bracigliano* 177 N.J. 250, 268 (2003).

This court was also convinced that the standards established in *Lehmann* should be used to determine if a school district should be held liable for bias-based peer harassment that violates the LAD.¹¹ In *Lehmann*, the New Jersey Supreme Court determined an employer's responsibility for remediating an aggrieved situation. This included reinstating the work conditions and terms of employment that the victim would have enjoyed save the workplace harassment and discrimination. That court explained that an employer has the power to remediate by hiring, promoting, reinstating, providing back pay etc. The employer also has the power to implement measures to prevent future harassment and discrimination. This superior court also noted that an employer is liable on agency principle if a supervisor created a hostile work environment, if the supervisor was given the authority to control the workplace and the supervisor abuses this authority and creates a hostile work environment, or the employer does not have anti-harassment policies, training and systems of monitoring, or if the employer knew or should have known of the harassment and failed to take effective measures to end it.¹²

Title IX and the LAD

The judges then addressed Toms River's argument that the court should interpret the LAD using the same Title IX standards that the U.S. Supreme Court established for unlawful peer harassment in *Davis*. In that case, the Court ruled that a district will be held liable only if the harassment "is so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."¹³ Based on this standard, a plaintiff will be

¹¹ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 381 N.J.Super. 487 (2005).

¹² *Ibid.*

¹³ *Davis v. Monroe County Board of Education* 526 U.S. 652 S.Ct. (1999).

awarded monetary damages if they establish that a district displayed deliberate indifference to the harassment in its programs and activities and had actual knowledge of the harassment.¹⁴

The Superior Court found that it would not be appropriate to apply Title IX standards to a claim of peer harassment under the LAD. The judges provided several reasons for reaching this conclusion. Although they look at federal case law for guidance when interpreting the LAD, the judges stated that they will depart from federal precedent if the use of its standards is not appropriate to the case at hand. The standards imposed in *Davis* are more burdensome for the claimant than the standards established in *Lehmann*. As they pointed out earlier, the judges did not believe that the legislature intended for public school children be entitled to less protections from unlawful discriminations under the LAD than adults in the workplace.¹⁵ Another reason the judges felt the Title IX standards were inappropriate is that *Davis* requires intent on the part of the district in order to impose monetary damages, as compared to *Lehmann*, which imposes a negligence standard. The judges did not see any reason to impose a higher hurdle for claims by students who are victims of bias-based peer harassment in school than that which is used for individuals who make a workplace harassment claim. In addition, the U.S. Supreme Court established its stringent standard for liability because Title IX is a funding measure that Congress enacted by way of its spending power, and Title IX did not explicitly provide a cause of action for damage for unlawful discrimination. This is not the case with the LAD. The state legislature's intent provided a host of legal and equitable remedies for discrimination in both the work place and in places of public accommodation. Finally, and this court emphasized this point as the most important justification, the standards established in *Lehmann* advance the primary

¹⁴ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 381 N.J.Super. 488 (2005).

¹⁵ *Ibid.*

purpose of the LAD, which is to protect the civil rights of the state's citizens and "nothing less than the eradication of the cancer of discrimination."¹⁶ It has been well-established by case law, as well as legislative intent, that the LAD is to be liberally construed to achieve this goal.

Review of Equitable Relief and Damages

Next, the judges discussed the Director's findings and his award of equitable relief and monetary damages. First, they addressed the scope of their powers of review of administrative action, explaining that these are well-established and very limited. The judges noted that they can only intervene "in those rare circumstances in which an agency action is clearly inconsistent with its statutory mission or with other state policy."¹⁷ With that said the court was charged with assessing whether the Director's action is "arbitrary and unreasonable..." and "whether the agency's action violates express or implied legislative policies."¹⁸ The court also had to make sure there was enough evidence in the record to support the Director's findings. Interestingly, the court noted that if the evidence is sufficient to support the Director's findings, then the court must uphold those findings even though the court may have reached a different conclusion if they had considered that evidence.¹⁹

Hostile School Environment

The court next turned to addressing the question of whether there existed a hostile school environment. Interestingly, while the judges found that a hostile environment unequivocally

¹⁶ *Lehmann v. Toys R Us, Inc.* 132 N.J. 600, 626 (1993).

¹⁷ *George Harms Construction v. New Jersey Turnpike Authority* 137 N.J. 8 490 (1994).

¹⁸ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 381 N.J.Super. 490 (2005).

¹⁹ *Ibid.*

existed for Louis, they disagreed with the Director that there existed a school-wide anti-queer environment.²⁰ The court noted there was ample evidence in the record to support Vespa-Papaleo's finding that Louis was the victim of several incidents of pervasive harassment based on his perceived sexual orientation. The court stated "it is virtually undisputed that L.W. was subjected to a series of incidents of harassment by his fellow students in which he was taunted and physically assaulted on the basis of the perception that he was a homosexual."²¹ The courts then proceeded to enumerate several examples of this abuse from the record, including the bias-based epitaphs "gay," "homo" and "faggot." The judges also highlighted the humping incident in the cafeteria, the physical assault with the chain and the slapping in the seventh grade as well as the assaults in high school. "L.W. was told in no uncertain terms that he was not welcome in the school because it was believed he was a homosexual."²² Based on these circumstances, the judges noted that a reasonable student in Louis's protected class would perceive the school environment to be hostile and threatening.

One of the judges on this three-judge panel, Judge Alley, dissented in part from the majority opinion. His dissent was limited to the damage awards. At the heart of the dissent was the question of a hostile school environment. In one part of his dissent, Judge Alley stated that the incidents of harassment were "occasional, not pervasive" and that the action of the administrators dispelled to a degree the idea of the entire school environment as hostile.²³ The majority reminded Judge Alley, however, that the courts have established that a hostile

²⁰ *Ibid*, 493.

²¹ *Ibid*, 490.

²² *Ibid*.

²³ *Ibid*, 503.

environment can be created by harassment that is “sufficiently severe *or* pervasive. (Court’s emphasis)”²⁴ A single incident of harassment can create a hostile work environment. Therefore the judges were convinced that the evidence in Louis’s case supports a finding that his harassment was both “severe” and “pervasive” that a person in Louis’s same protected class would believe that the school environment was hostile or abusive.²⁵

Liability

The court next considered the Director’s finding that in 1999-2000 Toms River’s preventative mechanisms were inadequate. The judges explained that the district adopted a revised affirmative action plan. This plan indicated the state statute prohibits discriminatory practices in employment or education opportunity on the basis of “affectional or sexual orientation.”²⁶ The plan indicated that the district will maintain a harassment-free instructional and working environment, including sexual harassment, unwelcome sexual advances, requests for sexual favors and other conduct of a sexual nature. The student/parent handbooks that were distributed by Louis’s intermediate and high school also state that certain forms of discrimination were unlawful, but did not mention specifically that harassment based on sexual orientation was prohibited. The court noted, however, that the handbooks made it clear that Toms River Regional Schools was “committed to maintain an instructional and working environment that is free of harassment of *any* kind (court’s emphasis).” The Intermediate West handbook that was distributed stated that inappropriate behavior, such as a physical assault upon a student, teacher or school employee may result in suspension or expulsion, or the use of profanity or “abusive

²⁴ *Lehmann v. Toys R Us, Inc.* 132 N.J. 603, 626 (1993).

²⁵ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 381 N.J.Super. 491 (2005).

²⁶ *Ibid*, 491.

language.”²⁷ The handbook distributed by High School South also stated that any physical assault on a student, teacher or school employee would result in suspension or expulsion. The handbook clearly forbade peer intimidations based on physical differences, ethnic heritage, disabilities, and differences of opinion. The handbook states “sexual harassment in any form will not be tolerated.” It continues that any student “who harasses another student will be subject to discipline by administrators, suspended from school pending a parent conference, will be brought before the District Affirmative Action Officer and may also be subjected to criminal charges.”²⁸

While the majority of the court agreed with the Director that the written statement in the handbooks should have explicitly stated that bias-based peer harassment based on sexual orientation was prohibited, they were not convinced that this omission is sufficient to justify compensatory damages being imposed on Toms River. The court reasoned that there was no way the students at either of the two schools could have been under the impression that the type of harassment and discrimination they inflicted upon Louis was permissible. The handbook, according to the judges “put the students squarely on notice that harassment of *any* kind was prohibited (court’s emphasis)”²⁹ The court also pointed out that some of the actions directed at Louis, like the humping, were “sexual in nature and that conduct was explicitly “proscribed as a form of sexual discrimination.”³⁰ In addition, Louis was subjected to physical assaults, which were explicitly delineated to be grounds for severe disciplinary action. The court declared that

²⁷ *Ibid*, 492.

²⁸ *Ibid*.

²⁹ *Ibid*.

³⁰ *Ibid*.

despite the lack of an explicit statement in the handbooks prohibiting harassment based on sexual orientation, the written materials were sufficient to put the student body on notice that physical assaults and any type of harassment were prohibited.

The court next addressed the Director's findings concerning the district's efforts to end the harassment. Vespa-Papaleo concluded that the district knew or should have known of Louis's harassment, yet failed to take effective measures to end it. As *Lehmann* established, effective measures are those that are reasonably calculated to end the harassment. The timeliness of the response is also an important factor in determining if an anti-harassment program is effective.³¹ The court again noted that Louis's first complaint was made on January 21, 1999. After that, Louis was subjected to several incidents of harassment at the intermediate school that ended on April 13, 1999. Louis finished the remainder of seventh and all of eighth grade without any other reported incidents. Despite this cessation, the court was convinced that there was enough credible evidence in the record to support the Director's finding that the Intermediate West administrators' measures were not effective. Ms. Benn's disciplinary approach consisted of counseling students who were involved in each incident of harassment and then imposing more severe punishment for repeated harassment. The court stated that the record supports the Director's finding that the administrators' disciplinary approach was ineffective because it failed to stop some offenders from repeating their harassment of Louis. There was also no evidence that the discipline approach acted as a deterrent for other students to become first-time offenders. Yet, the administrators continued using the same approach despite the continued occurrence of harassment. The court, therefore, agreed that the Director was correct in finding that the district's

³¹ *Ibid*, 493.

remedial measures left Louis vulnerable to continued bias-based peer harassment.³² The court did not, however, agree with the Director's finding that Toms River failed to address the "anti-homosexual hostility in the school environment as a whole."³³ The court pointed to the record as not supporting this finding. In their opinion, a school-wide, anti-queer hostile environment did not exist. The judges noted that in 1999, the record indicates that there were about 1,300 students at Intermediate West. Of that number, there were only 18 students involved in Louis's harassment. Even without a school-wide anti-queer hostile environment, however, the court did agree that a reasonable member of Louis's protected class would find the harassment severe or pervasive enough to create a hostile or abusive school environment.³⁴ Even though the district argued that all of the complaints of harassment ended after the April 13, 1999 incident, the court agreed with the Director's finding that Toms River should have ended the harassment sooner. "We are convinced that there is sufficient credible evidence in the record to support the Director's finding that the district's delay in ending the harassment was unreasonable."³⁵

The judges also upheld Vespa-Papaleo's finding that the district did not effectively respond to the two assaults that occurred during September 2000 of Louis's freshman year. The judges stated that the district was on notice that Louis had been targeted for harassment and discrimination on the basis of his perceived sexual orientation while in middle school. Louis testified that the harassment began almost immediately upon his entry into High School south in

³² *Ibid*, 493.

³³ *Ibid*.

³⁴ *Ibid*.

³⁵ *Ibid*, 494.

the fall of 2000. He decided not to ride the bus because he was fed up with all of the bias-based comments directed at him based on his perceived orientation, but Louis never informed the high school administrators about this harassment. Based on this, the judges declared that the school could not have been expected to prevent the assault that occurred off school grounds on September 11, 2000 as Louis was walking home from school. The administrators, however, were aware that Louis was vulnerable to further bias-based harassment after the first incident. The administrators took action after the first attack, suspending the student who punched Louis, but did not address the other students who were involved. This suspension did not deter future harassment because less than two weeks later, Louis testified that even though the school would provide security to students who went into town for lunch, even after the first incident, the district did not employ this security to prevent another assault on Louis.

Instead, the administrators told L.G., Louis's mother, that the school could protect her son if he rode the school bus and took his lunch on campus. The judges declared, "This response was clearly inappropriate."³⁶ Louis was entitled to take his lunch off campus free from discrimination and harassment on the basis of his perceived sexual orientation. The administrators' remedial measures should have been geared toward changing the behavior of the harassers, not the victim being harassed.³⁷ In a similar vein, Toms River argued that it did not deny Louis an educational opportunity, but rather his mother voluntarily withdrew her son from High School South. The judges did not accept this argument, pointing out that Louis had suffered two bias-based physical assaults in less than two weeks, and the district had not put into effect measures that would prevent further bias-based peer harassment. L.G. believed her son was in

³⁶ *Ibid*, 495.

³⁷ *Ibid*.

danger, and would not be protected from further physical assault if he remained at the high school. The court stated, “We are convinced that, in the circumstances, her decision was reasonable.”³⁸ As part of Judge Alley’s dissent, he stated that there was not sufficient evidence in the record to determine if the district’s remedial measures were reasonable because there is no evidence of how other districts deal with bias-based peer harassment based on sexual orientation. Alley asserted that this type of information was most likely readily available, and thus the Director’s determination was essentially arbitrary.³⁹ The majority, however, was convinced that how other districts handled similar situations was not the issue at hand, but rather what Toms River did or failed to do to end the harassment. They were satisfied that the Director’s determination in this respect was reasonable.⁴⁰

Equitable Remedies

The Superior Court completely reversed the Director’s remedies regarding anti-discrimination policies and procedures. In essence, the court found that Vespa-Papleo did not have the authority to order revisions to policy, regulations, rules, procedures training etc. In addition, the legislature and/or the Commissioner of Education had already put in place regulations that addressed the Director’s concerns. The court stated “We are not persuaded that the record supports the imposition of these remedial measures.”⁴¹ The judges reasoned that the harassment in this case occurred in 1999 and 2000, but in 2003 the Commissioner of Education created regulations which were intended to ensure all students have equal access to educational

³⁸ *Ibid.*

³⁹ *Ibid*, 502, 503.

⁴⁰ *Ibid*, 498.

⁴¹ *Ibid*, 496.

programs and services.⁴² Among the requirements, the regulation requires that each board of education adopt and implement an “educational equity policy” that recognizes and values the diversity of all people and groups that make up our society and promote the acceptance of all people of diverse backgrounds regardless of race, creed, national origin, color, ancestry, age, marital status, affectional or sexual orientation, gender, religion, disability or socioeconomic status. Furthermore, the policy should foster a learning environment that promotes equal educational opportunity for all and is free from all forms of prejudice, discrimination and harassment based upon any other things, including “affectional or sexual orientation...”⁴³ The plan must also insure “equal and bias-free access for all students to all school facilities, courses, programs, activities and services” regardless of a number of factors including “affectional or sexual orientation.”⁴⁴ Finally, the regulation requires every district to develop a “comprehensive equity plan” every three years. This plan will “identify and correct all discrimination and inequitable educational and hiring policies, patterns, prejudice and practices affecting is facilities, programs, students and staff.”⁴⁵ This plan must be submitted to the county superintendent of schools for approval, and the district must also submit a copy of the plan to the New Jersey Department of Education. The regulation requires each district to inform parents and the school community of the plan.⁴⁶

⁴² N.J.A.C. 6A: 7-1.1 to-1.10.

⁴³ N.J.A.C. 6A: 7-1.4(a).

⁴⁴ N.J.A.C. 6A: 7-1.7(a).

⁴⁵ N.J.A.C. 6A: 7-1.7(c).

⁴⁶ N.J.A.C. 6A: 7-1.7.

Due to the fact that these comprehensive requirements are already in place, the court ruled that the remedial measures that the Director ordered were not necessary. The judges also noted that there is no evidence in the record that Toms River's educational equity policy required by the Commissioner was ever submitted and therefore was never considered by the Director. Anne Baldi, the district's affirmative action officer testified that in the 2003 equity plan, the district had shifted its focus from discrimination based on religion and race to sexual harassment, including harassment based on sexual orientation. The court added that there was no evidence of a district-wide problem with bias-based peer harassment based on sexual orientation, nor was there any evidence of this type of harassment in the district since Louis's harassment in 1999 and 2000. While the court recognized that there might be instances that warrant the Director to order implementation of anti-discrimination policies and procedures in addition to those required by the aforementioned regulation, the record in this case do not support this portion of the Director's order. "Therefore, we reverse those provisions of the order requiring the district to adopt...the remedial measures..."⁴⁷

As I discussed in the previous chapter, the Director also ordered the district to adopt and distribut to students, parents and staff an anti-bullying policy based on various protected characteristic, including sexual orientation. The court also reversed this part of Vespa-Papaleo's order. Again, the legislature had already addressed the Director's concerns in this aspect with the enactment of the HIB law. In the statute the legislature requires each school district to adopt a policy prohibiting harassment, intimidation and bullying on school property. The statute states that this includes conduct such as "any gesture or written, verbal or physical act that is reasonably perceived as being motivated" by several protected characteristic, including sexual

⁴⁷ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 381 N.J.Super. 498 (2005).

orientation.”⁴⁸ The judges declared that the Director did not have the authority to order a district to comply with anti-bullying statutes.⁴⁹

Compensatory Damages

The judges then addressed the compensatory damages that Director Vespa-Papaleo awarded to Louis and his mother, L.G. While they affirmed Louis’s award, they reversed L.G.’s. The district argued that Louis’s \$50,000 award for emotional distress should be set aside because the Director can only award “incidental” monetary relief. The district also argued that the award was excessive.⁵⁰ The LAD was amended in 2003 to make sure “a prevailing complainant may receive damages to compensate for emotional distress...to the same extent as is available in common law tort actions.”⁵¹ The legislature amended the statute to insure that complainant could receive emotional distress damages as is the case for plaintiffs in the Superior Court. The judges noted that even though this amendment was enacted after the events in Louis’s case, the relief the Director awarded was consistent with the amended statute.⁵²

The majority then explained their process for determining whether a statute should be applied retroactively. They applied a two-part test. The first question is whether the legislature intended for the statute to be applied retroactively. The second question is whether applying the statute retroactively will result in either “an unconstitutional influence with vested rights or a

⁴⁷ N.J.S.A. 18A:37-14.

⁴⁹ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 381 N.J.Super. 499 (2005).

⁵⁰ *Ibid.*

⁵¹ N.J.S.A. 10:5-17.

⁵² *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 381 N.J.Super. 499 (2005).

manifest injustice.”⁵³ The amendment went into effect four months after its enactment on September 12, 2003. The court declared “We are convinced that the Legislature intended the amendment to apply to matters that were pending as of that date.”⁵⁴ They reminded the parties that the LAD was intended to be a remedial statute and interpreted liberally to meet the laws objective. The court also explained that the application of the statute does not violate a “vested right” or create a “manifest injustice.” If the matter had been adjudicated through Superior Court, there would have been no limit to the amount of emotional distress damages that Louis could have been awarded.⁵⁵

After justifying the retroactive application of the law, they moved to the awards themselves. The court stated that they were convinced that there was ample evidence to support the Director’s finding that Louis was subjected to “humiliation, embarrassment and indignity” because of the unlawful harassment. They felt the amount of \$50,000 was appropriate. Regarding L.G.’s \$10,000 award for her emotional distress, Toms River argued she was not an “aggrieved” person under the LAD, and this court agreed with the district on this count. While they acknowledge that surely L.G. had suffered much emotional distress due to the harassment of her son, the LAD does not provide a remedy for her. The court used *Catalane v. Gilian Instrument Corp.* as precedent. As I discussed in the preceding chapter, that court determined that the spouse of the aggrieved party could not recover per quod damages under the LAD because the state legislature “did not intend to establish a cause of action for any person other than the individual

⁵³ *Ibid.*

⁵⁴ *Ibid.*, 500.

⁵⁵ *Ibid.*

against whom the discrimination was directed.”⁵⁶ For the purpose of refuting the Director’s justification for the award, the court discussed *Berner v. Enclave Condominium Assn. Inc.*, which this court also decided. In *Berner*, the court determined that the LAD permitted a claim for a white condominium owner who was not allowed by the association to lease his unit to an African-American. In this circumstance, the white owner was an aggrieved person as a result of the unlawful discrimination. *Berner* was the “functional equivalent” of a member of a protected group.⁵⁷ The court determined that this case law did not support an award for L.G. She was not a “functional equivalent” of a member of a protected group. Louis’s mother was not denied the advantages of a public education due to the unlawful discrimination. Louis was the only aggrieved person under the LAD. As a result, the court reversed the \$10,000 award to L.G.⁵⁸

The Superior Court of New Jersey, Appellate Division, affirmed several aspects of the Director’s decision, but also overturned a few. The most crucial outcome of this hearing was that the judges agreed that there was a cause of action for an aggrieved individual and that a claim against a school district may be brought under the LAD for peer harassment based on sexual orientation. This was the first time a court of law had found a cause of action under these circumstances, and therefore this ruling established a monumental legal precedent. While the Director was the initial catalyst for this precedent, the superior court made it part of New Jersey case law. Ultimately, this aspect of Louis’s case was much bigger than Louis and would impact every district, and scores of potentially vulnerable students throughout the state. It would also have a significant impact on how administrators make decisions regarding their most sacred

⁵⁶ *Catalane v. Gilian Instrument Corp.* 271 N.J. Super. 476, 500 (1994).

⁵⁷ *Berner v. Enclave Condominium Assn. Inc.* 322 N.J. Super. 299,235 (1999).

⁵⁸ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 381 N.J. Super. 500 (2005).

duty; the protection of the students in their care from harm. Specifically for Louis, the court affirmed several other aspects of the Director's final determination. The judges also agreed with Vespa-Papaleo that the standard for determining whether such harassment violates the LAD should be the standard articulated in *Lehmann*, and not the standard established in Title IX case law. The court also was convinced that the framework in *Lehmann* was appropriate for determining whether a district should be held liable for such harassment. They agreed that Louis was subjected to a hostile school environment, but were not convinced that there existed a school-wide or district-wide anti-queer climate.

While the superior court affirmed Louis's damage award, the court overturned the Director's equitable remedies regarding anti-discrimination policies and procedures as well as the anti-bullying measures that Vespa-Papaleo ordered the district to implement. The court also disagreed with the Director's conclusion that L.G. was an aggrieved person under the LAD so they reversed her damage award. Overall, the outcome of the appellate court's decision was very favorable for Louis, but subsequently Toms River would once again appeal this decision to the New Jersey Supreme Court. I have detailed that hearing and decision later in this chapter. In the next section, I have analyzed the court's majority opinion through the lens of Arendt's theory of judgment.

The Superior Court and Arendt's Theory of Judgment

Hannah Arendt's concept of reflective judgment can be used to analyze the various aspects of the judges' opinion. I will attempt to examine their decision through the filter of Arendtian judgment. Again, I am not asserting that any individuals involved in making decisions throughout this case consciously followed Arendt's theory, rather I have attempted to answer the

following question: Did the decisions, endeavors and judgment embody the qualities associated with Arendt's theory of judgment, and if so, to what extent?

Common Sense

A major pillar of Arendt's theory involves her idea of "common sense" which is the ability to engage in the possible and actual judgments of others. Arendt states "that the faculty of judgment could facilitate a thick description of political communities that join individuals together and habituates them to considering things from points of view other than their own."⁵⁹ The nature of an appellate judge's function naturally places her/him in a position to consider the viewpoints of others. The function of the appellate division of the Superior Court is to hear both judicial decisions from the lower courts as well the appeals of administrative determinations from a state administrative agency.⁶⁰ As a result of this duty to hear appeals, the appellate judges must carefully weigh all aspects of the record and consider the actual judgment of others. In the case of an appeal of an administrative action, the court is considering the actual judgment of the head of that state agency. In this case, this is Director Vespa-Papaleo's final determination and order. By reviewing the record of evidence, the judges are also considering the points of view and judgments of all parties involved. In this case, the superior court judges considered the testimonial evidence submitted by the district as well as the Whites. In addition, the judges had to consider the viewpoint and actual judgment of the Director to determine whether to affirm, overturn or remand his final determination and order. Once again, the political community to which Arendt refers has expanded beyond the Whites, the school district and Schuster to now

⁵⁹ David L. Marshall, "The Origin and Character of Arendt's Theory of Judgment," *Political Theory*, 38(3) (2010): 367.

⁶⁰ R.2:2-3(a) (1-2).

include Vespa-Papaleo. Because there were several other parties that filed amicus briefs, the judges considered their points of view and their actual judgments, and these groups and individuals became a part of this expanding political community. The majority's written opinion exhibits strong evidence that they considered others points of view and genuinely engaged with the judgment of others.

The superior court judges summarized the facts of the case and the Director's final determination, conclusions of law, as well as his legal analysis. The court's majority, for the most part, ruled in favor of Louis White as well as the Director, even though there were a few aspects of the Director's final determination, conclusions and order that the court overturned. Throughout the court's written decision, the judges highlighted evidence that they had thoroughly engaged in the Director's judgment. The court's majority was very meticulous in explaining the Director's decision, part-by-part, including the Director's legal analysis and rationale. Throughout the written opinion, the judges, whether they affirmed or overturned a portion of Vespa-Papaleo's final determination, it was only after they stated the Director's decision, including his legal analysis and rationale. Then, the judges either stated that they were convinced that the Director was right or that he had erred, they explained their reasons for doing so. For example, the judges disagreed with the Director's finding that the district failed to address the "anti-homosexual hostility in the school environment as a whole"⁶¹ The majority then explained that there was not sufficient evidence in the record to support this finding. The judges pointed out that of the 1,300 students at Intermediate West, only 18 were involved with Louis's harassment. The court proceeded similarly when they affirmed an aspect of Vespa-Papaleo's final determination. This not only complies with rules of court, but it also evidences

⁶¹ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 381 N.J.Super. 493 (2005).

the Arendtian characteristics of considering the viewpoints of others and engaging in the judgment of others.

Invisibles: Things that are absent

The majority of the court also approached their review of the Director's final determination with an eye toward the "invisibles" and "things" that are "absent". This aligns with Arendt's notion of judgment as a particular type of thinking. To Arendt, this species of thinking is associated with phenomenal that are not present in the physical sense.⁶² The judges, like the Director and ALJ Schuster, did not experience what Louis and his mother experienced. They did not experience the abuse of Louis at the hands of his peers or the heartache, frustration and terror of L.G. as a parent. The judges did not witness the school administrators' response to Louis's complaints or their challenge of addressing Louis's situation in an attempt to help him. To the judges, just as with the ALJ and the Director, these phenomena were invisible. These judges, however, were even removed another degree further than the Director. The judges did not witness the first-hand testimony of the witnesses during the ALJ hearing, nor did they have a chance to ask questions of the witnesses. These judges did not experience taking the bold first step to claim a cause of action under the LAD, as the Director did. All of these experiences are things that were absent for the judges. Only through the transcripts of the witnesses' testimony, documentary evidence, the Director's written decision and the oral arguments and written briefs that were presented before them could the judges engage with these phenomena. The court had to consider the invisibles as things that are absent. This engagement with the invisibles characterizes Arendtian thinking and judging.

⁶² Hannah Arendt, "Thinking and Moral Consideration," *Social Research*, 38(3) 446.

Action

When analyzing the majority's opinion, one can make a strong case that these judges were Arendtian actors. Arendt's concept of action is central to her ideas of thinking and judging. Arendt asserts that judging is a by-product of the "liberating effect of thinking."⁶³ In turn, she relates thinking to freedom through action, which Arendt characterizes as the pinnacle of human existence. To act is to begin something that previously did not exist.⁶⁴ A human is a "beginning and a beginner" and what makes us unique is our capacity to do something that has never been done before.⁶⁵ The court's opinion clearly qualified as Arendtian action in this regard. Like the ALJ and the Director, the superior court judges were presented with the opportunity to be a beginner and like Vespa-Papaleo, this court seized it. Like the Director, the court acted to grant bias-based peer harassment equal footing to workplace harassment under the LAD. Although the Director was the first to "begin" this, his decision was an administrative one which did not have the legal weight of a precedent-setting court decision. Within the New Jersey State court system. So in that sense, this court began something that did not previously exist. The court's opinion was Arendtian action based on the tenet of beginning something new.

The superior court used this opportunity to engage in disruptive action. They did so by affirming Vespa-Papaleo's finding of a cause of action, thus creating a significant, disruptive legal precedent. This action abandoned traditional thought and accepted truths. By creating a new precedent based on *Lehmann* and the LAD and ignoring Title IX, the judges abandoned the

⁶³ *Ibid.*

⁶⁴ Gert Biesta, "How to Exist Politically and Learn from It: Hannah Arendt and the Problem of Democratic Education," *Teachers College Record*. 112 (2), (2010): 559.

⁶⁵ Arendt, Hannah, "What is Freedom?" In *Between Past and Future*. Harmondsworth: Penguin, 1977), 170.

status quo and the “banister of thought” of federal precedent. When the judges wrote and verbally delivered this opinion, they engaged in speech. Because the court engaged in this disruptive action, they achieved natality and engendered freedom and liberation. In keeping with Arendt, the judges engaged in speech, which she asserts is a product of private thinking, and in addition to creating action, gives that action meaning.⁶⁶ Because the judges engaged in speech, and through that speech created something new, they therefore created true Arendtian action. As a result of this Arendtian action, the court also engaged in genuine thinking. Arendt’s steadfast insistence that action, thinking and judging are interdependent and support the contention that, at least in this particular aspect, the judges applied Arendtian judgment.

Meaningfulness

As previously mentioned, Arendt asserts that one can create meaningfulness through action. This certain type of speech as action actually reveals who we are as humans. Arendt writes that humans “can only make sense only to the extent that it can be spoken about...men in so far as they live and move and act in this world, can experience meaningfulness only because they can talk with and make sense to each other and to themselves.”⁶⁷ In other words, humans engage in action through speech and thereby make meaning. It is quite obvious that the judges used speech to explain their thinking. This speech was not just opinion; their words conveyed meaning to the Louis White case, and beyond. Since the LAD protections with the school context had not previously been codified in case law, the judges were creating something new,

⁶⁶ Biesta, 559.

⁶⁷ Mackler, “And Worldlessness, Alas, Is Always a Kind of Barbarism: Hannah Arendt and the Challenges of Educating in Worldlessness Times,” *Teachers College Record*. 112 (2), (2010): 520.

and part of this newness was meaningfulness and making sense. The court's speech made sense, certainly to the Whites and the Director. Even the parts to which either the district, or the Director and the Whites did not agree, the court's detailed explanations still rendered meaning. The judges' speech was a product of rational thinking and from a legal standpoint, strongly supported with clear standards established by case law, as well as the LAD itself. Because the court was able to achieve meaningfulness and make sense, the judges achieved natality and expanded freedom. The judges' use of speech in this context offers yet more evidence to support the assertion that the judges engaged in action, thinking and judging.

Liberation and Freedom

The judges of this court seized the opportunity to create liberation and freedom through destructive thinking and judging. Arendt argues that thinking, and the judgment that follows, have a destructive effect that challenges all established values and concepts of good and evil. This destructive nature of thinking and judging is also liberating because it frees humans and society from the enslavement of established "truths" that mankind often accepts without much consideration. Thinking destroys customs and rules of conduct related to ethics and morals.⁶⁸ This is what makes the need for thinking so crucial. When humans engage in endeavors without thought, this is dangerous. As much as Arendt asserts that thinking is dangerous, not thinking is even more so. Without thinking, humans often accept horrific conditions as the norm, as well as being just and right. Consequently, the lack of thinking and judging can result in opportunities lost to interrupt the status quo, destroy entrenched and harmful conditions, begin something new and perhaps even prevent evil. The superior court was given the opportunity to create liberation

⁶⁸ Hannah Arendt, "Thinking and Moral Consideration," *Social Research*, 38(3), (1971): 434.

and freedom through destruction when they considered Toms River's appeal of the Director's final determination, and the judges took advantage of this opportunity. By affirming the most important components of Vespa-Papaleo's decision, namely the creation of a cause of action in favor of Louis, the court destroyed accepted thinking, both in the legal sense with the new precedent, but also from a policy and procedural standpoint. The way schools address the issue of bias-based harassment was altered, and the practice of using federal statute and Title IX's limited protections and narrow standards was abandoned. The court's decision was destructive, yet also liberating and promoted freedom, all Arendtian traits of action, thinking and judging.

Presence of Others

One of the most vital components of Arendt's action is that action, thinking and judging take place in the presence of others. The ALJ operated in the presence of both the district and the Whites, while Vespa-Papaleo also acted in the presence of the ALJ, as he directly responded to the judge's initial decision. The superior court acted in the presence of both parties, the ALJ and the Director. In addition though, this court also acted in the presence of or within the confines of the legal system. Their action impacted the entire educational and legal system in New Jersey. Their decision was rendered in the public realm, both in writing and through speech, and included all interested parties, including the New Jersey Supreme court, educational practitioners, policy makers and researchers. Arendt asserts that when one acts in the presence of others, this action triggers a chain reaction of additional actions by others.⁶⁹ This court's action ultimately triggered the New Jersey Supreme Court's action, which in turn was the

⁶⁹ Hannah Arendt, *The Human Condition*, (Chicago: University of Chicago Press, 1958), 176.

catalyst for much more action. The superior court endeavored in the presence of others, acted and caused a chain reaction of actions. All of these are traits of Arendtian thinking.

Discussion and Debate

One must also consider discussion and debate when contemplating Arendtian action as it relates to the superior court's decision. The ALJ's initial decision, the Director's final determination as well as the superior court's decision on appeal all resulted from discussion and debate. The judges considered the original testimony and evidence in the ALJ hearing, his written decision, the Director's written final determination as well as the oral arguments of both Toms River's counsel as well as those of the Attorney General's office, who acted as counsel for the Whites and the Director. No doubt, there were questions, answers and challenges to those answers throughout the oral arguments. That, coupled with the aforementioned litany of procedure leading up to the superior court's consideration, also represents discussion and debate. Finally, the majority, as well as the one dissenting judge, delivered their decision orally. Judge Yannoti read the opinion, and, of course, it was published in written form. This entire process involved discussion and debate, including testimony from both sides, Judge Schuster's, the Director's and finally the superior court's. Arendt states that, "debate constitutes the very essence of political life."⁷⁰ Bernstein notes that to Arendt, debate is form of action and the act of public speech is also a form of action.⁷¹ The superior court, as well as all parties involved in the proceeding, engaged in discussion, debate and argument. This is another aspect of Arendtian action that was present in the judges' decision.

⁷⁰ Arendt, *Between Past and Future*, 241.

⁷¹ Bernstein, 222.

Nativity

As was mentioned earlier, speaking in the presence of others is closely related to the Arendtian notion of natality. When a human achieves natality, she or he emerges into the world Arendt explains, in *The Human Condition*, that action and speech “are so closely related because the primordial and specifically human act must at the same time contain an answer to the question of every newcomer, “Who are you?” Arendt goes so far as to assert that speechless action is not true action because without speech, there is no actor or “doer of deeds.” The actor must simultaneously be a speaker.⁷² Like the Director, the superior court judges engaged in speech, and through speech represented action because they created something new. The judges employed speech to create action and achieve natality. Again, in this aspect, the judges engaged in Arendtian action.

Work and Labor

The other two components of Arendt’s hierarchy of human existence, work and labor, are also helpful in assessing the court’s decision. Even though the judges’ endeavors share some traits of both work and labor, viewed holistically in relation to action, there exists much more evidence that their efforts are action, rather than work and labor, thus supporting the assertion that the court engaged in Arendtian thinking and judging. According to Arendt’s definition of labor, it is made up of things that sustain life. Labor is necessary to maintain our biological existence.⁷³ Based on this idea, the superior court’s opinion is not labor, since it does not sustain

⁷² Arendt, 158.

⁷³ *Ibid*, 143.

life. Although, considering the protections that the LAD provides, it could be argued that the court's decision helped maintain an environment where vulnerable students of various protected group's' physical safety is safeguarded. One could argue, in this respect, that the decision is a matter of life or death, and the protections that this decision ultimately afforded do indeed help sustain biological existence.

In addition to sustaining life, another characteristic of labor is that it does not create anything. What labor yields is consumed and nothing else remains.⁷⁴ The superior court's action, this decision, was not consumed. Their opinion ultimately created an important precedent that was ultimately upheld by the New Jersey Supreme Court, and therefore became the law of the land in the state, in perpetuity. In addition this precedent lives on and has often been used in subsequent anti-discrimination cases. The ruling is part of a historical record and also can live on as a focus of research, such as this study. There is strong evidence the superior court judges' endeavors were not labor but rather action.

Arendtian work, which is a close cousin of labor, can also be used to examine the court's decision. When approaching a phenomenon using Arendt's action-work-labor hierarchy, one often is left more confused than enlightened. This is certainly true with Arendt's notion of work. She asserts that work creates objects that endure for a time period beyond the humans who create them.⁷⁵ In other words, the product of work remains even after its maker has deceased. It is safe to say that the superior court's decision in the White case will most likely be in place perpetually; beyond each judge's lifetime. While the two judges in the majority appear to still be

⁷⁴ *Ibid.*

⁷⁵ *Ibid*, 158.

living, Judge Alley has passed away.⁷⁶ The decision has lasted longer than at least one of its creators and will probably do so in perpetuity. In addition to the opinion's existence as an important legal precedent, it is a historical legal document and matter of record. Not only is the court's opinion a crucial part of the entire case, it is also an integral part of Louis's story. Ultimately, the New Jersey Supreme Court would confirm the establishment of the important legal precedent, which extended LAD protections to all K-12 students in the state of New Jersey. Not only did the court's action qualify as Arendtian action, it also qualifies, in this respect, as Arendtian work.

The superior court judges' decision also contains other traits of Arendtian work. She argues that work creates objects with an end goal, purpose and instrumentality.⁷⁷ The superior court's very purpose is very clear, and that is to review the decisions of the trial courts, the Tax Court and state administrative agencies.⁷⁸ Unlike the Director of the Division on Civil Rights, this court is not solely focused on civil rights, but instead is focused on determining if a trial court, or, in this case, a state agency made a mistake in a ruling. So in essence, the end goal of the appellate superior court is to insure justice. Yet, that would qualify as having an end goal, a purpose and instrumentality. Whereas the Director's primary purpose is to protect the civil rights of the citizens of the state, the court has a more restrained purpose. Nonetheless, this element of instrumentality is strong evidence of another trait of Arendtian work.

⁷⁶ "Obituary: Edwin R. Alley of New Providence, retired judge of the Appellate Court of the State of N.J.," *NJ.com*, July 5, 2013.

⁷⁷ Chris Higgins, "Human Conditions for Teaching: The Place of Pedagogy in Arendt's Vita Activa," *Teachers College Record*. 112 (2), (2010): 413.

⁷⁸ <http://www.judiciary.state.nj.us/appdiv/index.htm> (February 9, 2015).

Particulars and Universals

As is so often the case when writing about Arendt, it is difficult to always come to a definitive conclusion. When analyzing a person's or persons' endeavors, some traits of Arendtian judgment are present, while others are more elusive. This is the case when analyzing the superior court's opinion through the lens of particulars and universals. One of the most critical criteria for Arendtian judgment is that thinking and judging operate in the realm of particulars and not universals. Judgment assumes no pre-established consensus to a phenomenon.⁷⁹ Virtually every judicial proceeding, including an appellate hearing, is committed to hearing the viewpoints of others and the particulars that are related to the proceeding. Legal decisions, however, rely heavily upon precedent, which one can argue are the quintessence of the universal, but then one can also argue precedent is very much a particular.

As I have argued previously, the courts epitomize focusing on the particulars, but on the other hand once a precedent is identified as relevant to a current case, they are supposed to be applied universally to all similar cases. Precedent is composed of a similar ruling, or several rulings involving similar cases, that have specific characteristics that are used and applied to future, similar cases. These precedents create legal standards by which future, similar cases are decided. The argument for precedent as the particular goes as follows. The use of precedent in judicial proceedings relies on very specific aspects of prior rulings. These can be considered particulars due to their specificity. Thus, although there exists a standard that could be viewed as having universal traits, the very specific details of each case forces attorneys, jurists and jurors to think the particular. Also, the specifics are applied to the particulars of a singular case, and on a

⁷⁹ David L. Marshall, "The Origin and Character of Arendt's Theory of Judgment," *Political Theory*, 38(3) (2010): 369.

case-by-case basis. This appears to be the essence of thinking the particulars. Conversely, jurists adopt universal truths based on the legal standards and theories that emerge from proceedings. In this sense, precedent is applied universally to specific classes of similar cases. If the same legal question is posed, then the precedent is applied, but the judges shift the focus of their decision to the specifics of the case at hand.

Precedent can be applied universally to the particulars of a case. For example, a judge, justice or jury consider the particulars of the case at hand and then decide if the law, which has universal characteristics, has been violated. This law can be case law or statute. It seems this process reflects thinking the particular, which, of course, Arendt demands. One writer notes that, for Arendt, “To judge something well is simply to know it in the light of a particular context.”⁸⁰ The particular context for the superior court, as it was for the Director, was the Louis white case. Arendt asserts that because judgments are outside the realm of proof, one cannot use a universal theory to validate a judgment, but rather can only make a specific claim about a specific phenomenon. Therefore, it is virtually impossible to assert that any court of law fully complied with her notion of thinking the particular versus the universal, in its purest form. In the context of the courts in our society, a final judgment, a decision that leads to action, must be made. To a certain extent, proof must be a part of any judge’s decision. The idea of using precedent universally in Arendtian terms is not without its difficulties.

There is evidence that the judges on the superior court thought the particular. For example, the court did not accept Vespa-Papaleo’s decision in whole. While they affirmed the most crucial portions of the Director’s final determination, they also overturned several

⁸⁰ *Ibid*, 384.

components. The judges thought the particular when they analyzed the standard the Director used in his decision. They agreed with the Director that using *Lehmann* as precedent, and the standards therein was proper in the White case. The court, however, was very meticulous in justifying their affirmation. The judges referenced the specific wording in the LAD referencing public accommodations, as what constituted unlawful discrimination in relation to public accommodations and established that public schools were explicitly covered by the wording in the law. When they agreed with Vespa-Papaleo that the *Lehmann* standards should be used in determining if bias-based peer harassment constitutes a violation by a district, they cited the specifics of that case and related it to Louis's case. When it came to determining if Louis's damages were just, they referenced an LAD amendment, and considered legislative intent. The court, in these instances, very clearly was thinking the particular.

Even with the components of the Director's decision with which they did not agree, the judges thought the particular. The court's use of this quote is a crystallization of them thinking the particular. They noted that they would not hesitate to depart from federal precedent "if a rigid application of its standards is inappropriate under the circumstances."⁸¹ The circumstances are the particulars. Nor was the court hesitant to depart from the Director's ruling in parts. The judges used the particulars to overturn his assessment of the school's preventative measures. Although they agreed that the written material should have specifically prohibited the precise type of harassment Louis suffered, the court noted that the handbooks prohibited harassment of "any kind" and that the students certainly knew the way they were treating Louis was not sanctioned by the school. The court also noted that the handbook did prohibit harassment that

⁸¹ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 381 N.J.Super. 488 (2005).

was “sexual in nature...”⁸² Even though the judges did not agree with the Director on these points; they still used the particulars to arrive at their differing opinion. Again, when the court ruled that Vespa-Papaleo overreached his authority with some of his equitable relief order regarding policies, procedures and anti-bullying measures, they referenced very specific sections of state statute to justify their decision. Finally, when the judges reviewed L.G.’s award, they very clearly explained their reasoning as to why L.G. was not an aggrieved party under the LAD, and that the statute does not provide *por quod* damages based on the standards established in *Burner* and *O’Lone*.⁸³ Even though the court did not affirm the Director’s decision on every count, like the Director, they too were thinking the particular when they arrived at different conclusions. This of course, this focusing on the process versus the outcome, seems to be in keeping with Arendtian thinking and judging.

Thinking for the Prevention of Evil

Thinking and judging, Arendt asserts, may very well act as an inoculation against evil. The court’s opinion, as well as the process by which they reached their conclusion, qualify as this type of evil-preventing thinking. Arendt suggests that evil is the inability to think critically and reflectively about one’s own actions.⁸⁴ The pursuit of justice is also a pursuit of the prevention of evil. The appeals court is designed as a way for the losing party in a suit or criminal trial to see redress. It is designed as a safeguard against an arbitrary or unjust decision on the part of the lower courts or the director of a state agency. The very purpose of the existence

⁸² *Ibid*, 492.

⁸³ *Ibid*, 501.

⁸⁴ Hannah Arendt, “Thinking and Moral Consideration,” *Social Research*, 38(3), (1971): 418.

of this court is the prevention of evil. Louis White filed a complaint because he had suffered at the hand of evil; both from his peer tormenters and the negligence of Toms River in their failure to stop and prevent his harassment. Like the Director, the judges were given the opportunity to engage in the type of thinking that could prevent similar, future evil to Louis, as well as thousands of students throughout New Jersey for generations to come.

Like Vespa-Papaleo, the court prevented evil by expanding LAD protections to prevent bias-based peer harassment in the school setting. The legislature intended to prevent evil by enacting this law. The Director and his agency were given the power to enforce those provisions, and in this case, when given the opportunity, this court also did this. By affirming these protections, the court used thinking and judging to prevent evil. It can even be argued that even the court's rejection of certain aspects of the Director's decision was a form of thinking to prevent evil. While affirming the precedent that would extend LAD protections, the court also exercised judicial restraint and overturned aspects of the decision they determined unjust. The judges felt that the Director went too far by declaring that there was a district-wide hostile climate against queer students, ordering the district to rewrite policies and procedures and enact anti-bullying measures, and awarding L.G. damages. The court attempted to apply standards that had been established by the legislature and the courts fairly and justly. By allowing the Director's decision to stand unabated, the judges would have created an injustice by not fairly applying the standards previously established. Injustice is a form of evil, so by overturning those aspects that were not supported by legislative intent and case law, the court used thinking and judging to prevent evil in that aspect as well.

Arendt also relates the idea of thinking the particular to the prevention of evil. She posed the question "could the activity of thinking, as such, the habit of examining and reflecting upon

whatever happens to come to pass, regardless of specific content...could this activity be of such a nature that it ‘conditions’ man against evil doing?”⁸⁵ Just as the ALJ and Director did, the judges considered the particulars of Louis’s case. They reflected and considered the viewpoints of others. Ultimately, the ALJ chose not to prevent evil, whereas the Director, as well as this court chose to do so. In each case, these people followed the same process, much of which complies with Arendt’s requirements, but of course came to decisions that varied somewhat. The Director and the judges focused on certain particulars, far different than those on which ALJ Schuster focused. Schuster and Vespa-Papaleo engaged in the same degree of thinking that could prevent evil, but the ALJ chose not to follow through and reflect, whereas the Director engaged in Arendtian thinking and judging on a purer, deeper level, which resulted in the prevention of evil. The judges focused on similar particulars, and the outcome of their thinking also prevented evil, both through the expansion of LAD protections, and by preventing injustice through the misapplication of legal standards. A strong argument can be made that the judges on the superior court in this case engaged in Arendtian thinking and judging to prevent evil.

Moral Judgment

Arendt believes moral judgment is not true judgment. She is very reluctant to associate judgment with ethics and morality. From a traditional, morality-laden western way of thinking, it is reasonable to conclude that creating more freedom by expanding the protections of an anti-discrimination law is morally and ethically sound. Based on this way of thinking, progressive thinkers might immediately conclude that the superior court’s decision was the morally “right” thing to do. If one is to remain in compliance with Arendt’s theory of judgment, she or he cannot

⁸⁵ *Ibid.*

analyze the court's decision on moral terms. Arendt ran counter to traditional western thought by keeping morality out of the realm of judgment. She asserted that judgment is the most political of all actions, and she was insistent that morality had no place in politics.⁸⁶ This was one point where she abandoned Kant as she formulated her own theory of judgment. Kant believed that judgment was, at least in part, "the ability to tell right from wrong."⁸⁷ Kant viewed judgment "as the faculty of thinking the particular under the universal" and that judgment is determinative. Therefore, the particular is subordinated to the universal.⁸⁸ Arendt took issue with this because moral law is the universal that guides moral action in all particulars, and therefore results in determinative, rather than reflective judgment. Since Arendt insisted that one cannot subsume the particular under the universal and moral law as universal subsumes the particular, there can be no moral law with which to judge all particulars.⁸⁹ Moral judgment is determinative, which Arendt wholly rejects because it is based on a moral agent who has moral imperatives and only has to apply these sets of static rules to very unstable and ever-changing phenomena.⁹⁰

Therefore, the question begs; is there evidence that the majority of the court acted as a moral change agent, with a moral imperative, blindly applying a static set of unbending rules to a variety of particulars? I think not. Even though the LAD inherently has moral traits; fairness, justice, inclusion; it is not applied as a set of unchanging, static rules. To the contrary, the LAD,

⁸⁶ *Ibid*, 446.

⁸⁷ R.J. Bernstein, "Judging-the Actor and the Spectator," in *Philosophical Profiles*, (Philadelphia: University of Pennsylvania Press, 1986), 221-23.

⁸⁸ Immanuel Kant, *Critique of Judgment*, trans. and with analytical index by J. C. Meredith, (Oxford: Clarendon Press, 1964), 10.

⁸⁹ Benhabib, 37.

⁹⁰ Marshall, 380.

like so many statutes, has evolved as the courts have established legal standards to make sense of the law, as well as through amendment. In addition, the judges exhibited no moralizing in their reasoning. The only imperative an appellate court has is to review the lower decision and make sure there were no errors. The court's decision reflected a meticulous process of review. This court went through each aspect of the Director's decision. For each portion of Vespa-Papaleo's decision, they used the same thorough process. The judges did not engage in determinative, moral judgment, but rather they engaged in reflective judgment. Arendt notes that determinative judgment is preceded by reflective judgment. Using the English and Roman legal system as exemplars of reflective judgment, first one assesses whether a law applies to a certain case, and then the case is studied: the particulars of the case are extrapolated into that law using reflective judgment.⁹¹ This is exactly the process the judges on this court followed. Although from any modernist, progressive viewpoint, one might immediately conclude that the court made the morally just or "right" decision, Arendt would give no credence to such a dichotomous analysis, especially without much reflection and discussion.

Reflective Judgment

In the realm of Arendt's theory of judgment, reflective judgment is the only true judgment. Reflective judgment must occur in the presence of others. It cannot occur in isolation.⁹² The judges' opinion complies with this facet of Arendtian judgment. The role of an appellate court practically necessitates judgment in the presence of others. This case began in the private realm of the mind of Louis's mother, L.G. As Arendt explains, true action happens when

⁹¹ *Ibid.*

⁹² Arendt, Hannah. "The Crisis in Culture." In *Between Past and Future*. Harmondsworth: Penguin, 1977), 220-221.

an idea leaves the private realm of the mind and is subsequently introduced to the world.⁹³ Once the Whites filed their complaint, they moved the internal dialogue from the private self to the public realm. This action caused a chain reaction of others' actions. Once the idea was introduced into the world, others were invited to consider it and possibly agree. As previously discussed, Toms River Regional Schools and Schuster did not agree, but the Director, as well as the majority of this court did agree. Again, just the potential for agreement opens the possibility for true judgment. This process, Arendt explains, involves the doer going public to "transcend individual limitations."⁹⁴ The Whites offered this idea to the school district, the Director, the ALJ, then again to the Director, and, at this point, the superior court. All considered the perspective of others. Schuster did this through testimony and evidence, the Director through testimony and evidence found in the record, and the appellate court through the record as well as oral arguments and written briefs. All parties, including the Whites, Toms River, the ALJ, the Director and the superior court all offered their perspective for consideration. The consideration of others' perspective, this emergence of an idea onto the world, into the public realm, evidences that the superior court judges' process for fashioning their opinion was reflective judgment. Without considering others' perspectives, for Arendt, true reflective judgment, "never has the opportunity to operate at all." This trait was decidedly present in the superior court's opinion.

Arendt argues that the ultimate goal of reflective judgment is not to persuade everyone to have the exact same beliefs. She asserts that judgment's goal is to improve perception by consistently heightening the awareness of what makes one particular different from all other particulars that share the same characteristics. The process that led to the court's opinion

⁹³ *Ibid*, 221.

⁹⁴ *Ibid*.

involved several components that contributed to improving perception. The court reviewed the record from the ALJ hearing, as well as the Director's final determination. In addition, both sides submitted written briefs and presented oral arguments. All of these contributed to making Arendt's goal for judgment, to improve perception by consistently making one aware of what distinguishes one particular from all other particulars that share some similar characteristics. On the other hand, by using all of this input, the court was able to improve its own perceptions and enlighten the perceptions of all participants, as well as the larger legal and educational community, including the justices on the New Jersey Supreme court who would eventually review the court's opinion on appeal, legislatures and other policy makers, boards of education, superintendents, other administrators, faculty and staff, students and parents and researchers. Not only were the judges exposed to others' perspectives, they were also the recipient of perspective improvement. In addition to being exposed to all of the perspectives of the parties in the case at hand, the judges were also exposed to the perspectives of the legislature as well as the judges and justices of whose case law informed their opinion. By considering all of these perspectives and carefully dissecting the Director's final determination, the court was able to improve the perception of all stakeholders, present and future. This process of improving perception, such a critical component of Arendtian judgment, was very much present in the court's opinion.

The initial assessment of the court's opinion in the White case is to determine if it reflects "good" judgment. Many modern, progressive thinkers would probably consider increasing the level of freedom of all members of our society improves our world. The traditional western philosophical tradition, which is obsessed with "right and wrong", one that tends to look at things in absolutes and universals, would lead one to this conclusion, but it is more challenging to so with Arendt's theory. There are too many variables and aspects of Arendt's theory that are

somewhat inconsistent, and some would say outright contradictory, to arrive at such a dichotomous conclusion. As a result, it is difficult to conclude definitely that a person practiced “good judgment”. This was definitely true with Schuster. Applying some of Arendt’s judgment traits renders the ALJ’s decision as qualifying as judgment, but when one applies other traits, the ALJ’s decision falls short. As with the Director, it is much easier to make such a broad, sweeping claim that this court practiced Arendtian judgment. Virtually every aspect of the judges’ opinion meets the many and varied demands of Arendt’s theory. Next, I have described the oral arguments and opinion of the New Jersey Supreme Court in response to Toms River’s appeal of the superior court’s ruling.

Toms River Appeals to the New Jersey Supreme Court

At this point, the Toms River Regional Schools have been found liable for unlawful discriminations twice. Once through administrative action with the Director’s final determination, and then again in the New Jersey Superior Court, Appellate Division, which affirmed the Director’s determination of the district’s liability. The school district, however, was undeterred in their quest to avoid liability for Louis White’s harassment. Rather than accepting the opinion of the majority of the superior court panel, it appealed the decision to the New Jersey Supreme Court. Toms River’s appeal was based on two different aspects of the appellate court’s ruling. First, based on Judge Alley’s dissent, they appealed the part of the ruling that found that the remedial measures taken to end Louis’s harassment were unreasonable. Second, the district requested that the Supreme Court certify the appellate court’s finding that the LAD provides a cause of action for peer harassment, and if so, to determine the appropriate standard of liability

for such a claim.⁹⁵ Based on New Jersey Rules of Court, the district was entitled to be heard by the Supreme Court. The rule states “Appeal maybe taken to the Supreme Court from final judgment to the Supreme Court from final judgment as of right...in cases where, with regard to those issues, as to which, there is a dissent in the Appellate Division...”⁹⁶

As was the case in the superior court hearing, there were seven child advocacy/civil rights organizations, including the ACLU, who submitted a joint amicus curiae brief. The oral arguments took place on November 12, 2006; just over eleven months after the superior court delivered its opinion. As with the appellate hearing, Thomas E. Monahan presented oral arguments for Toms River and James R. Michael argued the case for the Whites. The matter was heard by Chief Justice James Zazzali, and Justices Virginia Long, Jaynee LaVeechia, Barry T. Albin, John E. Wallace Jr., Roberto A. Rivera-Soto and Helen E. Hoens. The hearing began with Mr. Monahan presenting the district’s argument.

Oral Arguments Before the Court

Toms River’s Oral Argument

Mr. Monahan’s opening statement was a disjointed litany of ramblings. First, he accurately stated the issue the court was asked to decide in regards to standards of liability. The attorney then spoke about school administrators’ dual responsibility. He noted that they were not personnel directors, but had to address the student that was harassed and also educate the student doing the harassing. On more than one occasion, he pointed out that one cannot fire a student

⁹⁵ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 399 (2007).

⁹⁶ R.2:2-1(a) (2).

like an employer can fire an employee. Monahan then spoke to the difference in students who are in elementary, middle and high school. His point was that the age of the child matters. What might be harassment in high school might not be harassment in first grade because of the age of the child using the harassing terms. The district's counsel noted that they had a zero-tolerance policy for harassment of any kind. He then returned to the school being different than the workplace, repeated that students cannot be fired, and that they rarely were even expelled. Monahan noted that perhaps if a student threatened to blow up a school and "you have some dynamites you may be expelled...but it depends upon your age."⁹⁷ Monahan reiterated that schools were obligated to educate students, whereas employers could simply fire harassing employees. He then mentioned that administrators also have to deal with parents, some of which "have extreme religious views" and do not want the schools to even use the word "sex".⁹⁸ He ended his soliloquy by pointing out that there are other parents who do not parent at all.

At this point, the justices began asking questions. First they questioned the zero-tolerance policy for harassment; pointing out that there were eighteen students involved in numerous incidents over the course of four months. A justice then asked what the district did pursuant to that zero-tolerance policy to address those students and "to educating the rest of the students?"⁹⁹ Instead of answering, Monahan said he wanted to "address the fact of that issue," and began explaining how it all started when Louis called a female student a "whore" and she retaliated by calling him a "faggot". Monahan then stated that there were two other incidents of "name

⁹⁷ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, Oral Argument WL 5985685 N.J. (2007), 2.

⁹⁸ *Ibid*, 2.

⁹⁹ *Ibid*.

calling” prior to this.¹⁰⁰ The attorney then claimed that the briefs that were filed sensationalize what happened here, there was very little except name calling...”¹⁰¹ A justice noted that there was also touching. Mr. Monahan explained that that was the last incident in March in which Louis “alleged...some student came up behind him and rubbed against him in the...line.”¹⁰² Other than that it was “just name calling” Monahan explained. One of the justices pounced on this, stating “they certainly aren’t downplaying the force of words.” The justice continued, explaining how words can do much damage, and in the workplace setting, “the weapons are words and, and you seem to be making light of that...”¹⁰³ The district’s counsel then conceded that words are harmful, and asked what was an administrator to do about words when a student is that young.

The justice then repeated the question of what did administrators do in this case to address this harassment, as well as to educate the rest of the student body. Monahan repeated what Ms. Benn and other administrators testified regarding the progressive discipline approach. He also explained that Ms. Benn spoke to the students and took the additional step of developing a plan, which resulted in the March 10 meeting with L.G., the affirmative action officer and school administrators. One justice quipped, “is that what you would have done if this had been racial slurs...this...kind of lethargic response...would we have been developing...a plan to deal with this or would there have...a quick response?”¹⁰⁴ Monahan avoided answering this and

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*, 3.

¹⁰⁴ *Ibid.*

another justice forced him back to Justice Long's question, repeating it. Again, Mr. Monahan said it would have depended on the circumstances and again implied that Louis was to blame for his harassment when Monahan said "In this case, did the child who was called that name call the other child the name?"¹⁰⁵ The justice responded by pointing out that Monahan is still focused on one incident but that "We're talking about a course of conduct over years."¹⁰⁶ Counsel immediately disputed this, explaining that it was only a three month period, and that the school took immediate action. That same justice then asked about ninth grade, which Monahan responded that those incidents occurred off campus. He then asked where the school's responsibility ends. Monahan then stated that the school advised Louis to ride the bus, to which a justice reminded counsel that Louis refused to ride the bus because he was being harassed on the bus. Monahan responded that the school was not made aware of the harassment on the bus.

A justice then moved the discussion to what she/he saw as a hole in the district's theory. Toms River argued that there is a duty to educate children and that one cannot just expel bad behaving students. The problem is, the district always responded after specific incidents, as opposed to educating the entire student body as to the inappropriateness of this conduct. As a result, the justice stated, the administrators left "open the possibility of future action, more action by more...additional actors."¹⁰⁷ The justice therefore asked how the district can claim that it is fulfilling its responsibility to educate all children in the district. Monahan answered by noting the lectures given to the students at the beginning of the school year that prohibited harassment of

¹⁰⁵ *Ibid*, 4.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid*, 5.

any kind. He then noted that the appellate court agreed that these measures were sufficient, adding “There’s no problem in Toms River Schools,” and that they had just this one case.

A justice retorted, noting that eighteen students were involved and added that there was a systemic problem that need to be addressed as a whole. The district should have conducted classes in which students were taught to respect all people regardless of “race, religion, sexual orientation, gender...”¹⁰⁸ The district did not educate the children to respect their peers regardless of their differences. Instead, the administrators only addressed each offending student after a harassment incident occurred. Based on the number of people involved, the justice continued, there “was a wider problem that just wasn’t being addressed by the school district.”¹⁰⁹ Monahan responded that the appellate court found that there was not a systemic problem in the Toms River schools. Again the justices noted eighteen students were involved and queried Monahan, “Don’t you think if you...have a policy, at least it failed miserably?”¹¹⁰ The district’s counsel then answered no, and again mentioned that the students’ ages and how Louis was going “back and forth” with the other students. A justice challenged him on this, stating that he was referring to the one instance where Louis called the female student a whore. The justice asked if there were other times when Louis was the instigator. Monahan answered in the affirmative and referred to the time Louis grabbed a girl’s bottom, and her brother hit Louis with a thick necklace. Counsel noted that was part of the back and forth and that Louis and the other students were counseled, but none, including Louis, was suspended.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

At that point, another justice moved the conversation back to establishing a legal standard of liability. A justice asked Monahan what standard would the district like the Court to use. The counselor answered that “we took the position that reading from Judge Arenas’...the deliberate indifference standard would apply.” A justice pointed out that the standard was established in *Davis*, the United States Supreme Court case and not the district case to which Monahan was referring.¹¹¹ The justices continued and Monahan explained that the district believed the deliberate indifference standard should apply because it “takes into account the issues...with having to deal with both sides...” Monahan again was referring to having to address the harassment and also educate the harasser. Again, one of the justices asked would this be the same standard the district would want to use if we were dealing with racial harassment. Monahan again said yes, but it would depend on the circumstances. He added that the only zero-tolerance policy in Toms River is for fighting, which results in an automatic ten-day suspension. Otherwise, “The administrator is free to choose the course of discipline based upon...” the circumstances.¹¹²

The justices then moved to the idea of public schools being places of public accommodation. The justices began by asking Monahan if he could concede that schools are places of public accommodation under the LAD. The attorney said no, and then explained that he has gotten older, but there was an issue in the schools with regards to whether “a homosexual...could work in the school district. Those kinds of issues were part of the landscape 20-25 years ago...when the statute was passed, I...don’t believe the legislature was looking to

¹¹¹ *Ibid*, 6.

¹¹² *Ibid*, 7.

do...”¹¹³ At that point, one of the justices went back to the statute and began reading N.J.S.A. 10:5-5, “A place of public accommodations is defined as any kindergarten, primary and secondary school...am I not reading that correctly?”¹¹⁴ Monahan conceded that was indeed the correct reading. Therefore, the justice asked, how Monahan could suggest that the school is not a public accommodation. Counsel argued that he believed that the statute was addressing the hiring of employees for schools.

A justice then asked that if a teacher, instead of a peer, called a student a “homo” or “fag”, would there be any question in his mind that that would be a violation of the LAD? The attorney agreed that it would be. Then, the justice continued asking, what if a teacher witnessed one student calling another student the same slur and did nothing. Would there be a difference between the teacher violating the LAD by using slurs and a teacher that witnesses an identical student-on-student encounter, but does nothing? Mr. Monahan gave his typical answer of “it depends on the circumstances.”¹¹⁵ The justices eventually led Mr. Monahan to admit that there are instances where student-on-student harassment could be a violation of the LAD.¹¹⁶

Mr. Monahan then shifted the discussion to what standard the courts would apply to the school in respect to its obligation to address peer harassment. The justices explained, essentially, if a school has knowledge of the harassment, that knowledge triggers an obligation to respond. The real issue of this Court, one justice noted, is to determine the school’s obligation once it has

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*, 8.

¹¹⁶ *Ibid.*, 9.

knowledge “either affirmatively or imputed” of an incident of harassment.¹¹⁷ Monahan then used Superior Court Judge Alley’s dissent and asked “How do we know?” meaning, what criteria does one use to determine if a school’s response to end the harassment was reasonable? Monahan then used this to advocate for employing a negligence standard, yet again. He proposed a standard where one has to illustrate that the educational professionals were “not doing what they should have done.”¹¹⁸ One of the justices contested the negligence proposal, stating “...if you have an obligation...you have that obligation and the obligation is not acted on, why isn’t...strict liability?” Mr. Monahan retorted because one has to determine if the administrator “acted reasonably.”¹¹⁹ Then a justice compelled Monahan to clearly agree that the standard of review is whether the district acted reasonably in order to eliminate a hostile educational climate. The justice quipped “I’m saying that because that’s different from deliberate indifference.”¹²⁰ Monahan agreed, and said if the Court abandons deliberate indifference, then the question is how do you determine reasonableness?

At that point, the Court asked Monahan to sum up, but instead he brought up the two assaults that took place off campus during September of Louis’s freshman year. Counsel argued that because these occurred off campus, the district had no responsibility. To challenge this, one justice asked that if a student’s “peers are either sexually harassing him, racially harassing him or harassing him based on sexual orientation...” and it occurs a block away from school property, then the school has no responsibility? Monahan answered that the district recognized that

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*,10.

responsibility in Louis's case, and this was evidenced by the fact that the offending students were suspended. One of the justices responded, "Well, that ends that issue. You're conceding that this responsibility off the premises, during lunch hour..."¹²¹ In response, Monahan queried as to what distance was the school no longer responsible. He then pointed out that the district suggested that Louis ride the bus and take lunch on campus, but he refused to do so. Monahan then claimed that since Louis refused, Toms River was therefore not liable. One justice suggested that since he was off campus, the school's role became reactive instead of proactive, and that was the case with the two off-campus beatings.

Oral Argument on Behalf of the Whites

Mr. Michael began by stating that the Director and the appellant court were correct in ruling that a school district may be held liable under the LAD for a hostile school environment based on student-on-student harassment. He also stated that they were correct that students in our public schools should enjoy the same level of protection under the LAD as adults in the workplace. Michael noted that this Court has declared, on several occasions, "that the goal of the LAD is the eradication of "cancer" of discrimination, and that goal cannot be advanced with the deliberate indifference standard..."¹²² Michael then reminded the Court, as they attempt to devise a standard for liability that this Court has also said it will not hesitate to depart from federal standards if they are inappropriate given the circumstances under consideration, "and this is just such a case."¹²³ Michael then discussed how the LAD and the federal Title IX differ, pointing out that one is part of a Congressional funding contract as opposed to the LAD, which

¹²¹ *Ibid*, 11.

¹²² *Ibid*, 12.

¹²³ *Ibid*.

was enacted by the state legislature with the express intent of protecting citizens' civil rights. This statute included public accommodations, including public schools. The legislature declared that the opportunity to attend a public school without discrimination was to be a civil right. In addition, Mr. Michael added, the legislature spelled out specific ways individual could "seek redress and be made whole." Title IX provides no such protections. Using the deliberate indifference standard is inconsistent with this Court's declaration that schools have a responsibility to protect the children entrusted to them during the school day.¹²⁴ Michael concluded his initial argument by stating that it seems commonsensical that the standard for a minor child, who brings to an administrator a complaint of bias-based harassment, not be less than that of an adult staff member in similar circumstances. He closed by stating that the LAD does not support this position.

The justices then turned to the facts and explained that they were going to attempt to delineate three distinct time periods during which the incidents took place. The first was during seventh grade, in which many events occurred. Then, the second time period was from April of seventh grade to the end of eighth grade. The justice stated that there were no incidents. Michael refuted this, explaining there were incidents but none reported. Then, the justice noted that the third time period was the few weeks of high school, which was when the two physical assaults occurred, in which both offending students were suspended. Mr. Michael explained that there were two areas of concern; the seventh grade and high school. The justice retorted that the incidents in high school were addressed rather harshly. Mr. Michael countered, explaining that during these seventh, eighth and ninth grade years, the district did not proactively address the entire student body. There was no plan in place, no assurance that the high school would protect

¹²⁴ *Ibid.*

Louis. Michael also explained that one cannot look “at ninth grade in a vacuum...” and that you have to take into account what happened in seventh grade; the history.¹²⁵ Michael conceded that there are going to be disputes, but what Toms River failed to realize is that every time Louis became involved in one, it became “a gay bashing incident.”¹²⁶

Mr. Michael explained that Louis had put up with this for years on his own, and finally decided he could not take it anymore; he needed some help. Louis told administrators what was going on, and also that it had been occurring for years, even in elementary school. Michael stated that Louis said that he was called something every day. The justice retorted that when each incident was brought to administrators’ attention, the school responded. When L.G. withdrew Louis, the district paid for it. The justice asked, “What more could they have done in respect to L.W.?” Michael explained that when the reports started coming in, the administrators knew that there was a widespread problem. This justice countered that 18 students out of 1,400, .1%, was not widespread when 99.9% of students were behaving properly. Mr. Michael then countered that we do not know if 99% were behaving properly. Louis reported the offending students he knew by name, but he also testified that “A lot of these kids are saying it, I don’t know who they are. It’s just I’m passing the hall kids are saying this.”¹²⁷ Therefore, Mr. Michael argued, we do not know that it was limited to eighteen students. At that moment, another justice, apparently, asserted “We don’t use that standard for adults.”¹²⁸ She/he went on to explain with an example; if harassment was happening at Ford, where thousands of employees work, and eighteen

¹²⁵ *Ibid*, 13.

¹²⁶ *Ibid*.

¹²⁷ *Ibid*, 14.

¹²⁸ *Ibid*.

employees were making life miserable for someone, “we wouldn’t be doing a percentage, we, we... wanted to know whether or what Ford was doing...anything to eliminate the discrimination.”¹²⁹

Mr. Michael continued pointing out that the other key was the climate that Louis had to enter every day. As the reports started to come in, there were more students harassing Louis, and the harassment was becoming more severe. First it started with verbal taunts, “then it went to little nuisance, lit pats on the head” accompanied with anti-queer slurs, then to the humping in the cafeteria, and when he was hit with the chain necklace in the locker room.¹³⁰ The most important part though, is what students were saying to Louis when they were hitting, humping and punching him. The comments were always laced with anti-queer slurs. Despite all these reports coming in, including the bias nature of the harassment, the school never “took any proactive measures...to address the student body as a whole.”¹³¹

A justice then asked if the Division on Civil rights alone, or in conjunction with the Commission of Education published standards for school districts to follow in terms of how schools are supposed to address this type of harassment. Mr. Michael explained that the Division had not, but the Commissioner had done so. Counsel said generally that this guidance simply requires that schools have policies in place and have an affirmative action officer to address anti-discrimination issues. Michael did not dispute that Toms River had these elements in place. What was really at issue though “it was what they did once they receive the

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid*, 15.

information?”¹³² A justice then asked Mr. Michael how the district should have publicized the policy better than they did. Again, Mr. Michael went back to the overall climate of the school. He answered the justice by explaining that at some point in the process, the administrators should have reinforced to the student body that this type of harassment would not be tolerated. The way Toms River handled it, Michael argued, the policy was only reinforced to individual students when they violated the policy by harassing Louis. To support his claim on the school climate, Michael pointed out that there were few repeat offenders, which is evidence that new students were not being deterred from harassing Louis.¹³³

Mr. Michael then began discussing sources of guidance the district could have used to inform their efforts to address Louis’s harassment. He noted that under Title IX, the Federal Office of Civil Rights had issued guidelines on how to address bias climate issue. Mr. Michael asserted that when the district encountered multiple incidents, which indicated that they needed to do more and that did not happen in the case at hand. Another justice then challenged Mr. Michael by asking if there existed any “empirical proof in the record” that would indicate that implementing any of the Director’s remedial measures would have had any effect on middle school students. Counsel responded that there are studies, but none in the record. The justice continued, explaining that his concern is that the Director is making findings and ordering relief without a factual basis that the measures “he is ordering are things that will have the result he is seeking.” Another justice came to Michael’s aid and asked her/his colleague is not the failure to act reason enough to take appropriate remedial action to stop such behaviors? Mr. Michael answered in the affirmative, that yes, which is the basis for liability in the case. A justice then

¹³² *Ibid.*

¹³³ *Ibid.*

noted that also seems to be the standard that the school board settled on during their oral arguments. Speaking of the district's counsel, Mr. Monahan, the justice quipped "if I heard correctly...has abandoned any sort of deliberate indifference standard."¹³⁴ Mr. Michael agreed, and said if that the standard the district is now proposing is the standard of reasonableness calculated to end the harassment, then he is "arm in arm with the...school board," as one justice put it. Mr. Michael also added that the district did not take reasonable measures to end the harassment. A justice the retorted "what about all the things..." the district did do to address the harassment.

Toward the conclusion of Mr. Michael's oral argument, he addressed a justice's question regarding the fact that there were only three repeat offenders. Following the progressive approach, Mr. Michael explained, the administrators dispensed more severe punishment for those repeat offenders. Yet, the number of different students being reported kept rising, the school needed to do more, but they stuck to their progressive discipline. In addition, Mr. Michael added, the district shifted the burden to Louis to "monitor the situation."¹³⁵ The only way the administrators responded to the situation was when Louis reported the incidents. Mr. Michael noted that there are some studies that suggest educating the student body improves the climate and reduces harassment. Mr. Michael acknowledged that the district "did do some things correctly," but they did not do enough to address the problem, especially considering all of the information they had.

¹³⁴ *Ibid*, 16.

¹³⁵ *Ibid*, 17.

The New Jersey Supreme Court's Opinion

During the oral arguments, there were questions from justices that implied empathy for both the Whites' argument and the district's. On February 21, 2007, just over three months after oral arguments, and nearly eight years since L.G. filed her complaint with the Division; Chief Justice James Zazzali of the New Jersey Supreme Court delivered the Court's opinion. Zazzali began by explaining the Court had to determine whether a school district may be found liable under the New Jersey Law Against Discrimination (LAD), when a student is harassed by fellow students due to her or his perceived sexual orientation. The Court also had to determine that if a district can be held liable, what standard of liability warrants a cause of action. The opinion continues, with a brief synopsis of Louis's ordeal from fourth grade until his freshman year of high school. Zazzali then explained that because the LAD's "broad statutory language is clear, we hold that the LAD recognizes a cause of action against a school district for student-on-student affectional or sexual orientation harassment."¹³⁶ The Court also found that a school district can be held liable for such harassment "when the school district knew or should have known of the harassment but failed to take actions reasonably calculated to end..." the harassment.¹³⁷ The Chief Justice continued, explaining that this conclusion "furtheres the legislative intent of eradicating the scourge of discrimination not only from society, but also from our schools..." The Court also stated that it was its intent that this decision would encourage "school districts to take proactive steps to protect the children in their charge."¹³⁸

¹³⁶ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 390 (2007).

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

Legal Analysis

After a lengthy summary of Louis's abuse from grade four until September of his freshman year, Zazzali gave a concise procedural history before beginning the analysis which led to the Court's conclusion to grant a cause of action. This section of the opinion outlined important provisions and language of both the LAD and relevant case law. "Freedom from discrimination is one of the fundamental principles of our society."¹³⁹ This is the "bedrock principle" on which this case and determination was founded. Zazzali also noted that "the overarching goal of the...is nothing less than the eradication 'of the cancer of discrimination.'"¹⁴⁰ This makes obvious the legislature's intent was to "protect society from the vestiges of discrimination."¹⁴¹ Zazzali then moved to a discussion of the LAD. This statute was enacted in 1945 and was the nation's first state anti-discrimination statute. The LAD is a law designed to specifically protect its citizens' civil rights.¹⁴² The LAD works to guarantee "that the civil rights guaranteed by the State Constitution are extended to all citizens."¹⁴³ The statute reads "discrimination threatens not only the rights of proper privileges of the inhabitants of the State but menaces the institution and foundation of a free democratic state...that because of discrimination, people suffer personal hardships, and the state suffers a grievous harm."¹⁴⁴ Based on the obvious legislative intent through very clear language, this Court "has liberally construed

¹³⁹ *Lehmann v. Toys R Us, Inc.* 132 N.J. 600 (1993).

¹⁴⁰ *Fuchilla v. Layman*, 109 N.J. 219, 334 (1998).

¹⁴¹ *Cedeno v. Montclair State Univ.*, 163 N.J. 478(2000).

¹⁴² *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 399 (2007).

¹⁴³ *Viscik v. Fowler Equip. Co., Inc.*, 173 N.J. 1, 12, 800 (2002)

¹⁴⁴ N.J.S.A. 10:5-3.

the LAD to further the Legislature's broad remedial objectives."¹⁴⁵ Furthermore, the state courts have advised that "the more broadly...is applied, the greater its anti-discriminatory impact."¹⁴⁶

A Cause of Action Under the LAD

The opinion then shifted to addressing the first question in this appeal, which is does the LAD recognize a cause of action against a school district for peer harassment of a student based on her or his perceived sexual orientation.¹⁴⁷ Since this question requires interpreting the statute, the Court looked to the LAD's clear language, which this Court referred to as the "polestar in discerning the Legislature's intent."¹⁴⁸ This approach was articulated by this same Court when deciding a former case, "If the language is plain and clearly reveals the statute's meaning, the Court's sole function is to enforce the statute according to its terms."¹⁴⁹ Zazzali then quoted a pertinent part of the LAD, "it is unlawful for any owner, lessee, proprietor, manager, superintendent, agent or any employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny any person any of the accommodations, advantages, facilities or privileges thereof...on the basis of that person's "affectual or sexual orientation."¹⁵⁰ The justice also included the statute's definition of those terms, of which includes the phrases "being perceived...by others as having such orientation."¹⁵¹ The opinion also included the

¹⁴⁵ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 400 (2007).

¹⁴⁶ *Ptaszynski v. Uwaneme*, 371 N.J.Super. 333 (2004).

¹⁴⁷ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 400 (2007).

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ N.J.S.A. 10:5-12 (f).

¹⁵¹ N.J.S.A. 10:5-5 (hh).

LAD's definition of a place of public accommodation, which reads in part and includes "any...primary or secondary school,...high school...or any educational institution under the supervision of the State Board of Education, or the commissioner of Education of the State of New Jersey."¹⁵²

Zazzali then explained that applying the LAD to claims against districts for this type of harassment being discussed will address a real problem with which the state's educational system is facing. The justice used as evidence of the significance of this problem the legislature's enactment of the very stringent HIB law in 2002. This law specifically forbids harassment based on sexual orientation.¹⁵³ Zazzali highlighted a portion of the law that emphasizes the purpose of the statute is to insure a safe environment that is necessary for students to learn and prevent harassment, intimidation and bullying, which disrupts both teaching and learning.¹⁵⁴ The justices emphasized the prevalence of this type of harassment in the nation's schools by noting a law review article, which states "student-on-student sexual harassment is a pervasive problem in primary and secondary schools throughout our nation."¹⁵⁵ To further emphasize the legislature's determination to rid the state's schools of this type of harassment, the HIB statute even criminalized "bias intimidation", which is considered a fourth degree offense.¹⁵⁶

Zazzali continued, explaining that because the LAD's clear language and clear legislative intent for the statute to have a "broad remedial goal" and the prevalence of peer sexual

¹⁵² N.J.S.A. 10:5-5 (l).

¹⁵³ N.J.S.A. 18A: 37-13 to 18.

¹⁵⁴ N.J.S.A. 18A: 37-13.

¹⁵⁵ Rebecca A. Olesky, "Student-on-Student Sexual Harassment: Preventing a National Problem on a Local Level", 32 *Seton Hall Law Review* 230, 230 (2001).

¹⁵⁶ N.J.S.A. 2C: 16-1.

harassment, the Supreme Court concluded that the LAD indeed provides a cause of action against a school district for student-on-student harassment based on a student's perceived sexual orientation. A district is liable if it fails to take reasonable measures to end the harassment, and the district's failure to do so results in the denial to the harassed student any of the school's "accommodations, advantages, facilities or privileges."¹⁵⁷ The Court further explained not reaching this conclusion would be "incongruous with the LAD's prohibition of discrimination in other settings..."¹⁵⁸ The "right of a student to achieve an education free from sexual harassment is certainly as important as the rights of an employee in a work setting."¹⁵⁹ Zazzali declared that by finding this cause of action, the Court has furthered the legislature's goal of "eradicating the invidious discrimination faced by students in our public schools."¹⁶⁰ The Court noted that it was not the Court's intention to suggest that all "isolated schoolyard insults or classroom taunts" would trigger a cause of action. Instead, to make a claim under the LAD, a victim must allege that the discrimination would not have occurred if the student was not a part of a protected class, and that a reasonable person of that same protected group would also consider the harassment "severe or pervasive enough to create an intimidating, hostile, or offensive school environment, and the school district failed to reasonably address such conduct."¹⁶¹

¹⁵⁷ N.J.S.A. 10:5–12(f).

¹⁵⁸ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 402 (2007).

¹⁵⁹ *K.P. v. Corsey*, 229 F. Supp. 2d 547 D.N.J. (2002).

¹⁶⁰ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 402 (2007).

¹⁶¹ *Ibid*, 403.

Standard of Liability

The next section of the Court's opinion addressed the circumstances with which a district's action or inaction to prevent and address a hostile school environment would entitle an aggrieved student to recover damages.¹⁶² Zazzali began his discussion by focusing on the public accommodation clause in the LAD and the workplace standards established in *Lehmann*. The Whites contended that the Director and the appellate court were correct in applying a similar standard of a hostile work environment for sexual harassment standard of liability established in *Lehmann*. This same standard should be applied "to the analogous hostile school environment alleged here."¹⁶³ In the *Lehmann* decision, the Court held that an employee can establish a claim against her/his employer for a hostile work environment due to sexual harassment under the LAD when the discrimination is so "severe or pervasive" that it "creates an intimidating, hostile, or offensive working environment."¹⁶⁴ In this same case, the Court also established that an employer will be liable for a hostile work environment under the LAD in three circumstances. First, if an employee is given supervisory power and abuses it and thereby creating a hostile environment, the employer is liable. Second, if an employer fails to enact anti-harassment policies and procedures, and third, "when the employer has actual or constructed knowledge of the harassment..." but failed to take effective measures to stop the discrimination.¹⁶⁵ Zazzali noted that it was the third circumstance that is related to this appeal. Based on *Lehmann*, if the employer had knowledge of the harassment and failed to take effective measures to top the

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Lehmann v. Toys R Us, Inc.* 132 N.J. 592 (1993).

¹⁶⁵ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 403 (2007).

harassment, the employer has created a hostile environment. In this same case, the court clearly defined effective measures, noting that they are measures that are “reasonably calculated to end the harassment.”¹⁶⁶ The Court continued by clarifying reasonableness, which “will depend on its ability to stop harassment by the person who engaged in harassment.”¹⁶⁷

Toms River Regional Schools, on the other hand, contended that the appropriate standard in this case should be the standard applied in Title IX claims; the “deliberate indifference” standard.¹⁶⁸ Title IX of the Education Amendment of 1972 provides that no “person in the United States shall, on the basis of sex, be excluded from participation, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal Financial assistance.”¹⁶⁹ The United States Supreme Court, in *Davis*, established under what circumstances a private action could be brought against a school district under Title IX cases of student-on-student harassment.¹⁷⁰ The Court declared that a private action is recognized “only when the funding recipient acts with deliberate indifference to know acts of harassment in its programs or activities ...that is so severe, pervasive and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”¹⁷¹ That Court rejected a mere negligence standard and set a high bar for recovery because the act was enacted under Congress’ authority under the Spending Clause. Since the law is linked to Congress’ spending power, it is essentially a funding contract, and therefore the funding recipient, for example a school district,

¹⁶⁶ *Ibid*, 404.

¹⁶⁷ *Ibid*.

¹⁶⁸ *Davis v. Monroe County Board of Education*, 526 U.S. 642 (1999).

¹⁶⁹ 20 U.S.C.A 1681(a).

¹⁷⁰ *Davis v. Monroe County Board of Education*, 526 U.S. 632 (1999).

¹⁷¹ *Ibid*.

would have to have sufficient advance notice of potential liability before a victim could recover damages.¹⁷²

As did the superior court in this case, this Court, at the beginning of the discussion of Title IX and the LAD, noted that while they may look at federal case law for guidance, they are not bound to do so. Zazzali quoted from *Lehmann*, noting that this Court will not hesitate to abandon “federal precedent if a rigid application of its standards is inappropriate under the circumstances.”¹⁷³ The Chief Justice then stated “We reject the Title IX deliberate indifference standard because we conclude that the *Lehmann* standard should apply in the workplace and in the school setting. We find no need to impose a separate standard because the discrimination is in a school.”¹⁷⁴

Zazzali continued, noting there are important differences between Title IX and the LAD. First, Title IX prohibits discrimination based only on sex.¹⁷⁵ Compare that to the extensive list of protected characteristics enumerated in the LAD, which, most germane to this case, includes “affectional or sexual orientation”.¹⁷⁶ Also, Title IX’s very existence was pursuant to Congress’ authority under the Spending Clause of the United States Constitution, which implies contract principles. The LAD, as well as the New Jersey Constitution, enforce the guarantee of civil rights, and apply to any place of public accommodation. The LAD’s extensive list of protected

¹⁷² *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 404 and 405 (2007).

¹⁷³ *Lehmann v. Toys R Us, Inc.* 132 N.J. 600 (1993).

¹⁷⁴ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 405 (2007).

¹⁷⁵ 20 U.S.C.A 1681(a).

¹⁷⁶ N.J.S.A. 10:5-4.

public accommodations specifically includes schools, no matter their funding source.¹⁷⁷ Finally, where the courts have established an implied private right of action under Title IX, the LAD explicitly gives victims the right to file a private cause of action in order to attain a range of equitable remedies.¹⁷⁸ The LAD standards are much less burdensome than its Title IX counterparts. For Title IX, an aggrieved person must establish deliberate indifference on the part of the respondent. Zazzali then commends Superior Court Judge Yannotti's opinion, agreeing that it would not be fair to apply a more burdensome standard on an aggrieved student than of an aggrieved employee. "Students in the classroom are entitled to no less protection from unlawful discrimination and harassment than their adult counterparts in the workplace."¹⁷⁹

The Chief Justice next announces that the Court is satisfied that the LAD standard that governs hostile work environment sexual harassment, somewhat modified, is appropriate in the White case. Any other conclusion, Zazzali explained, would go against New Jersey's well-established policy of protecting children. Quoting *Frugis*, the Court stated that educators have no "greater obligation...than to protect the children in their charge from foreseeable dangers, whether those dangers arise from the careless acts or intentional transgressions of others."¹⁸⁰ A school district's number one priority "must be to do no harm to the children in its care."¹⁸¹ A district must take reasonable measures to ensure staff, "who stand as surrogate parents during the day" are teaching and protecting "vulnerable children."¹⁸² The Court continued, noting it

¹⁷⁷ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 405 (2007).

¹⁷⁸ N.J.S.A. 10:5-13.

¹⁷⁹ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 406 (2007).

¹⁸⁰ *Frugis v. Bracigliano*, 177 N.J. 268 (2003).

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

concedes that a school cannot be expected to shield students from all peer harassment, but the schools must take “reasonable measures...to protect our youth.”¹⁸³ Districts are capable of doing so because schools have the state’s power over school children, and control and supervise them to a much greater extent than could be exercised over adults.¹⁸⁴

Next, Zazzali detailed the modified version of the *Lehmann* standard that the Court was establishing. In a school setting, the “standard requires that a school district may be found liable under the LAD for student-on-student sexual orientation harassment that creates a hostile educational environment when the school district knew or should have known of the harassment, but failed to take action reasonably calculated to end the harassment.”¹⁸⁵ The Chief Justice explained that this standard promulgates the LAD’s goal of eliminating “the cancer of discrimination” and also complies with the liberal construct that the statute requires. “We therefore further the Legislature’s objective of eliminating bias-based harassment from New Jersey schools embodied in the LAD.”¹⁸⁶ With this ruling, the Court did not create a strict liability standard. In tort cases, strict liability exists when a defendant is in legal jeopardy just by virtue of the wrongful act, without any consideration of intent.¹⁸⁷ If the court had established strict liability, any existence of peer harassment would create a liability for school districts. Because the Court did not create a strict liability standard, “a district is not compelled to purge its schools of all peer harassment to avoid liability.”¹⁸⁸ Instead the Court required districts to put in

¹⁸³ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 406 (2007).

¹⁸⁴ *Ibid*, 407.

¹⁸⁵ *Ibid*.

¹⁸⁶ *Ibid*.

¹⁸⁷ www.law.cornell.edu/wex/strict_liability (Accessed February 16, 2016).

¹⁸⁸ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 407 (2007).

place preventative and remedial measures to lessen pervasive or severe discriminatory harassment. “Appropriate and reasonable measures will reinforce the basic principal that student-on-student sexual harassment is unacceptable.”¹⁸⁹

Assessing Reasonableness

The Chief Justice then moved to a lengthy analysis and discussion of how to assess the reasonableness of a district’s response to a hostile educational environment. When assessing reasonableness, one must keep in mind that schools are indeed different than the workplace, as the United States Supreme Court noted, stating “children may regularly interact in a manner that would be unacceptable among adults.”¹⁹⁰ Therefore, this Court reasoned, fact finders are must assess reasonableness of a district’s response to the type of harassment presented in this case “in light of the totality of the circumstances.”¹⁹¹ For further clarity, Zazzali quoted yet another U.S. Supreme Court case, which advises investigators to consider the “constellation of surrounding circumstances, expectations and relationships which are not fully captured by a single recitation of the words used or the physical acts performed.”¹⁹² In fact, the New Jersey Department of Education (DOE) established and periodically updates a model policy to guide districts in establishing and maintaining policies that prohibit harassment, intimidation and bullying in an educational environment. This was created to assist districts in complying with state statute that requires the establishment of such policies.¹⁹³ The DOE’s guidance, in brief, encourages districts

¹⁸⁹ *Ibid.*

¹⁹⁰ *Davis v. Monroe County Board of Education*, 526 U.S. 651 (1999).

¹⁹¹ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 408 (2007).

¹⁹² *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 82 (1998)

¹⁹³ N.J.S.A. 18A:37-13 to 18.

responding to violations of HIB policies to take into account the particular circumstances of each case, as well as the students involved and the unique characteristics of each district.¹⁹⁴ The Court then provided an example. Name calling among elementary students might demand a different assessment of reasonableness of a school's response compared to the reasonableness of a response to violence among high school students. The Court directed fact finders to consider all relevant circumstances such as "students' ages, developmental and maturity levels; school culture and atmosphere; rareness or frequency of the conduct; duration of harassment; extent and severity of the conduct; whether violence was involved; history of the harassment within the school district, the school and among individual participants; effectiveness of the school district's response; whether the school district considered alternative responses; and swiftness of the school district's reaction."¹⁹⁵ The Court also recommended districts seek guidance from DOE regulations, model policies and other sources of information from the agency.

The Court further advised that one consider the cumulative effect of student harassment as well as all of the efforts the school district employed to curtail the harassment. Zazzali cautioned courts and agencies, that when assessing reasonableness, to not view the incidents of harassment or the district's responses to the incidents in isolation. Again, quoting *Lehmann*, the Chief Justice stated that courts must "bear in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the ...environment created may exceed the sum of the individual episodes."¹⁹⁶ The final advice for fact finders in assessing reasonableness was that expert advice may be required to determine the

¹⁹⁴ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 408 and 409 (2007).

¹⁹⁵ *Ibid*, 409.

¹⁹⁶ *Lehmann v. Toys R Us, Inc.* 132 N.J. 607 (1993).

reasonableness of a district's response to student-on-student harassment. There will be times, the Court conceded, when common sense will be enough to determine obvious cases of unreasonableness of a district's response, but most likely, reasonableness may be less obvious and, in those circumstances, fact finders may need expert opinion 'regarding educational theories and principles, as well as the standards, policies, and procedures employed in the profession by similarly situated educators.'¹⁹⁷

The Court Remands the Case

With a standard now in place for determining a district's liability under the LAD for bias-based peer harassment, as well as having provided guidance on how fact finders should proceed when assessing reasonableness of a district's response to such harassment, the Court determined that the White case be remanded to the Director of the Division on Civil Rights, with the direction that the Director refer the case to the Office of Administrative Law (OAL). Zazzali explained that both parties will be permitted to supplement the record. "This, we require, as a matter of fairness to the parties."¹⁹⁸ The Court remanded because the current record of the case was created before the parties were aware of the reasonableness standards that the Court developed during this appeal. The standards require that a district's response to this type of harassment be assessed under the reasonableness standard within the educational context. Therefore, the Chief Justice declared, both parties in the matter must be given the chance to be heard in light of this newly established standard. In the name of due process, the parties will be permitted to supplement the record evidencing what a reasonable response to Louis's harassment would have been during the time period in which the harassment occurred; during seventh,

¹⁹⁷ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 408 and 410 (2007).

¹⁹⁸ *Ibid*, 410.

eighth and ninth grade, and perhaps even earlier since this record indicated Louis's harassment may have begun as early as elementary school.¹⁹⁹

The Court acknowledged that Toms River attempted to respond to the harassment of Louis without the benefit of the DOE's guidance in this matter and without any direction from the HIB law that was established by the legislature in 2002. At the same time, however, any assessment of Toms River's actual response may be guided by what the DOE currently advises how school districts should respond to such circumstances that the district confronted with Louis from at least 1998 to 2000. The Court also ruled that each party should be given the opportunity to use the testimony and opinion of experts who can inform as to how educators reasonably responded to similar harassment during the relevant timeframe.²⁰⁰ The Court then summarized their opinion, which established a cause of action under the LAD and established a framework for determining reasonableness of a school district's response to bias-based peer harassment based on sexual orientation.²⁰¹ The Court declared that this opinion accommodates the competing interest presented in the appeal. When a student is the victim of severe and pervasive bullying in the school setting, and the district fails to adequately respond to the harassment, the student can seek redress. At the same time, schools will be shielded from liability if their preventative measures and remedial actions "are reasonable in light of the totality of the circumstances."²⁰² The delivery of the opinion ended with the Chief Justice announcing that the lower court decision is affirmed as modified and remanded to the Division and the OAL for

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*, 411.

²⁰¹ *Ibid.*, 411 and 412.

²⁰² *Ibid.*, 412.

adjudication consistent with this opinion. This ruling was decided unanimously, with all seven justices concurring and none opposing.

Arendt's Theory of Judgment and the Supreme Court

Hanna Arendt's concept of reflective judgment can be used to analyze the various aspects of the justices' opinion. I have attempted to examine their decision through the lens of Arendtian judgment. Again, I am not asserting that any individuals involved in making decisions throughout this case consciously followed Arendt's theory; rather I have attempted to answer the following question: Did the decisions, endeavors and judgment embody the qualities associated with Arendt's theory of judgment, and if so, to what extent?

Common Sense

A major pillar of Arendt's theory centers on her idea of "common sense" which is the ability to engage in both the possible and actual judgments of others. Arendt states "that the faculty of judgment could facilitate a thick description of political communities that join individuals together and habituates them to considering things from points of view other than their own."²⁰³ The very purpose of existence of a justice and a Supreme Court is to consider the viewpoints of others. The function of the New Jersey Supreme Court is to hear and review judicial decisions of the lower courts. The Rules of Court states, "Appeals may be taken to the Supreme Court from final judgments as of right..."²⁰⁴ During these proceedings both sides in the

²⁰³ David L. Marshall, "The Origin and Character of Arendt's Theory of Judgment," *Political Theory*, 38(3) (2010): 367.

²⁰⁴ R. 2:2-1 (a).

dispute are given the opportunity to be heard and “shall be entitled to open and conclude argument.”²⁰⁵

As a result of this duty to hear appeals, the justices must carefully weigh all aspects of the record, as well as the oral arguments of both parties; they must consider the actual judgment of others. In this case, Toms River had a right to appeal because Judge Alley, one of the members of the three-member panel, dissented in part regarding whether Toms River’s response to the harassment was reasonable. Therefore, this Court was compelled to engage in the actual judgments of others, including both the Whites, the district, the Director, majority of the superior court as well as Judge Alley through his dissent in part. The Supreme Court had to consider the judgments of all of these parties and determine whether to affirm, reverse or remand all or parts of the superior court’s ruling. At each stage of this case, the political community to which Arendt refers expanded beyond the Whites and the school district. Once this lengthy adjudication process began, this political community added the Director, the ALJ, the superior court judges and finally the justices of the Supreme Court. As a constant, before the Whites filed their complaint, the legislature and the LAD were the original members of this political community. Because there were several parties who filed an amicus curia brief, the justices had to consider these groups’ point of view, as well as their actual judgments. At that point, these groups became a part of this expanding political community. The published opinion of the New Jersey Supreme Court exhibits strong evidence that the justices considered others’ point of view and genuinely engaged with the judgment of others.

²⁰⁵ R. 2:11-1 (B) (3).

There is specific evidence that the justices thoroughly engaged with the actual judgments of every member of this political community. During oral arguments, the justices asked questions that revealed they were engaging in the judgments of others. During Toms River's arguments, the justices posed many questions in order to understand the district's position. For example, one justice asked the district's counsel "What is the principled rule of law that you want us to adopt in lieu of what the Appellate Division has set?"²⁰⁶ In addition, it was apparent that the justices had read the record of testimony and the procedural history, as the written opinion included a detailed account of the case up to that point. The Supreme Court came to a unanimous, 7-0 decision. The Court upheld the most pertinent part of the previous ruling, as well as that of the Director's final determination. The justices established the fact, as a matter of law, that the LAD did indeed afford a student a cause of action for an aggrieved student such as Louis White. The Court went even further though. The justices meticulously fashioned a standard whereby a fact finder could determine the reasonableness of a school district's response to such harassment. Finally, it is quite obvious that the Court also engaged in the judgment of the school district, as it did not affirm Louis's damage award, but rather remanded the case to the Director and ALJ for adjudication in light of the newly crafted standards. In addition, the justices ordered that both parties had a right to submit additional evidence and testimony during this remanded process. The Court explained "This, we require, as a matter of fairness to the parties."²⁰⁷ Due to the fact that the justices were charged with interpreting the LAD, the Court also engaged with the statute as the actual judgment of the legislators who crafted the law. The justices were very careful to discern legislative intent. The opinion reads "We thereby further the Legislature's

²⁰⁶ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, Oral Argument WL 5985685 N.J. (2007), 6.

²⁰⁷ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 410 (2007).

objective of eliminating bias-based harassment from New Jersey schools embodied in the LAD.”²⁰⁸ This is evidence that the justices considered the viewpoints of others and engaged in all parties’ actual judgments, which is in keeping with an important aspect of Arendt’s theory of judgment.

Invisibles: Things that are absent

The Supreme Court approached their review of the appeal by considering the “invisibles” and “things” that are “absent”. This complies with Arendt’s notion of judgment as a particular type of thinking. To Arendt, this species of thinking is associated with phenomena that are not present in the physical sense.²⁰⁹ The justices, like the judges, Director and ALJ before them, did not experience what Louis and his mother experienced. They did not experience the abuse of Louis at the hand of his peers or the torment, terror heartache and frustration that L.G. experienced as a parent. The Court did not witness the school administrators’ response to Louis’s complaints or face their challenge of addressing Louis’s situation in an attempt to help him. To the justices, as was the case with the judges, the Director and the ALJ, these phenomena were invisible. The justices of this Court, however, were removed another degree further than the courts and administrators who had confronted this difficult situation prior to them. The justices did not witness the first-hand testimony of the witnesses during the ALJ hearing, nor did they have a chance to ask questions of the witnesses. These justices did not experience taking the first bold step of claiming a cause of action under the LAD, as the Director did, or creating the initial legal precedent as the superior court did. All of these experiences were things that were absent for the justices. Only through the transcripts of the witnesses’ testimony, documentary evidence,

²⁰⁸ *Ibid*, 407.

²⁰⁹ Hannah Arendt, “Thinking and Moral Consideration,” *Social Research*, 38(3), (1971): 446.

the Director's written decision, the written opinion of the appellate court and the oral arguments they heard and written briefs that were presented could the justices engage with these phenomena. The Court considered the invisibles as things that were absent. This engagement with the invisibles characterizes Arendtian thinking and judging.

Action

When analyzing the Court's opinion, one can make a strong argument that these judges were Arendtian actors. Arendt's concept of action is central to her ideas of thinking and judging. Arendt asserts that judging is a by-product of the "liberating effect of thinking."²¹⁰ In turn, she relates thinking to freedom through action, which Arendt characterizes as the pinnacle of human existence. To act is to begin something that previously did not exist.²¹¹ A human is a "beginning and a beginner" and what makes humans distinct is our ability to do something that has never been done before.²¹² The Court's opinion qualifies as Arendtian action based on this requirement. Like the legislature, ALJ, Director, and the appellate court, the Supreme Court justices were presented with the opportunity to be a beginner, and just as the Director and the appellate court judges, these justices seized it. Just as the Director and the appellate judges did, the Court granted bias-based peer harassment in the schools equal footing with workplace harassment under the LAD. The opinion states "we hold that the LAD recognizes a cause of action against a school district for student-on-student affectional or sexual orientation harassment."²¹³ With this statement, the Supreme Court justices began something that did not

²¹⁰ *Ibid.*

²¹¹ Gert Biesta, "How to Exist Politically and Learn from It: Hannah Arendt and the Problem of Democratic Education," *Teachers College Record*. 112 (2), (2010): 559.

²¹² Arendt, Hannah, "What is Freedom?" In *Between Past and Future*. Harmondsworth: Penguin, 1977), 170.

²¹³ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 389 and 390 (2007).

previously exist. While both the Director and the appellate court came to this same conclusion, the Supreme Court's affirmation officially and permanently made it the law of the land in the New Jersey. The Court's opinion was Arendtian action based on the tenet of beginning something that previously did not exist.

Disruptive Action

The Supreme Court's action can also be considered disruptive action. By affirming the appellate court's finding of a cause of action, they created a significant, disruptive legal precedent. This action abandoned traditional thought and accepted truths. By creating this important new precedent grounded in *Lehmann* and the LAD, they abandoned the status quo of applying Title IX standards and the "banister of thought" that was federal precedent. This Court even said as much, stating "we will not hesitate to depart from federal precedent if a rigid application of its standards is inappropriate under the circumstances."²¹⁴ In addition, the justices also created a standard for determining a district's liability when they established the reasonableness standard. When the justices wrote and verbally delivered this opinion, they engaged in speech. Because this Court engaged in this disruptive action through speech, they achieved natality and engendered freedom and liberation. In keeping with Arendt, the justices engaged in speech, which she asserts is a product of private thinking and in addition to creating action, gives that action meaning.²¹⁵ Because the justices engaged in speech, and through that speech created something that didn't previously exist, they therefore created true Arendtian action. As a result of this Arendtian action, the Court also engaged in genuine thinking. Arendt's

²¹⁴ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 405 (2007).

²¹⁵ Biesta, 559.

unwavering insistence that action, thinking and judging are interdependent supports the contention that, at least in this particular aspect, the justices applied Arendtian judgment.

Meaningfulness

As was noted earlier, Arendt posits that one can create meaningfulness through action. This certain type of speech, as action, actually reveals who we are as humans. Arendt writes that humans “can only make sense only to the extent that it can be spoken about...men in so far as they live and move and act in this world, can experience meaningfulness only because they can talk with and make sense to each other and to themselves.”²¹⁶ In other words, humans engage in action through speech and thereby make meaning. Obviously, the justices used speech both during oral arguments, and when they delivered the opinion. During oral arguments, the justices used speech both to ask questions in order to get a better understanding of the parties’ position, and guide the discussion. For example, at times one or both of the counsel would lead the conversation away from the main questions of the case, and a justice would bring them back. For instance, one justice tried to redirect the discussion by stating “Can I, can I try to focus on that standard...”²¹⁷ In addition, the Court’s speech made meaning by clarifying several important legal questions related to this case. Their speech established a cause of action for bias-based peer harassment in schools and a standard to assess a school district’s liability. This helped all parties, as well as other school districts, make sense of this complex issue.

The justice’s speech was not just opinion; their words conveyed meaning to all parties. Since the LAD protections within the school context had not previously been codified in case

²¹⁶ Mackler, “And Worldlessness, Alas, Is Always a Kind of Barbarism: Hannah Arendt and the Challenges of Educating in Worldlessness Times,” *Teachers College Record*. 112 (2), (2010): 520.

²¹⁷ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, Oral Argument WL 5985685 N.J. (2007), 11.

law by the Supreme Court, the justices were creating something new, and part of this newness was meaningfulness and making sense. Even when one of the parties was not in agreement with the justices, the Court's speech nonetheless rendered meaning. The justices' speech was a product of rational thinking from a legal standpoint, strongly supported with clear standards established by relevant case law, as well as the LAD itself. Because the court was able to achieve meaningfulness and make sense, the justices achieved natality and expanded freedom. The justices' use of speech in this context offers yet more evidence to support the assertion that the justices engaged in action, thinking and judging.

Liberation and Freedom

The justices of the Supreme Court seized the opportunity to create liberation and freedom through destructive thinking and judging. Arendt argues that thinking, and the resulting judgment that follows, have a destructive effect that challenges all established values and concepts of good and evil. This destructive nature of thinking and judging is also liberating because it frees humans and society from the bondage of established "truths" that mankind often accepts without much forethought. Thinking destroys customs and rules of conduct related to ethics and morals.²¹⁸ This is what makes thinking so crucial to sound judgment and decision making. When humans engage in endeavors without thought, this is dangerous. As much as Arendt asserts that thinking is dangerous, not thinking is even more so. In the absence of thinking, humans often accept and are even complicit in creating horrific conditions that become the norm and are accepted as just and right. Consequently, the lack of thinking and judging can result in opportunities lost to interrupt the status quo, destroy entrenched and harmful conditions, begin

²¹⁸ Hannah Arendt, "Thinking and Moral Consideration," *Social Research*, 38(3), (1971): 434.

something new and perhaps even prevent evil. Before the extension of LAD protections to the educational setting, our society, in essence, allowed vulnerable students to matriculate in our schools without any thought to the dangers that existed. This status quo also limited freedom and liberation because these students were not protected. The Supreme Court was given the opportunity to create liberation and freedom through destruction when they considered Toms River's appeal of the lower court's decision. These justices took advantage of this opportunity. By affirming the most important components of the opinion, the Court destroyed accepted thinking, both in the legal sense with the new precedent, but also from a policy and procedural standpoint. The way schools address the issue of bias-based harassment was permanently altered, and the practice of using the federal precedent based on Title IX's limited protections and burdensome standards was abandoned. The Court's decision was destructive, yet also liberating and promoted freedom, all Arendtian traits of action, thinking and judging.

Presence of Others

One of the most vital components of Arendt's action is that action, thinking and judging must take place in the presence of others. At each stage of this saga, the decision-makers operated in the presence of others. Even before Louis brought his case to the Division, the legislators had worked together, in the presence of others, to create the LAD. The ALJ operated in the presence of both the district and the Whites, while the Director also acted in the presence of the ALJ, as he directly responded to the judge's initial decision. The superior court acted in the presence of both parties, the ALJ and the Director. The Supreme Court acted in the presence of all parties, and indirectly, in the presence of all of society, as their opinion was felt across the state, and still continues to impact policy, procedure and litigation to this day. The Court's action impacted the entire educational and legal system in New Jersey. This opinion was rendered in the

public realm, both written and through speech. Arendt asserts that when one acts in the presence of others, this action triggers a chain reaction of actions by others.²¹⁹ The Court's decision was the catalyst for much more action, as school districts across the state reexamined their policies and procedures regarding bias-based peer harassment. The Supreme Court endeavored in the presence of others, acted and caused a chain reaction of more actions. All of these are Arendtian traits of thinking.

Discussion and Debate

It is also important to contemplate discussion and debate when considering Arendtian action in relation to the Supreme Court decision. The ALJ's initial decision, the Director's final determination and order, the superior court's decision as well as the Supreme Court's decision were all the result of discussion and debate. The justices considered the original testimony and evidence of record from the ALJ hearing, his written decision, Director's written final determination, the superior court's written opinion and the oral arguments presented before the Court. Throughout the oral arguments, there was questions and answers, as well as challenges to those answers. When Deputy Attorney General Michael claimed that the school did not do enough in response to Louis's harassment, one justice interjected "But, Mr. Michael, every time one of those incidents was brought to the attention of the school administration, they acted."²²⁰ This type of discussion and debate occurred during both side's oral arguments. In addition, the aforementioned litany of procedure leading up to the Supreme Court's review of this appeal also represents discussion and debate. Finally, Chief Justice Zazzali delivered their opinion orally and it was published. This entire process involved discussion and debate, including testimony from

²¹⁹ Hannah Arendt, *The Human Condition*, (Chicago: University of Chicago Press, 1958), 176.

²²⁰ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, Oral Argument WL 5985685 N.J. (2007), 14.

both sides, Judge Schuster's, the Director's, the appellate court's and finally the Supreme Court's. Arendt states that "debate constitutes the very essence of political life."²²¹ Bernstein states that to Arendt, debate is a form of action, and the act of public speech is also a form of action.²²² The Supreme Court, as well as all parties who participated in this proceeding, engaged in discussion, debate and argument. In this respect, Arendtian action was present in the justices' decision.

Natality

Of course, one cannot engage in discussion and debate unless it occurs in the presence of others. Speaking in the presence of others is closely related to the Arendtian notion of natality. When a human achieves natality, she or he emerges onto the world. Arendt explains, in *The Human Condition*, that speech and action "are so closely related because the primordial and specifically human act must at the same time contain an answer to the question of every newcomer, "Who are you?" In other words, humans reveal who they are through their speech as action. Conversely, Arendt asserts that speechless action is not true action because without speech, nothing is done. There is no actor or "doer of deeds". If one is to be an actor, one must also be a speaker.²²³ Like the Director, and appellate judges, the Supreme Court justices engaged in speech, and through speech represented action because they created something new. The justices employed speech to create action and achieve natality. This is yet another example of how the justices engaged in Arendtian action.

²²¹ Arendt, *Between Past and Future*, 241.

²²² Bernstein, 222.

²²³ Arendt, 158.

Work and Labor

Although Arendt held action in the highest esteem within her hierarchy of human existence, it can also be helpful to use the other two components, work and labor, to assess the Court's decision. The Court's endeavors share traits of action, work and labor, but when examined holistically in relation to action, the justices' efforts exhibit many more traits of action than either work or labor. This further supports the assertion that the Supreme Court engaged in Arendtian thinking and judging. According to Arendt's definition of labor, it is made up of things that sustain life. Labor is necessary to maintain our biological existence.²²⁴ Viewed through this lens, the Supreme Court's decision is not labor because the decision is not life sustaining. The one tenable argument for the case of the Court's opinion being life-sustaining would be the following. It could be argued that the Court's opinion helped maintain an environment where vulnerable students of all protected classes are safe. For proof of the real physical danger of attending school in a biased environment, look no further than Louis White's experience. In addition though, if one considers Maslow's hierarchy of needs, if these students do not feel physically and psychologically safe, it is very difficult for them to learn, achieve and succeed. Not achieving academic success can lead to a long life where sustaining one's biological existence is a daily struggle.

Another characteristic of Arendt's labor is that it does not create anything. The fruits of labor are consumed and nothing else remains.²²⁵ The Supreme Court's action, their decision in the White case, is the most permanent, more so than that of the ALJ, Director and superior court. Other than the legislature's action that resulted in the LAD, this Court's decision is probably the

²²⁴ *Ibid*, 143.

²²⁵ *Ibid*.

longest lasting. The Court's opinion was not consumed. It created an important precedent that has become the law of the land in this state, and in perpetuity. In addition, this precedent lives on and has often been used in subsequent anti-discrimination cases. The ruling is also part of a historical record and even lives on as a guide for policy makers and researchers. There is strong evidence that the justices' endeavors were not labor but rather action.

The other component of Arendt's hierarchy is work. Approaching a phenomenon using Arendt's labor-work-action construct is often confounding. Arendt asserts that work results in objects that endure for a time period beyond the humans who create them.²²⁶ Even after its maker has deceased the product of her or his work remains. As I noted when discussing this decision through the lens of labor, the Supreme Court's decision in the White case will likely be in effect perpetually, long after the makers, these justices, are gone. In addition to the opinion's status as an important legal precedent, it is also a historical legal document, as well as a matter of record. The Court's opinion is, in all likelihood, the most pivotal part of this entire case, and it is also a part of Louis White's story. In this respect, in addition to the court's endeavors qualify as Arendtian action, it also qualifies as Arendtian work.

The Supreme Court justices' decision also exhibits other Arendtian traits of work. She posits that work creates objects with an end goal, purpose and instrumentality.²²⁷ The Supreme Court's purpose is clearly articulated and codified. As mentioned previously, the function of the New Jersey Supreme Court is to hear and review judicial decisions of the lower courts. The Rules of Court states, "Appeals may be taken to the Supreme Court from final judgments as of

²²⁶ *Ibid*, 158.

²²⁷ Chris Higgins, "Human Conditions for Teaching: The Place of Pedagogy in Arendt's Vita Activa," *Teachers College Record*. 112 (2), (2010): 413.

right...”²²⁸ In plain language, the New Jersey Rules of Court state that the Court’s primary purpose is to come to a final conclusion. Not only is this Court charged with assuring that the lower courts did not make a legal error in their decision, the Court is often asked to give a final answer to an important legal question that has broad implications across society. The end goal, the purpose, the Court’s instrumentality is not only to be the final arbiter of the dispute at hand, but often to create important legal standards and set precedents that will both guide various entities’ policies and procedures, but also guide future litigation when similar circumstances are presented before the courts. In this particular case, the opening lines of this opinion revealed the Court’s end goal and purpose, which was twofold, “we must determine whether a school district may be held liable under the New Jersey Law Against Discrimination ... when students harass another student because of his perceived sexual orientation...” The Court also explained that if there is a cause of action under these circumstances, the justices also must decide “what standard of liability governs such a cause of action.”²²⁹ The overarching goal, in general terms, is to settle the dispute at hand and establish legal standards for future, similar litigation, both of which are meant to insure justice. As in the *White* case, this Court will often settle the overarching question of legal standard related to the interpretation of state statute or the state Constitution and remand to the lower courts to seek a final resolution that is consistent with the current opinion and newly established legal standards. There is little doubt that the endeavors of the justices, both in this particular case, and generally speaking, contain an end goal, purpose and instrumentality, all of which are traits of Arendtian work.

²²⁸ R. 2:2-1 (a).

²²⁹ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 389 (2007).

Particulars and Universals

Often, when using Arendt to analyze a phenomenon, it is difficult to come to a definitive conclusion. Often, the focus of the analysis contains some traits of Arendtian judgment, while other traits are less obvious, or downright absent. This is the case when analyzing the Supreme Court's opinion through the lens of particulars and universals. Of all the traits of Arendt's thinking and judging, operating in the realm of the particulars and not the universals may be the most critical. Judgment assumes no pre-established consensus to a phenomenon.²³⁰ In general, all judicial proceedings, including appeals to the Supreme Court, are committed to hearing the viewpoints of others and the particulars that they reveal. At the same time, legal opinions lean heavily on previously established legal precedent. One can argue that employing precedent is the ultimate use of the universal, but at the same time, precedent can also be posited as a particular.

I have argued, and will do so hear, that the courts' use of precedent actually epitomizes focusing on the particular. At the same time, once a precedent is identified as germane to the case at hand, it is supposed to be applied universally to all similar cases. Precedent is composed of a similar ruling, or several rulings of similar cases, that over time, evolve into a precedent that establishes new legal standards to answer new and previously unanswered legal questions. These cases have specific characteristics that are used and applied to future, similar cases. These precedents create legal standards by which future, similar cases are decided. The argument for precedent as the particular is as follows. The use of precedent in judicial proceedings relies on very specific aspects of prior rulings. These can be considered particulars due to their specificity.

²³⁰ David L. Marshall, "The Origin and Character of Arendt's Theory of Judgment," *Political Theory*, 38(3) (2010): 369.

The justices are not merely blindly applying a precedent to a similar case. They go through a rather meticulous process of examining the particulars of the case at hand to see if its particulars are similar enough to the precedent to be applied. Thus, although there exists a standard that could be viewed as having universal traits, the very specific details of each case forces attorneys, jurists and jurors to think the particular. Also, the specifics are applied to the particulars of a singular case, and on a case-by-case basis. This, one could argue, is the essence of thinking the particulars. Conversely, jurists adopt universal truths based on the legal standards and theories that emerge from proceedings. In this sense, precedent is applied universally to specific classes of similar cases. If the same legal question is presented before the court, then the precedent is applied, but the judges shift the focus of their thinking to the specifics of the case at hand. In other words, while the precedent itself presents universal truths, the way those truths are applied to the case at hand, compels jurists to think the particulars as they employ these universal truths.

Precedent can be applied universally to the particulars of a case without violating Arendt's insistence that thinking and judging operate in the particular. For example, a judge, justice or jury considers the particulars of the case in question and then decide if the law, case or statute, or Constitutional principle has been violated. It would seem that this process reflects thinking the particular, which, of course, Arendt demands. Marshall notes that, for Arendt, "To judge something well is simply to know it in the light of a particular context."²³¹ Therefore, the process that I have described above would seem to comport with this species of Arendtian judgment. Even a cursory reading of virtually any of the Courts opinion, of which I have ready many, evidences an extremely thorough consideration of evidence and testimony of record, case law, the statute relevant to the case at hand. In addition, in the case of this Supreme Court

²³¹ *Ibid*, 384

considering the White case, the justices' intense and thorough inquiry addressed to counsel reveals careful and thorough consideration of the particulars. In other words, before rendering their opinion in the White case, they knew "something well...in the light of a particular context."²³² Arendt throws a slight wrench into this argument when she asserts that because judgments are outside the realm of proof, one cannot use a universal theory to validate a judgment, but rather can only make a specific claim about a specific phenomenon. Therefore, it is challenging to assert that any court of law fully complied with her notion of thinking the particular versus the universal, in its purest form. In the context of a legalistic society, not unlike the one in which we live, a final judgment, resolution and a decision that leads to subsequent action must be made. We demand that "proof" support any legal decision. The justices who ruled in Louis's case knew this case very well. Despite this conundrum, a strong argument can be made that this Court, in this case, thought the particular.

There is further evidence that the justices of the Supreme Court thought the particular. They did not blindly affirm every aspect of the appellate court's ruling. They rendered a rather balanced opinion, which reflects a careful consideration of the particulars presented by all parties involved. For example, the Court carefully used case law and the wording of the LAD to affirm the lower court's finding of a cause of action under the LAD. This was not done without an in depth analysis of both the statute and case law, but also the particulars of the events in Toms River that were under consideration. Again, when the Court established the reasonableness standard to determine a district's liability, this was carefully and thoughtfully presented, supported by the particulars of the White case, the statute itself and case law. At the same time, the justices displayed measured judicial restraint, as well as evidence of considering all the

²³² *Ibid.*

particulars by not affirming the lower court's finding that Toms River was liable in the White case, and as a result, the Court also did not affirm Louis's damage award. Instead, in the name of due process and fairness to both parties, this Court remanded the matter to the Director and Office of Administrative Law for further proceedings that were consistent with the newly minted standards in the opinion. In this instance, the Court very clearly thought the particular.

Thinking for the Prevention of Evil

Arendt asserts that the act of thinking and judging may actually be an inoculation against evil doing. The Court's opinion, and the process by which they reached it, qualifies as this type of evil-preventing thinking. Arendt suggests that evil results from the inability to think critically and reflectively about one's own actions.²³³ If thinking results in the prevention of evil, and presented here is strong evidence that these justices practiced this type of thinking, then this Court used thinking to prevent evil, and there is evidence to support this assertion. First, the Court recognized that the type of harassment to which Louis was subjected was indeed evil, and a substantial problem in New Jersey schools. The justices noted that "Commentators underscore the insidious existence and detrimental effects of peer sexual harassment in our schools."²³⁴ The Court, in their oral and written opinion, recognized this particular form of evil. One could argue, therefore, that one of the intents of this court was to prevent evil. In addition, the pursuit of justice, in broader terms, is also a pursuit to prevent evil. The Supreme Court is designed to be a place where the non-prevailing party in litigation or a criminal case can seek redress. The Court is designed to safeguard against an arbitrary or unjust decision on the part of the lower courts. The very purpose of the existence of this Court is to prevent evil. Louis White filed a complaint

²³³ Hannah Arendt, "Thinking and Moral Consideration," *Social Research*, 38(3), (1971): 418.

²³⁴ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 401 (2007).

because he had suffered at the hands of evil; both from his peer tormenters as well as the negligence of Toms River in their failure to stop and prevent his harassment. Like the Director and the appellate court, the justices seized the opportunity to engage in the type of thinking that could prevent similar, future evil to Louis, as well as the thousands of students throughout New Jersey that suffer a similar fate, and future generations of students to come.

Like the Director and the appellate court, the Supreme Court prevented evil by expanding LAD protections to prevent bias-based peer harassment in the school setting. The legislature's intent in enacting the LAD was to prevent evil. The director and his agency were given the power to enforce the provisions of the statute, and the appellate court furthered that cause. In the White case, the Supreme Court also prevented evil. By affirming these protections, the Court used thinking and judging to prevent evil. Also, by not expanding their opinion to the point of affirming the appellate courts finding of liability of Toms River, and the accompanying damage award, it can be argued this was also thinking to prevent evil. Instead, the court created clear guidelines and established standards for this case to come to a final resolution in light of their opinion. The can be viewed as thinking to prevent evil because they wanted to insure that their opinion did not create an injustice, a particular type of evil. It is possible, by affirming the appellate court's ruling in its entirety, the Court could have created an injustice, and instead of preventing evil, the Court would have been the progenitor of evil. This further evidences that the Court used thinking and judging to prevent evil.

Not only did Arendt posit that thinking could prevent evil, but she also focused on thinking the particular to prevent evil. She posed the question, "could the activity of thinking, as such, the habit of examining and reflecting upon whatever happens to come to pass, regardless of specific content...could this activity be such a nature that it 'conditions' man against evil

doing?²³⁵ Just as the ALJ, Director and the appellate judges, the Supreme Court justices considered particulars of Louis's case in order to prevent evil. They reflected and considered the viewpoints of others. Ultimately, the ALJ chose not to prevent evil, despite having access to the same particulars as the other fact finders. The Director, appellate judges and the justices chose to prevent evil, even though they focused on similar particulars and arrived at slightly different conclusions. The ALJ chose to focus on different particulars or aspects of particulars and arrived at a far different conclusions, as well as findings of facts for that matter. The Director, the judges and the justices focused on similar particulars, and as a result, the outcome of thinking the particulars yielded similar results. To one degree or other, their thinking resulted in the prevention of evil, both through the establishment of expanded protections for the LAD and by avoiding injustice through a misapplication of legal standards, or without proper due process given the newly minted standards. A strong argument can be made that the justices on the New Jersey Supreme Court engaged in Arendtian thinking and judging to prevent evil.

Moral Judgment

Arendt believes moral judgment is not really judgment at all. She was loathed to associate ethics and morality with judgment. From a traditional, western way of thinking, imbued with morality, it is reasonable to conclude that creating more freedom by expanding the protections of anti-discrimination law is morally and ethically sound. Based on this way of thinking, modern thinkers might immediately conclude that the Supreme Court's decision was the morally "right" thing to do. One cannot analyze the Court's opinion in moral terms and remain in compliance with Arendt's theory of judgment. Arendt's thinking ran counter to

²³⁵ *Ibid.*

traditional western thought by eliminating morality from the realm of judgment. She asserted that judgment is the most political of all actions, and felt strongly that morality had no place in politics.²³⁶ Therefore, to Arendt, morality had no place in judgment. Although Arendt was heavily influenced by Kant, she abandoned Kant on this point as she fashioned her own theory of judgment. Kant believed that judgment was, in part, “the ability to tell right from wrong.”²³⁷ To him, judgment is “... the faculty of thinking the particular under the universal” and that judgment is ultimately determinative. In other words, Kantian judgment subordinates the particular to the universal.²³⁸ Arendt obviously disagreed with this because to her, moral law is the universal that guides moral action in all particulars, regardless of the specifics of those particulars, and therefore results in determinative, rather than reflective judgment. Since Arendt insisted that one cannot subsume the particular under the universal and moral law as universal subsumes the particular, there can be no moral law with which to judge all particulars.²³⁹ Moral judgment is determinative, and therefore is based on a moral agent who has moral imperatives and only has to apply these set of static rules to very unstable and ever-changing phenomena to arrive at sound judgment. Arendt rejected this notion.²⁴⁰

So this begs the question; is there evidence that the justices on the Supreme Court acted as moral change agents, with a moral imperative, blindly applying a static set of unbending rules

²³⁶ *Ibid*, 446.

²³⁷ R.J. Bernstein, "Judging-the Actor and the Spectator," in *Philosophical Profiles*, (Philadelphia: University of Pennsylvania Press, 1986), 221-23.

²³⁸ Immanuel Kant, *Critique of Judgment*, trans. and with analytical index by J. C. Meredith, (Oxford: Clarendon Press, 1964), 10.

²³⁹ Benhabib, 37.

²⁴⁰ Marshall, 380.

to a variety of particulars? I argue there is no evidence of that. Because the judges thought the particulars and did not subsume the particulars under the universal, they did not practice moral, determinative judgment. Even though the LAD inherently has moral traits; fairness, justice, inclusion, opportunity for all; the law is not blindly applied as a set of unchanging, static rules. To the contrary, the LAD, like so many statutes, has evolved as the courts have established legal standards to make sense of the law, and it has also evolved through amendment. The Supreme Court's end goal, purpose and instrumentality, as discussed previously, possess what we would consider moral traits similar to the LAD itself. However, because these justices thought the particular and focused on relevant precedent, they did not moralize as they rendered their opinion. The Court's decision reflected a meticulous process of review, going through each relevant aspect of the record. The Court also carefully reviewed numerous of cases for precedent and guidance in fashioning their opinion and establishing the standards therein. In short, the justices did not engage in determinative, moral judgment, but rather they engaged in reflective judgment. Arendt notes that determinative judgment is always preceded by reflective judgment. Arendt even holds up the English and Roman legal system, on which this state and country's own legal system is based, as exemplars of reflective judgment. One first assesses whether a law, statute or that derived from precedent, applies to a certain case, and then the case is studied. Through that study, the particulars of the case are extrapolated into that law using reflective judgment. This is the process the justices followed in the White case. Although from a liberated, modernist viewpoint, one might immediately conclude that the Court made a morally "right" decision, Arendt would have no use for such dichotomous and morality-laden analysis. In this case, however, the Supreme Court justices did not engage in moral judgment.

Reflective Judgment

In essence, this entire discussion and analysis of Arendtian judgment has been a discussion of reflective judgment. It is important, however, to discuss this further. In the realm of Arendt's theory of judgment, reflective judgment is the only true judgment. Reflective judgment cannot occur without the presence of others. For Arendt, there is no individual, isolated thinker practicing true judgment.²⁴¹ The justices' opinion complies with this tenet of Arendtian judgment. Our court system recognizes the importance of this trait. The appellate court decision, as well as the opinion of the Supreme Court was not made in isolation. First, the appellate court was part of a three-judge panel. The Supreme Court was made up of seven justices. This case began in the private realm; in the mind of L.G., Louis's mother. Arendt explains that true action happens when an idea leaves the private realm of the mind and subsequently emerges onto the world.²⁴² After the Whites filed their complaint with the Division, the internal dialogue left the private self and entered the public realm. This action created a chain reaction of others' actions. Once the idea was introduced into the world, the world was invited to consider it and possibly agree. ALJ Schuster and the school district, while invited to engage in this idea, this judgment, did not agree. The Director, appellate court and the Supreme Court, to one degree or other, did agree with this idea L.G. brought into the world. Arendt is fairly flexible on this point. In order to qualify as Arendtian judgment, there only has to be the *potential* for agreement because that potential opens up the possibility of true judgment. This is why thinking and judging cannot be done in isolation. This process, Arendt explains, involves the doer going public to "transcend

²⁴¹ Arendt, Hannah. "The Crisis in Culture." In *Between Past and Future*. Harmondsworth: Penguin, 1977), 220-221

²⁴² *Ibid*, 221.

individual limitations.”²⁴³ It is impossible to transcend individual limitations if the individual remains isolated with their private thoughts. There is no possibility for agreement and therefore no possibility for judgment unless the idea is presented to the world. The Whites offered this idea first to the school district, then the Director, the ALJ, then back to the Director, then the appellate court and ultimately to the Supreme court . All considered the perspective of others. Schuster did this through testimony and evidence, the Director through testimony and evidence found in the record, and the appellate court as well as the Supreme Court did so through the record, oral arguments and written briefs. All parties, including the Whites, Toms River, the ALJ, the Director, the Superior Court, Appellate Division, and the Supreme Court offered their perspective for consideration. The consideration of others’ perspective, this emergence of an idea onto the world, into the public realm, evidences that the Supreme Court justices’ process for rendering their opinion and the newly established legal standards therein was reflective judgment. Without considering others’ perspective, for Arendt, true reflective judgment, “never has the opportunity to operate at all.” This trait was present in the Supreme Court’s opinion.

Arendt posits that reflective judgment’s ultimate goal is not to persuade everyone to have the exact same beliefs. She asserts that judgment’s goal is to improve perception by consistently heightening the awareness of that makes one particular different from all the other particulars that share common characteristics. The process that concluded with the Supreme Court’s opinion involved several components that contributed to improving perception and heightening the awareness of the distinct nature of similar particulars. The Court reviewed the record from the ALJ hearing, the Director’s final determination, the appellate court’s decision; written briefs filed by both parties and actively participated in the oral arguments. In addition, the court read

²⁴³ *Ibid.*

copious amounts of case law, in light of the particulars in this case, to find shared characteristics with other cases. All of these contributed to reaching Arendt's goal for judgment; to improve perception by consistently making one aware of what distinguishes one particular from all other particulars that share some similar characteristics. At the same time, the Court was also able to improve its own perceptions and enlightened the perceptions of all participants, as well as the larger legal and educational community, including other jurists, legislatures and other policy makers, boards of education, superintendents, other administrators, faculty and staff, students, parents and researchers. Not only were the justices exposed to others' perspectives, they were also the recipient of a heightening of their own awareness of the distinctiveness of the various particulars in this case that share common traits. In addition to being exposed to all of the perspectives of the parties involved in this particular case, the justices were also exposed to the perspectives of the legislature as well as the judges and justices of whose case law informed their opinion. By considering all of these perspectives and carefully dissecting the appellate court's decision, the court was able to improve perception of all stakeholders, present and future. This process of perception improvement and heightened awareness of the distinctiveness of similar particulars is such a critical component of Arendtian judgment, and was very much present in the Court's opinion.

Viewing the Supreme Court's opinion through the lens of Arendt's theory of judgment is informative. The process that the justices employed, as well as the opinion itself, complies with many tenets of Arendtian judgment. The justices engaged with the possible and actual judgments of others, which Arendt refers to as common sense. They also considered the invisibles while formulating their decision. The Court had to consider events and realities that they did not personally experience. A key piece of evidence that this Court practiced Arendtian judgment is

that they were Arendtian actors. The justices created something new with this ruling, including precedent, legal standards and more protection for vulnerable children in our schools. This opinion was also disruptive. The Court's ruling changed the rules and abandoned the status quo. The justices employed speech to render meaning and make sense of the LAD and the issue at hand, and they did this in the presence of others through discussion and debate. While the justices' endeavors also shared a few traits with Arendt's concept of work and labor, overall, it is apparent these justices were Arendtian actors. The Court rendered its opinion by examining the particulars, and avoided universal thinking. Instead, their analysis, and ultimately the outcome of their opinion operated in the particular. This ruling also exhibited thinking for the inoculation against evil. By using Arendtian thinking and judging, the justices prevented evil. The Court also avoided moral judgment. They did not employ a universal, moral law to guide their decision making. Their judgment was not determinative, but rather it was reflective. By operating in the particulars, in the presence of others, all the while engaging in the judgment of others, the justices heightened the awareness of the similar characteristics of the relevant particulars. In short, the justices engaged in Arendtian judgment.

Chapter Summary

Even though the Director of the Division on Civil Rights had rejected virtually every aspect of the ALJ's initial decision, Louis's battle was not finished. The Toms River Regional Schools would not accept the Director's final determination and order and appealed to the New Jersey Superior Court, Appellate Division, as was its right under a provision in the LAD. In addition to the Whites and the school district, several child advocacy/civil rights group, including the American Civil Liberties Union, were also invested in the outcome of Louis's case and filed an amicus curia brief on Louis's behalf. Thomas E. Monahan argued the case for the district, and

James R. Michael, Deputy Attorney General for the State of New Jersey argued on the Whites' behalf. The appeal was heard by a three judge panel. The opinion of the court was delivered by Judge Yannotti.

In the first section of the opinion, the judge stated the purpose of the appeal, which included the district challenging the Director's finding of a cause of action against the school district under the LAD based on bias-based peer harassment. The district also appealed the Director's equitable relief and compensatory damages. This court affirmed in part, reversed in part and remanded for further proceedings. The judge then proceeded to summarize the procedural history, the facts of the case and the Director's conclusion of law and order. The court refuted the district's claim that the Director had erred in declaring the LAD covered the type of harassment in question. The judges pointed out that the statute explicitly enumerates public schools as a protected public accommodation, and it also explicitly states that sexual orientation is a protected characteristic. This was the first time a state court in New Jersey had recognized such a cause of action, and the court's action set a monumental legal precedent that would influence thousands of students and public educators for years to come.

The court stated that the same principles established by *Lehmann* for workplace harassment should be used to determine if bias-based peer harassment has created a hostile educational environment in a public school. Essentially, if a student who is a member of a protected class is the victim of bias-based peer harassment based on sexual orientation, and that harassment is severe and pervasive enough that a reasonable member of the same protective class would perceive the environment as hostile or abusive, then a hostile educational environment has been created. The appellate court stated that they did not believe that the state legislature, when

crafting the LAD, intended for students in the public schools to have less protection than adults in the workplace.

The court then addressed the standard of liability that should be used to determine if a school district is liable for the type of harassment previously discussed. Again, this court turned to *Lehmann* for the standard of liability, thereby rejecting the district's claim that the Title IX standards, established in *Davis*, should be used. That standard a district is only liable for student-on-student sexual harassment if the harassment is so severe and pervasive that it denies the victim access to an educational opportunity. In addition, that severe and pervasive harassment would have to be virtually ignored by the district. Under the Title IX *Davis* standard, a district is only liable if they displayed deliberate indifference to the harassment, and the district had actual, not constructed knowledge of the harassment. This court rejected this standard, saying it would be inappropriate to use it under the LAD. The *Davis* standard is much more burdensome than *Lehmann*, and again, the judges reasoned that the legislature did not intend for students in a public school be subjected to a more burdensome standard than adults in the workplace.

The judges continued, noting that with *Davis*, an aggrieved person must prove intent to recover monetary damages, whereas with the *Lehmann* standards, a plaintiff only needs to establish negligence on the part of the district. Also, the two laws were written for different intent. Title IX was established through Congress's spending power established by the Constitution. Essentially, preventing sexual harassment is a condition for receiving federal funding; virtually a contractual obligation. Conversely, the LAD was established with the express intent of protecting the state's citizens' civil rights. The court determined that using

Lehmann standards would further the legislature's intent to eliminate discrimination from our society.

The judges next addressed the Director's finding that there existed a hostile school environment. The judges enumerated several of the incidents of harassment that Louis suffered, and found that there was a hostile school environment, and a reasonable member of his protected class would also find the environment hostile or abusive. The court disagreed and reversed the Director's finding that there was a school-wide and district-wide hostile environment, citing that there was no evidence to support this finding. Judge Alley dissented, and argued that Louis was not subject to a hostile school environment. The judge asserted that the harassment was only occasional and not pervasive, and that the administrators' actions prevented a hostile environment for Louis.

The court next turned to the Director's finding that Toms River was liable for Louis White's harassment and resulting hostile school environment. The Director had found that the district's preventative measures were inadequate, based primarily on the fact that the written materials and lectures did not explicitly state that harassment based on sexual orientation was a violation that would not be permitted. The judges disagreed and reasoned that the district's written policies and procedures made it very clear that harassment of any kind was prohibited, and it did mention harassment that was sexual in nature, assault and harassment of any kind. Since some of the Louis's harassment was sexual in nature, this court found that the district's preventative measures were adequate, were not a basis for compensatory damages and reversed this finding.

The court then turned to the district's efforts to end Louis's harassment. The Director found that the district knew of Louis's harassment, but failed to take effective measures to end it. *Lehmann* defined effective measures as being those that are reasonably calculated to end the harassment. Timeliness of a district's response is also a factor in determining reasonableness. Louis suffered nine incidents in less than a three-month period. The court felt that there was enough evidence to support the Director's finding that the administrators' measures were not effective. Despite the discipline measures failing to end the harassment, the administrators continued employing the same approach, which continued to leave Louis vulnerable to further harassment. The court, while rejecting the idea that there was a school-wide hostile environment, the judges did find enough evidence to support the Director's finding that the district's delay in ending the harassment was unreasonable.

The judges also affirmed the Director's finding that the district did not effectively respond to the two assaults that Louis suffered in September of his freshman year. The District was on notice from Louis's middle school experience that he was vulnerable to attack when he entered the high school. When Louis was physically assaulted the first time, the administrators took action by suspending the student who punched Louis, but the accompanying students received no discipline. In addition, the suspension did not deter, as Louis was attacked in less than two weeks later. Again, only the student who assaulted Louis was suspended. Despite the availability of security guard escort to off-campus lunch, the school placed the burden of Louis's safety on him, advising him to ride the bus and eat lunch on campus. The judges stated that this was inappropriate because Louis had the same right as any other student to take his lunch off campus free from harassment or discrimination. The district also argued that they did not deny Louis an educational opportunity; instead his mother chose to withdraw him. The court stated

that the mother's action was reasonable because the school had proven that they would not protect Louis and she feared for his safety. Judge Alley, again dissented, arguing that there was no evidence of how other districts handle similar issues and so it is impossible to determine if Toms Rivers measures were reasonable or not. Nonetheless, the majority was convinced that other districts' methods were irrelevant, and that Toms River's measures were inadequate and not reasonable, thus affirming the Director's finding on this count.

In the Director's final determination, he ordered several equitable remedies related to anti-discrimination policies and procedures. The appellate court found that the Director did not have the authority to order the various remedies he imposed. In addition, the court noted that the Commissioner of Education had already put in place regulations that addressed the Director's concerns, requiring each district to create an educational equity policy and a comprehensive equity plan, all aimed of insuring a bias-free educational environment for New Jersey's students. In addition, the legislature had already addressed many of the Director's other concerns by enacting the HIB law in 2002. Finally, the court found no evidence of a district-wide problem with bias-based peer harassment. Due to these measures already being in place, the court overturned the Director's order in this regard.

The Director awarded compensatory damages of \$50,000 to Louis and an award of \$10,000 to his mother L.G. While they affirmed Louis's award, the judges overturned L.G.'s. The court rejected the district's argument that the \$50,000 was excessive and affirmed this, since it is clearly supported by amendments made in 2003 in the LAD. The judges also determined that they could apply this amended stipulation in the statute. Because the matter was pending when the law was enacted, the judges determined that the legislature intended the amendment be applied. The court supported its affirmation of Louis's award by citing sufficient evidence that

Louis was subjected to severe humiliation, embarrassment and indignity to warrant the damages. At the same time, the court determined, under the LAD, L.G. was not an aggrieved person and therefore could not receive compensatory damages.

Despite both the Director of the Division on Civil Rights and the New Jersey Superior Court, Appellate Division, finding that the LAD provides a cause of action for bias-based peer harassment and finding that Toms River was liable for Louis White's discriminatory harassment; the district was undeterred and appeals the lower court's decision to the New Jersey Supreme Court. Because there was a dissent in the appellate court, as a matter of law, the district was granted a hearing before the highest court. Toms River asked the Court to certify the appellate court's finding that there is indeed a cause of action against a school district under the LAD for student-on-student harassment based on sexual orientation, and determine the standard of liability to assess if a district should be held liable.

On February 21, 2007, the New Jersey Supreme Court delivered its opinion in the Louis White case. Chief Justice Zazzali read the opinion on behalf of the court. He explained that because of the LAD's "broad statutory language is clear, we hold that the LAD recognizes a cause of action against a school district for student-on-student affectional or sexual orientation harassment."²⁴⁴ The Court also found that a school district can be held liable for such harassment "when the school district knew or should have known of the harassment but failed to take actions reasonably calculated to end..." the harassment.²⁴⁵ The Court noted that these findings would further the legislature's intent to eliminate discrimination from our society and the public

²⁴⁴ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 390 (2007).

²⁴⁵ *Ibid.*

schools. The Court also stated that its intent was that this decision would encourage school districts to take proactive steps to protect all the children in their care.

The first question the Court addressed was whether the LAD recognized a cause of action for student-on-student harassment based on perceived sexual orientation. The justices turned to the straightforward language of the statute itself. It very clearly states that no one in authority, such as an employer, manager, superintendent etc. will deny, withhold, refuse etc. access to any public accommodation due to a number of protected characteristics, including “affectional or sexual orientation.” In addition, the justices noted, the LAD specifically enumerates specific public accommodations that are covered under the law, which includes all K-12 public schools. In short, the justices determined that it was clear that the legislature intended for the LAD to provide its protections to public school students who are subjected to bias-based peer sexual harassment.

The prevalence of peer sexual harassment, as noted in a study published in a law review article, as well as the legislature’s work in creating the HIB law, made it clear to the Court that this decision will help address a major issue in the public schools. Because of its broad goal as a remedial statute, the Court was confident that the LAD did provide this cause of action. The Court also determined that a district is liable if it fails to take reasonable measures to end the harassment, and the district’s failure to do so results in the denial to the harassed student any educational “accommodations, advantages, facilities or privileges.”²⁴⁶ The Court noted that this was the only sensible conclusion and that the right of a student to obtain an education in an

²⁴⁶ N.J.S.A. 10:5–12(f).

environment free of sexual harassment is just as important as the rights of an employee in the workplace.

Having established that the LAD does recognize a cause of action for bias-based peer harassment in schools, the Court next moved to addressing under what circumstances a school district would be found liable for such harassment. A student can make a claim if the discrimination would not have happen if the student was not a member of a protected class, and a reasonable person of that same protected class would also consider the harassment severe or pervasive enough to create a hostile school environment, and the school district failed to take reasonable measures to end the harassment.

The Court determined that the standards in *Lehmann* should be used to determine if a school district is liable. While the *Lehmann* opinion established three circumstances where an employer could be found liable, only one of these three apply to student-on-student bias-based harassment in the public schools. This, in part, read that there is liability “when the employer has actual or constructed knowledge of the harassment...” but failed to take effective measures to stop the discrimination.²⁴⁷ The Court also defined “effective measures” as those that are reasonably calculated to stop the harassment.

The justices then refuted Toms River’s argument that the appropriate standard should be the Title IX standards established by the U.S. Supreme Court in *Davis*. With this standard a district is only liable for student-on-student sexual harassment if the harassment is so severe and pervasive that it denies the victim access to an educational opportunity. In addition, that severe and pervasive harassment would have to be virtually ignored by the district. Under the Title IX

²⁴⁷ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 403 (2007).

Davis standard, a district is only liable if they displayed deliberate indifference to the harassment, and the district had actual, not constructed knowledge of the harassment. This Court rejected the use of the deliberate indifference standard and adopted the *Lehmann* standard, noting that they find need to impose a separate standard for workplace harassment and another for similar harassment in the public schools.

The Court noted many differences between Title IX and the LAD, and these differences make applying the LAD and *Lehmann* to this case the logical step to take. First, Title IX only prohibits discrimination based on sex, as opposed to the LAD that lists a host of protected characteristics. Title IX is part of a funding contract; its primary purpose is a stipulation for receiving federal funding. The LAD was created for the express purpose of guaranteeing the state's citizens' civil rights. These protections apply to all public accommodations, regardless of their funding source. The courts have established only an implied right to private action, whereas the LAD explicitly gives victims the right to file a private cause of action in order to attain a host of equitable remedies. Finally, the deliberate indifference standard is very burdensome for the aggrieved person, and this Court determined that students in the schools are entitled to as many protections as adults in the workplace. The justices stated that using the *Lehmann* standard, somewhat modified, is also consistent with New Jersey's well-established policy of protecting children.

The modified *Lehmann* "standard requires that a school district may be found liable under the LAD for student-on-student sexual orientation harassment that creates a hostile educational environment when the school district knew or should have known of the harassment,

but failed to take action reasonably calculated to end the harassment.”²⁴⁸ The court took care to note that with this ruling they did not create a strict liability standard. As the court stated, “a district is not compelled to purge its schools of all peer harassment to avoid liability.”²⁴⁹ In doing so, the Court recognized that there will be a degree of harassment in schools, but what the law requires is that schools do all they can to prevent it, and when harassment is discovered, take action that is reasonably calculated to end the harassment.

Next, the Court had to establish standards to guide fact finders when assessing the reasonableness of a school district’s response to a hostile educational environment. Because children in the school are indeed different than adults in the workplace, fact finders must consider the harassment case “in light of the totality of the circumstances.”²⁵⁰ The Court also directed those investigating these cases to consider the students’ ages, maturity level, school culture, history of harassment, frequency or rareness, duration, extent, severity etc. as well as the effectiveness of the district’s response. The justices also recommended that districts seek guidance from the DOE, which regularly issues and updates model policy crafted to prevent harassment, intimidation and bullying. Finally, the Court recommended that fact finders may need to seek expert advice to assist in determining the reasonableness of a district’s response.

With a standard now in place for determining a district’s liability under the LAD for bias-based peer harassment, and having provided guidance on how fact finders should proceed when assessing the reasonableness of a district’s response to such harassment, the Supreme Court determined that the White case should be remanded to the Director of the Division on Civil

²⁴⁸ *Ibid.*

²⁴⁹ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 407 (2007).

²⁵⁰ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 408 (2007).

Rights, with the direction that the Director refer the case to the Office of Administrative Law (OAL). Since the current record of the case was established before the reasonableness standards were created during this appeal, the Court remanded, with direction that both parties be allowed to supplement the record and be heard in light of the newly established standards. The Court acknowledged that Toms River attempted to respond to Louis's harassment without the benefit of the DOE's current guidance and without any direction from the HIB law that was established in 2002. Even so, the justices said that an assessment of Toms River's response may still be guided by what the DOE currently advises regarding district responses to such harassment. The Court also stated that each party should be given the opportunity to submit expert testimony as to what a reasonable response would have been during the time period of Louis's harassment.

Hannah Arendt's theory of judgment can be used to analyze the various aspects of the opinions of the appellate court and New Jersey Supreme Court. A major underpinning of Arendt's theory is her idea of "common sense", which is the ability to engage in the possible and actual judgments of others. The nature of the appellate court's function is to consider the viewpoints of others. During the appeals process, both sides in a case present briefs and oral arguments. Through this process, the appellate judges weigh all aspects of the record and consider the actual judgments of others. Throughout this proceeding, the court evidenced a meticulous review of all the evidence. In addition, the judges also engaged in a detailed legal analysis using precedent from relevant case law. In addition, the judges did not accept the Director's final determination in whole, further evidence that this court considered the viewpoints and judgments of both sides in this case. The court's endeavors in respect to engaging in the judgment of others qualify as Arendtian judgment.

The judges and justices also approached their review of this case with an eye toward the invisibles and things that are absent. This aligns with Arendt's notion of judgment as a particular type of thinking. The judges and justices were charged with deciding an appeal without seeing or experiencing any of the events that led up to the appeal. Members of these courts did not experience Louis's abuse, or L.G.'s frustration and heartache as a parent who was trying to help her child. The judges and justices did not witness the administrators struggling to address the problem and find ways to help Louis. Nor were the members of these courts faced with the initial challenge of deciding whether the LAD covered this type of harassment. Throughout this process, the judges and justices had to contemplate the invisible, which characterizes Arendtian thinking and judging

When analyzing these courts' opinions, one can make a strong argument that these judges and justices were Arendtian actors. Arendt asserts that judging is a by-product of the liberation that results from thinking. Freedom is achieved through action. To act is to begin something new. When one speaks and acts to begin something new, they emerge into the world and achieve natality. These judges and justices began something new; new protections for vulnerable students under the LAD, and a new legal precedent to guide future policy, procedures and litigation. This action was also disruptive. The judges' and justices' decision to recognize a cause of action under the LAD destroyed conventional thinking, which, in this case, was using the Title IX standards established in *Davis* to assess student sexual harassment cases. By replacing this standard with the *Lehmann* standard, these courts disrupted conventional thinking. In addition, the Supreme Court justices created a new standard to determine a school district's liability, as well as guidelines for determining the reasonableness of a district's response to the harassment. This disruption also created liberation and freedom, also Arendtian traits of action. The judges

and justices acted through speech, which Arendt posits is necessary in order to create action. The courts acted to create meaning and make sense. The courts' process of arriving at their opinion, as well as the opinion itself provided clarity and made sense of the White case, as well as similar, future cases.

One of the most is vital components of Arendt's action is that action, thinking and judging must take place in the presence of others and involves discussion and debate through speech. The appellate court and the Supreme Court acted in the presence of others. The judges and justices engaged in the both the ALJ's and Director's decision, and the Supreme Court also engaged with the appellate court's opinion. By doing so, both engaged with the record of testimony and evidence presented by both sides in this dispute. In addition, the courts also acted in the presence of others during oral arguments, as both sides in the dispute submitted briefs and were afforded an opportunity to be heard. These oral arguments were highlighted by discussion and debate, as both sides presented their arguments, the judges and justices also asked questions and challenged some of counsel's assertions. The judges and justices also delivered their opinion in the presence of all parties involved. These courts also acted in the presence of all state courts, as well as school districts, policy makers, researchers etc. These courts' action in the presence of others triggered more action by others. All of these evidence Arendtian traits of acting, thinking and judging.

Many Arendtian traits of action can be found in the endeavors of the appellate judges and Supreme Court justices, but their activities also share some traits of Arendtian work. However, traits of Arendtian labor are not present in the justices' or judges' activities. Labor is made up of things that sustain life and maintain our biological existence. The endeavors of these courts clearly did not sustain life. In addition, labor does not create anything. All that labor yields is

consumed, and nothing is left behind. The product of these courts' opinions was not consumed. The protections under the LAD afforded by way of these opinions, as well as the legal precedent that was set, are still standing to this day, and probably will be in perpetuity. The precedent set in this case has been used in subsequent anti-discrimination cases throughout the United States. These opinions also serve as a matter of historical record. Neither of these courts' opinions possesses traits of Arendtian labor.

The judges' and justices' activities share some traits with Arendtian work. Arendt asserts that work creates objects that endure beyond the humans who create them. These objects "outlive" their creators. This decision has outlived one of the three judges on this appellate panel, as Judge Alley passed away in 2013. Most likely this opinion and its impact will outlast all three judges on the appellate court and all seven justices on the Supreme Court. It continues to exist as a legal precedent, and as a guide for school districts and policy makers. The protections under the LAD that the opinion established are still in place, and it is memorialized as part of a historical record. Another Arendtian trait of work that the judges' and justices' decisions share is that it had an end goal and purpose. Both the Supreme Court's and appellate court's purpose was very clear; to insure that the lower courts did not err in their ruling and create an injustice. This is exactly what the judges and justices did in the White case. The Supreme Court, specific to the White case, had to answer two questions; did the LAD recognize a cause of action under the LAD for bias-based peer harassment, and if so what standard of liability determines if a school district is liable for such harassment? This is very clearly a purpose, end goal and instrumentality. Despite these courts and their opinions possessing many traits of Arendtian action, they also share some traits with Arendtian work.

One of the most important aspects of Arendtian thinking and judging is that it must occur in the realm of the particular and not the universal. Although one could look at both of these courts' heavy reliance on legal precedent as a universal application of the law, the process is actually characterized by thinking the particular. All courts use precedent to some degree, but it is not blindly applied to a similar case. The process by which judges and justices use precedent to help form an opinion is thinking the particular. The judges and justices consider the specifics of each case and then compare it to former cases to find traits that the case at hand has in common with the precedent. It is only through carefully examination of the intricacies of both the case at hand and the precedents under consideration do judges and justices apply a precedent. In the case of both the Supreme Court and the appellate court, there is evidence that the judges and justices thought the particular and did not subsume the particular under the universal. The appellate judges did not simply accept the Director's final determination and order in whole, nor did the justices simply accept the appellate court's opinion in whole. The court used precedent to both affirm some parts of the decision and overturn other parts. The courts arrived at these decisions by carefully examining the particulars of the record, legal theory, the LAD itself and relevant case law. By doing so, these courts arrived at balanced decisions that was the result of examining the particulars. The judges and justices thought the particular. They did not hesitate to depart from federal precedent or the decisions that were under appeal. They allowed the particulars to guide their opinion.

Thinking and judging, and thinking the particular, Arendt asserts, may very well be an inoculation against evil. Both courts' opinions and the process by which they arrived at the opinions qualify as this type of evil-preventing thinking. The product of their opinions also prevented future evil, in the Toms River Regional Schools as well as districts across the state, by

expanding LAD protections to all students in the public schools. This furthered the intent of the legislature to eradicate discrimination from our society. In addition, by rejecting the provisions of the Director's order that were unjust, the appellate court prevented evil by eliminating an injustice, which is a form of evil. In addition, by remanding the case to the Director and the ALJ for adjudication using the newly-established standards, the Supreme Court prevented evil by eliminating a potential injustice, which is a form of evil. The courts acted as a safeguard against an arbitrary or unjust decision. This was accomplished because the judges and justices considered all of the relevant details available to them and thought the particular, which resulted in the prevention of evil.

In Arendtian terms, judgment laced with morality is not true judgment. Arendt is very reluctant to associate judgment with ethics and morals. Although one could conclude that creating more freedom by expanding a law that fights discrimination, as the morally "right" thing to do, Arendt would give little credence to any rationale based on morality. Judgment is the most political of all human actions, and she was adamant that morality had no place in politics. Therefore, judgment, in her assertion, could not be based on moral values. Using these values, or a moral law, necessitates subsuming the particular under the universal because moral law is a universal that is applied to all particulars. Because this type of judgment is determinative, Arendt rejects moral judgment. There is no evidence that either the appellate court or the Supreme Court practiced moral judgment. They did not blindly apply a set of static rules to a variety of particulars.

When Arendt writes about judgment, she is referring to reflective judgment. This type of judgment must occur in the presence of others. True judgment cannot happen in isolation. A private thought leaves the mind and is introduced to the world through speech. It is offered in the

public realm for consideration and possible agreement. This is the process that occurred in this proceeding. L.G. originated this when her idea left the private realm and she filed the complaint. This triggers a chain reaction of actions, which resulted, up until this point, the appellate court considering her idea for possible agreement. The courts considered the perspectives of all parties involved. This process furthered judgments goal, which is the heightening of awareness of what makes one particular different from other particulars that share similar characteristics. The consideration of others' perspective, this emergence of an idea onto the world, into the public realm, and improved perceptions all evidence the courts practiced reflective judgment.

CHAPTER SIX: CONCLUSIONS

Louis Finally Obtains Resolution

After approximately eight years, the Whites received the opinion from the New Jersey Supreme Court that they had been waiting for. Although the Court did not rule on Toms River's liability or Louis's damage award, the Whites' pursuit of justice had resulted in a monumental legal victory for all queer youth in New Jersey's public schools. All of the torture that Louis endured did not happen in vain. This ordinary teenager had catalyzed extraordinary changes in how New Jersey public schools protected some of the more vulnerable students of our state. The Supreme Court settled once and for all the question of the auspices of the LAD in regards to the public schools. The Court held that the LAD recognizes a cause of action against a school district for student-on-student affectional or sexual orientation harassment if the district does not take reasonable measures to end the harassment. When assessing a school district's liability, a fact finder must determine whether the district, with actual or constructed knowledge of the harassment, took actions reasonably calculated to end the harassment. More specific to Louis's case, it would take one more hearing with the ALJ for him to finally get personal justice.

Finally, on February 25, 2013, Craig Sashihara, Director of the Division on Civil Rights, rendered his Final Decision and Order by adopting Chief Administrative Law Judge Laura Sanders' initial decision, which found that the Toms River Regional Schools Board of Education failed to take reasonable action to remedy the hostile school environment in which Louis was subjected to severe and pervasive peer harassment based on his perceived sexual orientation in violation of the Law Against Discrimination. Because of the findings of the appellate court and Supreme Court, the only question remaining before the ALJ was "whether the District's response

to a hostile educational environment was reasonable.”¹ The ALJ heard the testimony of two educational experts who testified as to what a reasonable response to Louis’s harassment would have been during the 1998-2000 timeframe. As could be expected, the expert for the State, on behalf of the Whites, and the expert for Toms River were at loggerheads. The district’s expert witness claimed that the Toms River’s response was reasonable given the circumstances and time period, while the State’s witness noted that the sheer number of first time offenses should have alerted the administrators that the progressive approach was not working and a different approach was warranted.² The ALJ was not convinced by the district’s argument, and found that Toms River’s measures to end the harassment were not reasonable. The Director agreed and ordered remedies congruent with the ALJ’s ruling and his adoption of that ruling.

In 2004, the Director had granted a stay of the payment ordered that year, but allowed interest to continue to accrue on both the emotional distress damages and the attorney fees. The ALJ awarded Louis the “present day value” of \$50,000, which included \$18,269.86 in post-judgment interest for a total of \$68,269.86. The ALJ imposed a statutory penalty on the district for \$10,000. In addition, Toms River was ordered to pay \$28,175.75 in attorney fees to the state, plus \$10,242.36 post-judgment interest on those attorney fees for a total of \$38,418.11. In total, the Louis White affair cost Toms River Regional Schools \$116,687.97, plus their own counsel fees. The Director adopted the damages award, statutory penalty, counsel fees and accrued interest.³ Sashihara closed his discussion with this statement which echoed the Supreme Court’s opinion in this case, “The law does not demand that school districts shelter their students from

¹ LW v. Toms River Regional Schools BOE, Craig Sashihara, Director, Division on Civil Rights February 25, 2013, 6.

² *Ibid*, 6-7

³ *Ibid*, 17.

every single instance of peer harassment. It does, however, require each school district to take reasonable measures to protect those under its watch. In the case of L.W., the District fell short of that requirement.”⁴ And they paid dearly for that failure. Interviewed after the Director’s final decision was announced, Louis, 27 at the time of the decision, said he was grateful to finally have the matter resolved. Louis told the *Star Ledger* that he filed the suit almost fourteen years ago hoping it would force Toms River Regional Schools to change the way it handles bullying.⁵

Revisiting the Research Questions

This dissertation presented a historical and legal case study of the Toms River School District’s handling of the Louis White case. The role of judgment in school leaders’ decision-making appeals to my own sensibilities as an educator who is convinced that providing a high-quality education to all children is an imperative, and that practicing reflective judgment on the part of school leaders is inextricably linked to this imperative. School leaders are called upon to use their judgment to make hundreds of decisions each day. These administrators do not operate in a vacuum. The field of education is heavily influenced by policy makers, government officials, legislatures and the courts. Often, the decisions that school leaders make have a significant impact on the lives of many students. In addition, some of the judgments and decisions administrators make can have dire legal consequences for their school districts. Operating in this legal and political “education ecosystem” can be challenging for school leaders.

As the basis of my conceptual framework, I used the political thought of Hannah Arendt. Arendt is generally recognized “as one of the most original and influential political thinkers of

⁴ *Ibid*, 15.

⁵ “Toms River board of education to pay former student \$68K in bullying case,” *New Jersey Record* (N.J.), February 28, 2013.

the twentieth century...”⁶ For the purposes of this study, I attempted to provide an in-depth analysis of the Louis White case, of which the legal battle began in 1999 and was concluded in 2013 when Louis finally recovered damages for the discrimination that he suffered. I attempted to analyze various aspects of each stage of this legal saga through the lens of Arendt’s *Theory of Judgment*.

Through this project, I have presented a history and analysis of the various aspects of Louis’s struggle. It is my hope that this work will contribute to this ongoing dialogue. I attempted to address the following research questions:

1. What was the chain of events in the Louis White case that ultimately led to the establishment of LAD protections for students who are victims of bias-based peer harassment?
2. To what extent do the decisions and actions of lawmakers, school administrators, jurists and the Director of the Division on Civil Rights embody the characteristics of Arendtian judgment?

The Writings of Hannah Arendt

In the political arena that is the American public schools, many vital decisions and choices that affect thousands of students are made by a few very powerful people. Hannah Arendt’s political thought is a relevant companion with which to think about and analyze the thinking, decisions and judgments of these individuals.

⁶ Dana Villa, “Introduction: the development of Arendt’s political thought,” in Dana Villa, ed., *The Cambridge Companion to Hanna Arendt* (Cambridge, UK: Cambridge University Press, 2000), 1.

Arendt's writing on education per se is sparse. One main point of emphasis for her is that education has contributed to modern society's continued alienation from the world. She felt very strongly that politics should be kept separate from education, and this was particularly true for public education—although in the U.S. Arendt's stance could be seen as anachronistic. In Arendt's view, schools have moved away from teaching students about the world to teaching about life. This has led to wordlessness because the emphasis on life has subordinated the world and action to work and labor.

Arendt spent most of her professional life focusing on how thinking relates to evil. In essence, she believed that evil results from the inability to think reflectively about one's actions. This line of thinking is what led to Arendt's controversial conclusions about the Nazi atrocities. For Arendt, sound judgment cannot occur without thinking and when judgment occurs without thinking, individuals make poor decisions, sometimes with tragic consequences. Drawing from Kant, Arendt theorizes that using sound judgment can help political entities facilitate decisions based on the consideration of diverse viewpoints. This position relates to Arendt's conception of "common sense," which she views as the ability to engage with the judgments of others.

Arendtian thinking and judging are inextricably linked, yet at the same time separate and distinct. Arendt proposes that judging is a certain type of thinking that occurs in the political realm. She also views judging as a byproduct of thinking. In short, Arendtian judgment can be thought of as thinking in the political world. One crucial aspect of Arendt's theories is that both thinking and judging operate in the realm of the particulars and not in the realm of universals. Judgment occurs without any pre-established notion in response to a particular situation. An Arendtian thinker is not in pursuit of a universal truth or certainty, but rather "general communicability" and agreement within a plurality. Judgment is therefore only about one

particular situation and has no implication for any other situation. As a result, we cannot create any “moral propositions or commandments, no final code of conduct.”

Arendt did not think of judgment and its consequences in moral terms. This stance was very different than the accepted Western notion of good and evil. Arendt was adamant that morality had no place in politics. This is where Kant and Arendt parted ways, since he believed that the purpose of judgment was to discern right from wrong. When Arendt refers to judgment, she is referring to reflective judgment. This is yet another point where Arendt and Kant differ. Whereas Kant’s reflective judgment focuses on the individual, Arendt’s reflective judgment is based on consensus. This reflective judgment is synonymous with political judgment and it can only happen in the presence of others. Real judgment requires the potential for agreement, which must then lead to action. For Kant, reflective judgment is merely for thought, appreciation and contemplation. For Arendt, real judging has to happen in public and result in some political action.

Since Arendt closely links judgment with action, it makes sense that some writers have turned to Arendt’s theory of action to piece together a more complete theory of judgment. In order to do this one must concede that judgment is more closely associated with the political tradition than the philosophical. For Arendt, action is defined as political action so it stands to reason that Arendt’s concept of judgment is closely tied to action rather than mere contemplation. Thinking is not the end, but rather the means by which one practices Arendtian judgment, which ultimately leads to action.

Some argue however that Arendt’s later writings mark a shift of emphasis from actor to spectator. These writers propose that after 1971, Arendt’s concept of judgment was no longer

focused on the deliberations of political action but rather judgment as reflection on what has already taken place. One approach to reconcile these dichotomous and frankly perplexing contradictions is to view thinking and judging as integral parts of debate. I argue that speech itself is political action. If debate is action, and Arendt is correct that debate is the highest form of political action, then one can analyze political actors' judgments based on this construct. When attempting to use Arendt's thought on judgment and analyze the contemporary political realm, it may be a more complete approach to use her idea of both actor and spectator, which may lead to a richer portrayal of events.

The Law Against Discrimination

The case of *L.W v. Toms River Regional Schools* is a landmark case that forever changed the way schools in New Jersey respond to student-on-student harassment. The backbone of this case is the Law Against Discrimination. Essentially the courts determined that the LAD not only protects employees in the workplace, but also students in the New Jersey public schools. Despite aggressive efforts by the school district to quash the case, Louis White and his mother doggedly pursued their action, insisting the LAD indeed protected students from harassment by their peers. Ultimately the Supreme Court of New Jersey agreed, and as a consequence, every school district in the state was compelled to reexamine their harassment policies, especially those that addressed harassment based on sexual orientation or perceived orientation.

The original law, enacted in 1945, was the first statewide anti-discrimination statute in the country.⁷ The legislation created the Division on Civil Rights, which was empowered by the

⁷ State of New Jersey Office of the Attorney General, *New Jersey Against Discrimination: April 16, 1945-2005" Comments of J. Frank Vespa-Papaleo*, http://www.state.nj.us/lps/dcr/happy_bday_lad.html (accessed January 31, 2015).

law to prevent and eliminate discrimination. The Division is composed of the Commission and the state's attorney general. While the commissions' role seems to be limited, the law grants the attorney general broad and extensive powers and duties. The attorney general investigates all claims of discrimination. He/she appoints a director of the division who is empowered to act on the behalf of the attorney general. The law gives the director broad powers to facilitate the investigation of complaints. Essentially she/he is authorized to use any of the discovery procedures that are allowed in a court of law.⁸ In short, the director through the attorney general is equipped with the power and authority to enforce the LAD.

The LAD was intended to be the "law of the land" in the state and cover a broad swath of society. The legislature also made it clear that the statute was intended to be used liberally. The lawmakers who created the original law intended to eradicate current discriminatory practices and also prevent future mistreatment. Essentially every class of marginalized citizens, as well as every public space, is covered by the law.⁹ The LAD not only renders discriminatory practices illegal, the law contains provisions to make sure the statute could and would be enforced. For example, provisions added through amendments insure that victims of discriminations would have a right to a jury trial and damages, both compensatory and punitive. The LAD also imposes fines for those who are found to have violated the law.¹⁰ These amendments insured that if anyone engaged in discriminatory practices, they would pay for it.

Another important aspect of the LAD is that it provides a broad definition of public accommodation. One section lists over 60 specific types of places where the LAD prohibits

⁸ N.J.S.A. 10:5-8.

⁹ N.J.S.A. 10:5-3.

¹⁰ *Ibid.*

discrimination and this includes public schools.¹¹ In this particular section, it is made clear that a public school is a place of accommodation, and that “affectional orientations” is included as a protected class of citizens.¹² This is a term that the lawmakers went to great lengths to specifically define. The inclusion of affectional orientations would prove crucial in the eventual outcome of the Louis White case.

The LAD contains provisions that clearly delineate the procedures for filing a discrimination claim. A claimant can initiate an investigation in two ways. The complainant can seek relief by filing a claim in Superior Court or through the Division on Civil Rights. If a complaint is filed with the director, as Louis White did, then the director must decide if there exists probable cause. The accused, or respondent, then has to answer the complaint. If the director rules in favor of the complainant, the respondent must “cease and desist,” and if the violations resulted in an economic impact, the director may award damages. If either party is not satisfied with the final order of the director, they may appeal the ruling to the Appellate division of the State Superior Court.¹³

One can detect many characteristics of Arendt’s concepts of thinking and judging. Arendt’s reflective judgment has two main characteristics; judging in terms of the particular and the idea of “common sense,” which is the ability to engage with the judgments of others.¹⁴ The enactment of the law in 1945 is an example of how the legislature engaged in thinking and

¹¹ N.J.S.A. 10:5-1 (l).

¹² N.J.S.A. 10:5-1 (hh).

¹³ N.J.S.A. 10:5-21.

¹⁴ David L. Marshall, “The Origin and Character of Arendt’s Theory of Judgment,” *Political Theory*, 38(3) (2010): 368.

judging. This entire process involved considering points of view other than one's own. These lawmakers considered the perspectives of their fellow lawmakers as well as the various classes of people the LAD is intended to protect. In writing the law, the legislature tried to imagine as many particulars as possible that the law could address mainly by being very specific in regards to what particular forms of discrimination the law covered.

Arendtian thinking and judging can also be detected in the LAD by considering her concept of action. To Arendt, judging is a byproduct of the "liberating effect of thinking."¹⁵ She relates thinking to freedom by way of action. Acting is beginning something new that didn't previously exist.¹⁶ The LAD can be viewed as action because it was a beginning; it did not previously exist, nor did its protections. The process of creating the law is also action. Speech is a byproduct of thinking and speech gives action meaning. Speech is used during debate, and one can reasonably assume the lawmakers debated through speech during the construction of the law. Perplexingly, the law also exhibits some features that would also characterize it as Arendt's idea of work. This is yet another example of how difficult it is to neatly classify human phenomena using Arendt's theories.

Arendt insisted that both thinking and judging operate in the realm of particulars and not universals. The entire legislative process embodies this notion. As a representative governing body, it considers the opinions of both its members as well as the constituents the lawmakers represent. In addition, in relation to the LAD, the focus on the particulars is spelled out in a verified complaint. Arendt insists that thinking about the specific phenomenon results in good

¹⁵ Hannah Arendt, "Thinking and Moral Consideration," *Social Research*, 38(3) 446.

¹⁶ *Ibid.*

judgment and the prevention of evil. Clearly, the very purpose of the LAD is the prevention of evil.

Yet, viewing any phenomenon, including the process and product of this statute in moral terms proves problematic for Arendt. She posits that judgment and thinking have nothing to do with morality, and she argues against the concept of moral judgment. When maintaining an argument that the LAD is representative of Arendtian thinking and judging, it is difficult to argue that the law does not have a moral and virtuous objective. The phrasing of certain sections of the law implies morality. For example, the phrase “civil right” is used throughout the law, and the statute contains the word “morals.” It is clear that in this aspect, with the obvious presence of morality, one cannot easily assert that the LAD is representative of Arendtian thinking and judging.

Dismissing moral judgment, Arendt asserts that the only valid type of judgment is reflective judgment, which she equates to political judgment. Judgment cannot be practiced in isolation, but rather, only in the presence of others. Through the process of creating the LAD, the New Jersey legislature practiced reflective judgment. Anti-discrimination legislation began in the mind of an individual, but eventually this concept became the subject of discourse and debate. This evolution from private to public is the genesis of reflective judgment in relation to the construction of the LAD. This process represents an informed account of all those judgments, all those particulars that came before. These particulars, and the resulting judgments, would prove to be absolutely vital in Louis White’s quest for justice.

The ALJ's Initial Decision

Since elementary school, Louis White had suffered persistent harassment at the hands of his classmates. Finally, frustrated by the district's inability to end Louis's abuse, L.G. filed a complaint with the Division on Civil Rights on March 12, 1999. Within the first few weeks of his high school career, the harassment had escalated to physical attack. At this point, Louis's mother had lost all confidence that Toms River Regional Schools could keep her son safe, and so she withdrew Louis from the school system. The initial legal filing began a legal battle that lasted eight years, and with the New Jersey Supreme Court's favorable ruling for the Whites, every school district was compelled to revisit their harassment policies. This decision extended the protections afforded by the Law Against Discrimination to student-on-student harassment, essentially granting school children the same protection that the law provides to adults in the workplace.

This case began once the Director determined that the Whites had a cause of action and subsequently referred the case to the Office of Administrative Law (OAL). The OAL is an independent agency created to expedite due process in administrative proceedings. These proceedings are heard by Administrative Law Judges (ALJ), and cases are referred to this office by the various agencies that make up the executive branch of the New Jersey state government. An ALJ only hears cases referred by a director of one of these agencies. Litigants cannot file a request for a hearing directly. Oral arguments, as well as documents may be submitted as evidence, and contestants may cross-examine witnesses and submit rebuttal evidence if the ALJ allows it. Once the hearing concludes the ALJ issues a recommendation to the referring director to review. This decision is not final or binding, and the director can adopt the decision as is, modify it or outright reject it within 45 days of receipt.

It was within the confines of the Office of Administrative Law that Louis White truly began to fight back. While the outcome of Judge Schuster's initial decision was disappointing to the Whites, it does signify a turning point in Louis's saga. As a result of Schuster's decision, in which he found in favor of Toms River, there was no expansion of LAD protections to students. This, however, was only a temporary setback. Eventually the Director on Civil Rights would reject Schuster's decision. That phase of Louis's story will be discussed in chapter four.

Louis and his mother, referred to in court documents as L.G., filed a verified complaint with the Director on Civil Rights on March 12, 1999. The complaint claimed that Louis was the subject of repeated harassment by fellow students, and that this harassment was based on Louis's perceived sexual orientation. The claim also state that the Toms River Regional School district did not take corrective action in response to multiple complaints reported by White to school administrators. The Whites also claimed that the district violated the state's Law Against Discrimination by denying White access to public accommodation due to the district's inaction. As a result, the district failed to protect Louis's civil right to attend public school and "receive all the benefits of an educational opportunity."¹⁷

On August 14, 1999, five months later, the Toms River School District responded by filing an answer denying the allegations of discrimination. The Director of the Division on Civil Rights found probably cause on July 10, 2000, and noted that the district's initial responses to the abuse "were not sufficiently prompt, effective or remedial."¹⁸ The hearing with the

¹⁷ LW v. Toms River Regional Schools BOE, John Schuster III, ALJ April 26, 2004.
http://njlaw.rutgers.edu/collections/oal/html/initial/crt08535-01_1.html (accessed November 20, 2015).

¹⁸ Schuster, 2.

Administrative Law Judge (ALJ), the Honorable John Schuster III, took place on March 26, April 1 and April 15, 2003. Both parties submitted evidence and provided witnesses.

In the section of Schuster's written decision entitled "Testimonial Review," the judge described his observation of witnesses and stated his findings as to the credibility and reliability of the testimony. Schuster then went on to summarize the testimony of each witness representing both sides in the case. The judge began with Louis's testimony, which chronicled the abuse he suffered from his time at the elementary school, South Toms River School, through his short tenure at Toms River High School South, his transfer to Red Bank Regional High School and finally the Career and Technical Institute in Ocean County.

Louis's mother, his aunt and a long-time friend of Louis testified. Louis's mother emphasized that his abuse started when he was ten years-old and in fifth grade. An incident in fifth grade resulted in the class writing letters of apology. She said she was aware of the middle school handbook's stated sexual harassment policy, and that she did not make any claims of harassment until after the humping incident. L.G. requested a meeting with school administrator, but the administrator responded that she was too busy to meet. L.G. resorted to writing a letter to Ms. Benn concerning the incident. L.G. testified that she felt that the administrator was somewhat indifferent, and in general, she did not think the school was doing enough to remediate the harassment. L.G. also described the incidents of physical assault that occurred at the beginning of Louis's first year of high school. She spoke to the vice-principal, who told her he would administer discipline to Louis's attackers, and he also suggested that Louis take the bus home instead of walking. After the last physical attack at the 7-Eleven, the school suggested that Louis stay on campus for lunch so that the school could protect him. L.G. testified that she no

longer felt that the Toms River Schools could keep Louis safe so she withdrew Louis from the district.

The written decision then goes on to chronicle the testimony of district officials. Ann Baldi, the district's affirmative action officer, testified that the district does have a written anti-sexual harassment policy, which is presented in school and published in the student handbook, as well as the district's manual. Baldi also noted that the seventh grade students were lectured on the policy. Baldi explained the safety plan upon which L.G. and the administrators agreed, and she stated that both Louis and L.G. seemed satisfied with the action. Baldi testified that she followed up during Louis's eighth grade year and did not hear of an incident again until the attacks in September of Louis's first year of high school.

Ms. Benn, the vice-principal, also discussed the handbook rules regarding harassment and discipline, as well as the accompanying assemblies at the beginning of each school year. She stated that administration explained that abuse based on sex or sexual preference was explained to the students during the assemblies. Benn also noted that Louis's case was the only case she was aware of that the school had encountered. She explained that she did not become aware of Louis's plight until the humping. Benn then proceeded to chronicle the sequence of incidents, and her description was consistent with Louis's account.

The last two witnesses for Toms River were Lawrence McCauley, assistant principal at the high school, and John Gluck, assistant superintendent of high schools for the district. McCauley detailed the September incidents. He explained that he had not been briefed on Louis's history of abuse, and did not have any knowledge of Louis until the September 11, 2000 incident. He explained that he immediately suspended the violent student and offered busing to

Louis. Again, when McCauley was made aware of the 7-Eleven incident, he suspended the offending student for ten days. At that point, he recommended that Louis eat lunch on campus, and McCauley suspected discrimination so he contacted the affirmative action officer. He then stated the procedure of presenting the harassment policy to students at the beginning of the school year. Gluck's testimony indicated that he knew nothing of Louis's plight until he received the request for transfer from L.G. He also arranged, upon the approval of the board of education, to pay for some of the transportation cost for Louis's commute to Red Bank. Gluck informed L.G. that Louis could still participate in extracurricular activities at South, and he could arrange for Louis to graduate with his original class.

In the "Findings of Facts," section of his written decision, Judge Schuster states what he finds as the reliable facts based on the testimony and other evidence. This essentially summarizes all of the testimony. In subsequent phases of this legal saga, the Director and appellate courts take issue with some of his findings. For the purpose of this chapter of the dissertation, these findings are what I have used for my analysis.

In the "Legal Analysis" section of Schuster's decision, he states his decision and explains that he does not have the authority to create a cause of action under the LAD in the White case. To support his decision, Schuster cites *S.P. v. Collier High School* as a precedent where the state recognizes a district's negligence for student-on-student conduct that negatively affects a student's educational experience. At the same time, Schuster cites *K.P. v. Corsey* to support his claim that Title IX standards should govern Louis's case, as opposed to the LAD. *Corsey* did not involve student-on-student harassment, but rather a district employee harassed K.P. The court found Corsey, the student's track coach, liable, but did not find the district liable. Since *Corsey* was decided in federal district court, and not in the New Jersey state courts, the federal judge in

the case was hesitant to abandon a federal standard. The judge in the *Corsey*, Joseph Irenas, explained that since the state court had not expanded the LAD protections to the schools, the federal court had to predict what the New Jersey Supreme court would do if faced with this case. As a result, Irenas looked at the state court's decision in *Lehman v. Roys R Us, Inc.* In this landmark workplace harassment case, the New Jersey Supreme Court relied heavily on Title VII, part of a federal statute. Therefore, Irenas predicted that the state court would also rely heavily on federal statute if it were to hear *Corsey*, and therefore used Title IX in determining its ruling. Judge Irenas set a precedent in student harassment cases by applying the much broader Title IX standards to student-focused sexual harassment. The "notice and deliberate indifference standard" was used to determine the district's liability in *Corsey*, and as a result, the district was not found liable. Only Mr. Corsey, their agent, was found at fault. Judge Schuster chose to use this federal standard, as opposed to the much stricter LAD standards, in the *White* case. Therefore, he ruled in favor of the Toms River Regional School District.

When analyzing Judge Schuster's legal decision in light of Arendt's theory of judgment, it is difficult for one to declare unequivocally that the judge's endeavors do or do not qualify as Arendtian judgment. Arendt insisted judgment had to involve her concept of "common sense." This term, as Arendt defines it, is the ability to engage with the possible and actual judgments of others. At first glance, the judicial proceeding would encompass considering things from points of view other than one's own. A judge inherently considers things from other's point of view. Schuster considered the testimony of many players. He defined the issue at hand as if the district did enough to prevent Louis's right to public accommodation being violated. The other big question to be decided was whether the right to public accommodation and a public education are protected under the law Against Discrimination. When he summarized what he determined to

be reliable and credible testimony, these statements represent his perspective and viewpoint. These statements also show evidence that he considered the viewpoints of others via their testimony. This is an Arendtian trait of judging.

Schuster also approached the case with an eye toward dealing with the invisibles and things that are absent. Arendt asserts that the notion of judgment is a particular type of thinking. This type of thinking is associated with phenomena that are not physically present. Schuster was dealing with invisibles. He did not witness the abuse, the administrator's responses, L.G.'s responses, or the impact that this abuse had on Louis. This forced the judge to consider things that are invisible and absent.

Because Arendt links thinking and judging with acting, it is important to assess Schuster's endeavors in light of Arendt's concepts of action, labor and work. Arendt claims that action is a by-product and an effect of thinking. In turn, she relates thinking to freedom through action, which Arendt considers the zenith of human existence. To act is to begin something new; to do something that has never been done before. Judge Schuster had an opportunity to engage in Arendtian action. By ruling in favor of White, he could have created new protections for students guaranteed by the LAD, but he chose not to do so. Deciding in Louis's favor also would have created an important legal precedent that did not previously exist. Arendt asserts that speech is the product of private thinking, creates action and gives action meaning. Even though Schuster engaged in speech, he did not truly act or judge. Although he used speech in the presence of others and engaged in discussion and debate, that speech was meaningless because Schuster did not create anything new.

Viewing Schuster's decision in light of Arendt's concepts of labor and work offers more perspective. Arendt explains that work creates objects of relative permanence, things that outlive their creator. Schuster's decision endured for only 90 days. Once the Director rejected his decision and sided with White, that which Schuster created no longer existed, other than as a matter of legal and historic record. Though his decision had purpose and instrumentality, the fact that it was overturned by the Director renders this purpose and instrumentality void. Regarding labor, Schuster's endeavors do not qualify as such. Labor creates things that sustain life. Clearly, the judge's decision does not do this. On the other hand, labor does not create anything and is consumed. Once Schuster's decision is nullified, it became nothing, and in a sense, it was "consumed" by due process. In short, Schuster's decision does not qualify as Arendtian work, labor or action.

Another important aspect of Arendtian judgment is the concept of particulars and universals. Judgment demands focusing on the particulars. There are no universals to guide judgment and decision-making. Arendtian judgment rejects the notion of pre-established consensus to a phenomenon. Legal proceedings are somewhat dichotomous in this regard. Judicial proceedings are dedicated in part to hearing viewpoints of others and the particulars they share. At the same time, legal decisions rely heavily on precedent, which was the case with the ALJ's decision in the White case. Judicial procedures, like the one which is the focus of this dissertation, share traits of both the particular and the universal. The use of precedent relies on very specific aspects of former rulings. These could be considered particular due to their specificity. These specifics are applied on a case-by-case basis through the careful examination of the particulars of the case in question. Perhaps this is the essence of thinking the particular. On the other hand, judges adopt universal truths based on legal theory that emerge from precedents.

In this sense, precedents have universal application to specific cases. These shared characteristics are confounding and complicate any assessment of Schuster's decision in terms of particulars and universals.

When considering Arendt's notion of using thinking to prevent evil, as it related to the Schuster decision, one can make a definitive claim. Schuster, through his ruling, chose not to prevent evil. Louis had suffered unequivocal evil at the hands of his peers. Whether or not Schuster's endeavors qualify as Arendtian thinking and judging is not as clear-cut, it is clear that the outcome of Schuster's decision failed to prevent evil. The ALJ had the opportunity to engage in the type of thinking that could have prevented similar future evil from occurring in schools throughout New Jersey. Schuster chose not to do so. If one focuses on the outcome of Schuster's analysis, as opposed to the process by which he arrived at his decision, it is clear that the judge did not engage in the type of Arendtian judgment that would prevent evil. Despite a modicum of evidence of Arendtian thinking during these proceedings by the ALJ, Schuster chose not to use this process to prevent evil. In regards to morality, Schuster seems to have complied with Arendt's insistence that morality has no place in practicing good judgment. Ironically, though traditional thinking would equate preventing evil with sound moral judgment, Schuster's decision not to prevent evil complies with Arendt's tenet that thinking and judging must remain free of moralizing.

For Arendt, the only true judgment is reflective judgment. Schuster's endeavors share some traits of Arendt's idea of reflective judgment. Schuster's decision did not occur in isolation, but rather in the presence of others. Although the ALJ did not initiate Arendtian action due to the nature of a judge's role, once the Whites went public with their idea, the judge did become a part of Arendtian action. Once initiated, Schuster reacted. He considered the viewpoint of others

through testimony. There existed the potential for agreement. Arendt explains that judgment's goal is not complete agreement but to improve perceptions by examining phenomenon in the light of particulars. The process in which Schuster engaged did just that. The very nature of adjudication through the Office of Administrative Law is about considering the particulars. Differences of opinion are not eliminated, but those opinions are made clearer. Throughout the hearing, perceptions were enhanced. All parties involved, including Schuster, were offered the opportunity to reflect and improve perceptions. In the end, it is simply not possible to make a definitive claim, one way or the other, whether Schuster practiced pure Arendtian judgment.

The Administrators and Arendtian Judgment

One can also consider the district administrators' endeavors through the lens of Arendtian judgment. The concept of considering particulars as opposed to universals in order to engage in "common sense" is an important aspect of Arendt's theory of judgment. On the one hand, administrators did this. Whenever Louis or his mother lodged a complaint, the administrators listened and considered their point of view. Then, when they addressed the alleged perpetrators and their parents, the administrators considered their point of view. On the other hand, the administrators did not thoroughly consider Louis's point of view. The school leaders mechanically followed the district's progressive discipline policy. For a first offense, if it was deemed a minor infraction, students were simply counseled and issued a verbal warning. When administrators deemed those first offenses that Louis endured as "minor," they were no longer considering the viewpoints of others. Louis's treatment was anything but minor. This was not simple name-calling or teasing. These acts were based on a perception associated with Louis's very essence. The nature of these first offenses qualified as major, and should have been addressed by administration as such. If these "minor" offenses had been handled more

aggressively by the administrators, then perhaps this would have deterred the torture Louis continued to endure. Truly considering the viewpoints of Louis and L.G., and those of all marginalized members of the student community would have led the administrators to a similar conclusion. This inability to consider other points of view, specifically Louis's, ultimately prevented the administration from judging the particulars and things close at hand, which Arendt defines as thinking.

Considering Arendt's judgment is so inextricably tied to her notions of action, work and labor, it is important to analyze the administrators' endeavors through these lenses. Action creates freedom. To act is to begin something that did not previously exist. The administrators had multiple opportunities to begin something that did not yet exist. When Louis first presented them with his complaints, as well as with each subsequent incident, administrators could have taken the first step in creating a school climate focused on inclusion, dignity and humanity. The school leaders, by not acting, also missed an opportunity to achieve meaningfulness. There was no constructive destruction. By treating these incidents of abuse with the care that was warranted, the vice-principals and principals could have ended Louis' torture early on. This could have been a transformative beginning. Taking action such as this would have been true Arendtian action as a result of thinking and judging. Yet, the administrators, despite some effort, failed to begin. By treating these incidents as minor, the administration missed an opportunity to engage in Arendtian action.

Some of the administrators' endeavors however, possess some traits of Arendtian action. Action cannot occur in isolation. It must happen in the presence of others. All of the administrators' activities occurred in the presence of others. The administrators engaged in speech during their investigations, meetings and during the hearing with the ALJ. All of this was

done in the presence of others. In addition, during this entire process, the school leaders engaged in discussion and debate, which are also traits of Arendtian action.

If one is to use Arendt's concept of action, one must do so in relation to her ideas of work and labor. The district's activities would also not qualify as work or labor. Labor encompasses activities that sustain our biological existence. Regarding work, Arendt argues that work creates objects that endure for a time beyond the men who created them. The "objects" the administrators created did not last. The policies, procedures and decision that endured during Louis's ordeal did not last beyond the New Jersey Supreme Court's final decision. The district's various responses to each development involving Louis White did not endure for a time beyond the existence of their creators. The administrators' endeavors do not qualify as Arendtian work or labor.

The administrators' activities can also be examined through the lens of particulars and universals. The progressive discipline approach the district used has characteristics of both the universal and the particular. When an administrator faces a discipline situation, she or he must examine the specifics of that particular situation and make a decision. Their decision is based on the particular of the situation at hand. At the same time, the administrators use a systematic approach to discipline, with first, minor offenses usually addressed with a warning and repeat offenses and serious first offenses resulting harsher punishment. Following a uniform system such as this also implies the universal. In addition, like legal precedent, administrators gradually adopt universal tendencies based on a certain way of thinking that emerges from these prior discipline cases. As a result, the precedents set by the handling of prior and similar discipline matters have universal application to a specific class of offenses. In short, the administration did not think the particulars during the Louis White crisis. Once Louis and L.G. filed their complaint

with the Director, the district chose to fight the legal action. This was a strident effort to protect their systems, which I posit is the essence of universal thinking.

When assessing Toms River in terms of Arendt's concept of thinking for the prevention of evil, there is evidence that the district approached this ideal, but failed. Once Louis and L.G. filed their complaint, any semblance of thinking to prevent evil was lost. Arendt's theory as to the cause of evil is somewhat controversial, and it was particularly so in post-war United States and Europe when she first espoused her ideas. She defines evil as the inability to think critically and reflectively about one's own actions. So at first glance, one can surmise that the district was trying to prevent evil by keeping all students safe. The district had policies and procedures in place that were designed to prevent harassment, a favorite form of evil for adolescents. The administrators made numerous attempts to help Louis and end the harassment. The bottom line though is that the administration could not and did not end it. The administrators failed to reflect on their actions when following their progressive discipline approach. By reflecting critically, the administration could have realized that following their boilerplate procedures was not working, yet they continued applying the same approach again and again. The administration had the opportunity to engage in this type of Arendtian thinking and prevent evil, but they failed to do so. The only thing that ended Louis's torment was L.G.'s decision to remove her son from the school system. The administrators failed to engage in thinking to prevent evil.

The administrators did not exhibit any moralizing during this ordeal. Arendt asserts that morality has no place in politics or judging. It is quite simple to use traditional thinking and assess Toms River's behavior as morally deficient. Yet, if one is to hold fast to an analysis that complies with Arendt's theory, then arriving at a dichotomous "right or wrong" assessment is not possible. Based on Judge Schuster's written decision, none of the administrators' testimony

exhibits any moral decision-making. The district's personnel mechanically followed the established progressive discipline protocol, which left little room for moralizing.

While the administration did consider the viewpoints of others, their perceptions were not improved. L.G. created a chain reaction when she brought her private idea, Louis's abuse, then reacted. They engaged in dialogue and listened to various viewpoints. These are all traits of Arendt's reflective judgment. However, judgment's ultimate goal is to improve perception by examining and distinguishing one particular from another. Perhaps it can be argued that the administrators attempted this type of reflective judgment, but failed because they never truly understood, or were willing/able to truly consider L.G. and Louis's viewpoint. Ultimately, they failed to improve their own perception. Once the ordeal entered the legal realm, Toms River was no longer trying to improve perceptions, but rather they were trying to eliminate difference of opinion, which is not the goal of Arendtian judgment.

Despite the fact that my analysis has illustrated that the judge's activities do exhibit some traits of Arendtian judgment, overall it would not be accurate to claim that Schuster exercised Arendtian judgment during his handling of the Louis White case. Ultimately Schuster chose not to expand the protections of the LAD to student-on-student harassment. He claimed he didn't have the authority to do so. Schuster determined that Louis case should be decided based on Title IX and not the LAD. While the judge listened to viewpoints of others, did he actually consider them? I argue that he did not, or he would have understood Louis's unique situation and applied the LAD as opposed to Title IX. Schuster really did not engage in Arendtian action, which is closely linked to judgment. By maintaining the status quo with his ruling, Schuster refused to begin something new. Even though he engaged in speech, it was meaningless because it was not true action. Although there is some evidence of the ALJ considering the particulars, his

conclusions reflect universal thinking more so than the thinking the particulars because of his overwhelming reliance on precedent rooted in Title IX. Regarding the notion of using reflective judgment to prevent evil, Schuster clearly failed. Granted, he did operate in public; his decisions were in public, yet Arendtian judgment's goal is not to eliminate disagreement, but rather to improve perception. Schuster's decision was meant to eliminate disagreement. When weighing all factors and considering the various Arendtian traits, Schuster did not engage in this type of thinking and judging.

Like Schuster, the endeavors of the administrators displayed some traits of Arendtian judgment, but overall there is not enough evidence to claim that they practice this type of judgment. The school leaders attempted to invoke common sense by considering the viewpoints of others. They listened to Louis, his mother, the accused students and their parents. By deeming Louis's attackers' offenses as minor, the administrators failed to truly consider Louis's unique point of view the administrators also had an opportunity to engage in Arendtian thinking and judging via action. Again, however, they did not. These men and women had a chance to create something that didn't formally exist, but failed to do so. While these administrators considered the specifics of the various incidents, their thinking and decision-making appears to have been driven more by the universal through the mechanistic use of their progressive discipline policy. The administrators also failed to use thinking for the prevention of evil. One can argue that they approached this, but ultimately failed. Morality does not seem to have been present in their activities, which does comply with Arendt's theory. Ultimately, while they did not operate in isolation, and the viewpoints of others were heard, the administrators ultimately did not improve perceptions, and ultimately shifted their goals to changing the minds of others, which is evidence by their attempt to fight the White's claim in court.

Although Louis's initial attempt to seek justice was temporarily thwarted by both the ALJ and the district, subsequent efforts on the Louis's part would pay off. The Director's rejection of Schuster's initial decision would set in motion a chain of events that would see Louis ultimately prevail. The Director, the appellate court and ultimately the New Jersey Supreme Court found much at fault in both Schuster's legal decision and the district's handling of Louis's situation.

The Director and Arendtian Judgment

Although the Whites suffered a loss in Schuster's initial decision, it would be short lived. In compliance with state statute, Director Frank Vespa-Papaleo issued his final determination regarding the ALJ's recommendation 90 days following its rendering. In short, the Director completely dismantled Schuster's opinion. Most notably, however, is that Vespa-Papaleo rejected the ALJ's dismissal of the case, and indeed did find a cause of action for Louis White. For the first time, this decision, eventually, would lead to the extension of the same LAD protections found in the workplace to public schools, covering bias-based peer harassment. In addition, Vespa-Papaleo directed Toms River Regional Schools to implement many remedial actions, pay Louis and his mother emotional damages and pay a statutory fine to the New Jersey State Treasury. In short, a complete victory for Louis White and his mother, L.G.

For matters that are adjudicated administratively, the director of a state agency who refers a case to the Office of Administrative Law makes the final determination in the case. The ALJ's initial decision is simply a recommendation. This was the case with Vespa-Papaleo, who rejected or modified virtually every aspect of Schuster's decision. Much of the Director's written decision is devoted to refuting the ALJ's findings of facts and conclusions of law. The director first noted the exceptions that the White's filed after the hearing, as well as Toms River's reply to those

exceptions. For the most part, the Director agreed with the Whites' exceptions, and most of these exceptions were remedied in Vespa-Papaleo's final determination and order. The Whites also filed exceptions regarding Schuster's conclusions of law. Namely, they felt the judge was wrong and that there was a cause of action against a school district for bias-based peer harassment under the LAD, and that the standard established in *Lehmann v. Toys 'R Us* created that cause of action. Even not applying *Lehmann*, but instead Title IX's standards, the district should still be held liable due to the deliberate indifference the district displayed to Louis's abuse. Toms River filed a post-hearing response to the Whites' exceptions, and essentially took the polar opposite stance to the Whites on each count.

The Director gave an exhaustive enumeration of his factual determinations, which were quite different than Schuster's. Vespa-Papaleo agreed with most of the exceptions filed by the Whites. There was no evidence in the record that indicated that the teasing in elementary school stopped once it was addressed. The written material distributed to students and parents, as well as the lectures, failed to explicitly state that discrimination or harassment based on sexual preference or orientation was prohibited. Vespa-Papaleo noted that there was direct testimony from district officials that contradicted the finding that Toms River had never dealt with harassment based on "perceived homosexuality" prior to Louis's ordeal. The Director also found no evidence that school officials offered Louis any alternative educational programming. The Director also determined that L.G. withdrew Louis as a result of the cumulative effect of years of harassment.

The bulk of Vespa-Papaleo's written decision is devoted to tackling the legal standards and analysis, by which the Director justified his modification and rejection of Schuster's initial decision. The Director determined that the LAD explicitly prohibits the type of discrimination

and harassment that Louis suffered in places of public accommodations, including public schools. Vespa-Papaleo used the standard *Lehmann* established for a hostile work environment. This standard requires that if the harassment is severe and pervasive that a reasonable member of the same protected class would also perceive the conditions of employment altered, then the work environment is considered abusive and/or hostile. For public accommodations, the courts have been very liberal in interpreting the LAD. Vespa-Papaleo argued that this liberal interpretation of the LAD also applies to the public schools, and that harassment based on a protected characteristic violates the LAD when it creates a hostile environment in a public accommodation, including public schools. The director stated that such an environment existed in Louis's educational setting.

Vespa-Papaleo determined that the *Lehmann* standards were appropriate to assess whether bias-based harassment of a student violates the LAD. Based on this legal standard, harassment of a public school student will violate the LAD when the harassment is based on that student's protected characteristic and the harassment is so severe and pervasive that another student in that same protected class would find the school environment hostile or abusive. The district will be liable if administrators knew or should have known that the harassment was occurring and failed to take effective measures to stop it. Thus, Vespa-Papaleo rejected Schuster's suggestion that Title IX standards should be used to determine liability.

The Director noted that both legislative intent and case law supported abandoning the Title IX standards. Even in the context of workplace discrimination where evidence supporting an LAD claim is the same to those using Title VII or the ADA, New Jersey courts have used the LAD instead in order to provide broader protections for victims of discrimination rather than the protections provided by federal law. In addition, the differences between the LAD and Title IX

make it apparent that the state legislature intended for the law to be applied in all circumstances of public accommodation in order to eliminate discrimination and protects all of the state's citizens' civil rights. Where the LAD provides many avenues of redress for a victim, Title IX's standards are very narrow and quite burdensome for the plaintiff. Title IX was created as a condition of receiving federal funding, not with the express intent to protect civil rights.

The other reason Schuster provided for rejecting the Whites' claim by employing Title IX was a statement from the U.S. Supreme Court in *Davis v. Monroe County Board of Education*. The court stated that schools are unlike the adult workplace and that children often act in ways that would not be acceptable among adults. The Director pointed out, however, that the court in that same decision emphasized the schools' responsibility to educate students, which includes, the Director asserted, the responsibility to teach school children what constitutes discrimination. Vespa-Papaleo noted that the same Court to whom Schuster referred also pointed out that schools are in the best position to educate our students in order to eliminate discrimination based on sexual orientation.

The Director also supported his conclusion by emphasizing the duty that school administrators and boards of education have to protect the children in their care from harm. Vespa-Papaleo referenced *Frugis v. Bacigliano*, a recent New Jersey Supreme Court case that was negligence suit against a principal. The court stated that when parents relinquish control of their children, school personnel are guardians, and there exist no greater obligation than protecting the children under their care. The crux of the court's opinion was that school officials must protect children in their care from foreseeable, predictable dangers. Vespa-Papaleo Asserted that even though this was a common law case, it can still inform a determination of liability standards in an LAD claim.

Even if one were to apply the Title IX deliberate indifference standard, the Director asserted, Toms River was liable for the harassment of Louis. Administrators have a duty to protect students from foreseeable, bias-based harassment, and embracing this duty will encourage the reporting of such incidents, which will in turn help administrators eliminate and prevent this type of harassment. The legislature felt so strongly about this duty that it enacted the HIB statute in 2002. Vespa-Papaleo pointed to this initiative as further evidence that legislative intent of the LAD included the prohibition of bias-based peer harassment in public schools.

Vespa-Papaleo noted that there was substantial evidence that Louis was the subject of numerous incidents of harassment based on the perception that he was gay. This abuse was severe and pervasive enough to meet the *Lehman* standard. The testimony indicated that every incident was accompanied by anti-queer verbiage, including the terms “faggot,” “gay” and “homo”. Louis was subjected to nine incidents of harassment over a period of less than four months. Some of these incidents were so severe that his mother kept him out of school for one or more days afterward. Despite the minimizing effect of the ALJ’s characterization, the Director asserted that there was ample testimony to establish the pervasive and severe nature of the anti-queer harassment that Louis endured.

Vespa-Papaleo next turned to the task of determining if the Toms River Regional Schools was liable for unlawful discrimination. Using *Lehmann*, a court determined that an employer could be found liable based on agency principles. If the employer knew or should have known that the harassment was occurring and did not stop it, then the employer becomes complicit in the harassment and contributes to the hostile environment. Effective measures to stop the harassment are those that are “reasonably calculated” to end the harassment and the measure of that reasonableness is the ability of the employer to stop the harassment. In the Louis

White case, one would be hard pressed to determine that the steps taken by the administrators were reasonable since they failed to stop the harassment.

Another component in determining reasonableness is the effectiveness of preventative measures that were in place. If an employer has weak preventative mechanisms, and the hostile environment continues, then the employer is negligent. Failing to have well-publicized and enforced anti-harassment policies, as well as effective and formal complaint protocols, training etc., opens up an employer to liability. The New Jersey Supreme Court encouraged districts to put in place effective policies, training and reporting procedures in order to insure the safety of the students in the administrators' care. In the same vein, the Director noted that Toms River's preventative measures "were extremely limited."¹⁹

Vespa-Papaleo was highly critical of the measures the administrators took to address Louis's harassment. The main criticism was that the administrators addressed each incident in isolation, but never attacked the systemic problem of harassment. School officials promptly dealt with each harassing student in accordance with the school's progressive discipline policy, but they did not put the student body as a whole on notice that bias-based peer harassment based on sexual orientation would not be tolerated, nor did the school leaders educate students as to what constitutes the prohibited harassment. The Director noted that there was no evidence that administrators ever addressed the discriminatory aspects of the students' behavior, nor did they address the anti-queer hostility of the school climate as a whole. By only addressing each individual incident as a discipline issue, as opposed to a discriminatory harassment issue, the administrators left Louis vulnerable to further bias-based abuse.

¹⁹ *Ibid*, 26.

The Director contended that even if one applied the much narrower standards of Title IX, Toms River should still be held liable for the bias-based harassment Louis endured. Title IX imposes liability when the harassment is “so severe, pervasive and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”²⁰ Furthermore, if a school district had actual knowledge of the harassment and its “efforts to remediate are ineffective” yet the district continues to use the same approach without success, then the district “failed to act reasonably in light of the known circumstances.”²¹ Nine reported incidents over a four-month period indicate that the district had actual knowledge, yet the administrators continued addressing the harassment in the same ineffective manner. The Director concluded that Louis’s harassment was severe and pervasive enough to deny him educational opportunities and benefits. In short, Toms River had actual notice, did not reasonably address the harassment, and the harassment was severe and pervasive enough to deny Louis an educational opportunities and benefits. Applying either the Lehmann standard under the LAD or the title IX standards, Toms River was liable for Louis’ bias-based peer harassment.

Vespa-Papaleo then prescribed the remedies that he was imposing. These included corrective action regarding policies and procedures as well as statutory penalties and damages. The Director ordered the district to strengthen its anti-discrimination policies and procedures as well as other written material distributed to students and parents, and mandatory training for school staff. All of these types of harassment incidents must be reported to the district’s Affirmative Action Office and investigated by that office. The Director’s order also required additional action to address systemic, school-wide issues. Vespa-Papaleo’s order included a

²⁰ *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999).

²¹ *Vance v. Spencer County Public School District*, 231 F.3d 253, 259, 6th Circuit (2000)

directive that Toms River fulfills the requirements of the new HIB law as it relates to bias-based harassment.

After delineating the corrective action plan, Vespa-Papaleo addressed damages. As the LAD allows victims to recover non-economic losses, such as emotional distress and mental anguish resulting from unlawful discrimination. In awarding damages, the Director noted that Louis had suffered all varieties of pain; emotional, physical and mental. The testimony clearly related his suffering to the bias-based harassment. In addition, Louis suffered physical injuries from the attacks during September of his freshman year of high school. All of this anguish ultimately led to L.G. withdrawing her son from the district. The Director found plenty of evidence to justify awarding Louis \$50,000 in emotional distress damages, and he also awarded Louis's mother, L.G., an emotional distress award of \$10,000. Finally, the Director imposed a statutory fine of \$10,000 on the district, which is the maximum penalty prescribed by law for first-time violations of the LAD.

Obviously, Louis was the benefactor of Vespa-Papaleo's liberal construction of the legal argument in his final determination, conclusions and order. When viewed through the lens of Arendt's theory, the process and product of the Director's decision would qualify as judgment. Vespa-Papaleo engaged in the possible and actual judgment of others. He considered the district's judgment, the Whites' and the ALJ's. He considered testimony and evidence presented by the two parties, as well as Schuster's findings and conclusion. Even though he rejected much of the ALJ's initial decision, there is ample evidence that he engaged in the ALJ's judgment. Vespa-Papaleo approached his review of the ALJ's decision with an eye towards invisibles and things that are absent. This conforms to Arendt's notion of judgment as a particular type of thinking. The Director did not experience what any of the players in this saga experienced.

Vespa-Papaleo, while engaging in the judgment of others, had to consider the invisibles and things that were absent.

Analyzing Vespa-Papaleo's decision through Arendt's concepts of action, work and labor also reveals the nature of his judgment. There is a strong case that the Director was indeed an Arendtian actor, which also means he engaged in Arendtian judgment. Arendt's idea of action is vital to her concepts of thinking and judging. Arendt posits that judging is a byproduct of the "liberating effect of thinking." In turn, she relates thinking to freedom through action. An actor is someone who begins something new; something that had not previously existed. Vespa-Papaleo's decision qualifies, as it resulted in the beginning of something that did not exist; LAD protections for queer students in the New Jersey public schools. When the Director uttered and wrote the words creating a cause of action, he achieved natality, engendered freedom and liberation, and gave this action meaning. In turn, his action created meaningfulness. Speech in the service of action creates meaning and reveals who we are as humans. Arendt stated that to act in the world creates meaningfulness because humans can talk with each other and make sense. Vespa-Papaleo created meaning and he made sense of the Louis White case. The newness and freedom that the Director's words created were meaningful and made sense. The liberation and freedom that speech creates is destructive thinking and judging. Arendt argues that thinking and its subsequent judgment has a destructive effect on the established values and concepts of good and evil. This destruction is also liberating because it frees human from the enslavement of established truths. Vespa-Papaleo seized the opportunity to use thinking and judging to destroy traditional thinking through his rejection of the ALJ's initial decision.

Arendt also asserts that thinking, acting and judging must occur in the presences of others and involves discussion and debate. Vespa-Papaleo acted in the presence of others. His decision

was rendered in the public realm and included all interested parties. This action eventually led to the action of others and the establishment of LAD protections for queer students in the public schools. While in the presence of others, the Director was a part of the discussion and debate regarding the Louis White case. He reviewed the discussion and debate of Schuster's initial decision, and this also contributed to this discussion with his 41 page written decision. All parties involved engaged in discussion and debate, and in the presence of others.

Work and labor, the other two components of Arendt's hierarchy of human existence are also helpful in formulating an Arendtian assessment of Vespa-Papaleo's decision. The Director's endeavors share some traits of work as well as action, but viewed in its totality, more evidence supports the assertion that most of his efforts qualify as action, rather than work or labor. His decision is not labor, since labor is necessary for the maintenance of our biological existence. In addition, labor does not create anything that lasts. What labor yields is consumed and nothing is left behind. Vespa-Papaleo's decision was not consumed, but rather is now part of the law of the land in New Jersey. Arendt asserts that work creates things that endure for a time period beyond the humans who create them. Vespa-Papaleo's decision will outlast its creator; the Director and the jurists that upheld his decision. The ruling will live on as a legal precedent as well as policy and procedure in the public schools. In addition to action, it appears that the Director's decision also meets this permanence criterion for Arendtian work. Vespa-Papaleo's decision also meets another characteristic of work. Arendt states that work creates objects with an end goal, purpose and instrumentality. This entire process of adjudication had an end goal and purpose.

While the determination of the Director's decision as action is fairly clear-cut, that is not the case when looking at his decision through the lens of particulars and universals. Arendt insists that judging and thinking operate in the realm of particulars and not universals. The

administrative proceeding shares many characteristics with a regular case decided in a court of law. Any legal proceeding is committed to hearing the viewpoints of others and the particulars that they have to share during the proceeding. At the same time, these proceedings rely heavily upon precedent, which can be viewed as a particular and a universal. Precedent is used as a universal in the same sense that once established, it is applied somewhat universally to similar, future cases. On the other hand, precedent also relies on the particulars because one must examine the particulars of those similar, future cases to see if those particulars have much in common with the particulars of the case in which the precedent was established. In addition, Arendt suggests that judgment is outside the realm of proof and therefore one can only make a specific claim about a specific phenomenon. The notion of precedent in terms of the universal and the particulars is complicated. However, it can be argued that Vespa-Papaleo thought the particular when choosing which precedents to use to support his decision. And though he leaned heavily on *Lehmann* and other precedent cases, he examined the particulars of that case and created a legal argument by matching those to the particulars of the White case. Although the Director used precedent, with its universal characteristics, he focused on the particulars of that precedent as well as the particulars of the White case, and “thought” the particular, in accordance with the tenets of Arendtian thinking and judging.

Arendt also considered thinking and judgment to be the inoculations against evil. Vespa-Papaleo’s decision, and the process by which he reached that decision, qualify as this type of evil-preventing thinking. The harassment that Louis endured could be characterized as evil. The LAD and the administrative process by which the case was decided gave both Schuster and Vespa-Papaleo the opportunity to engage in this type of thinking. While Schuster passed on this, the Director seized the opportunity, and through his decision, expanded LAD protections against

bias-based peer harassment based on sexual orientation, in the public schools. Vespa-Papaleo meticulously chose a precedent with the particulars needed to create this new precedent in the White case. By actively building a legal argument to extend the statute's protections, the Director helped fulfill the legislative intent of the eradication of discrimination from our society. A goal, most would agree, is virtually synonymous with the prevention of evil.

Arendt separated judgment from morality. From a traditional, western way of thinking, it is reasonable to conclude that creating more freedom by expanding the protections of an anti-discrimination law is morally and ethically sound; the "right" thing to do. One cannot analyze Vespa-Papaleo's decision in this manner and remain in compliance with Arendt. The alternative, for Arendt, is to bow to a universal moral law to guide moral action in all particulars. Thus, operating in the pretext, judgment becomes determinative and not reflective. Moral judgment is determinative because it is dependent on a moral change agent who has a moral imperative and so only has to apply a set of static rules to very unstable and ever-changing challenges in order to make decisions and take action. To comply with Arendt's notion of reflective judgment, Vespa-Papaleo would need to not have acted as a moral change agent. I argue that the Director did not act with a moral imperative. Even though the LAD has inherently moral traits, it is not applied as a set of unchanging, static rules. To the contrary, the LAD has evolved since 1945 through amendment and even more so through interpretation by the courts. The Director analyzed the particulars of the White case in order to apply the ever-evolving LAD. Vespa-Papaleo acted as a legal change agent with a legal imperative; not a moral change agent with a moral imperative. Therefore, the Director engaged in reflective judgment and not moral, determinative judgment. He followed our legal system, which was modeled on the English and Roman legal system; the very legal systems that Arendt holds as the exemplar of using reflective judgment.

When Arendt writes about judgment, she is referring to reflective judgment. This type of judgment must occur in the presence of others. Vespa-Papaleo's decision complied with this aspect of Arendtian judgment. This entire process was conducted in the presence of others. The Director made his decision public, through speech, and offered this idea up for potential agreement. Although Toms River did not agree, the Whites and the state courts did. The goal of this type of judgment is not to convince everyone to believe the exact same way. Judgment's goal is to improve perception by consistently heightening one's awareness of what makes one particular different from all other particulars that share the same characteristic. Just the potential for agreement opens up the possibility for true judgment. All parties, including the Whites, Toms River and the ALJ offered their perspectives for consideration. The consideration of others, this emergence of an idea onto the world, into the public realm, evidences that Vespa-Papaleo's process for making his decision was reflective judgment. By examining the record from the ALJ hearing, the Director was exposed to and considered all perspectives for possible agreement, thus improving his perception, and ultimately society's.

The Director's decision completely changed the tide in the Louis White case. Vespa-Papaleo rejected or modified virtually every aspect of Judge Schuster's initial decision. This phase of Louis's saga was a complete and total victory for the Whites, but this decision was much bigger than just Louis. Vespa-Papaleo's decision paved the way for a landmark New Jersey Supreme Court decision that would establish an important precedent in anti-discrimination case law, and it would impact every public school district in the state. At the same time, Director Vespa-Papaleo's decision exhibited Arendtian judgment. Based on each of the traits analyzed, there is ample evidence to support this assertion. During the next phase of the

White case, Toms River would appeal the Director's decision, first to the New Jersey Superior Court, Appellate Division and ultimately to the New Jersey Supreme Court.

The State Courts and Arendtian Judgment

Even though the Director of the Division on Civil Rights had rejected virtually every aspect of the ALJ's initial decision, Louis's battle was not finished. The Toms River Regional Schools would not accept the Director's final determination and order and appealed to the New Jersey Superior Court, Appellate Division, as was its right under a provision in the LAD. In addition to the Whites and the school district, several child advocacy/civil rights group, including the American Civil Liberties Union, were also invested in the outcome of Louis's case and filed an amicus curia brief on Louis's behalf. Thomas E. Monahan argued the case for the district, and James R. Michael, Deputy Attorney General for the State of New Jersey argued on the Whites' behalf. The appeal was heard by a three judge panel. The opinion of the court was delivered by Judge Yannotti.

In the first section of the opinion, the judge stated the purpose of the appeal, which included the district challenging the Director's finding of a cause of action against the school district under the LAD based on bias-based peer harassment. The district also appealed the Director's equitable relief and compensatory damages. This court affirmed in part, reversed in part and remanded for further proceedings. The judge then proceeded to summarize the procedural history, the facts of the case and the Director's conclusion of law and order. The court refuted the district's claim that the Director had erred in declaring the LAD covered the type of harassment in question. The judges pointed out that the statute explicitly enumerates public schools as a protected public accommodation, and it also explicitly states that sexual orientation

is a protected characteristic. This was the first time a state court in New Jersey had recognized such a cause of action, and the court's action set a monumental legal precedent that would influence thousands of students and public educators for years to come.

The court stated that the same principles established by *Lehmann* for workplace harassment should be used to determine if bias-based peer harassment has created a hostile educational environment in a public school. Essentially, if a student who is a member of a protected class is the victim of bias-based peer harassment based on sexual orientation, and that harassment is severe and pervasive enough that a reasonable member of the same protective class would perceive the environment as hostile or abusive, then a hostile educational environment has been created. The appellate court stated that they did not believe that the state legislature, when crafting the LAD, intended for students in the public schools to have less protection than adults in the workplace.

The court then addressed the standard of liability that should be used to determine if a school district is liable for the type of harassment previously discussed. Again, this court turned to *Lehmann* for the standard of liability, thereby rejecting the district's claim that the Title IX standards, established in *Davis*, should be used. With that standard, a district is only liable for student-on-student sexual harassment if the harassment is so severe and pervasive that it denies the victim access to an educational opportunity. In addition, that severe and pervasive harassment would have to be virtually ignored by the district. Under the Title IX *Davis* standard, a district is only liable if they displayed deliberate indifference to the harassment, and the district had actual, not constructed knowledge of the harassment. This court rejected this standard, saying it would be inappropriate to use it under the LAD. The *Davis* standard is much more burdensome than *Lehmann*, and again, the judges reasoned that the legislature did not intend for

students in a public school be subjected to a more burdensome standard than adults in the workplace.

The judges continued, noting that with *Davis*, an aggrieved person must prove intent to recover monetary damages, whereas with the *Lehmann* standards, a plaintiff only needs to establish negligence on the part of the district. Also, the two laws were written for different intent. Title IX was created through Congress's spending power established by the Constitution. Essentially, preventing sexual harassment is a condition for receiving federal funding; virtually a contractual obligation. Conversely, the LAD was established with the express intent of protecting the state's citizens' civil rights. The court determined that using *Lehmann* standards would further the legislature's intent to eliminate discrimination from our society.

The judges next addressed the Director's finding that there existed a hostile school environment. The judges enumerated several of the incidents of harassment that Louis suffered, and found that there was a hostile school environment, and a reasonable member of his protected class would also find the environment hostile or abusive. The court disagreed and reversed the Director's finding that there was a school-wide and district-wide hostile environment, citing that there was no evidence to support this finding. Judge Alley dissented, and argued that Louis was not subject to a hostile school environment. The judge asserted that the harassment was only occasional and not pervasive, and that the administrators' actions prevented a hostile environment for Louis.

The court next turned to the Director's finding that Toms River was liable for Louis White's harassment and resulting hostile school environment. The Director had found that the district's preventative measures were inadequate, based primarily on the fact that the written

materials and lectures did not explicitly state that harassment based on sexual orientation was a violation that would not be permitted. The judges disagreed and reasoned that the district's written policies and procedures made it very clear that harassment of any kind was prohibited, and it did mention harassment that was sexual in nature, assault and harassment of any kind. Since some of the Louis's harassment was sexual in nature, this court found that the district's preventative measures were adequate, and their awarding of compensatory damages was not based on the fact that there was a school/district wide hostile environment. The judges reversed this finding.

The court then turned to the district's efforts to end Louis's harassment. The Director found that the district knew of Louis's harassment, but failed to take effective measures to end it. *Lehmann* defined effective measures as being those that are reasonably calculated to end the harassment. Timeliness of a district's response is also a factor in determining reasonableness. Louis suffered nine incidents in less than a four month period. The court felt that there was enough evidence to support the Director's finding that the administrators' measures were not effective. Despite the discipline measures failing to end the harassment, the administrators continued employing the same approach, which continued to leave Louis vulnerable to further harassment. The court, while rejecting the idea that there was a school-wide hostile environment, did find enough evidence to support the Director's finding that the district's delay in ending the harassment was unreasonable.

The judges also affirmed the Director's finding that the district did not effectively respond to the two assaults that Louis suffered in September of his freshman year. The District was on notice from Louis's middle school experience that he was vulnerable to attack when he entered the high school. When Louis was physically assaulted the first time, the administrators

took action by suspending the student who punched Louis, but the accompanying students received no discipline. In addition, the suspension did not deter, as Louis was attacked in less than two weeks later. Again, only the student who assaulted Louis was suspended. Despite the availability of security guard escort to off-campus lunch, the school placed the burden of Louis's safety on him, advising him to ride the bus and eat lunch on campus. The judges stated that this was inappropriate because Louis had the same right as any other student to take his lunch off campus free from harassment or discrimination. The district also argued that they did not deny Louis an educational opportunity; instead his mother chose to withdraw him. The court stated that the mother's action was reasonable because the school had proven that they would not protect Louis and she feared for his safety. Judge Alley, again dissented, arguing that there was no evidence of how other districts handle similar issues and so it is impossible to determine if Toms Rivers measures were reasonable or not. Nonetheless, the majority was convinced that other districts' methods were irrelevant, and that Toms River's measures were inadequate and not reasonable, thus affirming the Director's finding on this count.

In the Director's final determination, he ordered several equitable remedies related to anti-discrimination policies and procedures. The appellate court found that the Director did not have the authority to order the various remedies he imposed. In addition, the court noted that the Commissioner of Education had already put in place regulations that addressed the Director's concerns, requiring each district to create an educational equity policy and a comprehensive equity plan, all aimed at insuring a bias-free educational environment for New Jersey's students. In addition, the legislature had already addressed many of the Director's other concerns by enacting the HIB law in 2002. Finally, the court found no evidence of a district-wide problem

with bias-based peer harassment. Due to these measures already being in place, the court overturned the Director's order in this regard.

The Director awarded compensatory damages of \$50,000 to Louis and an award of \$10,000 to his mother L.G. While they affirmed Louis's award, the judges overturned L.G.'s. The court rejected the district's argument that the \$50,000 was excessive and affirmed this, since it is clearly supported by amendments made in 2003 in the LAD. The judges also determined that they could apply this amended stipulation in the statute. Because the matter was pending when the law was enacted, the judges determined that the legislature intended the amendment be applied. The court supported its affirmation of Louis's award by citing sufficient evidence that Louis was subjected to severe humiliation, embarrassment and indignity to warrant the damages. At the same time, the court determined, under the LAD, L.G. was not an aggrieved person and therefore could not receive compensatory damages.

Despite both the Director of the Division on Civil Rights and the New Jersey Superior Court, Appellate Division, finding that the LAD provides a cause of action for bias-based peer harassment and finding that Toms River was liable for Louis White's discriminatory harassment; the district is undeterred and appeals the lower court's decision to the New Jersey Supreme Court. Because there was a dissent in the appellate court, as a matter of law, the district was granted a hearing before the highest court. Toms River asked the Court to certify the appellate court's finding that there is indeed a cause of action against a school district under the LAD for student-on-student harassment based on sexual orientation, and determine the standard of liability to assess if a district should be held liable.

On February 21, 2007, the New Jersey Supreme Court delivered its opinion in the Louis White case. Chief Justice Zazzali read the opinion on behalf of the court. He explained that because of the LAD's "broad statutory language is clear, we hold that the LAD recognizes a cause of action against a school district for student-on-student affectional or sexual orientation harassment."²² The Court also found that a school district can be held liable for such harassment "when the school district knew or should have known of the harassment but failed to take actions reasonably calculated to end..." the harassment.²³ The Court noted that these findings would further the legislature's intent to eliminate discrimination from our society and the public schools. The Court also stated that its intent was that this decision would encourage school districts to take proactive steps to protect all the children in their care.

The first question the Court addressed was whether the LAD recognized a cause of action for student-on-student harassment based on perceived sexual orientation. The justices turned to the straightforward language of the statute itself. It very clearly states that no one in authority, such as an employer, manager, superintendent etc. will deny, withhold, refuse etc. access to any public accommodation due to a number of protected characteristics, including "affectional or sexual orientation." In addition, the justices noted, the LAD specifically enumerates specific public accommodations that are covered under the law, which includes all K-12 public schools. In short, the justices determined that it was clear that the legislature intended for the LAD to provide its protections to public school students who are subjected to bias-based peer sexual harassment.

²² *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 390 (2007)

²³ *Ibid.*

The prevalence of peer sexual harassment, as noted in a study published in a law review article, as well as the legislature's work in creating the HIB law, made it clear to the Court that this decision will help address a major issue in the public schools. Because of its broad goal as a remedial statute, the Court was confident that the LAD did provide this cause of action. The Court also determined that a district is liable if it fails to take reasonable measures to end the harassment, and the district's failure to do so results in the denial to the harassed student any educational "accommodations, advantages, facilities or privileges."²⁴ The Court noted that this was the only sensible conclusion and that the right of a student to obtain an education in an environment free of sexual harassment is just as important as the rights of an employee in the workplace.

Having established that the LAD does recognize a cause of action for bias-based peer harassment in schools, the Court next moved to addressing under what circumstances a school district would be found liable for such harassment. A student can make a claim if the discrimination would not have happen if the student was not a member of a protected class, and a reasonable person of that same protected class would also consider the harassment severe or pervasive enough to create a hostile school environment, and the school district failed to take reasonable measures to end the harassment.

The Court determined that the standards in *Lehmann* should be used to determine if a school district is liable. While the *Lehmann* opinion established three circumstances where an employer could be found liable, only one of these three apply to student-on-student bias-based harassment in the public schools. This, in part, read that there is liability "when the employer has

²⁴ N.J.S.A. 10:5–12(f).

actual or constructed knowledge of the harassment...” but failed to take effective measures to stop the discrimination.²⁵ The Court also defined “effective measures” as those that are reasonably calculated to stop the harassment.

The justices then refuted Toms River’s argument that the appropriate standard should be the Title IX standards established by the U.S. Supreme Court in *Davis*. With this standard a district is only liable for student-on-student sexual harassment if the harassment is so severe and pervasive that it denies the victim access to an educational opportunity. In addition, that severe and pervasive harassment would have to be virtually ignored by the district. Under the Title IX *Davis* standard, a district is only liable if they displayed deliberate indifference to the harassment, and the district had actual, not constructed knowledge of the harassment. This Court rejected the use of the deliberate indifference standard and adopted the *Lehmann* standard, noting that they find no need to impose a separate standard for workplace harassment and another for similar harassment in the public schools.

The Court noted many differences between Title IX and the LAD, and these differences make applying the LAD and *Lehmann* to this case the logical step to take. First, Title IX only prohibits discrimination based on sex, as opposed to the LAD that lists a host of protected characteristics. Title IX is part of a funding contract; its primary purpose is a stipulation for receiving federal funding. The LAD was created for the express purpose of guaranteeing the state’s citizens’ civil rights. These protections apply to all public accommodations, regardless of their funding source. The courts have established only an implied right to private action, whereas the LAD explicitly gives victims the right to file a private cause of action in order to attain a host

²⁵ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 403 (2007).

of equitable remedies. Finally, the deliberate indifference standard is very burdensome for the aggrieved person, and this Court determined that students in the schools are entitled to as many protections as adults in the workplace. The justices stated that using the *Lehmann* standard, somewhat modified, is also consistent with New Jersey's well-established policy of protecting children.

The modified *Lehmann* "standard requires that a school district may be found liable under the LAD for student-on-student sexual orientation harassment that creates a hostile educational environment when the school district knew or should have known of the harassment, but failed to take action reasonably calculated to end the harassment."²⁶ The court took care to note that with this ruling they did not create a strict liability standard. As the court stated, "a district is not compelled to purge its schools of all peer harassment to avoid liability."²⁷ In doing so, the Court recognized that there will be a degree of harassment in schools, but what the law requires is that schools do all they can to prevent it, and when harassment is discovered, take action that is reasonably calculated to end the harassment.

Next, the Court had to establish standards to guide fact finders when assessing the reasonableness of a school district's response to a hostile educational environment. Because children in the school are indeed different than adults in the workplace, fact finders must consider the harassment case "in light of the totality of the circumstances."²⁸ The Court also directed those investigating these cases to consider the students' ages, maturity level, school culture, history of harassment, frequency or rareness, duration, extent, severity etc. as well as the

²⁶ *Ibid.*

²⁷ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 407 (2007).

²⁸ *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 408 (2007).

effectiveness of the district's response. The justices also recommended that districts seek guidance from the DOE, which regularly issues and updates model policy crafted to prevent harassment, intimidation and bullying. Finally, the Court recommended that fact finders may need to seek expert advice to assist in determining the reasonableness of a district's response.

With a standard now in place for determining a district's liability under the LAD for bias-based peer harassment, and having provided guidance on how fact finders should proceed when assessing the reasonableness of a district's response to such harassment, the Supreme Court determined that the White case should be remanded to the Director of the Division on Civil Rights, with the direction that the Director refer the case to the Office of Administrative Law (OAL). Since the current record of the case was established before the reasonableness standards were created during this appeal, the Court remanded, with direction that both parties be allowed to supplement the record and be heard in light of the newly established standards. The Court acknowledged that Toms River attempted to respond to Louis's harassment without the benefit of the DOE's current guidance and without any direction from the HIB law that was established in 2002. Even so, the justices said that an assessment of Toms River's response may still be guided by what the DOE currently advises regarding district responses to such harassment. The Court also stated that each party should be given the opportunity to submit expert testimony as to what a reasonable response would have been during the time period of Louis's harassment.

Hannah Arendt's theory of judgment can be used to analyze the various aspects of the opinions of the appellate court and New Jersey Supreme Court. A major underpinning of Arendt's theory is her idea of "common sense", which is the ability to engage in the possible and actual judgments of others. The nature of the appellate court's function is to consider the viewpoints of others. During the appeals process, both sides in a case present briefs and oral

arguments. Through this process, the appellate judges weigh all aspects of the record and consider the actual judgments of others. Throughout this proceeding, the court evidenced a meticulous review of all the evidence. In addition, the judges also engaged in a detailed legal analysis using precedent from relevant case law. In addition, the judges did not accept the Director's final determination in whole, further evidence that this court considered the viewpoints and judgments of both sides in this case. The court's endeavors in respect to engaging in the judgment of others qualify as Arendtian judgment.

The judges and justices also approached their review of this case with an eye toward the invisibles and things that are absent. This aligns with Arendt's notion of judgment as a particular type of thinking. The judges and justices were charged with deciding an appeal without seeing or experiencing any of the events that led up to the appeal. Members of these courts did not experience Louis's abuse, or L.G.'s frustration and heartache as a parent who was trying to help her child. The judges and justices did not witness the administrators struggling to address the problem and find ways to help Louis. Nor were the members of these courts faced with the initial challenge of deciding whether the LAD covered this type of harassment. Throughout this process, the judges and justices had to contemplate the invisible, which characterizes Arendtian thinking and judging

When analyzing these courts' opinions, one can make a strong argument that these judges and justices were Arendtian actors. Arendt asserts that judging is a by-product of the liberation that results from thinking. Freedom is achieved through action. To act is to begin something new. When one speaks and acts to begin something new, they emerge into the world and achieve natality. These judges and justices began something new; new protections for vulnerable students under the LAD, and a new legal precedent to guide future policy, procedures and litigation. This

action was also disruptive. The judges' and justices' decision to recognize a cause of action under the LAD destroyed conventional thinking, which, in this case, was using the Title IX standards established in *Davis* to assess student sexual harassment cases. By replacing this standard with the *Lehmann* standard, these courts disrupted conventional thinking. In addition, the Supreme Court justices created a new standard to determine a school district's liability, as well as guidelines for determining the reasonableness of a district's response to the harassment. This disruption also created liberation and freedom, also Arendtian traits of action. The judges and justices acted through speech, which Arendt posits is necessary in order to create action. The courts acted to create meaning and make sense. The courts' process of arriving at their opinion, as well as the opinion itself provided clarity and made sense of the White case, as well as similar, future cases.

One of the most is vital components of Arendt's action is that action, thinking and judging must take place in the presence of others and involves discussion and debate through speech. The appellate court and the Supreme Court acted in the presence of others. The judges and justices engaged in the both the ALJ's and Director's decision, and the Supreme Court also engaged with the appellate court's opinion. By doing so, both engaged with the record of testimony and evidence presented by both sides in this dispute. In addition, the courts also acted in the presence of others during oral arguments, as both sides in the dispute submitted briefs and were afforded an opportunity to be heard. These oral arguments were highlighted by discussion and debate, as both sides presented their arguments, the judges and justices also asked questions and challenged some of counsel's assertions. The judges and justices also delivered their opinion in the presence of all parties involved. These courts also acted in the presence of all state courts, as well as school districts, policy makers, researchers etc. These courts' action in the presence of

others triggered more action by others. All of these evidence Arendtian traits of acting, thinking and judging.

Many Arendtian traits of action can be found in the endeavors of the appellate judges and Supreme Court justices, but their activities also share some traits of Arendtian work. However, traits of Arendtian labor are not present in the justices' or judges' activities. Labor is made up of things that sustain life and maintain our biological existence. The endeavors of these courts clearly did not sustain life. In addition, labor does not create anything. All that labor yields is consumed, and nothing is left behind. The product of these courts' opinions was not consumed. The protections under the LAD afforded by way of these opinions, as well as the legal precedent that was set, are still standing to this day, and probably will be in perpetuity. The precedent set in this case has been used in subsequent anti-discrimination cases throughout the United States. These opinions also serve as a matter of historical record. Neither of these courts' opinions possesses traits of Arendtian labor.

The judges' and justices' activities share some traits with Arendtian work. Arendt asserts that work creates objects that endure beyond the humans who create them. These objects "outlive" their creators. This decision has outlived one of the three judges on this appellate panel, as Judge Alley passed away in 2013. Most likely this opinion and its impact will outlast all three judges on the appellate court and all seven justices on the Supreme Court. It continues to exist as a legal precedent, and as a guide for school districts and policy makers. The protections under the LAD that the opinion established are still in place, and it is memorialized as part of a historical record. Another Arendtian trait of work that the judges' and justices' decisions share is that it had an end goal and purpose. Both the Supreme Court's and appellate court's purpose was very clear; to insure that the lower courts did not err in their ruling and create an injustice. This is

exactly what the judges and justices did in the White case. The Supreme Court, specific to the White case, had to answer two questions; did the LAD recognize a cause of action under the LAD for bias-based peer harassment, and if so what standard of liability determines if a school district is liable for such harassment? This is very clearly a purpose, end goal and instrumentality. Despite these courts and their opinions possessing many traits of Arendtian action, they also share some traits with Arendtian work.

One of the most important aspects of Arendtian thinking and judging is that it must occur in the realm of the particular and not the universal. Although one could look at both of these courts' heavy reliance on legal precedent as a universal application of the law, the process is actually characterized by thinking the particular. All courts use precedent to some degree, but it is not blindly applied to a similar case. The process by which judges and justices use precedent to help form an opinion is thinking the particular. The judges and justices consider the specifics of each case and then compare it to former cases to find traits that the case at hand has in common with the precedent. It is only through carefully examination of the intricacies of both the case at hand and the precedents under consideration do judges and justices apply a precedent. In the case of both the Supreme Court and the appellate court, there is evidence that the judges and justices thought the particular and did not subsume the particular under the universal. The appellate judges did not simply accept the Director's final determination and order in whole, nor did the justices simply accept the appellate court's opinion in whole. The court used precedent to both affirm some parts of the decision and overturn other parts. The courts arrived at these decisions by carefully examining the particulars of the record, legal theory, the LAD itself and relevant case law. By doing so, these courts arrived at balanced decisions that were the result of examining the particulars. The judges and justices thought the particular. They did not hesitate to

depart from federal precedent or the decisions that were under appeal. They allowed the particulars to guide their opinion.

Thinking and judging, and thinking the particular, Arendt asserts, may very well be an inoculation against evil. Both courts' opinions and the process by which they arrived at the opinions qualify as this type of evil-preventing thinking. The product of their opinions also prevented future evil, in the Toms River Regional Schools as well as districts across the state, by expanding LAD protections to all students in the public schools. This furthered the intent of the legislature to eradicate discrimination from our society. In addition, by rejecting the provisions of the Director's order that were unjust, the appellate court prevented evil by eliminating an injustice, which is a form of evil. In addition, by remanding the case to the Director and the ALJ for adjudication using the newly-established standards, the Supreme Court prevented evil by eliminating a potential injustice, which is a form of evil. The courts acted as a safeguard against an arbitrary or unjust decision. This was accomplished because the judges and justices considered all of the relevant details available to them and thought the particular, which resulted in the prevention of evil.

In Arendtian terms, judgment laced with morality is not true judgment. Arendt is very reluctant to associate judgment with ethics and morals. Although one could conclude that creating more freedom by expanding a law that fights discrimination, as the morally "right" thing to do, Arendt would give little credence to any rationale based on morality. Judgment is the most political of all human actions, and she was adamant that morality had no place in politics. Therefore, judgment, in her assertion, could not be based on moral values. Using these values, or a moral law, necessitates subsuming the particular under the universal because moral law is a universal that is applied to all particulars. Because this is type of judgment is determinative,

Arendt rejects moral judgment. There is no evidence that either the appellate court or the Supreme Court practiced moral judgment. They did not blindly apply a set of static rules to a variety of particulars.

When Arendt writes about judgment, she is referring to reflective judgment. This type of judgment must occur in the presence of others. True judgment cannot happen in isolation. A private thought leaves the mind and is introduced to the world through speech. It is offered in the public realm for consideration and possible agreement. This is the process that occurred in this proceeding. L.G. originated this when her idea left the private realm and she filed the complaint. This triggers a chain reaction of actions, which resulted, up until this point, the appellate court considering her idea for possible agreement. The courts considered the perspectives of all parties involved. This process furthered judgments goal, which is the heightening of awareness of what makes one particular different from other particulars that share similar characteristics. The consideration of others' perspective, this emergence of an idea onto the world, into the public realm, and improved perceptions all evidence the courts practiced reflective judgment.

Limitations of this Study

There were several limitations to this dissertation. My data collection was limited to document analysis. In all likelihood, conducting interviews of some of the key players could have enriched this study, and I acknowledge that foregoing these interviews is a limitation of my study. Based on a quick internet search, most of these individuals are still living and still reside in the state, and many of the adults involved are still employed in the school district, the Office of Administrative Law, and by the state courts. I have personal contacts at high levels of central office administration in Toms River, so it is possible that I could have gained access to several of

the individuals involved in the White case. Despite my contacts, it still may have been difficult to gain access to these individuals, and there would also be the risk that any information obtained could be inaccurate or self-serving. Regarding access to the various judges and justices involved in the case, it is unlikely that I would have been granted interviews.

In addition, using a historical analysis has its limitations. This type of research cannot use direct observation as a method of data collection, and one cannot test a hypothesis using a historical case study.²⁹ It was impossible for me to observe the events as they unfolded since they happened in the past. There is also the possibility that documents were inadvertently misinterpreted by the writer. I have no formal legal training, so the possibility of a misinterpretation is quite real. In an attempt to remedy this, I read every case that was referenced in the primary decisions and opinions that were the focus of this study. In addition, I consulted the New Jersey Rules of Court, online legal references, and at times, sought the advice and opinion of an attorney to verify my understanding of various legal concepts. None of this, however, is a substitute for legitimate legal training. To the best of my ability, I have heeded Marshall and Rossman's recommendation that the historian maintain a healthy dose of skepticism as she or he conducts a historical study.³⁰

The documents I used were limited, primarily, to published opinions, case law and federal and state statute. There was very little media coverage of this case, and what was available did not inform the study to any significant extent. In addition, there were few law review articles, and again, the focus of the few that I found were tangential to the Louis White

²⁹ Marshall and Rossman, 119.

³⁰ *Ibid.*

case, at best, and therefore not of great value to this study. My attempts to access transcripts of ALJ Schuster's hearing through the Office of Administrative Law were unsuccessful. Likewise, I was unable to locate the oral arguments of the appellate court case. These documents may have added to the depth of my study.

In particular, the record of Schuster's hearing could have been particularly helpful since the written opinion was not nearly as revealing as some of the verbiage used during the hearing. Only when reading the Director's final determination, in which he rejected Schuster's initial decision, was I able to read some of the transcript of the first hearing, which Vespa-Papaleo included. As the Director noted, the ALJ minimized much of Louis's testimony when he characterized much of the anti-queer slurs as "name calling" and "insensitive comments". The other key passage of transcript that Vespa-Papaleo included in his final determination was the cross examination of Ms. Benn, during which, she admitted that her lectures at the beginning of the school year did not specifically prohibit harassment based on sexual orientation as prohibited conduct. By being forced to rely only on Schuster's characterization of the events and testimony, my Arendtian analysis of his endeavors may have suffered.

My data analysis was obviously shaped by the framework that I used, which was philosophical in nature. This approach is relatively narrow in that I employed a political theorist's rather abstract theory, and Hannah Arendt's theory of judgment was never completed. Therefore, I was forced to rely heavily on bits and pieces of the theory revealed in various works written by Arendt. In addition, I relied heavily on the writings of various political scientists who have devoted much of their academic careers to unraveling Arendt's theory, as well as its meaning. Many of these theorists' interpretation of Arendt conflict with each other, presenting

yet another challenge when trying to interpret Arendt. As a result, it is possible that I may have inadvertently misinterpreted some of her writings, which could have adversely influenced my analysis. In addition, I chose the various traits of Arendt's theory based on my understanding of their relevance to the analysis I was attempting. It is possible that I overlooked important aspects of her theory that could have shaped my study in ways I cannot anticipate. Perhaps using a different framework, such as one focused on ethical leadership, could have been more informative.

Finally, I examined one legal case in one school district focused on one state statute, albeit a substantial and expansive one. In other words, this is a bound study with inherent limitations. This is a relatively narrow analysis in relation to public education in the United States, or even New Jersey for that matter. Despite these limitations, it is my hope that this history can be useful in continuing the discourse related to the judgment and decision-making and of school leaders. It is a study, quite simply, of particulars.

Implications for Research, Policy and Practice

Future Research

There are many studies that could be pursued in light of this research project. First, one could pursue Louis White's story with a completely different framework. For example, instead of doing a legal history with a philosophical framework, one could conduct a phenomenological study. This could be conducted as a bound case study focusing on the lived experiences individuals involved in one of the most prominent harassment, intimidation and bullying case. This study could be driven primarily by interviews, and possibly focus groups. Assuming a

researcher could gain access, this project might include extensive interviews of Louis White, his mother, his aunt and some of his friends who advocated for him. Also, interviews with administrators, teachers, guidance counselors, board of education members and perhaps students; the harassers as well as the bystanders, could all inform this study. Perhaps, again if one could gain access, interviews with both ALJs, both Directors of the Division, both attorneys who argued the case, and if possible even the judges and justices who decided the case might also add to the study. It would also be interesting to conduct focus groups, both homogeneous as well as heterogeneous. For example, there could be a focus group with each of these groups: the Louis White contingent, the administrators, the harassers and the bystanders. Then, perhaps another focus group with participants from each of these subgroups could comprise up a separate focus group.

This study focused on one case within the Toms River Regional Schools. The district has been notorious for some of the district's leaders with questionable decision making. A more expansive history, or perhaps a case study of one major event, during the tenure of a notorious former superintendent, Michael Ritacco, who led the district could be informative. For example, the once-powerful former superintendent was involved in one of the biggest corruption cases involving a school district in the history of the state. The former superintendent pleaded guilty to public corruption and tax evasion charges.³¹ Among the various charges, and perhaps the most egregious, Ritacco was found guilty of accepting more than one million dollars in bribes from an

³¹ "Former Superintendent Admits Taking Bribes," *Burlington County Times* (N.J.), April 6, 2012 (Westlaw).

insurance broker.³² A researcher could use an Arendtian framework, or perhaps a framework that encompasses the current research literature on ethical school leadership.

Another possible outcropping of this dissertation could be investigating other phenomena within the realm of education and/or educational leadership using Arendt's theory of judgment. Perhaps one could employ a mixed methods approach to study, for example, the micro-politics of a single school. The data might include interviews and focus groups, and Arendt's theory could be used to analyze that data. Another fertile area for research, equitable school funding, could be studied using Arendtian judgment. This might involve studying the macro-politics and legal aspects of a specific case, such as those that have played out in the state of New Jersey.

Policy and Practice

The findings in this study have many implications for education policy and practice. This discussion will blend policy and practice, as one informs the other, and the two are almost impossible to separate. It is, however, important that many of these ideas be codified in policy. First, governing bodies, such as the legislature and boards of education should look to the New Jersey State Legislature as a model for using Arendtian thinking and judging. As I discussed, at length, in chapter two, the LAD is replete with evidence of Arendtian thinking and judging. Boards of education should carefully consider the viewpoints of others when creating policy that will impact hundreds of teachers and thousands of students. When approaching a problem, it is important that decisions and judgment not be made in isolation. All major decisions should be preceded with much discussion and debate, with all relevant stakeholders being heard. Boards of education, as well as current legislatures should also not approach problems with preconceived

³² "State Briefs," *The Press of Atlantic City*, October 23, 2010 (Westlaw)

universal truths or “banisters of thought” and blindly apply them. Rather, policy makers need to think the particular. This is not a panacea against “bad” judgment and decision making, but perhaps decisions and courses of action will be better informed using this approach.

Administrators should also heed similar advice. Unfortunately, principals in particular are faced with unanticipated problems that flare up in the course of the day, and many of these problems must be addressed with a sense of urgency. Despite these circumstances, administrators would do well to follow Arendt’s process of thinking and judging. Even though these individuals are the “boss,” it is incumbent upon them to not make decisions in isolation. Before taking action, principals and other leaders should seek the counsel of trusted colleagues, subordinates and their own supervisors. Assistant principals, guidance counselors, social workers etc. are often rich sources of information. Engaging in discussion and debate, listening to others and truly considering various viewpoints will help school leaders make better decisions. Again, every situation is different, and even similar situations have particulars that need to be examined closely, and the resulting judgment and decision that is rendered and acted upon should be informed by those particulars. For longer term, strategic planning, taking these steps is not only more feasible than doing so during an “emergency”, it may even be more critical because strategic planning usually implies a widespread and lasting impact. Extra care, in keeping with Arendt, should be taken in these situations.

Although one’s judgment and decision making may be informed with the Arendtian analysis in this study, there are many practical and legal implications that are also evident. Boards of education that create policy, as well as administrators and teachers who carry out these policies should become very familiar with both the relevant sections in the LAD and the HIB law. With the Supreme Court establishing a negligence standard during the White case,

ignorance of the law will not play well before a court or an administrative law judge. The Department of Education has created and regularly updates model policies and procedures to assist districts in developing anti-discrimination policies and procedures and promoting an educational environment free of harassment, intimidation and bullying and a hostile educational environment. Educators should look to these, as well as the statutes and administrative code related to these issues for guidance.

It is important that administrators insure that students clearly understand that harassment based on sexual orientation, or any other protected characteristic, violates school rules, as well as state law. Perhaps more importantly, it is crucial that administrators and teachers take care to insure that students not only understand that this harassment is prohibited, but also what type of conduct constitutes unlawful, bias-based peer harassment. Like the LAD itself, written materials, student and parent handbooks and policy statements, as well as discussions with students should explicitly state that this type of harassment is discriminatory, hurtful, prohibited and unlawful. These statements should include not only the type of harassment is prohibited, but the specific protected characteristics that are covered by district policy and state law.

Boards of education, principals, curriculum supervisors and teachers should collaborate to create a curriculum that encourages inclusion and respect for diversity. Specific instruction on this topic could be part of the health or social studies curriculum. Just as importantly, however, teaching tolerance for diversity should be embedded throughout the curriculum. Classes that focus on the humanities, such as English language arts and social studies, should engage reading material that includes writers from traditionally marginalized groups, as well as books and novels that address themes and issues related to diversity, tolerance and social justice.

The implications for practice related to the White case go well beyond legal compliance. Administrators have a sacred duty to protect the children under their care. On many levels, the problem of harassment, intimidation and bullying is a safety issue, both physical and emotional. Administrators must be vigilant in protecting all students under their care. During the White saga, one jurist noted that the school imposed the responsibility of monitoring the harassment on the victim, Louis. Administrators must be proactive in monitoring, detecting and addressing any harassment. It is not enough for administrators to only rely on student reporting of harassment incidents. Most, if not all of the harassment that Louis endured occurred in less supervised locations, such as the locker room, the cafeteria and hallways; in other words, in areas where few, if any adult staff members were present. Schools should take care to insure that there is adequate supervision by staff members in these traditionally less supervised. For example, Louis testified that almost daily, when classes were changing, unknown, random students would yell anti-queer slurs at him, in the presences of scores of students. Building administrators should insure that teachers are strategically stationed in the hallway during the times when a large number of students are moving, such as in between classes, traveling to and from lunch, recess or special classes and arrival and dismissal. More adult supervision will most likely serve as a deterrent for would-be harassers. If the harassment is not allowed to take place, if it can be prevented, then there will be no hostile educational environment.

Final Thoughts

At the risk of sounding like an apologist for the administrators involved in this case, the principalship, at least today, is extremely challenging. While the current vernacular in educational circles, with both practitioners and researchers, characterizes the principal as an instructional leader, or at the very less a school leader this idea of educational leader may be a

myth. In today's educational and political landscape, I posit that in this age of accountability, layers of mandates from state and federal lawmakers, HIB, ever-changing curriculum, programs and pedagogy and a student population with a variety of needs that go beyond academics, principals are practically forced to be managers and not leaders. This state of the principalship is germane to the topic of this dissertation. Because of the unyielding demands placed upon them, principals often avoid confronting problems. I suggest that because of their workload, many do not want to hear any more "bad news". However, the Louis White case suggests that principals must be school leaders, and not just managers. Principals need to lead the charge in creating and maintaining an educational climate in their buildings that is characterized by tolerance and acceptance. These school leaders need to simultaneously cultivate tolerance and be vigilant against any occurrences of harassment. In order to do so and meet all the other demands of the position, these principals need help. States and districts need to increase funding to increase the number of staff to share these responsibilities. Many elementary schools have no assistant principal and only have a part-time guidance counselor. Secondary schools are often also understaffed in the administrative ranks. Districts need to fund more guidance counselor and assistant principal positions. Instead of only having a HIB specialist who responds to accusations of harassment and bullying, additional staffing is needed to allow these educators to proactively prevent such harassment.

In addition, the use of Hannah Arendt's theory of judgment in this study highlights the need for a greater emphasis on the humanities in principal preparation programs. Graduate schools of education, as well as lawmakers and policy makers, need to reevaluate how future school leaders are trained. The core courses that are required by the New Jersey Department of Education place a heavy emphasis on the social sciences at the expense of the humanities. These

principal preparation programs are practically training candidates to be managers and not leaders. For example, some of the core courses include Decision Analysis, School Finance and Personnel. In the Decision Analysis course, for instance, students are taught to collect data, disaggregate that data using an Excel spreadsheet, draw conclusions and make decisions. There is a heavy emphasis on the use of quantitative methods to make decisions; a “mathematical formula or equation” that supposedly leads to good judgment. More courses in the humanities focused on the writings of thinkers such as Hannah Arendt may teach future school leaders how to actually think, solve problems, judge, decide and act.

There are several heroes in the story documented in this study. In chapter two, I lauded the New Jersey Legislature for creating such an expansive and protective state anti-discrimination law. State lawmakers should be applauded for creating a law specifically designed to protect the civil rights of all of its citizens. The state courts also deserve much credit for interpreting and construing the law very liberally, furthering the legislative intent to eliminate discrimination in all its forms from our society. Without the LAD, the Louis White case could have concluded very differently. If the courts had not established the negligence standards in *Lehmann*, and then subsequently adapted this standard to apply to public schools, this case may have been decided based on the much more burdensome “deliberate indifference” standard established in *Davis* under Title IX. This would have made it very difficult for Louis to have achieved justice, and maybe more importantly, this alternate outcome may have left thousands of New Jersey school children vulnerable to harassment.

Finally, it is important to remember that while this dissertation emphasized Arendt’s theory and legal history, this dissertation is also Louis White’s story; a story that needed to be told. Even though there is ample evidence that the state legislators, Director, appellate court

judges and Supreme Court justices engaged in Arendtian judgment, the biggest hero in this saga was Louis White. Louis braved unimaginable taunting, humiliation and physical abuse day in and day out. At the age of fourteen, Louis, with the help of his mother, took action. This ordinary young man persevered through nearly a fourteen-year legal battle, and won. More than that though, Louis changed the legal and educational landscape, and the way school districts in New Jersey address peer harassment based on sexual orientation. This was no small problem in America's schools. The Supreme Court, in their written opinion, referenced to a national study in a law review article that found that anti-queer, bias-based peer harassment is pervasive in our schools.³³ In the early 2000's, the National Mental Health Association in a study found that more than three-quarters of teenagers reported that queer students, or those perceived to be so, were bullied in their schools.³⁴ As the editorial board for the *New York Times* so aptly noted after the New Jersey Supreme Court ruling in the case, "The court's ruling provides much-needed support to some of the nation's most vulnerable young people, and it sets a worthy standard for courts and educators nationwide."³⁵ This is all due to the bravery of one young man. I will end with this quote from an editorial in the *New Jersey Record*, stating that students guilty of bias-based harassment should have "to write an essay on courage and how people display it. Their source could be Louis White, surely one of the bravest people they'll ever meet."³⁶

³³ Rebecca A. Olesky, "Student-on-Student Sexual Harassment: Preventing a National Problem on a Local Level", *Seton Hall Law Review* 230, 230 (2001).

³⁴ Editorial, *New York Times*, February 24, 2007.

³⁵ *Ibid.*

³⁶ "Gay student writes new profile in courage," *New Jersey Record*, December 9, 2005.

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