UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LAUREN DONINGER, PPA AVERY DONINGER	:	NO.: 3:07CV01129 (MRK)
v.	:	
KARISSA NIEHOFF AND PAULA SCHWARTZ	:	
	:	AUGUST 20, 2007

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

I. BACKGROUND

A. Procedural History

The plaintiff, Lauren Doninger, PPA Avery Doninger (hereinafter "plaintiff"), commenced this action on July 16, 2007 in the Superior Court for the Judicial District of New Britain against the Defendants Karissa Niehoff and Paula Schwartz by way of a six-count Complaint. This Complaint seeks injunctive relief and damages stemming from conduct of the defendants that occurred when plaintiff was a junior at Lewis Mills High School (hereinafter "LMHS"). Simultaneously with the Complaint, plaintiffs filed an Application for Temporary Injunction and Order to Show Cause and accompanying Memorandum of Law seeking to bar defendants Niehoff and Schwartz from violating plaintiff's rights, specifically her first amendment right to free speech, her right to equal

protection, and her right to due process. Defendant Niehoff (hereinafter "Principal Niehoff") is and was the principal of Lewis Mills High School (hereinafter "LMHS"), and Defendant Schwartz (hereinafter "Superintendent Schwartz") is and was the superintendent of schools for the Region #10 school system.

The defendants removed the action to this Court on July 27, 2007.

B. Factual History

For the 2006-2007 school year, plaintiff Avery Doninger was a high-school junior at LMHS and Class Secretary for the class of 2008. At all relevant times Principal Niehoff was the principal at LMHS, and Superintendent Schwartz was the superintendent of Region #10 schools, of which LMHS is a part.

The plaintiff alleges that the events leading up to this lawsuit began on April 24, 2007. (Plaintiff's Brief, p. 2). On this date, the plaintiff alleges that Principal Niehoff was "apparently angry" about an email that was written by another member of the student council and endorsed by plaintiff, encouraging members of the community to contact school administrators to ask that students be allowed to use the LMHS auditorium for an event called "Jamfest," on April 28, 2007, where local bands perform. Id. The LMHS administration and central office would not permit use of the auditorium that date, because the only staff member (David Miller, Music Teacher at LMHS) who knew how to use the auditorium's new, sophisticated and expensive sound and lighting equipment was unavailable.

At no time did the LMHS administration or Central Office indicate that Jamfest was being cancelled; the message was clear that if Jamfest was to go forward on April 28, 2007 it would have to be held in the cafeteria or gymnasium, and if the students wanted to hold the event in the auditorium a new date would have to be selected when Mr. Miller was available to run the light and sound systems.

On April 24, 2007 four students, including the plaintiff, sent an email from the school computer lab to members of the community regarding Jamfest. This email was sent by the plaintiff and students Tim Farmer, Jackie Evans, and Pat Abate and "all the Students of Lewis Mills." The email stated, "[r]ecently, the Central Office decided that the Student Council could not hold its annual Jamfest/battle of the bands in the auditorium. The students who are planning the event were informed of the change of venue this morning (4-24) when the event is supposed to be this Saturday." The email asked, "you, the taxpayers, to please contact the central office and ask that we be let to use the auditorium." The email provided an incorrect central office phone number, and a second email sent a short time later on April 24, 2007 contained the correct phone number and the email address of Superintendent Schwartz. This email correspondence dated April 24, 2007, and sent from the school computer lab to members of the community is attached hereto as **Exhibit A**.

At least one student, Paul Omichinski, expressed his displeasure at being included in the above email, given that it was signed by, "Tim Farmer, Jackie Evans,

Avery Doninger and all The Students of Lewis Mills." Mr. Omichinski also made suggestions in his email regarding re-scheduling Jamfest, and indicated that no event can be held in the auditorium without Mr. Miller, due to Board of Education policy, not "Central Office" policy. This email response from student Paul Omichinski dated April 24, 2007 is attached hereto as **Exhibit B**.

The mass email sent by the plaintiff and additional students came to the attention of Principal Niehoff during the afternoon of April 24, 2007. Principal Niehoff spoke to the plaintiff about the email. Principal Niehoff expressed her concern to the plaintiff that this email was an inappropriate way to deal with the administration in arriving at a solution to the Jamfest issue. Further, Principal Niehoff noted that the email sent by plaintiff and the other students was in violation of the school's email policy, in that the Internet was not to be used by students for any other reason other than educational purposes. This Acceptable Use Agreement was signed by both Avery and Lauren Doninger at the start of the year and states the following:

> **Student**
> I understand and will abide by the Regional School District #10 Acceptable Use Agreement Policy and the corresponding procedures and guidelines. I understand that this access is designed **for educational purposes**….Should I commit any violation, of said policy or corresponding procedures and guidelines, my access privileges may be revoked, and school disciplinary action as deemed appropriate by the administration and/or appropriate legal action may be taken. (Emphasis added).

This Acceptable Use Agreement signed by both Lauren and Avery Doninger on September 6, 2006 is attached hereto as **Exhibit C**.

Ms. Niehoff further expressed her concern that this email did not exemplify the good citizenship and leadership that is required of school officers, as it contained false information and encouraged the public to protest via phone calls and emails to the central office; and that this was not the way for a class officer to resolve the pending issue. **Again, Ms. Niehoff never told the plaintiff that Jamfest was cancelled.**

As a result of this knowing violation of the school's email policy, Avery Doninger received a notation in her event log. The entry was made as a result of "inappropriate use of school computers to send unauthorized and inaccurate email to students, parents, and community members regarding Jamfest." This Event Log entry is attached hereto as **Exhibit D**. It is important to note that a similar log entry was also made in the logs of the other students who sent the April 24, 2007 email. (Tim Farmer, Jackie Evans, and Pat Abate).

As a result of this mass email sent to members of the community, Principal Niehoff and Superintendent Schwartz received emails, phone calls, and visits from parents and students asking about the Jamfest situation. One of these emails was from plaintiff's mother, plaintiff Lauren Doninger. In this email, Ms. Doninger expressed her disappointment with the LSM students being "denied the auditorium for Jamfest," and expressed "as you have likely become aware, there is significant parent/taxpayer

support for the students being able to hold Jamfest in the auditorium this weekend." The email dated April 24, 2007 from Lauren Doninger is attached hereto as **Exhibit E.**

On April 25, 2007, Principal Niehoff, Superintendent Schwartz, Ms. Hill, Mr. Miller and Dave Fortin (the Director of Building and Grounds) met with the plaintiff and the other concerned students regarding Jamfest. At this meeting, it was determined that moving Jamfest to June 8, 2007 would accommodate Mr. Miller's schedule, and allow the students to hold the event in the new auditorium. This date was chosen to give the administration enough time to handle security and stage issues properly. Email correspondence from Superintendent Schwartz summarizing this April 25, 2007 meeting is attached hereto as **Exhibit F**.

As a result of this meeting, the students sent another email to the community, advising of the resolution of the Jamfest issue. Tim Farmer sent Superintendent Schwartz a thank-you note for taking the time to meet with the students to address their concerns regarding Jamfest, and indicated he hoped his last email to the community would stop the "influx of calls." The April 25, 2007 email to the community and Tim Farmer's thank-you email to Superintendent Schwartz with Superintendent Schwartz's response are attached as **Exhibit G**.

On May 7, 2007, Principal Niehoff received an email from Superintendent Schwartz with a blog address attached. This address linked to a blog posting on livejournal.com, posted by plaintiff, Avery Doninger. This blog entry was posted on

April 24, 2007, the same day that the plaintiff and four other students sent the mass email to the community regarding Jamfest, after her discussion with Principal Niehoff about appropriate conduct for student leaders, and prior to resolving the Jamfest issue with the defendants. This blog was still posted on the Internet as of May 7, 2007. The plaintiff stated on her blog entry that:

> jamfest is cancelled due to douchebags in central office. Here is an email that we sent out to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest. Basically, because we sent it out, Paula Schwartz is getting a TON of phone calls and emails and such. We have so much support and we really appriciate (sic) it. However, she got pissed and decided to just cancel the whole thing altogether. Anddd (sic) so basically we aren't going to have at all, but in the slightest chance that we do it is going to be after the talent show on may (sic) 18th. Anddd..(sic) here is the letter we sent out to the parents.

Plaintiff's blog entry then directly pastes the email sent earlier that date from the school computer lab to the community (**Exhibit A**). In addition, the blog entry directly pastes her mother, plaintiff Lauren Doninger's email to defendants (**Exhibit E**) with the heading, "and here is a letter my mom sent to Paula and cc'd Karissa **to get an idea of what to write if you want to write something or call her to piss her off more."** (Emphasis added). A copy of plaintiff's April 24, 2007 blog entry is attached hereto as **Exhibit H**.

The contention in plaintiff's blog entry that Superintendent Schwartz "got pissed off and decided to cancel the whole thing" is patently false. In fact, at the time of the blog entry, nothing had been decided about Jamfest, and no one had told the students

that it had been cancelled. The defendants met with all the concerned students regarding Jamfest, and worked hard at a resolution, which was reached on the morning of April 25. Also, this blog entry encourages more disruption from the students and community by telling them to write and call to "piss off" the defendants. Id. This blog entry pastes emails sent from the school computer lab, as well as an email sent directly to the defendants from plaintiff's mother. Finally, the plaintiff's blog entry uses vulgar language against the defendants when she calls the administration "douchebags." Id.

On May 15, 2007, Principal Niehoff met with the plaintiff to discuss the blog entry. She shared her disappointment at the language used, the inaccurate information it contained, the disruption it caused and that her conduct wad unbecoming of a class officer. She further expressed her disappointment in that the plaintiff's livejournal message was posted in the evening after she had just spoken to the plaintiff during the school day on April 24, 2007 with regard to her poor judgment in sending out the inaccurate mass email in violation of the school internet policy, and her poor example as a school officer in not dealing constructively with the administration regarding the Jamfest issue.

Ms. Niehoff assigned the plaintiff three consequences for her actions: (1) to apologize to Superintendent Schwartz and the central office staff; (2) to show plaintiff's mother the blog entry; and (3) not to run in the upcoming election for class officers as

participation in student government is a privilege, and as the plaintiff had not demonstrated the conduct, character and good citizenship becoming of a class officer. Plaintiff was not removed from her position as class secretary for the 2006-2007 school year. Principal Niehoff determined these consequences after discussing the issue with other administrators, consulting the Student Handbook, the Board of Education Policy documents, and general school law contained in, A Practical Guide to Connecticut School Law, by Thomas Mooney. Principal Niehoff reviewed the following language when determining the consequences, and in fact sent the excerpt from the book to Mrs. Doninger:

> Consistent with the premise that participation in extracurricular activities is a privilege, however, the normal rules regarding discipline do not apply when students are excluded from such activities. Rather, exclusion from such activities are a matter for the discretion of the school officials supervising the activity.

Thomas Mooney, A Practical Guide to Connecticut School Law, 335-36, (3d ed. 2002). The above excerpt is attached hereto as **Exhibit I.**

Plaintiff and her mother disagreed with the consequences decided upon by the administration. Plaintiff's father, Clark Doninger, however, agreed with the consequences, and expressed his support in an email dated May 22, 2007. A copy of Clark Doninger's email addressed to Principal Niehoff is attached hereto as **Exhibit J**.

On May 18, 2007, Principal Niehoff received word that the media was contacting the school for comment regarding Avery Doninger's not being allowed to

run for Class Secretary. Five students were nominated for Grade 12 class secretary. The nominees were the plaintiff, Sarah Grabaskus, Jackie Evans, Rachel Considine, and Alicia Kennedy. The nomination sheet reflecting the candidates for Grade 12 class secretary is attached hereto as **Exhibit K**.

On the date of the candidate speeches for the student election, May 25, 2007, the plaintiff alleges that she wore a t-shirt that said "R.I.P.Democracy" on it. Other students wore t-shirts that said "Team Avery" on the front, and "Support LSM Freedom of Speech" on the back, and the plaintiff claims she was holding another of the "Team Avery" t-shirts in her hand. Principal Niehoff requested that one of the other students remove the t-shirt prior to the school assembly because it would have been disruptive at the assembly. The t-shirts in question were worn to the assembly on May 25, 2007. These shirts were to be worn after all the publicity regarding the incident, after the plaintiffs had contacted the media, after a news segment had been run on the incident, and after plaintiff had been told to stop talking about this incident in class. Another student was sent to Principal Niehoff's office from that class after the discussion of the news segment had been initiated. At the May 25, 2007 assembly, a student yelled out Avery Doninger's name during the assembly, and Principal Niehoff had to address the audience to prevent further disruption.

On May 22, 2007, Principal Niehoff received a lengthy email from Mrs. Doninger, requesting a meeting with Superintendent Schwartz, a Board of Education

member and Avery. Notably, Mrs. Doninger concedes in this email that Avery's posting, "was not appropriate-it was offensive and she needs to learn that she will not advance as a leader with that approach." This email sent by Mrs. Doninger is attached hereto as **Exhibit L.**

On May 23, 2007, Principal Niehoff proposed a meeting with Mrs. Doninger, per her request, on the morning of May 24, 2007. Superintendent Schwartz had arranged to attend this meeting. Mrs. Doninger responded that she was unavailable for this proposed meeting. Email correspondence between Principal Niehoff and Mrs. Doninger regarding this meeting is attached hereto as **Exhibit M**. On this date, Channel 30 news aired a segment about the story on the evening news. Principal Niehoff learned that Avery was announcing the upcoming news broadcast in class, and had to be admonished not to disrupt her class.

Since the media was contacted by Mrs. Doninger, and the consequences of Avery's actions were reported publicly, the defendants have received many disruptive phone calls at home and school, as well as threatening emails. For example, an email addressed to Principal Niehoff dated July 16, 2007 states, in part, "you have no business imposing sanctions on students within the school for exercising their right to free speech outside of the school setting. You will lose the suit. You will be ousted from your position. We, the townspeople of Region 10, will cheer that day. Rot in hell." Another email sent to Principal Niehoff on July 17, 2007 states, "you are the perfect

moral argument for abortion. If you were black, you'd be the perfect moral argument for lynching, and if you were Jewish, you'd be the perfect moral argument for Auschwitz." These threatening emails sent to the defendants are attached hereto as **Exhibit N**.

The plaintiffs seek an injunction to enjoin the defendants' from, in part, removing plaintiff from her position of LMHS class secretary, from allowing any student council meetings or activities to take place until a new election for class secretary is held, from maintaining any disciplinary record in the plaintiffs' records regarding this issue, from taking any punitive action against plaintiff for campaigning for class secretary, from taking any punitive action against plaintiff for exercising her first amendment rights, and from preventing plaintiff from addressing the entire class of 2008. See Plaintiff's Application for Temporary Injunction and Order to Show Cause. For the following reasons, the defendants submit that an injunction should not issue.

II. LAW & ARGUMENT

A. Standard of Review

A preliminary injunction is considered an "extraordinary" remedy that should not be granted as a routine matter. See JSG Trading Corp.v. Tray-Wrap, Inc., 917 F.2d 75, 80 (2nd Cir. 1990); Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 273 (2nd Cir. 1986); Medical Society of New York v. Toia, 560 F.2d 535, 538 (2nd Cir. 1977); see Hassan v. Slater, 41 F. Supp.2d 343 (E.D.N.Y. 1999), *aff'd* 199 F.3d 1322

(2nd Cir. 1999). When a party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the moving party must show: (1) it will suffer irreparable harm absent the injunction and (2) a likelihood of success on the merits. Rodriguez ex. rel Rodriguez v. DeBuono, 175 F.3d 227, 233 (2nd Cir. 1998), *cert.denied* 531 U.S. 864, 121 S.Ct. 156, 148 L.Ed. 2d. 104 (2000). See Jolly v. Coughlin, 76 F.3d 468, 473 (2nd Cir. 1996).

Irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction. Rodriguez ex. rel. Rodriguez v. DeBuono 175 F.3d at 234. See Bell & Howell: Maiya Co. v. Masel Supply Co., 719 F.2d 42, 45 (2nd Cir. 1983). Accordingly, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered. *Id.* See Reuters Ltd. v. United Press Int'l, Inc., 903 F.2d 904, 907 (2nd Cir. 1990). The movant must demonstrate an injury that is neither remote or speculative, but actual and imminent and that cannot be remedied by an award of money damages. *Id.* See Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 332 (2nd Cir. 1995); Sweeney v. Baine, 996 F.2d 1384, 1387 (2nd Cir. 1993). In the absence of a showing of irreparable harm a motion for a preliminary injunction should be denied. Rodriguez ex. rel. Rodriguez v. DeBuono 175 F.3d at 234; See JSG Trading Corp. v. Tray-Wrap Inc., 917 F.2d at 80; Sierra Corp. v. Hennessey, 695 F.2d 643, 647 (2nd Cir. 1982).

B. The Plaintiff Failed to Demonstrate Irreparable Harm Because Plaintiff Has No Right to Serve as Class Secretary

The plaintiff will not be irreparably harmed by the enforcement of the consequences imposed by the defendants. Irreparable harm is injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages. Rodriguez ex. rel. Rodriguez v. DeBuono 175 F.3d at 234; See Bell & Howell: Maiya Co. v. Masel Supply Co., 719 F.2d 42, 45 (2nd Cir. 1983); See Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 332 (2nd Cir. 1995); Sweeney v. Baine, 996 F.2d 1384, 1387 (2nd Cir. 1993). Avery Doninger was not expelled, suspended, or even assigned to detention as a result of her actions. She simply forfeited the privilege of running for student government as class secretary. As class secretary, Avery Doninger was a representative of her school, and the Board of Education policy for Regional School District #10 maintains that students must maintain good citizenship to participate in student government. The policy, states in part:

> All students elected to student offices, or who represent their schools in extracurricular activities, shall have and **maintain good citizenship records**. Any student who does not maintain a good citizenship record shall not be allowed to represent fellow students nor the schools for a period of time recommended by the student's principal, but in no case, except when approved by the board of education, shall the time exceed twelve calendar months.

(Emphasis added). The relevant portion of the Board of Education Policy for Regional School District #10 is attached hereto as **Exhibit O**.

As mentioned above, Avery Doninger was not removed as class secretary for the 2006-2007 school year. Therefore, the period of time in which she is not allowed to represent fellow students or the school, does not exceed twelve months per the Board of Education Policy (**Exhibit O**).

In addition, the Student Handbook lists the following objective of the Student Council:

> **4.** Direct students in the duties and responsibilities of good citizenship, using the school environment as the primary training ground.

The relevant portion of the Student Handbook is attached hereto as **Exhibit P.**

Participation in extracurricular activities such as student council and athletics is a privilege, not a right. In one of many newspaper articles in which the plaintiffs commented, Avery Doninger likened student government to her "varsity sport." She stated, "some kids play sports, but student government is my 'varsity sport.' That is why it is so important to me." See The Register Citizen article regarding the plaintiff's litigation dated July 23, 2007 attached hereto as **Exhibit Q**. The Sixth Circuit Court of Appeals, in the recent matter of Lowery v. Euverard, 2007 WL 2213215 (6th Cir. 2007) (copy attached as **Exhibit R**) cited the well established rule that students, "do not have a general constitutional right to participate in extracurricular athletics." Id. at *4, (citations omitted). The Sixth Circuit in the matter of Poling v. Murphy, 872 F.2d 757 (6th Cir.1989), *cert. denied*. 493 U.S. 1021 (1990), also determined that with respect to

the participation in school athletics being a privilege, "the privilege of participating in student council election seems no different." Id. at 764. The Sixth Circuit in Lowery also cited that the Supreme Court has held that student athletes are subject to more restrictions that the student body at large. See, Lowery v. Euverard, 2007 WL 2213215 at *4, citing Vernonia School District 47J v. Acton, 515 U.S. 646,657 (1995). In contrast, all of the cases cited by the plaintiff regarding discipline for speech on or off campus involve suspension or expulsion – denial of a fundamental right.

Avery Doninger is certainly allowed to participate in other activities available in school, and to showcase her leadership abilities in these other activities. In fact, she was encouraged to participate in student council by Principal Niehoff. The plaintiff lost her privilege to run for a class officer position because she did not maintain good citizenship, as required by the Board of Education Policy and the Student Handbook. **Exhibits O and P**. In addition, the plaintiff cannot demonstrate that irreparable harm is "actual and imminent" rather than "remote or speculative." Rodriguez ex. rel. Rodriguez v. DeBuono 175 F.3d at 234; See Bell & Howell: Maiya Co. v. Masel Supply Co., 719 F.2d 42, 45 (2nd Cir. 1983); See Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 332 (2nd Cir. 1995); Sweeney v. Baine, 996 F.2d 1384, 1387 (2nd Cir. 1993). For instance, the plaintiff argues that her loss of a right to vote on issues as a member of student council "may" have a detrimental impact on her college admissions. (Plaintiff's Brief, p. 10). In addition, any disciplinary notations in plaintiff's record "could" adversely

affect acceptance of her college applications. (Plaintiff's Brief, p. 11). Clearly, this harm is entirely speculative, and it is undisputed that the subject note in plaintiffs disciplinary log is not a part of her permanent record. The plaintiff cannot demonstrate irreparable harm because she has not been denied any right. She has only lost the privilege to serve as class secretary.

C. The Plaintiff Cannot Demonstrate Likelihood of Success on the Merits of the Case Because the Actions of the Defendants did not Violate either the United States or Connecticut Constitutions

1. The Plaintiffs Speech at Issue Did Not Deal With a Matter of Public Concern, and is Therefore Not Constitutionally Protected Speech

As illustrated above, there was a series of events that led up to the consequences imposed on the plaintiff. The speech contained in both the mass email sent by the plaintiff and three other students, and the speech contained in the blog entry posted by plaintiff, related to a private grievance that the plaintiff had with the defendants regarding Jamfest. The language in the blog had nothing to do with the school leaders breaching the public trust, or not discharging their responsibilities. The plaintiff was not stopped from running for school office because of any religious or political views. Nor was this a whistleblower situation, in which plaintiff was disciplined for reporting improprieties. See Lowery v. Euverard, 2007 WL 2213215 at *17 (6th Cir. 2007).

The plaintiffs in Lowery circulated a petition to have their football coach fired. The plaintiffs were dismissed from the team and claimed their petition was protected by the First Amendment. The Sixth Circuit Court of Appeals determined that there was no First Amendment protection, given that it was reasonable for the defendants to forecast that this petition would undermine the coach's authority, and affect the unity of the team. Id. Further, the Sixth Circuit supported its reasoning by analogizing the plaintiffs' petition to the context of government employment because, "student athletes have greater similarities to government employees than the general student body….it is well established that participation in athletics is not a constitutional right, and student athletes are subject to greater restrictions than the student body at large. The Supreme Court has noted:

> By choosing to "go out for the team" [student athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally….Somewhat like adults who choose to participate in a "closely regulated industry," students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.

Id. at *13, quoting Veronia School District. 47J v. Acton, 515 U.S. 646,657 (1995).

Speech by public employees on matters of "legitimate public concern" is protected as "free and open debate is vital to informed decision-making by the electorate." Pickering v. Board of Education, 391 U.S. 563, 571-572(1968). However,

the plaintiff's speech at issue was a private grievance regarding Jamfest. It did not regard any matters of public concern.

The Sixth Circuit in the matter of Poling v. Murphy, 872 F.2d 757 (6th Cir.1989) also determined that with respect to the participation in school athletics being a privilege, "the privilege of participating in student council election seems no different." Id. at 764. In the instant matter, the plaintiff chose to voluntarily participate in student government, and therefore voluntarily subjected herself to a greater degree of regulation.

After analogizing the facts in the case to that of a government employee due to the voluntary nature of athletics, the Lowery court applied the reasoning of the Supreme Court in the matter of Connick v. Myers, 461 U.S. 138 (1983) to the students' situation in Lowery. The plaintiff in Connick, an assistant district attorney, was unhappy about being transferred. She prepared a questionnaire regarding the views of others on transfer policy, office morale, the level of confidence in supervisors and pressure to work on political campaigns. Id. at 141. She was then terminated. The Supreme Court noted that:

> To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark-and certainly every criticism directed at a public official-would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

Id. at 149.

The Supreme Court further found that Connick's speech did not inform the public about matters of public concern. It only conveyed that one person was upset with the status quo. Id. at 148. The Supreme Court further found:

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

Id. at 146.

In the instant matter, the plaintiff's voluntary participation in student government can be analogized to the situation of a public employee, per Lowery. The Sixth Circuit in Lowery stated that the plaintiff in Connick, "had a right to criticize her supervisor; the state could not throw her in jail or deport her for her actions. However, the plaintiff did not have a right to continue working for the supervisor whose authority she challenged. Lowery v. Euverard, 2007 WL 2213215 at *17. Similarly, the plaintiffs in Lowery are "free to continue their campaign to have Euverard fired. What they are not free to do is continue playing football for him while actively working to undermine his authority." Id. at *16,

In the instant matter, the plaintiff does not have the right to continue to be a student leader and an example of good citizenship while at the same time being

insubordinate, untruthful, vulgar and inciting disruption. Lowery v. Euverard, 2007 WL 2213215 at *17, Connick v. Myers, 461 U.S. 138 (1983).

2. The Defendants Did Not Violate Plaintiff's Right to Free Speech Because The Speech at Issue was Antithetical to the Mission of Regional School District #10, Vulgar, and Knowingly False

> The role and purpose of the American public school system [is to]….'prepare pupils for citizenship in the Republic….It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.'
>
> Bethel School District No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

In the instant matter, Avery Doninger clearly did not exhibit civility or good citizenship by calling the central office members "douchebags" on a web journal. She also did not exhibit civility or good citizenship by encouraging all those reading the web journal to write and call Superintendent Schwartz to "piss her off more." (**Exhibit H**). Pursuant to the Board of Education Policy and the Student Handbook a student must exhibit good citizenship to maintain the privilege of serving on student council, of which the class officers are members. (**Exhibits O and P**).

The speech exhibited by the plaintiff on her blog entry, is antithetical to the mission of Regional School District #10. As demonstrated in both the Student Handbook and the Board of Education Policy the mission of student council officers at LMHS is to "direct students in the duties and responsibilities of good citizenship;" and to "maintain good citizenship" (**Exhibits O and P**). The Supreme Court has maintained

that the school, not the judicial system, has the authority to determine what speech is appropriate for students. Id. at 683. In addition, the school does not have to allow speech that is incompatible with the "basic educational mission" of the school. Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 266 (1988), quoting Fraser, supra, 478 U.S. at 685. An exhibition of poor citizenship by a school officer is clearly incompatible with the basic mission of the school, and directly contradicts school policy. The school retains the right to "disassociate itself from an entire range of speech, including speech that is, for example, ungrammatical, poorly written…or unsuitable for immature audiences." Id. at 271.

Plaintiff's speech was plainly vulgar. It is a "highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." Bethel School District No. 403 v. Fraser, 478 U.S. at 683. In plaintiff's blog entry, she called the administration, "douchebags." The Webster Online Dictionary definition of douche bag is, "a small syringe with detachable nozzles; used for vaginal lavage and enemas." Vulgar language is described by the Supreme Court in FCC v. Pacifica Foundation, 438 U.S. 726 (1978) and cited in Fraser:

> These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said '[s]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

FCC v. Pacifica Foundation, 438 U.S. at 746, quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). The vulgar language at issue in FCC v. Pacifica were words that "depicted sexual and excretory activities in a patently offensive matter…" Id. at 732. The defendants submit that the language used by the plaintiff in her blog entry, specifically, "douchebags" addresses vaginal and anal activities in an offensive manner, and the vulgar language is directed towards the defendants. The term "douchebags" is commonly recognized as vulgar language. In a recent editorial in the New York Times dated July 22, 2007 regarding this litigation, the author characterizes the language used by the plaintiff as vulgar. The editorial states that the plaintiff "used a vulgar term last April to describe the administrative staff of the school district." This editorial dated July 22, 2007 is attached hereto as **Exhibit S**. This language is of such "slight social value….that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

Further, the speech posted on the plaintiff's blog was knowingly false. The plaintiff posted that "jamfest is cancelled due to the douchebags in central office." As outlined above, Jamfest was never cancelled. None of the defendants ever indicated that Jamfest was cancelled. After the plaintiff approached Principal Niehoff about her concerns over the scheduling of Jamfest, Ms. Niehoff immediately contacted those concerned, and worked at a resolution. Clearly, at the time of the posting, the plaintiff

knew that Jamfest was not cancelled. This resolution was clearly stated in the April 2007 issue of the school newsletter. In this newsletter, Principal Niehoff attached a letter to all parents and students outlining the Jamfest issue and the resolution. This letter clearly states, "at no time was the event cancelled by the school or the district." The April 2007 newsletter is attached hereto as **Exhibit T**.

> Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality….

McDonald v. Smith, 472 U.S. 479, 487(1985), quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

The Supreme Court in McDonald further ruled that, "the knowingly false statement and the false statement made in reckless disregard for the truth, do not enjoy constitutional protection." Id., quoting Garrison v. Louisiana, 379 U.S. 64, 75, (1964). Clearly, at the time that plaintiff posted her language indicating that the administration canceled Jamfest, plaintiff knew that it was not true. This knowingly false statement is not constitutionally protected.

3. It Was Reasonable for the Defendants to Believe That the Speech at Issue Would Cause Disruption

Plaintiff's speech had the potential to cause, and did in fact cause, significant disruption within the school. In the matter of Tinker v. Des Moines Independent

Community School District, et. al.,393 U.S. 503 (1969), the Supreme Court found the following :

> Conduct by student, **in class or out of it**, which for any reason, whether it stems from time, place or type of behavior, materially disrupts classwork or involves substantial disorder or invasion of rights of others is not immunized by constitutional guaranty of freedom of speech.

Id. at 513, citing Blackwell v. Issaquena County Board of Education, 363 F. 2d 749 (C.A. 5th Cir. 1966). (Emphasis added).

The speech at issue in Tinker, was students wearing black armbands on their sleeves to show their disapproval of the Vietnam War. Id. at 514. The Supreme Court ruled that this type of passive and symbolic speech was protected because it, "neither interrupted school activities, nor sought to intrude in the school affairs or the lives of others." Id. Tinker does not require certainty of a disruption, only that it was reasonable for school officials "to forecast a substantial disruption of or material interference with school activities. Lavine v. Blaine School District, 257 F.3d 981, 989,992 (9th Cir. 2001), *cert denied*. 536 U.S. 959 (2002).

In Lowery v. Euverard, supra, the Sixth Circuit ruled that the defendants "were not obligated to wait until the petition circulated by the players disrupted the team before acting, nor are they now required to demonstrate that it was certain that the petition would substantially disrupt the team. Rather, the defendants must show that it was reasonable for them to forecast that the petition would disrupt the team. Id. at *9.

4. Plaintiff was Not Given Consequences by the Defendants Because of the Content of her Speech, but Because her Conduct Caused the Negative Secondary Effect of Disruption.

> [R]egulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment. On the other hand, the so-called "content neutral" time, place, and manner regulations are acceptable as long as they are designed to serve a substantial governmental interest and do not unreasonably limit the alternative avenues to communication.
>
> Bigg Wolf Discount Video Move Sales, Inc. v. Montgomery County, 256 F. Supp. 2d 385 ,392 (D.MD. 2003), citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986).

In the instant matter, plaintiff's conduct exhibited poor citizenship and the negative secondary effect of disruption, and that conduct, rather than the content of her speech, is what caused her to forfeit her privilege to run for class officer. A regulation that targets only harmful secondary effects of speech, rather than the content of the speech itself is deemed content neutral. See, City of Erie v. Pap's A.M.,529 U.S. 277, 291, 296 (2000) (plurality opinion) See City of Los Angeles v. Alameda Books, 535 U.S. 425,434 (2002) For example, in Renton v. Playtime Theatres, Inc.,475 U.S. 41, the Court determined that the government has the ability to adopt ordinances that regulate "adult" businesses based on a governmental interest in "adverse secondary effects." Renton, 475 U.S. at 47-49. In the instant matter, the adverse secondary effect that the defendants were seeking to control was disruption within the school, as well as poor citizenship by class leaders. The defendants had a significant governmental interest in controlling disruption per Bigg Wolf Discount Video

Move Sales, Inc. v. Montgomery County, 256 F. Supp. 2d at 392, citing Renton v. Playtime Theatres, Inc., 475 U.S. at 46-47.

> "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. " Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

The consequence at issue was a valid content-neutral time, place and manner regulation in that it was based on plaintiff's conduct, not the content of her speech. In addition, the consequence was designed to serve a substantial governmental interest in protecting the school from disruption. Id. Further, the consequence did not unreasonably limit the alternative avenues to communication. The defendants contend that the plaintiff could actively criticize the defendants, but she does not have the right to continue to be a student leader and an example of good citizenship while at the same time exhibiting insubordinate, vulgar and disruptive conduct, and to misrepresent the truth to the public.

As set forth above, it was certainly reasonable for the defendants to anticipate that the conduct at issue would cause a disruption, and it did in fact cause a disruption. After being spoken to about appropriate behavior of class officers, plaintiff went home on the evening of April 24, 2007 and posted a blog entry on livejournal.com which contained false information (Jamfest was not cancelled), vulgar language, and language intended to incite the readers of the blog to disrupt the school and the lives

of the defendants (to “piss off” the superintendent more) by writing emails and making telephone calls.

Moreover, although the defendants and Avery Doninger came to a resolution about Jamfest the day after Avery posted her blog, Avery did not revise, change, update or remove her blog posting. Until at least May 7, 2007, the inaccurate, vulgar, and incendiary post was still on livejournal.com, open for the public to read. Clearly, a posting of that nature (one that encouraged disruption by calling or writing to “piss off”) open for public view for two weeks had the potential to cause a disruption, and it was reasonable for the defendants to forecast such a disruption. In addition, Principal Niehoff had heard that the plaintiff continued talking in class about the Jamfest issue, even after the April 25, 2007 resolution. This caused a disruption within the classroom, and other students even requested that the plaintiff stop talking about the issue in class. After the plaintiffs alerted the media, there was an additional, significant disruption in the form of telephone calls, letters, and even threatening emails to the defendants as outlined above.

To say plaintiff did not intend the administration to know about the speech at issue because it was posted on a blog at home is to “ignore the realities of the situation.” Lowery at *10. Not only is livejournal.com a public Internet forum, but also on livejournal.com there exists an online “community” of LMHS students.

The facts in the recent Second Circuit matter of Wisniewski v. Board of Educ. Of Weedsport Cent. School District, 2007 W.L. 1932264 (2nd Cir. 2007) (copy attached as **Exhibit U**) and the instant matter are nearly identical. In Wisniewski, the plaintiff, a middle school student, was using AOL Instant Messaging ("IM") to message his friends from his parents' home computer. Id. at *1. One of these messages portrayed a threatening message about the plaintiff's English teacher, and an icon portraying a pistol firing at a person's head. Id. This message was available for viewing by the plaintiff's "buddies" for three weeks, and came to the attention of the defendants. Id. at *2.

The Second Circuit ruled that the speech contained in the instant message sent from plaintiff's family computer "constitutes student conduct that poses a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would "materially and substantially disrupt the work and discipline of the school. Id. at *4, quoting Morse v. Frederick, 127 S. Ct. 2618, 2625, (2007) (quoting Tinker, 393 U.S. at 513). The Second Circuit further concluded that the fact that the creation and submission of the IM occurred off school property, did not "necessarily insulate him from school discipline." Id. at *5. Courts have recognized that off campus conduct can create a foreseeable risk of disruption within a school. Id., citing Thomas v. Board of Education, 607 F.2d. 1043, 1052 n. 17 (2nd Cir. 1979), cert. denied 44 U.S. 1081

(1980). ("We can, of course envision a case in which a group of students incites a substantial disruption within the school from some remote locale.")

The Second Circuit in Wisniewski concluded that all federal claims were properly dismissed because it was reasonably foreseeable that the speech would have caused a disruption within the school environment even thought no actual disruption occurred. Id. at *1. Further, the Second Circuit was mindful that "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." Id. at *5, quoting Wood v. Strickland, 420 U.S. 308, 326 (1975).

While the speech in the instant matter is clearly less grave than the depiction in Wisniewski, like Wisniewski, it was reasonable for the defendants in this matter to foresee that the blog language posted off of school grounds would cause a disruption. This blog had been up for at least two weeks at the time it was discovered by the administration. This blog was posted for view by the general public. The instant message in Wisniewski had been posted for three weeks, but was only able to be viewed by plaintiff's "buddies." The blog in question could be viewed by anyone, and therefore, arguably created a greater chance of disruption.

The plaintiff called the administration "douchebags" and encouraged others to disrupt the lives of the defendants by calling and writing them. She was in no way expressing any non-disruptive deeply held political beliefs as was the case in Tinker.

Not only was it reasonable for the defendants to believe that he blog entry would be disruptive to school and the lives of others per Tinker, disruption in fact, did occur.

Other students read and responded to plaintiff's blog entry. Clearly, the plaintiff expected this entry to be read by other students at LMHS. In her blog she encouraged others to send an email like the one her mother sent, or make phone calls to the defendants to cause further disruption.

As noted above, the Second Circuit in Wisniewski concluded that it is reasonable for school administrators to foresee that off campus speech can cause a disruption on campus. The Court in Wisniewski quoted the Second Circuit in Thomas v. Board of Education, to stand for this proposition. As mentioned above, the Second Circuit in Thomas stated, "we can, of course envision a case in which a group of students incites a substantial disruption within the school from a remote locale." Id. at 1052 n.17.

The plaintiffs claim that the decision in Thomas is dispositive of the instant claim. (Plaintiff's Brief, p. 7). However, Thomas is easily distinguishable from the instant matter. The Second Circuit in Thomas determined that by the facts of the case, there was no threat or forecast of material and substantial disruption within the school. Thomas v. Board of Education 607 F.2d at at 1052 n.17. In the case at bar, however, it was reasonable for the defendants to foresee disruption as a result of the plaintiff's posting the blog. Clearly, the facts in this case align with the most recent Second

Circuit decision of Wisniewski, in which it was determined that it was reasonable to forecast disruption. In Wisniewski, the icon was received by fifteen recipients including some of the plaintiff's classmates (considered by the Second Circuit as "extensive distribution"), and was up for a three-week period of time. The Second Circuit ruled that this "made the risk at least foreseeable to a reasonable person, if not inevitable. And there can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment." Wisniewski v. Board of Educ. Of Weedsport Cent. School District, 2007 W.L. 1932264 at *5.

In the instant matter, it is clear that the blog language was "extensively distributed," per Wisniewski, in that it was posted on a public Internet blog, and certainly more than fifteen people read it. In addition, it was posted for two weeks prior to being brought to the attention of the defendants, and after the Jamfest issue had been resolved. Clearly, these circumstances are nearly identical to those in Wisniewski. Therefore, the defendants submit that it was reasonable for the defendants to forecast a "substantial disruption in the school environment" once the blog entry was brought to their attention. Id.

5. Pursuant to the Recent Morse v. Frederick Decision, Plaintiff's Speech is Not Constitutionally Protected

Morse v. Frederick, 127 S. Ct. 2618, 2625, (2007), stands for the proposition that the First Amendment does not require schools to tolerate speech that is in violation of established school policy. Id. at 2629. The Supreme Court in Morse ruled that when Frederick unfurled his banner that read "Bong Hits for Jesus," it was not in violation of the First Amendment to take actions against the speech because, "it promoted illegal drug use-in violation of established school policy." Id. Similarly, in the instant matter, the defendant acted in violation of established school policy in favor of good citizenship on the part of student leaders. **Exhibits O and P**. Therefore, the defendants' actions towards the plaintiff were not in violation of the First Amendment because they were taken in furtherance of established school policy in favor of good citizenship on the part of student leaders.

Furthermore, Justice Thomas filed a concurring opinion, raising a compelling argument that the Constitution does not afford students a right to free speech in public schools. Justice Thomas analyzed the legal doctrine of *in loco parentis*, and how as early as 1837, state courts applied this principle to public schools. Id. at 2631. This doctrine was applied in the following manner:

> One of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits….The teacher is the substitute of the parent; …and in the exercise of these delegated duties, is invested with his power.

Id. at 2631-32, quoting State v. Pendergrass, 19 N.C. 365, 365-366 (1837).

Justice Thomas' review of the case law showed that the doctrine of *in loco parentis* also allowed schools to regulate student speech. Id. In a case from 1859, the court found the following:

> Language used to other scholars to stir up disorder and subordination, or to heap odium and disgrace upon the master; writings and pictures placed so as to suggest evil and corrupt language…By common consent and by the universal custom in our New England schools, the master has always been deemed to have the right to punish such offenses. Such power is essential to the preservation of order, decency, decorum and good government in schools.

Id. at 2632, quoting Lander v. Seaver, 32 Vt. 114, 121 (1859).

Further, the Supreme Court has continued to recognize the *in loco parentis* doctrine as it applies to public schools. Id. at 2633, citing Veronia School District. 47J v. Acton, 515 U.S. 646,654,655 (1995) ("Traditionally, at common law, and still today, unemancipated minors lack some of the most fundamental rights of self determination").

Justice Thomas concurred with the majority ruling in Frederick v. Morse, but for a much simpler reason: "[a]s originally understood, the Constitution does not afford students a right to free speech in public schools." Id. at 2634. Justice Thomas continued, "[t]o be sure, our educational system faces administrative and pedagogical challenges different from those faced by 19th-century schools. And the idea of treating children as though it were still the 19th century would find little support today. But I see

no constitutional imperative requiring public schools to allow all student speech. Parents decide whether to send their children to public schools….If parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or home school them; or they can simply move. Whatever rules apply to student speech in public schools, those rules can be challenged by parents in the political process." Id. at 2635.

For the above reasons pursuant to Morse v. Frederick, the plaintiff cannot demonstrate that her free speech rights were violated.

6. The Defendants Did Not Violate Plaintiff's Right to Free Speech When They Requested that T-Shirts Emblazoned with "Team Avery" on the Front and "Support LSM Freedom of Speech" on the Back Not Be Worn to a School Assembly

On the date of the candidate speeches for the student election, May 25, 2007, the plaintiff alleges that she wore a t-shirt that said "R.I.P.Democracy" on it. Other students wore t-shirts that said "Team Avery" on the front, and "Support LSM Freedom of Speech" on the back, and the plaintiff claims she was holding another of the "Team Avery" t-shirts in her hand. Principal Niehoff requested that one of the other students remove the t-shirt prior to the school assembly because it would have been disruptive at the assembly. Clearly, the plaintiff does not have standing with regard to other students being asked to remove the t-shirts, and the plaintiff was never asked to remove her t-shirt. However, the plaintiff alleges that her right to free speech was

violated because she "feared that if she donned her shirt it would be banned, as well." (Plaintiff's Brief, p. 2).

In the Second Circuit matter of Guiles ex rel. Guiles v. Marineau, 461 F.3d 320 (2nd Cir. 2006), the student speech at issue was a t-shirt that depicted President Bush's head on the body of a chicken, surrounded by words such as "Crook," "Cocaine Addict," AWOL, Draft Dodger," and "Lying Drunk Driver." Id. at 322. The student was disciplined for wearing the shirt after being issued warnings by the school, and sent home from school. Id. at 323. The Second Circuit found that the censorship by the school was unwarranted because the shirt did not cause any disruption on any of the four occasions when the student wore it. Also, the defendants did not contend that they had a reasonable belief that the shirt would cause any disruption. Id. at 331.

In the instant matter, as opposed to Guiles, the defendants contend that they did have a reasonable belief that the t-shirts at issue would cause a disruption at the assembly. The t-shirts in question were worn to the assembly on May 25, 2007. These shirts were to be worn after all the publicity regarding the incident, after the plaintiffs had contacted the media, after a news segment had been run on the incident, and after plaintiff had been told to stop talking about this incident in class. Another student was sent to Principal Niehoff's office from that class after the discussion of the news segment had been initiated. At the May 25, 2007 assembly, a student yelled out Avery Doninger's name during the assembly, and Principal Niehoff had to address the

audience to prevent further disruption. The defendants had to ensure that, for the good of the school, the election assembly progressed without disruption.

As outlined above, Tinker does not require certainty of a disruption, only that was reasonable for school officials "to forecast a substantial disruption of or material interference with school activities. Lavine v. Blaine School District, 257 F.3d 981, 989,992 (9th Cir. 2001). Taking into account the facts above, it was entirely reasonable for the defendants to believe that the t-shirts would cause a disruption at the school assembly.

7. The Defendants Did Not Violate Plaintiff's Right to Due Process

The Fourteenth Amendment to the United States Constitution provides that no state shall deprive any person of life, liberty, or property without due process of law. Under the due process clause, a student may not be deprived of a property right in his education, by way of suspension or expulsion, without notice or hearing. Goss v. Lopez, 419 U.S. 565, 578 (1975).

In the instant matter, plaintiff lost no property right. Plaintiff was neither suspended nor expelled from school. As outlined in Section II.B. above, participation in extra-curricular activities such as student government, is a privilege, not a right. The Sixth Circuit has very clearly stated that, "the privilege of participating in interscholastic athletics…[is] outside the protection of due process." Poling v. Murphy, 872 F.2d

757,764 (6th Cir.1989),citing Hamilton v. Tennessee Secondary School Athletic Association, 552 F.2d 681, 682 (6th Cir. 1976). "the privilege of participating in a student council election seems no different." Id. at 764.

In the instant matter, plaintiff was not suspended, expelled, or denied a right to education in any way. Because the plaintiff was not denied any liberty or property right, the defendants did not violate her right to due process under the Fourteenth Amendment to the United States Constitution.

8. The Defendants Did Not Violate Plaintiff's Right of Equal Protection

Because plaintiff does not claim to be a member of a protected group, plaintiff's equal protection claim is premised on a "class of one" theory. Village v. Willowbrook v. Olech, 528 U.S. 562, 564 (2000). The Supreme Court has ruled that the "class of one" plaintiff must prove that they were intentionally treated differently from other similarly situated and that there is no rational basis for the treatment. Piscottano v. Town of Somers, 396. F.Supp. 2d 187, 205 (2005), citing Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

In general, a plaintiff's burden on a "class of one" claim is "extremely high" and a plaintiff cannot prevail absent a prima facie showing that he is identical in all aspects to the individuals with whom he compares himself. Morron v. Middletown, 464 F. Supp.

2d 111,120 (D.Conn. 2006), quoting Nielson v. D'Angelis, 409 F.3d 100, 104 (2d Cir. 2005), Purze v. Village of Winthrop Harbor, 286 F.3d 452, 455 (9th Cir. 2002).

In the instant matter, plaintiff has not presented a similarly situated class officer who was allowed to keep their position. She has not presented a fellow class officer who sent an email in violation of school policy, was talked about his or her behavior following this email, and then was insubordinate by posting a blog with vulgar language directed at the administration, false information, and language encouraging others to disrupt the defendants, and did not receive the same treatment as she did.

Even if the plaintiff did present a similarly situated class officer, the defendants had a rational basis to not allow her run for class secretary for 2007-2008 school year. By her actions, the plaintiff was not exhibiting good citizenship. Maintaining good citizenship is required for student officers by both the Student Handbook and the Board of Education Policy. This, among the other reasons argued above, provided a rational basis for the consequences handed out to the plaintiff by the defendants.

9. The Connecticut Constitution Does Not Provide Greater Free Speech Protection Than the United States Constitution Regarding Student Speech

The plaintiff cites State v. Linares, 232 Conn. 345 (1995), in support of her argument that the Connecticut Constitution provides greater protection for expressive activity than that provided by the first amendment to the federal constitution. (Plaintiff's Brief, p. 11). Linares states:

> [a]lthough we often look to United States Supreme Court precedent when construing related provisions in our state constitution, we **may** determine that "the protections afforded to the citizens of this state by our own constitution go beyond those provided by the federal constitution, as that document has been interpreted by the United States Supreme Court."
> Id. at 379. (Citations omitted) (Emphasis added).

In Linares, gay and lesbian protesters unfurled a banner and chanted at the Connecticut General Assembly until the Former Governor William A. O'Neill had to stop speaking due to the disruption. Id. at 353. Notably, the Linares court determined that this speech was not constitutionally protected because the activity intentionally disrupted the proceedings. Id. at 387 &n. 17, 390-91. The speech at issue in Linares is completely different than the student speech at issue in the instant matter.

No Connecticut Appellate or Supreme Court case has enlarged Connecticut Constitutional protections beyond the parameters of the United States Constitution in cases involving student speech. Therefore, the defendants respectfully submit that the Court follow federal precedent in the instant matter.

III. CONCLUSION

For the reasons set forth above the plaintiffs' motion for Preliminary Injunction should be denied.

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