UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LAUREN DONINGER, P.P.A.	:	CIVIL ACTION NO.
as Guardian and Next Friend of	:	
Avery Doninger, a minor	:	3:07CV1129 (MRK)
Plaintiff,	:	
	:	
V.	:	
	:	
KARISSA NIEHOFF, and	:	
PAULA SCHWARTZ	:	
Defendants	:	AUGUST 20, 2008

PLAINTIFF'S MEMORANDUM OF LAW
IN OBJECTION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The plaintiff, Lauren Doninger as the guardian and next friend of Avery Doninger,[1] hereby submits this supplemental memorandum of law in opposition to Karissa Niehoff and Paula Schwartz's Motion for Summary Judgment.

Several legal aspects of this case have already been considered by this Court and the Second Circuit as part of the Preliminary Injunction proceedings. Both of the resulting decisions relied heavily on certain facts, found in favor of the defendants, which the plaintiff contends are not only in dispute, but the plaintiff can now show are demonstrably false. Moreover, subsequent discovery of earlier written communications by or to the defendants leads the plaintiff to now believe that the defendants may have perpetrated a fraud upon this court and continue to do so by asserting facts that are clearly untrue through their Motion for Summary Judgment and accompanying 56(a)1 Statement. While these accusations are serious, they are borne out by previously withheld documents

[1] On August 6, 2008, Avery Doninger turned eighteen. A motion, pursuant to Fed. R. Civ. Pro. 19(a) to add her as a plaintiff in her own right, has been filed and is pending.

in the defendants' own words, which are attached to plaintiff's submission.

For all the foregoing reasons, the defendants' motion must be rejected. Furthermore, the plaintiff herself filed a motion for partial summary judgment, and incorporates those arguments herein.

I. FACTS OF THE CASE

The plaintiff's version of facts, as presented in her Local Rule 56(a)2 Statement, are as follows:

In the spring of 2007, the plaintiff's daughter, Avery Doninger, was sixteen years old and in her junior year at Lewis Mills High School (LMHS), a public secondary school in Burlington, CT. Avery was Secretary of the Class of 2008 and an active member of the Student Council. As a Student Council member, she planned social events for the general student body. Avery Doninger Prelim. Inj. Hr'g Test., (hereinafter "PIH") at 235, 243-44; Avery Doninger Aff., PIH Ex. 26 at ¶ 1[2]. In particular, Avery had spent a great deal of time and effort planning Jamfest, a "battle of the bands" event, where local bands performed for the student body. She was very excited to hold Jamfest in the school's new auditorium. See Avery Doninger PIH, at 245-46. Jamfest had already been postponed three times as construction on the auditorium dragged on, see Ex. SJ-2; Avery Doninger PIH, at 245-46, but finally the auditorium was completed and Jamfest was set for Saturday April 28, 2007.

Before the high school's spring break, Avery learned that the teacher responsible for operating the new equipment in the auditorium, David Miller, was now unavailable on the scheduled date for Jamfest. Avery Doninger PIH, at 248, 337. Avery spent the next

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[2] In the interest of reducing the volume of paper and disk space required for this motion, the plaintiffs did not include additional copies of the preliminary injunction hearing transcripts and exhibits with this motion, as they are already part of the record.

few weeks attempting to find another person who might be able to run the lights and sound for their concert, and proffered a few alternatives to her class advisor, Jennifer Hill. See Avery Doninger PIH, at 249; Ex. SJ-2.

Unbeknownst to Avery, Niehoff had already decided that Jamfest could only happen in the cafeteria or it would be cancelled. Ex. SJ-4. Hill had explained to Miller in an email that the bands would only need to use the lights system and that April 28th was the only workable date because there were no other weekend dates available and weeknights were not appropriate for such an event. Hill also suggested someone, whose name is redacted in the exhibit, with experience in theater production who could operate the lights, or proposed that Miller train someone of his choosing. See, Ex. SJ-2. Miller agreed with Hill's suggestion for a light technician, adding that an adult should be there as a safety precaution; not for any technical work. Ex. SJ-3. Niehoff then explained the entire situation to Schwartz, Ex. SJ-11, and recommended on her own that an event such as Jamfest should have a "qualified staff person to protect the facilities." Id. She closed the email by stating with remarkable prescience: "I have no problem being the bad guy, so to speak by directing them to use the cafeteria again this year- acoustic only. *But I know there will be repercussions; you may get a phone call or two...*" Id., (emphasis added, ellipses in original). Schwartz agreed with Niehoff's "feeling" that an adult stage supervisor was necessary, but left the ultimate decision on whether to hold the concert in the auditorium to Niehoff. Id.. Niehoff then replied: "I will tell Jen Hill that *the event runs in the cafeteria, acoustic only, or that it is cancelled.* If they want to explore a weeknight with Dave Miller's supervision that's another option but we're running out of nights, quite honestly..." Ex. SJ-4 (emphasis added, ellipses in original).

On Tuesday, April 24, 2007, the week before Jamfest was scheduled to occur, Avery and the other Student Council members attended a meeting with Jennifer Hill. See

Avery Doninger PIH, at 249. Hill informed the students Jamfest could only be held on April 28th in the cafeteria, or that it would be cancelled, just as Niehoff instructed. Avery Doninger PIH, at 250-251, 342-43; P.A. Prelim, Inj. Hr'g Test., at 32; J.E. Prelim, Inj. Hr'g Test., at 93; Ex. SJ-1, at 28. This development effectively cancelled Jamfest, because the bands would not agree to perform in the cafeteria with only acoustic instruments. Two participating bands had already dropped out of the competition because of the constant rescheduling, and the remaining bands had said they could not rearrange their sets to accommodate an acoustic setting. J.E. Prelim, Inj. Hr'g Test., at 94. In addition, several bands refused to play anywhere other than the auditorium. Id. Furthermore, as Hill believed, there were no other available dates during the school year that Jamfest could be held on. Ex. SJ-2.

Avery and three other students asked Hill what steps they might undertake to save the Jamfest event. Hill first suggested that the four students meet with Niehoff to discuss alternative solutions. However, Niehoff was engaged in an early morning meeting and would not be available until the afternoon. Avery Doninger PIH, at 252, 259. Hill then stated to the students that since the auditorium belongs to the taxpayers, the students could reach out to taxpayers for support. See Avery Doninger PIH, at 251-52; T.F. Dep., at 33. Presented with that advice, the four students most heavily involved in planning Jamfest, J.E., T.F., P.A., and Avery, secured passes to the school's computer lab. T.F. accessed his father's email account, composed and sent an email that read as follows:

> Recently 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. Many of the bands have said that they will not play anywhere but in the auditorium. The date has already been changed 3 times due to the constant pushing back of the auditoriums opening. Two bands have already dropped out and the other are very frustrated, as is the whole student body. There are very few dates left on the calendar to change the

> date. The reason that the students are not allowed to hold the concert is the one Region 10 Staff Member who is "certified" to run the new lighting and sound system can not attend. This staff member has however, trained students to use the lights and the Jamfest has its own sound system. Mills administration has said even if we rent own lights the event can not occur in the auditorium. The Central Office says that the auditorium is the taxpayers', not the school's. We the students are asking you, the taxpayers, to please contact the central office and ask that we be let to use our auditorium. The number for Central Office is (860) 673-2538. Please forward this to as many people as you can.
> Thank you very much,
> [T.F.], [J.E.], [P.A.], Avery Doninger and all the Students of Lewis Mills.

PIH Plaintiff's Ex. 1. The email was sent to a total of forty-one addresses, including Hill's. Id. T.F. was the only person who typed the email, although the other three students present agreed with the sentiment. Avery Doninger PIH, at 256-57, T.F. Dep., at 25-26.

Avery volunteered to meet with Niehoff later that day. At approximately 12:30 p.m., while walking toward the principal's office, she encountered Niehoff in the hallway. Avery PIH, 259. Niehoff appeared agitated, and told Avery that she needed to speak with her immediately. Niehoff then took Avery by the arm into her office. See Avery Doninger PIH, at 262. Niehoff informed Avery that her office and Superintendent Schwartz's office had received numerous emails and phone calls from parents regarding Jamfest. Avery Doninger PIH, at 260. She further informed Avery, consistently with her earlier emails to Hill, that Jamfest would happened in the cafeteria with acoustic sets or it would be cancelled. Id.

At approximately 9:25 p.m. on April 24, 2007, Avery made one last attempt to garner community support so that Jamfest could proceed. She wrote the now well-known entry onto her online blog on LiveJournal.com explaining the situation surrounding Jamfest and the students' efforts to resolve it by petitioning the school administration:

> 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.

PIH Plaintiff's Ex. 2. One of Avery's classmates, J.R., read the post, remarking that Schwartz was "a dirty whore." Id.

Both Schwartz and Niehoff arrived at school the next morning to find that citizens and students in the school district had sent them emails and voicemails expressing support for Jamfest. Karissa Niehoff PIH, at 501. Schwartz called a meeting between Avery, T.F., P.A., J.E., Hill, and two other faculty members for the morning of April 25. At that meeting, an agreement was reached for Jamfest to be held in the auditorium on June 8th. See Avery Doninger PIH, at 427-28. Schwartz then requested that the students send out an email alerting the community that Jamfest was rescheduled for June 8, and T.F. did so. PIH Plaintiff's Ex. 7.

At some date after the meeting of April 25, 2007, on Niehoff's instruction, Vice Principal Bogen created entries on each of the four students' logs, ostensibly noting discipline for violating the school's Acceptable Use of Technology policy. These entries were then backdated to April 24, 2007. Ex. SJ-6, at 28. These logs remain in the school's computer system for several years, Karissa Niehoff PIH, at 532-36, although they never are placed in students' guidance files, which are sent to colleges and kept in the school's records for years after a student graduates. Sandra Bilodeau PIH, at 224-25, 229-30. Nevertheless, a copy of the log entry was placed on Niehoff's orders in Avery's guidance file, and remained there until just before the start of the preliminary injunction hearing. Sandra Bilodeau PIH, at 226-27, 229. Bilodeau had been the guidance

department secretary had for seven years, and she had never before been asked to put a discipline log into a student's guidance file, including the files of the other three students whose names were on the email. Sandra Bilodeau PIH, at 230. She in fact protested placement of the discipline log in Avery's guidance file, but Niehoff overrode her objections and told her to insert the log "on the advice of counsel." Sandra Bilodeau PIH, at 224-25.

On May 7, 2007, Superintendent Schwartz's adult son searched the Internet for his mother's name and discovered Avery's LiveJournal.com posting of April 24, 2007. He forwarded it to Ms. Schwartz's attention, who in turn forwarded the link to Niehoff. See, Paula Schwartz PIH, at 644. On May 17, 2007, Avery went to Niehoff's office to accept her nomination to run for Class Secretary for her senior year, but Niehoff instead presented her with a hard copy of the blog posting. The word "douchebag" had been underlined in red ink. PIH Plaintiff's Exhibit 2. Niehoff expressed to Avery that the blog posting was extremely disrespectful. Avery Doninger PIH, at 283. Avery verbally apologized the Niehoff and offered to take the blog posting down, but Niehoff rejected this and countered with three demands of her own: Avery had (1) to formally apologize to Ms. Schwartz, (2) to show the blog posting to her mother, and (3) to withdraw her candidacy for Class Secretary for the class of 2008. Avery Doninger PIH, at 281-2. Avery agreed to the first two tasks, but refused the third, whereupon Niehoff unilaterally prohibited her from running for class office. Id. Lauren Doninger was told in writing by Niehoff that Avery was being punished for writing a "disrespectful" blog. Email from Karissa Niehoff to Lauren Doninger, (June 3, 2007 1:11PM), PIH Plaintiff's Ex. 15; Ex. SJ-7, at 45. Later, the classmate who called Superintendent Schwartz a "dirty whore" was given an award, thereby elevating her to a similar position of honor. Avery Doninger, PIH at 278.

On May 23, 2007, Avery wrote the apology note to Schwartz and showed her mother the blog posting, but she was still prohibited from running for Senior Class Secretary. See, PIH Plaintiff's Exhibit 9, 11. To protest her removal from the race for class office, several of Avery's friends went to the election assembly wearing shirts with the words "Team Avery" on the front and "Support LSM Freedom of Speech" on the back. They gave one of the shirts to Avery, who was already wearing another shirt bearing the message "RIP Democracy." She walked toward the auditorium, carrying the shirt in her hand. Avery Doninger PIH, at 293. While approaching the entrance to the auditorium, where the election assembly would be held, Avery observed Niehoff angrily chastising a classmate for wearing a "Team Avery" t-shirt. Id. Avery stood for a moment "taken aback....wide-eyed" before hurriedly shoving the "Team Avery" shirt she planned to wear later into a friend's backpack to hide it. Id., at 294.

Niehoff positioned herself at the entrance to the auditorium. Niehoff PIH, at 517. In her preliminary injunction hearing testimony, she claimed she had no prior knowledge that Avery's classmates would wear t-shirts supportive of Avery and her free-speech rights. Id., at 587. However, in an earlier email to Bogen and Schwartz, Niehoff wrote that she had heard rumors that t-shirts supporting Avery would be worn that day, and that other teachers should prevent the students from wearing these shirts and prohibit student conversations about the shirts. Ex. SJ-14. At the time, there was no policy concerning student electioneering materials, and the Board of Education's policies regarding student clothing prohibited items only if indecent, or contained profanity, or advertised drug or gun use. Defendants' PIH Ex. W. Under the board's policies at the time, "Team Avery" students were allowed to wear t-shirts with student electioneering material to be worn at the election assembly. Id.

II. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." When deciding a motion for summary judgment, the court "must resolve all ambiguities and draw all inferences in favor of the nonmoving party." Millgard Corp. v. White Oak Corp., 224 F. Supp. 2d 425, 428, (D. Conn. 2002), citing Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir. 1992).

The moving party bears the initial burden of demonstrating that no factual issue exists and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986). In ruling on a motion for summary judgment,

> [t]he inquiry performed is the threshold inquiry of determining whether there is a need for a trial - whether, in other words, there are any factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The movant must demonstrate the absence of a genuine issue of material fact. If the movant carries this burden, the burden then shifts to the non-moving party to produce concrete evidence sufficient to establish a genuine unresolved issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. at 322-24. The court then must view the facts in the light most favorable to the non-movant and give that party the benefit of all reasonable inferences from the evidence that can be drawn in that party's favor. See Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000). The court neither weighs evidence nor resolves material factual issues but only determines whether, after adequate discovery,

any such issues remain unresolved because a reasonable fact finder could decide for either party. See Anderson v. Liberty Lobby, Inc., *supra*, 477 U.S. at 249; Gibson v. Am. Broad. Corp., 892 F.2d 1128, 1132 (2d Cir. 1989). However, neither conclusory statements, conjecture, nor speculation suffice to defeat summary judgment. See Kulak v. City of New York, 88 F.3d 63, 71 (2d Cir.1996).

III. ARGUMENT

A. As Previously Undisclosed Documents have Come To Light Since the Preliminary Injunction Hearing, the Factual Findings in Previous Proceedings Should Be Rejected.

Since the preliminary injunction proceedings, plaintiff has acquired previously unknown documents written by or to the defendants, that incontrovertibly refutes material aspects of defendants' prior testimony, some of which the district court and the Second Circuit relied on to reach their decisions. Because these documents not only contradict the defendants' prior testimony, but suggest it was deliberately false, the prior rulings it supports are of little aid for the purposes of summary judgment. Specifically, the testimony plaintiff can now show is plainly false are:

- Defendants claim that the students were told on the morning on of April 24, that Jamfest could be held in the auditorium on a later date. See, Defendant's Local Rule 56(a)1 Statement, ¶ 6. However, earlier emails clearly indicate that Jennifer Hill was instructed to tell the students that Jamfest would be would take place in the cafeteria or be cancelled. Ex. SJ-4.

- Miller testified in deposition that his presence would be required at Jamfest, however, new emails state that he thought student technicians with non-technical adult supervision would be adequate. Ex. SJ-3.

- Niehoff claims that she told Avery during their meeting on the afternoon of April 24, 2007 that Jamfest might be rescheduled to a later date, but Niehoff wrote that she planned to cancel Jamfest if it was not in the cafeteria. Ex. SJ-4.

- Niehoff refers to a missed health seminar as evidence that the school was disrupted on April 25, 2007, but emails indicated that this event was not a high priority, and that she chose to skip the health seminar in favor of resolving the Jamfest issue because she didn't "care" about the seminar. Ex. SJ-5.

- Niehoff refers to Miller's need to secure alternative coverage for his class as evidence that the school was disrupted on April 25, 2007, but emails indicate that the meeting was scheduled at defendant's choice. Ex. SJ-5.

- Niehoff testified that she had no prior knowledge of the students' plan to wear t-shirts bearing message supportive of Avery and her free speech rights, but emails indicate that she had heard rumors that such shirts might be worn and specifically directed other faculty to stop any student conversation regarding the shirts. Ex SJ-14.

Plaintiffs submit that if the court had known of these emails at the time of the preliminary injunction proceedings, it is not likely that this Court would have found as it did. Furthermore, it shows that defendants' testimony is "at best misleading, and at worse false," and a reasonable jury could easily conclude that their testimony should be rejected as incredible.[3]

Evidence of falsity in one aspect of a witness's testimony provides a reasonable basis for a fact finder to discredit the witness's testimony in its entirety under the maxim *falsus in uno, falsus in omnibus*. Kanawha & Michigan Ry. Co. v. Kerse, Adm'r of

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[3] If, as plaintiff suspects, the defendants' attorneys had knowledge of these emails before the summary judgment motion was filed, their failure to correct defendants' testimony, compounded by their continued reliance in the present motion on facts contradicted by this pre-existing evidence, may violate Fed. R. Civ. P. 11(b): "By presenting to the court . . . a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, . . . (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."

Barry, 239 U.S. 576, 581 (1916). The principle is still relied on today, particularly where the lack of corroborating evidence makes witness credibility crucial to the outcome of the case and the inconsistencies in testimony concern the basis of a claim. Siewe v. Gonzalez, 480 F.3d 160, 170 (2d Cir. 2007); Lin Zhong v. U.S. Dep't of Justice, 461 F.3d 101, 123 (2d Cir. 2006).

Here, the defendants appear to have testified falsely and the rulings on the preliminary injunction proceedings rely heavily upon this false testimony. The defendants claim that Niehoff never told Avery that Jamfest was cancelled, and that Avery's blog posting to the contrary was misleading. Karissa Niehoff PIH, at 492, Ex. PIH 2. Both the district court and the Second Circuit made this fact central to their rulings. Doninger v. Niehoff, 527 F.3d 41, 51 (2d Cir. 2008); Doninger v. Niehoff, 514 F. Supp. 2d 199, 214-15 (D. Conn. 2007). However, Niehoff had earlier mentioned twice in emails to other members of the faculty and staff that Jamfest would be cancelled if it could not run in the cafeteria – an option that was tantamount to cancellation from the students' perspective. Ex. SJ-4; Ex. SJ-5. This testimony significantly concerns otherwise unrecorded conversations, the contents of which can only be verified through oral testimony thereby putting defendants' credibility directly in issue. The emails also corroborate Avery's version of what she was told. Furthermore, Niehoff claimed she had not known about the shirts, and that she banned the shirts from the assembly because she was concerned about maintaining equity in the election process. Karissa Niehoff PIH, at 517-18, 587. Preexisting emails also refute this assertion, as she had, in fact, heard about the shirts and specifically directed other faculty to hinder their production by stopping all conversation about them. Ex. SJ-14.

Thus, Niehoff may have defrauded the court with her testimony in the Preliminary

Injunction hearing and defendants' continued reliance on it in the present motion constitutes an outrageous and continuing effort to mislead the court and plaintiff submits that all of Niehoff's testimony should be rejected as false under the legal doctrine of *falsus in uno, falsus in omnibus.* Moreoever, since Defendant Schwartz was a recipient of many of these same emails, yet remained silent during Niehoff's false testimony, the same sanction should apply to her testimony as well. In any event, since the defendants' assertions contradict what Avery, Lauren and the other students said, the would necessarily have to be set aside as disputed evidence.

B. AVERY'S LIVEJOURNAL.COM BLOG ENTRY WAS PROTECTED UNDER THE FIRST AMENDMENT AND ANY CONSEQUENCE SHE RECEIVED STEMMING FROM THE BLOG ENTRY IS AN IMPERMISSIBLE RETALIATION AGAINST PROTECTED ACTIVITY.

1. Avery's Speech was Protected by the First Amendment Because it was off-campus speech and there was no foreseeable risk of disruption.

Any analysis of students' First Amendment rights must begin with the axiom set forth in Tinker v. Des Moines Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) that students "do not shed their constitutional rights at the school house gate." Rather, student speech may only be abrogated when that speech creates a foreseeable risk of "substantial disruption of or material interference with school activities." Id., at 514. In the forty years since the Supreme Court decided Tinker, school officials have been granted moderate powers to regulate vulgar on-campus speech, see, Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986), and speech that bears the imprimatur of the school, see, Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988). Nowhere in this long history has the Supreme Court ever granted school officials the authority to regulate peaceful, off-campus speech. Indeed, the Supreme Court's most recent decision regarding the First Amendment rights of students, Morse v. Frederick, 551 U.S. ___, 127 S. Ct. 2618 (2007), noted that even

vulgar speech disallowed on school grounds would nonetheless be permissible outside of campus. Id., at 2627.

The Second Circuit followed this standard by ruling that vulgar speech with only *de minimus* contact with school campus may not be punished by school officials. Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043 (1979). Once school officials begin to regulate speech "out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena." Id., 607 F.2d, at 1050. The court in Thomas refused to address a scenario in which a student "incites substantial disruption from some remote locale," Id., at 1052, *cf.* Boucher v. School Bd. Of the School Dist. Of Greenfield, 134 F.3d 821 (7th Cir. 1998) (suspension upheld when student published article in an underground student newspaper instructing and encouraging classmates to hack into the school's computer systems, potentially exposing the students' and faculty's private information).

The Second Circuit advanced Tinker into the age of the Internet in Wisneiwski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007). In Wisniewski, a student created and displayed in his instant messaging window a small icon showing a pistol firing a bullet into a person's head, containing a caption suggesting that a named teacher should be killed. The student was subsequently suspended. The Second Circuit ruled that, given the icon's wide distribution and threatening nature, there was a reasonably foreseeable risk that the icon would come to the attention of school officials and that it would materially and substantially disrupt the work and discipline of the school. Id., at 39-40. Thus, the Wisniewski court created a narrow exception to the rule that off campus speech cannot be regulated in precisely the manner envisioned by the

court in Thomas.

In Doninger v. Niehoff, 527 F.3d 41(2d Cir. 2008), the Second Circuit adhered to the Tinker line of cases as further explicated in Wisniewski in concluding that plaintiff's speech should be regulated only if it was reasonably foreseeable that her speech would cause substantial disruption or materially interfere with school activities. While this court and the Second Circuit ultimately denied plaintiff's motion for a preliminary injunction, these decisions were based on the resolution of disputed facts, the majority of which were favorable to the defendants. Those findings must be rejected here when considering this motion for summary judgment. Moreover, as explained above, some of this disputed testimony upon which the court relied is now demonstrably false, based upon the previously undisclosed emails by or to the defendants.

Thus, under Tinker, Avery's LiveJournal.com posting is indisputably off-campus speech that school officials could not traditionally regulate. Avery used her own computer, while in her bedroom, at about 9:30 in the evening. Avery Doninger PIH, at 267. Furthermore, she posted her blog entry on a website with no relation to the school; indeed, one dedicated to building communities of people with similar interests so that they may communicate and share ideas. PIH Ex. 3. This would place Avery's written posting "outside of the schoolyard, out in the community, where freedom of expression is at its zenith," Thomas, 607 F.2d at 1052, and squarely under the ruling in Thomas. In short, under the First Amendment, Avery's conduct was no less protected than if she had written a scathing editorial in her town's local newspaper.

Furthermore, Avery's blog posting did not fall under the exception carved out in Wisniewski. Based on the plaintiff's version of facts, the defendants did not reasonably forecast that any disruption could stem from the blog posting, nor had Avery been told by

anyone in the school that such conduct would not qualify as good citizenship. The defendants admit that by the time they found out about the blog on May 7, 2007, the controversy over Jamfest had been resolved, the community of concerned taxpayers had been alerted to the resolution both by email and by a newsletter to all parents, see PIH Ex.7, PIH Ex. M, and the calls and emails to the school administration regarding Jamfest had ceased. Paula Schwartz PIH, at 646. Even Avery had committed the Jamfest blog posting to the dim recesses of her memory. Avery Doninger PIH, at 276. Unlike the student in Boucher, whose article posed a continuing and direct threat to the school's security system, Avery's posting contained no rallying cry to write letters to the school beyond those necessary to the resolution of the Jamfest issue. That the earlier email from the four students had generated emails and calls is irrelevant to defendant's summary judgment motion. This court previously found no evidence that the blog generated a single email or phone call and the defendants have failed to provide a single communication to the contrary. Because the Jamfest controversy was definitively in the past, school officials could not possibly have predicted any disruption as a result of the blog posting, and a jury could, therefore reject any claim to the contrary. Moreover, the Second Circuit largely based its opinion on this court's findings of fact regarding key disputed testimony, such as whether Avery was told on April 24th that Jamfest was cancelled, or whether the students were ever told that contacting parents and taxpayers demonstrated bad citizenship.

Therefore, a reasonable jury could easily find that school officials improperly punished Avery Doninger's protected off-campus speech in violation of the First Amendment.

2. Assuming Defendants Could Regulate Avery's Speech if it Were Offensive, Defendants Still Could Not Punish Avery for her LiveJournal.com Posting Because the Words Were Not "Plainly Offensive."

The offensiveness of Avery's speech is irrelevant to the question of whether school officials can regulate her speech, because Avery's LiveJournal.com entry was clearly non-disruptive off-campus speech and the Fraser line of cases does not apply. However, even if this Court finds that school officials can consider vulgarity when deciding the constitutionality of off-campus speech regulation, plaintiff submits that Avery's speech was still protected because the language used was not plainly offensive.

The Second Circuit clearly defined the meaning of offensive language in Guiles v. Marineuau, 461 F.3d 320, 327-29 (2d Cir. 2006), a case not cited in the Second Circuit's decision on the preliminary injunction proceedings. In that case, the plaintiff wore a shirt to school depicting, *inter alia*, the president drinking alcohol and using cocaine. Id., at 322. The district court ruled that the shirt was plainly offensive under Fraser, but the Second Circuit explicitly disagreed:

> Dictionaries commonly define the word offensive as that which causes displeasure or resentment or is repugnant to accepted decency. . . . We doubt the Fraser Court's use of the term sweeps as broadly as this dictionary definition, and nothing in Fraser suggests that it does. . . . Courts that address Fraser appear to treat "plainly offensive" synonymously with and as part and parcel of speech that is lewd, vulgar, and indecent -- meaning speech that is something less than obscene but related to that concept, that is to say, speech containing sexual innuendo and profanity. Id., at 327-28.

The Second Circuit went on to say that terms that may "cause school administrators displeasure and could be construed as insulting or in poor taste," do not rise to the level of vulgarity or profanity outlined in Fraser. Id. While the Second Circuit's opinion in the instant case mentions in passing that Avery's blog was "plainly offensive," Doninger, 527

F.3d at 50-51, it fails to cite to Guiles and appears to be dicta unrelated to a Tinker analysis.

Avery's LiveJournal.com entry, while impolite, was not "plainly offensive" as a matter of law. The word "douchebag" is not "profanity," nor is it sexual innuendo as used in the blog posting. Instead, it is a term for a feminine hygiene product that was used here to describe unnamed people who were acting foolish. Avery Doninger PIH, at 270. While this certainly may have annoyed the superintendent, it is not the vulgarity or profanity described by the Supreme Court in Fraser. Indeed, the primary concern expressed in Fraser, that impressionable young students should not be exposed to certain terms, Fraser, 478 U.S., at 683-84, is not present in this case. Moreover, as the Second Circuit has already made clear, using a Fraser analysis in this case would be in error.

3. Disputed Questions of Fact Exist Concerning Whether the Forecasted Disruption Would Substantially Affect the School Day, as Required by Tinker and Wisniewski.

As noted, Tinker allows school officials to regulate student speech that "substantially interferes with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." Tinker, 393 U.S. at 513. This certainly allows for some interruption or inconvenience into the normal school day before student speech may be curtailed. As the court explained in Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007), mere buzz or animated discussion does not interfere with the school day enough to warrant interference. Justice Black, dissenting in Tinker, described conduct that the majority explicitly rejected as not materially disruptive the school day, including constant interruptions during class time, discussion, teasing, and warnings from other students. Tinker, 393 U.S. at 517-18. The Second Circuit's holding in Wisniewski is entirely consistent with this standard. There,

the student's depiction of a teacher with a bullet through his head put the teacher in great discomfiture around the student and necessitated transferring the student to a different class. Wisniewski, 494 F.3d at 36. Likewise, in Boucher, the threatened harm was an invasion into the school's computer system and the privacy of all the students in the school district. Boucher, 134 F.3d at 828.

In comparison, the disruption that the defendants claim was foreseeable here was *de minimus*, if credible at all. Even if the blog posting could have recreated the atmosphere of Lewis Mills High School on April 24th and 25th at the time the defendants discovered it, the purported disruption would have been limited to emails, phone calls, and rescheduling a few activities solely at the defendants' convenience. These were all within the regular duties of the principal and superintendent of schools. Paula Schwartz PIH, at 638-39. Furthermore, the defendants' responses to the complaints was at times and places of defendants' choosing, and therefore had no bearing on any other planned activities. Thus, a jury could reject any claimed concern about disruption, just as this court did.

The other two incidents that the defendants claim as evidence of disruption to the school day, namely, that the juniors and Niehoff missed the health seminar and that Miller had to secure alternative coverage for one class so that he could attend the meeting to select a new date for Jamfest, hardly amount to substantial disruption and actually appear frivolous. Niehoff consciously chose to prioritize the resolution of the Jamfest issue before the health seminar, categorically stating that she no longer cared to attend the health seminar. Ex. SJ-5. Furthermore, one teacher's search for coverage for one meeting does not substantially interfere with the normal operation of the school any more than, for example, one of the school's faculty taking half a personal day to be present while a

veterinarian cares for her pet horses. Ex. SJ-9. Once again, the timing of the meeting and any inconvenience to the teacher were solely of the defendants' doing. All of these are merely temporary disruptions that may well occur in the normal operation of the school. In any event, when the blog entry was discovered on May 7, 2007, the Jamfest issue had long been resolved and there would be no need to call an emergency meeting so there would be no chance that these incidents could recur.

Therefore, any of the defendants' claims that disruption was likely to stem from Avery's posting on LiveJournal.com lack credibility and are disputed not only as to whether they rise to the level of substantial disruption envisioned by the Supreme Court in Tinker, but also as to whether they had any relation to Avery's blog. To argue otherwise would be to equate a student's poorly worded essay rallying her classmates to join her in a letter-writing campaign to a student's suggestion that a teacher should be killed or guide on how to sabotage the school's computer system as a matter of law.

4. Prohibiting Avery from Running for Class Secretary and Nullifying the Subsequent Election Results Violates the First Amendment Because the School Officials' Actions Chilled Avery's Speech under the First Amendment and Was an Impermissible Retaliation Against Protected Activity.

The defendants claim a question remains as to whether student government is a "privilege" under Constitutional analysis. The plaintiff submits that this is irrelevant. To support their contention that Avery had no right to remain on student government after posting to her blog, defendants rely on the Second Circuit opinion in this case, which in turn relies primarily on Lowery v. Everaud, 497 F.3d 584 (6th Cir. 2007). That case concerned a high school football player that circulated a petition to have his coach fired. In upholding the school's decision to expel him from the team, the court noted "the immediate goal of an athletic team is to win the game...[e]xecution of a coach's will is

paramount." Id., at 489 (internal quotation marks omitted). The court went on to reason that any insubordination among the teammates would inhibit this central goal of the team, and therefore prohibiting the student from playing football was justified.

If the basis for denying students the opportunity to participate in extra-curricular activities is that students fail to comport with the stated goals of the activity, then Avery's actions should have had no bearing on her position as Class Secretary. The objectives of student government in LMHS were:

> 1. Provide a democratic forum in which students can address those school-related issues which affect their lives
> 2. Maintain a continuous communication channel from students to both faculty and administration, as well as among the students within the school.
> 3. Offer a year-long program of social functions and community involvement project for the students.
> 4. Direct students in the duties and responsibility of good citizenship, using the school environment as the primary training ground.

PIH Plaintiff's Ex. 10. These were not prerequisites for the position. Avery's blog posting merely encouraged citizens to voice their opinion on a student sponsored event that was of interest to at least three other people. By fostering dissent and civil discourse, she was also setting an example to her classmates and the community at large concerning the proper way to interact with elected and appointed officials to achieve these goals in society, by petitioning those officials for the redress of a grievance. The fact that she used some words in the course of that petition that may be distasteful to some adults is irrelevant to her "good citizenship."

Even if the court believes that Avery's chosen language would fail to meet some amorphous "good citizenship" standard, a question of fact for the trier, the defendants' actions still violated the First Amendment. As explained above in § III, B, 1, *supra*, Avery's blog was off-campus speech, outside the authority of the school to regulate.

The school's chosen punishment against Avery's protected speech chilled Avery's future expression at the school, and foreclosed her singular opportunity to speak at her high school graduation. She also stopped posting bulletins updating her friends about her life on MySpace, and stopped using online chat as a means of communication. Avery Doninger PIH, at 306. Even in verbal speech, she is more guarded, and is subject to continual anxiety over the possibility of retribution for expressing her ideas. Id. Thus, a reasonable jury could find that Avery's speech rights were chilled.

Furthermore, Avery's blog entry was not only protected under the First Amendment's freedom of speech provisions, but it also falls under the First Amendment's provisions for the right to petition the government for redress of grievances.

The right to petition one's public officials for redress of grievances is among the most precious of the liberties safeguarded by the Bill of Rights. Graham v. Henderson, 89 F.3d 75, 80 (2d Cir. 1996)(prisoners maintain the right to petition even while incarcerated). This right is so centrally important to a functioning democracy, the Second Circuit has declared that it is a substantive – not a procedural – right and such due process considerations, such as the "rights-privileges"argument as presented by defendants is irrelevant in this context. Id. Any claim of retaliation for First Amendment rights can only be defeated if the defendants show by a preponderance of the evidence that they would have disciplined the plaintiff even in the absence of the protected conduct. Mount Healthy Sch. Dist. v. Doyle, 429 U.S. 274, 287 (1977).

Avery's blog posting was clearly a call for fellow citizens to petition their appointed public officials concerning a matter of communal concern, i.e, use of the taxpayer-funded auditorium. Such an activity is protected under the right to petition. Just

as clearly, Avery was removed from the race for Class Secretary solely because of this constitutionally protected activity. PIH Ex. 15. The fact that Avery's position as class officer is not accorded the same degree of procedural due process rights as her academic education is irrelevant. Thus, in order to defeat the plaintiff's claim, defendants must show that Avery would have been removed from the race for Class Secretary even if she had not written her blog entry. Since there is nothing in the record or the defendants' motion for summary judgment and accompanying documentation to suggest that this is the case, removing Avery from the race for Class Secretary violates the First Amendment.

Therefore, any action the school takes against Avery in retribution for her speech violates the First Amendment, whether it was rescinding a parking pass, imposing detention, or barring her from graduation.

C. NIEHOFF VIOLATED AVERY'S FIRST AMENDMENT RIGHTS BY BARRING THE "TEAM AVERY" T-SHIRTS.

1. Defendants' Argument that Avery Was Not Chilled in her Speech is Lack Merit Because Tinker Does Not Require a Student to Show that her Speech was Chilled, and the Record Clearly Establishes that Avery's Speech Was, in Fact, Chilled.

The District Court, while considering plaintiff's initial motion for preliminary injunction, correctly established that the students' wearing t-shirts with messages that support Avery was the type of silent protest that falls squarely under Tinker v. Des Moines Cmty. Sch. Dist.,393 U.S. 503 (1969). Tinker does not require any affirmative showing of a subjective chill before a student may assert a claim under the First Amendment. Since Avery's message was banned, her First Amendment rights were violated.

Even if the court determines that a chill is necessary to assert a First Amendment

claim, the record clearly shows that Avery was specifically chilled by Niehoff's actions. Avery approached the auditorium with a "Team Avery" t-shirt. Niehoff's reaction to another student wearing the shirt in Avery's presence was so explosive, Avery was shocked into silence. Avery Doninger PIH, at 294. Avery then quickly stashed the t-shirt in a friend's backpack. Id. This indicates that not only was she afraid to wear her shirt that day, but she was afraid to even be seen carrying the shirt before entering the assembly. Moreover, Niehoff's earlier email demonstrates that she intended to prohibit even mere talk of wearing the t-shirts. Ex. SJ-14.

Because the record indisputably shows that Avery was chilled in wearing the t-shirt due to Niehoff's actions, Avery has standing to challenge those actions as offensive to her own rights.

D. PUNISHING AVERY ALONE FOR DEFENDANTS' STATED REASONS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THERE WERE OTHER COMPARABLE INDIVIDUALS IN NEARLY IDENTICAL SITUATIONS.

The Equal Protection Clause of the Fourteenth Amendment exists to ensure that "all persons similarly situated be treated alike." City of Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). The standard for reviewing a claim under the Equal Protection Clause depends on the right or classification involved. If the state action disadvantages a fundamental right, it must be analyzed under strict scrutiny. Plyler v. Doe, 457 U.S. 202, 216-17 (1982); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976). In Willowbrook Condominium Association v. Olech, 528 U.S. 562, 564 (2000), the Supreme Court "recognized successful equal protection claims brought by a 'class of one' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." "[T]he plaintiff must establish that [s]he, compared with others similarly situated, was

selectively treated . . . and . . . that such selective treatment was based on impermissible considerations such as race, religion, *intent to inhibit or punish the exercise of constitutional rights*, or malicious or bad faith intent to injure a person." LeClair v. Saunders, 627 F.2d 606, 609-10 (2d Cir. 1980). See, also, Wayte v. United States, 470 U.S. 598, 608-09 (1985) (applying equal protection clause to claim government selectively prosecuted defendant to retaliate for first amendment activity).

1. There are Three Other Comparable Individuals Who Were Treated Differently With Respect to The Discipline Logs Because None of the Other Students Whose Names Were on the Email of April 24th had Discipline Logs Placed in their Permanent File.

The other students on Student Council who appended their names on the Jamfest email are comparable individuals. All of them had been long time members of the student council and planned to run again for their positions in the next election, and all of them were signatories to an email encouraging members of their community to contact their elected officials. Therefore, they may be treated as individuals in the same class as Avery for the purposes of her Equal Protection claim.

Furthermore, there is no rational basis for treating Avery differently than these three classmates. All four of them exercised their right to petition their public officials for the redress of a grievance. Avery took the additional initiative of using her blog to communicate an almost identical plea. The only difference between the earlier email and Avery's blog is the use of the word "douchebags," which, as explained above, is outside the school's ability to regulate. See, § II, B, *supra*. The ideas contained in the blog posting are nearly the same as those expressed in the email the students sent out the morning of April 24th. Although the blog posting was expressed more crudely, such expression is permissible under the First Amendment, as demonstrated above, particularly

when spoken off school property and outside school hours, and designed to seek public support to contact public officials.

Even though T.F., J.E., P.A., and Avery each had the same entry posted to their discipline logs for the same act of sending the email, only Avery's discipline log entry was placed in her permanent file. This was confirmed through Joan Evans, J.E.'s mother, when she discovered that J.E.'s guidance file did not have a copy of the discipline record in it. Joan Evans PIH, 175. The idea that it was placed there for Lauren Doninger's convenience is absurd, not credible, and belied by the testimony of Bilodeau. Bilodeau PIH, at 224-225. Moreover, the record demonstrates that placement of the discipline log entry into Avery's file out was part of a continuous pattern of animosity toward her. Examples of this animosity include Ms. Niehoff's banning of the "Team Avery" shirts, despite the fact that they were clearly permissible forms of expression under Tinker, and a vicious email to a teacher from outside the school district, falsely claiming that Avery has been punished for similar instances in the past. Ex. SJ-10.

Finally, Niehoff's concession that the disciplinary log was placed in the guidance file over the objection of the secretary at the instruction of an attorney at a time when no litigation was pending bolsters the claim that Niehoff was trying to create a false track record as a pretext for her unconstitutional behavior.

2. J.R. is a Prima Facie Identical Individual to Avery Doninger WhoWas Not Punished for Offensive Language, but Received an Award Instead.

In addition, the plaintiff can identify a prima facie identical individual in J.R., the student who called Superintendent Schwartz a "dirty whore" in an online response to Avery's blog. Even though J.R. did not hold a class office, as Avery did, she was nevertheless given an award for good citizenship a short time later. This elevated her to a

position of honor similar to Student Council or class officers. All of these positions serve to represent the students to the school and the community at large. Since the defendants' justification for punishing Avery rests largely on her supposed failure to live up to the required standards of good citizenship an assertion plaintiff rejects as post-hoc pretext, by their logic, J.R. should have similarly been barred from receiving such an award. Therefore, as a comparator, Avery was treated differently.

E. PLAINTIFF'S CLAIMS ARE NOT BARRED BY QUALIFIED IMMUNITY BECAUSE AVERY'S FIRST AMENDMENT RIGHTS TO SPEECH AND PETITION WERE CLEARLY ESTABLISHED AND DEFENDANTS' CONDUCT IS OBJECTIVELY UNREASONABLE.

The defendants' contention that the plaintiff's claims are barred by qualified immunity is incorrect because Avery's rights were clearly established, the defendant's actions are objectively unreasonable, and there exist serious factual disputes that render such a determination inappropriate.

Qualified immunity is an affirmative defense for which defendants bear the burden. Gomez v. Toledo, 446 U.S. 635, 640 (1980). The test for qualified immunity was set forth in Saucier v. Katz, 533 U.S. 194 (2001). First, a court must consider, after construing the facts in the light most favorable to the plaintiff, whether any constitutional right has been violated. Id., at 201. The court must next determine whether the rights, if violated, were clearly established. The Second Circuit has explained a three point test for determining whether a right was clearly established:

> (1) whether the right in question was defined with "reasonable specificity"; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.

Jermosen v. Smith, 945 F.2d 547, 550 (2d Cir. 1991). Alternatively, a defendant may

attempt to show that even if the rights in question were clearly established, the defendant was "objectively reasonable" in believing that her actions did not violated the plaintiff's constitutional rights. Soares v. State of Connecticut, 8 F.3d 917, 920 (2d Cir. 1993). While defendants correctly state that summary judgment would be appropriate "if the court determines that the only conclusion a rational jury could reach is that reasonable [governmental actors] would disagree about the legality of the defendants' conduct under the circumstances [presented]," Lennon v. Miller, 66 F.3d 416, 421 (2d Cir. 1995), they neglect to state that a court should only reach this determination where the facts on the record are not in serious dispute. Id. Otherwise, the question of reasonableness is more appropriately left to a jury. See, Id.

As the plaintiff's facts demonstrate above, Defendants Niehoff and Schwartz violated Avery's constitutional rights to free speech and petition when they punished her for using the term "douchebags" while writing a blog entry regarding Jamfest, and again when they chilled her expressive conduct by banning students from entering the auditorium with t-shirts supporting Avery. Furthermore, since many of the facts remain in serious dispute by the previously undisclosed documents, the court need not reach a decision now regarding the reasonableness of defendants' actions. Thus, the first question to consider is whether these rights were clearly established. Plaintiff submits that they were.

1. Avery's Right to Engage in Whatever Speech she Wished Away from Campus Without Fear of Retaliation Was Clearly Established.

Defendants' primary argument is that Avery had no clearly established right to run for Senior Class Secretary after posting her blog entry. This, however, is not the right plaintiff is claiming. Avery's right to peacefully speak and write on community issues

from home and to petition appointed officials about those issues free from any adverse consequence whatsoever from those elected officials is clearly established.

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) and its progeny clearly establish the right of students to engage in peaceful speech without a reasonable forecast of disruption. Moreoever, Morse v. Frederick, 551 U.S. ___, 127 S. Ct. 2618 (2007), noted that even students vulgar speech otherwise disallowed on school grounds is nonetheless permissible off campus, Id., at 2627, and took particular care to note that the school officials could only regulate the student's arguably off-campus speech if he were at a school-approved event, such as a field trip. Id., at 2624. Furthermore, the Second Circuit has continued to hold that off-campus student speech falls under the standard outline by Tinker. See Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043 (1979); Wisneiwski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007); Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008). Given this clearly specified decisional law from the United States Supreme Court and the Second Circuit, no reasonable official could believe, based on plaintiff's version of events, that defendants' actions were constitutionally permissible. Therefore, Avery had a clearly established right to engage in the particular written speech she desired to because it occurred completely off-campus and there was no reasonable likelihood of disruption from that speech. Additionally, Avery's right to petition government officials for the redress of grievances was equally well established in both the Supreme Court and the Second Circuit. See Mount Healthy Sch. Dist. v. Doyle, 429 U.S. 274 (1977); Graham v. Henderson, 89 F.3d 75 (2d. Cir. 1996). At a minimum, a jury must determine if even a reasonable likelihood of disruption existed, or whether the defendants' claims are pretextual and false.

2. Avery and Her Classmates' Rights Under the First Amendment to Wear Expressive Clothing Was Clearly Established.

Here, defendants' claim that there is no Supreme Court decisional law regarding silent, non-disruptive student protest is simply false. Tinker, the seminal case on student expression, clearly addresses this issue, and the Second Circuit has since ruled that t-shirts are entitled to First Amendment protection Guiles v. Marineuau, 461 F.3d 320 (2d Cir. 2006). The so-called policy regarding electioneering materials is irrelevant because no such policy existed at the time of the election assembly, – even this court concluded it was "ad hoc" – and the Board of Education's post hoc "clarification" on the policy clearly demonstrates that clothing such as the "Team Avery" was always permitted. Therefore, Avery and the other students had a clearly established right to wear the "Team Avery" shirts at the election assembly, and a reasonable jury can find that Niehoff's actions in barring the "Team Avery" t-shirts was objectively unreasonable.

F. EVEN IF THE CONNECTICUT CONSTITUTION DOES NOT PROVIDE A GREATER FREE SPEECH CLAIM THAN THE UNITED STATES CONSTITUTION, A CLAIM FOR MONEY DAMAGES STILL EXISTS UNDER THE CONNECTICUT CONSTITUTION.

The Connecticut Constitution clearly protects all citizens' rights to free speech. To show this, one need look no further than the plain text of the Constitution, Article First §§ 4, 5, and 14. Defendant argues, however, that the line of cases under Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics 403 U.S. 388 (1971) and Kelley Prop. Dev., Inc. v. Lebanon, 226 Conn 314 (1993) bar any monetary recovery for this claim. As the law stands today, this is a false assertion. Binette v. Sabo, 244 Conn. 23 (1998) allowed recovery for a monetary claim under Article First, §§ 7 and 9 of the Connecticut Constitution. Id., at 49-50. However, the Court did not limit recovery to unreasonable search and seizure claims, ruling instead that the possibility of such claims

must be determined on a case-by-case basis, and the determination shall be based on a multi-factor analysis. Id., at 48. The factors include:

> the nature of the constitutional provision at issue; the nature of the purported unconstitutional conduct; the nature of the harm; separation of powers considerations and the other factors articulated in Bivens and its progeny; the concerns expressed in Kelley Property Development, Inc.; and any other pertinent factors brought to light by future litigation.

Id. In Kelley, the Connecticut Supreme Court expressed concern that if a monetary claim was allowed for every procedural due process violation, that municipal zoning boards and state courts would be flooded with complaints. Kelley Prop. Dev., Inc., 226 Conn. at 342. The Court in Binette, however, recognized that certain constitutional rights, like the those against unreasonable search and seizure, are important enough to warrant an action for monetary damages under the Connecticut Constitution so that the right can be judicially protected. Binette, 224 Conn. at 48-49. Thus, Binette did not limit actions for monetary damages under the Connecticut Constitution to those arising from unreasonable searches and seizures, as defendants contend in their memorandum in support of the present motion, but rather leaves the door open for other such actions.

In the instant case, the nature of the purported unconstitutional conduct and the nature of the harm relate to the rights of free speech, publication, and the right to remonstrate under the Connecticut Constitution's Declaration of Rights, remain, along with the right to unreasonable search and seizure, among the rights fundamental to human dignity and the proper functioning of democracy that the Binette Court found so central to its decision.

The Court may, in the alternative, choose not to rule on these State Constitution issues, and may instead submit them to the Connecticut Supreme Court pursuant to Conn.

Gen. Stat. § 51-199b(d) (2007), which states:

> The Supreme Court may answer a question of law certified to it by a court of the United States or by the highest court of another state or of a tribe, if the answer may be determinative of an issue in pending litigation in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state.

Here, since there is no statute or controlling appellate decision to determine whether monetary relief for a free speech claim under the Connecticut Constitution is available, the question may be properly submitted to the Connecticut Supreme Court.

G. A JURY COULD REASONABLY FIND THAT DEFENDANTS' ACTIONS WERE EXTREME AND OUTRAGEOUS AND WERE DONE WITH AN INTENT TO CAUSE AVERY EMOTIONAL DISTRESS.

To succeed on a claim for intentional infliction of emotional distress, a plaintiff must establish four elements: "(1) that the actor intended to inflict emotional distress, or that he knew or should have known that emotional distress was a likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendants' conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe." Petyan v. Ellis, 200 Conn. 243 (1986). The conduct must cause and be calculated to cause serious mental distress. DeLaurentis v. New Haven, 220 Conn. 225. Whether defendants' actions arise to the level of 'extreme and outrageous' is a question of fact for the jury when reasonable minds can differ on its outcome. See Mellaly v. Eastman Kodak Company, 42 Conn. Supp. 17 (Super. 1991).

Whether the defendants' actions were the cause of Avery's emotional distress remains a jury issue. Not only did Avery suffer anxiety and fear of retribution from publishing protected speech, Avery Doninger PIH 305-06, but she also suffered distress by her removal from the race for Senior Class Secretary. She was denied the right to

speak at her own graduation. As Avery testified at the preliminary injunction hearing, being class officer is what she loved the most, which she equated to that of a varsity sport. Id., at 308. Reasonable minds may differ on whether defendants' conduct was extreme and outrageous because it violated clearly established constitutional rights that are the basis of a functioning democracy and was based on a vindictiveness that was out of proportion to the offense. Freedom of speech, freedom to petition government officials for the redress of grievances, and equal protection under the laws are not only rights fundamental to a free society, but values that must be conveyed to youth as they take their place in a free society. To act as the defendants did is to crush the tender beginnings of an active, involved citizenry. In addition, plaintiffs can demonstrate that a question of material fact remains as to whether Avery's removal from class office was part of a continuing pattern of animosity and harassment that persisted through these proceedings. See, eg., Ex. SJ-10. Thus, defendants' conduct could be construed as extreme and outrageous, intended to cause Avery extreme emotional distress and did, in fact, cause such harm.

IV. CONCLUSION

For the foregoing reasons, as well as for those reasons set forth in plaintiff's memorandum in support of summary judgment, the defendants' motion should be denied.

THE PLAINTIFF –
LAUREN DONINGER, P.P.A., for
AVERY DONINGER,

By /s/ Jon L. Schoenhorn
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CERTIFICATION

I hereby certify that on the above date, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Jon L. Schoenhorn
Jon L. Schoenhorn

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