RETURN DATE: 8/14/07	:	SUPERIOR COURT
	:	
LAUREN DONINGER, P.P.A.	:	
as Guardian and Next Friend of	:	
Avery Doninger, a minor	:	
Plaintiff,	:	
	:	J.D. OF NEW BRITAIN
V.	:	
	:	AT NEW BRITAIN
KARISSA NIEHOFF, and	:	
PAULA SCHWARTZ	:	
Defendants	:	JULY 16, 2007

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S APPLICATION FOR TEMPORARY INJUNCTION

The Plaintiff in the above entitled action, the mother of Avery Doninger, (hereinafter "Avery") a 16-year-old high school student entering her senior year at Lewis Mills High School in Burlington, moves this Court for temporary and permanent injunctions barring defendants from the continuous violation of Avery's first amendment and state constitutional freedoms of speech, petition, and remonstrance. Plaintiff seeks the immediate reinstatement of Avery to her position as 2008 class secretary at Lewis Mills High School in Burlington, an order providing Avery opportunity to give the speech which she was entitled to give to the entire class of 2008, to enjoin the defendants from allowing any student council meetings until a new election is held in which Avery is permitted to run as a candidate for class secretary, and to enjoin the defendants from prohibiting the wearing of clothing with messages advocating first amendment rights for students and/or Avery's candidacy for class secretary. Finally, the plaintiff seeks to enjoin the defendants from retaliating against her or her daughter for pursuing their lawful remedies. The defendants have, to date, engaged in all of these retaliatory and illegal actions.

I. Relevant Facts

Avery Doninger is sixteen years old, and about to enter her senior year at Lewis Mills High School ("LMHS") in Burlington, Connecticut. LMHS is a four-year public secondary school that is part of Regional School District # 10. Until the unconstitutional actions of the defendants, Avery was the peer-elected secretary of the LMHS class of 2008, having been elected to that position each year since she was a freshman. As the 2008 class secretary, Avery participated in sharing students ideas, interests, and concerns with school administrators both at meetings and as a member of student council. She planned social functions for the school and was involved in programs to benefit the community. Moreover, she gave an annual speech to the entire class assembled for that purpose in the school auditorium. The defendants (Principal Niehoff with the express support of Region # 10 Superintendent of Schools Schwartz) summarily stripped Avery of her title and barred her from running again for 2008 class

secretary, prevented her from presenting a speech to the entire class of 2008, and seized t-shirts that supported her candidacy; all because of a published opinion Avery posted, at home after school hours, on a public internet website journal (known as a "blog") that is not affiliated with the school in any way.

The events that led up to this lawsuit began on April 24, 2007 after Avery encountered Defendant Niehoff in the hallway at LMHS. Niehoff was apparently angry about an e-mail that was written and sent by another member of the student council, that was also endorsed by Avery and two other student council members. In that e-mail, the students encouraged parents to contact the Region #10 administration and ask that students be allowed to use the auditorium to hold its annual "Jamfest" event, where several area bands perform for the benefit of the students and the community. As a result, the Region # 10 Board of Education offices received several phone calls. Apparently, the phone campaign by parents annoyed Region # 10 Superintendent of Schools Schwartz, who contacted Defendant Niehoff. During Avery's encounter with Niehoff, the principal told Avery that "Jamfest" was cancelled. Later that evening Avery posted her opinion about the decision to cancel "Jamfest" on livejournal.com, a public website, in which she criticized unnamed Region # 10 officials.

Several weeks later, on May 17, 2007 Avery went to the office to accept her re-nomination for class secretary and was told to go to Defendant Niehoff's office. Niehoff handed a hard copy of the April 24, 2007 livejournal.com blog and told Avery to do three things: (1) apologize to Defendant Schwartz for the journal entry; (2) tell her mother about the journal entry; and (3) resign as 2008 class secretary and withdraw her candidacy for re-election to that position. Avery agreed to apologize (and did so in writing) and told her mother about the blog entry. However, Avery refused to resign from her student council position. Niehoff thereupon "administratively removed" Avery from her 2008 class secretary position and disqualified her from running for re-election. At that time, Avery was the only candidate, nobody had expressed interest in running against her, and she likely would have been elected by acclamation. Defendant Niehoff provided no appeal process or opportunity to challenge her arbitrary and unilateral punitive actions whatsoever.

Furthermore, Avery was not allowed to present her speech to her class on May 25, 2007 when all the nominated candidates were given the opportunity to speak. Shortly before the assembly where the speeches were given, Niehoff ordered Avery's companions to remove shirts emblazoned with "Team Avery" on the front and "Support LSM Freedom of Speech," causing Avery (and others with the shirt) to fear that if she donned her shirt (which she was carrying) it would be banned, as well. The shirts did not violate Region # 10's school's dress guidelines (Board of Education policy 5132) which only prohibits "articles of clothing and accessories displaying obscenities, profanity, or derogatory messages relating to race, religion, or gender" and "clothing which advertises tobacco products, alcohol, or other drugs." During the candidates' speeches, some students in the auditorium called for Avery to speak, and were silenced by Defendant Niehoff who threatened to disqualify any votes of students who were "disrespectful." Defendant Niehoff's handpicked candidate to replace Avery as class secretary, was thereafter elected to that position. Avery was the only candidate who had accepted the nomination for 2008 class secretary at the time she was barred

from running by Defendant Niehoff.

Plaintiff contacted the defendants on behalf of her daughter on several occasion asking them to reconsider and overturn their actions. Both defendants have refused, and have failed to provide any lawful justification for their conduct. Plaintiff and her daughter were both told by Defendant Niehoff that she was sanctioned for the on-line publication of the blog.

Moreover, plaintiff and her daughter were interviewed about the defendants' actions on a local news program. Although Avery was subsequently asked about the interview in her civics class, she was later summoned from to the office, and ordered by Niehoff not to talk about the interview during school hours.

Avery's journal comment, written on April 24th, but apparently only brought to the defendants' attention on or about May 17th, stated:

> "Jamfest" is cancelled due to the douchbags 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 appreciate it. However, she got pissed off and decided to just cancel the whole thing all [sic] together. Anddd [sic] so basically we aren't going to have it at all, but in the slightest chance we do it is going to be after the talent show on may 18th. Anddd [sic] ... here is the letter we sent out to parents.

Avery then attached the e-mail prepared by another student council member on April 24th and her mother's letter to Defendant Schwartz. Livejournal.com describes itself as "an online journaling community, where people from around the world share stories, discuss topics and keep in touch with friends. It's a free service that you can use for meeting people and creating bonds through writing and sharing."

Avery broke no written or announced school rules. Her comments caused no disruption of school activities. She typed and published the blog at home, using her own computer, on her own time. Thus, she had an absolute constitutionally protected right to speak, write and publish as she pleased. She was denied the opportunity to campaign, run, and be re-elected 2008 class secretary, which is a position that comes available once in a lifetime. She was denied the right to give a speech to her class. Her political message t-shirts were censored. Disciplinary logs have been entered into her school record. She will be denied the right to address her senior class at commencement as senior class secretary. The defendants' conduct is so outrageous, illegal and so arbitrary, that a temporary injunction should issue.

II. Argument

This case raises a fundamental constitutional issue of free speech and publication of opinion, involving pure speech. Shirts with a political messages were barred by a school official. A speech at an assembly was banned. A class officer was summarily dismissed from her position and disqualified from future office. All these measures occurred because some school administrators were annoyed by a constitutionally protected online journal entry. These unconstitutional actions are so egregious and arbitrary, they suggest that these officials never read the chapter in their history books about the rise of fascism in Europe before World War II. As a result, nothing less than injunctive relief will prevent the ongoing chill on the putative plaintiff's rights under the first amendment to the U.S. Constitution, and the broader rights derived from the Connecticut Constitution. Moreover, only immediate action by the court can restore these fundamental rights, and the damage will be irreparable after the start of the new school year, which financial remuneration will never be able to address. Only a new election barring police-state tactics, where Avery will be allowed to campaign and run for class secretary and present her speech to the student body and/or display her campaign and pro-speech shirts, will prevent further harm.

In the case at bar, an immediate injunction is clearly warranted pending a full determination of the merits. The urgency of the plaintiff's situation, before the start of the school year in September, is one which merits the immediacy of the relief inherent in a temporary order until the matter can be addressed more fully at a trial. "A temporary injunction is a preliminary order of the court, granted at the outset or during the pendency of an action, forbidding the performance of the threatened acts described in the original complaint until the rights of the parties respecting them shall have been finally determined by the court." *Deming v. Bradstreet,* 85 Conn. 650, 659 (1912). The purpose of a temporary injunction is to preserve the status quo and protect the moving party from immediate and irreparable harm until the rights of the parties can be determined after a full hearing on the merits. *Olcott v. Pendleton*, 128 Conn. 292, 295 (1941). To be entitled to such relief, the plaintiff must show the following three elements: (1) probable success on the merits of his claim; (2) irreparable harm or loss; and (3) a favorable balancing of the results or harm which may be caused to one party or the other by the granting of the temporary relief requested. *Griffin Hospital v. Commission on Hospitals & Health Care*, 196 Conn. 451, 457-58 (1985). Because the plaintiff clearly demonstrates the existence of all three elements, this Court should grant the temporary injunction.

A. Avery Doninger's First Amendment Rights Have Been Violated and She will Continue to Suffer Irreparable Harm as a Result of Defendants' Actions

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality opinion); *Paulsen v. County of Nassan,* 925 F.2d 65, 68 (2d Cir. 1991); *see also, Green Party v. New York State Bd. Of Elections,* 389 F.3d 411, 418 (2d Cir.

2004). This is not just a case about a temporary school suspension or other administrative sanction for first amendment activities. The punishment itself involved censorship and the continued suppression of opinion. While the subject of Avery's blog was critical of the administration of Region # 10 schools, this does not even constitute a "school speech" case since the comments were not made during the school day, did not occur as part of a school-sponsored activity, did not violate any rules of the Region # 10 Board of Education or the high school and, most importantly, did not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker v. Des Moines Indep. Community School District*, 393 U.S. 503, 509 (1969). Even if this were a school speech case, or even if this court looks at the additional first amendment suppression involving class discussion and the wearing of shirts with printed messages of support, the plaintiff would prevail because the defendants can not justify their "prohibition of a particular expression of opinion" because of a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.*

1. Avery's Blog Entry Did Not Contain "Fighting Words" or Other Exceptions to Her Absolute Right to Free Speech.

The first amendment to the United States Constitution provides that "Congress shall make no law...abridging the freedom of speech." While not all speech is protected, the plaintiff asserts that the words Avery used in this case were protected by the Free Speech Clause and the Connecticut Constitution, because they did not constitute "fighting words" or fit some other exception to free speech and publication. In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), the United States Supreme Court held that when words are claimed to offend a statute, rule or regulation, only those words having a "direct tendency to cause acts of violence by the persons to whom they are addressed may be proscribed." *State v. LoSacco*, 12 Conn. App. 481 (1987). Moreover, as Justice Powell once observed: "[W]ords may or may not be 'fighting words,' depending upon the circumstances of their utterance." *See Houston v. Hill*, 482 U.S. 451, 461 (1987). Whether or not referring to unnamed school administrators in a blog as "douchbags," is rude, it does not under any circumstance rise to the level of "fighting words."

"[T]he exclusion of 'fighting words' from the scope of the first amendment simply means that, for purposes of that amendment, the unprotected features of the words are, despite their verbal character, essentially a 'non-speech' element of communication. Fighting words are thus analogous to a noisy sound truck..." *RAV v. St. Paul*, 505 U.S. 377, 386 (1992). Indeed, the Connecticut Appellate Court has stated that the *Chaplinsky* doctrine only permits public officials "to prohibit speech that has a direct tendency to inflict injury or to cause acts of violence or a breach of peace *by the persons to whom it is directed.*" *State v. Torwich*, 38 Conn. App. 306, 313 (1995) (emphasis supplied). *See also State v. Indrisano*, 228 Conn. 795, 812 (1994). Here, the words were not directed to anyone in the school administration; they were directed to the blog audience of livejournal.com.

2. Defendants Lacked the Authority to Impose Sanctions for Published Remarks Not Occurring at School or at a School Function.

Plainly, Avery possessed a constitutional right to express her opinion in a public forum outside of school-sponsored activities, that can not be censored by the defendants. This issue was categorically and definitely decided by the Second Circuit Court of Appeals in *Thomas v. Board of Education*, Granville School District, 607 F.2d 1043 (2d Cir. 1979), *cert. denied,* 44 U.S. 1081 (1980). In that case, a group of high school students published a "satirical publication addressed to the school community" called "Hard Times" on their own time after school, although some of the materials was prepared at school. The students then sold the newspaper after school at a nearby store. Copies of the newspaper were brought to school by students who purchased them and sanctions were imposed on the student-publishers. In an opinion by then Chief Justice Kaufman, the court overturned the sanctions, holding that school officials had no authority to take action against the students:

> Here, because school officials have ventured 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. at 1050. In condemning the officials' behavior, the court went on to explain,

> We may not permit school administrators to seek approval of the community-at-large by punishing students for expression that took place off school property. Nor may courts endorse such punishment because the populace would approve. The First Amendment will not abide the additional chill on protected expression that would inevitably emanate from such a practice. Indeed, experience teaches that future communications would be inhibited regardless of the intentions of well meaning school officials.

Id. at 1051. Expressly rejecting the notion that school officials can impose "sanctions for off-campus expression," the court stressed the harmful effects that would flow by allowing a school to regulate students expression outside of school settings:

> It is not difficult to imagine the lengths to which school authorities could take the power they have exercised in the case before us. If they possessed this power, it would be within their discretion to suspend a student who purchases an issue of National Lampoon, the inspiration for Hard Times, at a neighborhood newsstand and lends it to a school friend. And, it is conceivable that school officials could consign a student to a segregated study hall because he and a classmate watched an X-rated film on his living room cable television. While these activities are certainly the proper subjects of parental discipline, the First Amendment forbids

> public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon. Parents still have their role to play in bringing up their children, and school officials, in such instances, are not empowered to assume the character of parens patriae.

Id.

Here the principal – with the express endorsement of the superintendent of schools – imposed sanctions upon Avery for her comments posted on a blog written off school grounds and on her own time. Not only were the defendants' acts of sanctioning Avery for utilizing her first amendment rights a violation of those very rights, but the punitive measures themselves involved further clear violations of Avery's (and other students') first amendment rights. The defendants were not impartial decision makers, as is apparent by the fact that Avery was told to apologize to Defendant Schwartz, who obviously felt Avery's journal entry was directed at her. Avery was not allowed to give a speech to her class as all the candidates who had been nominated for office had been allowed to do, and was told by Defendant Niehoff that she was not allowed to discuss her right to free speech and her news interview in school as a result of her request to discuss the issue in civics class, where, presumably, it is the most appropriate place to do so. Furthermore, Avery and others were censored and prohibited from displaying shirts imprinted with support for free speech and her candidacy. Avery remains fearful that if she says anything or publishes any remarks critical of the defendants, LMHS, or Region #10, even in a public forum unconnected to the school, that the defendants will impose further sanctions when in fact the defendants lacked any justification in the first place. Moreover, the defendants have demonstrated their repeated willingness to go to extraordinary lengths to censor speech at LMHS, and appear ignorant of the long-established constitutional rights of students.

While the plaintiff submits that the *Thomas* decision is dispositive of the instant claim, there are other cases that address internet postings in particular. In *Beussink v. Woodland R-IV School District*, 30 F.Supp. 2d 1175, 1180 (E.D. Mo. 1998), for example, a federal court granted an injunction against school administrators who disciplined a student for the content of a personal homepage on the internet, which was admittedly disrespectful and critical of school officials and teachers, stating: "Disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech . . .." See also *Emmett v. Kent School District No. 415*, 92 F.Supp. 2d 1088 (W.D. Wash. 2000) (injunction issued prohibiting student's suspension based upon offensive posting on website that was unconnected to the school).

A student's constitutional rights are protected even within school walls, provided the student does not cause a disruption or material interference with the educational process or rights of others. In *Tinker, supra*, the Supreme Court made clear that students retain first amendment protections in the school environment. "When [a student] is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects . . . if he does so without materially and substantially interfering with the requirements of

appropriate discipline in the operation of the school and without colliding with the rights of others." *Id.* at 512-13. Avery caused no such disruption with her blog.

As the Second Circuit Court of Appeals more recently stated in *Peck v. Baldwinsville Central School District*, 426 F.3d 617 (2d. Cir. 2005), *cert. denied*, 126 S.Ct. 1880 (2006), there are two categories of student expression *in the school environment*, each of which must meet a different degree of judicial scrutiny in connection with school-imposed speech restrictions. One category involves "student expression that [is] characterized as curricular and, hence 'school-sponsored' . . .." *Id.* at 628. The second category involves "students' 'personal expression that happens to occur on the school premises,' [that] was explored by the [Supreme] Court in *Tinker*." *Peck, supra*, 426 F.3d at 627. Neither type of "student expression" analysis is applicable here, but even if it were, the defendants acts are prohibited.

It cannot be emphasized enough that "students in the public schools do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'" *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (1988), *quoting Tinker, supra*, 393 U.S. at 506. Thus restrictions on expression require the greatest amount of scrutiny. As *Tinker* explains, "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 1337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." *Id.* at 508-509. If there is one core principle of first amendment jurisprudence, it is that speech and opinion by students outside of the school environment is absolutely protected from government interference.

Even in the recent case of *Morse v.* Frederick, No. 06-278, 2007 U.S. LEXIS 8514, (June 25, 2007), the supreme court emphasized the narrowness of its ruling restricting "school speech" that occurred during a school-sponsored event:

> The event occurred during normal school hours. It was sanctioned by Principal Morse "as an approved social event or class trip," . . . and the school district's rules expressly provide that pupils in "approved social events and class trips are subject to district rules for student conduct." . . . Under these circumstances, we agree with the superintendent that Frederick cannot "stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.

The 5-4 majority in *Frederick* made clear that its ruling upholding the sanctions against the student was extremely narrow because the speech at a school sponsored event conveyed a pro-drug message, that was strictly prohibited by the district's policy. Even the concurring opinion of Justices Alito and Kennedy emphasized that the decision "goes no further than to hold that a public school may restrict speech that a reasonable

observer would interpret as advocating illegal drug use" and "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue . ..." Here the minor plaintiff's blog was unconnected to any "school-sanctioned activity" and thus clearly did not constitute "school speech." Therefore, even the narrow restrictions of *Tinker* do not apply here.

Avery published her on-line commentary at home, and the defendants will be hard-pressed to suggest that either the website or her home computer were connected to a school-sponsored activity. As the Ninth Circuit Court of Appeals noted in *Frederick v. Morse*, 439 F.3d 1114, 1117 (9th Cir. 2006), reversed by the Supreme Court, if the facts in that case involved "a student driving a car on public streets with a 'Bong Hits 4 Jesus' bumper sticker . . . the law would be easy indeed . ..." This is an easy case. As one court has observed, "Courts considering speech that occurs off grounds have concluded (relying on Supreme Court decisions) that school officials' authority over off-campus expression is much more limited than expression on school grounds." *Killion v. Franklin Regional School District*, 136 F. Supp. 2d 446, 454 (W.D. Pa. 2001); see also, *Klein v. Smith*, 635 F. Supp. 1440, 1441 (D. Me. 1986) (raising middle finger at teacher while in restaurant parking lot not basis for suspension of student); Therefore, the strictest scrutiny involving speech cases must be applied here. As *Thomas, supra*, 607 F.2d at 1052, eruditely declares:

> When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends. In this manner, the community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption. Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.

The Supreme Court in *Hazelwood* earlier noted the distinction school officials could make in the content of a school sponsored newspaper versus an underground newspaper upon which the school could impose no content regulations. *Papish v. University of Missouri Board of Curators*, 410 U.S. 667 (1973). Avery's blog was similar to the publishing of an underground newspaper. Avery was writing about a political topic in an online journal. Avery was not at any school-sponsored event. She was at home. The website in which Avery posted her comment was a public forum and not associated with Region # 10. Because the defendants were offended by the posted comments, they chose to abuse their authority by removing her from her post, and barring her re-election. The blog entry's expressive content on a matter of public concern is clear, and was posted on a website not affiliated with the school. The blog also did not cause any disruption in the school, which is demonstrated by the fact that the defendants apparently were not even aware of its publication until May 15, 2007 – three weeks after its posting. It is outlandish to suggest that a student should be permanently banned from a school activity for a constitutionally protected comment outside of school, because it "pissed off" a couple of thin-skinned administrators.

Moreover, the phrase that apparently annoyed these defendants – douchbag – was certainly not meant to be interpreted literally that someone in the "central office" could be depicted as a feminine hygiene product. In fact, the phrase "douchbag" when used in modern slang, means:

> Someone who is annoying, bossy, or embarrassing. Someone who is stupid, intellectually challenged or mentally deranged but less than clinically insane. Someone who is unintelligently lying or scamming. Someone who is arrogant, elitist or snobby. Someone who you don't like. Someone who is socially inept. Someone who you think is mentally challenged.

(See, www.*Answerbag.com*). Clearly Avery was publishing an opinion about arbitrary conduct and action that was being taken by unspecified school administrators. There is certainly evidence in this case that one or more officials acted in a manner that might fit part of the definition quoted above. It appears from the evidence that the superintendent (Schwartz) presumed the comment referred to her, and she then contacted the school principal (Niehoff) to take measures against the minor plaintiff. Avery stated her opinion on a public forum from the confines of her own home which not only did not disrupt any school activities or infringe upon the rights of other students in any way, but was part of a general call to the public to contact their public servants and elected representatives in the "central office" to overturn what appeared at least to some high school students, to be an arbitrary decision to cancel a long-planned event. Avery simply posted her opinion in an online journal accessible to anyone with a computer. Indeed, there is no difference between this blog post, a letter to the editor, or publication of a protest flyer or underground newspaper.

By attacking Avery, the defendants blatantly overstepped their authority, violating Avery's first amendment right to freedom of speech, without even analyzing the broader rights under the Connecticut Constitution. The misconduct by the defendants continued, when Avery was prohibited from giving a speech to her class, and when others were forced to remove shirts emblazoned with "Team Avery" by Defendant Niehoff, causing Avery and others to fear donning their own, and by Niehoff ordering Avery not to discuss her television interview during school hours, even in a civics class. Obviously, the principal fails to grasp the irony of the latter action.

Avery has already suffered immediate and irreparable harm which will continue unless a new election is ordered, where she will be allowed to run for the position. She was banned from giving a speech. She will never again have the opportunity to campaign, run, stand for election and serve as secretary for her class. She will be denied her right to give a speech at commencement. Her right to free speech and to publish on all subjects will continue to be chilled if the court does not enjoin the actions of the defendants. As an incoming senior, she will forever lose her right to express opinions and vote at student council meetings on issues that will affect her class. This may also have a detrimental impact on her imminent college admissions.

Further irreparable harm will occur if the defendants are not ordered to remove any disciplinary notations added to Avery's record directly or indirectly as a result of her blog. Avery did not break any school rules when she posted the comment and should

not be punished for expressing her opinion and utilizing her first amendment rights. The disciplinary notations in Avery's permanent record could adversely affect acceptance of her applications to college and other programs. Avery is now a senior, and shortly will begin submitting applications to colleges. It is imperative that these notations be removed forthwith.

As the evidence in this case sadly demonstrates, with Orwellian grandeur, when it comes to Lewis S. Mills High School, students not only "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," but likewise while at home in the privacy of their own bedroom, as well.

In her application for a temporary restraining order, the plaintiff's requested relief is narrowly tailored to require what the constitution long has mandated: Protected speech rights of citizens, including students. By invalidating the sham election and allowing Avery to campaign, speak and run for class secretary, displaying pro-speech messages on shirts, and by purging the school records of unwarranted discipline, this court will provide a first step towards restoration of Avery's civil rights. She simply seeks the opportunity to run for the 2008 class office that was taken away from her in an arbitrary and capricious manner, for the clear exercise of her first amendments rights, before it is too late. Avery is at a critical point in her academic life, where college admissions may very well revolve around one's school activities and permanent record.

B. The Defendants Violated Avery's Right to Freedom of Speech Under the Connecticut Constitution

Of course, the federal standard for speech is only the starting point of the court's analysis. There are three provisions of the Connecticut Constitution that broaden the scope of individual rights to speech and protest that the plaintiff suggests go beyond any limitations of the first amendment to the United States Constitution. The text of Conn. Const. Art. I, § 4, for example, differs markedly from the first amendment, in its clear pronouncement that "[e]very citizen may freely speak, write and publish his sentiments *on all subjects* . . .." Article I, § 5 goes further stating, *"No* law shall ever be passed to curtail or restrain the liberty of speech . . .." Finally, Article I, § 14 protects the citizens' right to "apply to those invested with the powers of government for redress of grievances, or other proper purposes, by petition, address or remonstrance." The Connecticut Supreme Court has expressly acknowledged that this last provision protects more robust language than what may be acceptable under the first amendment. *State v. Linares,* 232 Conn. 345, 381(1995).

Since "[e]ffect must be given to every part and each word in our constitution, unless there is some clear reason . . . for not doing so," *Cahill v. Leopold*, 141 Conn. 1, 21(1954), it is clear that the state constitutional right is broader than that set forth in the first amendment. Identical provisions were contained in the original Connecticut Constitution of 1818, adopted less than 30 years after this state's ratification of the federal Bill of Rights. The framers of the state constitution were, consequently, well aware of the language of the federal provision contained in the first amendment, when it chose to use more expansive language. Thus, when a state constitutional right

provides more protection for its citizens than its federal counterpart, Connecticut courts are not bound by any limitations of the federal provision and may offer broader rights to its citizens. *Fasulo v. Arafeh*, 173 Conn. 473, 475 (1977). While "decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration . . . they are to be followed by Connecticut courts only when they provide no less individual protection than is guaranteed by Connecticut law." *Horton v. Meskill*, 172 Conn. 615, 641-42 (1977).

In *State v. Linares, supra*, the Court applied various "tools of analysis" to conclude that the state constitutional provisions dealing with free speech bestow "greater expressive rights on the public than that afforded by the federal constitution." *Id.* at 379. The analysis principally applied the textual distinctions between the first amendment and the Connecticut provisions, and particularly the right to free speech "on all subjects." *Id.* at 381. In addition the use of the word "remonstrance" in Article I, § 14 "sets forth free speech rights more emphatically than its federal counterpart." *Id.* The Supreme Court, in adopting Judge Schaller's concurring opinion in the Appellate Court, concluded from the historical events surrounding the adoption of the Connecticut Constitution, "that the framers of our constitution contemplated vibrant public speech, and a minimum of governmental interference . . .." *Id.* at 386. *Accord, Leydon v. Town of Greenwich*, 257 Conn. 318 (2001).

Thus, even if the Second Circuit opinion in *Thomas* did not clearly demonstrate the unconstitutional behavior of the defendants, the Connecticut Constitution's provisions would demand broader protection for Avery.

C. The Defendants Violated Avery'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 the law. A plaintiff may assert a procedural due process violation only where (1) a property right can be identified, (2) governmental action with respect to that property right amounting to a deprivation can be established, and (3) the deprivation occurred without due process. *Rosa R. v. Connelly*, 889 F.2d 435, 438 (2nd Cir. 1989), *cert denied*, 496 U.S. 941 (1990). In *Goss v. Lopez*, 419 U.S. 565 (1975), the Supreme Court held that students are entitled to "a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause." *Id.* at 735.

"Protected interests in property are normally ... created and their dimensions are defined by an independent source such as state statutes or rules entitling the citizen to certain benefits. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (quoting *Roth*, 408 U.S. at 577). Connecticut has created a protected property interest in "other educational activities" in Connecticut General Statute § 10-220. The statute specifically states,

> "Each local or regional board of education shall maintain good public elementary and secondary schools, implement the educational interests of the state as

> defined in section 10-4a *and provide such other educational activities* as in its judgment will best serve the interest of the school district; provided any board of education may secure such opportunities in another school district in accordance with provisions of the general statutes and shall give all the children of the school district as nearly equal advantages as maybe practicable"

Connecticut General Statute § 10-4a(1) further establishes the protected property interest to extracurricular activities by stating that "each child shall have for the period prescribed in the general statutes equal opportunity to receive a suitable program of educational experiences."

Students at public educational institutions have recognized liberty and property interests in their educational programs, that cannot be withheld in the absence of due process. *Goss v. Lopez*, 419 U.S. 565, 581 (1975). This is because suspension from such a program based upon false or exaggerated charges damages the student's associational relationships with other students and his future educational and employment opportunities. *Id.*

The United States Supreme Court has stated that the "touchstone of due process is protection of the individual against arbitrary action of government, ... whether the fault lies in a denial of fundamental procedural fairness, ... or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective ..." (Citations omitted; internal quotation marks omitted.) *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). Integral to the concept of due process is the notion of fundamental fairness. *State v. Corchado*, 200 Conn 453, 459 (1986). "[A] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1965).

Procedural due process under the fourteenth amendment requires that any deprivation of a right to property or liberty be "preceded by notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985). The minimum procedural due process requirements for disciplinary actions in public schools include notice and an opportunity to respond. *Goss v. Lopez*, 419 U.S. 565, 581 (1975). Notice must be reasonably calculated to: 1) inform the party of the pendency of the action, and 2) afford the party an opportunity to defend against the action. *See*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Rosa R. v. Connelly*, 889 F.2d 435, 438 (2nd Cir. 1989).

The fairness of all governmental hearings that deprive an individual of any property or liberty interest must consider the three factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the

additional or substitute procedural requisites would entail.

The hearing process itself that is provided must be adequate to provide an individual with a safeguard against arbitrary governmental actions. *See, e.g. Barry v. Barchi*, 443 U.S. 55 (1979). "When the right infringed is 'fundamental' the government regulations must be 'narrowly tailored to serve a compelling state interest.' *Reno v. Flores,* 507 U.S. 292, 302 (1993). Rights are fundamental if they are 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) or 'deeply rooted in this Nation's history and tradition.' *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977).

Here Avery clearly had either a liberty or property interest in continuing her participation in the 2008 class elections, which is part of the educational experience. Moreover, the position afforded her a forum in which she could speak, which involves a most fundamental right of liberty. Avery was also deprived of her liberty interest in campaigning for the office she held for three years, without any right to challenge that arbitrary position. The punitive measures clearly violated Avery's first amendment right to freedom of speech. As such, Avery was not afforded any procedure to challenge the arbitrary and capricious actions. No administrative options were available to Avery and the plaintiff has attempted through correspondence and meetings to appeal on her own.

Not only was Avery's punishment unconstitutionally imposed as a result of opinions expressed under her constitutional right to freedom of speech, but the punishment itself involved further restriction on her rights to speech, publish and petition. No administrative measures exist to redress the defendants' deeds.

D. The Defendants Violated Avery's Right to Equal Protection

The standard for reviewing a law under the Equal Protection Clause depends on the right or classification involved. If the law disadvantages a fundamental right, it must be analyzed according to the strict scrutiny standard. *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. " *DiMartino v. Richens*, 263 Conn. 639, 673 (2003).

The punishment imposed upon Avery impinges specifically on rights protected under the First Amendment to freedom of speech. Minors are entitled to the protection

of the bill of rights.[1] Here the defendants have violated Avery's fundamental rights and strict scrutiny must apply. Moreover, the evidence demonstrates that she was singled out for punitive measures precisely because she exercised her first amendment rights. Under a strict scrutiny analysis, the defendants have the burden of demonstrating that Avery's punishment is narrowly tailored to serve a compelling state interest. *Able v. United States*, 155 F.3d 628, 631-32 (2d Cir. 1998). The defendants clearly can not meet this burden. Even if the school could articulate a compelling state interest to prevent students from posting their views on internet blogs, which they can not, Avery's punishment was not narrowly tailored to that end.

Avery violated no rule by simply questioning authority. She was rightfully angry about the potential cancellation of "Jamfest" after she and other members of the student council applied so much time and dedication arranging the event. Avery, therefore, had every right to state her opinion on livejournal.com. She apologized anyway.

E. A Balancing of the Harm Caused to One Party or the Other by the Granting of the Temporary Relief Requested Justifies Issuance of a Preliminary Injunction.

Balancing the relative harms easily justifies granting the temporary injunction in this case. Without a preliminary injunction, the plaintiff's daughter will continue to be deprived of her fundamental right to freedom of speech, equal protection, and due process. Monetary damages cannot adequately compensate the plaintiff for the continued violation of these rights.

In contrast, the only "hardship" to the defendants if an injunction is granted would be the inconvenience of having to hold another election for 2008 class secretary at the beginning of the 2007-2008 school year, allowing candidates adequate time to campaign and giving Avery an opportunity to address her class, and all staff who were present on May 25, 2007. Basically, it requires the defendants to start obeying the law – a burden that should not be onerous to them. A balancing of interests clearly favors the restoration of a fundamental constitutional right to the plaintiff and her daughter.

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[1] *See Bellotti v. Baird*, 443 U.S. 622, 633 (1979) ("A child, merely on account of his minority, is not beyond the protection of the Constitution."); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."); *In re Gault*, 387 U.S. 1, 13 (1967) ("[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

CONCLUSION

In light of the equities tipping sharply in favor of granting the plaintiff's request, and the defendants' continued violation of the constitutional rights of plaintiff's daughter, the plaintiff has clearly established the necessity of a preliminary injunction to prevent future irreparable harm. For all of the foregoing reasons, the plaintiff's request for a temporary injunction should be granted.

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

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