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
Plaintiff,	:	
	:	
V.	:	
	:	
KARISSA NIEHOFF, and	:	
PAULA SCHWARTZ	:	
Defendants	:	JULY 18, 2008

MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

Introduction

The plaintiff commenced this action, on behalf of her minor daughter, Avery Doninger, in the Superior Court for the New Britain Judicial District, against the principal and superintendent of Regional School District No. 10, located in Burlington, Connecticut. The defendants thereafter removed the case to the United States District Court. The court's familiarity with the general circumstances and nature of this school first amendment case are presumed, as it has been the subject of a published opinion by this court, *Doninger v. Niehoff*, 514 F. Supp. 2d 199 (D. Conn. 2007), and by the Second Circuit Court of Appeals, *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008), affirming the denial of plaintiff's motion for preliminary injunction. The plaintiff notes, however, that the factual findings in those decisions, were based, in part, on credibility determinations and resolution of disputed facts by this court, which would not and could not provide grounds for the invocation of collateral estoppel principles. Moreover, neither this court nor the Court of Appeals ruled on the claim that is presently before the court. However, in proceeding on the instant motion, the plaintiff will rely, to a great extent, on the undisputed testimony and exhibits that were presented at the preliminary injunction hearing held on several dates in August, 2007, as well as additional material in the form of an e-mail between the defendants that is submitted herewith. The plaintiff asserts that by relying only on undisputed

material facts, she is entitled to summary judgment against defendant Niehoff on her constitutional claims surrounding the banning of the "Team Avery" t-shirts that were worn or carried by the minor plaintiff and other students on May 25, 2007.

I. Statement of Facts

Avery Doninger was the elected secretary of the Class of 2008. On or about April 24, 2007, she posted a blog from her home on an internet networking site known as livejournal.com. In May, 2007, defendant Schwartz, the superintendent of schools, learned of the posting and instructed Karissa Niehoff, the principal of Lewis Mills High School, to take some action regarding the post. As a result, Niehoff imposed certain sanctions against Avery, including, *inter alia*, banning her from running for reelection to the post of Class Secretary for her senior year. The election for class officers and student council were scheduled for May 25, 2007 in the school auditorium, preceded by student speeches. All students in grades 9 through 11 attended the speeches.

Some time before 5:00 a.m. on the day of the student elections, defendant Niehoff learned that some students planned to wear shirts to the auditorium containing a message of support for Avery Doninger. Niehoff expressed disapproval of the plan, and instructed the student council advisor, Jennifer Hill, to stop any conversations that she overheard on the topic. She further wrote to Defendant Schwartz and Peter Bogen, vice principal at Lewis Mills High School, that she "hope[d] that Avery herself stops her group of friends from doing this."

On May 25, 2007, Niehoff stationed herself outside the doors of the auditorium and stopped students who were wearing or carrying t-shirts that said "Team Avery" on the front and "Support LSM Freedom of Speech" on the back. One student wore a "Vote for Avery" t-shirt and she was barred from wearing it into the auditorium, as well. These students were told that they would not be allowed to attend the assembly in the auditorium unless they removed the shirts and put them away. Niehoff seized one of the "Team Avery" shirts from Kevin Nestico. Avery was present when Niehoff prohibited students from wearing the shirts. She was in possession of one of these shirts and planned to wear it, but became "wide eyed" and "taken aback" by what Niehoff did and, therefore, hid the shirt in another student's backpack

In May of 2007, Lewis Mills High School was subject to Region 10 Board of Education Policy No. 5132, which permitted students to wear articles of clothing containing written material that was not obscene, profane or derogatory on the basis of race, religion or gender. In addition Region 10 Policy No. 5145.2, pertaining to freedom of speech, expressly endorses a policy "to recognize and protect the rights of student expression."

II. Standard of Review

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

factfinder 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

The issues presented in the instant motion are plain: Did Defendant Niehoff violate the first amendment rights of Avery Doninger when she prohibited her and others from attending a school assembly unless they removed and stowed printed t-shirts that communicated a clear message in support of Avery, that was disfavored by Niehoff? Moreover, was the right at issue clearly established at the time? The answer to both of these questions is yes.

Despite Niehoff's sworn testimony in August, 2007, that she had no prior knowledge about the pro-Avery t-shirts, the undisputed evidence now demonstrates that she, in fact, knew about them, at least prior to 4:56 a.m. the day of the assembly. In an e-mail sent at that early hour to Defendant Paula Schwartz and Vice Principal Peter Bogen, Niehoff stated that she "heard a whisper" from a source (whose identity is redacted from the copy of the e-mail) "that a few kids may be planning to wear a 'Vote for Avery' shirt" during class speeches and elections. Niehoff went on to announce that she had told someone named "Jen" (believed to be student council faculty advisor Jennifer Hill) "to stop any conversation that she hears." Finally, Niehoff expressed her "hope that Avery herself stops her group of friends from doing this."

Thus it is apparent, that Niehoff anticipated the appearance of the t-shirts, expressed strong displeasure with the message and the messengers before the communication could occur. She, in fact, instructed someone else to "stop any conversation" about it. What happened at the assembly is likewise not in dispute: Niehoff concedes that she prohibited students from wearing or bringing the t-shirts into the auditorium and, indeed, confiscated one of them. Avery was present when other students were accosted by Niehoff and – fearful of the consequences that would befall her should she don her own shirt – hid it in a backpack. The censorship was total and effective. Avery's message was banned from the auditorium and her silent speech chilled. The message was not communicated.

A public school student's constitutional rights to speech and expression are protected even within school walls, provided the student's communication does not cause a disruption or material interference with the educational process or rights of others. *Thomas v. Board of Education, Granville Central School District*, 607 F.2d 1043 (2d Cir. 1979). In *Tinker v. Des Moines Ind. Community School District*, 393 U.S. 503 (1969), the Supreme Court held that students retain first amendment protections in the school environment, with certain recognized but very limited exceptions: "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. The same is true regarding attendance at an assembly where student speeches take place. There is certainly no evidence whatsoever that the "Team Avery" t-shirts caused a material and substantial disruption in the operations of the school, nor is there any suggestion that it was reasonable likely to lead to such disruption. Indeed, Niehoff's entire premise for censorship was her personal decision to ban "electioneering" material from the school assembly, which clearly contravened the school district's first amendment and school attire policies. Moreover, it is readily apparent that this excuse for censorship was invented after the unconstitutional misconduct by Niehoff, and that the 4:56 a.m. e-mail proves this point beyond a reasonable doubt.

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. The plaintiff acknowledges, however, that the Supreme Court has cautioned that "the constitutional rights of students are not automatically coextensive with the rights of adults in other settings;" *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); and that the rights of students "must be 'applied in light of the special characteristics of the school environment.'" *Kuhlmeier, supra*, 484 U.S. at 266.

Nevertheless, even applying the restrictions permitted in the school setting, censorship of student expression requires close scrutiny. In this case – similar to the circumstances in *Tinker,*

supra – "There is no evidence whatever of [Avery's] interference, actual or nascent, with the school's work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the school or the rights of other students." *Id.* at 508. Moreover, "where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained." *Id.* at 509. This rule is so clear that no reasonable school administrator – no matter how authoritarian and priggish – could believe that banning the shirts that are the subject of this lawsuit would comport with established constitutional law.

As the Second Circuit noted 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. That is not the type of speech that is claimed here. 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. It is this latter form of expression at issue here. This type of expression deserves the greatest amount of scrutiny. *Tinker* made absolutely clear that

> 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.

The clear established rule pertaining to non-vulgar, non-offensive speech on student

clothing is governed by the decision in *Guiles v. Marineau,* 461 F. 3d 320 (2d Cir. 2006), *cert. denied*, 127 S.Ct. 3054 (2007), which involved the discipline of a middle school student for wearing a t-shirt that was critical of and derogatory towards President George W. Bush. The Second Circuit held that the *Fraser* limitations only applied to on-campus "lewd," "indecent," "vulgar," and "plainly offensive speech." *Id.* at 326. It then defined each of these terms, holding that "[l]ewdness, vulgarity and indecency normally connote sexual innuendo or profanity." *Id.* *Guiles* concluded that *Fraser's* reference to "plainly offensive" speech meant "speech that is something less than obscene but related to that concept, that is to say, speech containing sexual innuendo and profanity." *Id.*

While the Second Circuit opinion in *Doninger* seems to go further than other federal courts of appeals in suggesting what type of words may be considered disruptive of the school environment – even from off-campus – and, therefore, subject to restriction within the meaning of *Tinker*, it is absolutely uncontroverted that the "Team Avery" t-shirts did not even remotely fall within the category of speech that might be banned. There was nothing vulgar, lewd, indecent or offensive about them. Clearly, they contained a political message with which Niehoff disagreed. By her own written words and testimony, she admits to prohibiting students from wearing or bringing the shirts into the auditorium, confiscating one of them, and prohibiting any talk of wearing them. This is, plain and simple, garden variety censorship of a disfavored message in direct violation of the first amendment. See also *DePinto v. Bayonne Bd. Of Education*, 514 F. Supp 2d 633 (D.N.J. 2007), in which school officials were deemed to have violated the first amendment rights of a student who wore a button that depicted uniformed Hitler Youth as a silent protest of a proposed school uniform policy; *Nuxoll v. Indian Prairie School Dist. #204*, 523 F.3d 668 (7th Cir. 2008), where the Court of Appeals concluded that school officials improperly punished students for wearing shirts that declared, "Be Happy, Not Gay"; *Chandler v. McMinnville*, 978 F.2d 524 (9th Cir. 1992)(students possessed first amendment right to wear buttons displaying the word 'scab' to protest the school's hiring of substitute teachers during a teacher's strike).

Indeed, this Court has already commented on the controversy surrounding the censorship

of the "Team Avery" t-shirts, and the plaintiff submits that there is no additional evidence to controvert or undermine what was said last August:

> The Court has more substantial concerns, however, regarding the "Team Avery" t-shirts. The shirts did not violate the school dress code or contain vulgar or offensive language, and could not be seen as endorsed by the school administration. Moreover, the students intended to wear them in the auditorium as a silent protest, similar to the wearing of black arm bands in Tinker. As such, the t-shirts are not governed by either *Fraser* or *Kuhlmeier*, but rather by *Tinker*. As mentioned above, under *Tinker*, the school administration must show that permitting the t-shirts into the auditorium "would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at 509 (quotation marks omitted). No such showing was made at the preliminary injunction hearing; the only evidence of a disruption at the election assembly was the shouting of one or perhaps a few students that Avery be allowed to speak. Not only was the disruption minor and temporary, it could hardly be due to the t-shirts, as the students were forbidden to wear them into the auditorium. Ms. Niehoff and Ms. Schwartz have presented no evidence that had the t-shirts been permitted, the foreseeable disruption would have been so much greater as to meet the *Tinker* standard.

Doninger v. Niehoff, supra, 514 F. Supp. 2d at 218. The plaintiff submits that there is no other evidence to support Niehoff's action.

In expressing its view at the time that it was "troubled" by Niehoff's conduct vis-a-vis the "Team Avery" t-shirts, and her injunction hearing testimony that her intention was to ban all "electioneering" material, this court also stated:

> Here, however, there was certainly no formal written policy [regarding the prohibition on electioneering material] at the time, and instead the approach of school administrators appears to have been rather ad hoc, to say the least, at least on the evidence presented to date. And, of course, Avery was not a candidate for any office. The danger of such an ad hoc approach is that it may allow for censorship based on the message conveyed – here, support for Avery in her struggle with administrators. *See, e.g., Guiles*, 461 F.3d. 320 (censorship of a t-shirt harshly critical of President Bush); *K.D. v. Fillmore Cent. Sch. Dist.,* No. 05-CV-0336(E), 2005 WL 2175166 (W.D.N.Y. Sept. 6, 2005) (censorship of a t-shirt bearing anti-abortion message).

Doninger, supra, 514 F. Supp. 2d at 219.

Of course, information that came to light after the hearing demonstrates that Niehoff's

goal was, in fact, to stop Avery and her friends from displaying messages of support for her position; not election material in general. In light of the conceded censorship by Niehoff, the actual chill that it caused to Avery's right of expression, and the clear existence of both a first amendment right that was applicable to the wearing of issue-oriented t-shirts in a public high school, combined with a Region 10 School Board policy that permitted expressive material on school clothing, the plaintiff submits that summary judgment in her favor on this claim is in order.

CONCLUSION

For the foregoing reasons, the plaintiff requests that summary judgment be granted in her favor.

Dated at Hartford, Connecticut this 17th day of July, 2008.

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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