UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LAUREN DONINGER, PPA AVERY DONINGER	: :	NO.: 3:07CV01129 (MRK)
v.	:	
KARISSA NIEHOFF AND PAULA SCHWARTZ	: :	JULY 18, 2008

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. BACKGROUND

A. FACTUAL BACKGROUND

The plaintiff, Lauren Doninger, brought this action against Lewis Mills High School ("LMHS") Principal Karissa Niehoff and Superintendent Paula Schwartz for alleged violations of her minor daughter, Avery Doninger's, constitutional rights as a result of disciplinary action taken against Avery. This incident stems from a public internet blog which Avery posted on LiveJournal.com from her home computer, on the evening of April 25, 2007, in which she described school administrators in a derogatory manner, and called on parents and students to contact the superintendent in order to "piss her off more." Superintendent Schwartz and Principal Niehoff became aware of Avery's blog posting. Principal Niehoff, thereafter, disqualified Avery from running for the voluntary extra-curricular position of Senior Class Secretary as a consequence of the derogatory and disruptive blog posting.

The defendants hereby incorporate their Local Rule 56(a)1 Statement of undisputed material facts as if fully set forth herein.

B. PROCEDURAL HISTORY

The plaintiff moved, in part, for a preliminary injunction in which she sought an order voiding the election for Senior Class Secretary, and an order that the school hold a new election in which she be permitted to run for the position of Senior Class Secretary or, in the alternative, that she be granted the position of Co-Secretary. Following a hearing encompassing some four days of evidence and testimony from eleven witnesses, this Court issued a Memorandum of Decision [Doc. 37], on August 31, 2007, denying the plaintiff's request for preliminary injunction. The plaintiff appealed the denial of her preliminary injunction.

On May 29, 2008, the Second Circuit Court of Appeals issued its ruling affirming this Court's ruling. See Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008).

C. ALLEGATIONS OF THE COMPLAINT

The Amended Complaint is brought by Lauren Doninger as guardian and next friend of her minor daughter, Avery Doninger, in three counts against Karissa Niehoff and Paula Schwartz in their individual and official capacities. The claim for injunctive relief is directed to the defendants in their official capacity, and the claim for damages is directed to the defendants in their individual capacities.

In the First Count of the Amended Complaint, the plaintiff alleges a cause of action pursuant to 42 U.S.C. § 1983 for violation of Avery's First and Fourteenth Amendment rights. With regard to the First Amendment claim, the plaintiff contends that the defendants violated Avery's constitutional right to free speech in precluding her from running for class secretary as disciplinary action for her LiveJournal.com blog posting. (See Am. Compl., Count One, ¶¶ 24, 34, 46-47.) Additionally, the plaintiff contends that Principal Niehoff's prohibition of "Team

Avery" T-Shirts in the auditorium during the election assembly violated Avery's First Amendment rights. (See id. at ¶¶ 29-31, 46-47.)

With regard to her Fourteenth Amendment claim, the plaintiff alleges that the defendants treated Avery differently from other similarly situated students in two respects. First, the plaintiff contends that Principal Niehoff caused a discipline log entry to appear in Avery's guidance file regarding inappropriate use of school computers to send unauthorized e-mails while no such discipline log entry appeared in the files of the other three students involved in the e-mail. (See Am. Compl., Count One, ¶¶ 1, 13, 36-38, 47.) The plaintiff further contends that Avery's equal protection rights were violated by the defendants in that disciplinary action was taken against her for her LiveJournal.com blog entry, while no such disciplinary action was taken against another student who posted an offensive comment to her blog. (See Avery Doninger Aff., **Ex. B**, at ¶ 26.)

In the Second Count of her Amended Complaint, the plaintiff alleges that the foregoing conduct of the defendants violated Avery's rights under the Connecticut Constitution. More specifically, the plaintiff alleges that the defendants' actions restricted Avery's ability to freely speak, write and/or publish her sentiments on a matter of concern in violation of Article First, § 4. (See Am. Compl., Count Two, ¶ 51.) The plaintiff further claims that the defendants' actions curtailed and restrained Avery's speech and right to publish in violation of Article First, § 5. (See id. at ¶ 52.) Finally, the plaintiff claims that the defendants punished Avery for exercise of her right to petition for redress of grievances in violation of Article First, § 14. (See id. at ¶¶ 53-54.)

In the Third Count of the Amended Complaint, the plaintiff alleges a claim for intentional infliction of emotional distress. In particular, the plaintiff contends that the defendants' action

was willful and/or wanton, and extreme and outrageous. (See Am. Compl., Count Three, ¶ 57.) The plaintiff contends that Avery suffered emotional distress as a result of the same. (See id.)

The defendants now move for summary judgment as to the Amended Complaint in its entirety for the reasons more fully set forth herein.

II. STANDARD OF REVIEW ON SUMMARY JUDGMENT

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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." Fed. R. Civ. P. 56(c). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "The substantive law governing the case will identify those facts that are material, and 'only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Bouboulis v. Transp. Workers Union of Am., 442 F.3d 55, 59 (2d Cir. 2006), quoting Anderson 477 U.S. at 248.

The moving party bears the burden of demonstrating the absence of a genuine issue as to any material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1986). In determining whether a material issue of fact exists, the Court must resolve all ambiguities and draw all inferences against the moving party. See Anderson, 477 U.S. at 255. The party opposing summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 256. Thus, once the moving party has satisfied its burden of identifying evidence which demonstrates the absence of a genuine issue of material fact, the non-moving party is required to

go beyond the pleadings by way of affidavits, depositions, and answers to interrogatories in order to demonstrate specific material facts which give rise to a genuine issue. See Celotex, 477 U.S. at 324. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matasushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

The moving party seeking summary judgment satisfies their burden of demonstrating that there exists no genuine issue of material fact in dispute where they point to the absence of evidence to support an essential element of the non-moving party's claim. See Celotex Corp. v. Catrett, 477 U.S. at 322-23. "A defendant need not prove a negative when it moves for summary judgment on an issue that the plaintiff must prove at trial. It need only point to an absence of proof on the plaintiff's part, and, at that point, plaintiff must designate specific facts showing that there is a genuine issue for trial." Parker v. Sony Pictures Entertainment, Inc., 260 F.3d 100, 111 (2d Cir. 2001) (internal quotation marks omitted), citing Celotex, 477 U.S. at 324.

III. THE PLAINTIFF'S CLAIM OF VIOLATION OF AVERY'S FIRST AMENDMENT RIGHTS WITH REGARD TO HER LIVEJOURNAL.COM BLOG POSTING FAILS AS A MATTER OF LAW AS THE DEFENDANTS PROPERLY DISCIPLINED HER WITH REGARD TO THE SAME, AND THE POSTING WAS NOT PROTECTED SPEECH UNDER THE FIRST AMENDMENT

It is well established that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). However, it is equally well established that a student's constitutional rights to free speech and expression in the public school setting "are not automatically coextensive with the rights of adults in other settings." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986). Rather, a student's right "to advocate unpopular and controversial views in schools and classrooms must

be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." Fraser, 478 U.S. at 681.

In the instant matter, the plaintiff contends that the Defendants violated Avery's right to free speech and expression in disqualifying her from running for Senior Class Secretary in retaliation for Avery's LiveJournal.com blog posting. However, as demonstrated below, the Defendants' disciplinary action against Avery relative to her blog posting was constitutionally permissible.

A. THE DEFENDANTS PROPERLY REGULATED AVERY'S OFF-CAMPUS SPEECH AS IT WAS PURPOSELY DESIGNED BY HER TO COME ONTO THE SCHOOL CAMPUS, WAS OTHERWISE LIKELY TO COME TO THE ATTENTION OF THE SCHOOL ADMINISTRATION, AND FORESEEABLY CREATED A RISK OF SUBSTANTIAL DISRUPTION WITHIN THE SCHOOL ENVIRONMENT

In its ruling affirming the denial of a preliminary injunction in this matter, the Second Circuit applied the framework set forth in Wisniewski v. Bd. of Ed., 494 F.3d 34 (2d Cir. 2007), and also applied the Tinker standard in concluding that the record amply supported a finding that: (1) it was reasonably foreseeable that Avery's blog posting would reach school property, and (2) Avery's blog posting foreseeably created a risk of substantial disruption within the school environment. See Doninger v. Niehoff, 527 F.3d 41, 50-51 (2d Cir. 2008).

In Wisniewski, the plaintiff, a middle school student, utilized the AOL Instant Messaging ("IM") system to send a message to his friends from his parents' home computer. See Wisniewski, 494 F.3d at 35. One of these messages contained a threatening statement about his English teacher, and an icon portraying a pistol firing at a person's head. Id. The plaintiff shared his IM icon with fifteen of his "buddies" for a three week period. Id. at 36. The icon ultimately came to the attention of the school district. Id. The Wisniewski Court held that "[t]he fact that Aaron's creation and transmission of the IM icon occurred away from school property

does not necessarily insulate him from school discipline." Id. at 39. The Court further found that, on the facts presented, it was reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot. Id. In so finding, the Court noted that schools are authorized to regulate unprotected speech which occurs off campus, but is likely to come to the attention of the school administration, and which creates a foreseeable risk of substantial disruption within a school. Id. at 39. As a result, the Court affirmed the suspension of the plaintiff from school as a consequence for his instant message and icon. Id. at 40.

In the instant matter, the Second Circuit affirmed this Court's finding that, under the circumstances presented, "it was reasonably foreseeable that other LMHS students would view the blog and that school administrators would become aware of it." Doninger, 527 F.3d at 49; Prelim. Inj. Mem. Dec. [Doc. 37] at 28. In this regard, the undisputed evidence demonstrates that Avery chose her privacy setting on her blog posting as "public," which meant that the subject blog entry could be viewed by the entire world. (See Avery Doninger Prelim. Inj. Hr'g Test., **Ex. A**, at 240-41, 374-76). Avery, by her own admission, chose to have the subject blog entry as "public," because she wanted to encourage more people to contact the administration regarding Jamfest in order to get the administration to change its mind and allow Jamfest to be held in the auditorium as scheduled. (Id. at 377.) In addition to urging contact with the Superintendent's office, Avery asked the readers of her blog posting to forward it to everyone in their address book. (Id. at 380.) Moreover, it is undisputed that students did read Avery's blog and posted comments in response to the same. (See LiveJournal.com Blog, **Ex. P**; J. Rubino Dep., **Ex. Z**, at 9-10.)

Thus, as this Court found, it certainly was reasonably foreseeable that Avery's blog posting would reach the school campus and, by her own admission, this was her intended purpose. It is no surprise, therefore, that as in Wisniewski, Avery's blog posting did in fact come to the attention of the school administration. (See Karissa Niehoff Prelim. Inj. Hr'g Test., **Ex. J**, at 508.) Accordingly, the undisputed evidence amply supports a finding that it was reasonably foreseeable that Avery's blog posting would reach school grounds, was designed by Avery to do so and did, in fact, come to the attention of the school administration. See Doninger, 527 F.3d at 49.

Moreover, as found by the Second Circuit, Avery's blog posting meets the Tinker standard in that it was reasonably foreseeable that her blog posting would materially and substantially disrupt the work or discipline of the school. See Doninger, 527 F.3d at 49. In Tinker, the Supreme Court held:

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

Tinker, 393 U.S. at 513. However, Tinker does not require certainty of a disruption, only that it was reasonable for school officials "to forecast a substantial disruption of or material interference with school activities. Lavine v. Blaine School Dist., 257 F.3d 981, 989-92 (9th Cir. 2001). "The question is not whether there has been actual disruption, but whether school officials might reasonably portend disruption from the student expression at issue." Doninger 527 F.3d at 51 (internal quotations omitted), citing Lavine, 257 F.3d at 989, Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668, 673 (7th Cir. 2008).

In the instant matter, the undisputed facts demonstrate that Avery's blog posting foreseeably created a risk of disruption of school activities. First, as found by the Second

Circuit,

> the language with which Avery chose to encourage others to contact the administration was not only plainly offensive, but also potentially disruptive of efforts to resolve the ongoing controversy. Her chosen words-in essence, that others should call the "douchebags" in the central office to "piss [them] off more"-were hardly conducive to cooperative conflict resolution. Indeed, at least one LMHS student (the one who referred to Schwartz as a "dirty whore") responded to the post's vulgar and, in this circumstance, potentially incendiary language with similar such language, thus evidencing that the nature of Avery's efforts to recruit could create a risk of disruption.

Doninger, 527 F.3d at 50 –51.

Secondly, Avery's blog posting contained false information that Jamfest had been cancelled. In her blog, Avery expressly stated that "jamfest is cancelled due to douchebags in central office." (See LiveJournal.com Blog, **Ex. P**.) Avery went on to state that, "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." (See id.) Avery concedes that her blog simply indicated that Jamfest was canceled notwithstanding the fact that, by her own sworn testimony, Principal Niehoff had left open the possibility that Jamfest could occur at a later date. (See Avery Doninger Prelim. Inj. Hr'g Test., **Ex. A**, at 261-62, 365.) The Second Circuit found it significant that such misleading information by Avery was disseminated amidst circulating rumors that Jamfest had been cancelled, and which had already begun to disrupt school activities. See Doninger, 527 F.3d at 51. Specifically, on April 25, 2007, the morning following Avery's blog posting, school activities were disrupted as follows:

(1) students assembled outside Principal Niehoff's office for the purpose of staging a sit-in demonstration because they believed that Jamfest had been cancelled. (See Avery Doninger Prelim. Inj. Hr'g Test., **Ex. A**, at 434-5; P.A. Prelim. Inj. Hr'g Test., **Ex. D**, at 59-60, 80-81, 86.)

(2) Avery, P.A., T.F and J.E. were called away from their scheduled classes and a field trip to a meeting in order to discuss Jamfest. (See P.A. Prelim. Inj. Hr'g Test., **Ex. D**, at 25; J.E. Prelim. Inj. Hr'g Test., **Ex. E**, at 105-06;

Avery Doninger Prelim. Inj. Hr'g Test., **Ex. A**, at 428; T.F. Dep., **Ex. F**, at 43.)

(3) Superintendent Schwartz missed the introduction to a Chinese delegation at a statewide conference, and experienced a delay in her planned presentation to the delegation. (See Paula Schwartz Prelim. Inj. Hr'g Test., **Ex. K**, at 614-15.)

(4) In addition, Superintendent Schwartz was late for a Superintendents' meeting as a result of responding to calls and e-mails regarding the Jamfest issue. (See Paula Schwartz Prelim. Inj. Hr'g Test., **Ex. K**, at 616, 618.)

(5) Principal Niehoff missed the presentation by and evaluation of a non-tenured teacher that had been scheduled for weeks (See Karissa Niehoff Prelim. Inj. Hr'g Test., **Ex. J**, at 501, 504-07.)

(6) In addition, Principal Niehoff was unable to present the introduction of a guest professor at the health seminar. (See Karissa Niehoff Prelim. Inj. Hr'g Test., **Ex. J**, at 501, 504-07.)

(7) Mr. Miller had to secure alternate coverage so that he could leave his scheduled class to attend the meeting to discuss a new date for Jamfest. (See David Miller Dep., **Ex. C**, at 37.)

Thus, as found by the Second Circuit, "[i]t was foreseeable in this context that school operations might well be disrupted further by the need to correct misinformation as a consequence of Avery's post." Doninger 527 F.3d at 51.

To the extent that the plaintiff argues that the disruption of school operations may have stemmed from the mass e-mail sent by the four students on April 24th rather than from Avery's blog posting, such an argument is unavailing. The proper inquiry is not whether actual disruption occurred from Avery's blog, but, rather, whether the defendants might reasonably foreseen disruption as a result of it. See Doninger 527 F.3d at 51. Stated differently,

> [t]his "reasonable forecast" test applies both to instances of prior restraint, where school authorities prohibit or limit expression before publication, and to cases like this one, where Avery's disqualification from student office followed as a consequence of the post she had already made available to other students.

Doninger, 527 F.3d at 51 n. 3, citing Boucher v. Sch. Bd. of Greenfield, 134 F.3d 821, 828 (7th Cir. 1998) and Wisniewski, 494 F.3d at 40.

As the foregoing demonstrates, the undisputed evidence demonstrates that it was reasonably foreseeable that Avery's blog posting would reach school grounds, was designed by Avery to do so and did, in fact, come to the attention of the school administration. Moreover, the undisputed evidence demonstrates that Avery's blog foreseeably created a risk of further disruption of school activities in light of the offensive and misleading information contained therein. Accordingly, Avery's blog satisfies the criteria in both Wisniewski and Tinker, such that her speech is not afforded the protections of the First Amendment and was, therefore, subject to regulation by the defendants.

B. THE DEFENDANTS' DISCIPLINARY ACTION IN PRECLUDING AVERY FROM RUNNING FOR THE EXTRACURRICULAR STUDENT OFFICER POSITION OF CLASS SECRETARY IS NOT VIOLATIVE OF THE FIRST AMENDMENT

There exists no dispute that Avery was not suspended or removed from school as a result of her blog posting. In fact, Avery served the remainder of her position as Junior Class Secretary, and remained a member of the Student Council. (See Avery Doninger Prelim. Inj. Hr'g Test., **Ex. A**, at 409, 415.) Rather, the sole disciplinary action taken against Avery relative to her blog posting was her disqualification from running for the voluntary extracurricular position of Senior Class Secretary. (See id. at 416.) As demonstrated below, the defendants' actions in precluding Avery from running for Senior Class Secretary as a consequence of her blog posting was constitutionally permissible.

In evaluating whether the defendants' discipline of Avery passed First Amendment scrutiny, the Second Circuit again applied the Tinker standard. The Second Circuit found, as this Court did, that "it is of no small significance that the discipline here related to Avery's

extracurricular role as a student government leader." Doninger, 527 F.3d at 52. The Court directed that this factor was to be considered in light of Tinker's standard that student speech may properly be regulated where school officials reasonably believe that the speech in question would materially and substantially disrupt the school's work and discipline. Id.

Notably, the Board of Education policy for Regional School District #10 requires that students must maintain good citizenship in order to participate in student government. More specifically, the policy provides, in pertinent part, as follows:

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

(See Bd. of Ed. Policy # 6145, **Ex. AA**.) In addition, the LMHS Student Handbook provides that the civic and social expectations for students include: the demonstration of: (1) a sense of ethics and to take responsibility for one's actions; (2) effort and persistence needed for success; (3) respect for one's self and others; and (4) being an active, constructive member of the community. (See LMHS Student Handbook, **Ex. BB**.) The Student Handbook goes on to set forth the following objective of the Student Council: "4. Direct students in the duties and responsibilities of good citizenship, using the school environment as the primary training ground." (Id.) Avery received a copy of the Student Handbook at the commencement of the 2006-2007 school year, and signed an Acknowledgment that she had read and reviewed the information therein. (See Student Handbook Acknowledgment, **Ex. N**.)

Notwithstanding the foregoing Board policy and handbook criteria, Avery proceeded to post the subject blog entry which referred to school administrators in an offensive manner, falsely stated that Jamfest had been cancelled, and requested that students contact Superintendent

Schwartz in order "to piss her off more," despite the fact that such action by her could place Jamfest in jeopardy of happening at all. (See Avery Doninger Prelim, Inj. Hr'g Test., **Ex. A**, at 391-92.) Moreover, Avery included the prior Jamfest e-mail in her blog which contained inaccurate information, was otherwise in violation of the school's internet policy, and which had already resulted in disruption of school operations. Accordingly, as found by the Second Circuit, "Avery's conduct risked not only disruption of efforts to settle the Jamfest dispute, but also frustration of the proper operation of LMHS's student government and undermining of the values that student government, as an extracurricular activity, is designed to promote." Doninger, 527 F.3d at 52.

Moreover, in delineating the duties of class officers, Principal Niehoff noted that the duties included working towards the objectives of the student council, working cooperatively with advisers and administration, to promote good citizenship in school, and to at all times behave as a good role model and citizen in the community. (See Karissa Niehoff Prelim. Inj. Hr'g Test., **Ex. J**, at 512.) Accordingly, Principal Niehoff testified that her decision to disqualify Avery from running for Senior Class Secretary was premised upon the fact that such extracurricular officer positions are privileges in which the students must demonstrate the foregoing qualities, and which Avery failed to do in posting the blog. (Id. at 509-10.) More specifically, Principal Niehoff testified that she believes Avery's blog posting demonstrated a lack of citizenship, respect for herself and others, and was contrary to her role as a class officer and cooperative conflict resolution. (Id. at 559-64.)

In light of the foregoing, the Second Circuit agreed that this matter was much like the situation presented in Lowery v. Euverard, 497 F.3d 584 (6th Cir. 2007). See Doninger, 527 F.3d at 52. In Lowery, a group of football players signed and circulated a petition in which they

expressed their hatred for the coach, as well as their preference to not play for him. See Lowery, 497 F.3d at 585. Their intention was to have their coach fired. Id. at 586. The plaintiffs were ultimately dismissed from the team when they failed to apologize and indicate that they wanted to play for the coach. Id. The plaintiffs filed suit claiming that their petition was protected by the First Amendment. The Court determined that it was reasonable for the defendants to forecast that this petition would undermine the coach's authority, and affect the unity. Id. at 596. The Court, therefore, held that, pursuant to Tinker, the plaintiffs' petition was not protected under the First Amendment. Id. In so holding, the Court noted as follows:

> Plaintiffs' regular education has not been impeded, and, significantly, they are free to continue their campaign to have Euverard fired. What they are not free to do is continue to play football for him while actively working to undermine his authority.

Id. at 600. The Court further noted that, to confuse one's right to express their opinions with the right to participate in a voluntary program under their own terms would lead to an unworkable legal regime. Id.

As in Lowery, Avery's blog posting was directly contrary to the school's policy requiring good citizenship of class officers without which a student may not represent the student body. Moreover, Avery's blog posting was directly contrary to the school's policy of cooperative conflict resolution. By her own concession, Avery consciously utilized language in her blog posting which referred to school administrators in an offensive manner, falsely stated that Jamfest had been cancelled, and which requested that students contact Superintendent Schwartz in order "to piss her off more," despite the fact that such action by her could place Jamfest in jeopardy of happening at all. (See Avery Doninger Prelim, Inj. Hr'g Test., **Ex. A**, at 391-92.) While Avery has a right to criticize the school administration, she does not have the right to run for class office while engaging in untruthful, offensive and disruptive expression which is

designed to undermine to the express policy of the school regarding the civic and social expectations for students, as well as the maintenance of good citizenship by class officers.

As this Court correctly found, "Avery is free to express her opinions about the school administration and their decisions in any manner she wishes . . . . However, Avery does not have a First Amendment right to run for a voluntary extracurricular position as a student leader while engaging in uncivil and offensive communications regarding school administration." (See Prelim. Inj. Mem. Dec. [Doc. 37], at 25-26.) The defendants' disciplinary action in precluding Avery from running for the extracurricular student officer position of Class Secretary is, therefore, not violative of the First Amendment. Accordingly, the defendants are entitled to judgment as a matter of law.

IV. THE PLAINTIFF'S CLAIM OF VIOLATION OF AVERY'S FIRST AMENDMENT RIGHTS WITH REGARD TO THE "TEAM AVERY" T-SHIRTS FAILS AS A MATTER OF LAW

In her Amended Complaint, the plaintiff alleges that Avery reasonably believed that she would be barred from the auditorium and her right to participate in the election, and was otherwise chilled in her constitutional rights as a result of Principal Niehoff's actions in prohibiting other students from entering the auditorium wearing Team Avery t-shirts. (See Amended Complaint, ¶ 31.) In addition, the plaintiff contends that the Team Avery t-shirts were not likely to cause a disruption of the educational process, did not violate the rights of others, and did not violate the school's dress code policy. (Id. at ¶ 32.) The plaintiff's claims for violation of Avery's First Amendment rights relative to the Team Avery t-shirts fails as a matter of law as the Board has implemented an appropriate dress code policy, the plaintiff lacks standing to challenge the prohibition of the other students from wearing the Team Avery t-shirt into the assembly, and Avery was not chilled in wearing the Team Avery t-shirt at the time of the assembly or thereafter.

A. ANY CLAIM FOR INJUNCTIVE RELIEF AS TO THE "TEAM AVERY" T-SHIRTS IS MOOT AS THE ADMINISTRATION HAS IMPLEMENTED AN APPROPRIATE DRESS CODE POLICY

It is undisputed that, at the time of the election assembly on May 25, 2007, the Board did not have a policy in place with regard to the regulation of student dress and/or campaign materials within the election assembly. However, the Board did have in place Policy # 5132 which governed student dress and grooming generally. (See Beitman Aff., **Ex. V**, ¶ 5; Bd. of Ed. Policy # 5132, **Ex. W**.) Pursuant to said policy, restrictions on a student's freedom of dress could be applied where the mode of dress: "1. is unsafe either for the student or those around the student; 2. is disruptive to school operations and the education process in general; [or] 3. is contrary to law." (Id.)

Subsequent to the election assembly at issue, the Board clarified its policy regarding the parameters of student dress in the context of student elections by way of a Memo to Parents and Students, dated September 5, 2007. (See Beitman Aff., **Ex. V**, ¶ 6; Sept. 5, 2007 Memo, **Ex. X**.) In accordance with the September 5, 2007 Memo, candidates and their supporters are permitted to wear T-shirts or buttons advocating for their candidates in and on school grounds, including during school assembly. (See Beitman Aff., **Ex. V**, ¶ 7; Sept. 5, 2007 Memo, **Ex. X**.) In addition, pursuant to the September 5, 2007 Memo, T-shirts which are offensive or likely to lead to disruption are not permissible. (See Beitman Aff., **Ex. V**, ¶ 8; Sept. 5, 2007 Memo, **Ex. X**.) The September 5, 2007 Memo clarifying the Board's dress code regarding T-shirts and buttons in the context of student elections was in effect and applicable for the 2007-2008 academic year, and remains in effect. (See Beitman Aff., **Ex. V**, ¶¶ 9-10.)

Accordingly, the plaintiff's claim for injunctive relief relative to the regulation and/or prohibition of t-shirts in the context of student election proceedings is now moot.

B. AVERY WAS NOT CHILLED IN WEARING THE TEAM AVERY T-SHIRT AT THE TIME OF THE ELECTION ASSEMBLY OR THEREAFTER

A §1983 claim alleging a chill of one's First Amendment rights requires more than allegations of a subjective chill. See Larkin v. West Hartford, 891 F. Supp. 719, 727 (D. Conn. 1995), citing Laird v. Tatum, 408 U.S. 1, 11, 92 S.Ct. 2318, 2324, 33 L.Ed.2d 154 (1972). Thus, a plaintiff must "demonstrate a . . . specific present objective harm or a threat of specific future harm . . . Absent such harm, no justiciable case or controversy exists . . . A plaintiff who does not show he or she has been or will be deterred from speaking alleges a harm too remote to satisfy the injury in fact requirement of standing." Larkin, 891 F. Supp. at 727; Meese v. Keene, 481 U.S. 465, 472, 107 S.Ct. 1862, 1866, 95 L.Ed.2d 415 (1987).

Thus, in order to state a legally cognizable cause of action pursuant to 42 U.S.C. §1983 for deprivation of one's First Amendment rights, a plaintiff must make specific allegations of fact which indicate a deprivation of his or her constitutional rights. See Larkin, 891 F. Supp. at 727; Spear v. West Hartford, 771 F. Supp. 521, 527 (D. Conn. 1991), aff'd, 954 F.2d 63 (2d Cir. 1992). Allegations which are merely broad, simple and conclusory statements are insufficient to state a cause of action pursuant to §1983 for First Amendment rights violations. See Spear, 771 F. Supp. at 527.

In the instant matter, by her own concessions, Avery was not chilled in wearing the t-shirt she intended to wear into the auditorium at the time of the election assembly. At the time of the assembly Avery was wearing a t-shirt she made which read "RIP Democracy." (See Avery Doninger Aff., **Ex. B**, at ¶ 18.) As Avery approached the auditorium to attend the election assembly, Principal Niehoff inquired about her shirt, looked at the front and back of Avery's "R.I.P. Democracy" t-shirt, and permitted her to wear the same into the assembly. (See Avery Doninger Prelim. Inj. Hr'g Test., **Ex. A**, at 295; Avery Doninger Aff., **Ex. B**, ¶ 21.) While

Avery did have a Team Avery t-shirt in her hand as she approached the auditorium, her own sworn testimony reveals that she did not intend to wear it into the assembly but, rather, she "was going to put it on after." (See Avery Doninger Prelim. Inj. Hr'g Test., **Ex. A**, at 293.)

Moreover, students were permitted to wear the Team Avery t-shirts both before and after the election assembly, and did so. (See P.M. Prelim. Inj. Hr'g Test., **Ex. U**, at 210, 216-17; J.E. Prelim. Inj. Hr'g Test., **Ex. E**, at 120.) Students were similarly permitted to wear Team Avery t-shirts without prohibition over the course of the academic year subsequent to the subject election assembly. In this regard, Avery acknowledged that she has not been prohibited from wearing a new version of the "Team Avery" t-shirt during her senior year at LMHS, and did wear it on a few occasions. (See Avery Doninger Dep., **Ex. Y**, at 52-53.) Similarly, other students have also worn the original "Team Avery" t-shirts without any prohibition by the administration. (Id. at 53-54.)

Avery, therefore, is unable to establish that she was chilled in her right to wear the Team Avery t-shirt at the assembly or thereafter. The plaintiff, thus, "alleges a harm too remote to satisfy the injury in fact requirement of standing" necessary to prevail on her First Amendment claim in this regard. See Larkin, 891 F. Supp. at 727. The defendants are, therefore, entitled to judgment as a matter of law with regard to the plaintiff's claim of a violation of Avery's First Amendment rights relative to the Team Avery t-shirts as alleged in Count One of the Amended Complaint.

C. THE PLAINTIFF LACKS STANDING TO CHALLENGE THE PROHIBITION OF OTHER STUDENTS FROM WEARING THE "TEAM AVERY" T-SHIRTS INTO THE ELECTION ASSEMBLY

In accordance with Article III of the U.S. Constitution, federal courts are required, "as a threshold matter, to determine whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to

justify exercise of the court's remedial powers on his behalf." Bordell v. Gen. Elec. Co., 922 F.2d 1057, 1060 (2d Cir. 1991) (internal quotations omitted). In order to establish standing on a claim for injunctive relief, a plaintiff's past exposure to illegal conduct is insufficient in the absence of continuing and present adverse effects. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 564, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

In the context of establishing standing on a challenge under the First Amendment, "a plaintiff need not demonstrate to a certainty that he will be prosecuted under the statute to show injury, but only that he has an actual and well-founded fear that the law will be enforced against him." Kempner v. Greenwich, ___ F.Supp.2d ___, 2008 WL 2167165 (D.Conn. 2008), citing Vermont Right to Life Comm. v. Sorrell, 221 F.3d 376, 382 (2d Cir. 2000). Moreover,

> in a narrow class of First Amendment cases, the Supreme Court has relaxed [the limitation on third-party standing] and allowed litigants to seek redress for violations of the rights of others . . . .This slender exception to the prudential limits on standing, however, does not affect the rigid constitutional requirement that plaintiffs must demonstrate an injury in fact to invoke a federal court's jurisdiction.

Bordell, 922 F.2d at 1061.

As demonstrated above, the plaintiff is unable to demonstrate that Avery sustained an injury in fact relative to the Team Avery t-shirt. Likewise, Avery is unable to establish that she or the other students face the prospect of imminent injury as a result of the restriction of the Team Avery t-shirts at the May 25, 2007 election assembly. On the contrary, as demonstrated above, the Board has clarified its policy to permit students to wear such supportive t-shirts on school grounds and during election assemblies so long as they are not offensive or likely to lead to disruption. In fact, students, including Avery, have worn Team Avery t-shirts on the school campus without restriction prior to the election assembly and thereafter. Accordingly, the plaintiff's claims for injunctive relief relative to the Team Avery t-shirts fail as a matter of law.

V. THE PLAINTIFF'S CLAIM OF VIOLATION OF AVERY'S EQUAL PROTECTION RIGHTS FAILS AS A MATTER OF LAW AS SHE IS UNABLE TO ESTABLISH ANY PRIMA FACIE IDENTICAL PERSONS WHOM WERE SIMILARLY SITUATED AND TREATED DIFFERENTLY BY THE DEFENDANTS

The Equal Protection Clause of the Fourteenth Amendment is "essentially a direction that all persons similarly situated be treated alike." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249 (1985). Typically, the Equal Protection Clause is invoked to bring claims alleging discrimination based upon membership of a protected class, such as race, sex or religious affiliation. See Neilson v. D'Angelis, 409 F.3d 100, 104 (2d Cir. 2005). However, where a plaintiff does not allege membership in a protected class, they may still prevail on a "class of one" equal protection claim. Id., citing Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). Specifically, a "class of one" equal protection claim may be brought "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." Olech, 528 U.S. at 564.

In order for a plaintiff to succeed in a "class of one" claim, "the level of similarity between the plaintiffs and the persons with whom they compare themselves must be extremely high." Neilson, 409 F.3d at 104. The plaintiff in a "class of one" claim must establish that "they were treated differently from someone who is ***prima facie identical*** in all relevant respects." Id. (emphasis added), quoting Purze v. Village of Winthrop Harbor, 286 F. 3d 452, 455 (7th Cir. 2002).

Accordingly, in order to prevail on a "class of one" equal protection claim, the test is whether the plaintiff has proven that:

> (i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in

> circumstances and difference in treatment are sufficient to exclude the possibility that the defendant acted on the basis of mistake.

Neilson, 409 F.3d at 105.

In the instant matter, the plaintiff alleges that the defendants treated Avery differently from other similarly situated students in two respects. First, the plaintiff contends that Principal Niehoff caused a discipline log entry to appear in Avery's guidance file regarding inappropriate use of school computers to send unauthorized e-mails while no such discipline log entry appeared in the files of the other three students involved in the e-mail. Secondly, the plaintiff further contends that the defendants took disciplinary action against Avery for her LiveJournal.com blog entry, while no such disciplinary action was taken against another student who posted an offensive comment to her blog. As demonstrated below, the plaintiff is unable to establish that these individuals were treated differently or were otherwise prima facie identical to Avery.

A. THE PLAINTIFF IS UNABLE TO ESTABLISH ANY PRIMA FACIE IDENTICAL INDIVIDUALS WHOM WERE TREATED DIFFERENTLY WITH REGARD TO THE DISCIPLINE LOG ENTRY

The plaintiff contends that Principal Niehoff caused a discipline log entry to appear in Avery's guidance file regarding inappropriate use of school computers to send unauthorized e-mails while no such discipline log entry appeared in the files of the other three students involved in the Jamfest e-mail. This contention is without merit, and the undisputed evidence demonstrates that the students were treated equally. Specifically, Principal Niehoff confirmed that she directed Assistant Principal Peter Bogen to place the discipline log entries in the logs of all four students. (See Karissa Niehoff Prelim. Inj. Hr'g Test., **Ex. J**, at 528, 546-48.) Mr. Bogen stated that he believed he did place the discipline log entry in the logs of the four students, although he had no present recollection of doing so. (See Peter Bogen Dep., **Ex. L**, at 28, 33-

34.)

Moreover, one of the students involved in the Jamfest e-mail, J.E., testified that she became aware that a discipline log entry appeared in her record relative to the e-mail sent by the students from the computer lab. (See J.E. Prelim, Inj. Hr'g Test., **Ex. E**, at 121.) Joan Evans, J.E.'s mother, confirmed that she reviewed J.E.'s records to verify the existence of the discipline log. More particularly, Mrs. Evans stated that she was able to observe the entry while in the LMHS main office. (See Joan Evans Prelim. Inj. Hr'g Test., **Ex. CC**, at 173.) Mrs. Evans further stated that she then proceeded to the guidance office and reviewed J.E.'s guidance file, however, no discipline log entry was present. (See id. at 175.)

Notwithstanding, and contrary to the plaintiff's belief, the evidence unequivocally demonstrates that that the discipline log entry is not a permanent record, nor is it contained in the students' guidance file. In this regard, the Guidance Secretary, Sandra Bilodeau, confirmed that the discipline log is not part of Avery's permanent guidance record, and that it was placed into the file for purposes of review of the same by Avery's mother. (See Sandra Bilodeau Prelim. Inj. Hr'g Test., **Ex. O**, at 226, 228-29.) Ms. Bilodeau further confirmed that the log no longer exists in Avery's guidance file as she personally removed it in August of 2007. (See id.)

Likewise, Principal Niehoff confirmed that the log was placed into Avery's file so that Mrs. Doninger would have access to it pursuant to her request to review Avery's files. (See Karissa Niehoff Prelim. Inj. Hr'g Test., **Ex. J**, at 521-22.) Principal Niehoff further confirmed that the log is not part of a student's permanent record and was not intended to be a permanent record. (See id. at 522.) Finally, Mr. Bogen confirmed that the discipline log was to be placed with Avery's guidance file, not in it, for convenience of Mrs. Doninger's review of her daughter's records. (See Peter Bogen Dep., **Ex. L**, at 53, 74.)

Thus, the foregoing demonstrates that the discipline log was not a permanent record within Avery's files but, rather, was placed there for the convenience of Mrs. Doninger's review of her daughter's records. The undisputed evidence demonstrates that the log was removed from Avery's guidance file in August of 2007. Accordingly, Avery was not treated differently from P.A, J.E. or T.F. as each student had a discipline log entry regarding the Jamfest e-mail placed into their activity logs.

In order to prevail on her "class of one" equal protection claim, the plaintiff must establish that Avery was "treated differently from someone who was ***prima facie identical*** to her in all relevant respects." Neilson, 409 F.3d at 104. However, the foregoing undisputed evidence demonstrates that the discipline log entry was placed in the activity logs of all four students involved in sending the Jamfest e-mail. The discipline log entries were not intended to be a part of the students' guidance file, and the courtesy copy placed in Avery's guidance file for her mother's review was removed therefrom in August 2007. Thus, the plaintiff is unable to establish that Avery was intentionally treated differently from the other three students involved. The defendants are, therefore, entitled to judgment as a matter of law with regard to the plaintiff's claim of violation of her right to equal protection with regard to the discipline log entry.

B. THE PLAINTIFF IS UNABLE TO ESTABLISH ANY PRIMA FACIE IDENTICAL INDIVIDUALS WHOM WERE TREATED DIFFERENTLY WITH REGARD TO THE DISCIPLINE AGAINST AVERY RESULTING FROM HER BLOG ENTRY

The plaintiff further contends that Avery's equal protection rights were violated by the defendant as she was disciplined for her LiveJournal.com blog entry while another student, Jaclyn Rubino, was not disciplined for an offensive comment she posted in response to Avery's

blog. (See Avery Doninger Aff., **Ex. B**, at ¶ 26.) The plaintiff, however, is wholly unable to establish that Jaclyn Rubino is prima facie identical to Avery.

Jaclyn Rubino posted a comment in response to Avery's LiveJournal.com blog in which she referred to Superintendent Schwartz as a "dirty whore." (See J. Rubino Dep., **Ex. Z**, at 9-10.) However, Jaclyn Rubino was not a member of the LMHS Student Council, nor was she an LMHS Class Officer at the time she posted the comment to Avery's blog. (Id. at 25.) Moreover, Jaclyn Rubino was not running for any LMHS Class Officer positions at the time she posted the comment to Avery's blog. (Id. at 27.)

As indicated above, in order to prevail in her "class of one" equal protection claim, the plaintiff must establish that Avery was "treated differently from someone who is ***prima facie identical*** in all relevant respects." Neilson, 409 F.3d at 104 (emphasis added). Jaclyn Rubino can hardly be said to meet the prima facie identical standard given Avery's status as a member of the Student Council and a Class Officer at the time she posed her blog entry. As indicated above, the undisputed evidence establishes that Jaclyn Rubino was not a member of the Student Council, nor did she hold any other student government position. Moreover, Jaclyn Rubino was not running for a student government position in the upcoming election. The plaintiff's inability to establish that Jaclyn Rubino was prima facie identical to Avery is fatal to her claim.

Accordingly, the defendants are entitled to judgment as a matter of law as to the plaintiff's Equal Protection claim as set forth in Count One of the Amended Complaint.

VI. THE PLAINTIFFS' CLAIMS AGAINST THE DEFENDANTS ARE BARRED BY THE DOCTRINE OF QUALIFIED IMMUNITY

Notwithstanding the fact that the plaintiff has failed to demonstrate a violation of Avery's First Amendment and Equal Protection rights as set forth above, the plaintiff's claims would, nevertheless, be barred by the doctrine of qualified immunity.

Qualified immunity shields public officials from suits for damages under 42 U.S.C. §1983, unless their actions violate clearly established rights of which an objectively reasonable official would have known. See Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); Thomas v. Roach, 165 F.3d 137, 142 (2d Cir. 1999); Ricciuti v. N.Y.C. Transit Authority, 124 F.3d 123, 127 (2d Cir. 1997). "Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation. [It] is an immunity from suit rather than a mere defense to liability . . . " Saucier v. Katz, 533 U.S. 194, 200-201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) (citations omitted; internal quotation marks omitted). The qualified immunity doctrine is "justified in part by the risk that the fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." Thomas, 165 F.3d at 142 (internal quotation marks omitted), citing, Anderson v. Creighton, 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Accordingly, where a defendant seeks qualified immunity, a ruling on the issue should be made early in the process so as to avoid the costs and expenses of trial where the defense is dispositive. See Saucier, 533 U.S. at 200. The immunity would be "effectively lost if a case is erroneously permitted to go to trial." Id. at 201.

Pursuant to Saucier, in evaluating a qualified immunity defense on summary judgment, the Court must first determine whether the facts alleged, construed in a light most favorably to the plaintiff, show that the government official's conduct violated a constitutional right. See Saucier, 533 U.S. at 201. If the Court determines that no constitutional right would have been violated were the allegations established, qualified immunity applies. Id. If, however, a violation could be made out, then the Court must determine whether the right was clearly established. Id.

However, the Second Circuit has held that in certain circumstances, the Court "may move directly to the second step of the Saucier test and refrain from determining whether a constitutional right has been violated." Erlich v. Town of Glastonbury, 348 F.3d 48, 57 (2d Cir. 2003), citing Koch v. Town of Brattleboro, 287 F.3d 162 (2d Cir. 2003); see also Vives v. City of New York, 405 F.3d 115, 118 (2d Cir. 2004) Horne v. Coughlin, 178 F.3d 603, 606-07 (2d Cir. 1999). More particularly, the Second Circuit has held that:

> Although we normally apply [the Saucier] two-step test, where we are convinced that the purported constitutional right violated I not "clearly established," we retain the discretion to refrain from determining whether, under the first step of the test, a constitutional right was violated at all . . . . In such an instance, we may rely exclusively on qualified immunity to decide a case . . . . This procedure avoids the undesirable practice of unnecessarily adjudicating constitutional matters.

Koch, 287 F.3d at 166 (internal citations omitted); see also African Trade & Info. Ctr., 294 F.3d 355, 359 (2d Cir. 2002).

As demonstrated below, Avery's claimed right to not be disqualified from running for Senior Class Secretary as discipline for her blog posting was not clearly established in May 2007. Similarly, it was not clearly established that the defendants' regulation of the Team Avery t-shirts during the election assembly was constitutionally impermissible. This Court may, therefore, rely exclusively on qualified immunity to decide this matter. See Koch, 287 F.3d at 166.

A. PLAINTIFF'S CLAIMED RIGHTS ARE NOT CLEARLY ESTABLISHED

For purposes of the qualified immunity analysis, a right is "clearly established" when "[t]he contours of the right [are] . . . sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . [T]he unlawfulness must be apparent." Anderson v. Creighton, 483 U.S. at 640; see also, Malley v. Briggs, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly break the law.");

Mitchell v. Forsyth, 472 U.S. 511, 528 (1985) (officials are immune unless "the law clearly proscribed the actions they took."). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 202, citing Wilson v. Layne, 526 U.S. 603, 615, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999).

In determining whether a particular right was clearly established for purposes of assessing the applicability of qualified immunity, the Second Circuit has considered three factors:

> (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 or official would have understood that his or her acts were unlawful.

Jermosen v. Smith, 945 F.2d 547, 550 (2d Cir. 1991); see also Shecter v. Comptroller of New York, 79 F.3d 265, 271 (2d Cir. 1996).

1. Avery's Claimed Right To Not Be Disqualified From Running For Senior Class Secretary As Discipline For Her Blog

The U.S. Supreme Court has addressed the parameters of protected student speech in four decisions, namely, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); and Morse v. Frederick, 127 S.Ct. 2618 (2007). None of the four decisions issued by the Supreme Court address the scope of a school administration's regulation of student speech or expression which occurs off school grounds, but ultimately reaches the school campus or the attention of the school administration. More particularly, none of the four decisions speak as to whether a student has a constitutionally protected First Amendment right to not being disqualified from running for an extra-curricular class officer position as a result of vulgar

speech occurring off school grounds, but ultimately coming to the attention of the administration. In fact, the Second Circuit itself acknowledged, in its ruling affirming the denial of a preliminary injunction in this matter, that the Supreme Court has yet to speak on the scope of a school's authority to regulate student expression such as Avery's. See Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008). Thus, there exists no clear decisional law by the U.S. Supreme Court that Avery's claimed constitutional right to not be disqualified from running for Class Secretary as disciplinary action for her blog posting exists.

Moreover, this Court, in its Memorandum of Decision denying the plaintiff's Motion for Preliminary Injunction, found that the Constitution does not forbid the actions of the defendants in disqualifying Avery from running for Senior Class Secretary. See Prelim. Inj. Mem. Dec. [Doc. 37] at 3. In evaluating which line of Supreme Court decisional law provided the proper framework for evaluating the plaintiff's claim, this Court noted that, "whether Tinker or Fraser provides the appropriate framework for considering the school's actions in this case is far less clear. For neither Tinker nor Fraser involved participation in voluntary, extracurricular activities . . . ." Id. at 21-22. In the end, this Court determined that this matter was, "closer to Fraser than to Tinker, though the Court admits that this calculus is less than entirely clear and that this case is neither just like Fraser nor Tinker" as the speech involved was created off school grounds, but was purposely designed to reach the school campus by Avery. Id. at 26.

As demonstrated above, Avery's claimed right under the First Amendment to run for the voluntary extracurricular position of Class Secretary while engaging in offensive speech regarding school administrators was not clearly established in May of 2007. There simply is no decisional law of the Supreme Court supporting the existence of Avery's claimed right. Similarly, there existed no applicable Second Circuit decisions supporting the existence such a

right at the time of the defendants' actions complained of. Thus, it cannot be said that, under preexisting law, a reasonable defendant or official would have understood that the actions of the defendants were unlawful.

Accordingly, the plaintiff's claimed rights were not clearly established, and no constitutional violation could have occurred. The plaintiff's claims are, therefore, barred by the doctrine of qualified immunity.

2. Restriction Of The Team Avery T-Shirts From The Election Assembly

Similarly, there existed no decisional law of the Supreme Court, nor any applicable Second Circuit decisions, which spoke to the constitutionality of a school administration's prohibition of electioneering materials during attendance at a school election assembly. Rather, Supreme Court precedent on the scope of permissible regulation of campaign materials on election day has upheld the constitutionality of "campaign-free zones."

In Burson v. Freeman, 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992), the Supreme Court addressed the constitutional viability of a Tennessee statute which prohibited the solicitation of votes and display of campaign materials within 100 feet of the entrance to polling places in the context of public elections. In concluding that such a restriction was not violative of the First Amendment, the Court noted that

> the government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication.

Burson, 504 U.S. at 197. In this regard, the Court went on to hold that a State has a compelling interest in protecting its voters from confusion and undue influence, as well as in preserving the integrity of the election process. Id. at 199. The Court went on to hold that "some restricted zone around the voting area is necessary to secure the State's [foregoing] compelling interest."

Id. at 208 (emphasis omitted). Accordingly, the Court concluded that Tennessee's 100 foot boundary prohibition on campaign materials and voter solicitation was a reasonable time, place and manner restriction under the First Amendment. Id. at 210-11.

In addition, the Connecticut Legislature adopted a very similar public election statute which restricts voter solicitation and campaign materials within 75 feet of the entry to a polling place. See Conn. Gen. Stat. § 9-236. In accordance with the ruling in Burson, the Connecticut statutory provision passes constitutional muster.

In the instant matter, Principal Niehoff testified that the Team Avery t-shirts were prohibited solely from the election assembly as they were campaign supportive materials. (See Karissa Niehoff Prelim. Inj. Hr'g Test., **Ex. J**, at 517-19.) She further testified that such supportive materials were precluded due to concern in maintaining equity at the student elections assembly with regard to those students who did not have the resources for campaign supportive materials. (Id. at 517-18.) As demonstrated above, Supreme Court decisional law, and Connecticut statutory provisions, allow for the restriction of campaign materials in the context of public elections. However, no decisional law exists with regard to similar content neutral, narrowly tailored restrictions in the context of student assemblies such as that implemented by Principal Niehoff in this matter. Accordingly, it was not clearly established that Principal Niehoff could not restrict electioneering materials from the student election assembly on May 25, 2007. The plaintiff's claim is, therefore, barred by the doctrine of qualified immunity.

3. Avery's Alleged Equal Protection Rights Were Not Clearly Established

Finally, should the Court conclude that Avery has satisfied her burden in demonstrating prima facie identical individuals whom were treated differently, the defendants would nevertheless, be afforded qualified immunity. In this regard, the prevailing decisional law of the

Second Circuit at the time of the incidents alleged, required that a class of one comparator must be prima facie identical to the plaintiff in all relevant respects. See Nielson 409 F.3d at 104. Accordingly it would not have been clearly established to the defendants that the differences of Avery's claimed comparators met the prima facie identical standard so as to amount to an equal protection violation. The defendants are, therefore, entitled to qualified immunity as to the plaintiff's claims under the Fourteenth Amendment.

B. EVEN IF THE COURT WERE TO CONCLUDE THAT AVERY'S RIGHTS WERE CLEARLY ESTABLISHED, THE ACTIONS OF THE DEFENDANTS WERE OBJECTIVELY REASONABLE

Even where a right is deemed to have been clearly established, qualified immunity would, nonetheless, protect the governmental actor if it was 'objectively reasonable' for him to believe that his actions were lawful at the time of the challenged conduct. See Lennon v. Miller, 66 F.3d 416, 420 (2d Cir. 1995), citing Anderson, 483 U.S. at 641. Accordingly, a defendant is entitled to summary judgment pursuant to a defense of qualified immunity when:

> no reasonable jury, looking at the evidence in the light most favorable to, and drawing all inferences most favorable to, the plaintiffs, could conclude that it was objectively unreasonable for the defendant to believe that he was acting in a fashion that did not clearly violate an established federally protected right.

Lennon, 66 F.3d at 420. A governmental actor's conduct is objectively unreasonable where "no [official] of reasonable competence could have made the same choice in similar circumstances." Id. at 420-21. Summary judgment is, therefore, 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]." Id. at 421.

1. The Defendants' Action In Prohibiting Avery From Running For Senior Class Secretary As A Consequence For Her Blog Posting Was Objectively Reasonable

In the instant matter, it was certainly objectively reasonable for the defendants to believe that their conduct in disciplining Avery as a consequence for her blog posting did not violate her constitutional rights. As demonstrated above, there existed no Supreme Court precedent which addressed the scope of a school administrations regulation of off-campus student speech. Similarly, there existed no Second Circuit precedent regarding the same at the time the defendants disciplined Avery. In fact, a few months following Avery's discipline, the Second Circuit issued its ruling in Wisniewski which addressed, for the first time, the regulation of off-campus student speech. Accordingly, there existed no decisional precedent which would have put the defendants on notice that their conduct in disciplining Avery for her offensive and disruptive blog posting would amount to a violation of her constitutional rights at the time they disciplined her. It was, therefore, objectively reasonable for the defendants to believe that their actions were lawful at the time they disqualified Avery from running for the voluntary extracurricular position of Senior Class Secretary.

Notwithstanding, as this Court itself recognized, "the Supreme Court and other courts have been willing to accord great discretion to school officials in deciding whether students are eligible to participate in extracurricular activities." (See Prelim, Inj. Mem. Dec. [Doc. 37] at 22.) This Court further acknowledged that the "overwhelming majority of both federal and state courts have held that participation in extracurricular activities . . . is a privilege, not a right." (Id.)

As amply demonstrated above, Avery's blog posting was directly contrary to the school's policy requiring good citizenship of class officers without which a student may not represent the student body. Moreover, Avery's blog posting was directly contrary to the school's policy of

cooperative conflict resolution. Accordingly, it was objectively reasonable for the defendants to conclude that Avery no longer qualified to run for class office in light of her offensive and disruptive blog posting which was designed to undermine the express policy of the school regarding the civic and social expectations for students, as well as the maintenance of good citizenship by class officers. The defendants are, therefore, afforded qualified immunity with regard to their disqualification of Avery from running for Senior Class Secretary.

2. The Defendants' Restriction Of The Team Avery T-Shirts From The Election Assembly Was Objectively Reasonable

As indicated previously, the Supreme Court in Burson, and Connecticut statutory provisions, allow for the restriction of campaign materials in the context of public elections. In light of the absence of any similar decisional law with regard to similar restrictions in the context of student assemblies, it was objectively reasonable for Principal Niehoff to believe that her prohibition of the Team Avery t-shirts constituted reasonable time, place and manner restrictions as permitted under Burson and Conn. Gen. Stat. § 9-236.

More particularly, Principal Niehoff testified that the Team Avery t-shirts were prohibited solely from the election assembly as they were campaign supportive materials. (See Karissa Niehoff Prelim. Inj. Hr'g Test., **Ex. J**, at 517-19.) She further testified that such supportive materials were precluded due to concern in maintaining equity at the student elections assembly with regard to those students who did not have the resources for campaign supportive materials. (Id. at 517-18.) However, Principal Niehoff did not prohibit the Team Avery t-shirts prior to or after the assembly. (Id. at 519; see also P.M. Prelim. Inj. Hr'g Test., **Ex. U**, at 210, 216-17; J.E. Prelim. Inj. Hr'g Test., **Ex. E**, at 120.)

Accordingly, consistent with Burson and Conn. Gen. Stat. § 9-236, it was objectively reasonable for Principal Niehoff to believe that her conduct in prohibiting the Team Avery t-

shirts solely from the election assembly proceedings was constitutionally permissible, and that permitting students to wear the t-shirt prior to and after the assembly left open ample alternatives for communication. The defendants are, therefore, afforded qualified immunity with regard to restriction of the Team Avery t-shirts.

VII. THE PLAINTIFF'S CLAIMS UNDER THE CONNECTICUT CONSTITUTION FAIL AS A MATTER OF LAW

In Count Two of the Amended Complaint, the plaintiff alleges that the conduct of the defendants violated her constitutional rights secured by the Connecticut Constitution. Specifically, the plaintiff alleges a deprivation of rights secured by §§ 4[1], 5[2], and14[3] of Article First of the Connecticut Constitution.

A. THE CONNECTICUT CONSTITUTION DOES NOT PROVIDE GREATER FREE SPEECH PROTECTION THAN THE UNITED STATES CONSTITUTION REGARDING STUDENT SPEECH

Although the plaintiff has repeatedly argued that, pursuant to State v. Linares, 232 Conn. 345 (1995), the Connecticut Constitution provides greater protection for expressive activity than that provided under the First Amendment to the U.S. Constitution, there exists absolutely no Connecticut precedent establishing the same.

In Linares, gay and lesbian protesters unfurled a banner and chanted at the Connecticut General Assembly until the former Governor William A. O'Neill had to stop speaking due to the disruption. See Linares, 232 Conn. at 353. In evaluating whether the plaintiffs' state constitutional free speech rights were violated, the Court stated as follows:

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[1] Article First, § 4 of the Connecticut Constitution provides as follows: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

[2] Article First, § 5 of the Connecticut Constitution provides as follows: "No law shall ever be passed to curtail or restrain the liberty of speech or of the press."

[3] Article First, § 14 of the Connecticut Constitution provides as follows: "The citizens have a right, in a peaceable manner, to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance."

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

Id. at 379 (citations omitted; emphasis added). Notably, the Linares Court ultimately determined that this speech was not constitutionally protected because the activity intentionally disrupted the proceedings. See id. at 387 n. 17, 390-91.

Nothing within the Court's language in Linares, or that of any other Connecticut Appellate or Supreme Court decision, has enlarged the protections afforded student speech under the First Amendment. The plaintiff conceded as much in the appeal of the denial of her preliminary injunction. See Doninger, 527 F.3d at 53.

Notwithstanding, the facts of Linares are wholly inapposite to the instant matter. Linares involved a speech by the former Governor in a public forum, whereas the speech in the instant matter involved student speech made off-campus, but ultimately reaching the confines of the school campus. The speech at issue in Linares is, therefore, entirely different than the student speech at issue in the instant matter.

Accordingly, the plaintiff's claims for injunctive relief under the Connecticut Constitution fail for the same reasons as do her federal claims.

B. NO PRIVATE CAUSE OF ACTION FOR MONEY DAMAGES EXISTS UNDER THE CONNECTICUT CONSTITUTION

The Connecticut Supreme Court has consistently looked to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and its federal progeny as a guide in determining whether to create a Bivens action for an alleged state constitutional violation. See Kelley Property Development, Inc. v. Lebanon, 226 Conn. 314, 334-38 (1993); ATC Partnership v. Windham, 251 Conn. 597, 613-14 (1999). Thus far, the Court has been

reluctant to create private causes of action for money damages under the Connecticut Constitution. See generally, ATC Partnership v. Town of Windham, 251 Conn. 597 (1999) (declining to recognize a cause of action for alleged violation of substantive due process rights under article first § 8); Kelly Property Development, Inc. v. Lebanon, 226 Conn. 314 (1993) (same). In Kelley Property, the Court referenced the Bivens line of Supreme Court cases and noted that, as a general rule, a plaintiff should not be able to maintain a Bivens action unless he can establish that he would otherwise be without any remedy. See id., at 337-38, 339.

To date, a cause of action for money damages has been created in only one limited circumstance. See Binette v. Sabo, 244 Conn. 23 (1998). In Binette, the Court allowed a claim for violations of Article First, §§ 7 and 9 of the Connecticut Constitution for an unreasonable search and seizure and unlawful arrest by municipal police officers. See id. at 49-50. The Binette Court made clear that such a remedy is not available in every case involving allegations of state constitutional violations. Specifically, the Court stated, "our decision to recognize a . . . remedy in this case does not mean that a constitutional cause of action exists for every violation of our state constitution." Id. at 47. The Court further held that "whether to recognize a cause of action for alleged violations of other state constitutional provisions in the future must be determined on a case-by-case basis." Id. at 48.

The Connecticut Superior Courts addressing the viability of a cause of action pursuant to the Connecticut Constitution subsequent to the Binette ruling have consistently held that no private cause of action for money damages exists. See e.g. Bazzano v. City of Hartford, 1999 WL 1097174, at *1 (Conn. Super. Ct. Nov. 18, 1999), attached as **Ex. DD**; Boudreau v. City of Middletown, 1998 WL 321858 (Conn. Super. Ct. June 9, 1998), attached as **Ex. EE**; Aselton v. East Hartford, 2002 WL 31875443 (Conn. Super. Ct. Dec. 3, 2002), attached as **Ex. FF**, aff'd on

other grounds, 277 Conn. 120 (Conn. 2006); McKirenan v. Amento, 2003 WL 22333200 (Conn. Super. Ct. Oct. 2, 2003), attached as **Ex. GG**; Peters v. Town of Greenwich, 2001 WL 51671 (Conn. Super. Ct. Jan. 2, 2001), attached as **Ex. HH**

Based on the above, the plaintiffs' claims of violations of Article First, §§ 4, 5 and 14 of the Connecticut Constitution fail as a matter of law as no viable cause of action exists under Article First of the Connecticut Constitution. Additionally, the plaintiff cannot demonstrate that she is otherwise without a remedy as she has adequate, alternative remedies at law and has exercised those rights in bringing her federal claims.

Even if the Court were to conclude that a viable claim under the Connecticut Constitution existed, the defendants would be afforded qualified immunity as to the same. See e.g. Rustici v. Malloy, 2004 WL 1664778, *12 n. 26, **Ex. II** (noting that "there is every reason to believe that absolute and qualified immunity apply to state constitutional claims."). As indicated above, no Connecticut Supreme or Appellate Court decision has enlarged a student's free speech rights beyond that afforded under the U.S. Constitution. Consequently, the plaintiff's claimed rights under the Connecticut Constitution would not have been clearly established.

The defendants are, therefore, entitled to judgment as a matter of law with regard to the claimed violations of the Connecticut Constitution as set forth in Count Two of the Amended Complaint.

VIII. THE PLAINTIFF'S CLAIMS OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS FAIL AS A MATTER OF LAW

In Count Three of the Amended Complaint, the plaintiff alleges that the conduct of the defendants intentionally inflicted emotional distress upon her. The plaintiff, however, has failed to offer any specific factual allegations to support a claim that the defendants acted intentionally to inflict emotional distress, and absent any such showing, this claim must also fail.

In order to prevail on a cause of action for intentional infliction of emotional distress, the plaintiff must establish four elements: "(1) that the actor intended to inflict emotional distress; or that he knew or should have known that the emotional distress was a likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's 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, 253 (1986). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Whelan v. Whelan, 41 Conn. Supp. 519, 523 (1991), quoting, 1 Restatement (Second) of Torts §46, p. 73, comment (d).

The conduct must be "especially calculated to cause, and does cause, mental distress of a very serious kind." DeLaurentis v. New Haven, 220 Conn. 225, 266 (1991); W. Prosser and W. Keeton, Torts, §12, p. 64 (5th Ed. 1984). Whether the defendants' actions rise to the level of extreme and outrageous conduct is a question of law for the Court, and only where reasonable minds can differ does it become a matter for the jury. See Mellaly v. Eastman Kodak Company, 42 Conn. Supp. 17, 18 (1991).

To be considered "extreme and outrageous," the conduct in question must be atrocious, utterly intolerable, and go beyond all possible bounds of human decency. See Whelan v. Whelan, 41 Conn. Supp. 523. For example, extreme and outrageous conduct was found to exist in the following cases: Mellaly v. Eastman Kodak Co., 42 Conn. Supp. 20-21 (taunting and harassing plaintiff about his alcoholism despite knowledge that he was a recovering alcoholic); Whelan v. Whelan, 41 Conn. Supp. 519 (false statement to one's spouse that one has AIDS);

Talit v. Peterson, 44 Conn. Supp. 490 (1997) (termination of employment in retaliation for filing grievance).

In the instant matter, the conduct of the defendants clearly does not rise to the level of conduct which any reasonable person could find "extreme and outrageous." In fact, the Second Circuit's finding that the defendants' discipline of Avery did not violate her rights under the First Amendment effectively eliminates a finding that the defendants' actions amounted to extreme and outrageous conduct. Additionally, the plaintiff cannot, and has not, proffered any evidence tending to establish that the defendants acted with an intent to cause her emotional distress. The plaintiff is, therefore, unable to sustain her burden of proof that the defendants' conduct was extreme and outrageous, or that they acted with the intent to cause her emotional distress. Accordingly, the defendants are entitled to judgment as a matter of law as to Count Three of the Amended Complaint.

IX. THE PLAINTIFF'S CLAIM FOR INJUNCTIVE RELIEF NO LONGER STATES A LIVE CASE OR CONTROVERSY AND IS, THEREFORE, MOOT

In accordance with Article III of the U.S. Constitution, federal jurisdiction is limited to live cases and controversies. Accordingly, "litigants are required to demonstrate a personal stake or legally cognizable interest in the outcome of their case." Cook v. Colgate University, 992 F.2d 17, 19 (2d Cir. 1993); see also Fox v. Bd. of Trustees of the State Univ. of N.Y., 42 F.3d 135, 140 (2d Cir. 1994). A matter may, therefore, become moot "when interim relief or events have eradicated the effects of the defendant's act or omission, and there is no reasonable expectation that the alleged violation will recur." Irish Lesbian & Gay Org. v. Giulliani, 143 F.3d 638, 647 (2d Cir. 1998).

The Second Circuit

> has consistently held that students' declaratory and injunctive claims against the universities that they attend are mooted by the graduation of the students, because

> after their graduation and absent a claim for damages, "'it becomes impossible for the courts, through the exercise of their remedial powers, to do anything to redress the injury.'"

Fox, 42 F.3d at 140, citing Cook, 992 F.2d at 19.

In the instant matter, Avery graduated from LMHS in June 2008. Accordingly, Avery's claims for declaratory and injunctive relief are moot.

X. CONCLUSION

For the foregoing reasons, the defendants respectfully request that this Court grant their motion for summary judgment as to the plaintiff's Amended Complaint in its entirety.

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CERTIFICATION

This is to certify that on **July 18, 2008**, a copy of the foregoing **Memorandum of Law in Support of Defendants' Motion for Summary Judgment** 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.

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