UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LAUREN DONINGER, PPA AVERY DONINGER	:	NO.: 3:07CV01129 (MRK)
v.	:	
KARISSA NIEHOFF AND PAULA SCHWARTZ	:	
	:	AUGUST 20, 2008

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The defendants hereby object to the plaintiff's Motion for Summary Judgment on the basis that the plaintiff's First Amendment claim relative to the Team Avery t-shirt fails as a matter of law, and that the defendants' conduct is, nevertheless, protected pursuant to the doctrine of qualified immunity. The defendants incorporate from their Motion for Summary Judgment [Doc. 73] their arguments on this very issue as is more fully set forth below. In accordance with Local Rule 56(a)2, the defendants have filed simultaneously herewith their Local Rule 56(a)2 Statement.

I. 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 24, 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.

Elections for the 2008 student officer positions were held at LMHS on May 25 2007. (See Karissa Niehoff Prelim. Inj. Hr'g Test., Defs.' Ex. J to Mot. Summ. J, at 516.) On that date, administratively endorsed candidates made their speeches at an assembly. (Id.) More specifically, an assembly was held in which all students in grades 9 – 11 attended to hear Student Council speeches and, thereafter, the students broke out into individual grades assemblies to hear class officer speeches. (See Pl.'s Ex. A to Mot. Summ. J.)

Prior to commencement of the assembly, Principal Niehoff was positioned at a doorway to the auditorium as students were entering the same. (See Karissa Niehoff Prelim. Inj. Hr'g Test., Defs.' Ex. J to Mot. Summ. J, at 516-17.) At that time, a few students attempted to enter the auditorium where the speeches were to be given wearing t-shirts stating "Team Avery" on the front, and "Support LSM Freedom of

Speech" on the back. (See Avery Doninger Prelim. Inj. Hr'g Test., Defs.' Ex. A to Mot. Summ. J, at 294; Avery Doninger Aff., Defs.' Ex. B to Mot. Summ. J, at ¶¶ 18-20; M.S. Prelim. Inj. Hr'g Test., Defs.' Ex. T to Mot. Summ. J, at 195.) Principal Niehoff requested that the students take off the Team Avery t-shirts prior to entering the auditorium as they were electioneering materials. (See Avery Doninger Prelim. Inj. Hr'g Test., Defs.' Ex. A to Mot. Summ. J, at 294; Avery Doninger Aff., Defs.' Ex. B to Mot. Summ. J, at ¶¶ 18-20; Karissa Niehoff Prelim. Inj. Hr'g Test., Defs.' Ex. J to Mot. Summ. J, at 517-18.) Karissa Niehoff believed that prohibiting electioneering materials into the election was warranted to maintain equity at the student election assembly with regard to those students who did not have the resources for campaign supportive materials. (See Karissa Niehoff Prelim. Inj. Hr'g Test., Defs.' Ex. J to Mot. Summ. J, at 517-18.) There were no electioneering materials of any kind within the auditorium at the time of the assembly. (See J.E. Prelim. Inj. Hr'g Test., Defs.' Ex. E to Mot. Summ. J, at 119.)

P.M., one of the students wearing the "Team Avery" t-shirt, had been wearing the t-shirt in school prior to the assembly and received no comments from the administration that he was unable to wear the t-shirt during that time. (See P.M. Prelim. Inj. Hr'g Test., Defs.' Ex. U to Mot. Summ. J, at 210, 216-17.) At the time of the assembly, P.M. approached the auditorium wearing the t-shirt at which time Principal Niehoff advised him that he was not allowed to enter the auditorium wearing

the t-shirt as it was disruptive and set a bad example. (See P.M. Prelim, Inj. Hr'g Test., Defs.' Ex. U to Mot. Summ. J, at 213, 217; M.S. Prelim. Inj. Hr'g Test., Defs.' Ex. T to Mot. Summ. J, at 197.)

The students were never told that they could not wear their Team Avery t-shirts in the hallways or in class before or after the assembly; they were only told that they could not wear them for the election assembly. (See P.M. Prelim. Inj. Hr'g Test., Defs.' Ex. U to Mot. Summ. J, at 216-217; Karissa Niehoff Prelim. Inj. Hr'g Test., Defs.' Ex. J to Mot. Summ. J, at 519.) The students were allowed to wear their t-shirts both before and after the assembly, and did so. (See P.M. Prelim. Inj. Hr'g Test., Defs.' Ex. U to Mot. Summ. J, at 210, 216-17; J.E. Prelim. Inj. Hr'g Test., Defs.' Ex. E to Mot. Summ. J, at 120; Karissa Niehoff Prelim, Inj. Hr'g Test., Defs.' Ex. J to Mot. Summ. J, at 519.)

At the time of the assembly, Avery was not wearing a "Team Avery" t-shirt, rather, she was wearing a t-shirt she made which read "RIP Democracy." (See Avery Doninger Aff., Defs.' Ex. B to Mot. Summ. J, at ¶ 18.) Avery had received two Team Avery t-shirts from friends, one of which she gave away and she "kept the other one because [she] was going to put it on after" the assembly. (See Avery Doninger Prelim. Inj. Hr'g Test., Defs.' Ex. A to Mot. Summ. J, at 293.) As Avery approached the auditorium to attend the election assembly, Principal Niehoff inquired about her "R.I.P. Democracy" t-shirt, examined its front and back, and permitted her to wear the same

into the assembly. (See Avery Doninger Prelim. Inj. Hr'g Test., Defs.' Ex. A to Mot. Summ. J, at 295; Avery Doninger Aff., Defs.' Ex. B to Mot. Summ. J, ¶ 21.)

At the time of the May 25, 2007 election assembly, there existed no written policy regarding electioneering materials/dress code at election assemblies. (See Karissa Niehoff Prelim. Inj. Hr'g Test., Defs.' Ex. J to Mot. Summ. J, at 585.) However, Regional School District # 10 Board of Education had in place a general Student Dress and Grooming Policy, Policy # 5132, which was adopted on September 17, 1990. (See Beitman Aff., Defs.' Ex. V to Mot. Summ. J, at ¶ 5; Regional School District # 10 Board of Education Policy # 5132, Defs.' Ex. W to Mot. Summ. J.) Pursuant to Policy # 5132, 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." (See Regional School District # 10 Board of Education Policy # 5132, Defs.' Ex. W to Mot. Summ. J.) Subsequent to the May 25, 2007 election assembly, 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., Defs.' Ex. V to Mot. Summ. J, at ¶ 6; September 5, 2007 Memo, Defs.' Ex. X to Mot. Summ. J.) 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, so long as they were not offensive or likely to lead to disruption. (See Beitman Aff., Defs.' Ex. V to Mot. Summ. J, at ¶¶ 7-8; September 5, 2007 Memo, Defs.' Ex. X to Mot. Summ. J.) 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., Defs.' Ex. V to Mot. Summ. J, at ¶¶ 9-10.)

Over the past school year, students were permitted to, and did wear, new an old versions of the "Team Avery" t-shirts. Specifically, Avery was not 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., Defs.' Ex. Y to Mot. Summ. J, at 52-53.) Other students have also worn the original "Team Avery" t-shirts without prohibition during the 2007-2008 academic year. (See Avery Doninger Dep., Defs.' Ex. Y to Mot. Summ. J, at 53-54.)

II. 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 Motion for Summary Judgment, the plaintiff contends that Principal Niehoff violated Avery Doninger's First Amendment rights when she prohibited Avery and other students from entering a school assembly while wearing or possessing t-shirts in support of Avery and which was purportedly disfavored by Principal Niehoff.

(See Pl.'s Mem. Summ. J. at 4.) The plaintiff further contends that Avery's First Amendment rights as alleged were clearly established. (Id.)

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 for the following reasons: (1) the Board of Education has implemented an appropriate dress code policy permitting the wearing of such t-shirts at elections assemblies; (2) Avery was not chilled in wearing the Team Avery t-shirt at the time of the assembly or thereafter; and (3) the plaintiff lacks standing to challenge the prohibition of the other students from wearing the Team Avery t-shirt into the assembly.

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., Defs.' Ex. V to Mot. Summ. J, at ¶ 5; Bd. of Ed. Policy # 5132, Defs.' Ex. W to Mot. Summ. J.) 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., Defs.' Ex. V to Mot. Summ. J, at ¶ 6; Sept. 5, 2007 Memo, Defs.' Ex. X to Mot. Summ. J.) 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., Defs.' Ex. V to Mot. Summ. J, ¶ at 7; Sept. 5, 2007 Memo, Defs.' Ex. X to Mot. Summ. J.) 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., Defs.' Ex. V to Mot. Summ. J, at ¶ 8; Sept. 5, 2007 Memo, Defs.' Ex. X to Mot. Summ. J.) 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., Defs.' Ex. V to Mot. Summ. J, at ¶¶ 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.

The plaintiff contends that Avery was in possession of a Team Avery t-shirt at the time of the election assembly, and planned to wear it into the auditorium. (See Pl.'s Local Rule 56(a)1 Statement at ¶ 14.) The plaintiff further contends that Avery was present when the other students were ordered to remove the Team Avery t-shirts and was fearful of the consequences that would befall her should she don the shirt she

was carrying. (See Pl.'s Mem. Summ. J. at 4.)

However, Avery's own testimony demonstrates that she 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., Defs.' Ex. B to Mot. Summ. J, 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., Defs.' Ex. A to Mot. Summ. J, at 295; Avery Doninger Aff., Defs.' Ex. B to Mot. Summ. J, at ¶ 21.)

In her summary judgment motion, the plaintiff now contends that Avery intended to wear the Team Avery t-shirt into the election assembly rather than the "RIP Democracy" t-shirt she herself created to wear to the assembly. Avery's own testimony, however, belies this contention. While being questioned by her attorney at the preliminary injunction hearing in this matter, Avery testified that she received two Team Avery t-shirts from friends who had decided to not wear them for the election assembly. (See Avery Doninger Prelim. Inj. Hr'g Test., Defs.' Ex. A to Mot. Summ. J, at 293.) Avery further testified that she "gave one to someone else and [she] kept the other one because she was going to put it on after." (Id.)

By her own concessions, Avery approached the auditorium entrance, where

Principal Niehoff was stationed, wearing the t-shirt she created for herself and which she intended to wear into the assembly. (Id. at 293-95.) There exists no dispute that she was permitted to wear her intended political message into the assembly.

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., Defs.' Ex. U to Mot. Summ. J, at 210, 216-17; J.E. Prelim. Inj. Hr'g Test., Defs.' Ex. E to Mot. Summ. J, 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 fact, 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., Defs.' Ex. Y to Mot. Summ. J, 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 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 thus fails as a matter of law.

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.

III. 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 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, it was not clearly established that the defendants' regulation of the Team Avery t-shirts solely 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).

At the time of the election assembly on May 25, 2007, 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., Defs.' Ex. J to Mot. Summ. 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.

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 afforded the protections of the 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. The defense of qualified immunity is, therefore, applicable "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.

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., Defs.' Ex. J to Mot. Summ. 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., Defs.' Ex. U to Mot. Summ. J, at 210, 216-17; J.E. Prelim. Inj. Hr'g Test., Defs.' Ex. E to Mot. Summ. J, at 120.)

Moreover, as stated in Burson, a compelling interest exists in protecting voters from confusion and undue influence, as well as in preserving the integrity of the election process. See Burson, 504 U.S. at 199. It was, thus, reasonable for Principal Niehoff to believe that prohibition of the t-shirts which purported to advocate for the reinstatement of Avery's candidacy constituted electioneering materials which sought

to confuse and influence the voters, and to otherwise undermine the integrity of the elections.

The plaintiff makes much of Principal Niehoff's e-mail in the early morning of election assembly as unequivocal evidence that Principal Niehoff's stated position that the t-shirts were precluded as electioneering materials was "an excuse for censorship [which] was invented after the unconstitutional misconduct." (See Pl.'s Mem. Summ. J. at 5.) However, the e-mail establishes only that Principal Niehoff was alerted to the fact that students would advocate that other students vote for Avery, support her terminated candidacy, or otherwise write her name in on the ballot, despite the fact that she was not an administratively endorsed candidate qualified to run in the election. (See Pl.'s Ex. A to M. Summ. J.) The e-mail itself is limited to reference to the class speeches and elections. Plainly read, the e-mail is consistent with Principal Niehoff's concern that the elections remain fair to those involved, and that no campaign materials advocating the candidacy of any student over another be permitted into the assembly.

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.

IV. CONCLUSION

For the foregoing reasons, the defendants respectfully request that the plaintiff's Motion for Summary Judgment be denied.

DEFENDANTS,
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By /s/ Beatrice S. Jordan

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CERTIFICATION

This is to certify that on August 20, 2008 a copy of the foregoing **Defendants' Memorandum in Opposition to Plaintiff's 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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