UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RYAN DWYER by and through his parents, Kevin Dwyer and Rosanne Dwyer, Plaintiff, vs. OCEANPORT SCHOOL DISTRICT, et al Defendants	Hon. Stanley R. Chesler Case No. 03-6005 (SRC) Civil Action Return date: January 4, 2005

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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PROCEDURAL HISTORY

This is a civil rights action, brought pursuant to the First Amendment to the United States Constitution, 42 U.S.C. § 1983, and Article I paragraphs 6 and 18 of the Constitution of the State of New Jersey. Plaintiff Ryan Dwyer claims that the Oceanport Board of Education, its Superintendent, and the principal of his middle school, violated his First Amendment and state constitutional free speech rights by disciplining him for an internet web site he created at home, off-campus, outside of school hours.

Ryan moves for summary judgment. The facts are undisputed, but their legal ramifications are contested. Fed. R. Civ. Pro. 56(c). Specifically, Ryan seeks a declaration that defendants violated constitutional guarantees of free speech. This Court has jurisdiction of this action under 28 U.S.C. § 1331, as an action arising under the Constitution of the United States, and 28 U.S.C. §1343(a)(3) to redress the deprivation, under color of state law, of rights secured by the Constitution of the United States; and over plaintiff's pendent state law claims pursuant to 28 U.S.C. § 1367.

STATEMENT OF FACTS

Plaintiff incorporates by reference the facts recited in the parties' joint stipulations, his L. Civ. R. 56.1 Statement of Facts, and the certification of counsel submitted herewith. Certain facts deserve to be highlighted.

Ryan Dwyer created an "I hate my middle school" website from his home computer in April 2003. The site contained various sections, including a Guestbook where other students could post their own messages. Ryan posted messages in the Guestbook asking others to keep profanity and threatening comments out of the Guestbook. Ryan did not (and could not, based upon the limitations imposed by his internet service provider) edit any messages left by others in his Guestbook. Ryan himself posted no messages with profanity, threats or unprotected speech in the Guestbook and neither was there any use of profanity, threats or unprotected speech in any other section of the website. Ryan was fourteen years old.

Some of the postings by others in the Guestbook offended the middle school principal and the district superintendent. One student posted an anti-Semitic statement, and three other postings were viewed by the defendants as potential threats. The school principal, Dr. Amato, testified that he knew the students who posted the messages and exercised his discretion accordingly. He said one student who posted a message was difficult and disruptive, but the other students were good boys from good families. None were punished as severely as Ryan.

Rather than meeting with the students who posted those messages or focusing discipline on those students, the defendants instead focused the

brunt of their discipline on Ryan for having created the forum for the speech to which they objected. Indeed, the only posting by Ryan about which the defendants stated a specific objection was a picture of Dr. Amato, who complained that the picture made him "look black." In the end, those who posted the troubling messages simply received a one day suspension each while Ryan was (1) forced to remove his website, (2) summoned (along with his father) by defendants to be questioned by the police, (3) suspended from school for five days, (4) suspended from the baseball team for one month, (5) banned from the eighth-grade trip to Philadelphia, and (6) obstructed from taking qualifying exams for advanced courses in high school.

There were no substantial disruptions to the school during the time the website was in place, nor were there any previous disruptions at the school related to issues discussed by Ryan on the site. Further, to date, the defendants have been unable to point to a specific rule or policy of the school that Ryan violated and for which the discipline was imposed.

ARGUMENT

I. PUNISHING RYAN FOR THE WEB SITE HE CREATED AT HOME, OFF-CAMPUS, AND OUTSIDE SCHOOL HOURS VIOLATED HIS FIRST AMENDMENT RIGHT TO FREE SPEECH

A. The Website, Created At Home, Off-Campus, and Outside School Hours, is Entitled to Constitutional Protection

When he was in eighth grade at Maple Place School, Ryan Dwyer created an "I hate school" web site. He created it at home, off-campus, and outside school hours. His website was protected by the First Amendment, according to the Supreme Court, which has established that internet publishing is entitled to the very highest level of constitutional protection. Reno v. ACLU, 521 U.S. 844 (1997).

The principal of the school and the Superintendent of the District disapproved of Ryan's website. They called the police, suspended Ryan for a week, took him off the baseball team, forbade him to join his eighth grade class trip, obstructed his efforts to take qualifying exams for advanced algebra and English courses, and subjected him to petty humiliations. The principal, John Amato, and the Superintendent, James DiGiovanna, held Ryan responsible for creating the website, and punished him for statements that were made by other students.

B. The Defendants Retaliated Against Ryan for the Website and Accordingly Bear the Burden of Proof

Ryan's prima facie case is established in the stipulations submitted by the parties. First Amendment law requires Ryan to prove that 1) he was engaged in constitutionally protected activity; 2) defendants' adverse actions caused Ryan to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and 3) the defendants' adverse action was motivated at least in part as a response to the plaintiff's exercise of constitutional rights. Mt. Healthy Sch. Dist. v. Doyle, 429 U.S. 274, 287 (1977); Leary v. Daeschner, 228 F.3d 729, 737 (6th Cir. 2000); Worrell v. Henry, 219 F.3d 1197, 1212 (10th Cir. 2000), cert. denied, 533 U.S. 916 (2001).

The undisputed facts set forth in the stipulations establish every element of a First Amendment violation. Ryan's website was a constitutionally protected activity, but when Dr. Amato saw it, he accused Ryan of criminal conduct, called the police, and suspended him from school. Superintendent DiGiovanna supported Dr. Amato, motivated by disapproval of the website. Yielding to the intense pressure these state actors brought to bear, Ryan removed his website from the internet.

The burden accordingly shifts to the defendants to demonstrate that their actions were justified. The school must show "that engaging in the

forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 509 (1969); see also Mt. Healthy, 429 U.S. at 283-84. The defendants cannot do so.

D. Ryan's Website Caused Neither Disruption Nor Any Reasonable Fear of Disruption at Maple Place School

The facts adduced in discovery show that the website posed no actual disruption or even any threat of disruption at Maple Place School. The School District must produce evidence that Ryan's website had a deleterious effect upon the school's ability to maintain order at the school. It must "show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." Tinker, 393 U.S. at 509.

The District can produce no such evidence. Dr. Amato did not file a complaint with the police. He did not ask the police to charge Ryan with a crime. Dr. Amato did not want the police to refer the website to the prosecutor. The police did not talk to Ryan, charge him with criminal activity, or make recommendations as to how he should be disciplined. This is because the website posed no threat of disruption at Maple Place School.

The United States Supreme Court has decided several cases establishing the framework within which to evaluate the First Amendment claims of public school students. The leading case is Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969), where the Court said “it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Id. at 506. The Court has repeatedly recognized that "minors are entitled to a significant measure of First Amendment protection." Erznoznik v. City of Jacksonville, 422 U.S. 211, 212-13 (1975).

In Tinker, the Supreme Court considered the suspension of high school students who wore black armbands in protest of the Vietnam War. The Court held that the prohibition of the armbands could not be sustained without showing that engaging in the prohibited conduct would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” 393 U.S. at 509.

The leading Third Circuit case on free speech in public schools is Sypniewski v. Warren Hills Regional Bd. of Ed., 307 F.3d 243 (3d Cir. 2002), cert. denied, 538 U.S. 1033 (2003). Sypniewski involved a facial challenge to a racial harassment policy at a high school that had a history of demonstrated racial hostility. The plaintiff was suspended for wearing a

"redneck" t-shirt. The t-shirt itself was fairly mainstream, having been purchased at Wal-Mart, and featuring the jokes of a popular comedian, Jeff Foxworthy. But there had been flare-ups of racial tension at the school in connection with displays of the confederate flag. In its analysis, the Third Circuit followed Tinker. "What is required is that the school has a well-founded fear that the material at issue would substantially disrupt or interfere with the work of the school or the rights of the other students." Id. at 265." Despite the tension related to the confederate flag, there was no evidence in the record that the Foxworthy t-shirt might genuinely threaten disruption. Id. at 269. Accordingly, the court enjoined the racial harassment policy.

In another case, dealing with a school harassment policy, the Third Circuit observed that "Under Tinker, regulation of student speech is generally permissible only when the speech would substantially disrupt or interfere with the work of the school or the rights of other students. … Tinker requires a specific and significant fear of disruption, not just some remote apprehension of disturbance." Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 211 (3d Cir. 2001).

Under Third Circuit law, therefore, Dr. Amato and Superintendent DiGiovanna could justify their discipline of Ryan only if they had a well-founded fear that the website would substantially disrupt or interfere with

the work of Maple Place School or the rights of other students. The undisputed facts demonstrate to the contrary that Amato and DiGiovanna never had more than a general non-specific apprehension that something untoward could conceivably happen.

A district court case in Pennsylvania bears a strong resemblance to Ryan's. In Killion v. Franklin Regional Sch. Dist., 136 F.Supp.2d 446 (W.D.Pa. 2001), a high school student created a "Top 10" list mocking the athletic director at his school. He made the list at home, after school, and emailed it to some friends, but never printed or copied it. The list contained some vulgarities, and eventually showed up in the teachers' lounge. The school district suspended the student, Paul, for 10 days from school, track team, and other school events. The court held that the school district violated the First Amendment a) because it failed to satisfy the Tinker "substantial disruption" test, and b) because the school's policy was vague and overbroad.

The court focused on the fact that the top-10 list was created off-campus. "Although there is limited case law on the issue, courts considering speech that occurs off school grounds have concluded (relying on Supreme Court decisions) that school officials' authority over off-campus expression is much more limited than expression on school grounds. Id. at 454 (internal

citations omitted). Applying Tinker, the court found that Paul's suspension violated the First Amendment because the School District failed to satisfy the "substantial disruption" test. The Top-10 list was upsetting to the athletic director, and the school librarian was almost in tears, but "the speech at issue was not threatening, and … did not cause any faculty member to take a leave of absence…."

In another similar case, Flaherty v. Keystone Oaks School District, 247 F. Supp.2d 698 (E.D. Pa. 2003), a high school student was disciplined for posting messages on an internet web site message board. Three of the messages were posted from home, and one from school. The messages ran afoul of the student handbook and board policy, which authorized discipline if a student's expression was "abusive, offending, harassing, or inappropriate." Applying Tinker, the court found no substantial disruption arising from the web site messages, and struck down the school policies as facially overbroad.

Several recent cases have dealt specifically with student websites and reached the same conclusion. In Beussink v. Woodland R-IV School Dist., 30 F.Supp.2d 1175 (E.D. Mo. 1998), the court enjoined a student's suspension from school. Like Ryan, the student had created a website on his home computer, outside of school hours. The website criticized the school

administrators, but did not materially or substantially interfere with school discipline. See also Mahaffey v. Aldrich, 236 F.Supp.2d 779 (E.D.Mich. 2002) (website had list of people the student wished would die, but there was no real threat and no proof of disruption at school); but see Coy v. Board of Ed., 205 F. Supp. 2d 791 (N.D. Ohio 2002) (the student's constitutional right was clearly established, but the court ruled the jury should determine whether the district's disciplinary actions were objectively unreasonable)**.**

Emmett v. Kent Sch. Dist. No. 415, 92 F.Supp.2d 1088 (W.D. Wa. 2000), considered the appropriateness of a student suspension for creating a web page from his home without using school resources or time. Granting a temporary restraining order, the court said

> Although the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school's supervision or control…. The defendant … has presented no evidence that the mock obituaries and voting on this web site were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever. This lack of evidence, combined with the above findings regarding the out-of-school nature of the speech, indicates that the plaintiff has a substantial likelihood of success on the merits of his case.

Id. at 1090.

Many cases about off-campus expression concern underground student newspapers, which deserve the same protection as other off-campus

speech. Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960 (5th Cir. 1972), overturned a set of three-day suspensions for creating and distributing an underground newspaper.

> It should have come as a shock to the parents of five high school seniors … that their elected school board had assumed suzerainty over their children before and after school, off school grounds, and with regard to their children's rights of expressing their thoughts. We trust that it will come as no shock whatsoever to the school board that their assumption of authority is an unconstitutional usurpation of the First Amendment.

Id. at 964. See also (Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988); Thomas v. Bd. of Ed., 607 F.2d 1043, 1045 (2d Cir. 1979) ("the arm of authority does not reach beyond the schoolhouse gate"); Fujishima v. Board of Ed., 460 F.2d 1355 (7th Cir. 1972) (citing cases).

In Klein v. Smith, 635 F. Supp. 1440 (D. Me. 1986), the plaintiff was suspended from school for making an inappropriate gesture to a teacher after school hours and off school grounds. The court held that the gesture constituted speech and that the suspension violated the student's First Amendment rights:

> The conduct in question occurred in a restaurant parking lot, far removed from any school premises or facilities at a time when teacher Clark was not associated in any way with his duties as a teacher. The student was not engaged in any school activity or associated in any way with school premises or his role as a student…. Anyone would wish that responsible teachers could go about their lives in society without being subject to Klein-like abuse. But the question becomes ultimately what should we be prepared to pay in terms of restriction of

> our freedom to obtain that particular security…. The First Amendment protection of freedom of expression may not be made a casualty of the effort to force-feed good manners to the ruffians among us.

Klein, 635 F.Supp. at 1441-42.

Even for on-campus speech, the requirement of a specific and significant disruption is well established. In a facial challenge to a school anti-harassment policy, the Third Circuit stated that student speech may be regulated "only if it would substantially disrupt school operations or interfere with the right of others." Saxe, 240 F.3d at 214. The risk of disruption must be specific and concrete, "not just some remote apprehension of disturbance." Id. at 211-212.[1]

The requirement of a specific and significant disruption has been adjudicated in other jurisdictions as well. In Chandler v. McMinnville Sch. Dist., 978 F.2d 524 (9th Cir. 1992), for example, a middle school punished students who wore "SCAB" buttons during a teachers strike. Because the school failed to present any evidence that the buttons were "inherently disruptive" to school activities, the court held that the students could proceed

[1] Certain speech can be suppressed without such a showing if it occurs at school functions or if the speech is considered "school-sponsored," such as if it were written in a school newspaper. See e.g., Bethel School Dist. v. Fraser, 478 U.S. 675 (1986) (student barred from giving speech with sexual innuendo at an official high school assembly); Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (school could censor speech in the school-sponsored newspaper). However, in creating these limited exemptions to Tinker, the Supreme Court recognized that "the government could not censor similar speech outside the school." Id. at 266. Ryan's speech occurred outside the school setting and no reasonable person could believe Ryan's website was officially sponsored by the Maple Place School. Thus, those cases are inapplicable.

with their First Amendment Claim. See also Newsom v. Albemarle County, 354 F.3d 249 (4th Cir. 2003) (enjoining middle school dress code that banned messages related to weapons); Chalifoux v. New Caney Indep. Sch. Dist., 976 F.Supp. 659 (S.D. Tex. 1977) (gang-related apparel did not create substantial disruption); Clark v. Dallas Indep. Sch. Dist., 806 F. supp. 116 (N.D. Tex. 1992) (religious tracts did not create substantial disruption).

There was no disruption, substantial or otherwise, prior to or on the day Dr. Amato called the police. Dr. Amato testified during discovery that he was "concerned, alarmed over the possibilities of what could happen," but he could not or would not describe the nature of any actual disruption that might result from the website. To the contrary, the only disruption he could identify consisted of talk, a "buzz" in the building.

Superintendent DiGiovanna could articulate no specific fear of disruption. Like Dr. Amato, he testified that the "unrestful climate" at Maple Place School consisted of "children talking back and forth to each other" at a school play the Saturday before. His concerns about "actual disruption" were nonspecific "possibilities."

Defendants' concern was limited to a vague, general, and nonspecific apprehension of disturbance. It does not justify their conduct. "In our

system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Tinker, 393 U.S. at 508.

In this case, there was no criminal activity, no disruption, and no threat of disruption. In their correspondence and in discovery, the defendants have failed to identify any legitimate pedagogical interest to justify the actions they took against Ryan. The defendants suppressed constitutionally protected speech and imposed discipline for no apparent purpose other than to punish a message of which they disapproved.

The present case is therefore strikingly different from those in which speech limitations have been justified. For example, in Walker-Serrano v. Leonard, 325 F.3d 412 (3d Cir. 2003), the Third Circuit ruled that the Lackawanna Trail School Board had authority to prohibit a third-grader from circulating a petition at her elementary school. Yet the third-grader was never disciplined for circulating the petition, there was no evidence that the school officials were trying to regulate her speech because they disagreed with her views, it was not clear that the other third-graders understood what they were signing, the student never received permission for such activities as required by school policies, and the court limited its reasoning to speech at elementary as opposed to secondary schools. See also West v. Derby Unified Sch. Dist., 206 F.3d 1358 (10th Cir. 2000) (upholding a suspension

under the Tinker substantial disruption standard because the school demonstrated a concrete threat).

Likewise, the present case differs markedly from S.G. v. Sayreville Board of Ed., 333 F.3d 417 (3d cir. 2003), which upheld the suspension of a kindergartner who said "I'm going to shoot you" on the playground. The Third Circuit held there was no First Amendment violation. "The school's prohibition of speech threatening violence and the use of firearms was a legitimate decision related to reasonable pedagogical concerns and therefore did not violate S.G.'s First Amendment rights." Id. at 423.

It is important to note that there had been three previous incidents at the same elementary school involving threats of gun violence, and all three resulted in three-day suspensions. The kindergartner's threat came two weeks after a widely reported fatal shooting of a 6-year old by another 6-year old in Flint, Michigan. The Sayreville school had adopted a zero-tolerance policy, which had been sent home with all the students and discussed in class. The Third Circuit found that the kindergartner's conduct was "not socially appropriate behavior," and held that the school officials reasonably determined that threats of violence and simulated firearm use were unacceptable, even on the playground. Id. at 422.

Maple Place School, by contrast, had no zero-tolerance policy, and no history of disruption, much less gun violence. And any postings that could arguably have been considered threats came not from Ryan but from students who were not punished nearly as severely as Ryan was punished simply for providing a forum for speech.

D. Ryan Cannot Be Punished for the Statements of Others Over Whom He Had No Control, and the Fact that Ryan Received Harsher Punishment Than Those Who Made the Objectionable Statements Underscores That Ryan's Treatment Was Not Related to Any Fear of Actual Disruption

Ryan was responsible for none of the Guestbook comments at which Dr. Amato and Superintendent DiGiovanna took offense. They acknowledged that other students – not Ryan – wrote the offensive messages, but held Ryan responsible, punishing the messenger for having created the medium.

The discipline (or lack thereof) assigned to the other students demonstrates that Dr. Amato and Superintendent DiGiovanna were never concerned about any threat of disruption at Maple Place School:

- A student named Justin contributed a message that said "we gotta pull the plug on them, ndtake down MPS." Neither Dr. Amato nor Superintendent DiGiovanna registered more than a nonspecific generalized concern about this statement. Justin's parents were not summoned to school to talk to the police. Justin received one day of suspension.

- A student named Harry posted a message that said "we'll get mps last day of school they wont no what hit em." Again, Dr. Amato and Superintendent DiGiovanna expressed nothing more than a vague apprehension. Harry's parents were not summoned to school to talk to the police. Harry received one day of suspension.

- A student named Jake wrote a Guestbook message that said "mp sux, but not as bad as that dirty jew, hirsh." Jake's parents were not summoned to school to talk to the police. Jake was suspended for one day and received other disciplinary measures.

- A student named Zach posted a message that referred to the "Oceanport Militia." Dr. Amato expressed nothing more than a generalized "concern," because, as he explained, "I know Zach." Zach's parents were not summoned to school to talk to the police. Zach received one day of suspension.

- A student named Allison posted a message that said "I say we take hirsh's wig on graduation." Allison received no discipline at all.

The treatment of these students demonstrates that Dr. Amato and Superintendent DiGiovanna did not consider their statements potentially criminal. The one statement that did indicate potential injury to another student elicited no response at all. Superintendent DiGiovanna was not in the least concerned that a student named Billy referred to another student as a "pusy." Ryan testified that the target of Billy's comment was a student who was bullied at Maple Place School. Dr. Amato did not even consider disciplining Billy for calling another student a "pusy."

To the extent other students' messages could be called "offensive," they still do not justify defendants' treatment of Ryan. First, "[m]ere

offensiveness does not qualify as 'disruptive' speech." Sypniewski, 307 F.3d at 260 n.16. Nor should it impair the ability of professional educators to teach middle schoolers. "We cannot accept, without more, that the childish and boorish antics of a minor child impair the administrators' abilities to discipline students and maintain control." Killion, 136 F.Supp.2d at 456.

Second, the law does not permit Ryan to be held accountable for simply providing an open forum for speech. Internet service providers have been given immunity by statute: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Webmasters like Ryan cannot be held responsible for hosting content created by someone else. See, e.g., Green v. America Online, Inc., 318 F.3d 465, 470 (3d Cir. 2003), cert. denied, 540 U.S. 877 (2003); Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

Dr. Amato testified it was he who showed Mrs. Hirshfield the anti-Semitic remark. But, as he testified, she was able to carry on, being a savvy veteran teacher. None of the other teachers at Maple Place School had to take time off or displace their lesson plans for the day. The only teacher who

had to take time off from school was Rosanne Dwyer, as a result of the defendants' actions.

The website was, at least for a moment, an important facet of students' lives that could have been seized for maximum educational value. The defendants could have taken advantage of an opportunity to ask the students about their complaints. They could have informed students that the right to free expression carries a responsibility. Students should learn that there are limits - defamatory speech and threats of violence sometimes are not protected speech - before they are punished for testing the limits.

Indeed, if Dr. Amato and Superintendent DiGiovanna had been genuinely concerned about a Columbine-type incident, which they clearly were not, the website gave them a window into the thoughts and feelings of the students. Instead, they took offense, and punished Ryan for creating the forum. "The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it." Saxe, 240 F.3d at 215.

II. THE DEFENDANTS' ARBITRARY AND DISCRETIONARY SUPPRESSION OF RYAN'S CONSTITUTIONALLY PROTECTED SPEECH VIOLATED NEW JERSEY LAW

Claiming a right to exercise unfettered discretion, Dr. Amato and Superintendent DiGiovanna deprived Ryan of rights secured to him by the state constitution. Article I of the New Jersey State Constitution is a bill of rights. The free speech provisions at stake in this case are set forth in paragraphs 6 and 18.[2]

The state constitution mandates that the state "shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State…." Art. VIII Sec. IV para. 1. New Jersey law requires that local school districts provide a free education to all residents over five and under twenty years of age. N.J.S.A. 18A:38-1. New Jersey law also provides for compulsory attendance of all students between the ages of six and seventeen. N.J.S.A. 18A:38-25.

School authorities may not exercise unbridled discretion to discipline students for off-campus activities. Nor do they have absolute power on campus. "The authority possessed by the state to prescribe and enforce

[2] Article I paragraph 6 of the New Jersey Constitution provides in pertinent part that "[e]very person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right." Article I paragraph 18 provides that "[t]he people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives and to petition for redress of grievances."

standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards." Goss v. Lopez, 419 U.S. 565, 574 (1975).

In Desilets v. Clearview Regional Board of Ed., 137 N.J. 585 (1994), the New Jersey Supreme Court held that a junior high school violated a student's First Amendment rights when it censored the student's reviews of R-rated movies in the school newspaper. The school board tried to justify its decision to suppress the movie reviews, but the court found that its policy was "at best equivocal and inconsistent." Id. at 593. "The record suggests only that such a policy, if it exists, is vaguely defined and loosely applied, and that its underlying educational concerns remained essentially undefined and speculative." Id. at 593. Here, similarly, the defendants' reasons for disciplining Ryan were purely speculative.

The right of public school students to speak freely in public and private places off-campus should not be limited because they are subject to compulsory attendance laws for part of the week. Students have the full complement of first amendment rights outside of the schoolhouse gate; otherwise they would have nothing to shed.

Dr. Amato clearly overstepped his authority, abetted by Superintendent DiGiovanna. The Board of Education abdicated its

supervisory role when it refused to rein in the abuse of power taking place before it. Ryan and his parents are entitled to a declaration that the defendants' conduct was unconstitutional.

III. THE DEFENDANTS NEVER IDENTIFIED THE RULE RYAN WAS ALLEGED TO HAVE BROKEN; THEY DISCIPLINED HIM ARBITRARILY, VIOLATING HIS RIGHT TO DUE PROCESS OF LAW

The Dwyers have never been told what rule Ryan was alleged to have broken when he created his website. In discovery, during the period when the Dwyers tried to appeal to the Board of Education, and to this day, the defendants have never identified any specific rule or policy that could justify their treatment of Ryan. As such, the defendants violated Ryan's due process rights.

The requirements of procedural due process for suspension of students were set forth in Goss v. Lopez, 419 U.S. 565 (1975), and specifically adopted by the Third Circuit in S.G. v. Sayreville Board of Ed., 333 F.3d 417, 424 (3d Cir. 2003). In Goss, the Supreme Court held that high school students were denied due process of law when they were suspended for misconduct without a hearing. The Court stated that a student has a "legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for

misconduct without adherence to the minimum procedures required by that Clause." 419 U.S. at 574. In addition, because the suspensions could damage the students' standing with other students and their teachers, and interfere with later opportunities for higher education and employment, the Court believed that the students' liberty interest in their reputation was also implicated. Id. at 574-75; S.G., 333 F.3d at 424.

The Due Process clause is phrased as a limitation on the state's power to act. "The touchstone of due process is protection of the individual against arbitrary action of the government." County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998). It is "intended to secure the individual from the arbitrary exercise of the powers of government," serving "to prevent governmental power from being used for purposes of oppression." Id. at 1057.

A basic requirement of due process is to identify the charges against the accused. Prior to lawsuit and during discovery, Ryan should have been "told what he is accused of doing and what the basis of the accusation is." Goss, 419 U.S. at 582. Notice and a meaningful opportunity to be heard are fundamental.

> Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges

> against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.

Id. at 581. The rules, policies and regulations upon which defendants rely are so vague that Ryan could not have known that his status in school was in jeopardy when he made the website.

In answers to interrogatories, the defendants pointed to a set of general school policies, but Superintendent DiGiovanna, could not point to any specific rule that Ryan broke. Indeed, as the Oceanport School District's Fed. R. Civ. Pro. 30(b)(6) witness, Superintendent DiGiovanna testified that the District had no policy about students using computers outside of school.

He and Dr. Amato certainly did not follow the District's formal policies. According to the Parents Calendar-Handbook, the infraction of "disruptive behavior" does not merit suspension from school. The Student Behavior Code indicates that a "child crisis unit" exists to respond to terroristic threats. Although Mr. DiGiovanna claimed to believe there were components of the website that could be deemed "terroristic," neither he nor Dr. Amato ever referred Ryan to the child crisis unit. In any event, any comments that could arguably have been deemed terroristic came not from

Ryan but from other students, who were neither referred to the child crisis unit nor disciplined near to the extent Ryan was.

Dr. Amato and the Superintendent acted in a wholly arbitrary manner. The Third Circuit addressed the process due in the school context in Palmer v. Merluzzi, 868 F.2d 90 (3d Cir. 1989). **"**Due process is a flexible concept and the process due in any situation is to be determined by weighing 1) the private interest at stake; 2) the governmental interest at stake; and 3) the fairness and reliability of the existing procedures and the probable value, if any, of additional procedural safeguards. Id. at 95. The defendants in this case have failed to identify any governmental interests that would have been served by silencing Ryan, and certainly have not demonstrated that their procedures were fair or reliable.

The Board of Education apparently absolved itself of any obligation to review Ryan's case. Dr. Amato and the District's R.30(b)(6) witness, Superintendent DiGiovanna, both testified that the decision to discipline Ryan was made exclusively by them. As often as the Dwyers approached Mr. DiGiovanna, wrote to the Board of Education, and pleaded for a stay of Ryan's discipline, the Board took no action, referred the matter to its counsel, and affirmed the disciplinary measures taken against Ryan.

The Board gave Ryan "some process" but it was meaningless. It held meetings on April 14 and 29, 2003, and gave the Dwyers a hearing, but never an explanation. The hearing was at best an opportunity for the Dwyers to read a statement to a body that apparently exercised no authority in the decision to discipline Ryan. The Board referred the matter to its counsel, Anthony Sciarillo. He in turn responded to the Dwyers and their counsel with letters saying he would get back to them, but in the meantime advising that the Board would take no action.

This motion for summary judgment will constitute the Dwyer's first hearing before an impartial tribunal. "A school official acts as both prosecutor and judge when he moves against student expression." Thomas v. Board of Ed., 607 F.2d 1043, 1051 (2d Cir. 1979), cert. denied, 444 U.S. 1081 (1980). A school official is unlikely to be an impartial or fair judge, because "[h]is intimate association with the school itself and his understandable desire to preserve institutional decorum give him a vested interest in suppressing controversy." Id. In Thomas, the Second Circuit concluded that suspensions handed out to students for their off-campus expression should only be "decreed and implemented by an independent, impartial decisionmaker." Id. at 1050.

IV. PLAINTIFF IS ENTITLED TO DAMAGES, TO DETER FUTURE ABUSIVE CONDUCT AND TO COMPENSATE FOR THE DEPRIVATION OF HIS CONSTITUTIONAL RIGHTS

The Dwyers' purpose in bringing this action is deterrence. They seek a declaration that Ryan's constitutional rights were violated, to ensure that other public school children will be spared such treatment.

To that end, plaintiff seeks damages for the injuries inflicted on him and his family when the defendants violated his rights to free speech and due process. "The denial of a particular opportunity to express one's views can give rise to a compensable injury." Irish Lesbian and Gay Organization v. Giuliani, 143 F.3d 638, 649 (2d Cir. 1998). The denial of First Amendment rights suffered by plaintiff is a classic example of irreparable harm. Elrod v. Burns, 427 U.S. 347, 373 (1976) ("the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury). See also Dellums v. Powell, 566 F.2d 167, 195 (D.C. Cir. 1977) (quantum of damages to be awarded for First Amendment violations); Tatum v. Morton, 562 F.2d 1279, 1282 (D.C. Cir. 1977) (compensation for denial of First Amendment rights).

The defendants' abusive treatment of Ryan caused the Dwyers anxiety, emotional distress, and injured their reputations. After the Dwyers took the website off the internet, they did everything they could to clear

Ryan's reputation, to no avail. As recounted in the R.56.1 Statement, Ryan and his parents were afraid that Ryan could be arrested. Mrs. Dwyer became so distraught that the school nurse urged her to see the school district's school psychologist. The psychologist told her the school was planning to come down hard on Ryan, adding that students needed to learn that they had no rights. His words were intensely upsetting to Mrs. Dwyer, who had not as yet seen the website.

The family continues to experience ongoing humiliation and distress. Mrs. Dwyer fears for their reputation in the school community, where she teaches, because rumors have continued to circulate about the website even after it was removed from the internet.

The defendants pressured the Dwyers so intensely to remove the website from the internet, they made it impossible to correct rumors that the defendants themselves generated. The defendants encouraged a widespread perception that the website was somehow criminal, when a cursory glance reveals that it is nothing more than a forum for fourteen-year-olds to complain about their middle school.

Deterrence is a species of compensatory damages. "Deterrence is also an important purpose of this system [and] operates through the mechanism of damages that are compensatory." Memphis Community Sch. Dist. v.

Stachura, 477 U.S. 299, 307 (1986). Damages are appropriate in this case because of the injury to the Dwyers' reputations and peace of mind. "[C]ompensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as 'impairment of reputation … personal humiliation, and mental anguish and suffering." Stachura, 477 U.S. at 307, quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). In City of Watseka v. Illinois Public Action Council, 796 F.2d 1547, 1559 (7th Cir. 1986), for example, a political canvassing company whose First Amendment rights were violated by city ordinance limiting door-to-door solicitation recovered damages not only for lost revenue but for harm it suffered when it was prevented from exercising its First Amendment rights.

Civil rights cases like Ryan's arise under 42 U.S.C. §1983, which creates "'a species of tort liability' in favor of persons who are deprived of 'rights, privileges or immunities secured' to them by the Constitution." Stachura, 477 U.S. at 306 (internal citations omitted). Section 1983 explicitly allows plaintiffs to seek damages for violations of constitutional rights. 42 U.S.C. §1983 (West 2003).

The U.S. Supreme Court considered the proper standard for determining damages for the loss of First Amendment rights in Memphis Community Sch. Dist. v. Stachura, *supra*, 477 U.S. 299 (1986). The Court

rejected damage awards for the "'abstract value' or 'importance' of constitutional rights." Id. at 309-310. The Court did not limit compensatory damages, however, even in cases where the monetary value of the particular injury is difficult to ascertain. Id. at n.14. The Court discussed with approval Nixon v. Herndon, 273 U.S. 536 (1927), a case holding that a plaintiff who was illegally prevented from voting in a state primary election suffered compensable injury. The holding did not rest on the "value" of the constitutional right as an abstract matter; rather, the Court recognized that the plaintiff had suffered a particular injury that might be compensated through monetary damages.

Dr. Amato, Superintendent DiGiovanna, and the other defendants not only violated Ryan's free speech rights, but barred him from access to educational opportunities and benefits to which he was entitled. Davis v. Monroe County Bd. Of Educ., 526 U.S. 629 (1999). Accordingly, the Dwyers respectfully request damages in an amount this Court deems just, as compensation for: (1) depriving Ryan of his right to disseminate his views regarding Maple Place School; (2) depriving Ryan of his right to be notified of the charges against him in connection with his punishment and to present his side of the story; (3) depriving Ryan of his right to a free education during his five-day suspension; (4) interfering with Ryan's education by

excluding him from school-related activities, including baseball, his class trip and advanced placement examinations; (5) inflicting emotional distress on Ryan and his family; and (6) injuring Ryan's reputation.

CONCLUSION

Summary judgment is appropriate where, as here, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The Court must examine the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of that party. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986).

When the non-moving party bears the burden of proof, the party moving for summary judgment may show that the evidence would be insufficient to carry the non-movant's burden of proof at trial. Celotex, 477 U.S. at 322. Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." White v. Westinghouse Electric Co., 862 F.2d 56, 59 (3d Cir. 1988), quoting Celotex, 477 U.S. at 322.

For all the reasons set forth above, Ryan and his parents are entitled to summary judgment.

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Grayson Barber
GRAYSON BARBER, L.L.C.

Edward Barocas
AMERICAN CIVIL LIBERTIES
UNIONOF NEW JERSEY
FOUNDATION

Dated: December 6, 2004