No. 06-1993

In the United States Court of Appeals For the Seventh Circuit

DEBORAH A. MAYER, PLAINTIFF-APPELLANT

v.

MONROE COUNTY COMMUNITY SCHOOL CORPORATION, ET AL.,
DEFENDANTS-APPELLEES

On Appeal from the United States District Court for the Southern District of Indiana, No. 1:04-cv-1695
The Honorable Sarah Evans Barker, District Judge

BRIEF FOR THE PLAINTIFF-APPELLANT DEBORAH A. MAYER

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

I. District Court Jurisdiction

The original complaint in this matter was filed in the Monroe County Circuit Court on October 5, 2004, against Monroe County Community School Corporation ("MCCSC") and four individuals: John Maloy, individually and in his representative and official capacities as Superintendent, Cheryl Brown, individually and in her representative and official capacities as President of the School Board, Victoria Rogers, individually and in her representative and official capacities as Principal of Clear Creek Elementary School, and Pam Sklar, individually and in her representative and official capacities as Director of Human Resources for the School Corporation ("Defendants"). The current President of the School Board is Sue Wanzer; the current Principal of Clear Creek Elementary School is Tammy Miller. The other individual defendants remain in their offices.

Defendants removed the case to the United States District Court for the Southern District of Indiana on October 18, 2004. The basis for jurisdiction in the district court was 28 U.S.C. § 1331. Plaintiff alleged claims arising under federal law, including claims under 42 U.S.C. § 1983 alleging violations of the First and Fourteenth Amendments. Plaintiff also alleged certain claims arising under the laws of the State of Indiana, over which the District Court exercised supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

II. Jurisdiction in the Court of Appeals

The United States Court of Appeals for the Seventh Circuit has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291. The district court entered Judgment against Plaintiff on all claims on March 10, 2006. The Notice of Appeal was filed on April 7, 2006.

STATEMENT OF THE ISSUES

I. Whether the district court erred in holding, as a matter of law, that no speech or expression by a teacher in class can ever be protected by the First Amendment, even where the speech or expression clearly involves a matter of public concern.

II. Whether the district court erred in failing to conduct the familiar *Pickering* balancing of interests, where a teacher's speech admittedly involved matters of public concern, and where the public employer did not claim disruption to the effective delivery of its services.

III. Whether genuine issues of facts exist precluding summary judgment on Mayer's claims that her protected speech was chilled and that she was harassed and discharged in retaliation for engaging in speech protected by the First Amendment.

STATEMENT OF THE CASE

This is an appeal from the district court's Judgment entered on March 10, 2006 against Plaintiff-Appellant and in favor of Defendants-Appellees, the Monroe County Community School Corporation ("MCCSC") and all of the individual defendants.[1] (Short App., "B"). The complaint in this case was filed on October 5, 2004 in the Monroe County (Indiana) Superior Court (App. 5) and subsequently removed to the United States District Court for the Southern

[1] All defendants are referred to throughout this brief collectively as "Defendants" or "MCCSC" or "the school."

District of Indiana by Defendants on October 18, 2004 (App. 1). In her complaint, Mayer invoked the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act of 1871, Title 42 U.S.C. § 1983. Mayer claimed, among other things, that Defendants retaliated against her because of her exercise of her First Amendment right to free speech by subjecting her to adverse actions including, but not limited to, systematically and maliciously scrutinizing and criticizing her work and wrongfully discharging her from her employment with the Monroe County Community School Corporation. (App. 5, 10-12).

After discovery, Defendants filed a motion for summary judgment on September 26, 2005. The motion was fully briefed by December 29, 2005. The district court granted the school's motion for summary judgment in an Entry dated March 10, 2006 (Short App. "A") and entered its Judgment the same day. (Short App. "B").

In dismissing Mayer's First Amendment claims, the district court did not reach the question of whether or not MCCSC was justified in imposing restrictions on Mayer's speech or expression; *i.e.*, it did not conduct the familiar *Pickering* balancing typical in cases such as this one. Nor did the court make any determination regarding the existence of any material, disputed facts pertaining to Mayer's First Amendment claims.[2] The district court's Entry did not discuss, for example, whether or not Mayer had produced sufficient evidence that her speech on a matter of public concern had been chilled by MCCSC, or whether there was sufficient evidence of pretext regarding MCCSC's alleged reason for terminating Mayer's contract to preclude summary judgment. Rather, the district court found, as a threshold matter, that no speech by a teacher in class and during the instructional period could ever be protected by the First

[2] Although the district court's Entry devoted approximately seventeen (17) pages to what the court called a "Factual Background," its dismissal of Mayer's First Amendment claims – that her speech was unconstitutionally chilled and that she was discharged in retaliation for that speech – turned solely on the court's finding that her speech was not protected as a matter of law.

Amendment because the school board has "exclusive" control over the curriculum. (Entry, pp. 21-28; Short App. "A").[3]

Mayer's notice of appeal was timely filed on April 7, 2006. This appeal was docketed on April 10, 2006.

STATEMENT OF FACTS[4]

On January 10, 2003, Plaintiff taught a class using the December 13, 2002 edition of *Time For Kids* magazine (App. 199, 220-221; Mayer Aff., ¶8, Ex. A). This was a normal part of the curriculum at Clear Creek Elementary and was something Plaintiff did with her class nearly every Friday. (App. 250, Mayer Dep., p. 60). It is undisputed in this case that the *Time For Kids* magazine Plaintiff was discussing with her students on January 10, 2003 was part of the approved curriculum for her class. (App. 226, Rogers Dep., p. 57; App. 180-181, Defendants' Answers to Plaintiff's Interrogatories; App. 249-250, Mayer Dep., pp. 57-60). The speech Plaintiff claims is constitutionally protected in this case occurred in the context of the discussion of this article. Plaintiff described the speech in her deposition as follows:

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Q Tell me about that discussion in January.
A After we had talked about some of the other things that had happened, one of the kids asked me -- and we had read the article about the peace march in

[3] Citation to the district court's "Entry Granting Defendants' Motion for Summary Judgment" appears throughout the brief as "Entry, p. ___".

[4] Because the district court granted summary judgment on Mayer's First Amendment claims based solely on the conclusion that no in-class speech by a teacher can ever be protected, the facts discussed in this section are the only "facts relevant to the issues submitted for review." Fed.R.App.P. 28(7). However, because MCCSC may argue that the record would permit summary judgment to be granted on alternative grounds, *see, e.g., Sharp v. United Airlines,* 236 F.3d 368, 371 (7th Cir. 2001) (summary judgment may be affirmed on alternative basis in appropriate circumstances), other potentially relevant facts and reasonable inferences are discussed in detail in Sections II and III of the Argument below.

Washington, D. C., one of the kids asked me if I would ever march in a peace march. At that time I said, "Peace marches are going on all over the country. We even have demonstrations here in Bloomington, Indiana. When I drive past the courthouse square and the demonstrators are picketing I honk my horn for peace because their signs say, "Honk for peace."

And then I went on to say that I thought that it was important for people to seek out peaceful solutions to problems before going to war and that we train kids to be mediators on the playground so that they can seek out peaceful solutions to their own problems and so they won't fight and hurt each other. And that was the extent of the conversation and the discussion.

And it lasted probably no more than five minutes.

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Q I think at the beginning of your testimony you said, "After we had discussed the situation in Iraq" or something to that effect. What did you talk about regarding Iraq?

A Well, like I said, the kids got to choose the articles that they wanted to talk about. Some kids wanted to talk about the inspectors. So we talked about them. There was also an article in there about our history with Iraq. And this is what I remembered most vividly from that conversation until the incident with the peace thing happened.

There was one portion of the article, of the magazine, that talked about the United States selling weapons to Iraq. And one of my students, very precocious child, raised her hand and said, "Ms. Mayer, I think there is a mistake in this article."

And I said, "Well, what do you think the mistake is?"

And she said, "It says right here that the United Stated sold weapons to Iraq. We wouldn't do that."

And I said to her that it was true. And she and the rest of the class just didn't believe it. This was more than they could handle. So this

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particular student, I know her father was a politician. And I said to her, "Why don't you go home and talk about it with your father, and he will explain it to you."

And for the rest of the class I just said, you know, "It's history. It's something that happened." And I just left it at that because how do you explain something like that to 4th, 5th, and 6th graders. And then we just went on to talk about something else. But I thought there might be questions about that part of the article from parents because it was something that was hard to explain to children.

(App. 251, Mayer Dep., pp. 62-64).

This speech drew an angry response from the parents of one of Mayer's students. (App. 252). As a direct result, Mayer was expressly forbidden from discussing the Iraq war and peace in her class, and was reprimanded and told in writing to "refrain from expressing your political views." (App. 252; App. 109). Also in response to Mr. Hahn's complaint, Principal Rogers cancelled the school's traditional "Peace Month" in January 2003. (App. 9, ¶ 28; 17; 25, ¶ 28; 253-254; Entry, p. 6; Mayer Dep., pp. 88-89). Mayer alleges that, in addition to these speech-chilling actions of Defendants, she was subjected to a campaign of harassment by Defendants in retaliation for her speech, and ultimately discharged because of her speech. (App. 5, 9-12). It is undisputed that Mayer's in-class expressions involved a matter of public concern. (Entry, p. 24) ("Both parties agree that the topic of U.S. involvement in the Iraq war is a matter of public importance."). Defendants have never claimed that regulation or restriction of Mayer's in-class speech was necessary or justified, and specifically did not ask the district court to balance Mayer's interest in the speech or expression in this case against the school's interests. (*See, e.g.*, R. at Doc ## 28, 40, Defendants' Summary Judgment memorandum and reply).

SUMMARY OF ARGUMENT

It has been settled law for nearly 40 years that speech or expression by a teacher on a matter of public concern – even in the classroom – is entitled to constitutional protection absent any showing by a school that the speech or expression would materially and substantially interfere with the operation of the school. Yet, in this case, the district court held as a matter of law that any time a teacher addresses students in a classroom she is speaking as an employee and not as a citizen and, therefore, nothing she says is ever protected, and no balancing of the interests discussed in *Pickering* is required. This holding was error.

The district court disregarded long-established precedent and relied erroneously on inapposite out-of-circuit cases to hold that no in-class expression could be protected by the First Amendment. If the court had proceeded to the *Pickering* analysis, Mayer's interest in speaking as she did would have outweighed any interest MCCSC would have had in restricting or punishing the speech. Since MCCSC has waived its *Connick* defense and has never claimed a need to restrict or punish Mayer's speech, the court's analysis should have proceeded to a determination of whether or not genuine issues of fact existed on Mayer's "chilling" and retaliation claims.

Genuine issues of fact do exist on those claims, because reasonable minds could find from the designated evidence that a reasonable person of ordinary firmness in Mayer's position would have refrained from engaging in protected speech under the circumstances (the "chilling" claims), and because Mayer has designated evidence which, if believed by the jury, supports an inference that MCCSC's newly-stated reasons for discharging Mayer are pretextual. Therefore, summary judgment in favor of MCCSC should not have been granted, and this case should be remanded for a trial on the merits.

ARGUMENT

This Court reviews de novo the grant of summary judgment in favor of MCCSC, and construes the evidence in the light most favorable to Mayer, according her the benefit of all reasonable inferences. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1012 (7th Cir. 2006).

I. The District Court Erred In Holding As a Matter of Law That No In-Class Speech Can Ever Be Protected by the First Amendment

The essence of the district court's summary dismissal of Mayer's free speech claims is that no speech by a teacher *in the classroom* can ever be protected because everything that happens in the classroom is part of the curriculum and is under the "exclusive control" of the school board. (Entry, pp. 25-26). The district court reasoned simply that, since Mayer's speech regarding peace as an alternative to the impending war in Iraq took place in the classroom, it was not protected and, therefore, there was no need to conduct a *Pickering* analysis. *Id.* The district court erred because: (1) speech or expression in the classroom is entitled to protection under certain circumstances such as those present here; (2) *Pickering* balancing is mandatory where, as here, the speech or expression clearly involves a matter of public concern and not a personal grievance against the employer and where, as here, there is an adverse action and/or a direct attempt to chill the protected speech; (3) the district court's reliance on cases from the Fourth and Fifth Circuits was misplaced because, unlike those cases, there was no attempt by Mayer to "arrogate control" of the curriculum; and (4) the fact that Mayer expressed her opinion in the classroom did not convert her speech as a citizen into employee speech or government speech.

A. Classroom speech commands special First Amendment protection

The United States Supreme Court has carved out special protection for speech on matters of public concern in the academic realm:

> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of our independence and vigor of Americans who grow up and live in this relatively permissive, often disputations, society.
>
> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to 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. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained. *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966).

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508-09, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *see also Shelton v. Tucker*, 364 U.S. 479, 487, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools.").

While *Tinker* specifically concerned free expression by students, it is clear that teachers also enjoy first amendment rights while teaching and while in the classroom:

> With respect to **both teacher and student**, the responsibility of school authorities to maintain order and discipline in the schools remains the same. The ultimate goal of school officials is to insure that the discipline necessary to the proper functioning of the school is maintained among both teachers and students. Any limitation on the exercise of constitutional rights can be justified only by a conclusion, based upon reasonable inferences flowing from concrete facts and not abstractions, that the interests of discipline or sound education are materially and substantially jeopardized, whether the danger stems initially from the conduct of students or teachers. **Although it is not unreasonable to assume that the views of a teacher occupying a position of authority may carry more influence with**

> **a student than would those of students *inter sese*, that assumption merely weighs upon the inferences which may be drawn. It does not relieve the school of the necessity to show a reasonable basis for its regulatory policies**. As the Court has instructed in discussing the state's power to dismiss a teacher for engaging in conduct ordinarily protected by the first amendment: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968).

James v. Board of Education, 461 F.2d 566, 571-72 (2nd Cir. 1972) (emphasis added). The Second Circuit in *James* held that where the Board of Education submitted no evidence that the teacher's speech "threatened to disrupt classroom activities or created any disruption in the school," the regulation of the teacher's in-class speech was unconstitutional. 461 F.2d at 572. The court in *James* rejected the Board's claim that *Tinker* did not govern the teacher's free expression case. The Board argued that ". . . a teacher may have a far more pervasive influence over a student than would one student over another," and therefore the Board's broad power to control the curriculum should extend "to controlling a teacher's speech in public schools. . . ." *Id*., at 573. Rejecting this claim, the *James* court said:

> The question we must ask in every first amendment case is whether the regulatory policy is drawn as narrowly as possible to achieve the social interests that justify it, or whether it exceeds permissible bounds by unduly restricting protected speech to an extent "greater than is essential to the furtherance of" those interests. *See United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968). Thus, when a teacher presents a colorable claim that school authorities have infringed on his first amendment rights and arbitrarily transgressed on these transcendent values, **school authorities must demonstrate a reasonable basis for concluding that the teacher's conduct threatens to impair their legitimate interests in regulating the school curriculum**.

Id., at 574 (emphasis added).

These authorities make it clear that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students," (even when the

teachers are in class and addressing students) and that before school authorities can stifle or restrict particular speech or the expression of an opinion by a teacher in class (as they did *James* and in the case at bar), they must make a specific showing that the speech if allowed to occur would materially and substantially interfere with "the requirements of appropriate discipline in the operation of the school," and that their regulation of the speech was drawn "as narrowly as possible" to achieve its end. *Tinker*, 393 U.S. at 506 and 509; *James*, 461 F.2d at 574. School is a special place, and First Amendment problems arising in the context of classroom speech deserve – and require – a delicate and particular balancing by courts.

B. The District Court erroneously held that no in-class speech can ever be protected, regardless of whether or not it is on a matter of public concern

At the core of the district court's analysis of this case was the incorrect assumption that school boards possess "exclusive" control over every word uttered inside a school classroom by the teacher. (Entry, p. 25). The district court found that "public school teachers are not free, under the First Amendment, to arrogate control of the curricula," *Id., citing Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 369 (4th Cir. 1998), and reasoned that since Mayer's comment on "this matter of public concern" [the impending war in Iraq] occurred during classroom instruction time, and since "school officials are free to adopt regulations prohibiting classroom discussion of the war in Iraq while allowing teachers and students the opportunity to engage in discussions about the war elsewhere. . . .", there could not possibly be a constitutional violation in the case at bar because no speech by any teacher in class can ever be protected. (Entry, pp. 25-26). As the district court put it:

> The point is that whatever the school board adopts as policy regarding what teachers are permitted to express in terms of their opinions on current events

> during the instructional period, that policy controls and there is no First Amendment right permitting teachers to do otherwise.

(Entry, p. 27).

There are a number of serious flaws in the district court's analysis of Mayer's rights in this case. First, the district court's conclusion that the First Amendment never protects speech by a teacher in class is a misstatement of the law. *See, e.g., James*, 461 F.2d at 571-574 (despite broad power of school board to set curriculum, teacher had First Amendment right to wear a black armband in class as a symbolic protest against the nation's involvement in the Vietnam War, where there was no showing by school that such speech disrupted classroom activities); *Sterzing v. Fort Bend Indep. Sch. Dist.*, 376 F.Supp. 657 (S.D.Tex. 1972)[5] (teacher had First Amendment right to answer honestly student's question whether teacher was opposed to interracial marriages, despite backlash from parents, where there was no evidence that teacher was insubordinate regarding his choice of teaching methods); *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036 (6th Cir. 2001) (elementary school teacher had First Amendment right to invite a speaker to talk to her class about the benefits of industrial hemp, despite backlash from other teachers and school staff, and many parents and members of the school community). As the Supreme Court said thirty-seven years ago: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years." *Tinker*, 393 U.S. at 506. Even more on point, the *Tinker* court proclaimed:

[5] Vacated and remanded because district court denied reinstatement remedy on improper grounds, *Sterzing v. Fort Bend Indep. Sch. Dist.*, 496 F.2d 92 (5th Cir. 1974).

> Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, **or to supervised and ordained discussion in a school classroom**.

Id., at 513 (emphasis added). The district court's analysis cannot be squared with these principles.

C. The District Court's conclusion that Mayer's in-class speech warranted no protection is not supported by the *Boring* and *Kirkland* cases

The district court relied exclusively (and erroneously) on two cases from the Fourth and Fifth Circuits for the proposition that Mayer's in-class expression on a matter of admitted public concern was nevertheless unprotected because (1) it was in class, and (2) the school controls the classroom "exclusively." (Entry, pp. 24-28). The cases relied on by the district court, *Boring v. Buncombe County Bd. of Ed.*, 136 F.3d 364 (4th Cir. 1998), and *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 802 (5th Cir. 1989), bear no factual resemblance to this case, and in any event do not compel the result reached by the district court.

The Fourth and Fifth Circuits in *Boring* and *Kirkland* did not disregard the need to engage in *Pickering* balancing, nor did they find that no in-class speech by a teacher could ever be protected. In *Kirkland*, the court held that a supplemental reading list did not present a matter of public concern under the facts presented, and that *Pickering* balancing was not necessary. *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 799-800 (5th Cir. 1989). The case turned on the fact that Mr. Kirkland was not expressing any personal opinion – was not speaking "as a

citizen" – when he proffered his reading list. *Id*., at 800. Not because no teacher can ever speak as a citizen in class or at school, but because under the facts of the case it was clear that Mr. Kirkland did not speak on his allegedly protected issue until after he was disciplined. *Id*. In fact, the *Kirkland* court specifically noted that it is "well settled that even nontenured public school teachers do not shed first amendment protection in speaking on matters of public concern," *Id*., at 798, and qualified its holding this way:

> Our decision should not be misconstrued as suggesting that a teacher's creativity is incompatible with the first amendment, **nor is it intended to suggest that public school teachers foster free debate in their classrooms only at their own risk** or that their classrooms must be "cast with a pall of orthodoxy." We hold only that public school teachers are not free, under the first amendment, to arrogate control of curricula.

Id., at 801 (emphasis added). Respectfully, it is clear that the district court misconstrued the holding in *Kirkland* in exactly the way the Fifth Circuit hoped to avoid. When Ms. Mayer answered her students' question and discussed her personal opinion on peace as an alternative to the impending war in Iraq, fostering free debate is exactly what she was doing. It was exactly what her students wanted her to do. She was teaching the approved curriculum. Her protected expression was in no way comparable to what Mr. Kirkland did when he knowingly ignored the approved reading list and substituted his own, even though there were administrative guidelines available to him that he could have used to have his substitute list approved. *Id*., at 800.

Likewise, in *Boring*, the Fourth Circuit's holding turned on the question of whether selection of a particular play for inclusion in a high school's curriculum was a matter of public concern. The court held it was not, following precisely the reasoning in *Kirkland* – that the teacher's claimed right to control the curriculum was not speech on a matter of public concern, and was therefore not entitled to protection or further analysis. *Boring v. Buncombe Cty. Bd. of Ed.*, 136 F.3d 364, 368-370 (4th Cir. 1998). For the same reasons that *Kirkland* does not support the

district court's conclusion, *Boring* does not apply to the case at bar either. Not only was Mayer's speech completely divorced from any struggle to control curriculum, it was admittedly based on approved curriculum. More importantly, the "public concern" element in Mayer's case is firmly established, as the district court acknowledged. (Entry, p. 24). It is clear that had the courts in *Boring* and *Kirkland* found the teachers there to be giving their opinions on a matter of public concern, those courts would have proceeded to the familiar *Pickering* balancing test to see if the schools had a valid justification to limit the speech.

Neither *Boring* nor *Kirkland* held that no speech by a teacher in class could ever be protected by the First Amendment. Those cases are limited to their facts. In each case the teacher claimed a constitutional right <u>to decide what the curriculum should contain</u> for the students in their classes (in *Boring*, the selection of a play was at issue; in *Kirkland* it was the selection of a supplemental reading list). Of course, as a general matter, teachers do not have a constitutional right to set curriculum. There is nothing new in the notion that schools have the right to control their own curriculum, and Mayer does not dispute that point. Indeed, the Second Circuit in *James* paid much attention to the "broad power" of the schools when it comes to making curriculum choices: "Accordingly, courts consistently have affirmed that curriculum controls belong to the political process and local school authorities." *James*, 461 F.2d at 573. But, in *James*, just as in the case at bar, the teacher was not doing anything to take control over the curriculum. Rather, the teacher in both instances was merely expressing a simple point of view -- a personal opinion -- on a matter of great public concern. And, in this case, the district court should have followed the analysis in *James* and rejected the argument that all teacher speech in the classroom is subject to unlimited restriction because young minds are impressionable or

because the students are a "captive group." The Second Circuit properly rejected these arguments as "fallacy":

> More than a decade of Supreme Court precedent leaves no doubt that we cannot countenance school authorities arbitrarily censoring a teacher's speech merely because they do not agree with the teacher's political philosophies or leanings. This is particularly so when that speech does not interfere in any way with the teacher's obligations to teach, is not coercive and does not arbitrarily inculcate doctrinaire views in the minds of the students.

James, *Id.* In short, even a school board's broad power to exercise curriculum controls is limited by the requirement that "those charged with overseeing the day-to-day interchange between teacher and student . . . exercise that degree of restraint necessary to protect first amendment rights." *James*, 461 F.2d at 573-574. "In the classroom there are recognized limits on local control of educational matters. School boards are for example not free to fire teachers for every random comment in the classroom." *Zykan v. Warsaw Comm. Sch. Corp.*, 631 F.2d 1300, 1305 (7th Cir. 1980) (citing *Sterzing v. Fort Bend Indep. Sch. Dist.*, 376 F.Supp. 657 (S.D.Tex. 1972).

The district court's reliance on *Kirkland* and *Boring* was misplaced because Mayer was <u>not</u> deviating from approved curriculum when she spoke on peace. Indeed, her comments were made, as the district court noted, "during a classroom instruction session based on approved curriculum and in response to a legitimate, altogether appropriate question from a student." (Entry, p. 26). The question specifically requested Mayer's personal view; Mayer obliged in a highly appropriate, professional way. (App. 251, Mayer Dep., pp. 62-64). Defendants have never claimed that Mayer's speech disrupted the class or interfered in any way with Mayer's ability to carry out her duties. Therefore, as was the case in *James*, there simply is no constitutionally permissible basis for the school to restrict – let alone punish – Mayer's speech. Here, the record shows Defendants did both. Summary judgment therefore should have been denied.

D. The District Court erred in failing to consider the content, form, and context of Mayer's in-class expression

The district court's refusal to engage in *Pickering* balancing, where there is no dispute that the speech at issue was squarely on a matter of public concern and conclusive evidence that the school engaged in conduct specifically designed to chill that speech, violated long-established Supreme Court and circuit precedent. Implicit in the Supreme Court's holding in *Connick v. Myers* was the notion that once speech has been found to touch on a matter of public concern (even if only a little bit, as was the case with Ms. Myers' questionnaire in *Connick*) the court is "compelled to examine for [itself] the statements in issue and the circumstances under which they are made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Connick v. Myers*, 461 U.S. 138, 150, 103 S.Ct. 1684, 1692, 75 L.Ed.2d 708, (1983), fn. 10, (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295 (1946)). In other words, it is axiomatic that once a court finds from the "content, form, and context of a given statement, as revealed by the whole record," that the plaintiff has engaged in speech on a matter of public concern, and where, as here, it is clear that the school took actions to chill that speech (and otherwise retaliated against the speaker), the court must engage in the balancing described in *Pickering*. *Id*. The district court's failure to do so here was error.

It is worth noting that in *Connick v. Myers*, the issue of whether there was a causal connection between the adverse employment action and the speech Ms. Myers claimed was protected was not before the Supreme Court. It is clear, however, that the burden of demonstrating a connection between the protected speech and termination of employment rests with the plaintiff; it is one of the elements of a First Amendment retaliation claim. *See, e.g.,*

Gustafson v. Jones, 290 F.3d 895, 906 (7th Cir. 2002) (to prevail on "First Amendment retaliation claim" plaintiff must show that speech was on a matter of public concern and that speech played "at least a substantial part" in adverse employment action). Plaintiff-Appellant herein asserts a retaliation claim, but also asserts a separate claim that Defendants' actions chilled her speech. "Any deprivation under color of law that is likely to deter the exercise of free speech, whether by an employee or anyone else, is actionable . . . ." *Power v. Summers*, 226 F.3d 815, 820 (7th Cir. 2000). The district court summarily dismissed Mayer's "chilling" claim for the same reason it dismissed her retaliation claim – not because the causation element was missing, but because no in-class speech could ever be protected. (Entry, pp. 26-28). In so doing, the district court turned First Amendment analysis on its head.

The district court ignored the content, form, and context of Mayer's protected speech and seems to have assumed (erroneously) that Mayer was attempting to "arrogate control" of the curriculum when she answered her students' question. (*See* Entry, pp. 26-27). It is true, as the court observed, that "school officials are free to adopt regulations prohibiting classroom discussion of the war in Iraq . . . without violating First Amendment protections," (Entry, p. 26)[6], but it is also true, and undisputed, that there were no such regulations in place when Mayer spoke about peace as an alternative to the impending war in Iraq, as the district court duly noted. (Entry, p. 27). More importantly, an analysis of the content and form of Mayer's speech reveals that, like the armbands in *Tinker* and *James*, Mayer's in-class expression of her personal opinion was "closely akin to 'pure speech'" which, as the Supreme Court has repeatedly held, "is entitled to comprehensive protection under the First Amendment." *Tinker*, 393 U.S. at 506, citing *Cox v.*

[6] However, if such a regulation were adopted, it would have to be "drawn as narrowly as possible to achieve the social interests that justify it. . . ." *James*, 461 F.2d at 574, citing *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968).

Louisiana, 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471 (1965); *Adderley v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966).

As was the case in *Tinker* and *James*, there is no indication at all in the record that Mayer's expression caused any disruption in her class.[7] Mayer's expression was very similar to wearing an armband, but less invasive or obtrusive. Wearing an armband as in *Tinker* and *James* is a constant expression of an opinion, whereas Mayer's expression was only momentary. Moreover, Mayer's expression was actually solicited by her class, a factor not present in the armband cases. Given the fact that the form of Mayer's expression was pure speech, that it was appropriate in the context of the lesson being taught, and given that its content was simple, clear, and entirely divorced from any attempt to disrupt the class or air an employee grievance, the district court erred in categorically refusing to afford protection to Mayer's speech or even to balance Mayer's interests against the school's. Teachers *in class* can engage in expression presumptively protected by the First Amendment. When they do, and when that speech is regulated, then "in each case" the court must inquire as to whether the regulatory policy is "drawn as narrowly as possible to achieve the social interests that justify it," and as to whether the school officials can demonstrate a "rational basis for concluding that the teacher's conduct threatens to impair their legitimate interests in regulating the school curriculum." *James,* 461 F.2d at 573-574. *See also Goldwasser v. Brown*, 417 F.2d 1169 (D.C. Cir. 1969), *cert. denied* 397 U.S. 922, 90 S.Ct.918, 25 L.Ed.2d 103 (1969) (*Pickering* test applies to teacher's classroom speech at Air Force

[7] "If the conduct takes the form of simply and unobtrusively communicating an idea, with the physical action element of the conduct limited to the extent necessary to transmit the idea, then the conduct is pure expression or speech and is entitled to the highest degree of protection." *Kucinich v. Forbes*, 432 F.Supp. 1101, 1111 (N.D. Ohio 1977), citing *Tinker*, 393 U.S. 503, 505-506; and *Buckley v. Valeo*, 424 U.S. 1 (1976). The government cannot restrict pure speech in the absence of a "clear and present danger" to society. *Id*. (citations omitted).

language school). The district court erred by failing to analyze this case based on the *Pickering* factors. Summary judgment for MCCSC must therefore be reversed.

Finally, the district court's reliance on *Gonzalez v. City of Chicago*, 239 F.3d 939 (7th Cir. 2001), was misplaced. This Court in *Gonzalez* specifically rejected a *per se* rule that no on-the-job speech could ever be protected. *Id.*, at 942; *see also Delgado v. Jones*, 282 F.3d 511, 518-519 (7th Cir. 2002), *cert. denied*, 543 U.S. 925, 125 S.Ct. 346, 160 L.Ed.2d 223 (2004) (fact that public employee's job responsibilities "may in some measure overlap with motivations of a well-meaning citizen" does not result in lack of First Amendment protection). The flaw in the district court's analysis of Mayer's speech is that the court concluded, incorrectly, that Mayer spoke only as an "employee" and not as a "citizen" when she answered her students' request for her personal opinion. (Entry, p. 28). In the cases just cited, this Circuit has rejected such a rigid view of speech on the job.

E. *Garcetti v. Ceballos* does not control this case

Plaintiff-Appellant predicts that MCCSC will ask this Court to hold that the Supreme Court's recent opinion in *Garcetti v. Ceballos* controls this case because Mayer's speech occurred in the classroom and during the instructional period. Any such argument would have no merit.

The Supreme Court made special note of the uniqueness of First Amendment claims arising out of the classroom context in its recent opinion in *Garcetti v. Ceballos*, --- U.S. ----, 126 S.Ct. 1951 (May 30, 2006). In *Garcetti*, the Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.*, at 1960. However, the Court specifically reserved judgment on

whether its analysis in *Garcetti* would apply in cases such as this one because "[t]here is some argument that expression related to academic scholarship **or classroom instruction** implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence." *Id.*, at 1962 (emphasis added).

What are the "additional constitutional interests" the Supreme Court was concerned about in *Garcetti?* They are, at a minimum, the notions of "academic freedom" and "political expression."[8] For example, a teacher has a First Amendment right to academic freedom in the teaching of approved curriculum to his or her class, and that right is infringed where, as here, the teacher is punished or suffers retaliation after parents complain about the teaching of that curriculum. *Stachura v. Memphis Comm. Sch. Dist.*, 763 F.2d 211, 215 (6th Cir. 1985), reversed on other grounds, *Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986). More important, however, is the interest of each and every citizen in self-government: "The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984). Therefore, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). This is why "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citation omitted). Simply put, granting absolute, unchecked authority to a local school principal to strictly forbid a teacher from even mentioning peace as an

[8] When the majority acknowledged the "additional constitutional interests" that "are not fully accounted for" in *Garcetti*, the referred to Justice Souter's dissent. These are the interests Justice Souter was concerned about. 126 S.Ct. at 1962, 1969-1970.

alternative to war, which is a public affair of the highest order, is not what the Supreme Court had in mind in *Garcetti*. This is especially true where, as here, the teacher's opinion on the subject was solicited by her class, and was a natural outgrowth of a lesson based on curriculum specifically approved by the school. The circumstances of this case implicate directly the additional constitutional interests about which the Supreme Court was concerned in *Garcetti*; therefore, the analysis in that case is inapposite.

Moreover, and perhaps even more importantly, it is clear that the essence of the majority's opinion in *Garcetti* rested on the premise that "[r]estricting speech that **owes its existence** to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Garcetti*, 126 S.Ct. at 1959 (emphasis added). The issue in *Garcetti* was whether or not a memo written by Mr. Ceballos pursuant to his official job duties constituted protected speech. *Id.*, at 1959-1960. Mr. Ceballos' memo never would have been written had he not been functioning in his official capacity; there would never have been any reason for Mr. Ceballos even to form the opinions he expressed in the memo had he not been a deputy district attorney. By contrast, Mayer's opinions about peace were personal to her; they formed not because of any on-the-job investigation she was required to do but because she paid attention to current events and had a son in the military whom she would rather have kept out of harm's way. Her speech did not owe its existence to her job any more than Mr. James' armband owed its existence to his. It was her view as a private citizen expressed to her students only because it became relevant during an officially sanctioned in-class discussion of current events. Unlike the situation in *Garcetti*, the speech here was not speech which "the employer itself has commissioned or created" and therefore has the right to control. *Id.,* at 1960. To find, as the district court did, that Mayer spoke as an employee and not as a citizen is to pretend that teachers

are not also citizens. That proposition has been resoundingly rejected, *Tinker*, 393 U.S. at 506 and 509; *James*, 461 F.2d at 574, and cannot be used as a basis to deny Mayer her day in court. As Justice Kennedy noted in *Garcetti*, "it would not serve the goal of treating public employees like 'any member of the general public,' *Pickering*, 391 U.S. at 573, 88 S.Ct. 1731, to hold that all speech within the office is automatically exposed to restriction." *Garcetti*, 126 S.Ct. at 1959. Yet that is exactly what the district court held here: that all speech within Mayer's "office" – the classroom – is automatically exposed to restriction. That holding was error, and *Garcetti* does nothing to change this.

II. Genuine issues of fact preclude summary judgment on Mayer's claim that Defendants' actions to chill or prohibit protected speech were unconstitutional

Defendants' sole emphasis in their motion for summary judgment was on only one of Plaintiff's two types of First Amendment claims in this case. Defendants were concerned only with whether Plaintiff could demonstrate a triable issue on the question of whether the termination of her contract with MCCSC was motivated by illegal reasons. Defendants ignored Mayer's claim that Defendants' actions chilled her right to engage in protected speech.

If reasonable minds could conclude that Defendants took steps to chill Plaintiff's exercise of a protected right, then summary judgment was improper regardless of whether a triable issue of fact exists on Mayer's non-renewal/termination claim. Actions taken by Defendants in this case which were likely to chill Mayer's protected speech – however trivial they may have been – are actionable pursuant to long-settled law:

> Any deprivation under color of law that is likely to deter the exercise of free speech, whether by an employee or anyone else, is actionable, even for something as trivial as making fun of an employee for bringing a birthday cake to the office to celebrate another employee's birthday, *Bart v. Telford*, 677 F.2d 622, 624 (7th Cir. 1982), if (an important qualification, emphasized in *Bart, Id.* at 625) the

> circumstances are such as to make such a refusal an effective deterrent to the exercise of a fragile liberty.

Power v. Summers, 226 F.3d 815, 820 (7th Cir. 2000), citing *McGill v. Board of Education*, 602 F.2d 774, 780 (7th Cir., 1979); *Glass v. Dachel*, 2 F.3d 733, 741 (7th Cir. 1993); *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990). Even in the absence of a retaliatory discharge, damages are available to a victim of harassment designed to chill protected speech. *See, e.g.*, *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989) (compensatory damage award of $95,000.00 was not excessive even though employee retained her job, salary, and benefits in the face of campaign of harassment). As Mayer's Complaint makes clear, this case has never been solely about the termination of Plaintiff's contract. Defendants waived argument on this point by not seeking summary judgment on Plaintiff's "chilled speech" claim. And, even if Defendants had not waived their argument in this regard, summary judgment nevertheless was inappropriate because the undisputed evidence supports Plaintiff's claim.

In response to Plaintiff's speech about war and peace, Defendants took the following steps. First, at the meeting with Mayer, Principal Rogers, and Mr. and Mrs. Hahn on January 13th, Principal Rogers unilaterally prohibited Mayer from discussing peace in her classroom, telling an angry Mr. Hahn "I think she can do that. I think she can not mention peace in her class again." (App. 252, Mayer Dep., pp. 74-76). This statement alone would chill a person of ordinary firmness from exercising her right to free speech for fear of losing her job (as Plaintiff did). (App. 252, Mayer Dep., p. 76).

Second, immediately following the meeting with the Hahns, Principal Rogers circulated the memo entitled "Peace at Clear Creek." (App. 9, ¶ 28; 17; 25, ¶ 28; 253-254). The memo, identified as being "From the Principal," said, in relevant part:

> We are living in scary times with the threat of war and a high level of concern for everyone's personal safety. For many years at Clear Creek, we have had an annual Peace Month in January and support the peaceful solution of problems through mediation. This continues to be a focus for the way we solve problems here. Learning requires a peaceful environment.
>
> We absolutely do not, as a school, promote any particular view on foreign policy related to the situation with Iraq. That is not our business. Individuals in a democracy have personal beliefs, but a public school acknowledges various points of view and those might be discussed related [to] current events and the news.
>
> Do we talk about peace at school? Yes, as a general approach to solving problems at Clear Creek. Please do not confuse that educationally sound goal with a stance on foreign policy.

Id. At the meeting where Principal Rogers handed out the "Peace at Clear Creek" memo, she told the teachers that Peace Month was cancelled. (Mayer Dep., p. 88). Plaintiff described the discussion at the faculty meeting about the memo this way:

> 88
>
> Q What was discussed at the faculty meeting regarding this memo which is Exhibit 4?
> A There really wasn't much of a discussion.
> Q Was there any discussion about it?
> A Victoria Rogers passed it out to everyone. She said that Peace Month would be cancelled.
>
> * * *
>
> And I said to her after she had read the memo, I said, "Maybe we could still teach about peace and just let students know that you can be for peace and still be patriotic."
> And she said she thought that topic was too hot to handle in the climate of the school and the culture of the school and that we were not to teach
>
> 89
>
> about peace in our classes.

(Mayer Dep., pp. 88-89). Reasonable minds could infer from this evidence that Rogers intended to stifle discussion of peace as an alternative to war, and that a person of ordinary firmness would feel compelled to keep quiet on the subject.

The third step taken by Defendants to chill any discussion by Plaintiff about peace as an alternative to war came a few weeks after the meeting with the Hahns, and the "Peace at Clear Creek" memo, when Principal Rogers and Assistant Principal Miller sent Plaintiff the "formal letter of concern" dated February 7, 2003. (App. 109). This letter plainly states that Ms. Mayer is "directed" to "Refrain from presenting your political views." *Id.* It was sent to Mayer two (2) days after Principal Rogers received an email from Mrs. Hahn complaining that Ms. Mayer was "still lecturing the class to protest the war." (App. 199, ¶9; 223).

Reasonable minds could find that these steps, all of which were taken under color of law, were designed – indeed specifically intended – to chill Plaintiff's constitutionally protected speech. This evidence alone rendered summary judgment inappropriate. But there is more than this, because Plaintiff contends that the entire campaign of letter and memo writing by Rogers, which only began after Plaintiff taught the *Time For Kids* lesson on January 10, 2003, was designed to harass her in retaliation for her speech. That campaign started with the "formal letter of concern," which Plaintiff testified was the first time Rogers had ever spoken to her about "complaints whatsoever" about her. (App. 255, Mayer Dep., pp. 91-92). Mayer testified that all of her problems with Rogers began *after* the peace lesson. (App. 260, Mayer Dep., p. 183). Prior to that, she had enjoyed a "regular professional relationship" with Rogers. *Id*. If asked to use one word to describe her relationship with Rogers after the peace lesson and the meeting with the Hahns, the word Plaintiff would use is "Harassment." *Id.*

For all of these reasons, summary judgment on Plaintiff's claim that Defendants chilled her free speech was inappropriate.

III. Genuine issues of fact preclude summary judgment on Mayer's retaliation claim

As this Court has made clear, "[a] proper analysis of a public employee's First Amendment claim proceeds in a sequence of three steps." These are: (1) decide whether the speech, if uttered by someone who was not a public employee, would be protected; if so, then (2) decide whether the speech is merely a personal employee grievance of the type disqualified from protection in *Connick*; if so, the case is over; if not, then (3) decide whether the public employer had a "convincing reason to forbid the speech." *Dishnow v. School District of Rib Lake*, 77 F.3d 194, 197 (7th Cir. 1996).[9]

MCCSC admits, as it must, that Mayer's speech in this case – on the topic of the propriety of the impending war in Iraq – "is clearly as much a matter of public concern as that of the Vietnam war recognized in *Tinker v. Des Moines Indep. Cmt. Sch. Dist.*, 393 U.S. 503 (1969)." (R. at Doc. # 28, Defendants' Brief, p. 18). Clearly, Mayer's expression was of the type that would be protected if uttered by someone who was not a public employee. Content here favors protection.

The next question under the *Dishnow* analysis is whether Mayer's speech was a "personal employee grievance." This is commonly referred to as the "*Connick* Defense." *Dishnow*, 77 F.3d at 198. MCCSC ignored this question in the district court, perhaps because the answer was obvious. This is not a case where a personal grievance is held out to be protected speech, as was the case in, for example, *Cliff v. Board of School Commissioners of the City of Indianapolis*, 42 F.3d 403 (7th Cir. 1994) (personal grievance over size of math classes and "general disorder" at

[9] The district court flatly refused to apply the *Dishnow* analysis to Mayer's case, dismissing it as "too simplistic an approach for this case. . . ." (Entry, p. 23, fn 5).

Broad Ripple High School held not protected). Mayer's speech in this case was not a grievance at all; rather, it was an expression of her own personal view that peaceful alternatives to war should always be pursued to the fullest, and an expression of truth – that yes, indeed, the United States had previously given weapons to Iraq. (App. 251, Mayer Dep., pp. 62-64). Mayer was not responding to any criticism or defending herself in any way when she made her comments; rather, she was responding to a legitimate question asked by one of her students. The question stemmed from the *Time For Kids* article (App. 220) that had just been discussed by the class; thus, Mayer was acting both as a teacher presenting approved curriculum to the class, *and* as a private citizen who had just been asked for her personal opinion on a matter of great public concern.[10] Her speech was not a personal grievance.

The third inquiry, then, normally would be whether or not Defendants had a "convincing reason" to forbid Plaintiff from speaking as she did. *Dishnow*, 77 F.3d at 197. This is the familiar *Pickering* balancing test. However, in this case, Defendants waived their *Connick/Pickering* defense just as the defendant in *Dishnow* did – by failing to ask the court to balance the interests. Nowhere in Defendants' brief was there any suggestion or argument whatsoever that MCCSC was justified in imposing a restriction on Mayer's speech about the impending war in Iraq. Nowhere did the school ask the court to balance the interests of the school district in furthering its educational goals against the constitutional rights of a public school teacher giving a lesson (based on approved curriculum) about current events.

As a matter of trial strategy, Defendants could not ask for that balancing to be done because it would require Defendants to admit both that Mayer's speech was entitled to *"prima facie*

[10] Defendants attempted to portray Mayer as having ignored their directive that she refrain from speaking to her students about this subject matter. However, as discussed elsewhere in this brief, after Plaintiff was told by Principal Rogers not to discuss these matters with her children further, she never did again for fear of losing her job. (App. 252).

protection" in the first place, *Dishnow*, 77 F.3d at 197, and that they took specific actions designed to chill that speech. Rather than make those admissions, Defendants chose to waive the defense and argue instead that no speech by a teacher in the classroom could ever be protected, regardless of the content, because the school has the right to control the curriculum. (*See* R. at Doc # 28, Defendants' Brief, pp. 18-19). As noted above, the district court erred by accepting this argument. (*See* Section I above).

As argued above, there is no question that Mayer's in-class speech on a matter of great public concern was entitled to protection. The district court should have proceeded to the third step of the *Dishnow* analysis and balanced the interests of the parties in accordance with *Pickering*. That balance clearly tips in favor of Mayer.

A. *Pickering* balancing favors protection of Mayer's speech

The factors examined by the Supreme Court in applying the *Pickering* balancing test include "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). Also, because this is a case that very substantially involves a matter of public concern (as opposed to an employee grievance regarding her employer as in *Connick*) the employer must make a stronger showing that its interests in regulating the speech outweigh Plaintiff's interest in speaking. *Cockrel*, 270 F.3d at 1053, citing *Connick*, 461 U.S. at 150 ("[w]e caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern."). As this Court has said: "[t]he greater the potential social, as distinct from purely private, significance of the employee's speech, the less likely is the employer to be

justified in seeking to punish or suppress it." *Eberhardt v. O'Malley*, 17 F.3d 1023, 1026 (7th Cir. 1994). Here, the significance of Mayer's speech was purely public and not private at all; it was not a grievance at all, but a statement of pure opinion on a matter of the utmost importance to society as a whole. Thus, to "punish or suppress" this speech, Defendants must overcome a very high hurdle. They cannot jump so high in this case.

There is no evidence that Ms. Mayer's speech in this case in any way impaired discipline by superiors or harmony among co-workers at Clear Creek Elementary School. Nor is there any credible reason to think that her expression of her opinion – for example that she "honks for peace" – would be the source of any interference with the performance of Ms. Mayer's duties or the operation of the school. The fact that one student's parents disagreed with the content of her speech and complained about it does not rise to the level of the type of interference with the normal operation of the school that justifies the prior restraint on speech imposed by Principal Rogers in this case. There is no evidence that any deliberative process on the part of Defendants took place before the decision was made to order a blanket prohibition against Ms. Mayer's expression of her "political views" and ordered "Peace Month" cancelled. Defendants have not made (and cannot make) any showing that the school's interests in this case outweigh Mayer's, and most certainly cannot make the "stronger showing" required in this case.

To the extent Defendants may argue it was necessary to restrict Ms. Mayer's speech to avoid a conflict with parents, their argument fails. In their statement of the case in the Case Management Plan, which was later incorporated into Defendants' sworn Interrogatory responses, Defendants claimed that "Peace Month" was cancelled "to diffuse the situation" that had arisen when Mr. Hahn came to the school to complain about Ms. Mayer's speech. (App. 37; 183). What situation needed to be diffused? One angry parent is not sufficient justification to ban or

punish protected speech. *See, e.g.*, *Cockrel v. Shelby County School Dist.*, 270 F.3d 1036, 1053-56 (6th Cir. 2001) (*Pickering* balancing favored discharged teacher despite the fact of numerous protests and letters by parents and "evidence of a contentious and periodically disrupted work environment," because the allegedly disruptive speech had been approved by the school). This case is analogous to *Cockrel*, because the curriculum which spawned the speech in this case, as in *Cockrel*, had been approved by Defendants. For all of these reasons, summary judgment should have been denied.

B. Genuine issues of fact exist as to whether Mayer's protected speech was a substantial factor in her discharge and whether Defendants' proffered reasons for her discharge are pretextual

1. Appropriate legal standard

It is appropriate to apply the *Vukadinovich* three-step analysis to Mayer's retaliatory non-renewal (or as Defendants call it, "contract termination") claim. The three steps are: (1) was Mayer's speech constitutionally protected? If so, (2) were Defendants' actions motivated by her constitutionally protected speech? If Plaintiff makes these showings (and she does), then the burden shifts to Defendants to prove by a preponderance of the evidence that they would have cancelled/non-renewed/terminated Ms. Mayer's contract regardless of her protected speech. *Vukadinovich v. Bd. of Trustees of North Newton Sch. Corp.*, 278 F.3d 693, 699 (7th Cir. 2002).

It is important to note that since Defendants bear the burden of proof on their claim that they would have taken the same action regardless of the speech, they must do more than come forward with evidence *allowing* a jury to believe them; rather, they must produce evidence meeting their burden of persuasion *and* that evidence must be "so powerful that no reasonable jury would be free to disbelieve it." 11 James William Moore, *et al.*, *Moore's Federal Practice* § 56.13[1], at 56-138 (3d ed. 2000). As the Supreme Court has held: "[s]ummary judgment in

favor of the party with the burden of persuasion . . . is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999). As the Court will see, the evidence proffered by Defendants as to their alleged reasons for terminating Mayer's employment is not so powerful and is, in fact, susceptible to inferences favorable to Mayer. Because this is so, the burden of proving pretext does not shift to Mayer in this case.

2. Methods of proving pretext

Nevertheless, assuming the Court finds that the burden to show pretext does shift back to Mayer in this case, the evidence of pretext here is powerful and precludes summary judgment. Plaintiff can show pretext by demonstrating that (1) Defendants' alleged justifications for the discharge have "no basis in fact," that (2) the justifications were not the "real reason" for the discharge, or that (3) the justifications were "insufficient to warrant the termination." *Vukadinovich*, 278 F.3d 700, citing *Worth v. Tyer*, 276 F.2d 249, 265-66 (7th Cir. 2001). Another recognized way to show pretext is to show that Defendants' ostensible justification is "unworthy of credence." *Testerman v. EDS Technical Products Corp.*, 98 F.3d 297 303 (7th Cir. 1996); *Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285, 289 (7th Cir. 1999). One typical way of meeting this burden is to introduce evidence that Defendants have "changed their story" about the reasons for the termination. *Id.*, at 291, citing *Perfetti v. First Nat'l Bank of Chicago*, 950 F.2d 449, 456 (7t Cir. 1991), *cert. denied*, 505 U.S. 1205 (1992) (when employer gives one reason at the time of the adverse employment decision, and at trial gives another reason unsupported by the documentary evidence, the jury could reasonably conclude that the new reason was a pretextual after-the-fact justification).

3. The evidence demonstrates Defendants' justification is pretextual

The evidence of pretext in this case comes in all of the forms identified above. However, perhaps the most compelling evidence of pretext here is Defendants' ever-changing story about their alleged justification for terminating Mayer's employment. The analysis of this evidence starts with the original, official stated reason given by Principal Rogers for her recommendation that Mayer's contract not be renewed.

a. The original, official reason for Mayer's non-renewal

There is no dispute that Principal Rogers was the relevant decision-maker in this case. (App. 226, Rogers Dep., p. 55). Thus, the starting point for finding pretext in this case is the original, officially stated reason for the non-renewal. This official statement is found in the "STAFF MEMBER END-OF-YEAR REPORT" dated April 24, 2003 and signed by Principal Rogers. (App. 107). A review of that form makes it clear that the "contract termination" recommendation was based on "visitations" on 11/21/02, 2/28/03, and 4/16/03; on "conferences" on 2/12/03, 3/27/03, and 4/21/03, and that "memos" dated 3/26/03, 4/1/03, and 4/9/03 "may have contributed" to the end-of-year report. *Id*.

In other words, it is clear that at the time Principal Rogers made the decision to terminate Mayer, she had a specific, finite set of visitations, conferences, and memos in mind which she believed justified the action taken. This is critical because, as the Court will see, the visitations, conferences, and memos cited by Rogers actually support an inference that Plaintiff's speech was directly related to her termination. And, more importantly, the visitations, conferences, and memos cited by Rogers are completely different from the justification Defendants are now proffering.

The only way to draw a circle around the original, official reason for Mayer's termination is to examine each of the visitations, conferences, and memos relied on by Rogers and see what they actually involved.

b, "Visitations" relied on by Principal Rogers

The classroom visitations referred to by Rogers were all favorable to Mayer and quite simply do not support the action taken. The 11/21/02 visitation refers to the observation form filled out by Assistant Principal Miller and is the one quoted by Plaintiff in her Complaint. It was very favorable to Mayer:

> Mrs. Mayer has stepped into a difficult situation, taking over a class two weeks into the school year. The previous teacher took another job and left. The students in the classroom are feeling abandoned as this same scenario occurred last year. The students stay in the same class for three years with one of the benefits being continuity of teachers. Unfortunately, this class has had four teachers in a one year time span. They are angry and not willing to trust.
>
> Mrs. Mayer is working hard to provide consistency and has high expectations for them both academically and socially. She has remained positive and persevered with a challenging group of students as well as parents.
>
> **It is impressive to watch Ms. Mayer put her vast knowledge of best practices into action**. She has much to offer in methodology and life experiences.

(App. 168) (emphasis added). There were no causes for concern listed in this evaluation, which was obviously very favorable to Mayer. Reasonable minds would conclude that this document does not support the adverse action taken against Mayer.

The 2/28/03 visitation refers to the first classroom observation Principal Rogers conducted of Mayer. (App. 115). Once again, a review of this document shows that it was also favorable to Mayer. With regard to "classroom environment and management," for example, Principal Rogers observed that "Deb has high expectations for student behavior. The environment is highly structured; students are working quietly. . ." *Id.* She also observed what she called a

"[n]ice use of student choice in voting for the magazine and allowing the students to propose articles to discuss. . . There was order throughout the lesson. Students raised their hands and always responded appropriately." *Id*. Under the heading "aspects of some concern," Principal Rogers noted that "[l]ittle connection was made to their lives or personal experiences." In response to this minimal critique, Ms. Mayer wrote:

> I was a bit apprehensive to relate the articles to real life experiences after having gotten into trouble for talking about peace as an option to war when the students asked questions about an article written about peaceful protests.[11]

Id. Regardless of this critique and Mayer's response, a reasonable jury would infer that the 2/28/03 observation did not warrant terminating Plaintiff.

Finally, the third visitation relied on by Rogers – dated 4/16/03 – like the others would be insufficient to motivate the discharge in this case. (App. 113). In that evaluation, Principal Rogers praised Mayer for her students being "on task throughout the group lesson" and commended her "involvement of each student in the lesson." *Id*. There were no causes for concern listed at all by the Principal. *Id*. This observation would not support terminating Mayer's contract.

c. <u>"Conferences" relied on by Rogers</u>

The first of the three (3) "conferences" relied on by Rogers in making her decision to terminate Mayer was a meeting on **February 12, 2003** between Rogers, Mayer, and Mayer's union representative Nancy Martin. This meeting (and the "letter of formal concern" dated February 7th) was prompted by an email on February 5th that Rogers received from Kimberly

[11] This comment tends to support the inference, urged by Plaintiff, that her speech on matters of public concern was actually chilled by Defendants' conduct. A jury will be entitled to infer that the sole criticism found anywhere in the record of classroom observations grew out of the fact that Plaintiff was told by Principal Rogers and Assistant Principal Miller to "refrain from expressing your political views." (App. 109).

Hahn alleging that Mayer was "still lecturing the class to protest the war." (App. 228-230, Rogers Dep., p. 83-90).[12] According to Rogers, prior to this meeting, Principal Rogers and Mayer discussed whether or not Mayer was in fact expressing her political views in class, to which Mayer responded that she was not. (App. 229, Rogers Dep., p. 89).[13] Also according to Rogers, Mayer's political speech was discussed at the February 12th meeting, as it was one of the points in the letter of concern. (App. 229, Rogers Dep., p. 86). The February 7th letter of concern and the February 12th meeting occurred because Principal Rogers felt that she "needed to document that [the presentation of political views] could not continue to happen." (App. 229, Rogers Dep., p. 89).

Based on this evidence, a reasonable jury could find that the purpose of the February 12th conference was to make sure that Mayer was not continuing to speak about peace or her views on the propriety of the impending war in Iraq. Equally important, however, is what was not discussed at the February 12th meeting. There was no discussion about any parent complaints other than the Hahns (who were complaining only about Plaintiff's alleged political speech). In fact, because the letter of concern made a vague reference to "long term supportive parents" who were at their "wit's end," Plaintiff took it upon herself to ask Rogers specifically to identify these parents and the nature of their problems. Rogers refused to do so. (App. 256, Mayer Dep., pp. 100-101). Thus, the jury can infer that there was no discussion in the 2/12/03 conference about any parent complaints other than the Hahns', whose complaint involved Plaintiff's speech about war and peace. Therefore, when Principal Rogers pointed to this conference as one of the

[12] This allegation was untrue, as Rogers learned when she asked Mayer about it. (App. 229-230, Rogers Dep., pp, 89-90).

[13] Mayer denies that Rogers asked her about her political speech prior to writing the "formal letter of concern" of February 7th, and contends that Rogers performed no investigation prior to sending the letter. (App. 10, Complaint, ¶ 36).

reasons for her decision to terminate Mayer, she was actually admitting that Plaintiff's speech about war and peace was the basis for her termination decision.

Indeed, to rely on alleged parent complaints never made known to Mayer would be a blatant violation of the school's policy regarding complaints from parents. As Assistant Principal (and later Principal) Miller testified in her deposition, the school's policy regarding parent complaints requires the school to share the complaint with the teacher. (App. 237, Miller Dep., pp. 50-51). Indeed, according to both the Collective Bargaining Agreement and the school's own official written policies, "hearsay" cannot be used as evidence for purposes of reprimand, warning, or disciplining a teacher, and teachers are entitled to be informed of all parent complaints, formal or informal, and to be provided with a copy of any formal complaints within three (3) school days after the initial filing. (App. 237-239, Miller Dep.; App. 190-195). The teacher is required to be told of the "nature and source" of the complaint. (App. 237, Miller Dep., pp. 51-52). Pam Sklar, Human Resources, also testified that it would be against the school's policy to base a termination decision on secret complaints that had not been brought to the teacher's attention, regardless of whether the teacher was a permanent or nonpermanent teacher. (App. 242-243, Sklar Dep., pp. 69-71).[14]

The reasonable inference from these facts is that if there actually had been any complaints about Mayer by parents, either formal or informal, prior to any of the meetings Principal Rogers had with Plaintiff, it would have been incumbent on Principal Rogers to tell Mayer who was complaining, and to tell her the nature of the complaint. Since Rogers did not do this, it is reasonable to infer that there were none, and to infer further that all of the alleged parental

[14] In a particularly telling moment in her deposition, Ms. Sklar was forced to admit that the school has no record of any kind, no written document reflecting any complaint ever made about Ms. Mayer by any parent or any student prior to the time Plaintiff spoke to her class about war and peace. (App. 244, Sklar Dep., pp. 95-96).

complaints described in Defendants' motion (and the year 2005 affidavits signed by various parents) are "pretextual, after-the-fact justifications." *Stalter,* 195 F.3d at 291.

This identical analysis applies to the second "conference" relied on by Rogers in terminating Mayer, dated **March 27, 2003.** The meeting on that date involved Plaintiff, Principal Rogers, union representative Carol Carter, and Human Resources representative Pam Sklar. (App. 258, Mayer Dep., p. 116). The discussion at this meeting focused on three (3) things: the fact that the Hahn's child might be returning to Clear Creek and Mayer's insistence on some level of protection from Mr. Hahn; the Fosha child's discontent with a certain hand gesture used by Mayer in the classroom; and the Principal's desire to have Mayer attend a workshop on "Dealing with Difficult Parents." (App. 232, Rogers Dep., pp. 120-21; App. 258, Mayer Dep., pp. 116-17).

There is no evidence whatsoever of <u>any discussion</u> at this meeting of any other issues besides the Foshas' hand gesture issue, the Hahns' issue[15], and the "Dealing with Difficult Parents" workshop. (App. 103). Although Mrs. Hahn had allegedly filed a grievance against Mayer on March 10, 2003, Plaintiff was never given a copy (App. 257, Mayer Dep., p. 113), and it was not discussed at the 3/27/03 conference except to talk about "Mr. Hahn and Deb's discomfort with him and their discomfort with her." (App. 232, Rogers Dep, 120). This discussion was necessary because, at the time, there was a possibility that the Hahn child might return to Clear Creek. (App. 106).

[15] What Plaintiff knew at the time from Rogers was that "issues have continued with the Hahns and have been expressed as a complaint at the central administrative level." (App. 106); however, Rogers never provided Mayer with a copy of the complaint. Despite the fact that copies of any and all parent complaints were requested in discovery in this case, the first time Ms. Mayer ever saw the Hahns' "central administrative" complaint was at her deposition on May 20, 2005. (App. 257, Mayer Dep., p. 113; App. 140).

Whatever the issue was with the Hahns, Rogers knew it was not sufficient reason to move the Hahn child out of Mayer's room despite the fact that the Hahns were demanding tuition reimbursement and that Mayer be fired. In fact, Rogers only offered to move the Hahn child to another class after Mr. Fry of the school administration told her to do so. (App. 233-234, Rogers Dep., pp. 124-28). The entire issue was, by Rogers' admission, a "moot point" because by April 1, 2003 it was clear that the Hahn child would not be returning to Clear Creek. (App. 233-234, Rogers Dep., pp. 125-26).

The truth is, the only issue Plaintiff had with the Hahns was their discontent with her speech about the impending war in Iraq. As noted above, Mr. Hahn was extremely vocal about his opposition to Mayer's views at the January 13, 2003 meeting. Apparently, the Hahns thought that Ms. Mayer was harassing their daughter in retaliation for the meeting (App. 140). This was not true, and in any event Principal Rogers admitted that in her investigation of these charges she never saw Mayer harass any students. (App. 227, Rogers Dep., p. 73). The issue with the Hahns always centered on Plaintiff's exercise of free speech. It was and is, as a matter of law, insufficient to motivate Plaintiff's termination. In fact, to the extent Principal Rogers admits that she relied on the issue with the Hahns in making her decision, she is admitting that there is a direct connection between Plaintiff's exercise of a protected right and Defendants' decision to fire her.

As for the issue with the Foshas, a reasonable jury would be free to conclude that Defendants did not actually terminate Mayer for making a hand gesture to silence a 4th, 5th, or 6th grader; that would be akin to swatting a fly with an ICBM. Reliance on the issue with the Foshas as a basis of terminating Plaintiff is unworthy of credence.

Finally, as with the 2/12/03 conference, since none of the other alleged parent complaints were discussed on March 27th, they cannot now be said to have formed part of the basis for Rogers' decision in this case. Therefore, to the extent Defendants have changed their story after the fact, a jury will be entitled to infer that the new reason is merely a pretext. *Stalter,* 195 F.3d at 291.

The third "conference" relied on by Rogers in her end-of-year report appears to be a phantom conference. It allegedly took place on **April 21, 2003**. However, Rogers admits there is no record of it, and that she has no recollection of it. (App. 231-232, Rogers Dep., pp. 115-119). The only evidence of what was *supposed* to be discussed on April 21st is Mayer's memo to Principal Rogers dated April 17, 2003. (App. 231, Rogers Dep., p. 116; App. 196). Plaintiff was at that time seeking clarification as to why she was being evaluated more than required two times and stating that "[i]f you continue to evaluate me, you must state a reason." *Id.* There being no other evidence of what (if anything) was discussed on April 21st, Defendants cannot rely on this alleged conference to meet their burden of showing a legitimate basis for the discharge. It is reasonable to infer that there was again no discussion of the parent complaints Defendants now claim they received about Mayer. *Id.*

To summarize this section: none of the "conferences" relied on by Principal Rogers in her official statement of the reasons for her decision to terminate Mayer would be sufficient to motivate the discharge. The 2/12/03 conference dealt with the Hahns' complaint about Plaintiff's speech about war and peace; the 3/27/03 conference dealt with that same issue again and with a hand gesture one of Mayer's students did not like; and the 4/21/03 conference apparently did not occur at all, or if it did, nothing significant was discussed. One permissible inference from all of this evidence is that the only real reason for Plaintiff's discharge was her

speech on a matter of public concern and the Hahns' bitter disagreement with Plaintiff's opinion. Another reasonable inference is that, after Plaintiff's speech, Principal Rogers liked to nit-pick Plaintiff about this issue and about a hand gesture. But it is not a permissible inference that these conferences coupled together with the three favorable class "visitation" forms could have formed the basis for terminating an "impressive" teacher like Ms. Mayer. Summary judgment was therefore improperly granted.

d. Memos which "may have" been relied on by Principal Rogers

The last remaining part of the original, officially-stated reason for terminating Plaintiff is the "[a]dditional sources of data that may have contributed to this report." (App. 107). These are easy to dispense with.

The 3/26/03 memo is the document sent to Mayer by Rogers to set up the 3/27 meeting discussed above. That memo mentions only the Foshas, the Hahns, and the "Dealing with Difficult Parents" workshop information discussed above. In short, this document supports the inference that these were the only topics discussed on 3/27. (App. 106).

The 4/1/03 letter is the same: it is a follow up to the 3/27 meeting, and again only mentions the Foshas, the Hahns (stating that the issue with them was a "moot point"), and the "Working with Difficult Parents" workshop information again. It is true that the 4/1/03 letter claims that "[w]e have lost the trust of five long-term Clear Creek families with children in your class this year." However, nothing in the letter attributes this problem to Mayer, and, as discussed above, Mayer was never told of any parent complaints other than the issues with the Hahns and Foshas. (App. 103).

The only remaining bit of paper on which Rogers based her decision was a letter she sent to Mayer dated 4/9/03. This letter expressed Principal Rogers' "regret" that Mayer missed a faculty meeting. (App. 55, 74). To the extent Defendants claim they terminated Ms. Mayer for missing this faculty meeting, their explanation would be unworthy of credence because (1) Mayer in fact gave advance notice to Assistant Principal Miller that she would miss the meeting (App. 75); and (2) there is no evidence or even any suggestion by Defendants that a teacher could be terminated for this reason. Teachers routinely missed faculty meetings.

Simply put, analysis of Defendants' original, officially-stated reason for terminating Ms. Mayer demonstrates that the reasons given were insufficient to motivate the action taken. In fact, the record reveals only positive evaluations of Plaintiff, with the lone "cause for concern" coming on the heels of a meeting about Plaintiff's right to free speech. The evaluations cannot form the basis for termination. Moreover, the common thread through the two conferences that actually occurred and two of the three memos relied on by Rogers is the issue with the Hahns – and that issue dealt solely with Plaintiff's protected speech! This analysis of the original reason given by Defendants tends to prove that Plaintiff's speech was a substantial or motivating factor in her discharge.

The fact that Defendants have now come forward – two years after the termination – with the affidavits of multiple parents whose alleged complaints were never made known to Plaintiff and whose names (with the exception of the Hahns and Foshas) do not appear on <u>any</u> of the documents from the school's files, tends to hurt Defendants rather than help them. The reasonable inference to be drawn is that Defendants are re-writing history in this case because they realize that the documentary record looks very bad for them. Because, as noted above, this revisionism is proof of pretext, summary judgment cannot be granted on this record.

CONCLUSION

For the foregoing reasons the district court's Judgment finding that no speech by a teacher in class can ever be protected by the First Amendment and dismissing Mayer's First Amendment claims must be reversed and this cause must be remanded for a trial on the merits.

Respectfully submitted,

_____

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Certificate of Compliance with Type Volume Limitations

This certifies that this brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 13,618 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

_____

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Certificate of Service

I hereby certify that a copy of the foregoing was served on the below named person(s) by first class United States Mail, postage pre-paid, on this 29th day of June, 2006.

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No. 06-1993

In the United States Court of Appeals For the Seventh Circuit

DEBORAH A. MAYER, PLAINTIFF-APPELLANT

v.

MONROE COUNTY COMMUNITY SCHOOL CORPORATION, ET AL.,
DEFENDANTS-APPELLEES

On Appeal from the United States District Court for the Southern District of Indiana, No. 1:04-cv-1695
The Honorable Sarah Evans Barker, District Judge

SHORT APPENDIX

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Documents Bound With Brief:

Exhibit A: Entry Granting Defendants' Motion for Summary Judgment

Exhibit B: Judgment

Statement Pursuant to Circuit Rule 30(d)

All of the materials required by part (a) of Circuit Rule 30 are included in this Short Appendix. All of the materials required by part (b) of Circuit Rule 30 are included in a separate appendix.

_____

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EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DEBORAH A. MAYER, Plaintiff,	)	
vs.	)	1:04-CV-1695-SEB-VSS
MONROE COUNTY COMMUNITY SCHOOL CORPORATION, et al., Defendants.	)	

ENTRY GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Deborah A. Mayer ("Mayer") filed her Complaint in this action on October 5, 2004 in the Monroe County Circuit Court and, on October 18, 2004, the case was removed to this court by Monroe County Community School Corporation ("MCCSC" or "School") and its Superintendent John Maloy, individually and in his representative and official capacity as School Superintendent; Cheryl Brown, individually and in her capacity as President of the School Board; Victoria Rogers, individually and in her capacity as Principal of Clear Creek Elementary School; and Pam Sklar, individually and in her capacity as Director of Human Resources for the School Corporation (collectively the "Defendants"), pursuant to 28 U.S.C. § 1441 and § 1446. Now before the Court is Defendants' Motion for Summary Judgment on each of the four counts in the Complaint.

We summarize the four counts in Ms. Mayer's Complaint as follows: Ms. Mayer

alleges that the School Defendants: (1) violated her rights under the First Amendment after she spoke out against the Iraq war (Count I); (2) conspired together to violate her civil rights in violation of 42 U.S.C. § 1985 (Count II); (3) breached her employment contract (Count III); and (4) failed to follow the legal requirements imposed by the Indiana's Teacher Tenure Act prior to the non-renewal of her contract (Count IV). (Def.s' Reply in Supp. at 1.)

Defendants maintain that Count I of the Complaint must be dismissed because Ms. Mayer's comments regarding Iraq were not protected speech under the First Amendment. Count II must be dismissed because § 1985(3) does not apply where there is an "intra-corporate" conspiracy. Count III warrants dismissal based on a lack of evidence to establish that Plaintiff's contract was improperly terminated, in fact, to the contrary, the evidence shows that her termination was based on her inability to work with students and parents. Regarding Count IV, Defendants assert that they have met all the requirements imposed on them by state law under the Indiana Teacher Tenure Act.

Plaintiff's Motion to Strike Defendants' "Statement of Material Facts"

As a preliminary matter, we address Plaintiff's motion to strike a substantial portion of Defendants' submissions in support of the pending motion. In "Plaintiff's Response to Defendants' Motion for Summary Judgment" [hereinafter Pl.'s Resp.], Plaintiff objects to and moves to strike the portion of Defendants' Brief labeled "Statement of Material Facts" claiming that it fails to "include a section labeled 'Statement of Material Facts Not in Dispute' containing the facts potentially

determinative of the motion as to which the moving party contends there is no genuine issue" as required by Local Rule 56.1(a). Pl.'s Resp. at 4.

In response, Defendants state that, by inadvertence, they omitted three words, "not in dispute," from the heading of their moving brief but that this small error in no way prejudiced Ms. Mayor, nor was it done in bad faith. (Def.s' Reply in Supp. at 10, citing Bell v. Bowman, Heintz, Boscia & Vician, P.C., 370 F. Supp. 2d 805, 806 n.1 (S.D. Ind. 2005) (denying plaintiff's motion to strike as violation of L.R. 56.1 did not prejudice plaintiff); see also Luttrull v. McDonald's Corp., No. 3:04-CV-00117-JDT-WG, 2004 WL 2750244 at *6 n.6 (S.D. Ind. Nov. 2, 2004) (finding that a violation of L.R. 5.2(a)(3) was not willful or in bad faith and therefore denied plaintiffs' motion for sanction and to strike)).

Because there is no evidence to show that Defendant's failure to conform completely to the requirements of L.R. 56.1 caused any real prejudice to Plaintiff, nor that the omission of these words was done in bad faith, the Court DENIES Plaintiff's motion to strike the section in Defendants' brief labeled "Statement of Material Facts." See L.R. 56.1(i) (stating that "[t]he Court may, in the interests of justice or for good cause, excuse the failure to comply strictly with the terms of this rule.")

Factual Background

On August 12, 2002, Ms. Mayer applied for a substitute teaching position at Clear Creek Elementary School ("Clear Creek" or "the School") in Bloomington, Indiana.

(Mayer Dep. Exh. 1). When the LAUnCHED[1] classroom teacher, Steve Cole, quit his position at Clear Creek two weeks into the school year, the School moved Ms. Mayer from her substitute position into the full-time position to teach the LAUnCHED class. (Rogers Depo., p. 27-28). Ms. Mayer had a one-year contract with Defendant MCCSC and was a non-tenured probationary teacher for the 2002-2003 school year, and her contract was not renewed as of April 24, 2003.

Classroom Discussion of Peace and the War in Iraq

Ms. Mayer used the "Time for Kids" ("TFK") newsletter nearly every Friday to teach her students about current events. (Complaint, ¶¶ 19-20; Mayer Dep. p. 60). The TFK newsletter was a part of the approved curriculum at Clear Creek and the LAUnCHED classroom. (Mayer Dep. p. 57-58, 60). On January 10, 2003, Plaintiff taught a class, using the TFK December 13, 2002 issue, which discussed peace marches in Washington, D.C. conducted in protest of U.S. involvement in the war in Iraq. (Complaint, ¶ 20; Pl.'s Resp. at 1). In her deposition testimony, Ms. Mayer described her discussion of the article as follows:

> After we had talked about some of the other things that had happened, one of the kids asked me—and we had read the article about the peace march in Washington, D.C., one of the kids asked me if I would ever march in a peace march. At that time I said, "Peace marches are going on all over the country. We even have demonstrations here in Bloomington, Indiana. When I drive past the courthouse square and the demonstrators are picketing I honk my horn for peace because

[1] The LAUnCHED classroom is designed to provide an alternative learning experience in a multi-age setting for students of all abilities in grades 4-6.

> their signs say, 'Honk for Peace.'
>
> And then I went on to say that I thought that it was important for people to seek out peaceful solutions to problems before going to war and that we train kids to be mediators on the playground so that they can seek out peaceful solutions to their own problems and so they won't fight and hurt each other. And that was the extent of the conversation and the discussion.
>
> And it lasted probably no more than five minutes.

(Mayer Dep., p. 62). Ms. Mayer characterized her discussion in a similar manner in her Complaint, stating, in part:

> During the discussion, one student asked Plaintiff if she would ever march in a peace march. Although she did not usually give her opinion in class, in this case she explained that peace marches were taking place all over the country, including in Bloomington . . . She stated that she thought peace was an option to war and that peaceful solutions should be sought before going to war.

(Complaint, ¶ 20).

School's Response to Ms. Mayer Imparting her Opinions on Peace to the Class

Mr. and Ms. Hahn had a daughter in Ms. Mayer's classroom, and, on January 13, 2003, a meeting was held at their request with Ms. Mayer and Principal Rogers to complain about Ms. Mayer's discussion of the Iraq war in the LAUnCHED classroom. (Hahn Aff. ¶¶ 6-8). Plaintiff claims that at this meeting Principal Rogers unilaterally prohibited Ms. Mayer from discussing peace in her classroom, when she responded to an angry Mr. Hahn who was seeking some restraint by Ms. Mayer on the subject, saying "I think she can do that. I think she can not mention peace in her class again." (Pl.'s Reply

at 30; Mayer Dep., pp. 74-76). Plaintiff asserts that this action by the Principal chilled her from speaking about the war in Iraq or peace because she feared losing her job if she again addressed the issue in class. (Pl.'s Reply at 30; Mayer Dep., p. 76).

Following the meeting with the Hahns, Principal Rogers circulated a written memo entitled "Peace at Clear Creek." (Pl.'s Reply at 30-31). The memo, identified as being "From the Principal," said, in relevant part:

> We are living in scary times with the treat [sic] of war and a high level of concern for everyone's personal safety. For many years at Clear Creek, we have had an annual Peace Month in January and support the peaceful solution of problems through mediation. This continues to be a focus for the way we solve problems here. Learning requires a peaceful environment.
>
> We absolutely do not, as a school, promote any particular view on foreign policy related to the situation with Iraq. That is not our business. Individuals in a democracy have personal beliefs, but a public school acknowledges various points of view and those might be discussed related [to] current events and the news.
>
> Do we talk about peace at school? Yes, as a general approach to solving problems at Clear Creek. Please do not confuse that educationally sound goal with a stance on foreign policy.

(Id.) At the meeting where Principal Rogers handed out the "Peace at Clear Creek" memo, she told the teachers that Peace Month was being cancelled. (Mayer Dep., p. 88). Plaintiff was asked at her deposition: "What was your understanding when you left the faculty meeting as to whether or not you could discuss peace in the classroom?" Ms. Mayer answered, "I thought it was pretty clear that we couldn't discuss peace in the

classroom, but I thought that it was specifically in regard to the war with Iraq because in the peace memo it talks about the situation in Iraq." (Pl.'s Reply at 32; quoting Mayer Dep., pp. 89).

Parental Complaints Regarding Ms. Mayer's Teaching Techniques

The Defendants' briefings in support of summary judgment contain extensive facts of alleged parental complaints. These alleged factual assertions, though supported by depositions and affidavits, are disputed by Ms. Mayer.[2] (Pl.'s Resp. at 4). Ms. Mayer states in her affidavit that "[m]oving of students was not something unique to my classroom." (Mayer Aff. ¶ 7). Despite there being numerous parent complaints, it appears that only one – from the Hahns – complained of Ms. Mayer's discussion of the Iraq war and peace protests.

The Hahns

As mentioned previously, Mr. and Ms. Hahn's daughter was in Ms. Mayer's classroom, and on January 13, 2003, a meeting was held at their request between themselves, Ms. Mayer and Principal Rogers to complain about Ms. Mayer's discussion of the Iraq war during the LAUnCHED classroom session. (Hahn Aff., ¶¶ 6-8). The Hahns claim they were also concerned about Ms. Mayer's general classroom management

[2] "Because of the volume of evidence and complexity of issues in this case, it is not practical for Plaintiff to respond in this brief to each and every allegation made by the parents in their affidavits and included in the 'Statement of Material Facts' section of Defendants' brief. Plaintiff does, however, dispute nearly all of the statements made by the parents in their affidavits, as is shown very clearly in Plaintiff's Affidavit. (See Plaintiff's Attachment F, Affidavit of Deborah Mayer)." Pl.'s Resp. at 4.

and their daughter's educational progress, stating that their 6th grade daughter was being given 5th grade math problems. (Id. ¶¶ 4, 6, 7; Exh. "A" of Hahn Aff.). According to the Hahns, Ms. Mayer indicated to them that she would not change her teaching style only to accommodate their daughter and made comments that their daughter was lying about her teaching style and classroom management. (Id.) According to Principal Rogers, Ms. Mayer's conduct bordered on being unprofessional during the meeting with the Hahns. (Rogers Dep., p. 199). Ms. Mayer claims that at the meeting, they did not discuss teaching style or classroom management; they discussed only Ms. Mayer's comment about peace demonstrations. (Mayer Aff. at ¶¶ 7, 8).

Following the meeting, Ms. Hahn again complained to Principal Rogers charging that Ms. Mayer continued to discuss her opinions on the war despite being instructed on January 13, 2003, to refrain from doing so. (Hahn Aff., ¶ 9). On February 5, 2003, Ms. Hahn e-mailed Principal Rogers, noting that:

> "[i]t seems Ms. Mayer is still lecturing the class to protest the war. I have instructed [my daughter] that the next time this occurs I want her to report to the office and ask to call home to be picked up. I have full confidence that you will support this action."

(Rogers Dep., p. 87). Principal Rogers forwarded the e-mail to Ms. Mayer on February 6, 2003. (Id.) Thereafter, the Hahns came to view that Ms. Mayer retaliated against their daughter for their having met with Ms. Mayer on January 13, 2003, reporting that at one point Ms. Mayer laughed in their daughter's face as she told her she could not speak to Principal Rogers. (Hahn Aff., ¶ 10). Ms. Mayer states that she did not treat the Hahn's

daughter poorly, she did not laugh in her face, nor did she discuss peace after January 13, 2003. (Mayer, Aff. ¶¶ 9, 10).

The Hahns requested that their daughter be placed in another classroom, but the school was unable to accommodate their request. ((Def.s' Reply in Supp. at 12-13; citing Hahn Aff., ¶ 12) Therefore, the Hahns transferred their daughter to a private school in March of 2003. (Id. at ¶ 13). Ms. Mayer states in her affidavit that "[m]oving of students was not something unique to my classroom." (Mayer Aff. ¶ 7).

The Quallses

Andy and Barbara Qualls ("the Quallses") expressed similar concerns regarding Ms. Mayer's instruction of their daughter to both Principal Rogers and Ms. Mayer during the first and second semesters of the 2002-2003 school year. (Rogers Dep., p. 28-29). The Quallses first complained to Ms. Mayer during the October 2002 parent-teacher conference that their fifth grader was being assigned fourth grade math problems. (Qualls Aff., ¶ 5; Rogers Dep., p. 76). The Quallses also complained that Ms. Mayer displayed a negative attitude toward them when she said to them that she knew what she was doing despite their concerns.[3] (Qualls Aff., ¶ 6). They also believed that Ms. Mayer retaliated

[3] The Quallses had additional complaints, although it is unclear if or when these issues were communicated to Ms. Mayer and or Principal Rogers. For example, they assert that: (1) Ms. Mayer would not permit their daughter to help out in the classroom; (2) Ms. Mayer would accuse the students of not turning in work; (3) students were not allowed to progress at their own pace and were treated like kindergartners; (4) Ms. Mayer would yell "shut up" in the classroom; (5) Ms. Mayer implied that the Quallses' daughter forged her mother's initials on a worksheet; and (6) Ms. Mayer refused to let the Quallses' daughter return to the gymnasium to retrieve her eyeglasses. (Qualls Aff'd. at

(continued...)

against their daughter after they expressed their concerns. (Id. at ¶ 12). On February 28, 2003, the Quallses wrote a five-page letter to Principal Rogers expressing their concerns regarding Ms. Mayer's actions and teaching methods. (Qualls Aff., 15; attached to Qualls Aff. as Exh. A). The Quallses' daughter was moved to Mr. Mont's classroom for the fourth nine-week period. (Def. Memo in Supp. at 12; Qualls Aff., ¶ 17).

Ms. Mayer states that she did not know of the Quallses' detailed letter nor any of the concerns voiced in it, learning of it only during discovery for this lawsuit. (Mayer Aff. ¶ 15). Ms. Mayer believe that the problems with the Qualls started when another student was removed from her classroom, and their daughter wanted to be moved into the same class with her friend. (Mayer Aff. ¶ 16).

The Millers

Tamby Miller ("Ms. Miller"), who also had a daughter in the LAUnCHED class, complained that Ms. Mayer made demeaning comments to her daughter and other classmates that made her daughter unable to focus on her homework after school. (Miller Aff., ¶ 4). Ms. Miller believes that Ms. Mayer told her students that she once taught Kindergarten and her Kindergarteners were smarter than the students she now taught in the LAUnCHED program. (Miller Aff., ¶ 5). According to Ms. Miller, her daughter

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[3](...continued)
¶¶ 7-10, 13, 14). Ms. Mayer's actions caused the Quallses' daughter to frequently cry because she hated going to school. (Id. at ¶ 11; Rogers Depo., p. 198). Ms. Mayer denies or explains these comments with responses such as "If you were to ask any student in my classroom, 'Who laughs most in this class?' they would unanimously answer, "C.Q.." . . . She was not unhappy at school. Her mother did not tell me she cried at home." (Mayer Aff. ¶ 11).

suffered from anxiety and low self-esteem while she was a student in Ms. Mayer's classroom, due to Ms. Mayer's negativity and poor classroom management. (Miller Aff., ¶ 7).

Ms. Mayer states that she did not make derogatory comments about students and did not tell her students that her kindergartners were smarter than they were. Ms. Mayer claims that other teachers and Ms. Miller told her that Ms. Miller's daughter was better adjusted in Ms. Mayer's class than in previous classes. (Ms. Mayer Aff., ¶¶ 4, 5, 6).

Ms. Miller stated that she expressed her concerns on several occasions to Ms. Mayer and Principal Rogers in October of 2002. (Miller Aff., ¶ 8). Moreover, according to Ms. Miller, Ms. Mayer laughed at her during one of the meetings when Ms. Miller was discussing Ms. Mayer's negative comments. (Id. at ¶ 9). Principal Rogers told Ms. Mayer in front of Ms. Miller that it was not a laughing matter. Ms. Mayer claims that she did not laugh in Ms. Miller' face although she smiled when she was asked to not give her class reading and writing homework on Mondays, Tuesdays, or Wednesdays because the Millers' daughter had to travel to gymnastics on those days and couldn't read in the car. (Mayer Aff. at ¶ 9).

Ms. Miller spoke with Principal Rogers and Ms. Mayer again following the 2002 Thanksgiving break because Ms. Mayer had not accommodated her concerns and because she wanted her daughter transferred to another LAUnCHED classroom. (Miller Aff., ¶ 12). Ms. Miller's daughter was transferred in February 2003 to Ms. Sterner's classroom. (Def. Memo in Supp. at 12; Miller Aff., ¶ 14). Ms. Mayer states that the Miller daughter

was placed with Ms. Sterner because she was a former gymnast, and the Miller daughter was not required to do reading homework on those days in Ms. Sterner's classroom. (Mayer Aff., ¶ 9).

The Mullises

Lisa and Troy Mullis's ("the Mullises") daughter was in the 5th grade and assigned to Ms. Mayer's class. During the October 2002 parent-teacher conference, Ms. Mullis states that she expressed concern that her daughter's grades were slipping to which Ms. Mayer responded that her daughter was a "needy" student. (Mullis Aff. at ¶ 5). Ms. Mayer states that Ms. Mullis expressed no concern that her daughter's grades were slipping and denies expressing to Ms. Mullis that her daughter was a "needy" student. Following the parent-teacher conference, Mr. Mullis attempted to speak again with Ms. Mayer about his daughter's grades and found Ms. Mayer to be very hostile and degrading during their conversation. (Mullis Aff. at ¶ 6). Ms. Mayer denies that Mr. Mullis attempted to speak with her after the Parent Conference, but alleges that he verbally assaulted her outside the principal's office her first week of school for not allowing his daughter to each chips in class and requiring his daughter to take a pass to the restroom. (Mayer Aff. ¶ 6).

The Mullises saw Ms. Mayer as exhibiting a "my way or the highway" approach in response to their concerns. (Mullis Aff. at ¶ 6). The Mullises spoke with Principal Rogers on approximately five occasions during the school year to complain about Ms. Mayer's teaching style and classroom management. (Mullis Aff. at ¶ 7). Ms. Mayer

claims that she was not aware that the Mullises spoke with Principal Rogers five times, and that the Mullises did not attempt to contact her nor did they mention their concerns to her. (Mayer Aff. at ¶¶ 7 and 10). The Mullises believed that Mayer retaliated against their daughter after they had complained about Ms. Mayer. (Mullis Aff. at ¶ 8). Ms. Mayer denies this claim stating that she did not know that the Mullises had even spoken with Principal Rogers. (Mayer Aff. at ¶ 8). At their request, Principal Rogers removed their daughter from Ms. Mayer's class and placed her in another classroom. (Mullis Aff. ¶¶ 14, 17). Ms. Mayer states that she was not involved in the decision to remove the Mullises' daughter from her class, nor was she given a reason for the move. (Mayer Aff., ¶ 13).

The Burgesses

Sherry Burgess ("Ms. Burgess") also reported problems with Ms. Mayer regarding her daughter's Individualized Education Plan ("IEP"). (Burgess Aff., ¶ 5). Ms. Burgess met with Ms. Mayer and Principal Rogers in October of 2002 to discuss the IEP. (Burgess Aff., ¶ 4). Ms. Burgess complained that Ms. Mayer consistently failed to follow the IEP and told Ms. Burgess that she did not have time to implement the plan. (Id. at ¶ 5). Among other complaints, Ms. Burgess contends that Ms. Mayer treated her daughter unfairly. (Id. at ¶¶ 6-7). Ms. Burgess met with Ms. Mayer, Principal Rogers, and the Inclusion Teacher in early 2003 to again complain that Ms. Mayer was not following her daughter's IEP. (Id. at ¶¶ 8-9).

Ms. Mayer states that if Ms. Burgess's daughter had an IEP (prior to May 2003), it

was never given to her, although she did follow her behavioral contract diligently. (Mayer Aff., ¶¶ 4, 5). Ms. Mayer states that the only meeting she had with Ms. Burgess present was a required end-of-year case conference to discuss her daughters progress along with twelve other people.

The Foshas

Sherilyn and Joel Fosha were also vocal in their criticisms of Ms. Mayer and the relationship between the Foshas and Ms. Mayer deteriorated seriously during the second semester. (Fosha Aff., ¶¶ 5-12). The Foshas' daughter, who did not have problems with her grades prior to entering Ms. Mayer's classroom, was receiving failing grades in Ms. Mayer's class. (Id. at ¶¶ 5-6; see also Rogers Dep. p. 119). The Foshas conveyed their concerns to Ms. Mayer and stressed that they were interested in cooperating with her to improve their daughter's performance, but Ms. Mayer displayed a negative attitude and made no effort to accommodate the Foshas' concerns. (Fosha Aff., ¶¶ 7, 11) As with the other parents, the Foshas found that Ms. Mayer's attitude was a "my way or the highway" approach, that she unfairly targeted students whom she deemed difficult and that she had poor classroom management skills. (Id. at ¶¶ 8-10). The Foshas' daughter was eventually transferred to Ms. Campbell's classroom. (Def.s' Memo in Supp. at 12; citing Fosha Aff., ¶ 13).

Ms. Mayer acknowledges that the Foshas complained that their daughter did not approve of a certain hand gesture that Ms. Mayer made to tell students to wait. However, she claims that she worked diligently and patiently with the Foshas allowing

them to call her often and at home. (Mayer Aff. ¶¶ 9, 10). Ms. Mayer claims that the Foshas' daughter was pulled from her class because of the prospect of a potential lawsuit if she remained in her class with another student, who implicated each other in a sexual harassment incident. (Mayer Aff. ¶ 12).

The Perrys

Another set of parents, the Perrys, also insisted that their daughter be removed from Ms. Mayer's classroom, based on the allegations laid out by them in their Harassment Complaint against Ms. Mayer. (Roger Dep., p. 52; Defendants' Responses to Plaintiff's First Request for Production of Documents, Notes from Meeting with Mayer re: Harassment Complaint [at Docket No. 29]). In response to that Complaint, the Vice Principal, Tammy Miller, told Ms. Perry that her daughter could not be moved to another classroom at that point because there were only three days of school remaining. (Id.)

Ms. Mayer's Formal Evaluations and Feedback

On February 7, 2003, Principal Rogers sent Ms. Mayer a "formal letter of concern regarding the apparent lack of success that [Ms. Mayer demonstrated] in creating a positive learning environment in [her] LAUnCHED classroom." (Def.s' Memo. in Supp. at 8; citing Exh. 13). In the letter, Principal Rogers stated that she was "[m]oving select students from [her] class to defuse the present volatile situation." (Id.) She also placed Ms. Mayer on an improvement plan and directed her to work with Michelle Henderson to implement a positive learning environment, to attend weekly improvement meetings, and to improve her "interpersonal skills" and "[r]efrain from presenting [her] political views"

in the classroom. (Id.)

Less than a month after Principal Rogers's formal letter of concern was issued to Ms. Mayer, on March 10, 2003, the Hahns filed a complaint against Ms. Mayer under the School's Harassment policy, (Def.s' Memo in Supp. at 9, citing Hahn Aff., ¶ 11, attached to Hahn Aff. as Exh. A), alleging that "Ms. Mayer has harassed and intimidated Elise Hahn in a progressively worse fashion since [the January 13, 2003] meeting" and that "Ms. Mayer has ridiculed, embarrassed, made false accusations, and given unjust punishments to Elise." (Id.) They also complained about Ms. Mayer's continued expressions of political views in the classroom, even after being asked to stop, and that Ms. Mayer ignored School policy by failing to teach Elise according to her special needs. (Id.) The Hahns demanded the "[t]ermination of Ms. Mayer's employment [and] [r]eimbursement of funds to enroll Elise in a private school since Clear Creek will not put her in another class." (Id.) Ms. Mayer states in her affidavit that she was shown this complaint for the first time at her deposition on May 20, 2005. (Mayer, Aff. ¶ 11).

On March 26, 2003, Principal Rogers sent another memorandum to Ms. Mayer, this time to set up a "[m]eeting to discuss ongoing concerns/reminder." (Def.s' Memo in Supp. at 10; citing Rogers Dep., pp. 101-102, Exh. 15). Principal Rogers wrote that "[i]t is imperative that we meet immediately to generally discuss concerns about your interactions with parents and your choice of classroom management strategies." (Id.) She also noted that the Hahns had filed "a complaint at the central administrative level." (Id.; Hahn Aff. ¶11, attached to Hahn Aff. as Exh. A) In addition to scheduling the

meeting, Principal Rogers also directed Ms. Mayer to attend a workshop on "Dealing with Difficult Parents." (Rogers Dep., pp. 103-04, Exh. 15).

On March 27, 2003, Ms. Mayer met with Principal Rogers, the Director of Human Resources Pam Sklar, and the Monroe County Education Association Building Representative, Carol Carter, to discuss the problems in the LAUnCHED classroom, and more specifically, Ms. Mayer's problems with the Foshas and the Hahns. (Def. Memo in Supp. at 10; citing Rogers Dep., p. 119, Exh. "17"). Ms. Mayer was directed to consider these issues over the weekend and to advise Principal Rogers on Monday, March 31, 2003, of the steps she could take to remedy the situation. (Id.) However, Ms. Mayer failed to heed this directive, necessitating, on April 1, 2003, another letter from Principal Rogers to Ms. Mayer summarizing the events and directing her to respond by April 2, 2003:

> I must have your response toward solving this problem tomorrow. (4/2/03). Any longer delay is not acceptable. You have many strengths; however, communicating with parents constructively is an area of needed growth. Let's make this a success!

(Id.) Ms. Mayer did not report to work between April 1 and April 14, 2003, but did send an e-mail to Principal Rogers stating: "I am ill today and not able to respond to all of your comments. I will communicate with you as soon as I am able." (Def.s' Memo. in Supp. at 10; citing Mayer Dep., p. 125-126, Exh. 7 (Absence Report), Exh. 13). On April 6, 2003, Ms. Mayer sent Principal Rogers a three-page response to the April 1, 2003 letter. (Def.s' Memo in Supp. at 11, citing Mayer Dep. p. 130, Exh. 14). Ms. Mayer noted her

"concern for the animosity that you [Principal Rogers] have directed toward me during the past few months," stating:

> Since the day I announced that I would be looking for employment elsewhere for next year as a result of the proposed RIF, you have taken measures to discredit me as a professional. Your pattern of behavior stemming from that time is incomprehensible to me and my colleagues but may explain why four teachers have occupied my present position in the past calendar year.

(Id.) She then listed 22 events of alleged harassment and claimed that due to this harassment she had missed five days of work due to illness. (Id.) She also noted that Principal Rogers had "a personal vendetta" against her and that "[a]ny further harassment, including the lack of a positive recommendation, will result in legal action on my behalf." (Id.)

On April 8, 2003, Ms. Mayer failed to attend a faculty meeting. (Def. Memo in Supp. at 11, citing Mayer Dep., p. 139, Exh. 15). Following the meeting, Principal Rogers sent a memorandum on April 9, 2003, suggesting to Ms. Mayer that she review the materials from the faculty meeting as they "would have been helpful to you in analyzing your interactions with parents and students." (Id.) She also asked Ms. Mayer to provide times for observations and the weekly progress meetings. (Id.) Ms. Mayer responded to the memorandum by agreeing to attend the progress meetings. (Mayer Dep., p. 139, Exh. 16).

Termination of Ms. Mayer's Employment

Principal Rogers visited Ms. Mayer's classroom for formal observations twice

during the second semester, once on February 28, 2003, and again on April 16, 2003. (Def.s' Memo. in Supp. at 13; Rogers Dep., p. 23, Exh. 7, Exh. 8). On the basis of these observations, as well as other meetings and parent comments, on April 24, 2003, Principal Rogers prepared a Staff Member End-Of-Year report, (Pl.'s Memo. in Supp. at 13; Rogers Dep., p. 23, Exh. 14), in which she cataloged the problems with Ms. Mayer's performance and indicated that she would be recommending "Contract termination." (Id.) At a 1:00 pm meeting on April 24, 2003, Principal Rogers, Assistant Principal Miller, and Ms. Carter met with Ms. Mayer to discuss the End of Year report and Principal Rogers's recommendation. (Rogers Dep., p. 171; Mayer Dep., p. 143, Exh. 18). During the meeting, Ms. Mayer was given the opportunity to resign. (Id. at 144). Before responding to that option, Ms. Mayer left the meeting and then departed the building. (Id. at 144-146). Later that day, Ms. Mayer telephoned Principal Rogers to reject the resignation option and told Principal Rogers of her intention to contact her attorney. (Rogers Dep., p. 172; Mayer Dep., p. 147, Exh. 18).

It is undisputed that the School Board met in a regularly scheduled public session on the evening of April 24, 2003 and unanimously voted not to renew Ms. Mayer's contract. (Mayer Dep. pp. 143, 149; Defendants' Responses to Plaintiff's First Request for Production of Documents, Minutes of Special Meeting). This lawsuit by Plaintiff challenging her termination ensued.

Legal Analysis

A. Standard of Review

Summary Judgment is appropriate where the record shows 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); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). On a motion for summary judgment, the burden rests on the moving party, Defendants in this case, to demonstrate "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp., 477 U.S. at 325. After the moving party demonstrates the absence of a genuine issue for trial, the responsibility shifts to the non-movant to "go beyond the pleadings" and point to evidence of a genuine factual dispute precluding summary judgment. Id. at 322-24. "[I]f the non-movant does not come forward with evidence that would reasonably permit the finder of fact to find in her favor on a material question, then the court must enter summary judgment against her." Waldridge v. American Hoechst Corp., 24 F.3d 918, 920 (7th Cir. 1994), (citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-87 (1986); Celotex, 477 U.S. at 322-24.

Summary judgment is not a substitute for a trial on the merits, nor is it a vehicle for resolving factual disputes. Waldridge, 24 F.3d at 920. Therefore, in considering a motion for summary judgment, we draw all reasonable inferences in favor of the non-movant. Venters v. City of Delphi, 123 F.3d 956, 962 (7th Cir. 1997). If genuine doubts remain and a reasonable fact-finder could find for the party opposing the motion,

summary judgment is inappropriate. See Shields Enters., Inc. v. First Chicago Corp., 975 F.2d 1290, 1294 (7th Cir. 1992). But if it is clear that a plaintiff will be unable to satisfy the legal requirements necessary to establish his or her case, summary judgment is not only appropriate, but mandated. See Celotex, 477 U.S. at 322; Waldridge, 24 F.3d at 920. Further, a failure to prove one essential element "necessarily renders all other facts immaterial." Celotex at 323. A plaintiff's self-serving statements, unsupported by specific concrete facts reflected in the record, cannot preclude summary judgment. Albiero v. City of Kankakee, 246 F.3d 927, 933 (7th Cir. 2001); Slowiak v. Land O'Lakes, Inc., 987 F.2d 1293, 1295 (7th Cir. 1993).

B. Count I: 1st Amendment Claim

Ms. Mayer asserts two First Amendment claims against the School: first, that in discussing her opposition to the Iraq war in the classroom, she exercised her First Amendment rights and that the School retaliated against her by harassing her and ultimately firing her. (Pl.'s Memo in Supp.; Complaint ¶¶ 20, 49). Her second claim is that Defendants' actions chilled her free speech entitlements. Defendants rejoin that Ms. Mayer's speech was not constitutionally protected because it occurred in her classroom in conjunction with her role as a public school teacher, and not as an ordinary citizen. Therefore, both of her First Amendment retaliation claims fail as a matter of law. (Def.s' Reply in Supp. at 2). Plaintiff maintains that the war in Iraq is clearly a matter of great public interest and therefore her comments on the subject are protected by the First Amendment. In reviewing these claims, it is clear that, if Ms. Mayer's speech on the Iraq

war is not protected under the First Amendment, then her retaliation claim–including her contract "non-renewal" claim and her "chilling free speech" claim must also fail.[4]

In Gonzalez v. City of Chicago, 239 F.3d 939, 940 -941 (7th Cir. 2001) the Seventh Circuit laid out the two-step test under which claims by public employees asserting a violation against protected speech are to be analyzed:

> The first step, set forth in Connick v. Myers, is to determine whether the employee speaks "as a citizen upon matters of public concern." 461 U.S. 138, 147, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). The second step is to balance the "interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Bd. of Educ., 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). In determining whether speech is protected at step one, we must consider the content, form, and context of the speech. Connick, 461 U.S. at 147, 103 S.Ct. 1684. Where speech is intended to serve a private or personal interest, it may not meet the standards for First Amendment protected speech. See Kokkinis v. Ivkovich, 185 F.3d 840, 844 (7th Cir.1999). "Our precedent makes clear ... that speaking up on a topic that may be deemed one of public importance does not automatically mean the employee's statements address a matter of public concern as that term is employed in Connick." Id.

Gonzalez, 239 F.3d at 940 -941.[5]

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[4] The inquiry into the protected status of speech involves a legal analysis, not a factual one. Connick, 461 U.S. at 148, fn. 7. Further, the balancing of the interest in freedom of expression against the employer's interests is a function to be performed by the judge, not the jury. Dishnow, 77 F.3d at 198.

[5] Plaintiff argues that we should use the analysis the Seventh Circuit used in the 1996 case, Dishnow v. School District of Rib Lake, 77 F.3d 194, 197 (7th Cir. 1996). In (continued...)

In Pickering v. Board of Education,[6] 391 U.S. 563, 568 (1968), the Supreme Court held that public employees do not give up their First Amendment rights to comment on matters of public interest by accepting government employment, but that the State has an interest as an employer in regulating the speech of its employees which is unique from its interests in regulating the speech of its citizenry in general. See also Connick v. Myers, 461 U.S. 138, 140 (1983).

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[5](...continued)
this case the circuit court stated that when evaluating whether a public employee may be discharged or disciplined for speech, the public employee's First Amendment claim should be analyzed sequentially, in three steps: courts must (1) decide whether the speech, if uttered by someone who was not a public employee, would be protected; if so, then (2) decide whether the speech is merely a personal employee grievance of the type disqualified from protection in Connick; if so, the case is over; if not, then (3) decide whether the public employer had a "convincing reason to forbid the speech." Dishnow v. School District of Rib Lake, 77 F.3d 194, 197 (7th Cir. 1996). Limiting the analysis to whether the speech in the abstract, would be protected if uttered by a private citizen is too simplistic an approach for this case, and should be applied only in cases more closely in line with the facts of Dishnow, where a high school guidance counselor alleged that he was terminated in retaliation for informing the media of school board violations of law and for writing articles for a local newspaper on topics of interest to the public.

[6] In Pickering, the Court held impermissible under the First Amendment the dismissal of a high school teacher for openly criticizing the Board of Education on its allocation of school funds between athletics and education and its methods of informing taxpayers about the need for additional revenue. Pickering's subject was "a matter of public concern" upon which "free and open debate is vital to informed decision-making by the electorate." 391 U.S. at 571-72; quoted by Connick, 461 U.S. at 145. In Pickering, the teacher's erroneous public statements were:

> neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

Pickering, 391 U.S. at 572-73.

Both parties agree that the topic of U.S. involvement in the Iraq war is a matter of public importance. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (stating that the Vietnam war is a matter of public concern).[7] The role of the speaker is relevant because courts are more protective of citizen speech than they are of employee speech. See Gonzalez v. City of Chicago, 239 F.3d 939, 940 (7th Cir. 2001) (noting that employee of the Chicago Police Department investigating and writing reports of public complaints against officers was performing a "routine requirement of the job" and thus the reports were not protected speech by a citizen which touched upon matters of public concern); Youker v. Schoenenberger, 22 F.3d 163, 166 (7th Cir. 1994) ("Simply stated, the speech in the present case is not protected because it was not a speech as a citizen [because the employee used an official medium to convey his message].").[8] The courts are less protective of government interference in employee speech because –

> the Government, as an employer, must have wide discretion

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[7] In Tinker, students wore black armbands to school in order to protest the Vietnam War. The school banned the armbands under its dress code and the students challenged the school's policy based upon its impact on their First Amendment rights. The Supreme Court found that the student speech protesting the war pertained to a matter of public concern and was protected. (Id.) "The Supreme Court has more than once instructed that '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" James v. Board of Education, 461 F.2d 566, 568 (2nd Cir. 1972), citing Shelton v. Tucker, 364 U.S. 479, 487 (1960), quoted in Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Tinkerv. Des Moines Independent Community School District, 393 U.S. 503, 512 (1969).

[8] Youker is distinguishable from the holding in Pickering, where the Court noted that the Plaintiff's employment was only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, and therefore the teacher should be regarded as a member of the general public. Pickering, 391 U.S. at 574.

> and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Connick, 461 U.S. at 151 (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (J. Powell, separate opinion)).

In analyzing the content in which the challenged speech occurred, it should be noted that the classroom is unique in that it is under the exclusive control of the school board and "public school teachers are not free, under the First Amendment, to arrogate control of the curricula." Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 369 (4th Cir. 1998) (selection of a controversial school play in drama class) (quoting Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 802 (5th Cir. 1989) (use of unapproved and controversial reading list in class)).[9] In Tinker, the Supreme Court wrote:

> If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school.

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[9] Plaintiff's equivocations as to whether her speech was public or private is essentially irrelevant, as Plaintiff herself points out, citing Givhan v. Western Line Consolidated School Dist., 439 U.S. 410, 414 (1979) (holding that a public employee does not forfeit his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly). (Pl. Resp. at 14.)

Tinker, 393 U.S. at 513. We do not believe that the inverse is true, however; school officials are free to adopt regulations prohibiting classroom discussion of the war in Iraq while allowing teachers and students the opportunity to engage in discussions about the war elsewhere on school property without violating First Amendment protections.[10]

Ms. Mayer's comment on this matter of public concern occurred during a classroom instruction session based on approved curriculum and in response to a legitimate, altogether appropriate question from a student. In her Complaint, Ms. Mayer acknowledges, however, that she went beyond merely discussing the TFK article with her LAUnCHED class by expressly interjecting her own personal views and activities against the war in Iraq. (Def.s' Memo. in Supp. at 18; Complaint, ¶ 19-20).[11] Teachers, including Ms. Mayer, do not have a right under the First Amendment to express their

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[10] In the Supreme Court's recent decision Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 2006 WL 521237, *9 (U.S.) (Mar. 6, 2006) the Court noted that "many of its leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." These types of cases are distinguishable from the case at hand, where the Plaintiff, Ms. Mayer, is being prohibited from particular speech during class time, and not forced to speak on a particular topic. For example in "West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), [the Supreme Court] held unconstitutional a state law requiring schoolchildren to recite the Pledge of Allegiance and to salute the flag. And in Wooley v. Maynard, 430 U.S. 705, 717, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), we held unconstitutional another that required New Hampshire motorists to display the state motto-"Live Free or Die"-on their license plates." Rumsfeld, 2006 WL 521237 at *9.

[11] Defendants state: "According to the parents, Ms. Mayer did this on several occasions, even after she was asked not to by Principal Rogers." (Def. Memo in Supp. at 18; Hahn Aff., ¶ 9; Rogers Dep., p. 87). However, the frequency of Ms. Mayer's statements is clearly a disputed factual issue and therefore not appropriate for adoption on summary judgment. In this ruling, we are determining whether the comments made on January 10, 2003 were protected.

opinions with their students during the instructional period, particularly if the teacher's supervisors have directed her not to do so. Here, the fact that Ms. Mayer's January 10, 2003 comments were made prior to any prohibitions by school officials does not establish that she had a First Amendment right to make these comments in the first place. Previous judicial holdings have recognized that teachers do not have a First Amendment right to arrogate control of the curricula. Elementary school classrooms in which the teacher has considerable influence over her students and where the students are required to be in attendance are highly unique settings. Ms. Mayer, and teachers, generally, may find it difficult to lead a meaningful discussion without interjecting their personal opinions on important political topics; we assume in fact that, some school boards may encourage teachers to do so, in a balanced fashion. The point is that whatever the school board adopts as policy regarding what teachers are permitted to express in terms of their opinions on current events during the instructional period, that policy controls and there is no First Amendment right permitting teachers to do otherwise.[12] Had this case involved limitations or prohibitions on Ms. Mayer by the School regarding her practice of "honking for peace" off the school grounds, or writing editorials to the local newspaper, or discussing the Iraq war with other teachers at a time other than during the instructional period, we would expect a different outcome.

In summary, because the uncontroverted facts establish that Ms. Mayer expressed

[12] To hold otherwise, would be to say that an elementary school teacher has a constitutional right to speak without limitation on any matter of public concern with her students during valuable instruction time.

her views to her students at a time and place and as part of her official classroom instruction, she was acting as an "employee," rather than as a "citizen," so that her speech was not constitutionally protected. Thus, we do not need to undertake the kind of balancing called for in Pickering. Defendants are entitled to summary judgment as a matter of law on Ms. Mayer's First Amendment claims, including her retaliation and "chilling" claims. Summary judgment therefore shall be entered on Count I of Plaintiff's Complaint.

C. Count II: 42 U.S.C. § 1985 Claim

In Count II of her Complaint, Ms. Mayer invokes the protections of 42 U.S.C. § 1985, alleging that "Defendants conspired together to develop a plan of retaliation against Plaintiff and to stifle or chill her exercise of her First Amendment rights to free speech and to petition the government for redress of grievances." (Complaint, ¶ 51). Defendants contend that no claim under § 1985(3) is available to Ms. Mayer because that statute does not apply in the context of an "intra-corporate conspiracy" and further it does not apply to a deprivation of First Amendment rights, but only to Fourteenth Amendment equal protection claims. Plaintiff has not responded to these arguments. Def. Memo. in Supp. at 24.

In Trautvetter v. Quick, 916 F.2d 1140 (7th Cir. 1990), the Seventh Circuit stated:

> Under 42 U.S.C. §1985(3), a plaintiff must allege four elements to make out a valid cause of action:
> 1. a conspiracy;
> 2. a purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the

> laws, or of equal privileges and immunities under the laws;
> 3. an act in furtherance of the conspiracy, and;
> 4. an injury to his person or property or a deprivation of any right or privilege of a citizen of the United States.

Id., 916 F.2d at 1153.

The first element of a §1985(3) claim requires that there be evidence of a "conspiracy." In the case at bar, the Complaint alleges that "[d]efendants conspired together." (Complaint, ¶ 51). As noted in paragraphs 6-13 of the Complaint, each of the individual Defendants, Superintendent Malloy, Board President Brown, Principal Rogers, and Director Sklar is "employed" by the school corporation. (Id., ¶¶ 6, 8, 10, 12). Because Ms. Mayer has admitted that each of the alleged conspirators is employed by the school corporation, conspiracy claims are barred by the "intra-corporate conspiracy" doctrine.

The "intra-corporate conspiracy" doctrine states that intra-corporate discussions and actions which have a discriminatory impact "will normally not constitute the conspiracy contemplated by this statute [1985]." Dombrowski v. Dowling, 459 F.2d 190, 196 (7th Cir. 1972). In Travis v. Gary Cmty. Mental Health Ctr., Inc., 921 F.2d 108 (7th Cir. 1990), the Court reaffirmed the holding in Dombrowski, as follows:

> [A]gain, intra-corporate discussions lie outside the statute's [§1985(3)] domain . . . managers of a corporation jointly pursuing its lawful business do not become "conspirators" when acts within the scope of their employment are said to be discriminatory or retaliatory. . . . Now that the question has been presented for decision, we conclude that it does not matter whether the corporate managers took multiple steps to

> carry out their plan; intra-corporate discussions are not 'conspiracies.'

Travis, 921 F.2d at 110-111. The Seventh Circuit applied this doctrine to governmental entities in Wright v. Ill. Dep't. of Children and Family Servs., 40 F.3d 1492, 1508 (7th Cir. 1994).

Because the Complaint contains only allegations of intra-corporate discussions between the individual Defendants, all of whom are school corporation employees, no conspiracy under 42 U.S.C. §1985(3) can be found to exist as a matter of law, and consequently, Count II of Plaintiff's Complaint warrants dismissal on summary judgment.[13]

D. Count III: Breach of Employment Contract

In Count III of her Complaint, Ms. Mayer alleges that the School's action of non-renewal of her Regular Teacher's Contract constituted a "breach of the employment contract." (Complaint, ¶ 56). More specifically, she alleges that the School improperly failed to renew her contract even though she had "fully performed her obligations pursuant to her contract of employment." (Complaint, ¶ 54). Indiana courts have stated that the decisions of school boards to non-renew non-tenured teacher contracts "should not be disturbed except in cases where it is arbitrary and capricious, without reasonable basis or in direct violation of the Constitution." Tilton v. Southwest School Corp., 151

[13] Because Count II of Plaintiff's Complaint is dismissed for the specified reasons, we do not address Defendants' contention that Ms. Mayer's § 1985(3) claims also must fail because they do not involve racial or class-based animus. Def.s' Memo in Supp. at 25.

Ind. App. 608, 631 (1972) (interpreting an earlier version of Indiana's Teacher Tenure Act).

The Indiana's Teacher Tenure Act (I.C. § 20-6.1-1, et seq.) ("Tenure Act") governs the hiring and firing of teachers by public school corporations and its protections are incorporated fully into Ms. Mayer's contract. The statute creates three classifications for teachers: non-permanent, semi-permanent, and permanent teachers. Under the Tenure Act, a non-permanent teacher, such as Ms Mayer, has been employed for two years or less and may be terminated "(1) for any reason considered relevant to the school corporation's interest; or (2) because of a teacher's inability to perform the teacher's teaching duties." (I.C. § 20-6.1-4-14(I)).

Defendants contend that the reason the School cancelled Ms. Mayer's nonpermanent teaching contract was based upon her inability to work effectively with students and parents. This contention is reflected in the recorded created for this litigation and specifically in the End of Year Report and March 26, 2003 Memo. Defendants further contend that Ms. Mayer refused to follow the directives from her superiors, failed to follow school policy in terms of her absences, and failed to correct these various deficiencies after being apprised of them through multiple evaluations. Defendants assert that Ms. Mayer's conduct easily meets the statutory requirements. Def. Memo in Supp. at 16.

Plaintiff objects to summary judgment on this claim, contending that, contrary to school policy and her contract, Plaintiff was never advised of any parent complaints by

Defendants, other than the Hahns' complaint about Plaintiff's speech and the Foshas' complaint about a hand gesture.[14] Plaintiff contends that "the decision to terminate any teacher – permanent or non-permanent – cannot be based on complaints that have not been brought to the teacher's attention." Mayer Surreply, at 3 (citing Sklar Dep., p. 70). While questions of fact regarding whether Plaintiff was aware of every complaint made against her may exist, they are not material factual disputes.[15] On the basis of the Hahns' and the Foshas' complaints alone, school officials would be justified in concluding that Ms. Mayer's termination would be (1) in the school corporation's interest or (2) evidence

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[14] Most of Plaintiff's argument in this respect is irrelevant based on our holding that Plaintiff did not have a First Amendment right to express her opinions on the war in Iraq with her students during the classroom instructional period. Plaintiff frames her argument as follows:

> Assuming that terminating Plaintiff's contract for an illegal reason could not, as a matter of law, be considered a reason 'relevant to the school corporation's interest,' and assuming further that the jury finds in Plaintiff's favor on her First Amendment claims, it would logically follow that Mayer's contract was not terminated because of any inability to perform her duties. Stated differently, in the absence of the alleged illegal conduct by Defendants in this case, it is reasonable to infer that Plaintiff would have been renewed and would have continued to work for MCCSC. Mayer's intent, as Defendants knew, was to work into an administration position with the school.

(Pl.'s Resp. at 34, citing Mayer Dep., pp. 45-46).

[15] The numerous affidavits submitted by parents, and the deposition of Principal Rogers, as well as corresponding exhibits support the position that Ms. Mayer was aware that parents were complaining of her teaching techniques. Ms. Mayer's "self-serving statements, unsupported by specific concrete facts reflected in the record" that she was unaware of these complaints will not suffice to preclude summary judgment. Albiero v. City of Kankakee, 246 F.3d 927, 933 (7th Cir. 2001).

of Ms. Mayer's inability to perform her teaching duties. See IND. CODE § 20-6.1-4-14(i). Therefore, summary judgment shall issue as to Count III of Ms. Mayer's Complaint alleging breach of her employment contract.

E. Count IV: Indiana Code § 20-6.1-4-14

Finally, in Count IV of the Complaint, Ms. Mayer alleges that the School failed to comply with the requirements of IND. CODE § 20-6.1-4-14[16] by (1) failing to give her a statement of reasons for the non-renewal of her contract; (2) refusing to provide an appropriate written evaluation; (3) refusing to permit a conference with the School Board; and (4) failing to have an appropriate reason for nonrenewal.[17] Ms. Mayer has failed to respond to Defendants' arguments regarding Count IV, based on IND. CODE § 20-6.1-4-14 and, therefore, we shall assume that the facts and evidence adduced by Defendants on these issues exist without controversy and are controlling of our analysis. (See L.R. 56.1(e)).

With non-permanent teachers such as Ms. Mayer, Indiana law lays out three conditions precedent to the nonrenewal of their contracts: (1) the school shall "provide

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[16] At the time this opinion is being issued, Ind. Code Article 6.1, titled "Teachers" has been repealed by repealed by P.L. 1-2005, sec. 240, effective July 1, 2005 and in relevant part by Ind. Code §§ 20-28-7-8 (continuation of contract), 20-28-7-9 (rights of nonpermanent teacher - evaluations - notice of consideration of nonrenewal), 20-28-7-10 (right of nonpermanent teacher to conference - procedure).

[17] Defendants note that ground [4] is redundant to Count III and that our resolution of that issue necessarily covers this re-stated contention. See Def. Memo in Supp. at 26 n.6. We agree, holding that Defendants had an appropriate reason for non-renewal of Plaintiff, as discussed supra Section D.

the teacher with an annual written evaluation of the teacher's performance before January 1 of each year;" (2) "On or before May 1, the school corporation shall notify the teacher that the governing body will consider nonrenewal of the contract;" and, (3) "Upon the request of the teacher, and within fifteen (15) days of the receipt of the notice of the consideration of contract of nonrenewal, the . . . [School] shall provide the teacher with a written statement . . . giving the reasons for the noncontinuation of the teacher's contract." Def.s' Memo in Supp. at 27. Compliance with these three requirements is a "condition[] precedent to a valid nonrenewal of a contract," and the failure to comply with all of them will invalidate the cancellation or nonrenewal decision. Lewis v. Bd. of Sch. Trs. of the Charles A. Beard Mem'l Sch. Corp., 657 N.E.2d 180, 184 (Ind. Ct. App. 1995). In contrast, the statutorily-mandated conference with the school board is not deemed a condition precedent, and, if a school fails to hold such a meeting, the appropriate remedy is to remand the matter to the school board to permit the conference to be conducted. (Id.)

1. Annual Written Evaluation

Ms. Mayer claims that the School "refus[ed] to provide appropriate written evaluations" to her. (Complaint, ¶ 58). In particular, she appears to argue that Principal Rogers failed to give her an evaluation prior to January 1, 2003. However, this contention ignores the fact that prior to January 1, 2003, Ms. Mayer had received a completed "Form B: Professional Staff Evaluation," prepared by Assistant Principal Miller on November 21, 2002. (Def.s' Memo in Supp. at 28; citing Miller Dep. pp. 59-61;

Exh. 6). Thereafter, Ms. Mayer received two additional evaluations, one in February and one in April of 2003, from the School. (Rogers Dep, p. 23, Exh. 7, Exh. 8). Principal Rogers also prepared an End of Year Report, utilizing Form D, reflecting her assessments of Ms. Mayer's performance. (Rogers Dep., p. 23, Exh. 14).

We agree with Defendants that, while IND. CODE § 20-6.1-4-14 requires an "annual written evaluation of the teacher's performance before January 1 of each year," it does not specify the form or format for that evaluation, apparently leaving that to the discretion of the Schools and the teachers' unions. (See Def.s' Memo in Support at 29). Here, the School utilized "Form B: Professional Staff Evaluation," and the statute does not forbid that. Therefore, we find that the first requirement of IND. CODE § 20-6.1-4-14 was satisfied by Defendants.

2. Written Statement Giving Reasons for the Noncontinuation of the Teacher's Contract

Ms. Mayer cites, as a first basis for her breach of contract claim under IND. CODE § 20-6.1-4-14, that the School "refus[ed] to give Plaintiff a statement providing the reasons for the non-continuation of Plaintiff's contract." (Complaint, ¶ 58).

Under IND. CODE § 20-6.1-4-14(b):

> "Before a teacher is refused continuation of the contract under subsection (a), the teacher has the following rights, which shall be strictly construed: Upon the request of the teacher, and within fifteen (15) days of the receipt of the notice of the consideration of contract of nonrenewal, the . . . [School] shall provide the teacher with a written statement . . . giving the reasons for the noncontinuation of the teacher's contract."

This requirement is mandatory and its fulfillment is a condition precedent to the proper termination of Ms. Mayer's contract. Lewis v. Bd of Sch. Trs. of the Charles A. Beard Mem'l Sch. Corp., 657 N.E.2d 180, 184 (Ind. Ct. App. 1995).

The problem with Plaintiff's claim is that the statute imposes the obligation on the teacher to first "request" the statement of reasons. The evidence here establishes that Ms. Mayer never requested such a statement of reasons for her termination. (Def.s' Memo in Supp. at 28). During the meeting on April 24, 2003, Ms. Mayer was informed that Principal Rogers was going to be recommending the nonrenewal of her contract at the School Board hearing scheduled for that evening. (Mayer Depo., p. 143-149). Ms. Mayer testified that immediately after the meeting with Principal Rogers she went to the school office to find a substitute teacher to cover her class and then went directly home. (Id. at 144-147). Ms. Mayer testified that she telephoned Principal Rogers later that day to inform her that she was not resigning and that "the school system had not followed proper procedure in [her] dismissal and that [she] was contacting [her] attorney." (Id.) Nonetheless, the School Board terminated Ms. Mayer's contract at its meeting on the evening of April 24, 2003. Because Ms. Mayer never requested a statement of the reasons for her termination, the School was not required to provide it to her. (Def.s' Memo in Supp. at 28, citing IND. CODE § 20-6.1-4-14(b)). Therefore, the third requirement of IND. CODE § 20-6.1-4-14 was not violated by the Defendants.

3. School Board Conference

The final reason that Ms. Mayer cites as the basis for her breach of contract claim

and her claims under I.C. § 20-6.1-4-14 is that the School "refus[ed] to hold a conference with the governing body of the School Corporation." (Complaint, ¶ 58). Such a conference is not a condition precedent to contract termination, and the appropriate remedy for the failure to conduct that meeting is to remand the matter to the School Board to do it. Lewis v. Bd of Sch. Trs. of the Charles A. Beard Mem'l Sch. Corp., 657 N.E.2d 180, 184.

Defendants state that "there is no dispute that the Tenure Act requires a school, if requested to do so by the teacher, to provide that teacher a conference after the nonrenewal of a teacher's contract." Def.s' Memo in Supp. at 31. Indiana Code § 20-6.1-4-14(a)(3) provides that "[a] conference shall be held with the governing body, or at the direction of the governing body, with the superintendent or the superintendent's designee, not more than ten (10) days following the day the governing body receives the request." There is no dispute that, following after Ms. Mayer's non-renewal on April 24, 2003, she initially requested such a conference. (Mayer Depo. p. 175, Exh. 7 (Fax to Ms. Sklar)). It is also undisputed that the School offered to schedule the conference. However, the parties ultimately agreed that no conference was needed, as documented in a letter from Ms. Mayer's former attorney dated July 17, 2003: "We also confirm the agreement made that there would be no need to request a conference with the School Board as required by IC 20-6.1-4-14 because both sides agree that such a conference would be an act of futility." (Def.s' Memo in Supp. at 31; Mayer Depo., p. 175; Defendants' Responses to Plaintiff's First Request for Production of Documents, 7/17/03

letter). Because it appears that the parties jointly agreed that a conference was unnecessary and would be, indeed, an act of futility, Ms. Mayer's contention that the School failed to offer her a conference lacks any evidentiary support. Accordingly, Count IV is also subject to summary judgment.

F. Claims Against Individual Defendants

Having dismissed the four counts of Plaintiff's complaint on summary judgment we need not address Defendants' argument that each of the individual Defendants is entitled to judgment in their favor as a matter of law.[18]

Conclusion

For the foregoing reasons, we hold that Defendants are entitled to summary judgment in their favor on all Counts. IT IS SO ORDERED.

Date: 03/10/2006

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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[18] The School sought summary judgment on the official capacity claims under §1983 against the individual Defendants and on the federal claims against the individual Defendants based upon qualified immunity. The School also sought dismissal of the individual Defendants as to Count III and IV of the Complaint based on a lack of privity regarding the employment contract between Plaintiff and the School.

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EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DEBORAH A. MAYER, Plaintiff,	)	
vs.	)	1:04-CV-1695- SEB-VSS
MONROE COUNTY COMMUNITY SCHOOL CORPORATION, et al., Defendants.	)	

JUDGMENT

Pursuant to the Court's entry of this date granting Defendants' motion for summary judgment, final judgment is entered in favor of Defendants. Each party shall bear its own costs.

IT IS SO ORDERED.

Date: 03/10/2006

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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