PETER R. MERSEREAU, OSB No. 73202
pmersereau@mershanlaw.com
THOMAS W. McPHERSON, OSB No. 75001
tmcpherson@mershanlaw.com
MERSEREAU & SHANNON LLP
1600 Benjamin Franklin Plaza
One SW Columbia Street
Portland, Oregon 97258
Telephone: 503.226.6400
Facsimile: 503.226.0383

Of Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JACOB PINARD; MARK LIPKE; GRIFFIN LINN; HARRY MILLS; TYSON JARVI; TRAVIS JEFFERS; NATHAN WHITE; D.J. CRAWFORD; CHRISTOPHER SOMES;

Plaintiffs,

v.

CLATSKANIE SCHOOL DISTRICT 6J, a public body; JEFF BAUGHMAN; MICHAEL CORLEY; LES WALLACE; EARL FISHER; and JOHN DOES 1-10;

Defendants.

Case No. CV 03-172-HA

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF SUPPLEMENTAL MOTIONS FOR SUMMARY JUDGMENT

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Defendants Clatskanie School District 6J ("the school district"), Jeff Baughman, Michael Corley, Les Wallace, and Earl Fisher respectfully submit the within memorandum of law in support of their supplemental motions for summary judgment in this matter.

I. OVERVIEW OF QUESTIONS ON REMAND

This case is on remand from the Ninth Circuit Court of Appeals. The appellate court instructed the trial court to decide two narrow issues of fact:

(1) Was plaintiffs' petition a substantial or motivating factor in the decision to suspend plaintiffs from the basketball team?

(2) If plaintiffs had not presented their petition, would plaintiffs nevertheless have been suspended from the basketball team for having refused to board the team bus and for boycotting a regularly scheduled game?

Pinard v. Clatskanie School Dist. 6J 2006, ____ F3d ____, Slip Opinion, pp. 4927-29, 2006 WL 1133323, pages *8 - *10 (9th Cir. 2006).

Defendants submit that there is no evidence to support plaintiffs' case on either of these factual questions. As to the first question, there is no evidence of retaliatory motive on the part of the principal, who alone decided to suspend plaintiffs from the team.

Furthermore, retaliatory motive is conclusively refuted by the fact that the only player who signed the petition but did not participate in the boycott of the Rainier game, Christopher Somes, was not suspended from the team. The Supplemental Declaration of Frank Somes, filed herewith, resolves any doubt about this fact. The necessary conclusion, therefore, is that plaintiffs were suspended from the team for their conduct alone, not for their protected speech.

The second question on remand is deserving of special attention from this court, because the Ninth Circuit's opinion established a new point of law. For the first time, it is clear that defendants in the student speech context are entitled to a defense that was formerly available only to defendants in the public employment context, *i.e.*, the defense that the same disciplinary action would have been taken *even in the absence of the protected speech*. Regarding this defense, it is important that the Ninth Circuit found, as a matter of law, that plaintiffs' conduct (*i.e.*, refusing to board the team bus and refusing to participate in a regularly scheduled away game) could lawfully be punished by the school district, because such conduct "substantially disrupted and materially interfered with" the high school basketball program.

> Finally, assuming without deciding that the plaintiffs' refusal to board the bus constituted expressive conduct encompassed by the First Amendment, we agree with the district court that the plaintiffs' boycott of the game substantially disrupted and materially interfered with a school activity. . . . School districts spend much time and money scheduling and hosting their extracurricular events, all of which involve the coordination of multiple school officials, students, parents and often times volunteers, referees or judges. When students decide not to participate in an extracurricular school activity on the day it is scheduled to take place – particularly one involving a competition against another school – their conduct will inevitably disrupt or interfere with the activity, because school officials must either execute a contingency plan to see that the activity occurs or cancel it. This disruption or interference occurs even when school officials avoid canceling the activity by resorting to a backup plan, which itself constitutes a disruption. Thus, even if we viewed the plaintiffs' boycott as symbolic speech under the First Amendment, *Tinker* permits the officials to punish the plaintiffs' conduct because they forced the school officials to choose between replacing the plaintiffs with less experienced players or cancelling the game – both disruptive options.

Pinard, supra, ____ F3d ____, Slip Opinion, pp. 4926-27. (Underscoring added.)

The school district defendants, therefore, had ample cause to suspend the plaintiffs from the basketball team. Based on the supplemental declarations submitted herewith, there is no doubt that the school district would have suspended plaintiffs from the team for the remainder of the season for their disruptive and insubordinate actions, even if plaintiffs had not presented their petition or complained about their coach. *See* Michael Corley Suppl. Declaration; Lester Wallace Suppl. Declaration; Jeff Baughman Suppl. Declaration; and Ron Puzey Declaration.

II. OVERVIEW OF SUPPLEMENTAL MOTIONS FOR SUMMARY JUDGMENT

Defendants' first motion for summary judgment is brought on behalf of all defendants. Because one or both of the two questions presented to the trial court on remand must be answered in favor of the school district defendants, plaintiffs cannot establish the elements of a First Amendment retaliation case.

Defendants' alternative second motion for summary judgment is brought on behalf of all the individual defendants. In February 2001, when the underlying events took place, it was not "clearly established" that plaintiffs' petition and complaints about their coach – especially when accompanied by a disruptive boycott of a scheduled game – were entitled to constitutional protection. Therefore, each individual defendant is protected by the doctrine of qualified immunity.

Defendants' alternative third motion for summary judgment is brought on behalf of individual defendants Jeff Baughman and Earl Fisher. There is no evidence in the record from

which a reasonably jury could conclude that either of them participated in the decision to suspend plaintiffs from the basketball team. Therefore, these individual could not have retaliated against plaintiffs because of their protected speech, and consequently, both such defendants are entitled to judgment as a matter of law.

III. ARGUMENT ON FIRST MOTION:

A. Answer to First Question on Remand: There is a complete absence in the record of any evidence of retaliatory motive.

The first question to be addressed is whether the school district defendants suspended plaintiffs from the team in retaliation for their protected speech, on the one hand, or for their disruptive and insubordinate actions, on the other hand. Regarding this first question, the appellate court cited three factors that should be evaluated in a First Amendment retaliation, *Keyser v. Sacramento City Unified School Dist.*, 265 F3d 741, 751-52 (9th Cir. 2001).

1. *Factors to be Considered in Deciding the Question of Retaliatory Motive*

The *Keyser* case arose not from student speech, but from the public employment context, and there the court found no retaliatory motive as a matter of law. The three factors to be considered in deciding whether retaliatory motive may reasonably be inferred are as follows:

(1) proximity in time,

(2) expression of opposition to the protected speech by a decision maker, and

(3) evidence that the proffered reason for the adverse employment action was false and pretextual.

Keyser, supra, 265 F3d at 751-52.

Applying these three factors to the present case, the third factor must be rejected for the reason that the Ninth Circuit's Opinion unequivocally found that plaintiffs' actions had disrupted and interfered with the high school varsity basketball program. The appellate court found, as a matter of law, that the school district defendants had a right to punish plaintiffs for this conduct. Therefore, because the only stated reason for the school district's decision to suspend plaintiffs from the basketball team was such conduct by plaintiffs, that reason cannot have been either "false" or "pretextual." *Keyser*, supra, at p. 752.

The second factor must be rejected, as well. The only evidence in the record that any one of the defendants expressed opposition to the plaintiffs' protected speech is attributed to the coach, Jeff Baughman. Baughman, however, was not a participant in the decision to suspend the plaintiffs from the team, and there is no evidence whatsoever in the record to support an inference that Baughman was even consulted regarding this decision. Because Baughman was not a decision maker, his words of resentment at having been presented by his team with a petition asking for his resignation cannot be attributed to the school district or any of the other individual defendants. He did not have, and cannot have had, any influence on the making of the suspension decision.

In fact, the evidence is uncontradicted that the principal, Michael Corley, made the decision to suspend plaintiffs from the team, and he did this without consulting with Baughman. This matter was thoroughly briefed in defendants' original motion for summary judgment, and defendants' arguments need not be reiterated here. *See* "Defendants' Reply Memorandum in

Further Support of Motions for Summary Judgment," filed April 27, 2004, pp. 4 - 8, 17 - 19, and *see also* the supporting evidence cited therein.

The remaining factor is proximity in time. Here, of course, all the events took place within a period of less than 48 hours. However, mere temporal proximity does not suffice. Rather, the "proximity in time between the protected action and the allegedly retaliatory employment decision" must be one in which a "jury logically could infer [that the plaintiff] was terminated in retaliation for his speech." *Keyser*, supra, at 751, quoting from *Schwartzman v. Valenzuela*, 846 F2d 1209, 1212 (9th Cir. 1988).

In the present case, plaintiffs' conduct breaks the inference of any causal connection between their protected speech and the school district's allegedly retaliatory response. The appellate court found that, between the protected speech (*i.e.*, the petition and the oral complaints on February 13, 2001) and the alleged retaliation by defendants (*i.e.*, the suspension of plaintiffs from the team on the following day), there intervened conduct by the plaintiffs that "substantially disrupted and materially interfered with" the high school's basketball program – the plaintiffs' refusal to board the team bus at 4:45pm on February 13, 2001 and their boycott of the Rainier game later that same evening.

Phrased in other words, because the Ninth Circuit has found, as a matter of law, that plaintiffs' disruptive boycott of the Rainier game could be punished, "proximity in time" between the protected speech and the removal from the team would not permit a jury logically to infer that the suspension decision was motivated by a desire to retaliate against plaintiffs for their protected speech. Therefore, none of the three factors supports an inference of retaliatory motive.

2. *The fact that Christopher Somes was NOT suspended from the team conclusively refutes any inference of retaliatory motive.*

If there were any residual question of fact concerning the motive of the school district in deciding to suspend plaintiffs from the team for the remainder of the basketball season, such a question is resolved in favor of defendants by the fact that Christopher Somes was not suspended from the team. Lest it be forgotten, Somes was the only player who signed the petition asking for the coach's resignation but who also did not refuse to board the team bus and did not refuse to participate in the Rainier game. Furthermore, Somes was the co-captain of the team, and he was the player who had personally handed the petition to Baughman. Therefore, if one of the players would have been singled out as the prime target for retaliation on the basis of his protected speech, it would most certainly have been Somes.

In response to defendants' original motions for summary judgment in this case, plaintiffs attempted to dispute the fact that Somes was not suspended from the team. Plaintiffs offered the declarations of two parents who stated that, at the meeting where principal Corley announced the suspensions, "all of the players who signed the petition were permanently suspended from the team." Apparently, the appellate court (*see* Slip Opinion, p. 4915) regarded this evidence as sufficient to raise a question as to whether Somes was, in fact, suspended, even though the summary judgment record contained the affidavit of Frank Somes, the father of Christopher, stating that he had attended the same meeting along with his son, and that Christopher had not been suspended at that meeting.

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The only evidence to be found in the record from Christopher Somes himself is the "Student Grievance Form," which he filed. It is clear from that document that Somes did not consider himself to have been suspended from the team because he stated his grievance only as follows: "Mr. Corely [sic] forced me to make a decision on unfair grounds." *See* Affidavit of Michael Corley, filed herein on December 15, 2003, Ex. 2, p. 6. The "decision" that Somes had made, of course, was to board the team bus and to play in the Rainier game.

By contrast, every other "Student Grievance Form" protested the grievant's "unjust removal" from the basketball team. *Compare* pp. 1-5 and 7-11 of Ex. 2 with p. 6 of Ex. 2, Affidavit of Michael Corley, filed on December 15, 2003 along with defendants' opening memorandum in support of their original motion for summary. Christopher Somes was originally one of the plaintiffs, but he voluntarily dismissed his complaint on April 17, 2003. Each of the eight remaining plaintiffs, it is revealing to note, used nearly identical words to describe his suspension from the team. *Id.*

To close this factual issue conclusively, defendants have filed herewith the Supplemental Declaration of Frank Somes. Not only does Frank Somes state that Christopher was not suspended from the team, but he goes on the explain how and when Christopher quit the team:

> "A day or two after the announcement of the suspension of the players who had boycotted the Rainier game, Christopher and I, while at home, discussed whether he would continue as a member of the basketball team. Christopher told me that he no longer wanted to be a member of the team. He requested that I inform the school of his decision to quit the team. I agreed to do so, and within a few days, I told the Junior Varsity coach, Kyle Johnson, that Christopher had decided to quit the team."

Suppl. Declaration of Frank Somes, p. 2, filed herewith.

Furthermore, defendants have also filed herewith declarations showing that the school district did not intend to suspend Christopher Somes. Because he had not joined in with plaintiffs' disruptive boycott of the Rainier game, Christopher Somes was not included among those who were deserving of suspension. *See* Suppl. Declaration of Michael Corley, p. 2; and Suppl. Declaration of Lester Wallace, pages 2 - 3.

Finally, it is clear that Christopher Somes himself did not believe that he had been suspended from the team. This is evident from the fact that he continued to participate in basketball practice after the suspension announcement. *See* Declaration of Kyle Johnson, p. 2; Suppl. Declaration of Lester Wallace, p. 2; and Suppl. Declaration of Jeff Baughman, p. 2, all filed herewith.

It is hard to imagine more compelling evidence of the absence of retaliatory motive on behalf of the school district than the fact that Christopher Somes was not suspended from the team, because he was the one player who both signed the petition but also did not refuse to board the team bus and did not refuse to play in the Rainier game. This key fact, defendants submit, makes unreasonable any inference that plaintiffs' protected speech was a "substantial or motivating factor" in the decision to suspend plaintiffs from the team.

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B. Answer to Second Question on Remand: The same disciplinary action would have been taken even in the absence of protected speech by plaintiffs.

The second question for the court on remand raises a defense that is new in the context of student free speech retaliation cases. The question may be posed as follows:

> If the plaintiffs had never presented their petition or complained about their coach, but they had nevertheless (a) refused to board the team bus, and (b) boycotted a regularly scheduled game on the day of that game, would the school district still have suspended plaintiffs from the basketball team?

Defendants submit that the answer to this question is intuitively obvious. No athletic team could reasonably tolerate such disruptive and insubordinate conduct by its players. Clearly, high school athletic teams must be able to count on their players to show up for games. Even more clearly, when a player *willfully* refuses to participate in a scheduled game or event, that player has, in practical reality, quit the team. Therefore, the school district's action in suspending plaintiffs from the basketball team for the remainder of the season did no more than the players themselves had already done – remove them from a team which they already, by their own actions, had abandoned.

Again citing the case of *Keyser [v. Sacramento Unified School Dist.], supra,* the Opinion of the Ninth Circuit in the present case addressed this defense as follows:

> If the plaintiff establishes the elements of a retaliation claim, "the government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct." *Keyser [v. Sacramento Unified School Dist.],* 265 F.3d [741] at 750 (quoting *Bd. of County Comm'rs v. Umbehr,* 518 U.S. 668, 675, 116 S.Ct. 2361, 135 L.Ed.2d 843 (1996)). However, as

> we made clear in *Settlegoode v. Portland Pub. Schs.*, 371 F.3d 503 (9th Cir.2004), the defendants must show more than that they "could have" punished the plaintiffs in the absence of the protected speech; instead, "the burden is on the defendants to show" through evidence that they "*would* have" punished the plaintiffs under those circumstances. *Id.* at 512 (emphasis added).

Pinard, supra, ____ F3d ____, Slip Opinion, pp. 4927-28. (Underlining added.)

The court then continued with the following explanation of why this defense is appropriate for "retaliation cases" in the student speech context, as well as the public employment context.

> This framework for First Amendment retaliation claims arises from the public employment context. Although we have rejected importing into the student speech context the public concern test from the public employment context, we did so because of *Tinker's* well-established standard for non-offensive, non-school sponsored student speech, which does not include a public concern element. However, as the defendants note, it appears that none of our cases has adopted a standard for evaluating *retaliation claims* in the context of student speech. *Cf. Worrell v. Henry,* 219 F.3d 1197, 1212 (10th Cir.2000) (adopting a standard for "assessing First Amendment retaliation claims against defendants *other than the plaintiff's employer* "). Given the absence of an established retaliation standard for student speech cases and the adequate protection for school officials and students provided by the *Mendocino Envtl. Ctr./ Keyser* standard for First Amendment retaliation claims, we see no reason to adopt a different standard for the student speech context.

Pinard, supra, ____ F3d ____, Slip Opinion, pp. 4928 at footnote 19. (Italics in original, underlining added.)

Defendants argued for the application of the *Mendocino Envtl. Ctr./Keyser* defense in their December 15, 2003 motions for summary judgment, but the issue was rendered moot by the court's ruling. Defendants now renew this argument, as directed by the Ninth Circuit.

1. *The School District could properly punish plaintiffs for their disruptive boycott.*

The question of what the defendants would have done in the present case *in the absence of protected speech by the plaintiffs* is all but answered by another holding by the Ninth Circuit in this case. The appellate court found, as a matter of law, that the plaintiffs' boycott of the game had "substantially disrupted and a materially interfered with" a school activity. Therefore, the Ninth Circuit concluded, the plaintiffs' conduct here was properly punishable by defendants.

> Finally, . . . we agree with the district court that the plaintiffs' boycott of the game substantially disrupted and materially interfered with a school activity. . . . *Tinker* permits the officials to punish the plaintiffs' conduct because they forced the school officials to choose between replacing the plaintiffs with less experienced players or cancelling the game – both disruptive options.

Pinard, supra, ____ F3d ____, Slip Opinion, pp. 4926-27. (Underlining added.)

2. *The School District, as a matter of fact, "would have" suspended plaintiffs from the basketball team for the remainder of the season as a consequence of plaintiffs' disruptive boycott, even in the absence of their protected speech.*

Because the appellate court has found that defendants "could have" suspended plaintiffs from the team for their conduct, it remains only to be shown that defendants "would have" taken the same action, even in the absence of plaintiffs' petition and complaints. *Pinard, supra,* ____ F3d ____, Slip Opinion, pp. 4928, citing *Keyser, supra,* and *Settlegoode v. Portland Public Schools,* 371 F3d 503, 512 (9th Cir. 2004). (*Settlegoode*, like *Keyser*, was a public employment case, but unlike *Keyser*, *Settlegoode* involved a post-judgment challenge to a jury verdict. In the *Keyser* case, the court affirmed the trial court's entry of summary judgment in favor of the defendants on a First Amendment retaliation claim. *Keyser, supra,* 265 F3d at 751-53.)

It is important to recognize that the plaintiffs' conduct in the present case was willful. They did not merely "miss" a scheduled game, as plaintiffs have argued. They boycotted it. Deliberate defiance of the school district's instructions that plaintiffs must board the team bus and participate in a scheduled game is not the same as merely "missing" a game. Such defiance strikes at the heart of good order and discipline in a high school setting.

Plaintiffs have attempted to excuse their insubordinate conduct by pointing to their complaints about an allegedly abusive coach. But in the context of the *Mendocino Envtl. Ctr./Keyser* defense, this purported excuse cannot be considered. The question is what discipline, if any, would the school district have imposed on plaintiffs had they not engaged in protected speech. Their complaints about the coach were, in fact, plaintiffs' only protected speech. Therefore, plaintiffs' petition and complaints cannot be considered without indulging in circular reasoning. Plaintiffs' conduct alone must be the focus of this court in applying the *Mendocino Envtl. Ctr./ Keyser* defense.

By way of supplemental evidence addressing this question on remand, defendants have filed herewith four supplemental declarations. These declarations establish, as a matter of fact, that plaintiffs would have been suspended from the team for the remainder of the season for their actions in refusing to board the team bus and boycotting the game, *even in the absence of any protected speech* by plaintiffs. The school principal, Michael Corley, states in his supplemental declaration:

> "Those players who boycotted the Rainier game would have been suspended from the team for their actions, even if they had not presented their petition or complained about their coach. Refusing to get on the team bus and refusing to play in a scheduled game are

> insubordinate actions that cannot be tolerated in a high school basketball program. Suspension from the team was the necessary disciplinary response to such actions by students under my supervision as Principal."

Suppl. Declaration of Michael Corley, p. 2. (Underlining added.) As discussed above, it was the principal who made the decision to suspend plaintiffs.

The athletic director, Lester Wallace, also offers sworn testimony supporting the fact that the plaintiffs would necessarily have been suspended from the team for the season, solely on the basis of their boycott of the game, regardless of their protected speech:

> "If the final decision had been mine to make, I would have made the same decision that Mr. Corley made. Those players who refused to board the bus and play in the game would have been suspended from the team for the remainder of the season, even if they had not presented their petition or complained about their coach. For many years I served as coach of high school athletics, including basketball teams. Refusing to get on the team bus and refusing to play in a scheduled game are insubordinate actions that cannot be tolerated in any athletic program. Suspension from the team would be the necessary disciplinary response to such actions by student athletes under my supervision."

Suppl. Declaration of Lester Wallace, p. 3. (Underlining added.)

Also confirming this testimony is Ron Puzey, formerly the athletic director of the school district for 15 years and the varsity basketball coach for 11 years. Mr. Puzey states:

> "If, on the day of a scheduled game or competition, one or more athletes had simply refused to participate in that game or competition, those athletes would certainly have been suspended from the team, at least for the remainder of the season."

Declaration of Ron Puzey, p. 2. (Underlining added.)

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Finally, defendant Jeff Baughman, testifies that he was very much aware of the rule that all players must ride the team bus to away games. In fact, he had previously barred one of the plaintiffs herein, Nathan White, from playing in a game, because White had accidentally missed the team bus. Baughman goes on to explain:

> "Nathan had missed the bus by accident. If a player of mine had simply refused to board the team bus, such conduct would have constituted insubordination – which is a much more serious matter. Players must recognize that they have a commitment to the team, and insubordination undermines the ability of a basketball team to function together as a team."

Suppl. Declaration of Jeff Baughman, page 2. (Underlining added.)

Given the above testimony, defendants submit, this court now has ample evidence before it to find that defendants are entitled to the benefit of the *Mendocino Envtl. Ctr./Keyser* defense. The question is what disciplinary action, if any, the school district "would have" taken in response to plaintiffs disruptive boycott of the Rainier game *in the absence of any protected speech by plaintiffs*.

The common sense answer to this question is now also established as a matter of fact. The school district in the present case "would have" suspended plaintiffs from the basketball team for the remainder of the season as a consequence of plaintiffs' refusal to board the team bus and/or their refusal to participate in a regularly scheduled game, even in the absence of their petition and their complaints regarding the coach. On this basis alone, defendants are entitled to summary judgment.

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3. *The fact that Christopher Somes was not suspended from the team, even though he engaged in identical protected speech, proves that the school district, in the plaintiffs' case, was not punishing protected speech, but rather only plaintiffs' disruptive conduct,.*

The argument for the application of the *Mendocino Envtl. Ctr./Keyser* defense is further supported by the fact that Christopher Somes was not suspended from the team. As discussed above in connection with the first question on remand, there can be no evidence more compelling than that a player who engaged in exactly the same protected speech, but who did not participate with the other players in their disruptive boycott of a scheduled game, was not disciplined in any way for signing the petition and complaining about the coach.

While the case of Christopher Somes does not directly address the question of what disciplinary action the school district "would have" taken in response to a disruptive boycott in the absence of protected speech, it does approach the same question by way of inductive logic. That is to say, because the school district did not punish protected speech standing alone, but did punish those who engaged in a boycott of a scheduled game and also in exactly the same protected speech, then it necessarily follows that the reason for the school district's imposition of punishment was the disruptive boycott alone, and not the protected speech. No other conclusion is logically permissible. Therefore, defendants respectfully submit that the evidence now before the court requires the entry of summary judgment in their favor, on the basis of the second question on remand.

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IV. SECOND MOTION FOR SUMMARY JUDGMENT

A. The individual defendants are entitled to the benefit of the defense of qualified immunity.

As argued in defendants' original motions for summary judgment in this court, because defendants Baughman, Corley, Wallace, and Fisher have each been sued in their individual capacities, they are entitled to raise the defense of qualified immunity. Defendants incorporate herein the arguments and authorities from their "Memorandum in Support of Defendants' Motions for Summary Judgment," filed on December 15, 2003.

By way of summary, the defense of qualified immunity is available to public employees who have not violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 US 800, 818, 102 S Ct 2727, 73 L Ed 2d 396 (1982). Defendants argued that the individual defendants in the present case were entitled to qualified immunity, because, at the time of the events giving rise to this case, it was certainly not "clearly established" that the plaintiffs' petition and complaints about their coach were constitutionally protected speech in the context of a public high school.

Furthermore, defendants argued that plaintiffs' petition and their complaints about the coach were accompanied by an ultimatum and a threat. Plaintiffs informed the principal that they would boycott the Rainier game if the coach was not immediately removed from his job – a job for which he had been hired by the school board pursuant to an "Extra Duty Contract," earning an additional 12.5% of his regular pay as a teacher. *See* Affidavit of Jeff Baughman, Exhibit 1 attached thereto, filed 12/15/03.

That same day, plaintiffs carried out their threatened boycott of the Rainier game by refusing to board the team bus and refusing to play in the game. Given this close connection between plaintiffs' protected speech (the petition and the oral complaints) and their indisputably disruptive conduct, defendants had even less cause to suspect that, in suspending plaintiffs from the basketball team, they might be seen as violating any constitutional rights of the plaintiffs at all – and certainly not any rights that were "clearly established."

B. As of 2001 in the Ninth Circuit, it was not "clearly established" that plaintiffs' petition or complaints were constitutionally protected speech.

Until the Ninth Circuit's Opinion in the present case, every reported decision in this circuit finding that student speech was entitled to constitutional protection involved some form of "political speech." The leading case in the Ninth Circuit, *Chandler v. McMinnville School District*, 978 F2d 524 (9th Cir. 1992), involved suppression of student speech supporting the teachers union in a labor dispute. Furthermore, in a prior student speech case, *Cain v. Tigard-Tualatin School Dist. 23J*, 262 F Supp 2d 1120 (2003), this court had observed that the "content of the activity in question was clearly a matter of public concern." *Id.* at 1127.

Moreover, the seminal Supreme Court case in this field, *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 US 503, 506, 89 S Ct 733, 21 L Ed 2d 731 (1969), arose in the context of distinctly political speech. Indeed, the U.S. Supreme Court itself has emphasized that the importance of the fact that students in the *Tinker* case were expressing a "political viewpoint."

> We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the

> penalties imposed in this case were unrelated to any political viewpoint.

Bethel School Dist. No. 403 v. Fraser, 478 US 675 at 685, 106 S Ct 3159, 92 L Ed2d 549 (1986) (Emphasis added.) The high school student in *Bethel* had used an "explicit sexual metaphor" during a speech at a student assembly. *Id.* Distinguishing a prior case in which the Court had upheld the right of an adult to use offensive speech while protesting the draft, the Court explained that such offensive speech "may not be prohibited to adults making . . . a political point," but it does not follow that "the same latitude must be permitted to children in a public school." *Id.*, at 682. (Emphasis added.) The Supreme Court criticized the analysis of the lower court, emphasizing that *Tinker* had involved political speech by students:

> The marked distinction between the political "message" of the armbands in *Tinker* and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals.

Id., at 680. (Emphasis added.)

Furthermore, until the appellate decision in the present case, no court in this circuit had held that the "matter of public concern" element of First Amendment retaliation cases in the public employment context did not apply, with equal force, to the student speech context, as well. *See Connick v. Myers*, 461 US 138, 147-49, 103 S Ct 1684, 75 L Ed 2d 708 (1983). In fact, the question of whether there must be a "public concern" element for student speech to merit protection under the First Amendment had been litigated in many courts, but remained unresolved. *See,* for example, *Silberud v. Colorado State Board of Agriculture*, 896 F Supp 1506, 1517-18 (D. Colorado 1995) (absence of any political content in graduate student's speech

considered by the court); *Litman v. George Mason Univ.*, 5 F Supp 366, 378 (E.D. Virginia, 1998) (question of "public concern" test raised but not resolved in student speech case); *Rutherford v. Cypress-Fairbanks Ind. Sch. Dist.*, 1998 WL 330527 page *3 at footnote 5 (S.D. Texas, 1998) (pointing out that the plaintiff, a high school athlete, had engaged in speech did not address "a matter of public concern").

In view of the fact that the courts in many – if not most – jurisdictions had not reached agreement on whether student speech must address a matter of "public concern" in order to merit constitutional protection, how much less "clearly established" could the question have been for public school personnel without any legal training? To hold such public employees to a standard higher than the courts themselves would be unreasonable in the extreme.

C. The Ninth Circuit's holding that plaintiffs' boycott of the Rainier game was disruptive conduct that could lawfully be punished by the school district further supports the defense of qualified immunity.

Finally, student speech does not occur "in a vacuum," but must be observed in the context of "the totality of relevant facts." *Karp v. Becken*, 477 F2d 171, 174 (9th Cir. 1973). The Ninth Circuit upheld this court's finding that plaintiffs' refusal to board to team bus and boycott of a scheduled game "substantially disrupted and materially interfered with" a school's activity. Given this holding, the individual defendants should be entitled to qualified immunity *a fortiori*. If plaintiffs' conduct could be punished, it cannot have been "clearly established" in the law that plaintiffs' speech – on the same day and addressing the same subject as their disruptive conduct – were entitled to constitutional protection.

V. THIRD MOTION FOR SUMMARY JUDGMENT

A. Individual defendant Jeff Baughman is entitled to summary because he did not participate in the decision to suspend plaintiffs from the team.

The evidence in the record supports only the conclusion that the school principal alone made the decision to suspend plaintiffs from the team. The principal explained:

> "I decided that all players who had refused to board the team bus and play in the game should be suspended from the team for the rest of the season. The final decision was mine alone, in my capacity as Principal. The reason for the suspension was solely that those suspended had refused to play in a regularly scheduled game, and their actions were detrimental to the team and to the school. In reaching this decision, I conferred with Mr. Wallace, who agreed that suspension for the season was the only proper response to the boys' wilful refusal to honor their commitment to the team. I did not confer with Mr. Baughman or with Mr. Fisher in reaching my decision to suspend the players."

Affidavit of Michael Corley, filed herein on December 15, 2003. (Underlining added.)

There is no other evidence in the summary judgment record. Jeff Baughman, the coach, left the school immediately after he was given the petition and delivered it to the principal. He did not confer with the principal about the suspension decision, and therefore he could not have had any input into that decision. Therefore, because he cannot have retaliated against plaintiffs, Jeff Baughman is entitled to summary judgment in his favor.

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B. Individual defendant Earl Fisher is entitled to summary because he did not participate in the decision to suspend plaintiffs from the team.

Earl Fisher was the superintendent of the school district at the time of the events underlying this litigation. His only connection to the facts of this case is that he happened to be in the principal's office when Baughman brought the petition to the principal. However, Fisher explains:

> "After approximately ten or fifteen minutes, I had to leave because of a family emergency, which kept me away from my job as Superintendent until March, 2001. . . . I did not participate in the decision made by Principal Corley to suspend from the basketball team the boys who had refused to board the team bus and play in that evening's game. I did not confer with anyone regarding that decision before it was made."

Affidavit of Earl Fisher, filed herein on December 15, 2003. (Underlining added.)

Earl Fisher, like Baughman, had no connection to the suspension decision. In fact, Fisher was on family leave at the time. Therefore, he cannot have participated in the alleged retaliation against plaintiffs. For this reason, Fisher is entitled to summary judgment in his favor.

VI. CONCLUSION

There is no evidence in the record that would permit a reasonable jury to infer that the motivation for suspending plaintiffs from the basketball team was their protected speech. The only reason for the suspension was that they had refused to board the team bus and had boycotted a scheduled game. This conclusion finds overwhelming support in the fact that the only player who signed the petition and complained about the coach, but who did not participate with the

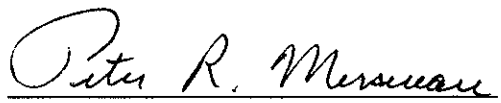
other players in their boycott, Christopher Somes, was not suspended from the team, even though, as team captain, he had personally handed the petition to the coach.

Furthermore, as the Ninth Circuit has found, by wilfully refusing to board the team bus and boycotting a scheduled game, plaintiffs materially interfered with and substantially disrupted the school's athletic program. In light of this key finding, the record now establishes that the school district would have suspended plaintiffs from the team for their disruptive conduct, even if plaintiffs had not engaged in protected speech.

In the alternative, each of the individual defendants is entitled to summary judgment on the basis of qualified immunity, because the law regarding student speech not addressing a matter of public concern was not "clearly established" at the time of the underlying events. Finally, defendants Baughman and Fisher are entitled to summary judgment, because the record contains no evidence permitting the inference that these two defendants participated in the decision to suspend the players from the team.

DATED: June 5, 2006

MERSEREAU & SHANNON LLP



PETER R. MERSEREAU, OSB No. 73202
pmersereau@mershanlaw.com
THOMAS W. MCPHERSON, OSB No. 75001
tmcpherson@mershanlaw.com
503.226.6400
Of Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have made service of the foregoing **DEFENDANTS' REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION FOR SUMMARY JUDGMENT** by sending a true and correct copy of same in the following manner:

___ U.S. regular mail, first class postage prepaid;

_X_ Hand delivery;

___ Facsimile;

___ Express and/or overnight service;

to the person listed below and addressed as follows:

Michael R. Seidl, OSB No. 83319
SEIDL LAW OFFICE, P.C.
806 SW Broadway, Suite 400
Portland, Oregon 97205
FAX: 503.224.7845

Of Attorneys for Plaintiffs

DATED: June 5, 2006

MERSEREAU & SHANNON LLP

Peter R. Mersereau

PETER R. MERSEREAU, OSB No. 73202
pmersereau@mershanlaw.com
THOMAS W. MCPHERSON, OSB No. 75001
tmcpherson@mershanlaw.com
503.226.6400
Of Attorneys for Defendants