

Nos. 08-1387 & 08-1389 & 08-1534 & 09-1111

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**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND  
IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS  
NECESSARY (BAMN), *et al.*

*Plaintiffs-Appellants (08-1387)/Cross-Appellees, Plaintiffs (08-1389/09-1111),*

CHASE CANTRELL, *et al.*,

*Plaintiffs-Appellees (08-1389), Plaintiffs-Appellants (09-1111)*

-v.-

REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES  
OF MICHIGAN STATE UNIVERSITY, *et al.*,

*Defendants-Appellees/Cross-Appellants (08-1534), Defendants (08-1389/09-1111),*

BILL SCHUETTE, Michigan Attorney General,

*Intervenor-Defendant-Appellee (08-1387/09-1111),*

ERIC RUSSELL,

*Intervenor-Defendant-Appellant (08-1389),*

JENNIFER GRATZ

*Proposed Intervenor-Appellant (08-1389).*

On Appeal from the United States District Court  
for the Eastern District of Michigan

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**ORAL ARGUMENT REQUESTED**

**SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLEES/CROSS-  
APPELLANTS THE UNIVERSITIES**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for the Universities certifies that no party to this appeal is a subsidiary or affiliate of a publicly-owned corporation and no publicly-owned corporation that is not a party to this appeal has a financial interest in the outcome of this matter. The Universities are the governing boards of state universities and the Presidents of those Universities.

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## **STATEMENT IN SUPPORT OF ORAL ARGUMENT**

Pursuant to Federal Rule of Appellate Procedure 34(a)(1) and Sixth Circuit Rule 34(a), the Universities hereby respectfully request oral argument on their cross-appeal. The Universities' cross-appeal raises the important and foundational question of whether the Universities are properly named as parties in the action brought by the Coalition Plaintiffs. The Universities note that the Coalition Plaintiffs have requested oral argument with respect to their appeal.

## **JURISDICTIONAL STATEMENT**

The Court of Appeals has subject matter jurisdiction over this case pursuant to 28 U.S.C. §1291. On March 18, 2008, the District Court issued a final order granting summary judgment to the Attorney General and dismissing all claims. In that same order, however, the District Court denied in part the Universities' Motion to Dismiss. On April 11, 2008, the Universities filed a Notice of Appeal, thereby taking a timely appeal from that portion of the District Court's order. This brief is timely filed under the Court's September 28, 2011 scheduling order.

## STATEMENT OF ISSUES FOR REVIEW

1. Whether the District Court erred in declining to dismiss the Universities from this case because they are not necessary or appropriate parties to this litigation.

2. Whether the governing boards of the Universities maintain plenary authority over matters of admissions policy within their respective institutions.<sup>1</sup>

## INTRODUCTION

The Regents of the University of Michigan, the Board of Trustees of Michigan State University, Mary Sue Coleman, and Lou Anna K. Simon<sup>2</sup> (“Universities”) file this supplemental brief for two purposes.

First, the Universities respectfully request that this Court reverse the District Court ruling that they are proper parties to this case. This case involves a challenge to the constitutionality of Article I, § 26 of the Michigan Constitution (“Proposal 2”). Plaintiffs name as a defendant the Michigan Attorney General, who holds the responsibility for enforcing and defending Proposal 2. Including the

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<sup>1</sup> This issue was raised by Plaintiffs and by the Panel opinions; the Universities address the issue here for clarification purposes only.

<sup>2</sup> Coleman and Simon are Presidents of the University of Michigan and Michigan State University, respectively.

Universities as defendants adds precisely nothing to Plaintiffs' ability to litigate this case or secure the relief they seek. Indeed, the complaint in question fails to state any specific claim against or demand any specific relief from the Universities. The Universities are improperly joined in this action and the District Court should have dismissed them from this lawsuit.

Second, the Universities wish to clarify the role of their governing boards with respect to admissions policy. The Panel opinions diverged in their understanding of that role, the significance of the legal principles that define it, and what (if any) insights the factual record offers into it. The Universities believe that some clarification of these matters will assist this Court in apprehending how the governing boards oversee and engage with questions of admissions policy. The governing boards have an obvious interest in ensuring that how they function in this regard is correctly understood by this Court and is accurately portrayed in any decision this Court renders.<sup>3</sup>

### **STATEMENT OF THE CASE**

The Second Amended Complaint ("Complaint") filed by Plaintiffs the Coalition to Defendant Affirmative Action, Integration, and Immigrant Rights and

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<sup>3</sup> The need for clarification remains, even though the Panel decision was vacated by the grant of rehearing *en banc*, because this Court could choose to draw upon the Panel opinions in conducting its analysis and reaching its decision.

Fight for Equality by Any Means Necessary, *et al.* (“Coalition Plaintiffs”) challenges the constitutionality of Proposal 2 under the Equal Protection Clause of the Fourteenth Amendment. The Complaint properly names the Attorney General of the State of Michigan as a defendant. But the Complaint also names the Universities as defendants. In contrast, Plaintiffs in the companion case of *Cantrell, et al. v. Cox, et al.* (“Cantrell Plaintiffs”) did not name the Universities as parties—for good reason. The Universities do not belong in this case.

The limited role of the Universities here is obvious but merits emphasis. The Universities did not draft Proposal 2. They did not promote Proposal 2. They did not pass Proposal 2 into law. They cannot unilaterally amend or suspend Proposal 2. They are not executive branch entities charged with the responsibility of enforcing Proposal 2. Indeed, the Universities have no role here other than that they—like every other public body that is affected by this provision—must follow Proposal 2 unless and until it is declared unconstitutional. The Universities are therefore powerless to afford the Coalition Plaintiffs the relief they seek in the Complaint—an injunction against the enforcement of Proposal 2. In contrast, the Coalition Plaintiffs can obtain such relief from a party they did properly name as a defendant in this litigation, the Michigan Attorney General.

In light of these infirmities in the Coalition Plaintiffs' Complaint, the Universities filed a Motion to Dismiss, in which they argued that, *inter alia*, they were unnecessary parties to this action. In its March 18, 2008 Opinion and Order the District Court granted the Attorney General's Motion for Summary Judgment and dismissed the Complaint on its merits. In that same Opinion and Order, however, the District Court denied the Universities' Motion to Dismiss. The Universities filed this limited cross appeal because they believed—and continue to believe—that the District Court was plainly mistaken in so ruling.

Although the Universities were concerned about the formidable challenges that Proposal 2 poses to the admission of a genuinely diverse student body—and remain so—they left it to the proper parties to this case to litigate the question of that provision's constitutionality. Accordingly, the Universities' initial brief on appeal did not address a variety of issues that the Panel opinions explored, including questions of how the governing boards exercise their plenary constitutional authority; how they delegate responsibility; and how they maintain oversight of university policies and their implementation. Unfortunately, the Panel opinions reflect some misunderstandings about these issues that risk being perpetuated if they are not corrected. Indeed, a reading of those opinions might leave one with the erroneous impression that these governing boards retain very little actual authority; that they abdicate all real responsibility to various

administrators; that when they delegate authority they surrender it finally and irretrievably; and that they have no ongoing involvement or interest in matters like admissions policy. Because this would be a serious misperception, the Universities believe it is necessary and proper for them to offer some critical clarifications.

### **STATEMENT OF FACTS<sup>4</sup>**

On November 7, 2006, the voters of the State of Michigan passed Proposal 2, which added a new Section 26 to Article I of the Michigan State Constitution. Proposal 2 amends the Michigan Constitution to provide that no public university can “discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin.” Proposal 2 extends much further, though, barring any and all units of “[t]he state” from granting preferential treatment on any of the prohibited bases in the context of “public employment, public education, or public contracting.” Shortly after the passage of Proposal 2, the Coalition Plaintiffs commenced an action challenging its validity and seeking to prevent its enforcement.<sup>5</sup>

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<sup>4</sup> The Panel and District Court opinions set out in greater detail the facts underlying this case. *See* 3/18/08 Order, District Court Record Entry (“RE”) 166, at 3-7; Panel Op. at 4-8.

<sup>5</sup> The Coalition Plaintiffs filed their initial Complaint on November 8, 2006. RE 1. The Coalition Plaintiffs filed an Amended Complaint on December 17, 2006. RE 24. And the Coalition Plaintiffs filed a Second Amended Complaint on March 28, 2007. RE 96. As noted

The Coalition Plaintiffs' Complaint alleges that Proposal 2 violates federal law, including the United States Constitution. *See* Complaint, RE 96, at ¶ 11. The first count of the Complaint claims that Proposal 2 violates the Equal Protection Clause of the Fourteenth Amendment by “intentionally discriminating” against minorities. *Id.* at ¶¶ 105-111. The second and fourth counts of the Complaint claim that Proposal 2 violates the Equal Protection Clause by restructuring government in a manner that eliminates “equal political means” for minorities and women to petition for university admissions policies in their interest. *Id.* at ¶¶ 112-121, 130-136. The third count alleges that Proposal 2 is preempted by Title VI of the Civil Rights Act of 1964. *Id.* at ¶¶ 122-129. The fifth count alleges that Proposal 2 is preempted by Title IX of the Education Amendments of 1972. *Id.* at ¶¶ 137-142. And the sixth count alleges that Proposal 2 violates “the First Amendment rights of the universities.” *Id.* at ¶¶ 143-149. The Complaint requests declaratory and preliminary and permanent injunctive relief restraining the “enforc[ement of] Proposal 2 insofar as it applies to the admission, education and graduation of students at the defendant universities.” *Id.* at 21.

On October 17, 2007, the Universities filed a Motion to Dismiss in which they requested that the District Court drop them from the case. RE 179. Among

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above, in this brief “the Complaint” refers to the Coalition Plaintiffs' Second Amended Complaint.

other things, the Universities argued that Fed. R. Civ. P. 21 provides a mechanism for courts to dismiss unnecessary parties from a lawsuit. They maintained that they plainly qualified as unnecessary defendants because they could not provide the relief the Complaint demanded.

The District Court denied this aspect of the Universities' Motion to Dismiss.<sup>6</sup> RE 246. The court acknowledged that "dismissal for misjoinder is proper where the party is not responsible for the alleged harm and does not have the power to accord relief." RE 246 at 22. But the court nevertheless concluded that the Universities were "properly joined as parties to the case" because "the claims brought against the universities are intertwined with those challenging Proposal 2 in general." *Id.* The Universities respectfully submit that in so ruling the District Court applied an incorrect legal standard to an incorrect characterization of the Complaint and consequently reached an incorrect conclusion.

Plaintiffs appealed from the District Court's dismissal of their claims and the Universities cross-appealed on the limited basis that the District Court had erred in

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<sup>6</sup> The District Court granted the Universities' motion insofar as it requested dismissal of the Coalition Plaintiffs' claim that Proposal 2 violated the Universities' right to academic freedom. The District Court concluded that the Coalition Plaintiffs lacked standing to advance this claim. *See* RE 246 at 23-27. The Coalition Plaintiffs have not challenged this ruling on appeal.

declining to dismiss them from the case as unnecessary parties. The Universities' brief on appeal therefore did not discuss the merits of Plaintiffs' claims or the constitutionality of Proposal 2. Nor did their brief discuss the authority of the governing boards or their oversight of or involvement in admissions policy. As to this last issue, the Panel opinions reached conclusions that reflected conflicting understandings of how these boards function. The majority found (as a matter of law) that these boards retain plenary authority over matters of admissions policy and are free to exercise that authority at any time. Panel Op. at 22-23. The dissent found (as a matter of fact) that while these boards may "superficially have 'plenary authority' over [their] respective institution[s]," in reality "the ultimate authority to set admissions policy rests exclusively with each program-specific faculty within the universities." Panel Op. at 49-50. Some clarifications may assist this Court in its consideration of this issue.

## **ARGUMENT**

### **I. The District Court Erred in Concluding that the University Defendants Were Properly Joined in this Action**

Fed. R. Civ. P. 21 provides a procedural mechanism by which a court "may drop or add parties" from a case. *Letherer v. Alger Group, LLC*, 328 F.3d 262, 267 (6<sup>th</sup> Cir. 2003). "A misjoinder of parties ... frequently is declared because no relief is demanded from one or more of the parties joined as defendants." *Id.* (citing 7

Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure* § 1683, at 475-476 (3d ed. 2001)). In *Letherer*, for example, plaintiffs included a party as a defendant solely in order to have it divert certain proceeds into an escrow account. When plaintiffs withdrew the escrow request, the district court concluded that this defendant—“who was neither seeking relief nor having relief sought from it”—was no longer an appropriate party and dismissed it from the case. *Id.* at 268. This Court affirmed.<sup>7</sup>

In this case, the Coalition Plaintiffs’ Complaint does not state any claim specifically directed at the Universities or demand any relief that the Universities can provide. The Complaint begins by summarizing the various bases on which the Coalition Plaintiffs allege Proposal 2 is invalid under federal law. RE 96 at ¶¶ 1-13. It alleges jurisdiction. *Id.* at ¶¶ 14-15. It identifies the parties. *Id.* at ¶¶ 16-39. It describes the putative class. *Id.* at ¶¶ 40-47. It offers an extended statement of facts that details the Coalition Plaintiffs’ objections to Proposal 2. *Id.* at ¶¶ 48-

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<sup>7</sup> In *Letherer*, this Court indicated that decisions to dismiss parties under Rule 21 are reviewed for an abuse of discretion. The Universities submit that the District Court so plainly erred in declining to dismiss them from this case that this standard is satisfied here. The Universities respectfully suggest, however, that misjoinder cases like this one might more appropriately be subject to the sort of *de novo* review that this Court applies to decisions on motions to dismiss under Fed. R. Civ. P. 12(b)(6). Where a decision on misjoinder requires the trial court to exercise its discretion in determining what is “just” under Fed. R. Civ. P. 21, then application of an abuse of discretion standard makes sense. Where, however, a decision on misjoinder requires the trial court to determine whether the plaintiff failed to advance any actual claims or seek any recoverable relief as to some of the named defendants, then the trial court is deciding a question of law that is similar, if not analytically identical, to the question presented by 12(b)(6) motions.

104. It fleshes out the Coalition Plaintiffs' six theories as to why Proposal 2 is unconstitutional. *Id.* at ¶¶ 105-149. And it concludes each count by asking for “preliminary and permanent injunctive and declaratory relief restraining the defendants from enforcing Proposal 2”—a request that can only be directed against the state actor charged with “enforcing Proposal 2,” the Michigan Attorney General. The Complaint neither does, nor could, seek this relief from the Universities.

In numerous cases involving analogous facts courts have dismissed misjoined parties. Consider, for example, *Hispanic Coalition on Reapportionment v. Legislative Reapportionment Commission*, 536 F. Supp. 578 (E.D. Pa. 1982). In that case, plaintiffs challenged the constitutionality of a reapportionment plan and sought a declaratory judgment, a preliminary and permanent injunction, and an order directing the adoption of a valid plan. Several defendants asked to be dismissed from the case because they were not involved in the state reapportionment process and therefore had no authority to grant plaintiffs the relief they sought. The court granted the motion, holding that “where certain defendants are clearly without authority or power to effect any of the relief sought by the plaintiffs, a motion to drop those defendants may properly be granted.” Because the Universities are “clearly without authority or power to effect any of the relief

sought by the [Coalition Plaintiffs],” the District Court plainly erred in not reaching the same conclusion here.

Consider also *Brown v. N.C. State Board of Elections*, 394 F. Supp. 359 (W.D.N.C. 1975). In that case, the plaintiff brought an action against a state board of elections and a county board of elections and their respective members, challenging the constitutionality of a statute that required individuals who wished to stand as candidates for public office to pay a filing fee. The county board and its members moved for dismissal on the ground that they were not proper parties to the action. The court granted the motion, observing that the statute in question required that candidates file their applications with the state board and that the county board had “no authority to accept or reject such applications.” Because the county board and its members were unable to afford plaintiff the relief he wanted—as the Universities here are unable to do with respect to the demands of the Coalition Plaintiffs—they were dismissed from the case.

Although an unpublished opinion, *Brooks v. Glynn County*, 1989 U.S. Dist. LEXIS 4776, \*11 (S.D. Ga. 1989) follows the same reasoning and is also instructive. In that case, plaintiffs brought a class action challenging state laws that allowed for certain election procedures that prevented African Americans from being the majority voting block in many districts. Plaintiffs claimed that these procedures ran afoul of the Federal Voting Rights Act and the Thirteenth,

Fourteenth, and Fifteenth Amendments. *Id.* at \*2. Plaintiffs sued the State Election Board, the Secretary of State of Georgia, the Chairman of the State Election Board, and also the local superintendents of elections of several counties. The local defendants moved to be dropped from the case pursuant to Rule 21 on the basis that the state defendants were responsible for the challenged practices and the local defendants could not grant plaintiffs the relief they wanted. Plaintiffs claimed that the local defendants were proper parties because they supervised the elections and would implement any changes to the law. *Id.* at \*6. Thus, the argument raised by plaintiffs in *Brooks* is identical to that raised by the Coalition Plaintiffs here, i.e., that a party who has no connection with a law beyond the obligation to *follow it* is a proper defendant in a lawsuit challenging the law. The *Brooks* court granted the local defendants' Rule 21 motion, ruling that “[w]here a particular defendant lacks authority to provide the requested relief, dismissal is proper.” *Id.* at \*8-\*11.

A number of courts have described dismissal under these circumstances as grounded in principles of standing, reasoning that no actual case or controversy exists between those particular defendants and the plaintiffs in the case. *See, e.g., Okpalobi v. Foster*, 244 F.3d 405, 425 (5th Cir. 2001) (holding that because the governor and attorney general had no powers to redress the injuries alleged, the plaintiffs had no case or controversy with those defendants that would permit them

to maintain an action in federal court); *Snyder v. Millersville Univ.*, No. 071660, 2008 U.S. Dist. LEXIS 97943, at \*12 (E.D. Pa. Dec. 3, 2008) (holding that plaintiff's request for a mandatory injunction failed because she had proceeded against only individuals who did not have the authority to afford her the desired relief); *Williams v. Doyle*, 494 F. Supp. 2d 1019, 1024 (W.D. Wis. 2007) (holding that a claim for injunctive relief can only stand against someone who has the authority to grant it).

The Universities should have been dismissed pursuant to Rule 21 because the Complaint demands no relief they can provide. Rather, as discussed above, the Complaint claims only that Proposal 2 violates various federal laws and asks for an injunction against its enforcement. Because the requested remedy would restrain the “enforc[ement] of Proposal 2,” the Complaint, in its totality, raises a claim solely with respect to the state officer charged with defending and enforcing that constitutional provision—the Michigan Attorney General.

The District Court therefore erred in concluding that “the claims brought against the universities are intertwined with those challenging Proposal 2 in general.” RE 246 at 22. After all, the Complaint—for the reasons discussed—did not actually advance *any* claim against the Universities. Rather, the Complaint simply alleged that the enforcement of Proposal 2 should be enjoined because it

runs afoul of various federal laws. Accordingly, there were “no claims brought against the universities” in the Complaint, let alone claims that were “intertwined” with “those challenging Proposal 2 in general.”

The District Court further erred in relying on Fed. R. Civ. P. 20(a) in concluding that the Universities were properly joined in this case. The District Court reasoned that, because “the claims against the university defendants and the attorney general share common questions of law and fact and arise out of the same occurrence, the preconditions of joinder under Rule 20(a) have been met and dismissal is unwarranted.” RE 246 at 22. But that analysis obviously does not apply here, where the Complaint actually states no claim at all against the Universities, let alone a claim that “share[s] common questions of law and fact and arise[s] out of the same occurrence” as the other claims advanced.

Unfortunately, the District Court fell into this error because it accepted an argument advanced by the Coalition Plaintiffs that has no merit. In response to the Universities’ Motion to Dismiss, the Coalition Plaintiffs argued that they had a claim against, and might need a remedy from, the Universities because those institutions “implemented” Proposal 2 by making such changes to their admissions and financial aid policies as the law required. RE 198 at 1. The Coalition Plaintiffs contended that, if the District Court declared that Proposal 2 violated the

Constitution or other federal law, and if that violation “harmed the admission” of minorities, then “affirmative relief” against the Universities might be required to undo those injuries. *Id.* at 7. The District Court accepted this argument, stating that “[i]f this Court were to find Proposal 2 unconstitutional, affirmative action would not automatically be reinstated into the admissions process. Rather, the universities would have to choose to do so on their own.” RE 246 at 22.

This line of reasoning suffers from two conspicuous and fatal flaws. First, the Complaint nowhere states that the Universities violated the Fourteenth Amendment or the federal civil rights laws. Rather, it alleges, over and over again, that Proposal 2 runs afoul of those provisions. Nor does the Complaint include a request for relief that encompasses the “affirmative” remedies that the District Court speculated might prove necessary. Indeed, with respect to this failing the Coalition Plaintiffs made no argument at all, save the weak observation that the “Second Amended Complaint repeatedly requests ‘such further relief as may be necessary’ to implement any judgment that they secure.” RE 198 at 2, n. 1. Surely, the pleading requirements of the federal rules—particularly after *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)—demand more from a complaint than this.

Second, and for these purposes more importantly, such a claim against the Universities—even if made—would not bring them within the terms of Rule 20(a). After all, the “transaction” or “occurrence” allegedly giving rise to such a claim would not be the passage of Proposal 2; it would be the implementing policies and procedures adopted by the Universities. Of course, the Universities deny that the Coalition Plaintiffs have a legally cognizable claim against them based upon their decision to obey the law. But the critical point here is that if such a claim did exist it would not belong in this lawsuit because it would relate to transactions and occurrences different than those at issue in this case. Permissive joinder under Rule 20(a) therefore has no application here.<sup>8</sup>

The Universities are not necessary parties to this action. They are not charged with the responsibility of enforcing Proposal 2 against anyone or of defending Proposal 2 in court. They did not draft or enact Proposal 2 and they cannot repeal or amend it. At present, all they can do is comply with their legal obligation to follow it. Should this Court grant the Coalition Plaintiffs the relief they seek, that relief can be obtained from the Michigan Attorney General. Because the Universities are not necessary parties to this action, they should have

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<sup>8</sup> In addition, *if* the Coalition Plaintiffs were to prevail in this action, and *if* the courts were to hold Proposal 2 unconstitutional or otherwise unlawful, and *if* the law required the Universities to take remedial steps as a result, then there is no reason to believe that the Universities would not then follow the law and adopt such measures.

been dismissed pursuant to Fed. R. Civ. P. 21. The Universities therefore respectfully request that this aspect of the District Court's Opinion and Order be reversed.<sup>9</sup>

## **II. The Governing Boards of the Universities Retain Ultimate Authority Over Admissions Policies and Engage with Admissions Policy Issues**

As noted above, one of the claims advanced by the Plaintiffs is that Proposal 2 unconstitutionally alters Michigan's political structure by impermissibly burdening racial minorities. This claim led the Panel judges into a discussion of what qualifies as a "political process." Panel Op. at 18-25 and 47-56. In the course of analyzing this issue, the Panel opinions made a number of statements about the Universities' governing boards. The Universities take no position on the merits of the political process claim or how it should be analyzed, leaving that to this Court and the parties who are properly before it. Nevertheless, because the Panel opinions reflect some conflict and confusion over the role of the governing boards with respect to admissions matters, and because the Universities have an obvious interest in ensuring that their governance is correctly understood and portrayed, the Universities offer some clarifications they hope will assist the Court.

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<sup>9</sup> Because another party to the litigation can afford the Coalition Plaintiffs the relief they seek, although the Universities cannot, the Coalition Plaintiffs obviously would not be prejudiced by the dismissal of the Universities from this case.

As both Panel opinions recognize, the general supervision of these Universities is vested in governing boards whose members are elected.<sup>10</sup> Panel Op. at 21 and 48. The Panel opinions agree that the Michigan Constitution confers upon these boards the plenary authority to manage their respective institutions. Panel Op. at 21 (“Michigan law has confirmed this absolute authority again and again”) and 47 (“The status of these boards has been described by the Michigan Supreme Court as ‘the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the legislature,’” quoting *Bd. of Regents of the Univ. of Mich. v. Auditor Gen.*, 132 N.W. 1037, 1039 (Mich. 1911)). And the Panel opinions agree that these boards, through their bylaws, authorize various administrators to set admissions standards. Panel Op. at 21 n. 5 and 48-49.

The opinions part company, however, with respect to their understanding of whether these governing boards do, or even could, maintain any ongoing supervisory role over admissions issues once this authorization has occurred. Compare majority Panel Op. at 22 (“Nothing prevents the board from altering this

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<sup>10</sup> Interestingly, some candidates for these boards have made their positions on admissions issues, including affirmative action, part of their campaign platform. See, e.g., Kalamazoo League of Women Voters report on University of Michigan regent candidates, <http://www.lwvka.org/guide04/regents.html> (last visited December 1, 2011) (two candidates expressing opposition to affirmative action in admissions); “University of Michigan’s admissions policy still an issue for regents’ election,” *Black Issues in Higher Education*, October 21, 2004 (candidates expressing disagreement over affirmative action in admissions).

framework for admissions decisions if they are so inclined”) with dissenting Panel Op. at 49-50 (“The governing boards have fully delegated the responsibility for establishing admissions standards to several program-specific administrative units within each institution .... Each institution’s board may superficially have ‘plenary authority’ over its respective institution[], but the ultimate authority to set admissions policy rests exclusively with each program-specific faculty within the universities”). A clearer understanding of governing board authority and how it operates may help avoid further conflict or confusion over this issue.

The governing boards of the Universities derive their authority from the Michigan Constitution. Mich. Const. art. VIII, § 5. Their bylaws are not the source of that authority but, rather, derive from it. Each board therefore expressly reserves the power to amend its bylaws. *See* Univ. of Mich., Bylaws of the Bd. of Regents § 14.03, available at <http://www.regents.umich.edu/bylaws> (last visited December 1, 2011) and Mich. State Univ., Bd. of Trs. Bylaws, art. 17, available at <http://trustees.msu.edu/bylaws> (last visited December 1, 2011).<sup>11</sup> That a governing board can revise its bylaws is not a mere theoretical possibility. It

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<sup>11</sup> The bylaws and proceedings of the governing boards of these constitutionally created institutions are, in the view of the Universities, “legislative facts” that this Court is free to consider, just as it could consider “the ruling of a judge” or “the enactment of a legislative body.” *See* Fed. R. Evid. 201, Notes of Advisory Committee. Even if this Court did treat these bylaws and proceedings as “adjudicative facts,” however, judicial notice could be taken of them as facts that can “accurately and readily [be] determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2).

happens with some frequency. For example, since 2008 the University of Michigan Board of Regents has revised more than two-dozen of its bylaws. Two of those bylaws fall within Chapter VIII, which addresses “Admission and Registration of Students.”<sup>12</sup> The bylaws of the Board of Trustees of Michigan State University indicate they were adopted in 1965 and revised in 1977, 1979, 1980, 1990, 1994, 2000 and 2003.

Because the Universities are vast and highly complex institutions, their governing boards must authorize others—a President, a Provost, executive officers, and a host of others—to implement university policy and conduct day-to-day operations. This includes rule- and decision-making responsibilities with respect to admissions. *See* Univ. of Mich., Bylaws of the Bd. of Regents, §§ 2.04 and 8.01, *available at* <http://www.regents.umich.edu/bylaws> (last visited December 1, 2011) (placing academic affairs and, specifically, undergraduate admissions under the authority of the Provost) and Mich. State Univ., Bd. of Trs. Bylaws, art. 4, *available at* <http://trustees.msu.edu/bylaws> (last visited December 1, 2011)

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<sup>12</sup> Bylaw 8.01 states that it was revised in April of 2009. The minutes from the April, 2009 board meeting include a line-edited text of the bylaw that shows what was changed. The bylaw was revised to name the specific administrators at the three University of Michigan campuses responsible for undergraduate admissions and to indicate their respective lines of direct report. Bylaw 8.04 states that it was revised in July of 2008. The minutes from the July, 2008 board meeting indicate that this was among a number of non-substantive “housekeeping” amendments to the bylaws. Interestingly, the minutes from the July, 2008 board meeting also show that an alumna of the university addressed admissions policy issues during the public comment portion of the meeting. These minutes can be found at <http://www.regents.umich.edu/meetings/minutes>.

(directing that the Provost “[s]hall be responsible for supervising procedures and policies relating to the admissions of students”).

At the same time, the governing boards have unambiguously declared that they retain the plenary and final authority that the Michigan Constitution confers upon them. *See* Univ. of Mich., Bylaws of the Bd. of Regents, Preface, *available at* <http://www.regents.umich.edu/bylaws> (last visited December 1, 2011) (noting that all rule-making authority within the institution is subject “to the ultimate authority of the board”) and Mich. State Univ., Bd. of Trs. Bylaws, Preamble, arts. 4 and 8, *available at* <http://trustees.msu.edu/bylaws> (last visited December 1, 2011) (emphasizing that “The Board of Trustees .... exercises the final authority in the government of the University” and specifically stating that the board retains the authority to “determine and establish the qualifications of students for admission at any level” upon the recommendation of the President, whom the Board elects and who serves at the pleasure of the Board). The governing boards take seriously their constitutional charge of institutional oversight.

In order to perform their supervisory function, the governing boards meet regularly. *See* Univ. of Mich., Bylaws of the Bd. of Regents, §§ 1.01, *available at* <http://www.regents.umich.edu/bylaws> (last visited December 1, 2011) and Mich. State Univ., Bd. of Trs. Bylaws, art. 2, *available at* <http://trustees.msu.edu/bylaws>

(last visited December 1, 2011).<sup>13</sup> Time is set aside at open board meetings for public comment. *See* Univ. of Mich., Public Comments Policy, *available at* <http://www.regents.umich.edu/meetings/addressing.html> (last visited December 1, 2011) and Mich. State Univ. Bd. of Trs., Policy for Addressing the Board, *available at* <http://trustees.msu.edu/meetings/publicparticipation.html> (last visited December 1, 2011). These public meetings provide a vehicle for the governing boards to receive reports from the President, Provost, and others; to hear the thoughts, concerns, and requests of members of the public; and to express their views on matters of university policy. This has included discussion of the specific issue of university policy regarding the use of affirmative action in admissions. *See, e.g.*, Univ. of Mich. Bd. Regents Proceedings, March, 2007, p. 264-265 (report by Provost to Regents regarding changes in admissions practices in light of Proposal 2; public statements by Regents regarding the report); Univ. of Mich. Bd. Regents Proceedings, June, 2004, p. 301 (report by Provost to Regents on the revamping of the undergraduate admissions process in light of the United States Supreme Court decision in *Gratz v. Bollinger*); and Univ. of Mich. Bd. Regents

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<sup>13</sup> Minutes of public meetings are prepared and made available. *See* Univ. of Mich., Bylaws of the Bd. of Regents, § 1.11, *available at* <http://www.regents.umich.edu/bylaws> and Proceedings and Minutes, *available at* <http://websvcs.its.umich.edu/regntpro> or <http://www.regents.umich.edu/meetings/minutes> (last visited December 1, 2011) and Mich. State Univ., Bd. of Trs. Meetings, *available at* <http://trustees.msu.edu/meetings> (last visited December 1, 2011).

Proceedings, July, 2003, p. 11 (Regents commenting on the importance of affirmative action in university admissions and of the United States Supreme Court decision in *Grutter v. Bollinger*), available at <http://websvcs.itcs.umich.edu/regntpro> (last visited December 1, 2011).

The record in this case does not contradict the notion that the governing boards have continuing authority over and involvement in matters of admissions policy. In reaching a different conclusion, the Panel dissent primarily relied upon the deposition of the University of Michigan Law School Assistant Dean of Admissions, Sarah Zearfoss, and the deposition of the former Dean of the Wayne State University Law School, Frank Wu. The Universities respectfully submit that it is important to understand the limited scope of the testimony offered in these depositions. As the record indicates, Assistant Dean Zearfoss was produced in response to a 30(b)(6) deposition notice requesting a witness who could testify about how the University of Michigan Law School makes admissions decisions. RE 203, Pls.' SJ Mot., Ex. E. (Zearfoss Dep.) at 4. She was not produced to testify about—and nothing in her deposition suggests she has personal knowledge of—questions regarding the extent to which admissions policies are subject to the control and oversight of the University of Michigan Board of Regents, let alone the Board of Trustees of Michigan State University or the governing board of any

other institution.<sup>14</sup> In the same vein, Dean Wu could only speak to his understanding of how admissions decisions were made within one academic unit at Wayne State, and certainly not to any issue relevant to these Universities.<sup>15</sup> The Universities respectfully suggest that a correct understanding of how their governing boards exercise their authority is better achieved through an examination of art. VIII, § 5 of the Michigan Constitution, which affords them plenary power over their institutions; their bylaws, which clearly express their intention to retain that power even in the context of necessary delegation; and their proceedings, which reflect their ongoing involvement in matters of academic policy, including admissions.

## CONCLUSION

For the reasons set forth above, the Universities respectfully request that this Court reverse the District Court's ruling that the Universities are proper parties to this case and dismiss them from this action. The Universities further respectfully request that, to the extent this Court finds it necessary to address the authority of

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<sup>14</sup> Indeed, immediately prior to Assistant Dean Zearfoss's cited testimony, counsel for the Universities interposed an objection on the basis that the witness "obviously can't speak to [the] question" of "who has the legal power to do these things." RE 203, Pls' SJ Mot., Ex. E (Zearfoss Dep.) at 214.

<sup>15</sup> Again, in conjunction with Dean Wu's cited testimony, counsel for the Universities interposed an objection that the witness could not answer legal questions about who had authority over admissions issues. RE 203, Pls' SJ Mot., Ex. F (Wu Dep.) at 192.

the governing boards and their involvement with matters of admissions policy, it consider the clarifications offered above.

December 21, 2011

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), I hereby certify that the foregoing brief complies with type-volume limitation of Rule 32(a)(7)(B), in that it contains 4,931 words.

/s/ Leonard M. Niehoff  
Leonard M. Niehoff

**CERTIFICATE OF SERVICE**

I hereby certify that on December 21, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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**TYRONE BROOKS, ET AL., Plaintiffs v. GLYNN COUNTY, GEORGIA BOARD OF ELECTIONS, CECIL LITTLE, Chairman of the Board of Elections of Glynn County; DIANE HALLMAN, Superintendent of Elections of Appling County, Georgia; DAVID M. PROCTOR, Superintendent of Elections of Camden County, Georgia; DOSHIE H. BUFORD, Superintendent of Elections of Jeff Davis, County, Georgia; CHRISTINE BURCH, Superintendent of Elections of Wayne County, Georgia; GEORGIA STATE BOARD OF ELECTIONS; and MAX CLELAND, Secretary of State and Chairman of the Georgia State Board of Elections, Defendants**

No. CV288-146

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, BRUNSWICK DIVISION**

*1989 U.S. Dist. LEXIS 4776*

**April 25, 1989, Decided and Filed**

**COUNSEL:** [\*1] LAUGHLIN MCDONALD, KATHLEEN L. WILDE, NEIL BRADLEY, DEREK ALPHRAN, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC., ATLANTA, GA, Attorneys for Plaintiffs

DAVID F. WALBERT, Atlanta, Ga, Attorney for Defendants

**OPINION BY: EDENFIELD**

**OPINION**

*ORDER*

*B. AVANT EDENFIELD, UNITED STATES DISTRICT JUDGE*

*Pursuant to Rule 12(b)(6) or Rule 21 of the Federal Rules of Civil Procedure, defendants Glynn County Board of Elections, Cecil Little, Superintendent of the*

*County Board of Elections for Glynn County and Chief Administrative Officer of the Glynn County Board of Elections, Diane Hallman, David M. Proctor, Doshie H. Buford, and Christine Burch, the Superintendents of the County Boards of Elections for the Brunswick Circuit representing Appling County, Camden County, Jeff Davis County, and Wayne County, respectively, ("local defendants") move to be dismissed. Alternatively, the local defendants move to be placed on "inactive status" in order to be relieved from the burdens of active participation in this litigation. For the reasons set forth below, the Court GRANTS the local defendants' motion to be dismissed as parties to this action.*

*Background*

*Plaintiffs, on behalf of themselves and all black voters residing [\*2] in the various judicial circuits in Georgia, bring this class action against the local defendants as well as the State Election Board and Max Cleland, Secretary of the State of Georgia and Chairman of the State Election Board ("state defendants"). According to the complaint, defendants failed to preclear*

certain statutes as required by the Voting Rights Act.<sup>1</sup> Plaintiffs seek declaratory and injunctive relief against the use of at-large, numbered post elections for the superior court judges of Georgia. They challenge the manner in which certain judicial circuits are drawn and the current method of electing superior court judges, contending that these methods violate sections 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 and 1973(c), and the first, thirteenth, fourteenth, and fifteenth amendments of the United States Constitution.

<sup>1</sup> Pursuant to 28 U.S.C. § 2284, the Chief Judge of the Eleventh Circuit, Paul H. Roney, designated a three judge panel to hear the claim arising under 42 U.S.C. § 1973(c).

The State of Georgia is divided into 43 judicial circuits. Most of the judicial circuits encompass more than one county, and each circuit follows county boundary lines. [\*3] Each circuit is composed of at least one superior court judge elected on a non-partisan basis by a majority vote. Each superior court judge serves for a four year term and must reside within the geographical area which he or she is elected to serve.

Plaintiffs challenge the use of "at-large" elections whereby all the voters within their respective circuits elect superior court judges. Plaintiffs assert that, in each judicial district, blacks constitute a minority of the voting age population and of the registered voters. Plaintiffs claim that black voters in Georgia are politically and geographically cohesive, but their candidates are usually defeated by whites voting as a bloc. According to the complaint, no blacks, or only a token number of blacks, have been elected superior court judges in various judicial circuits. Plaintiffs maintain that if the present judicial circuits were apportioned on the basis of single member districts, black voters would be a majority in many districts.

In addition, plaintiffs contest the use of "numbered post elections" in multi-judge elections. In numbered post elections, each seat on the court is the subject of a separate election and tally. Plaintiffs [\*4] argue that the purpose and result of at-large elections, numbered post elections, and the majority vote requirement is to deny or abridge, on the basis of race or color, the right of blacks to vote. They claim that many of the acts defining the present configuration of judicial circuits and elections have not been precleared by the United States Attorney General or by declaratory judgment from the

United States District Court for the District of Columbia as required by the Voting Rights Act, 42 U.S.C. § 1973c. Plaintiffs ask the Court to declare unenforceable those statutes that have not been precleared, to issue a permanent injunction against the present method of election, and to mandate that defendants re-apportion judicial circuits, adopting a method that remedies the alleged violations and complies with sections 2 and 5 of the Voting Rights Act.

#### Analysis

The local defendants move to be dismissed pursuant to Rule 12(b)(6) or Rule 21. The local defendants claim that the state defendants are the proper parties and that plaintiffs improperly joined the local defendants.<sup>2</sup> Enumerating plaintiffs' causes of action, the local defendants maintain that each challenged practice is [\*5] state-wide and that, therefore, the state defendants are responsible for the challenged practices.<sup>3</sup> The movants argue that they have no power to grant plaintiffs any of the relief requested, and that dismissing them would not prejudice the state defendants.<sup>4</sup>

<sup>2</sup> The local defendants accuse plaintiffs of forum shopping; according to the local defendants, plaintiffs joined them because plaintiffs believed that the Southern District of Georgia would be responsive to their claims.

<sup>3</sup> In the first cause of action, plaintiffs charge that defendants violated the Voting Rights Act, 42 U.S.C. § 1973(c), by failing to preclear certain statutes. In the remaining causes of action, plaintiffs argue that defendants violated 42 U.S.C. § 1973 and the first, thirteenth, fourteenth and fifteenth amendments of the United States Constitution. The second cause of action challenges the majority vote requirement, and the use of at-large elections and numbered posts. According to the third cause of action, boundary lines fragment the black population, thereby diluting black voting strength. Finally, plaintiffs contest the requirement that superior court judges be residents of the geographical districts in which they are elected.

[\*6]

<sup>4</sup> In response to the local defendants' motion, the state defendants filed a brief in support of dismissing the local defendants.

Plaintiffs respond that the local defendants are

proper parties under Rule 20 of the Federal Rules of Civil Procedure. <sup>5</sup> Plaintiffs contend that the local defendants should not be dismissed because the right to relief against the local defendants and the state defendants arises from the same occurrences; plaintiffs are asking the Court to enjoin both the local and state defendants from conducting elections under the current system and to require them to adopt new election methods. According to plaintiffs, the local defendants are proper parties because they supervise elections and, in addition, they would implement any changes enacted.

<sup>5</sup> Rule 20(a) governs permissive joinder of parties and provides that

[a]ll persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

*Fed.R.Civ.P. 20(a).*

[\*7] In support of the argument that the local defendants are proper parties under Rule 20, plaintiffs cite *O.C.G.A. § 21-2-70*. This section enumerates the powers and duties of the superintendents of the county election boards. Among the duties imposed is the duty "[t]o receive and act upon all petitions presented by electors . . . for the division, redivision, alteration, change, or consolidation of precincts" and the duty "[t]o make and issue such rules, regulations, and instructions, consistent with law, including the rules and regulation promulgated by the State Election Board, as he may deem necessary for the guidance of poll officers, custodians and electors in primaries and elections." *O.C.G.A. § 21-2-70(1),(7)*.

When a party is deemed misjoined, the Court or a party can invoke Rule 21 of the Federal Rules of Civil Procedure. According to Rule 21, the Court can drop parties "at any stage of the action and on any such terms as are just." Courts have declared misjoinder "where no relief is demanded from one or more of the parties joined as defendants, . . . where a particular defendant lacks authority to provide the requested relief, . . . where a defendant has no discernable legal [\*8] obligation to provide the requested relief, . . . or where a defendant's presence is not necessary to afford all the requested

relief." *Benson v. RMJ Securities Corp.*, 683 F. Supp. 359, 378 (S.D.N.Y. 1988) (citations omitted)

The Court finds that the local defendants' presence is not necessary to afford plaintiffs complete relief. State officials are charged with the responsibility of complying with preclearance requirements. In addition, the other challenged election procedures were promulgated by the state legislature and not by the local defendants. For example, *O.C.G.A. § 15-6-4.1* provides for at-large elections. <sup>6</sup> The Georgia Code also divides the state into 43 judicial circuits, *O.C.G.A. § 15-6-1*, and requires that superior court judges be elected by a majority vote, *O.C.G.A. §§ 21-2-284.1* and 21-2- 285.1.

<sup>6</sup> The Georgia Code provides that superior court judges "shall be elected by the electors of the judicial circuit in which the judge is to serve." *O.C.G.A. § 15-6-4.1*.

Although *O.C.G.A. § 21-2-70* imparts some authority to superintendents, their authority extends only to their respective counties. The relief sought by plaintiffs, however, is not limited to the Brunswick [\*9] District. Cf. *McCain v. Lybrand*, 465 U.S. 236 (1984). (In *McCain*, the county defendants were not dismissed, but the *McCain* plaintiffs challenged a South Carolina statute that altered election procedures in only one county). The conclusion that the local defendants need not be joined in order to insure complete relief is buttressed by the fact that plaintiffs failed to join the superintendents of other judicial districts even though plaintiffs allege that violations occurred throughout Georgia's 43 judicial districts.

In addition, *O.C.G.A. § 21-2-70* specifies that a superintendent's rulemaking authority is circumscribed by laws and by the regulations of the State Election Board. Plaintiffs have not alleged that the local defendants failed to follow the dictates of the State Election Board or that the local defendants applied state law discriminatorily. Cf. *United States v. Mississippi*, 380 U.S. 128 (1965) (In a suit challenging voter registration laws, the complaint named county registrars because the laws were subject to discriminatory application). Consequently, the Court can afford plaintiffs the relief requested without the presence of the local defendants; the [\*10] Court can address the alleged grievances, if necessary, by directing the state defendants to amend state laws, by declaring certain statutes unenforceable until precleared, and by enjoining certain state-wide procedures.

1989 U.S. Dist. LEXIS 4776, \*10

The gravamen of plaintiffs' complaint is that the local defendants and other superintendents have acted in accordance with a superior court judge election system that discriminates against blacks. The local defendants do not have the authority to amend these laws. They function in a "ministerial capacity" and they cannot act in "a manner inconsistent with the statute[s] governing election of superior court judges." *Republican Party of North Carolina v. Martin*, 682 F. Supp. 834, 835 (M.D.N.C. 1988).<sup>7</sup>

7 In dismissing the local defendants, therefore, the Court in no way relieves the local defendants of their obligation to comply with any change in election laws that may result from this lawsuit. The State Election Board has the power to "compel compliance with any election or primary law of the state." *O.C.G.A. § 21-2-32(a)*. In addition, the local defendants represent that, even if dismissed, they would adhere to any order issued in this litigation. (*See Local Defendants' Motion to Dismiss or Drop Parties, Or, in the Alternative, to Place Parties on Inactive Status*, January 17, 1989, p. 4.) The Court enters this Order with the expectation that the local defendants will fulfill their promise.

[\*11] Where a particular defendant lacks authority to provide the requested relief, dismissal is proper. In *Hispanic Coalition on Reapportionment v. Legislative*

*Reapportionment Commission*, 536 F. Supp. 578 (E.D.PA 1982), the plaintiffs challenged the apportionment of the state legislature. The court dismissed the Democratic Party City Committee and committee members because joining them was unnecessary; "if the Court were to find it necessary for the state to develop a new reapportionment plan free of constitutional and statutory defects, [the state] would have to produce a plan meeting those criteria." *Id. See also Brown v. North Carolina State Board of Elections*, 394 F. Supp. 359, 360 (W.D.N.C. 1975) (In a suit challenging a state election statute, the court dismissed the county board of elections and its members because "the state statute require[d] that candidates for Congress file with the State Board of Elections and the County Board [had] no authority to accept or reject such applications."). In the case *sub judice*, the power to alter the contested procedures rests with the state defendants. Joinder of the local defendants is superfluous and they will be dismissed.

[\*12] *Conclusion*

*For the foregoing reasons, the Court GRANTS the local defendants' motion to be dismissed. The Court dismisses defendants Glynn County Board of Elections, Cecil Little, Diane Hallman, David M. Proctor, Doshie H Buford, and Christine Burch.*

*SO ORDERED, this 25th day of April, 1989.*

LEXSEE



Cited

As of: Dec 20, 2011

**STACEY SNYDER, Plaintiff v. MILLERSVILLE UNIVERSITY, et al., Defendants**

**CIVIL ACTION NO. 07-1660**

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF  
PENNSYLVANIA**

**2008 U.S. Dist. LEXIS 97943**

**December 3, 2008, Decided**

**December 3, 2008, Filed**

**CORE TERMS:** teacher, student teaching, certification, teaching, posting, practicum, student teacher, injunctive relief, recommend, placement, webpage, public employee, rating, cooperating, administrators, satisfactory, mandatory, candidate's, official capacities, injunction, professionalism, preparation, full-time, taught, futile, unsatisfactory, public concern, recommendation, supervisor, photograph

**COUNSEL:** [\*1] For STACY SNYDER, Plaintiff: MARK W. VOIGT, LEAD ATTORNEY, LAW OFFICE OF MARK W. VOIGT, PLYMOUTH MEETING, PA.

For MILLERSVILLE UNIVERSITY, J. BARRY GIRVIN, individually and as a professor and student-teacher supervisor at Millersville University, DR. JANE S. BRAY, individually and as Dean of the School of Education at Millersville University, DR. VILAS A. PRABHU, individually and as Provost of Millersville University, DR. JUDITH WENRICH, in her individual and official capacity, DR. BEVERLY SCHNELLER, in her individual and official capacity, Defendants: BARRY N. KRAMER, OFFICE OF GENERAL COUNSEL, PHILADELPHIA, PA.

**JUDGES:** Paul S. Diamond, United States District Judge.

**OPINION BY:** Paul S. Diamond

**OPINION**

**MEMORANDUM**

Plaintiff Stacey Snyder alleges that Defendants -- five Millersville University administrators -- violated her [First Amendment](#) right to freedom of expression. Having held a two day non-jury trial, I enter judgment for Defendants and offer my supporting factual findings and legal conclusions. [Fed. R. Civ. P. 52](#).

**PROCEDURAL HISTORY**

From June 2002 until May 2006, Plaintiff attended Millersville University, where she majored in education. On May 13, 2006, after Defendants determined that Plaintiff had not successfully [\*2] met the prerequisites for obtaining the degree of Bachelor of Science in Education, they allowed Plaintiff to graduate from MU with a Bachelor of Arts in English. Plaintiff unsuccessfully appealed that decision to Dr. Jane S. Bray, Dean of MU's School of Education and Dr. Vilas A. Prabhu, MU's Provost and Vice President for Academic Affairs.

On April 25, 2007, Plaintiff filed a Complaint in this

Court against Millersville University, Bray, Prabhu, and J. Barry Girvin, her supervisor in MU's Student Teaching Program. She included three state law claims, and also alleged that Defendants had violated her [First Amendment](#) free speech rights and her [Fifth](#) and [Fourteenth Amendment](#) due process rights. [42 U.S.C. § 1983](#).

On September 17, 2007, I dismissed Plaintiff's claims against MU with prejudice on [Eleventh Amendment](#) sovereign immunity grounds. (Doc. No. 15). I gave Plaintiff leave to amend: (1) her ambiguous claims against the remaining Defendants in their individual capacities; and (2) her request for relief against those same Defendants in their official capacities. [Will v. Mich. Dep't of State Police](#), 491 U.S. 58, 71 n.10, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989); [Melo v. Hafer](#), 912 F. 2d 628, 635 (3d Cir. 1990), aff'd [502 U.S. 21](#), 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991).

On [\*3] October 12, 2007, Plaintiff filed a Second Amended Complaint, again alleging that Bray, Prabhu, and Girvin, acting in their individual and official capacities, violated her [First Amendment](#) free speech rights and her [Fifth](#) and [Fourteenth Amendment](#) due process rights. Plaintiff also brought several state law claims against Defendants in their individual capacities. I dismissed the [Fifth](#) and [Fourteenth Amendment](#) claims, ruling that Defendants had afforded Plaintiff adequate process. (Doc. No. 23). I also dismissed Plaintiff's state law claims as non-cognizable and barred by sovereign immunity. I denied Defendants' Motion to Dismiss as to Plaintiff's [First Amendment](#) claim.

On March 18, 2008, Plaintiff filed a Third Amended Complaint, adding as Defendants Dr. Judith Wenrich, MU's Student Teaching Coordinator and Director of Field Services, and Dr. Beverly Schneller, the Chair of MU's English Department. Plaintiff alleged that Defendants Bray, Prabhu, Girvin, Wenrich, and Schneller violated her [First Amendment](#) free speech rights. She sought monetary damages from Defendants in their individual capacities and injunctive relief from Defendants in their official capacities.

On April 11, 2008, [\*4] Defendants moved for summary judgment. I granted Defendants' Motion in part, ruling that qualified immunity barred Plaintiff's claims against Defendants in their individual capacities. (Doc. No. 39).

On May 6 and May 7, 2008, I conducted a non-jury trial on Plaintiff's claim for mandatory injunctive relief against Defendants in their official capacities. Plaintiff asks me to compel Defendants to: (1) award her a BSE and the teaching credits that will enable her to seek teaching certification from the Pennsylvania Department of Education; and (2) "take all necessary steps" to ensure that the PDE approves Plaintiff's application for initial teaching certification. (Doc. No. 31 at 18-19.)

Under PDE regulations, Defendants do not have the authority to award Plaintiff a BSE or the teaching credits she seeks, nor can they recommend her for initial teaching certification. Moreover, Defendants did not violate her [First Amendment](#) rights. Accordingly, I conclude that Plaintiff is not entitled to mandatory injunctive relief.

## FINDINGS OF FACT

In the summer of 2002, when she was twenty-two, Plaintiff enrolled at Millersville University as a full-time student. She majored in biology for one year before [\*5] switching to English and, eventually, to education. (Tr. May 6, 2008 at 4-5.) As part of the required education curriculum, in 2005 Plaintiff completed various field assignments at area schools, where she observed teachers and taught two mini-lessons. (Tr. May 6, 2008 at 6-7, 9, 11.) During the entire Spring Semester of 2006, Plaintiff was enrolled in MU's Student Teaching Program, which entailed considerably greater responsibilities, including lesson and curriculum planning, teaching a full course load, and administering exams. (Tr. May 6, 2008 at 25), (Tr. May 7, 2008 at 13-15), (Pl.'s Exs. 4, 5). She anticipated that upon her successful completion of the Student Teaching practicum, she would receive a BSE on May 13, 2006.

### Millersville University's Practicum Requirements

The Pennsylvania Department of Education closely regulates the training and certification of those who seek to become public school teachers. MU's policies and requirements reflect those regulations. For instance, MU requires that every student who seeks a BSE must successfully complete a Student Teaching placement. (Tr. May 6, 2006 at 204, 233-235, 245-248), (Tr. May 7, 2008 at 117-124). This reflects the PDE's regulation [\*6] providing that every applicant must complete a "Department-approved teacher preparation program" -- which must include a "full-time student teaching

experience" -- before seeking initial teaching certification from the PDE. [22 Pa. Code §§ 49.82\(b\)\(2\), 354.25\(f\)](#); (Pl.'s Ex. 4 at 9). The regulations also provide that each applicant for initial teaching certification must receive a recommendation for certification from his or her university. Id. § 49.82(b)(4). MU cannot recommend a candidate for initial teaching certification without confirming that he or she has "achieved at least a satisfactory rating" in Student Teaching. (Doc. No. 45, App. 1), (Tr. May 6, 2008 at 235), (Tr. May 7, 2008 at 134-136).

#### Plaintiff's Student Teaching Assignment

On January 16 and 17, 2006, Plaintiff attended MU's student teacher orientation conducted by Drs. Bray and Wenrich. (Tr. May 6, 2008 at 12), (Pl.'s Ex. 9). Plaintiff there received a copy of the Millersville University Guide to Student Teaching. (Tr. May 6, 2008 at 14), (Pl.'s Ex. 4). Plaintiff read and understood that manual before she began student teaching. (Tr. May 6, 2008 at 111.) The Guide provides that MU student teachers are required to "maintain [\*7] the same professional standards expected of the teaching employees of the cooperating school" and to "fulfill as effectively as possible every role of the classroom teacher . . ." (Pl.'s Ex. 4 at 7.) The Guide also provides that the "student teacher is a guest of the cooperating school." (Pl.'s Ex. 4 at 7.) During the January orientation, Bray explained that student teachers are "novice teachers." (Tr. May 7, 2008 at 139:4.)

In January 2006, Plaintiff was assigned to student teach at Conestoga Valley High School, where full-time CV faculty member Nicole Reinking would serve as her Cooperating Teacher. (Tr. May 6, 2008 at 15-16). In Mid-January, Plaintiff met with Reinking in the CV Teachers' Lounge. (Tr. May 6, 2008 at 16, 113). Reinking reviewed plans for the Semester and discussed Plaintiff's responsibilities. (Tr. May 6, 2008 at 16). Reinking also gave Plaintiff a Teacher's Edition of the course book and a copy of the final exam for one of the courses Plaintiff would teach. (Tr. May 6, 2008 at 113-114), (Tr. May 7, 2008 at 11-12). From the time Plaintiff began as a CV student teacher in January 2006 through May 2006, she took no classes at MU. (Tr. May 6, 2008 at 129.) Plaintiff [\*8] followed the CV school year calendar (rather than the MU academic calendar), and was responsible for conforming to Reinking's schedule. (Tr. May 7, 2008 at 14.)

After spending her first weeks observing Reinking's

twelfth grade English classes, Plaintiff "started [her] teaching experience." (Tr. May 6, 2008 at 20:8-9), (Tr. May 7, 2008 at 12). Within two months, Plaintiff was responsible for teaching two courses while Reinking observed. (Tr. May 6, 2008 at 23, 126). Plaintiff also taught another CV literature course, where she was the "sole teacher" and had "complete responsibility for the students." (Tr. May 6, 2008 at 126:9-13.) By April 2006, Plaintiff taught a "full load" of courses at CV. (Tr. May 6, 2008 at 117-118, 126), (Tr. May 7, 2008 at 13). Her responsibilities included "writing out the lesson plans and getting the documents ready for the students," as well as understanding material "well enough to teach [it] back to the students." (Tr. May 6, 2008 at 25:2-9), (Tr. May 7, 2008 at 16). Plaintiff referred to the pupils in those CV classes as "my students," and thought that they believed her to be "their official teacher." (Pl.'s Ex. 51.) Plaintiff considered the other CV teachers [\*9] -- with whom she attended faculty meetings -- to be her colleagues. (Tr. May 6, 2008 at 93:2.)

#### Mid-Placement Evaluations

Throughout the practicum, Plaintiff experienced great difficulty with respect to her competence and over-familiarity with her students. Those difficulties were described in Plaintiff's evaluations, and would eventually lead to the difficulties that caused Plaintiff to bring this lawsuit.

J. Barry Girvin was Plaintiff's MU Supervisor during her time at CV. He was responsible for observing Plaintiff in the classroom and for evaluating her teaching. Girvin observed Plaintiff seven times during the Semester. (Tr. May 6, 2008 at 187.) Plaintiff's "problems with discipline and also with content" concerned him. (Tr. May 6, 2008 at 187:20-21.) He noted that she had difficulty maintaining a formal teaching manner. (Tr. May 6, 2008 at 190-191.) Plaintiff explained at trial that Girvin helped her understand the importance of "putting [her] foot down." (Tr. May 6, 2008 at 20:24.) Girvin had advised her not to let the students "walk all over" her, and to remember "I'm the teacher, they're the students." (Tr. May 6, 2008 at 28:20-22.)

At the middle and end of Plaintiff's CV placement, [\*10] Girvin evaluated her work in two separate forms -- an MU evaluation and a PDE 430. (Tr. May 6, 2008 at 185-186.) Girvin completed Plaintiff's mid-placement evaluation on March 21, 2006. He indicated that Plaintiff showed "good" or "reasonable" progress in most

professionalism categories, but needed to work on appropriate communication with others -- including students, supervisors, and cooperating teachers -- and on establishing "proper teacher-student boundaries." (Pl.'s Ex. 45 at 1.) Girvin rated Plaintiff's overall performance "satisfactory." (Pl.'s Ex. 46 at 4-5.) He found her professionalism "superior," but her classroom environment "unsatisfactory," and indicated that she needed to employ a "more 'down to business' approach" with the students. (Pl.'s Ex. 46 at 2.) Plaintiff understood that she needed to attain satisfactory ratings in all PDE 430 categories before MU could recommend her for Pennsylvania teaching certification. (Tr. May 6, 2008 at 30.)

Throughout the practicum, Reinking criticized Plaintiff's competence -- especially her ignorance of basic grammar, punctuation, spelling, and usage -- her inadequate classroom management, her poor understanding of the subjects she [\*11] attempted to teach, and her inappropriate manner with students. (Tr. May 7, 2008 at 16-39.) Reinking found that on several occasions Plaintiff would "make up an answer" or "give the wrong answer" to student questions about literature or grammar. (Tr. May 7, 2008 at 32:9-20.) Reinking believed that the students were aware of Plaintiff's errors. (Tr. May 7, 2008 at 32:22-33:4.)

On March 20, 2006, Reinking completed her mid-placement evaluation of Plaintiff. (Pl.'s Ex. 65.) She indicated that Plaintiff needed "significant remediation" in several areas, including preparation, performance, and student learning. (Pl.'s Ex. 65 at 1-3.) Reinking noted that Plaintiff's lesson plans had "[m]any errors," and that "[t]oo many students are left behind as a result of ineffective lessons." (Pl.'s Ex. 65 at 1-2.) Reinking indicated that Plaintiff's professionalism showed "reasonable" or "good" progress, and that Plaintiff was interested in "getting to know her students on a personal level." (Pl.'s Ex. 65 at 1.) Reinking was concerned, however, that at times Plaintiff's efforts to "share her personal life" with the students crossed into "unprofessionalism." (Tr. May 7, 2008 at 21:8-11), (Pl.'s Ex. 65 [\*12] at 1-2). Reinking thought it especially inappropriate that Plaintiff told an English class that her Valentine's Day had been "ruined" when she encountered her former husband while dining out with her boyfriend. (Tr. May 7, 2007 at 22.) Reinking also noted that when Plaintiff could not control classroom behavior, she resorted to "talking over the students." (Pl.'s Ex. 65 at

1-2.) Reinking cited two instances when Plaintiff shouted "Shut-Up" at the students. (Pl.'s Ex. 65 at 2.)

It was apparent from Plaintiff's trial testimony that she greatly disliked Reinking, believing her criticisms to be unfair. (Tr. May 6, 2007 at 66, 70-74.)

#### Plaintiff's MySpace Webpage

During the January orientation, Bray and Wenrich cautioned the student teachers not to refer to any students or teachers on their personal webpages. Wenrich described a student teacher's dismissal from his practicum after he had posted information about his Cooperating School on his personal webpage. (Tr. May 6, 2008 at 231-232.) Wenrich recounted this incident because she wanted the student teachers to understand that "schools have the prerogative to remove student teachers from their placements." (Tr. May 6, 2008 at 232:1-3.) Plaintiff [\*13] remembered that Wenrich directed her not to post information about her students or her Cooperating Teacher on her personal webpage. (Tr. May 6, 2008 at 139-140.)

Contrary to the advice and directives she received, Plaintiff sought to communicate about personal matters with her CV students through the MySpace webpage that she maintained throughout her CV placement. On several occasions, she informed the students during class that she had a MySpace webpage. (Tr. May 7, 2008 at 37-38.) Plaintiff also informed Reinking that she had discovered that "a lot of [her] students were on [MySpace]." (Tr. May 6, 2008 at 66-67.) Reinking warned Plaintiff that it was not proper to discuss her MySpace account with the students, and urged Plaintiff not to allow students to become involved in her personal life. (Tr. May 7, 2008 at 38.)

In early May 2006, Plaintiff learned that one of her CV students had recognized and approached Plaintiff's friend Bree while off campus. (Tr. May 6, 2008 at 53.) Plaintiff believed that the student had recognized Bree from photos posted on Plaintiff's MySpace webpage. Plaintiff testified that she confronted the student, informing her that it was "unacceptable to talk to [\*14] [her] teacher's friends and relatives outside of school basis." (Tr. May 6, 2008 at 67:21-22.) Plaintiff testified it was "inappropriate" for her student to look at a teacher's MySpace account because "there's a boundary line and there's personal information on there that [the student] should know not to look at as a student." (Tr. May 6,

2008 at 69:8, 69:16-18.) Plaintiff explained that although the student could properly have looked at the webpage of a personal acquaintance, it was improper to look at Plaintiff's webpage because Plaintiff was "a person of a higher standard." (Tr. May 6, 2008 at 69:19-24.)

Plaintiff's suggestion that she had heeded the direction of Reinking and others not to share personal information with her students through her webpage was belied by Plaintiff's May 4, 2006 MySpace posting:

First, Bree said that one of my students was on here looking at my page, which is fine. I have nothing to hide. I am over 21, and I don't say anything that will hurt me (in the long run). Plus, I don't think that they would stoop that low as to mess with my future. So, bring on the love! I figure a couple of students will actually send me a message when I am no longer their official [\*15] teacher. They keep asking me why I won't apply there. Do you think it would hurt me to tell them the real reason (or who the problem was)?

(Pl.'s Ex. 51.)

Although Plaintiff denied at trial that Reinking was "the problem" at CV, that denial was not credible. (Tr. May 6, 2008 at 141-43.) Plaintiff acknowledged at trial that "my students" referred to her CV students. (Tr. May 6, 2008 at 139-140.) Plaintiff thus wanted "[her] students" to know that "their official teacher" had "nothing to hide" respecting her difficulties with Reinking. (Pl.'s Ex. 51.)

Plaintiff's posting also included a photograph that showed her wearing a pirate hat and holding a plastic cup with a caption that read "drunken pirate." (Pl.'s Ex. 51.) At trial, Plaintiff explained that she had a "mixed beverage" in the cup. (Tr. May 6, 2008 at 52.) She believed that the photograph showed her with a "stupid expression on my face . . . giving the peace sign . . . expressing myself at the moment, basically, peace, love, happiness. . . ." (Tr. May 6, 2008 at 52:7-12.)

Plaintiff testified at trial that the photograph and caption had an entirely personal meaning. (Tr. May 6, 2008 at 52.) She also acknowledged that her May 4th posting [\*16] was not directed at any CV administrators or anyone that she had "professional [contact] with . . ."

but was "really directed [to her] best friends." (Tr. May 6, 2008 at 55:22-24, 56:7-11.)

On Friday, May 5, 2006, another CV teacher accessed Plaintiff's MySpace account and saw Plaintiff's May 4th posting. (Tr. May 7, 2008 at 44.) The teacher showed the posting to Reinking, who believed that the last lines referred to her. (Tr. May 7, 2008 at 47.) Reinking also thought that it was inappropriate for a student teacher to invite her students to view a photograph of herself drinking alcohol. (Tr. May 7, 2008 at 67.) Reinking showed the posting to her CV Supervisor, Deann Buffington. (Tr. May 7, 2008 at 49.) At trial, Buffington stated that Reinking was "very upset." (Tr. May 7, 2008 at 88:7.) Buffington thought Plaintiff's posting represented a "blatant act of insubordination against Mrs. Reinking." (Tr. May 7, 2008 at 100:23-24.) Before the May 5th conversation, Reinking had reported to Buffington that she had been frustrated "on numerous occasions" by Plaintiff's lack of preparation, "inappropriate or unprofessional behavior," and problems with grammar and language. (Tr. May 7, 2008 [\*17] at 81:25-82:3, 84), (Pl.'s Ex. 48).

Buffington contacted Acting CV Superintendent Kim Seldomridge and told him of Plaintiff's MySpace posting and of Plaintiff's "other problem areas in the way of professional responsibilities." (Tr. May 7, 2008 at 89.) Seldomridge instructed Buffington to tell Plaintiff that she could not return to CV until her final evaluation. (Tr. May 7, 2008 at 88.) Seldomridge also told Buffington to ask Reinking to prepare a list of Plaintiff's other unprofessional actions. (Tr. May 7, 2008 at 90.)

Conestoga Valley Does Not Allow Plaintiff To Complete The Practicum

On Monday, May 8, 2006, Buffington phoned Plaintiff at home and informed her that an issue had arisen respecting Plaintiff's professionalism. (Tr. May 6, 2008 at 41.) Buffington told Plaintiff not to return to CV "under any circumstance[s]" until Thursday, May 11, 2006, when she would receive her final evaluation. (Tr. May 6, 2008 at 41:17-22.) According to Buffington, Conestoga Valley's administration "really did not want [Plaintiff] at [the] school at that point." (Tr. May 7, 2008 at 92:14-15.) Buffington then told Girvin that CV had barred Plaintiff from campus. On May 9, 2006, Buffington asked Reinking [\*18] to document Plaintiff's "unprofessional behavior." (Tr. May 7, 2008 at 63:5-8), (Pl.'s Ex. 48).

After speaking with Buffington, Plaintiff phoned Girvin, who suggested she think about what could have caused her difficulties at CV. (Tr. May 6, 2008 at 42.) Plaintiff testified that the "only thing that [she] could think of that would be in question was [her] MySpace account." (Tr. May 6, 2008 at 42:15-16.) Plaintiff spoke with Girvin again on May 9, 2006. He told her that she might not graduate or that she might not receive a BSE. (Tr. May 6, 2008 at 54:15-17.)

On May 9th, Plaintiff also wrote an email to Reinking "concerning student paperwork . . . documents that [she] would have been accountable for if [she] was in the school." (Tr. May 6, 2008 at 44:12-17), (Pl.'s Ex. 55). On May 10, 2008, Plaintiff emailed a letter to Reinking, Girvin, Buffington, Wenrich, Bray, and Seldomridge regarding the "situation that has been evolving over the past three days." Plaintiff stated, "I am the only person to blame. I have to take full responsibility for my actions and live with the consequences determined by the administrative staff in Conestoga Valley High School and Millersville University." (Pl.'s [\*19] Ex. 56 at 2.) Plaintiff went on:

Secondly, It is necessary that I present not only an apology to those involved, but also all present the positive experiences . . . I have excelled in my own personal life by interacting with the community, especially with elementary-aged functions . . . All of these experiences . . . show essential qualities of a teacher: professional interaction with staff and students inside and outside the school duration . . . I look forward to seeing each and everyone of you to discuss and elevate this issue.

(Pl.'s Ex. 56 at 2.)

The grammar and usage errors in Plaintiff's letter disturbed Buffington. (Tr. May 7, 2008 at 93.) On May 11, 2006, Buffington wrote a note to Girvin stating, "this young woman, in my opinion, should not pass Student Teaching . . . It will be no surprise to me if our excellent teachers here at CV do not volunteer again to serve as cooperating teachers for Millersville students." (Tr. May 7, 2008 at 98), (Pl.'s Ex. 52).

That same day, Buffington, Girvin, and Reinking

met with Plaintiff at CV for the final evaluation of her student teaching. Buffington criticized Plaintiff's teaching competence, especially her inadequate subject knowledge. (Tr. [\*20] May 6, 2008 at 50.) Buffington then showed Plaintiff her MySpace posting, which Buffington described as "unprofessional," and asked Plaintiff what she would have done if one of her students had seen the posting. (Tr. May 6, 2008 at 51:8-10.) After Buffington left the meeting, Plaintiff reviewed her final evaluations with Reinking and Girvin. Although they mentioned Plaintiff's "drunken pirate" photo, they were far more concerned with the posting's text. Both Girvin and Reinking believed that in remarking about "the real reason (or who the problem was)" Plaintiff had referred to Reinking. (Tr. May 6, 2008 at 58), (Tr. May 7, 2008 at 47, 206).

In her final evaluation, Reinking rated Plaintiff's professionalism as "unsatisfactory," and noted that Plaintiff "evidenced some aspects of poor judgment during the Semester, especially in regard to one specific instance." (Pl.'s Ex. 59 at 1), (Tr. May 7, 2008 at 62-63). Reinking also rated Plaintiff "unsatisfactory" in several areas of preparation because Plaintiff did not demonstrate strong general education, knowledge, or an in-depth understanding of the subject matter. (Pl.'s Ex. 59 at 1), (Tr. May 7, 2008 at 46-47). She rated Plaintiff as "competent" [\*21] or "superior" in all other categories. (Pl.'s Ex. 59 at 2-3.) In Girvin's final PDE 430 evaluation, which he completed on May 12, 2006, Girvin rated Plaintiff as "competent" or "superior" in all categories except professionalism, which he described as "unsatisfactory" based on "errors in judgment." (Pl.'s Ex. 58), (Tr. May 6, 2008, at 77:9-12, 208). He noted that Plaintiff did not communicate effectively with "students, colleagues, para-professionals, related service personnel, and administrators," and had not shown an ability to "cultivate professional relationships with school colleagues." (Pl.'s Ex. 57 at 4.) He gave Plaintiff satisfactory or superior ratings in all other categories. (Pl.'s Ex. 57.)

At trial, Reinking, Girvin, and Buffington all testified credibly that they believed Plaintiff had acted unprofessionally in criticizing Reinking -- her Cooperating Teacher -- on her webpage. (Tr. May 6, 2008 at 206; May 7, 2008 at 47, 100-101, 206).

Millersville University Is Unable To Award Plaintiff a BSE Degree

Conestoga Valley decided to bar Plaintiff from campus because Buffington and Reinking believed that Plaintiff: (1) had disobeyed Reinking by communicating about personal matters [\*22] with her students through her webpage; (2) had acted unprofessionally by criticizing Reinking to her students in the May 4th posting; and (3) had otherwise performed incompetently as a student teacher. No one at MU had anything to do with that decision. Once CV did not allow Plaintiff to complete the practicum, however, MU could not award Plaintiff a BSE degree.

For instance, Girvin could not, consistent with MU's PDE-approved course of study, pass Plaintiff in Student Teaching because she had not completed the course. (Tr. May 6, 2008 at 204:15-24.) Plaintiff understood that she could not pass Student Teaching because CV had removed her from her placement. (Tr. May 6, 2008 at 134:22-25.) Rather than fail her, however, Girvin allowed Plaintiff to withdraw from Student Teaching. (Tr. May 6, 2008 at 208-209.)

As MU's Director of Field Services, Wenrich did not have the authority to reinstate Plaintiff into the practicum. The Millersville University Guide to Student Teaching provides that in consultation with a Cooperating Teacher and University Supervisor, Wenrich has "the authority to change or terminate" a Student Teaching assignment "if professional conduct is not maintained." (Pl.'s [\*23] Ex. 4 at 7.) Wenrich does not have authority, however, to pass someone in the Student Teaching Program and award her the requisite student teaching credits once that person has been removed from his or her placement. (Tr. May 6 2008 at 248:8-14, 245:17-23, 247:22-24.) Moreover, as Wenrich explained at trial, under MU's PDE-approved course of study, no one at Millersville University had the authority to give Plaintiff a BSE "on the basis of that work she had done." (Tr. May 6 2008 at 248:8-14, 245:17-23, 247:22-24.)

Wenrich and Girvin spoke with Plaintiff on May 12, 2006 and explained that because she had not met MU's state-mandated Student Teaching requirement, she could not receive a BSE. (Tr. May 6, 2008 at 75, 233, 243:9-10, 247:22-24.) Wenrich told Plaintiff that she had spoken with English Department Chair Schneller, and they had thought of a way to "move credits around" so that Plaintiff would receive a BA in English "instead of just no degree at all." (Tr. May 6, 2008 at 80:10-19, 234.) This was consistent with the way Wenrich had handled

similar situations involving other students. (Tr. May 6, 2008 at 234.)

After meeting with Wenrich and Girvin, Plaintiff scheduled an academic [\*24] appeal with Bray, the University's PDE Teacher Certification Officer. Plaintiff then met with Schneller and signed transfer credits so that she could receive a BA in English. (Tr. May 6, 2008 at 83-84), (Pl.'s Ex. 70). Once Schneller changed Plaintiff's general education credits to English Department credits, Plaintiff qualified for a BA degree in English. (Tr. May 6, 2008 at 85.) Schneller informed Plaintiff that "she went to bat" for Plaintiff because she felt that Plaintiff had "worked hard and that [she] . . . deserved something instead of nothing." (Tr. May 6, 2008 at 84:10-12.) On May 13, 2006, Plaintiff graduated from Millersville University with a BA in English. (Pl.'s Ex. 2.)

On May 15, 2006, Plaintiff met with Wenrich and Bray to appeal the decision to grant her a BA instead of a BSE. Bray explained why she could not overturn Wenrich's decision: by failing to complete Student Teaching, Plaintiff had not fulfilled MU's state-mandated prerequisites for obtaining a BSE. (Tr. May 7, 2008 at 124.) Apart from Plaintiff's failure to complete the practicum, the unsatisfactory evaluation she received on her final PDE 430 also constituted a failure of Student Teaching. (Tr. May 7, 2008 [\*25] at 122.) Accordingly, Bray denied Plaintiff's appeal on May 15, 2006. (Pl.'s Ex. 62.)

As Teaching Certification Officer, Bray has a legal responsibility to recommend candidates to the Pennsylvania Department of Education for initial teaching certification. Bray fulfills this responsibility by completing a PDE Form 338C, which requires the Certification Officer to verify that a candidate has "achieved at least a satisfactory rating on the final PDE 430." (Doc. No. 45, App. 1, PDE Form 338), (Pl.'s Ex. 4 at 18), (Tr. May 7, 2008 at 134-135). Bray does not have the authority to change that evaluation. (Tr. May 7, 2008 at 121-122, 140), (Pl.'s Ex. 16 at 2). Accordingly, Bray could not recommend Plaintiff for initial teaching certification.

Plaintiff appealed Bray's denial to Prabhu, who, on February 21, 2007, held an academic appeal hearing at which Plaintiff was represented by counsel. On March 26, 2007, Prabhu denied the appeal, concluding that the dispute respecting Plaintiff's BSE had been resolved appropriately by allowing her to graduate timely with a

BA. (Pl.'s Ex. 63 at 3.) He also determined that Plaintiff was not eligible for teaching certification because she had failed "to satisfy [\*26] the proficiency standards of the Pennsylvania Department of Education." (Pl.'s Ex. 63 at 1.)

During Her Time At CV, Plaintiff Was A "Teacher" More Than A "Student"

As I discuss below, whether Plaintiff was a student or a teacher during the practicum is relevant to her [First Amendment](#) claim. This question appears to be one of law and fact, to be resolved by the finder of fact. See [Hennessy v. City of Melrose](#), 194 F.3d 237, 245 (1st Cir. 1999) (examining factual context of practicum relationship before concluding that plaintiff was entitled to the legal protections of a public employee).

From January through May 2006, Plaintiff did not attend any courses at MU. (Tr. May 6, 2008 at 129.) Her responsibilities arose entirely from her full-time assignment to CV. She followed the CV school calendar (not the MU calendar). (Tr. May 7, 2008 at 14.) CV relied upon Plaintiff in much the same way it relied on its full-time teachers. Plaintiff planned lessons and was responsible for teaching three separate English courses. (Tr. May 6, 2008 at 16.) Although she was observed by Reinking in two of the courses, Plaintiff taught the third course entirely by herself. (Tr. May 6, 2008 at 126:9-13.) She taught [\*27] from the Teacher's Edition of the course book. (Tr. May 6, 2008 at 113-114), (Tr. May 7, 2008 at 11-12). Plaintiff attended in-service meetings, faculty meetings, and special school events. (Tr. May 7, 2008 at 14-15), (Pl.'s Ex. 4 at 7). She used the Teachers' Lounge. (Tr. May 6, 2008 at 113.) Others, including CV students, perceived Plaintiff to be a teacher. Plaintiff learned at the practicum's outset that she was required to "maintain the same professional standards expected of the [CV] teaching employees." (Pl.'s Ex. 4 at 7.) Indeed, Plaintiff considered herself a teacher and believed the pupils in her CV classes were her students. (Tr. May 6, 2008 at 139-140.)

During the Spring 2006 Semester, Plaintiff was also a student at MU, student teaching so that she could obtain her BSE. Her CV-related activities plainly dominated her professional life during those five months, however. She had no assignments from MU unrelated to the practicum, and devoted virtually all her time to fulfilling her responsibilities at CV. In these circumstances, I find that during her CV Student Teaching Placement, Plaintiff was

an apprentice more akin to a public employee/teacher than a student.

## CONCLUSIONS [\*28] OF LAW

Plaintiff proceeds under [§ 1983](#), which allows suits against persons acting under color of state law for constitutional violations. [42 U.S.C. § 1983](#); [W. v. Atkins](#), 487 U.S. 42, 50, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988) ("[A] public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law."). Plaintiff argues that her [First Amendment](#) right to free expression protected the text and photograph in her May 4th MySpace posting. She alleges that Bray, Girvin, Prabhu, Wenrich, and Schneller, as administrators of a public university, violated her rights because the MySpace posting "played a substantial part" in both their decision to deny her the BSE and their "refus[al] to take the necessary steps" to ensure that she received PDE teacher certification. (Doc. No. 45 at 24.) Plaintiff seeks mandatory injunctive relief against Defendants in their official capacities, demanding that they award her a BSE degree and recommend her to the Pennsylvania Department of Education for initial teaching certification.

As I have found, Defendants do not have the authority to award Plaintiff a BSE because she failed to complete Student Teaching. As a result, [\*29] Plaintiff is not eligible for initial teaching certification. Moreover, Defendants did not violate Plaintiff's [First Amendment](#) right to free expression. Accordingly, I deny her demand for mandatory injunctive relief.

### A. Injunctive Relief -- Standards

A plaintiff seeking a permanent injunction must demonstrate: (1) actual success on the merits of the underlying dispute; (2) irreparable injury; (3) the inadequacy of remedies available at law; (4) that the balance of hardships between the plaintiff and defendant weigh in favor of injunctive relief; and (5) that the public interest would not be disserved by the injunction. See [eBay Inc. v. MercExchange, L.L.C.](#), 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006); [Shields v. Zuccarini](#), 254 F.3d 476, 482 (3d Cir. 2001); [Ciba-Geigy Corp. v. Bolar Pharmaceutical Co., Inc.](#), 747 F.2d 844, 850 (3d Cir. 1984). Injunctive relief is an "extraordinary remedy which should be granted only in limited circumstances." [Am. Tel. and Tel. Co. v. Winback and Conserve Program, Inc.](#), 42 F.3d 1421, 1427-28 (3d Cir.

[1994](#)) (quotations omitted). Mandatory injunctions, which require defendants to take some affirmative action, are "looked upon unfavorably and are generally only granted in compelling [\*30] circumstances." [Florham Park Chevron, Inc. v. Chevron U.S.A., Inc.](#), 680 F. Supp. 159, 166 (D.N.J. 1988).

Under [§ 1983](#), a plaintiff raising a [First Amendment](#) claim may seek related injunctive relief -- such as reinstatement to remedy past violations -- against state actors in their official capacities. See [Melo v. Hafer](#), 912 F.2d 628, 630 (3d Cir. 1990), aff'd 502 U.S. 21, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991) (in a 1983 action against a public official, plaintiffs properly sought reinstatement for wrongful termination in violation of their [First Amendment](#) and due process rights); see also [Dwyer v. Regan](#), 777 F.2d 825, 836 (2d Cir. 1985) (plaintiff entitled to reinstatement if he establishes wrongful termination).

#### B. Availability Of Relief

In her Third Amended Complaint, Plaintiff demands that I order the MU Defendants to award her a BSE and the teaching credits she needs to obtain a teaching certificate, and to recommend her to the Pennsylvania Department of Education for initial teaching certification. I believe this demand is akin to the requests for reinstatement in *Melo* and *Dwyer*. Plaintiff is not entitled to injunctive relief, however. Under PDE regulations, the Millersville University administrators against whom [\*31] she has chosen to proceed lost the authority to grant her a BSE once Conestoga Valley did not allow her to complete Student Teaching. Plaintiff's demand that I nonetheless order MU to recommend her for certification would be impermissibly futile.

#### The MU Defendants Do Not Have The Authority To Grant Plaintiff a BSE

As I have discussed, under PDE regulations, Plaintiff cannot obtain her BSE without successfully completing a Student Teaching placement. [22 Pa. Code § 49.82\(b\)\(2\), 354.25\(f\)](#). Plaintiff argues that because only several days remained in the practicum when CV terminated her, "[f]or all practical purposes" she successfully completed her Student Teaching Placement. (Doc. No. 45 at 27.) I disagree. The evidence is undisputed that CV did not allow Plaintiff to complete her Student Teaching placement. The evidence is also undisputed that no one at MU could compel CV to allow Plaintiff to complete the

practicum. Accordingly, under those same regulations MU does not have the authority to award Plaintiff the requisite student teaching credits or grant her a BSE because MU cannot give her a passing grade in a practicum she did not complete.

Although CV administrators did not allow Plaintiff [\*32] to complete the practicum, Plaintiff has decided not to sue anyone at Conestoga Valley. As I explain below, that decision was strategic. In proceeding instead only against individuals who do not have the authority to afford her the desired relief, however, Plaintiff's request for a mandatory injunction necessarily fails. See, e.g., [Okpalobi v. Foster](#), 244 F.3d 405, 431 (5th Cir. 2001) ("[I]f the suit is against the wrong officials, no claim for injunctive relief has been stated."); see also [Williams v. Doyle](#), 494 F. Supp. 2d 1019, 1024 (W.D. Wis. 2007) ("[A] claim for injunctive relief can stand only against someone who has the authority to grant it.").

#### Ordering Defendants To Recommend Plaintiff For Certification Would Be Impermissibly Futile

Over the course of this litigation, Plaintiff has repeatedly altered her demand for relief, as her lack of entitlement to the relief she most recently sought became apparent. Thus, when it became apparent at trial that the MU Defendants lacked the authority to award Plaintiff a BSE once CV barred her from campus, I asked if Plaintiff wished to amend her Complaint a fourth time to include Defendants from CV. (Tr. May 7, 2008 at 246-47). Plaintiff [\*33] did not do so. Instead, she submitted a Proposed Order with her Proposed Findings and Conclusions in which she does not mention her demand that I compel Defendants to award her a BSE. Rather, she identifies in greater detail the actions the MU Defendants must take to recommend Plaintiff for initial teaching certification. (Doc. No. 45 at 28.) Plaintiff now demands that I order: (1) Girvin to complete a new PDE 430 giving Plaintiff a "superior" rating in professionalism; (2) Bray to complete a new PDE 338C certifying that Plaintiff received a satisfactory rating on her PDE 430 and recommending her for initial teaching certification; and (3) all MU Defendants to "cooperate fully with any PDE inquiry into Plaintiff's application for teacher certification." (Doc. No. 45 at 28.)

As I have discussed, under PDE regulations, the MU Defendants do not have authority to pass Plaintiff in Student Teaching or award her a BSE. It is less clear, however, as to whether they have the authority to

recommend Plaintiff to the PDE for initial teaching certification. MU uses the PDE 430 to evaluate a candidate's performance in Student Teaching. The University uses the PDE 338C to recommend candidates for [\*34] initial teaching certification by verifying that the candidate received at least a satisfactory rating on the PDE 430. Neither the PDE 430 nor the PDE 338C contemplates the unusual situation presented here, however. Although Girvin testified that CV's decision to bar Plaintiff from campus played a "significant" role in his evaluation, he did not testify that he was required to give Plaintiff an unsatisfactory rating on her PDE 430 as a result of CV's decision. (Tr. May 6, 2008 at 208.) The PDE regulations do not address the question. It is thus possible (albeit quite unlikely) that Girvin could have given Plaintiff a satisfactory rating on her PDE 430 even though she was barred from CV.

The MU Defendants thus may have the authority to recommend Plaintiff for initial teaching certification. Plaintiff assumes that once MU makes this recommendation: (1) she will be eligible for initial certification under PDE regulations; and (2) that, as a practical matter, the PDE will grant Plaintiff initial teaching certification without inquiring as to whether she actually completed her Student Teaching assignment. Plaintiff's first assumption is incorrect; her second assumption is contrary to the [\*35] public interest.

Plaintiff assumes that because the regulations require "completion of a teacher certification program, not a student teaching assignment," her failure to complete the practicum will not prevent her from obtaining PDE certification, provided she has a recommendation from MU. (Doc. No. 45 at 26.) This is simply incorrect. Each applicant for certification must complete "a Department-approved teacher preparation program," which must include a "minimum 12 week full-time student teaching experience." [22 Pa. Code § 49.82\(b\)\(2\), 354.25\(f\)](#). Because Plaintiff did not complete MU's PDE-approved teacher preparation program -- which requires successful completion of Student Teaching -- she is ineligible under PDE regulations for certification. Accordingly, assuming *arguendo* that MU officials have the authority to recommend Plaintiff to the PDE, she would remain ineligible for certification. In these circumstances, ordering MU to recommend Plaintiff to the PDE would be pointless and impermissibly futile. See [Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 550, 57 S. Ct. 592, 81 L. Ed. 789 \(1937\)](#) ("[A] court of

equity may refuse to give any relief when it is apparent that that which it can give will not [\*36] be effective or of benefit to the plaintiff."); [United States v. Bernard Parish, 756 F.2d 1116, 1123 \(5th Cir. 1985\)](#) ("It is black letter law that an injunction will not issue when it would be ineffectual."); see also [Migliore v. City of Lauderdale, 415 So.2d 62, 65 \(Fla. Dist. Ct. App. 1982\)](#) ("Neither mandamus nor injunctive relief is available to require the performance of a futile act."); [Levine v. Black, 312 Mass. 242, 44 N.E.2d 774, 775 \(Mass. 1942\)](#) ("It is a principle of wide application that relief by injunction will not be granted where the granting of it would be but a futile gesture . . .").

Plaintiff apparently believes that because the Pennsylvania Department of Education will automatically certify her upon receiving MU's recommendation, her request for relief is not futile. Plaintiff emphasizes Bray's testimony that after receiving a recommendation for teaching certification from the candidate's university, the PDE typically does not inquire independently into a candidate's qualifications. (Doc. No. 45 at 23.) Accordingly, because my Order requiring Millersville University to submit a new PDE 338C would effectively conceal Plaintiff's failure to complete the practicum, it would result [\*37] in the PDE's approval of Plaintiff's application.

I believe Plaintiff's proposed deception of the Pennsylvania Department of Education would "disserve the public interest" and so would be an impermissible abuse of this Court's equitable powers. [MercExchange, 547 U.S. at 391](#); see also [Gidatex, S.r.L. v. Campaniello Imps., Ltd., 82 F. Supp. 2d 126, 131 \(S.D.N.Y. 1999\)](#) (under the doctrine of unclean hands, "[a] court may deny injunctive relief . . . where the party applying for such relief is guilty of conduct involving fraud, deceit, unconscionability, or bad faith related to the matter at issue" in the litigation); see also [Ne. Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1354 \(3d Cir. 1989\)](#) (in applying the doctrine of unclean hands to a plaintiff's request for affirmative injunctive relief, "courts are concerned primarily with their own integrity . . . and with avoiding becoming the abettor of iniquity") (quotations omitted). Accordingly, I will not order the MU Defendants to make it possible for Plaintiff to subvert PDE regulations.

### C. First Amendment

Finally, regardless of MU's authority to forgive

Plaintiff's failure to complete the practicum, she is not entitled to mandatory injunctive [\*38] relief because Defendants did not violate her [First Amendment](#) rights. Plaintiff's free speech claim triggers different tests, depending on whether she was a "teacher" or a "student" when she created her MySpace posting. The Supreme Court and the Third Circuit afford the speech of public employees -- like public school teachers -- [First Amendment](#) protection if their speech relates to matters of public concern:

So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.

[Garcetti v. Ceballos](#), 547 U.S. 410, 411, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006); see also [Pickering v. Bd. of Ed.](#), 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); [Brennan v. Norton](#), 350 F.3d 399, 412 (3d Cir. 2003). By contrast, to promote academic freedom, these same Courts confer [First Amendment](#) protection on all student speech unless school officials can make out a specific and significant fear that the challenged speech would substantially disrupt or interfere with the work of the school or the rights of other students. [Tinker v. Des Moines Indep. Cmty. Sch. Dist.](#), 393 U.S. 503, 509, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), [Saxe v. State Coll. Area Sch. Dist.](#), 240 F.3d 200, 211 (3d Cir. 2001); [\*39] see also [DeJohn v. Temple Univ.](#), 537 F.3d 301, 314 (3d Cir. 2008) ("[T]he [First Amendment](#) rights of speech and association extend to the campuses of state universities.") (quoting [Widmar v. Vincent](#), 454 U.S. 263, 268-69, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981)).

If I determine that Plaintiff was a public employee or a teacher when she created her MySpace posting, she would be obligated to show that the posting related to matters of public concern to receive [First Amendment](#) protection. See [Connick v. Myers](#), 461 U.S. 138, 147, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). If I determine that Plaintiff was a student when she created the posting, Defendants would bear the burden of showing that they had a constitutionally valid reason for regulating her speech beyond "a mere desire to avoid . . . discomfort and unpleasantness." [Tinker](#), 393 U.S. at 509; [DeJohn](#), 537 F.3d at 317 ("a school must show that speech will cause actual, material disruption before prohibiting it").

I have found that Plaintiff's role as a student teacher at CV was akin to that of a public employee. This is in accord with the First Circuit's analysis in [Hennessy v. City of Melrose](#), 194 F.3d 237 (1st Cir. 1999). There, an elementary school terminated a college student from his student teaching [\*40] placement because of comments he made during the practicum. [Id.](#) at 242-43. The elementary school thus precluded Mr. Hennessy from passing the university course in which he was enrolled. [Id.](#) at 243. The First Circuit determined that although Hennessy was in the practicum as part of his university training, he was not "in any meaningful sense a pupil," and his position as a student teacher "more nearly approximated that of an apprentice" who was entitled to the [First Amendment](#) protections afforded public employees. [Id.](#) at 245. Other courts have also rejected the [First Amendment](#) claims of those removed from their practicum placements because of speech that did not touch on matters of public concern. [Miller v. Houston County Bd. of Educ.](#), No. 06-940, 2008 U.S. Dist. LEXIS 19394, 2008 WL 696874, \*13 (M.D. Ala. March 13, 2008) (same); see also [Watts v. Fla. Int'l Univ.](#), 495 F.3d 1289, 1293 (11th Cir. 2007) (graduate student terminated from his placement in a hospital counseling practicum was a public employee); [Andersen v. McCotter](#), 100 F.3d 723, 726 (10th Cir. 1996) (student intern working for college credit in a penitentiary was a public employee in relation to the penitentiary officials who terminated him from the [\*41] program). Plaintiff notes that unlike the plaintiffs in these cases -- who sued their practicum administrators -- she has not proceeded against anyone at CV. Plaintiff's strategic choice does not alter my analysis of her posting, however. Like the plaintiff in [Miller](#), Plaintiff's challenged speech concerned the school where she taught, not the university where she was enrolled as a student. 2008 U.S. Dist. LEXIS 19394, 2008 WL 696874, at \* 13. In these circumstances, whether Plaintiff's MySpace posting was protected speech does not turn on her choice of defendants.

Plaintiff contends that because she was enrolled at Millersville University in May 2006, and because her MySpace posting had academic consequences at MU, she is entitled to a student's [First Amendment](#) protections. In support, she offers a decision that high school administrators violated a student's [First Amendment](#) rights when they suspended him for writing an insulting document about a teacher on his personal computer. [Killion v. Franklin Reg'l Sch. Dist.](#), 136 F. Supp. 2d 446, 457 (W.D. Pa. 2001); (Doc. No. 45 at 24). That decision

is inapposite. Unlike Mr. Killion, who was only a student, Plaintiff was a student teacher who explicitly acknowledged [\*42] in her MySpace posting that she was the "official teacher" of "[her] students." Like the Plaintiff in Hennessy, Plaintiff was not "in any meaningful sense a pupil" during the practicum. [194 F.3d at 245](#). Accordingly, I believe Plaintiff's status is indistinguishable from the student teacher plaintiffs in Hennessy, Miller, Watts, and Andersen. Like these plaintiffs, when Ms. Snyder created her challenged posting, she was more a teacher than a student. [194 F.3d at 245](#); [495 F.3d at 1293](#); [100 F.3d at 726](#); [2008 U.S. Dist. LEXIS 19394, 2008 WL 696874, at \\*13](#).

In these circumstances, insofar as Plaintiff's posting touched on any matter of public concern, it was protected by the [First Amendment](#). [Garcetti, 547 U.S. at 419](#); [Pickering, 391 U.S. at 568](#); [Brennan, 350 F.3d at 412](#). Plaintiff conceded at trial, however, that her posting raised only personal matters. (Tr. May 6, 2008 at 55:22-24, 56:7-11.) Accordingly, the [First Amendment](#) does not protect Plaintiff's MySpace posting. [Connick, 461 U.S. at 147](#) (federal court is not the appropriate forum in which to review the wisdom of a personnel

decision taken when a public employee speaks upon matters of a personal interest); [Brennan, 350 F.3d at 412](#) (the [First Amendment](#) does not [\*43] protect public employees' purely personal speech). Defendants' response to the posting thus did not violate Plaintiff's [First Amendment](#) rights.

In sum, Plaintiff has not prevailed on the merits of her [First Amendment](#) claim. Accordingly, she has not shown a legal entitlement to a mandatory injunction against the Millersville University Defendants. See [Ciba-Geigy Corp., 747 F.2d at 850](#).

#### VERDICT

I return a verdict in favor of Defendants and against Plaintiff. Plaintiff's request for injunctive relief is denied.

An appropriate Order follows.

#### BY THE COURT.

*/s/ Paul S. Diamond*

**Paul S. Diamond, J.**