**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

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| ANNE AND BRUCE BENDA, ANN GLASGOW and PETER BUSSEY, KERRY and KRISTIN DIEHL, KELLY and GILBERT HANNA, GRAHAM HATFULL and KATRINE PFLANZE, EDWARD and TONI MARIE KLAVIN, MARC and VALERIE NAVARRE, VICTORIA and JONATHAN PYE, PRABHA SANKARANARAYAN and SANKAR SEETHARAMA, and KAREN WILLIAMS, individually and on behalf of their minor children, | ) | Civil Case No. 06-328 |
| Plaintiffs, | ) | Judge Schwab |
| v. | ) | |
| UPPER ST. CLAIR SCHOOL DISTRICT, DR. WILLIAM M. SULKOWSKI, DR. MARK G. TROMBETTA, DAVID E. BLUEY, CAROLE B. COLIANE, and DR. DANIEL IRACKI, | ) | |
| Defendants. | ) | |

**MEMORANDUM IN SUPPORT OF PLAINTIFFS'**
**MOTION FOR PRELIMINARY INJUNCTION**

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Plaintiffs submit this Memorandum in Support of their Motion for Preliminary Injunction. This Memorandum contains an initial description of the legal bases for Plaintiffs' claims and was prepared without the benefit of discovery or knowledge of any defenses Defendants may assert. Accordingly, Plaintiffs respectfully reserve the right to submit a supplemental memorandum with further detail and argument at an appropriate time.

## I. INTRODUCTION

Plaintiffs seek a preliminary injunction to prevent the irreparable harm that would result if Defendants' unconstitutional and other unlawful actions in eliminating the Upper St. Clair School District's International Baccalaureate Program ("IB Program") are not reversed. On February 20, 2006, the Board of Directors of the Upper St. Clair School District ("Board") voted to eliminate the IB Program, in a five to four vote. Defendants took this action for the unconstitutional purposes of retaliating against students and residents who had exercised their First Amendment free speech rights to disagree with the particular religious and political views of the Board Majority and to campaign against their election last fall. The Board's action also violated the Pennsylvania Sunshine Act and the District's own State-mandated Strategic Plan.

As a result of the Board's vote, Defendant, Upper St. Clair School District ("District"), at the direction of the Board Majority, is now taking affirmative steps to dismantle the IB Program. Compl. ¶ 6. The District's action would deny many students the irreplaceable opportunity to finish programs in which they have participated for years, programs that the District previously actively promoted and that were the reason some of the families moved to Upper St. Clair in the first place. *Id.* If it is not enjoined from taking further steps to dismantle the IB Program, the School District will cause Plaintiffs and their children to suffer irreparable harm. If not corrected soon, the harm from the School District's actions will be irreversible, at least as to hundreds of students presently in the IB Program.

## II. FACTS

The facts upon which Plaintiffs' claims are based are set forth in detail in their Verified Complaint.

## III. ARGUMENT

### A. The Standard For Granting a Preliminary Injunction

A court must consider four factors in ruling upon a motion for preliminary injunctive relief:

> (1) whether the movant has a reasonable probability of success on the merits; (2) whether irreparable harm would result if the relief sought is not granted; (3) whether the relief would result in greater harm to the non-moving party; and (4) whether the relief is in the public interest.

*See, e.g., Swartzwelder v. McNeilly*, 297 F.3d 228, 234 (3d Cir. 2002). Where the irreparable harm is clear, as in this case, a moving party's burden to show a likelihood of success on the merits is reduced. *See, e.g., Constructors Ass'n of W. Pa. v. Kreps*, 573 F.2d 811, 815 (3d Cir. 1978) (where irreparable harm and public interest factors strongly favor the plaintiff, a preliminary injunction may be proper "even though plaintiffs did not demonstrate as strong a likelihood of ultimate success as would generally be required"). Here, these four factors all weigh in favor of granting Plaintiffs' motion.

### B. Plaintiffs Are Likely To Prevail On The Merits.

A plaintiff need only show that it is "reasonably probable" that it will succeed on the merits, not that it "certainly" will succeed on the merits, for preliminary injunctive relief to be granted. *SK&F Co. v. Premo Pharm. Labs., Inc.*, 625 F.2d 1055, 1066 (3d Cir. 1980). At a minimum, it is reasonably probable that Plaintiffs will prevail on the merits of each of their claims.

#### 1. Plaintiffs Are Likely To Establish That Defendants Violated the First Amendment by Retaliating Against Protected Speech.

Plaintiffs are likely to establish that Defendant's decision to eliminate the IB Program violated the First Amendment by retaliating against protected political speech. To prevail on Count I, Plaintiffs must show: (1) they engaged in protected speech or activity; (2) they were retaliated against; and (3) the protected activity was the cause of Defendants' retaliation. *See Anderson v. Davila*, 125 F.3d 148, 160 (3d Cir 1997). Plaintiffs will establish all three elements.

First, political expression on government affairs and public issues "has always rested on the highest rung of the hierarchy of First Amendment values."[1] "Whatever differences may exist

[1] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982), *quoting Carey v. Brown*, 447 U.S. 455, 467 (1980).

about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Thus, Plaintiffs' distribution of flyers at polling locations and other forms of political protest constitute protected speech or activity.

Second, the Board retaliated against Plaintiffs by eliminating the IB Program. Denial of a benefit constitutes retaliation under the First Amendment. *See Anderson*, 125 F.3d at 163 (recognizing denial of the "benefit of initiating litigation without the harassment of otherwise uncalled for surveillance" as a cognizable First Amendment retaliation claim). The Board Majority abolished the IB Program in retaliation against certain of the Plaintiffs and others who exercised their free speech rights to criticize and campaign against the members of the Board Majority during the November 2005 election campaign. Compl. ¶¶ 51-77.

Third, causation requires only a showing that the protected activity was a "substantial factor" or "motivating factor" for the retaliation. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Here, there is substantial evidence demonstrating a causal connection between IB students and parents exercising their free speech rights in protesting against the election of the members of the Board Majority and the Defendants' decision to eliminate the IB Program. At least one member of the Board Majority asserted publicly before the protected speech against them that the Board had no intent to eliminate the IB Program, Compl. ¶¶ 53-54, and another member of the Board Majority expressly cited the protected speech as "impetus" for the decision to eliminate the program. Compl. ¶¶ 66-67. Furthermore, the Board Majority's actions were part of a demonstrable pattern of retaliatory conduct. Compl. ¶¶ 60-63, 74, 77. Finally, the "official" reasons provided by the Board Majority for its actions are pretextual. Compl. ¶¶ 68-72. This evidence will establish causation. *See, e.g., Mt. Healthy*, 429 U.S. at 450-51 (direct statements, temporal proximity between protected activity and changed behavior, isolated acts of retaliation, taken as a whole, establish causation).

**2. Plaintiffs Are Likely To Establish That Defendants Violated the Establishment Clause of the First Amendment.**

Plaintiffs are likely to establish that Defendants violated the Establishment Clause of the First Amendment by, *inter alia*, eliminating the IB Program for religious purposes and advancing the impermissible effect of favoring one particular religious viewpoint over another.

The Establishment Clause "prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.' " *County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 594 (1989) (citation omitted). For the Board's elimination of the IB Program to withstand constitutional scrutiny, it must: (1) have a secular purpose; (2) neither advance nor inhibit religion in principal or primary effect; and (3) not foster excessive entanglement with religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Twp. Sch. Dist*., 386 F.3d 514, 534 (3d Cir. 2004). The Board must clear *all* three hurdles to justify its decision on First Amendment grounds.

In fact, the Board's decision lacks any genuine secular purpose. To the contrary, the Board's decision was rooted in the purpose of advancing a narrow type of Judeo-Christian religious view purportedly held by several of its Directors. Express statements made by the Board Majority demonstrate that elimination of the IB Program was to advance religion. *See* Compl. ¶¶ 78-80, 84. These statements demonstrate that the Board's decision to eliminate the IB Program had a religious, not secular, purpose. *See McCreary County v. Am. Civil Liberties Union of Ky*., 125 S. Ct. 2722, 2734 (2005) (government's "stated desire" for all Americans to adhere to particular religious beliefs demonstrates lack of secular purpose); *Edwards v. Aguillard*, 482 U.S. 578, 592-93 (1987) (relying on comments of legislators – including statements indicating that evolution curriculum ran contrary to certain religious beliefs – to find religious purpose behind law). The Board Majority's motive in eliminating the IB Program was to attack what the Defendants perceived to be views that were not in accord with their own religious views. The law is clear: the First Amendment forbids precisely what Defendants did here – prohibiting "theory which is deemed antagonistic to a particular dogma."

*Epperson v. Arkansas*, 393 U.S. 97, 106-07 (1968) (striking down statute that eliminated teaching of evolution from curriculum).

Defendants' pretextual reasons for the decision to eliminate the IB Program provide further indications that their real motivation was the unconstitutional retaliation against those exercising free speech rights and a hostility based on their political and religious beliefs. Defendants have, at times, raised cost cutting as the purpose behind eliminating the IB Program. That claim, however, is no more than a sham. *See Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) ("But it is nonetheless the duty of the courts to distinguish a sham secular purpose from a sincere one.") (internal quotation marks omitted). The cost savings associated with eliminating the IB Program amounted to less than 1% of the District's school budget. Compl. ¶ 4. If there truly was an economic impetus behind the Board's decision, the Board would have looked to trim other more costly programs, instead of eliminating a program that serves approximately 18% of the student body and was vocally supported by 1,000 people for the resulting miniscule savings. *See Sante Fe*, 530 U.S. at 309 (the stated purpose must be "necessary to further any of [school district's] purposes"); *Edwards*, 482 U.S. at 587 (stated purpose must be furthered by action to be genuine). In light of the Board Majority's statements indicating a purpose of advancing a particular religious view and the pretextual cost-cutting rationale, the "openly available data support[s] a commonsense conclusion that a religious objective permeated the government's action," rendering it unconstitutional. *McCreary*, 125 S. Ct. at 2735.

Although lack of a secular purpose is dispositive, it also is reasonably probable that Plaintiffs will prevail on the merits of at least one other prong of the *Lemon* test, which requires that the primary effect of Defendants' actions neither advance nor inhibit religion. Defendants' action here impermissibly advanced Judeo-Christian religious beliefs over other religious and non-religious beliefs. Because these professions of religious belief were made in public or otherwise offered to members of the Upper St. Clair community (at least one such endorsement of religious belief was made at an official School Board meeting), this sent a government-sponsored message to those of other religious persuasions "that they are outsiders, not full members of the political community, and an

accompanying message to adherents that they are insiders, favored members of the political community." *Sante Fe*, 530 U.S. at 309-10 (internal citations and quotations omitted). Parents and students in the Upper St. Clair School District, including Plaintiffs here, "unquestionably perceive[d] [the elimination of the IB Program] as stamped with [the] school's seal of approval." *Id*. at 308. The primary effect of the Board's decision was unmistakable – the endorsement of a particular religious belief to the detriment of Plaintiffs and other "outsiders" in the community.

**3. Plaintiffs Are Likely To Establish That Defendants' Decision To Eliminate the IB Program Was Motivated by the Intent To Prescribe Orthodoxy in Politics, Nationalism, and Religion in Violation of the First Amendment.**

It is also reasonably probable that Plaintiffs will establish their claim under Count III that Defendants' decision to eliminate the IB Program was motivated by a desire to prescribe what shall be orthodox in politics, nationalism, and religion in a manner that lacks any legitimate educational purpose in violation of the First Amendment.

A school board has broad discretion in making curriculum decisions, but its discretion is not unlimited. A school board's curriculum decisions must be "reasonably related to legitimate pedagogical concerns" and must have a "valid educational purpose." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272-73 (1988). In contrast, when the school board's curriculum decisions are not motivated by a "valid educational purpose," the First Amendment is "so 'directly and sharply implicate[d],' as to require judicial intervention to protect students' constitutional rights." *Id*. at 273 (alteration in original).

Making curriculum decisions for the purpose of suppressing ideas that the school board disagrees with and for the purpose of prescribing orthodoxy are not "legitimate pedagogical concerns" under *Hazelwood*. *Id*. at 272; *see Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982) (plurality) (the removal of books from the school library simply because the board dislikes the ideas and seeks to prescribe orthodoxy violates the First Amendment); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith

therein."); *Epperson*, 393 U.S. at 105 (the First Amendment "'does not tolerate laws that cast a pall of orthodoxy over the classroom'") (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967))).

In eliminating the IB Program, the Board Majority was motivated by its desire to ensure that Upper St. Clair students were instructed only according to its own political and religious orthodoxy and their belief that the IB Program was inconsistent with that orthodoxy. Accordingly, Defendants' actions violated the First Amendment. *See Pratt v. Indep. Sch. Dist. No. 831*, 670 F.2d 771, 773 (8th Cir. 1982) (school board's removal of film from the curriculum violated the First Amendment where the decision was motivated by the film's "religious overtones" and "ideological content" that offended the board); *cf. Zykan v. Warsaw Cmty. Sch. Corp*., 631 F.2d 1300, 1306 (7th Cir. 1982) (where plaintiff did not allege that the board sought to "impos[e] some religious or scientific orthodoxy or a desire to eliminate a particular kind of inquiry generally," the school board's exclusion of books from the curriculum did not violate the First Amendment); *Borger v. Biscaglia*, 888 F. Supp. 97, 99-100 (E.D. Wis. 1995) (ultimately upholding the school district's refusal to include R-rated films as part of its curriculum because it was reasonably related to a viewpoint-neutral, non-ideological pedagogical concern, but holding that the board could not exclude materials "for the *purpose* of restricting access to the political ideas or social perspectives" or simply because the board disagreed with the ideas expressed in the materials).[2]

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[2] *See also McCarthy v. Fletcher*, 207 Cal. App. 3d 130, 135, 254 Cal. Rptr. 714, 715 (Cal. Ct. App. 1989), where the court held:

> What is critical to the present case is that a school board does not have the power to advance or inhibit a particular religious orthodoxy as a 'community value' no matter how prevalent or unpopular the orthodox view might be in the community. This is the essence of the establishment clause of the First Amendment, *i.e.*, government *neutrality* with respect to religion.
>
> ….
>
> Therefore, respondents' decision to delete [the books] from the curriculum will survive a First Amendment challenge so long as that decision is reasonably related to legitimate educational concerns. However, even under this broad standard, the school authorities' discretion is not unfettered. As we have explained, such a decision cannot be motivated by an intent to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion…' … In other words, school authorities cannot substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make educational choices.

*Id*. at 144-46, 254 Cal. Rptr. at 722-23 (citations and quotations omitted).

Defendants' decision here to eliminate the IB Program from the curriculum was motivated by a desire to prescribe orthodoxy, suppress ideas they disliked, and promote their political ideology in a manner that lacks educational purpose. Thus, Plaintiffs are likely to prevail on the merits of Count III.

**4. Plaintiffs Are Likely To Establish That Defendants Deprived Plaintiffs of Their Due-Process Right Under the Fourteenth Amendment by Canceling the IB Program Without Following the Procedures Outlined in the Strategic Plan.**

Plaintiffs are likely to establish that Defendants deprived Plaintiffs of their due-process rights under the Fourteenth Amendment by canceling the IB Program without following the procedures outlined in the District's Strategic Plan. The due process inquiry requires a two step analysis: the Court first asks "whether the asserted individual interests are encompassed within the fourteenth amendment's protection of 'life, liberty, or property'; if protected interests are implicated, [the Court] then must decide what procedures constitute 'due process of law.'" *Robb v. City of Philadelphia*, 733 F.2d 286, 292 (3d Cir. 1984). Plaintiffs have property interests in the District's Strategic Plan and the IB Program, and Defendants deprived Plaintiffs of those interests by terminating the IB Program without following the established curriculum review procedures.

**(a) Plaintiffs Have Property Interests In the Strategic Plan and IB Program.**

Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577.

Pursuant to 22 Pa. Code § 4.13, the Upper St. Clair School District adopted a "Strategic Plan" that is in effect through 2008-09. Compl. ¶¶ 37-38.[3] The Strategic Plan expressly incorporates the IB Program. Compl. ¶¶ 39-40. Pennsylvania law provides that the Strategic Plan "***shall remain in***

[3] Chapter 4 of Title 22 of the Pennsylvania Code, Academic Standards and Assessments, which derives its authority from the Pennsylvania School Code, "establish[es] rigorous academic standards and assessments to facilitate the improvement of student achievement and to provide parents and communities a measure by which school performance can be determined." (22 Pa. Code § 4.2).

***effect until it is superseded by a locally approved revision or a new strategic plan developed under this section***, *id*. at § 4.13(f) (emphasis added), and further that "[i]f the board of directors alters the proposed strategic plan developed under subsection (d), it shall consult with the committee which developed it to reach the greatest possible consensus prior to its submission and shall include any minority report which is developed." *Id*. at § 4.13(e). The Board has taken no actions in conformity with those regulations to revise or modify the Strategic Plan, so it remains in effect. Compl. ¶ 42.

The Strategic Plan establishes a rigorous curriculum development process; it states: "It is important for instructional change to provide the opportunity for all stakeholders to feel ownership of ideas and to play a significant part of the process of change and development. There is need for total involvement in order to assure the integrity of theory, implementation, and practice among all involved. This involvement has always been a part of the [USC] district . . . ." Compl. ¶ 41, Ex. A (Plan at 16.). The Strategic Plan also provides, in relevant part, detailed procedures for change in curriculum, including a four-step curriculum development process of emergence, study/review, recommendation, and implementation/ evaluation (the "Curriculum Development Process") that the District adopted over twenty years ago and has routinely followed ever since. Compl. ¶ 41, Ex. A. (Plan at 14.) There are additional facts, beyond the contents of the Strategic Plan and the detailed Curriculum Development Process, that establish that Plaintiffs and their children have a legitimate claim of entitlement to the continuation of the IB Program:

- The District actively marketed IB to residents as a distinguishing characteristic to induce Plaintiffs and other parents to move into the District and enroll their children in the IB Program. *See, e.g*., Compl. ¶ 6, 15.
- The Board itself recognized the claim of entitlement that Plaintiffs have to the IB Program. One Director (Jeff Joyce) referred to the "implied contract" that the District has with parents and students for continuation of the IB Program during the February 20 meeting.
- Even more telling, the Board Majority recognized, at least in part, that students who have invested time and effort into the IB Program have a legitimate claim of entitlement to its continuation; it permitted juniors to complete the IB Program next year because of the investment those students made in the program, but failed to make the same accommodation for younger IB students.

In light of these facts, the Strategic Plan, and state law, Plaintiffs have a property interest worthy of due process protection.

**(b) Defendants Denied Plaintiffs Due Process Of Law In Terminating The IB Program Without Revising the Plan.**

Having established that Plaintiffs have a property interest that cannot be deprived without due process, the question becomes what process is due. *Goss v. Lopez*, 419 U.S. 565, 577-78 (1975). Here, Defendants' abrupt termination of the IB Program deprived Plaintiffs of due process because Defendants did not provide adequate notice or opportunity for the revision process required by Pennsylvania law and their own procedures. The due process that should be afforded is analyzed pursuant to a three-factor test:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Patterson v. Armstrong County Children & Youth Servs.*, 141 F. Supp. 2d 512, 530 (W.D. Pa. 2001 (quoting *Mathews v. Eldridge*, 424 U.S. 319 at 334-35 (1976)) (emphasis deleted). Each of these factors weighs in favor of finding that Defendants deprived Plaintiff of property interests without sufficient process.

First, the private interest affected by the Board Majority's decision is significant. More than 750 students (approximately 18% of the total enrollment) participate in the IB Program. Compl. ¶¶ 4, 34. Students already in the Middle Years Program ("MYP") will be barred from participating in the IB Program and obtaining both their MYP certificate and their IB diploma, even though they already may have spent several years in the IB Program. Compl. ¶ 6. In addition, the District itself identified the IB Program as a distinguishing characteristic of the school system. Several Plaintiffs, in fact, moved to the District because of the IB Program promised by the District. Compl. ¶ 6.

Second, the risk of an erroneous deprivation of the interest through the procedures used, and the probable value of additional procedural safeguards, is obvious. The Board Majority

admitted that it did not have the data it needed, while the school administration – which supports the IB Program – advised that it could provide that data. Compl. ¶¶ 65, 69-71. In fact, the Board Majority relied on undisclosed, unverified, third-party "research" divorced from what in fact was taught in the District. Compl. ¶ 88, 89. More importantly, the District already has an established a curriculum review procedure that has been designed specifically to eliminate the risk that the District's planned instruction is erroneously changed. "***This step-by-step evolution of program tends to negate those elements that often lead to poor results. …*** This long-range curriculum development process permits staff to back away when it appears the original idea simply is not achieving its intended purpose." (Plan at 16) (emphasis added). The District itself knows the value of additional safeguards, which is why it created and followed the four-step process.

Third, the additional or substitute procedural requirement would not impose a significant burden on the Board. In fact, all of the necessary procedures already are in place and are routinely followed for other planned instruction. Moreover, the professional educators in the District requested the opportunity (through the Superintendent) to conduct additional review and provide additional data. Compl. ¶ 73. Finally, the Plan specifically recognizes the value placed by the District in following that procedure and "provid[ing] the opportunity for all stakeholders to feel ownership of ideas and to play a significant part in the process of change and development." (Plan at 16). Undertaking the additional procedures requested by the administration would not result in any significant burden to the District.

**5. Plaintiffs Are Likely To Establish That Defendants Violated the School District's Strategic Plan and Procedures for Curriculum Review and Development in Violation of State Law.**

When the Board Majority voted to eliminate the IB Program, it illegally cast aside the school district's own rules prescribing the procedure for changing the District's curriculum, thereby making it at least reasonably probable that Plaintiffs will prevail on Count V. Pennsylvania law considers school boards to be local agencies. *See Sch. Bd. v. McDonald*, 298 A.2d 612 (Pa. Commw. Ct. 1972); *Oravetz v. West Allegh. Sch. Dist.*, 74 Pa. D.&C.2d 733 (Pa. C.P., Allegh. C'ty 1975). As such, the Upper St. Clair School Board is bound by its own rules. *See Bethlehem Area Sch. Dist. v.*

*Carroll*, 616 A.2d 737, 743 (Pa. Commw. Ct. 1992); *Wrightco Techol. Tech. Training Inst. v. Dep't of Educ.*, 850 A.2d 41, 49 (Pa. Commw. Ct. 2004).[4]

The Board established the Curriculum Development Process in its Strategic Plan and its School Board Policy Manual for amending the school curriculum. These procedures have been in effect and routinely followed for years, and the Board took no action to modify or revise those provisions before taking its unauthorized vote to eliminate the IB Program. The Board Majority, however, intentionally ignored its Curriculum Development Process and, indeed, expressly rejected requests from the community and other Board members that it follow its own policies and procedures. Compl. ¶¶ 75-76, 85-88, 90.

The Board Majority was required to follow its own Strategic Plan and Curriculum Development Process before deciding to eliminate the IB Program. It is incontrovertible that it failed to do so, and this failure deprived Plaintiffs of their right to participate in the development of the curriculum for their schools. Therefore, the Board Majority should be enjoined from implementing its illegitimate decision, and it should be required to follow its own rules and regulations in any future attempts to modify the District's curriculum.

**6. Plaintiffs Are Likely To Establish That Defendants Violated the Pennsylvania Sunshine Act by Impermissibly Rubber-Stamping at a Public Meeting a Private, Predetermined Decision To Eliminate the IB Program.**

Finally, it is reasonably probable that Plaintiffs will prevail on Count VI, establishing that Defendants violated the Pennsylvania Sunshine Act by impermissibly rubber-stamping a private, predetermined decision to eliminate the IB Program. Compl. ¶ 121-22. The Pennsylvania Sunshine

[4] It is, in fact, well-established across the country that a school board is bound by its own rules. *See Stansbury v. Sch. Dist.*, 50 Pa. D.&C.2d 348, 350, 354 (Pa. C.P., Del. C'ty 1970) (enjoining school board from suspending or expelling any student unless the board follows its own resolution governing the procedure for suspensions or expulsions); *Goddard v. South Bay Union High Sch. Dist*, 144 Cal. Rptr. 701, 709 n.9 (Cal. Ct. App. 1978) ("A school board must adhere to its own rules and method of procedures."); *Frates v. Burnett*, 87 Ca. Rptr. 731, 735 (Cal. Ct. App. 1970) ("It has been specifically held that a school board cannot ignore its own rules and repudiate its method of procedure."); *Tyska v. Bd. of Educ. Twp. High Sch. Dist. 214, Cook C'ty, Ill.*, 453 N.E.2d 1344, 1351 (Ill. App. 1983) ("A school board is bound to act in accordance with the rules and regulations it has made pursuant to statutory authority; such rules have the force of law.") (citations omitted); *Nordhagen v. Hot Springs Sch. Dist. No. 23-2*, 474 N.W.2d 510, 512 (S.D. 1991) ("[A] school board must comply with its own rules.").

Act, 65 Pa. Cons. Stat. § 701, *et. seq.*, requires that "official action"[5] and "deliberations"[6] by a quorum of the members of an "agency" take place at a "meeting"[7] open to the public unless certain exceptions apply (such as executive sessions not at issue here). *See* § 704. School boards are specifically included in the definition of "agency" under Section 703; thus, school boards must comply with the Sunshine Act.

A school board violates the Sunshine Act when board members deliberate in private and "predetermine" during these private meetings the decision that the board will announce at the subsequent open meeting such that the open meeting is merely a "rubber stamp" on what had already been decided in private. *See, e.g., Kennedy v. Upper Milford Township Zoning Hearing Bd.*, 575 Pa. 105, 132-34, 834 A.2d 1104, 1121-23 (2003) (where an agency meets "briefly in public to 'rubber stamp' a series of decisions made privately" during "extensive private discussions," the agency violates the Sunshine Act).

This is exactly what happened here. The Board Majority deliberated in private meetings before the official, open Board meeting on February 20, 2006 and decided that it was going to eliminate the IB Program. The open Board meeting was merely a "rubber-stamp" of the secret plan to eliminate the IB Program. Compl. ¶¶ 53, 90-92. If a board secretly adopts plans without the public's knowledge, the private meeting that violates the Act "taints" a later open meeting held to "rubber stamp" the decision reached at the private meeting and the open meeting does not cure the

[5] "Official action" is defined as follows: (1) recommendations made by an agency pursuant to statute, ordinance or executive order; (2) the establishment of policy by an agency; (3) the decisions on agency business made by an agency; or (4) the vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order. *See* Section 703.

[6] "Deliberation" is defined as "[t]he discussion of agency business held for the purpose of making a decision." Section 703. "Agency business" is defined as "[t]he framing, preparation, making or enactment of laws, policy or regulations, the creation of liability by contract or otherwise or the adjudication of rights, duties and responsibilities, but not including administrative action." *Id.*

[7] "Meeting" is defined as "[a]ny prearranged gathering of an agency which is attended or participated in by a quorum of the members of an agency held for the purpose of deliberating agency business or taking official action." Section 703.

violation.[8] The Court should invalidate the Board's action at the February 20, 2006 board meeting, *i.e.*, voting to eliminate the IB Program, pursuant to Section 713,[9] because the Defendants' violation of the Act has implicated the quintessential purpose of the Act, which is to "discourage private meetings on agency business followed by rubber-stamp public hearings."[10]

**C. Plaintiffs Will Establish That They Will Be Irreparably Harmed If Defendants' Decision to Eliminate the IB Program Is Not Enjoined.**

In a First Amendment challenge, "a plaintiff who meets the first prong of the test for a preliminary injunction will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech rights." *ACLU v. Reno*, 929 F. Supp. 824, 866 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality) (finding irreparable harm where defendants retaliated against plaintiff's exercise of free speech rights in violation of the First Amendment); *see also Swartzwelder v. McNeilly*, 297 F.3d 228, 242 (3d Cir. 2002); *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 258 (3d Cir. 2002). Here, Plaintiffs will be irreparably injured because Defendants retaliated against Plaintiffs' exercise of their free speech rights and sought to deprive them of their free speech rights by adopting a Political Activities Policy. Compl. ¶ 61.

Further, as a result of the Board's vote, the District is now taking affirmative steps to dismantle the IB Program on an expedited basis and thereby deny Plaintiffs and their children the irreplaceable opportunity to participate in a program in which many of them already have made substantial investments. Compl. ¶ 6, 93. Indeed, many students will be denied the opportunity to

[8] *See, e.g., Kennedy.*, 575 Pa. at 132-34, 834 A.2d at 1121-23; *Bradford Area Ed. Assoc. v. Bradford Area Sch. Dist.*, 132 Pa. Commw. 385, 389, 572 A.2d 1314, 1316 (1990) (acknowledging that a court should invalidate the board's action at an open meeting based on a prior violation of the Act where the board's plan was "adopted in secret and then foisted on the unsuspecting public"); *Ackerman v. Upper Mt. Bethel Twp.*, 567 A.2d 1116, 1120 (1989) (Upholding an action that "'was not a plan adopted in secret and then foisted on an unsuspecting public,'" where there was no "evidence that it was a mere rubber stamp approval.").

[9] Section 713, provides in pertinent part, that "[s]hould the court determine that the meeting did not meet the requirements of this chapter [the Sunshine Act], it may in its discretion find that any or all official action taken at the meeting shall be invalid."

[10] *See Ackerman*, 567 A.2d at 1120; *see also* Section 702.

finish established programs in which they have participated in for years. Compl. ¶ 6. Families who moved to Upper St. Clair School District principally because it offered the IB Program now are being denied the program that the District had actively promoted to Plaintiffs and others in Upper St. Clair with school age children. Compl. ¶ 6, 93. Finally, Plaintiffs have no adequate remedy at law. Monetary damages cannot compensate Plaintiffs for the irreparable injury that they would face if Defendants dismantled the IB Program and thereby denied Plaintiffs and their children the irreplaceable opportunity to participate in a program in which many of them already have made substantial investments. Unless this Court promptly awards injunctive relief to maintain the *status quo* as it was before Defendants' wrongful conduct, Plaintiffs will have no adequate remedy.

**D. The Balance Of Hardships Favors Plaintiffs.**

The Court must balance the harm to Plaintiffs if a preliminary injunction is not issued against the harm to Defendants if an injunction is granted. No Defendant and no other interested party will suffer harm from reinstating the IB Program. Thus, the irreparable harm faced by Plaintiffs when weighed against the lack of harm to Defendants favors issuing injunctive relief.

**E. The Public Interest Favors Granting a Preliminary Injunction.**

Granting the preliminary injunction will further a number of strong public interests: (1) protecting free political speech against retaliation; (2) protecting against establishment of religion; (3) protecting against the establishment of political orthodoxy in public schools; (4) promoting open decision-making and public participation in the deliberative process of local government agencies and preventing secrecy in public affairs as required by the Sunshine Act; and (5) requiring the school board to abide by its own established policies and procedures, as required by law.

## IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion For Preliminary Injunction.

Respectfully submitted,

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Dated: March 13, 2006

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION was served upon the Solicitor for the Upper St. Clair School District by electronic mail this 13th day of March, 2006, at the following address:

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