CASE NO. 20-2334

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

JONATHAN F. STARBUCK,

Plaintiff - Appellant,

v.

WILLIAMSBURG JAMES CITY COUNTY SCHOOL BOARD,

Defendant - Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT NEWPORT NEWS

RESPONSE BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 20-2334 Caption: Jonathan F. Starbuck v. Williamsburg James City County School Board

Pursuant to FRAP 26.1 and Local Rule 26.1,

Williamsburg James City County School Board
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Jeremy D. Capps Date: January 22, 2021

Counsel for: Appellee

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INTRODUCTION

The day after the mass school shooting in Parkland, Florida, Appellant—a student at a high school in Virginia—made statements to other students while at school critiquing the shooter's tactics and suggesting how the shooter could have been "capable of more harm had he wanted to [be]." A teacher overhead the comments and reported them to school administrators, who removed appellant from class so that he could be questioned by administrators and counselors about what he said. Administrators kept Appellant out of class for that day, and then informed him he would be subject to a further two-day out-of-school suspension as a result of his comments. These actions of the high school's administrators were consistent with the requirements of both the First and Fourteenth Amendments.

But before even reaching those questions, the Parties were to address the issue this Court identified as being of particular interest in this appeal: whether the district court erred in concluding that *Monell* barred constitutional claims related to discipline for student speech. On brief, Appellant now asserts that the School Board's own action in response to Appellant's putative appeal of his suspension is sufficient to constitute official policy to establish liability on the School Board under §1983. This argument, however, recasts the allegations in the Amended Complaint and the premise upon which Appellant sought to hold the School Board liable. Appellant's Amended Complaint does not allege a plausible ratification

theory of liability. Yet, even if it did, Appellant's constitutional rights were not violated.

STATEMENT OF THE ISSUES

1. Did the District Court err in concluding that the Amended Complaint did not allege a policy or custom of the School Board that proximately caused each of Appellant's alleged constitutional injuries under the First and Fourteenth Amendments?

2. Did Appellant state a claim that the Respondent School Board's decision violated his rights under the First and Fourteenth Amendments?

STATEMENT OF THE CASE

A. Allegations

Appellant was a student at Jamestown High School in Williamsburg, Virginia. (J.A. 9, at ¶ 4.)[1] He alleges that on February 15, 2018, the day after the tragic school shooting in Parkland, Florida, he engaged in a conversation about the shooting with classmates. (J.A. 6 at ¶ 1, J.A. 10 at ¶ 11.) During the discussion, Appellant "noted the possession of explosive devices by the shooter, and noted the use of the fire alarm to lure students out, in addition to noting the time it took for law enforcement to enter." (J.A. 7 at ¶ 1.) Appellant also characterized his

[1] Because this case was appealed followed the granting of a motion to dismiss, the Court must assume the truth of the facts alleged in the Amended Complaint. *Rotkiske v. Klemm*, 140 S. Ct. 355, 359 n.1 (2019).

remarks as "questioning the intent of the shooter, stating that the shooter would be capable of more harm had he wanted to, noting his possession of explosives and considering the time the shooter was left alone within the building unchallenged by local law enforcement." (J.A. 10 at ¶ 11.)

A teacher overheard the conversation and reported Appellant's remarks to school administrators and local police. (J.A. 10 ¶ 12.) Appellant was removed from class for "his safety" and subjected to "multiple interrogations by school officials, to include psychologists, service counselors, and principals." (J.A. 11 ¶¶ 14, 15.) Despite these "interrogations," Appellant nonetheless alleges he was not "informed of the reasons for which" he had been removed from class. (J.A. 11 ¶ 14.) That evening, Appellant's parent was notified that he would be subject to a two day out-of-school suspension, and also received an explanation for the reasons for that day's in-school suspension. (J.A. 11-12 ¶¶ 18, 19.) According to Appellant, school staff stated he was removed for "'his own safety' out of concern for 'retaliation from other students.'" (J.A. 12 ¶ 19.)

A school staff member then scheduled a meeting the following Tuesday, the day Appellant returned to school following his suspension, to discuss protection plans for Appellant if any retaliation occurred. (J.A. 12 ¶ 21.) During this meeting, Appellant disputed the characterization of his comments and stated his intention to appeal his suspension to the School Board. (J.A. 12 ¶ 23.)

Appellant delivered a written notice of appeal to the School Board office on February 27, 2018. (J.A. 13 ¶ 25.) The School Board initially did not respond to Appellant's appeal. (J.A. 7 ¶ 1, J.A. 13 ¶ 28.) It was only after Appellant filed another "petition" that he received a response from the School Board in May 2018. (J.A. 7 ¶ 1, J.A. 13 ¶ 28.) In that alleged response, the School Board indicated that the "suspension was proper, but altered the 'Cause' finding that the [Appellant] was a 'Classroom Disturbance'…" (J.A. 13 ¶ 28.) According to Appellant, this action was improper because he was "never afforded the opportunity to dispute" this characterization of a "classroom disturbance." (J.A. 13 ¶ 28.)

The Amended Complaint identifies two policies of the School Board that contributed to the alleged violation of Appellant's constitutional rights. First, Appellant claims the School Board has an internal policy of responding to appeals of long-term suspensions within 30 days. (J.A. 13 ¶ 27.) Appellant acknowledges there is no policy requiring a response from the School Board as to short-term suspensions, such as Appellant's suspension at issue here. (*Id.*) Second, Appellant claims that the School Board has a policy that "allows them to investigate an offense, have an informal meeting with the offending student, to allow them to present their version of facts, and then continue to investigate, and allow that new

evidence found under the second scope of the investigation into the decision process for disciplinary actions…"[2] (J.A. 8 ¶ 2.)

B. Procedural Posture

This action was originally filed in May 2018 when Appellant had not yet reached the age of majority. Appellant filed the action at that time through his brother, acting as next friend. The District Court dismissed the suit on September 10, 2018, finding that Appellant's brother could not represent him on a *pro se* basis and that appointment of counsel was not warranted. Appellant and his brother appealed that ruling to this Court, which eventually dismissed the appeal as moot because Appellant had reached the age of majority and could represent himself. (J.A. 1-4.) The case was returned to the District Court, which permitted Appellant to file the Amended Complaint on his own behalf. (J.A. 6-18.)

The School Board filed an Amended Motion to Dismiss on March 19, 2020. (J.A. 4.) Appellant responded in opposition to that motion on April 13, 2020. (*Id.*) The School Board replied in support of the Amended Motion to Dismiss on the same day. (*Id.*) The District Court granted the Amended Motion to Dismiss on November 20, 2020. (J.A. 19-34.) Appellant filed a timely Notice of Appeal on December 10, 2020. (J.A. 4.)

[2] Appellant advances substantively similar allegations in Paragraph 43 of the Amended Complaint. (J.A. 16-17 ¶ 43.)

The Parties exchanged informal briefing in January and February 2021 (Dkt. Nos. 5, 6, 10), before the Court appointed counsel for Appellant and ordered additional briefing. (Dkt. No. 11, 12, 14). In its appointment of counsel for Appellant, the Court indicated that its "issue of particular interest" was "Whether district court erred in concluding that *Monell* barred constitutional claims related to discipline imposed for student speech." (Dkt. No. 11.) Appellant filed his Opening Brief pursuant to the Court's Order on October 6, 2021. (Dkt. No. 16.) The School Board now respectfully responds.

SUMMARY OF ARGUMENT

Appellant claims in the Amended Complaint that his suspension violated his First, Fourth, Fifth, and Fourteenth Amendment rights. He further claims that the School Board's later decision to recharacterize the rationale for his suspension as being for creating a "classroom disturbance" rather than for making threats, violated the due process principles of the Fifth and Fourteenth Amendments. Appellant seeks to hold the School Board responsible for all of these alleged harms.

The district court correctly concluded that the Amended Complaint does not state a cause of action against the School Board. The Amended Complaint does not allege that a policy, custom, or decision of the School Board caused school administrators to suspend him, leading to the alleged deprivation of his

constitutional rights. And the constitutional harm the Amended Complaint purports to tie to actions of the School Board—a due process violation—cannot state a claim because Appellant was not entitled to any additional process from the School Board as a matter of state law.

But, even were the Court to conclude that the school administrators' actions in suspending Appellant reflected a policy or custom of the School Board, those actions did not violate Appellant's constitutional rights. Courts across the country have recognized the imperative for schools to take action to address the possibility of classroom disruptions—much less the specter of real violence—raised by speech related to school shootings, particularly when that speech occurs at school. Moreover, the process school officials afforded Appellant related to his suspension satisfied the statutory and constitutional requirements for process for short-term suspensions.

ARGUMENT

I. Standard of Review on Appeal.

The purpose of a motion pursuant to Federal Rule of Civil Procedure 12(b)(6) is to test the sufficiency of a complaint. *Burgess v. Goldstein*, 997 F.3d 541, 562 (4th Cir. 2021). This Court reviews *de novo* a district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Philips v. Pitt County Memorial Hosp.*, 572 F.3d 176, 179-80 (4th Cir. 2009). "In

considering such a motion, [the Court] accept[s] as true all well-pleaded allegations and view[s] the complaint in the light most favorable to the plaintiff." *Id.* at 180. "To survive a Rule 12(b)(6) motion, 'factual allegations must be enough to raise a right to relief above the speculative level' and have 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Moreover, the court 'need not accept the plaintiff's legal conclusions drawn from the facts,' nor need it 'accept as true unwarranted inferences, unreasonable conclusions, or arguments.'" *Id.* (quoting *Kloth v. Microsoft Corp.*, 444 F.3d 312, 319 (4th Cir. 2006)).

II. The Amended Complaint does not state a claim for municipal liability under 42 U.S.C. § 1983.

a. The School Board's liability pursuant to § 1983 is limited to injuries that result from its customs or policies.

An individual who believes that he has been "deprived of federal rights under color of state law" may assert a claim under 42 U.S.C. § 1983. *Riddick v. Sch. Bd.*, 238 F.3d 518, 521 n.2 (4th Cir. 2000). Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…

Though municipalities,[3] unlike states, can be treated as "persons" subject to liability under § 1983, a more stringent standard applies: the plaintiff must establish that the deprivation occurred pursuant to a policy or custom adopted by the local governing body." *Monell v. Dept. of Social Servs.*, 436 U.S. 658, 690-91 (1978). "[A] municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.* at 691. Stated differently, the Supreme Court has explicitly rejected the notion of governmental entity liability based on a theory of vicarious liability. *Id.* at 694.

Accordingly, the School Board's liability under *Monell* is limited to actions "for which [it] is actually responsible." *Riddick*, 238 F.3d at 523. To establish a claim against the School Board under *Monell*, a plaintiff must show a custom or policy through: (1) an express policy, such as an ordinance or regulation; (2) the affirmative decisions of policy makers; (3) omissions by such policy makers showing "manifest deliberate indifference to the rights of citizens"; or (4) a custom that is "'so 'persistent and widespread' and 'so permanent and well settled as to constitute "custom or usage" with the force of law.'" *Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999) (internal citations omitted).

[3] School boards and municipalities are "indistinguishable for purposes of § 1983." *Riddick*, 238 F.3d at 552 n.3.

b. The Amended Complaint does not allege facts showing that school administrators acted pursuant to a policy or custom of the School Board in suspending Appellant.

The Amended Complaint alleges that the high school administrators' decision to suspend him violated his "Right to Speak Freely," as well as his "Right to Due Process of Law." (J.A. 14-15 ¶¶ 35, 39.) Appellant now asserts for the first time on appeal, that the School Board's May 2018 response to his February 2018 "appeal" of his suspension was the final decision of a policymaker such that the actions of individual school employees became the School Board's "official policy" for the purposes of *Monell* liability. As the School Board observed in its Memorandum in Support of its Motion to Dismiss, an argument with which the District Court agreed, Appellant's allegations in the Amended Complaint relative to the specific actions attributable the School Board focus exclusively on the alleged procedural deficiencies of the School Board's actions. Appellant did not allege in the Amended Complaint—and, accordingly, cannot allege now in this Court—that any action of the School Board somehow adopted or ratified the alleged actions of individual employees.

i. Policies of the School Board alleged in the Amended Complaint.

As an initial matter, and as the district court correctly observed, the only policies of the School Board identified in the Amended Complaint address the alleged procedural deficiencies of the School Board's response to Appellant's

"appeal" of his suspension. First, Appellant claims the School Board has an express policy of responding to appeals of long-term suspensions within 30 days. (J.A. 13 ¶ 27.) Appellant acknowledges there is no express policy requiring a response from the School Board as to short-term suspensions, such as Appellant's suspension at issue here. (*Id.*)

Second, Appellant claims that the School Board has a policy that "allows them to investigate an offense, have an informal meeting with the offending student, to allow them to present their version of facts, and then continue to investigate, and allow that new evidence found under the second scope of the investigation into the decision process for disciplinary actions…"[4] (J.A. 8 ¶ 2.) The Amended Complaint does not expound further regarding the factual basis for this allegation. It identifies neither an express policy nor other incidences of the application of the alleged practice such that it could constitute a "custom" of the School Board. *See Lytle v. Doyle*, 326 F.3d 463, 471 (4th Cir. 2003) ("It is well settled that isolated incidents of unconstitutional conduct by subordinate employees are not sufficient to establish a custom or practice for § 1983 purposes.") (internal quotation omitted).

The Amended Complaint cites to each of these alleged policies as proof that the School Board's May 2018 response to the putative appeal of his suspension

[4] Appellant advances substantively similar allegations in Paragraph 43 of the Amended Complaint. (J.A. 16-17 ¶ 43.)

violated Appellant's due process rights. Neither of these policies is relevant to the actions of the school administrators, who are the individuals alleged to have violated Appellant's First and Fourteenth Amendment rights by suspending him in February 2018.

ii. The Amended Complaint does not allege that the School Board adopted or ratified the actions of the school administrators.

To be sure, one of the ways this Court has identified to allege a municipal policy is to show an affirmative decision by a "final policymaker," such that the action is attributable to the municipality. *Lytle*, 326 F.3d at 472. And the Amended Complaint alleges an action—the School Board's May 2018 response to his putative appeal of his suspension—by an entity that has final policymaking authority for the schools. But the Amended Complaint does not connect the School Board's actions to those of its subordinates in allegedly violating his First and Fourteenth Amendment rights through their decision to suspend him.

Instead, the Amended Complaint states that those acts attributable directly to the School Board were "in violation of the Fifth Amendment" because they "altered the 'Causes,' finding that the Plaintiff was a 'Classroom Disturbance,' a matter in which [Appellant] was never afforded the opportunity to dispute before his suspension …" (J.A. ¶ 28.) Plaintiff does not allege that the School Board's alleged finding violated his First Amendment rights. Nor does he allege that the

School Board's actions ratified the alleged First and Fourteenth Amendment violations of its subordinates to the level of official policy.

And for good reason. Even as alleged in the Amended Complaint, the School Board did not simply "ratify" the actions of the school employees who suspended Appellant. Instead, Appellant alleges the School Board entirely changed the rationale underlying that suspension. The School Board's action, therefore, was the independent act of a policymaker. Accordingly, under Appellant's theory, the School Board may be liable for any alleged harms resulting from that action—according to the Amended Complaint, violations of the Fifth and Fourteenth Amendments—but that independent action does not ratify or otherwise make the School Board liable for the actions and constitutional harms of individual school employees.

The comparison between this case and the cases on which Appellant relies illustrates why factual allegations—absent here—directly connecting the final policymaker to the alleged unconstitutional conduct of others are essential for the imposition of municipal liability. Plaintiff first discusses the Supreme Court's splintered decision in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). In that case, deputy sheriffs sought the advice of both the Sheriff and the County Prosecutor prior to serving certain capiases on people at a medical clinic. *Id.* at 473. The Supreme Court concluded that this level of involvement in an incident—

providing orders directly leading to unconstitutional conduct—clearly made the Sheriff and Prosecutors "policymakers" for purposes of liability under *Monell*. *Id.* at 484.

Similarly, in *Hall v. Marion School District Number Two*, 31 F.3d 183 (4th Cir. 1994), this Court concluded that a school board was liable for retaliatory actions against a teacher because the evidence showed that the school board "participated in the violation of [the plaintiff's] First Amendment rights because they were "completely aware" of their subordinate's actions as they were happening and because they, being the only body empowered to do so, affirmatively decided to fire the plaintiff." *Id.* at 196.

These two cases clarify what is required for a final policymaker's ratification of a subordinate's acts to be "the moving force" behind a plaintiff's constitutional violation. *Jones v. Wellham*, 104 F.3d 620, 627 (4th Cir. 1997) (quoting *Polk County v. Dodson*, 454 U.S. 312, 326 (1981)). In both *Pembaur* and *Hall*, the final policymakers ratified the actions of their subordinates because they were aware of the unconstitutional conduct as it was happening and took an active role in it or knowingly did not intervene to stop it. The policymaker's simultaneous action—or inaction—was, therefore, a moving force behind the violation.

Here, in contrast, the alleged constitutional violation was complete before Appellant attempted to place an appeal before the School Board. The Amended

Complaint does not allege that the School Board or any of its members were aware of the suspension prior to February 27, 2018. The Amended Complaint, therefore, does not allege the kind of awareness of an ongoing constitutional violation that must be present for a policymaker's knowing ratification to occur. *See Skeen v. Washington Cty. Sheriff's Off.*, No. 1:20-cv-17, 2020 WL 6688550, at *6 (W.D. Va. Nov. 12, 2020) ("Any such ratification, entirely subsequent to the alleged violation, does not plausibly illustrate a policy that was the 'moving force' behind the ultimate violation.").

Unlike in *Pembaur* and *Hall*, the Amended Complaint does not allege that the School Board was aware of, approved of, or otherwise participated in Appellant's suspension as it happened. The only allegation connecting the School Board to the acts of the individual employees is the claim that the School Board did not ratify the suspension as it was written. These allegations are insufficient to allege a policymaker's affirmative decision to adopt alleged First and Fourteenth Amendment violations committed by individual employees.

The district court correctly concluded that the Amended Complaint does not state a claim against the School Board based upon the acts of the school administrators who suspended Appellant.

c. The School Board's actions in responding to Appellant's appeal of his suspension did not violate his due process rights.

As noted above, the only policies Appellant identifies in the Amended Complaint that contributed to the alleged violation of his due process rights was the School Board's failure to comply with its own policy of responding to long-term suspensions—which Appellant's was not—within 30 days, and its alleged policy of conducting "further investigations" after disciplinary charges are presented to a student.

The 30-day response timeline, as Appellant acknowledges, does not apply to short-term suspensions. In fact, the Amended Complaint alleges that the School Board has not adopted a procedure requiring it to review or respond to appeals regarding short term suspensions *at all.* Moreover, neither the Constitution nor Virginia law require such a review. *See* Va. Code § 22.1-277.04 (outlining the processes for suspensions of less than 10 days). For a suspension of ten days or less, due process only requires that a student receive oral or written notice of the charges against him and an opportunity to present his story. *Broussard v. Sch. Bd. of Norfolk*, 801 F. Supp. 1526, 1532 (E.D. Va. 1992) (*citing Goss v. Lopez*, 419 U.S. 565, 581, 95 S. Ct. 729, 740 (1975)). All that is required is "at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension." *Doe 2 by & through Doe 1 v. Fairfax Cty. Sch. Bd.,* 384 F. Supp. 3d 598, 611 (E.D. Va. 2019). Moreover, a student whose presence poses a continuing

danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. *Goss*, 419 U.S. at 582–83, 95 S. Ct. at 740.

Here, the 30-day timeline to which Appellant refers is neither a constitutional requirement nor a School Board policy that actually applied to Appellant's circumstances. And Appellant received all of the process to which he was entitled—oral notice of the allegations against him and an opportunity to respond—before he even attempted to appeal to the School Board, a process which was neither required nor provided for in the alleged School Board's policies. Appellant cannot advance a procedural due process claim based on the deprivation of procedures that did not apply to his circumstances and to which he was not entitled.

The district court correctly concluded that the Amended Complaint does not state a claim for municipal liability founded on the actions of school employees or the School Board itself. The Amended Complaint was correctly dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

III. Appellant's Constitutional rights were not violated.

Even were the Court to conclude that the Amended Complaint states a claim for the School Board's liability for the actions of individual school employees, the

Amended Complaint nonetheless was appropriately dismissed because the alleged actions of those employees did not violate Appellant's constitutional rights.

The constitutional rights of public school students "are not automatically coextensive with the rights of adults in other settings," because the Constitution does not compel "teachers, parents, and elected school officials to surrender control of the American public school system to public school students." *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 106 S. Ct. 3159 (1986). "The difficulty is that our schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action." *Goss v. Lopez*, 419 U.S. 565, 580, 95 S. Ct. 729, 739 (1975).

Because school officials are far more intimately involved with running schools than federal courts are, "[i]t is axiomatic that federal courts should not lightly interfere with the day-to-day operation of schools." *Augustus v. Sch. Bd. of Escambia Cnty., Fla.,* 507 F.2d 152, 155 (5th Cir. 1975). As long as school officials reasonably forecast a substantial disruption, they may act to prevent that disruption without violating a student's constitutional rights, and Court's will not second guess their reasonable decisions. *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 440 (4th Cir. 2013); *Bethel Sch. Dist. No. 403*, 478 U.S. at 683, 106

S. Ct. at 3164 ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.")

a. The Amended Complaint does not allege a violation of the First Amendment.

Student conduct which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" is "not immunized by the constitutional guarantee of freedom of speech." *Doe 2 by & through Doe 1 v. Fairfax Cty. Sch. Bd.*, 384 F. Supp. 3d 598, 609 (E.D. Va. 2019); *Hardwick*, 711 F.3d. at 440. If school officials "reasonably forecast a substantial disruption" arising from the student's speech, they may act to prevent that disruption without violating the student's constitutional rights. *Hardwick*, 711 F.3d. at 440.

Here, the Amended Complaint alleges that the day after the tragic school shooting in Parkland, Florida, a teacher overheard a conversation in which Plaintiff made remarks about 1) "the intent of the shooter," 2) the shooter's capability to inflict "more harm had he wanted to," 3) the shooter's "possession of explosives," and 4) the length of "time the shooter was left alone within the building unchallenged by local law enforcement" and 5) noted the shooter's "use of the fire alarm to lure students out." (J.A. 6, 10 ¶¶ 1, 11, 12.) As a result of these remarks, the teacher was concerned enough to report them to the school administration and local police. Appellant was removed from class for a day, while remaining in school, and "subjected to multiple interrogations [including] psychologists, service

counselors, and principals." (J.A. 11 ¶ 15.) After discussing the matter with Appellant, school staff considered these remarks to be a threat or at least a "classroom disturbance" that justified a short-term suspension. (J.A. 13 ¶ 28).

These facts do not allege a violation of the First Amendment. On its face, the Amended Complaint shows that Appellant's remarks might reasonably lead school authorities to forecast a substantial disruption of or material interference with school activities, particularly under the specter of a very-recent school shooting.

Courts across the country have recognized the unique challenges associated with school violence and the need for administrators to address these issues. Thus, school officials do not have to wait "for an actual disruption to materialize before taking action [and] in fact, they have a duty to prevent the occurrence of disturbances." *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1070 (9th Cir. 2013). Indeed, the "question … is not whether there has been actual disruption, but whether school officials might reasonably portend disruption from the student expression at issue." *J.R. by & Through Redden v. Penns Manor Area Sch. Dist.*, 373 F. Supp. 3d 550, 557 (W.D. Pa. 2019); *see also* (upholding suspension of high school student based in part on poem describing shooting of students); *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 38–39 (2nd Cir. 2007) (concluding that instant computer message of eighth grader depicting a small

drawing of a pistol firing a bullet at a person's head with a teacher's name under it was not protected speech under the First Amendment); *K.J. v. Greater Egg Harbor Reg'l High Sch. Dist. Bd. of Educ.*, No. CV 14-0145 (RBK/JS), 2019 WL 6838050, at *12 (D.N.J. Dec. 16, 2019) (dismissing First Amendment claim and holding that schools response to student's drawing of "flame poofer" three days after Sandy Hook school shootings cannot be said to have violated the student's First Amendment rights, even though in retrospect may have been an overreaction, noting that "school officials must have the ability to react to threats of school violence, regardless of whether the student has the actual capacity to carry out the threat.").

The Western District of Pennsylvania's decision in *Redden* is instructive here. In that case, a few middle school students were discussing "who they would shoot if they were to do a school shooting." Another student overheard the conversation and reported it to school administration. The student was suspended pending an expulsion hearing before the school board. *J.R. by & Through Redden*, 373 F. Supp. 3d at 553. Despite the student's claim that he was joking and that school officials did not take him seriously, the Court granted a motion to dismiss, because the allegations showed that it was reasonable to forecast a substantial disruption. *Id.* at 559.

In reaching this conclusion, the Court recognized that federal courts have uniformly agreed that language reasonably perceived as threatening school violence is not constitutionally protected — whether such language is written or oral — and that school officials "must have significant discretionary decision-making ability to maintain a safe environment that is conducive to learning." *Redden*, 373 F. Supp. 3d at 559. Additionally, the Court adopted the Fifth Circuit's reasoning in *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765 (5th Cir. 2007) that if school officials could restrict language reasonably promoting illegal drug use, it would "defy 'logical extrapolation' to hold that school administrators cannot likewise restrict speech that threatens school violence." *Redden,* 373 F. Supp. 3d at 560. Indeed, the Court held that "school officials must send a 'powerful message' to students about just how serious they take that responsibility … [and] given the special characteristics of the school environment and given what appears to be an endless number of tragic acts of school violence now occurring in our society, school officials must be able to discipline students who threaten or otherwise encourage school violence." *Redden*, 373 F. Supp. 3d at 565.

The same result should be reached here. As this Court has recognized, "the consequences of inaction in the face of dangerous conditions can be grave" for school officials. *Wofford v. Evans*, 390 F.3d 318, 323 (4th Cir. 2004) (declining to announce a requirement of parental notification or a ban on detention where school

was investigating an student's report that another student brought a gun to school). Appellant's suspension did not violate his First Amendment rights and this claim should be dismissed.

Appellant's argument to the contrary—relying on the Supreme Court's recent decision in *Mahanoy Area School District v. B.L.*—is inapposite. *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038 (2021). It is true that the Supreme Court concluded in *Mahanoy* that a school district's suspension of a student from the cheerleading squad violated her constitutional rights. *Id.* at 2048. But the facts at issue in *Mahanoy* bear no resemblance to those here. The student in *Mahanoy* shared language that, while perhaps distasteful, had no relationship to any act of violence. *Id.* at 2043. Moreover, the student shared those statements on her private social media page on a weekend while she was not on school property. *Id.* The Supreme Court concluded that those factual circumstances created neither a risk nor the actuality of a substantial classroom disturbance resulting from the plaintiff's speech such that her suspension violated the First Amendment. *Id*. at 2048.

Appellant argues that the same result should obtain here because he made the conclusory allegation that his statements, like those in *Mahanoy*, did not create a disturbance. But that argument ignores this Court's instruction that schools can prohibit speech that creates the reasonable expectation of a disruption. *Hardwick*,

711 F.3d. at 440. Here, school administrators reasonably expected that Appellant's statements—at school, the day after a mass school shooting, and suggesting how the perpetrator of that shooting could have killed more people—would cause a disruption for students and staff. In light of that reasonable expectation, Appellant's suspension did not violate his First Amendment rights.[5] *Cf. Broussard by Lord v. School Bd. of City of Norfolk*, 801 F. Supp. 1526, 1534-37 (1992) (analyzing what language may be reasonably expected to cause a disturbance in the school environment and emphasizing that "school boards, school administrators, principals, and teachers must be permitted to govern schools attended by children.").

b. The Amended Complaint does not allege a violation of the Fourteenth Amendment.

Although Plaintiff identified in the Amended Complaint a number of alleged procedural deficiencies in the school's imposition of his suspension, Appellant abandons all of those arguments but one here. Appellant continues to maintain that

[5] The approach this Court took to the issue of disruptions in *Hardwick* is also instructive. In that case, the Court upheld punishment for a student who wore the Confederate flag to school after it had been banned. *Hardwick*, 711 F.3d at 430. In so doing, the Court noted the town's lengthy history of racial tensions, and prior incidents related to the Confederate flag, as proof that the presence of the flag was likely to cause a disruption. *Id.* at 438. Unfortunately, violence and shootings are endemic to the experience of students throughout the United States in the twenty-first century. In this environment, although not every comment regarding a school shooting will be disruptive, surely statements the day after a shooting that are effectively suggestions for how the shooter could have been more effective in killing students can be reasonably expected to disrupt both students and staff.

the School Board's decision to find that his statements caused a classroom disturbance deprived him of the opportunity to have a meaningful opportunity to present his version of the facts and contest the allegations regarding his conduct. Appellant's contention is consistent with neither the facts alleged in the Amended Complaint nor the law.

First, as outlined above, Appellant was not entitled to any kind of review by or appeal to the School Board of his suspension. Appellant cannot create a due process right by virtue of his own conduct where none previously existed.

Second, Appellant received all of the constitutionally and statutorily mandated process for a suspension of less than 10 days. In imposing discipline on a public school student in the form of a short-term suspension, due process only requires that a student receive oral or written notice of the charges against him and an opportunity to present his story. *Broussard v. Sch. Bd. of Norfolk*, 801 F. Supp. 1526, 1532 (E.D. Va. 1992) (*citing Goss v. Lopez*, 419 U.S. 565, 581, 95 S. Ct. 729, 740 (1975)). All that is required is "at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension." *Doe 2 by & through Doe 1 v. Fairfax Cty. Sch. Bd.,* 384 F. Supp. 3d 598, 611 (E.D. Va. 2019). Moreover, students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. *Goss*, 419 U.S. at 582–83, 95 S. Ct. at 740.

Appellant here received the exact process described above. Appellant was given oral notice of the conduct of which he was accused that was at the heart of the discipline he received. He was questioned about the incident during the day on February 15, 2018, and had the ability to respond to those questions that day, before the imposition of his out-of-school suspension. (J.A. 11 ¶ 15). Moreover, Appellant was given the opportunity to respond again upon his return from suspension, before being served with the written notice of the suspension. (J.A. 12 ¶ 23.) The allegations in the Amended Complaint could not be clearer that Appellant was aware of what specific actions concerned school staff that led to his suspension, and that he was given the opportunity to present his response to those facts.

Appellant's reliance on *Kowalski v. Berkley County Schools* highlights the similarities between this incident and that case. *Kowalski v. Berkley County Schools*, 652 F.3d 565, 576 (4th Cir. 2011). In *Kowalski*, a student created a website that had the effect of bullying other students. When a Vice Principal found out about the website, she summoned the student to her office, informed her of the charge, spoke with her about it, and imposed a 10-day suspension. *Id.* Appellant's attempt to distinguish *Kowalski* rests on his apparent belief that the law demands the specificity of a criminal indictment for the "notice" requirement applicable to a short-term suspension to satisfy the strictures of due process. But this position is

inconsistent with the federal court's recognition that the complex and dynamic nature of schools requires flexibility and speed in response to disciplinary needs. *Goss v. Lopez*, 419 U.S. at 580. Similarly, short-term suspensions require "an informal give-and-take between student and disciplinarian," in part because "federal courts should not lightly interfere with the day-to-day operation of schools." *Doe 2,* 384 F. Supp. 3d at 611; *Augustus,* 507 F.2d at 155.

Appellant received all the legal process to which he was entitled prior to the imposition of his suspension. The School Board's response neither created a new due process interest, nor did it deprive Appellant of the ability to effectively respond to the factual allegations that led to his being disciplined. The Amended Complaint does not allege a claim for a violation of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, as well as those stated in the District Court's opinion and the School Board's Informal Response Brief, Dkt. No. 6, this Court should affirm the District Court's Order granting the Motion to Dismiss and dismissing the Amended Complaint.

Respectfully submitted November 5th, 2021,

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