IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

M.C., through her mother and next friend, ERIN CHUDLEY; S.W., through her mother and next friend, HELEN WHISLER; and G.A., through her Mother and next friend, DEBORAH ALTENHOFEN Plaintiffs, v. SHAWNEE MISSION UNIFIED SCHOOL DISTRICT No. 512 (a/k/a the "SHAWNEE MISSION SCHOOL DISTRICT") and KENNETH SOUTHWICK, in his individual and official capacity as Interim Superintendent of Shawnee Mission School District, Defendants.	Case No. 2:18-cv-02283

MEMORANDUM IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendants Shawnee Mission Unified School District No. 512 ("District") and Dr. Kenneth Southwick (collectively referred to as "Defendants"), by and through undersigned counsel, and pursuant to Fed. R. Civ. P. 12(b)(6), respectfully submit this Memorandum in Support of Defendants' Joint Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted. In support of their Motion, Defendants state as follows:

INTRODUCTION

Plaintiffs are three (3) students attending schools within the District. They allege that they, along with students across the District, participated in a "student-led, school-permitted walkout" on April 20, 2018, in an attempt to "engage in political debate about the subject of gun violence."

See Plaintiffs' Complaint, ¶¶ 1-2. Plaintiffs allege that during the walkout, Defendants prohibited students from speaking about guns, gun control, or school shootings. *See id*., ¶ 33. Plaintiffs allege that by restricting students' ability to discuss these topics, Defendants violated their rights under the First and Fourteenth Amendment and the Student Publications Act, K.S.A. § 72-7211(a) ("Student Publications Act").

In addition to the District, Plaintiffs have named Dr. Kenneth Southwick, former Interim Superintendent for the District ("Dr. Southwick"), in his individual and official capacity. *See* Plaintiffs' Complaint (case caption). Plaintiffs have asserted three claims, each apparently against both Defendants: (1) violation of 42 U.S.C. § 1983 ("Section 1983") based on violation of the First and Fourteenth Amendments; (2) violation of Section 1983 pursuant to District custom or policy (municipal liability); and (3) violation of the Student Publications Act.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 12(b)(6), a purported cause of action may be dismissed when the complaint fails to state a claim upon which relief can be granted. To survive a motion to dismiss under Rule 12(b)(6), the complaint must: (1) assert a plausible claim; and (2) set forth sufficient factual allegations to support the claim. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007)). In *Twombly*, the Supreme Court squarely rejected the Rule 12(b)(6) standard set forth under *Conley v. Gibson*, 355 U.S. 41 , 45-46 (1957) . *Twombly*, 550 U.S. at 560-61. Pleadings are no longer satisfied by "an unadorned the-defendant-unlawfully-harmed me accusation." *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555). Now, neither a "formulaic recitation of the elements of a cause of action" nor "naked assertions [of fact] devoid of further factual enhancement" is sufficient to withstand dismissal. *Id*.

To satisfy the new standard under *Twombly* and *Iqbal*, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*. (citing *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the plaintiff pleads enough factual content that allows the court to draw the reasonable inference that the defendant is liable under the alleged claim. *Id*. (citing *Twombly*, 550 U.S. at 556). "A court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id*. at 1950. Therefore, if allegations are merely "conclusory," they are "not entitled to be assumed true." *Id*. Even if a court decides that the factual allegations are entitled to an assumption of truth, however, the facts must also "plausibly suggest an entitlement to relief." *Id*. at 1951.

ARGUMENT

1. Plaintiffs Have Failed to Allege Constitutional Violations Sufficient to Support Their Section 1983 Claims.

42 U.S.C. § 1983 ("Section 1983") is not a cause of action, in and of itself. It "merely provides a mechanism for enforcing individual rights "secured" elsewhere, i.e., rights independently "secured by the Constitution and laws" of the United States." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285, 122 S. Ct. 2268, 2276, 153 L. Ed. 2d 309 (2002). "[O]ne cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything." *See id*. (citing *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979). Thus, determining whether a plaintiff has sufficiently pleaded a claim under Section 1983 requires an analysis of whether the plaintiff has sufficiently alleged that the defendant violated one or more of plaintiff's federal rights. *See id*.

Here, in support of their Section 1983 claims, Plaintiffs allege that Defendants violated their rights to freedom of speech and freedom of press, as guaranteed by the First and Fourteenth

Amendments to the United States Constitution. *E.g.*, *see* Plaintiffs' Complaint, ¶¶ 77, 84. Specifically, Plaintiffs allege that the District prohibited students from giving speeches guns, gun control, and school shootings, and that such content-based censorship constituted a violation of Plaintiffs' First Amendment rights[1]. Defendants will demonstrate that, even if the Court accepts Plaintiffs' factual allegations as true, the alleged restrictions did not run afoul of Plaintiffs' First Amendment protections.

a. Plaintiffs' Speech Was School-Sponsored[2], and therefore Subject to Analysis Under *Hazelwood*.

The Supreme Court has made clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 506, 89 S. Ct. 733, 736, 21 L. Ed. 2d 731 (1969). At the same time, the Court has held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings*," Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), and that the rights of students "must be applied in light of the special characteristics of the school environment." *Tinker*, 393 U.S. at 506.

The crux of the Court's holding in *Tinker* is that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school," though a disruption need not actually materialize. See *id*. at 513-14. School officials may act to prevent problems as long as the situation "might reasonably [lead] authorities to forecast" substantial disruption or interference with the rights of others. *Id*.

[1] Plaintiffs also allege that a District employee confiscated a District-owned camera from Plaintiff S.W. during one of the demonstrations. Defendants are unaware of any case law – in this Circuit or any other – which confers upon a student journalist any First Amendment interest or entitlement to possession or use of a district-owned camera. Suffice to say, this allegation does not provide any support for Plaintiffs' claims, and as such, Defendants have focused their attention on the more substantial question of content-based restrictions of student speech.

[2] Defendants maintain that even if Plaintiffs' speech is not viewed as "school-sponsored," the District's alleged restrictions would still be permissible under the *Tinker* standard.

Officials may not, however, restrict speech based on "undifferentiated fear or apprehension of disturbance" or a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id*. at 508–09.

The Court later created an exception to *Tinker* for what has been termed "school-sponsored speech" in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 260, 108 S. Ct. 562, 564, 98 L. Ed. 2d 592 (1988). The *Hazelwood* case centered on "expressive activities that students, parents, and members of the public **might reasonably perceive to bear the imprimatur of the school**." *Id*. at 271 (emphasis added).

In *Hazelwood*, student staff members of a high school newspaper sued their school when it chose not to publish two of their articles, which discussed students' experiences with pregnancy and the impact of divorce on students at the school. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263, 108 S. Ct. 562, 565–66, 98 L. Ed. 2d 592 (1988). *Id*. at 263–64. The court of appeals analyzed the case under *Tinker*, ruling in favor of the students, because it found no evidence of material disruption to class work or school discipline. *Kuhlmeier v. Hazelwood Sch. Dist*., 795 F.2d 1368, 1375 (8th Cir. 1986), rev'd, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988). The Supreme Court reversed, holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are **reasonably related to legitimate pedagogical concerns**." *Hazelwood*, 484 U.S. at 273 (emphasis added).

The Supreme Court, in *Hazelwood*, effectively crafted an exception to *Tinker* for so-called "school-sponsored speech." The Court characterized newspapers and similar school-sponsored activities "as part of the school curriculum" and held that "[e]ducators are entitled to exercise greater control over" these forms of student expression. *Id*. at 271. Accordingly, the Court

expressly refused to apply the *Tinker* standard. *Id*. at 272–73. Instead, for school-sponsored activities, the Court created a new standard that permitted school regulation of student speech that is "reasonably related to legitimate pedagogical concerns." *Id*. at 273. The Court stated:

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Id. at 270–71.

The Supreme Court went on to recognize educators' need to consider "the emotional maturity of the intended audience" when disseminating student speech on "potentially sensitive topics," as well as the school's prerogative to not "associate [itself] with any position other than neutrality on matters of political controversy." *Id*. at 272 (emphasis added).

In sum, the Supreme Court has established two standards. A student's speech, which "happens to occur on school premises" may only be limited if it will "materially and substantially disrupt the work and discipline of the school." *Tinker*, 393 U.S. at 513. However, if the student's speech might be viewed as "school sponsored," limitations on the speech must merely be "reasonably related to legitimate pedagogical concerns," such as the school's prerogative not to associate itself with any position other than neutrality on matters of political controversy." *Hazelwood*, 484 U.S. at 272-73.

Plaintiffs' allege that "Defendants made clear to parents and students at both schools that the walkouts were student-led and optional, and that the District was not sponsoring the event." *See* Plaintiffs' Complaint, ¶ 31. Plaintiffs further allege that the "students' remarks were to be their own individual views and did not constitute school-sponsored speech bearing the school's imprimatur." *See* id., ¶ 70. Plaintiffs' Complaint erroneously frames the speech from the perspective of the Plaintiffs (e.g., their remarks were "their own individual views."). Under *Hazelwood*, the appropriate inquiry is how the speech will be "reasonably perceived" by "students, parents, and members of the public." Here, it is undisputed – and indeed, Plaintiffs' Complaint makes it clear – that:

- the demonstrations occurred during school (curricular) hours;
- the demonstrations occurred on school property;
- students were allowed to attend;
- the demonstrations were supervised by District personnel;
- and, the begin and end times were determined by building administrators[3].

Plaintiffs specifically admit that Shawnee Mission North High School "administrators permitted students to remain outside during the **unsanctioned event**," referring to demonstrations that occurred when more than 100 students refused to enter the school after the "school-permitted," scheduled event ended. *See* Plaintiffs' Complaint, ¶ 47.

Plaintiffs further allege that during the unsanctioned portion of the event, students were not restricted in their speech, as they "expressed a diversity of views and proposals on how to reduce

[3] Not only did the District establish the time and length of the originally scheduled 17-minute protest (See Plaintiffs' Complaint, ¶¶ 37, 46, but Plaintiffs allege that Alisha Gripp, Assistant Principal for Hocker Grove Middle School "abruptly ended the event" early, with nine minutes remaining, reflecting a high level of District supervision.

gun violence." *See id*., ¶ 51. Plaintiffs effectively admit that the sanctioned[4] demonstrations were school-sponsored speech. Under these circumstances, there is no question that students, parents, and especially members of the public, "might reasonably perceive" the students' speech to be school-sponsored. That is all that is required for students' speech to be subject to the less stringent standard under *Hazelwood*. 484 U.S. at 270-71.

b. Defendants' Alleged Restrictions Were Reasonably Related to the Pedagogical Concern of Avoiding Controversial Matters Within the School Environment.

Plaintiffs allege "the District's censorship stemmed from the District's wish to avoid controversy and discomfort." *See* Plaintiffs' Complaint, ¶ 73. Significantly, under the applicable standard, this would be a completely permissible reason for the restrictions. Under *Hazelwood*, a school district's restrictions on speech must merely be "reasonably related to legitimate pedagogical concerns," including the desire "not to associate the school with any position other than neutrality on matters of political controversy." 484 U.S. at 271-72. Thus, on the basis of Plaintiffs' own allegation, if the Court concludes that Plaintiffs' speech is "school-sponsored," then Defendants' alleged restrictions are patently permissible, and Plaintiffs' claims should be dismissed.

[4] "Sanctioned," is defined as "explicit or official approval, permission, or ratification." Merriam-Webster Online Dictionary. 2018. https://www.merriam-webster.com (2 Aug. 2018).

Synonyms of "sanctioned" include allowance, authorization, clearance, concurrence, and consent. In fact, among the words related to "sanction" is "imprimatur" – the very word used in *Hazelwood* when referring to school-sponsored speech. Coincidentally, the exemplar sentence is, "You cannot make a student video without your faculty advisor's *sanction* of its subject matter prior to shooting." Merriam-Webster Online Thesaurus. 2018. https://www.merriam-webster.com (2 Aug. 2018).

In *Fleming v. Jefferson County School District R–1*, the Tenth Circuit addressed restrictions placed on students contributing to a memorial being constructed at Columbine High School following its infamous school shooting. 298 F.3d 918, 920-21 (10th Cir. 2002). Students were permitted to decorate four-inch-by-four-inch memorial tiles that would be permanently affixed to the school's hallways. *Id*. The school placed certain restrictions on the students' designs, including by barring references to the school shooting, names or initials of student victims of the shootings, references to the date of the shooting, and any specific victim, and any religious references. *Id*. at 921.

After concluding that the tiles were indeed "school-sponsored speech," the Court stated that the "pedagogical" concept set forth in *Hazelwood* merely means that the activity is "related to learning." *Id*. at 925 (noting that "[t]he universe of legitimate pedagogical concerns is by no means confined to the academic for it includes discipline, courtesy, and respect for authority."). Ultimately, the Court held that the school district's restrictions were reasonably related to the pedagogical concern of "prevent[ing] the walls from becoming a situs for religious debate, which would be disruptive to the learning environment." *Id*. at 933.

In this case, Plaintiffs' Complaint firmly establishes that Defendants' alleged restrictions of Plaintiffs' school-sponsored speech were reasonably related to the pedagogical concern of not associating the District with any position other than neutrality on matters of obvious political controversy.

2. Dr. Southwick Is Entitled to Qualified Immunity with Respect to Plaintiffs' Section 1983 Claims.

In resolving cases in which a defendant claims qualified immunity, the Court "must first consider whether the plaintiff has alleged a deprivation of an actual constitutional right." *Peterson v. Jensen*, 371 F.3d 1199, 1202 (10th Cir. 2004) (citing *Saucier v. Katz*, 533 U.S. 194, 201, 121

S.Ct. 2151, 150 L.Ed.2d 272 (2001)). If the Court finds no violation, of course, the claim should be dismissed. *See id*. If the Court finds a violation, it must next determine whether "that right was clearly established at the time of the alleged violation." *Id*. (internal citations omitted). A right is "clearly established" if Supreme Court or Tenth Circuit case law exists on point or if the "clearly established weight of authority from other circuits" found a constitutional violation from similar actions. *See id*. (citing *Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1251 (10th Cir.1999). In *Murrell*, the Tenth Circuit noted:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law **the unlawfulness must be apparent**. *Anderson v. Creighton*, 483 U.S. 635, 639–40, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (citations omitted).

Murrell, 186 F.3d at 1251.

As set forth in Defendants' argument in Section 1, the facts alleged by Plaintiffs do not amount to constitutional violations, even accepting Plaintiffs' factual allegations as true. We will not repeat those same arguments, here. However, even if the Court finds that Plaintiffs have pleaded enough to establish colorable constitutional violations, those rights were not "clearly established" at the time of the alleged violations. Indeed, Defendants have not located any Supreme Court or Tenth Circuit decisions, holding that restrictions of student speech were unconstitutional under facts even remotely similar to the case at bar. To the contrary, the cases located by Defendants uniformly held that student speech was properly restricted, as set forth in the previous section.

Moreover, assessing Plaintiffs' claims involves a multifaceted First Amendment analysis, including a synthesis of both United States Supreme Court and Tenth Circuit Case law. In order

to extinguish Dr. Southwick's entitlement to qualified immunity, Plaintiffs must demonstrate that the "contours of [Plaintiffs'] rights [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Murrell*, 186 F.3d at 1251 (citing *Anderson*, 483 U.S. at 639–40). Again, even if the Court determines that Plaintiffs have asserted a colorable First Amendment claim, the analysis in this Motion demonstrates that the complexity of the issues would make it impossible for an official in Dr. Southwick's position to understand that the alleged restrictions violated Plaintiffs' First Amendment rights.

In sum, even if Plaintiffs have pleaded "enough" to survive a motion to dismiss, which analogous case law would contradict, the rights at issue were not clearly established, such that Dr. Southwick should lose his entitlement to qualified immunity. For those reasons, Defendants request that the Court dismiss Plaintiffs' claims against Dr. Southwick in his personal capacity.

3. Plaintiffs' Section 1983 Claims Are Improperly Pleaded and Attempt to Assert Erroneous Claims.

Plaintiffs have asserted two claims under Section 1983 against the District and Dr. Southwick, both in his official and individual capacities. Although not clearly pleaded, Plaintiffs' Section 1983 claims can be delineated as follows, and will be treated as such by Defendants in this Motion: (1) Count I based upon constitutional violations by Dr. Southwick, while acting "under color of state law"; and (2) Count II for "municipal liability" based upon unconstitutional District Custom or Policy.

There is some overlap between these two claims, in that Count I contains reference to District "policy," and Count II contains reference to Dr. Southwick's alleged conduct. Nevertheless, the above delineation reflects the overall thrust of the two claims, and gives them the only rational interpretation. Even with this most deferential view of Plaintiffs' claims, they remain improperly pleaded, warranting dismissal.

a. Plaintiffs' Official Capacity Claims Against Dr. Southwick Are Redundant of Plaintiffs' Claims Against the District.

The United States Supreme Court has recognized that "[t]here is no longer a need to bring official capacity actions against local government officials [because] local government units can be sued directly for damages and injunctive and declaratory relief." *Kentucky v. Graham*, 473 U.S. 159, 167, fn. 14 (1985). Because official-capacity suits are simply "another way of pleading an action against an entity of which an officer is an agent," official capacity claims against Dr. Southwick are, in fact, claims against the District. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 n. 55 (1978). Moreover,

"When a plaintiff names both a municipality and a municipal officer in his official capacity as defendants in an action, the suit against the officer is redundant, confusing, and unnecessary and should be dismissed." *Sims v. Unified Gov't of Wyandotte Cty./Kansas City, Kan.*, 120 F. Supp. 2d 938, 945 (D. Kan. 2000) (internal citations omitted). "Dismissal of the official capacity suit ... promote[s] judicial economy and efficiency, prevent[s] juror confusion, and streamline[s] the pleadings." *Reindl v. City of Leavenworth*, 361 F. Supp. 2d 1294, 1302 (D. Kan. 2005) (internal citations omitted); *see also Jones v. Wildgen*, 320 F. Supp. 2d 1116, 1124 (D. Kan.) (where plaintiff sues both municipality and municipal officers in official capacities, suits against officers are redundant and should be dismissed).

Plaintiffs have sued the District directly for alleged violations of Section 1983. Accordingly, their official capacity claims against Dr. Southwick are redundant and should be dismissed.

b. The District Cannot Be Held Liable for the Alleged Actions of Dr. Southwick on the Basis of *Respondeat Superior*, and Should Be Dismissed from Count I.

As set forth previously, Count I of Plaintiffs' Complaint is predicated upon alleged actions taken by Dr. Southwick. For example, Plaintiffs allege, "Defendant Southwick, acting under the color of law, unconstitutionally and deliberately banned students from discussing guns, gun violence, and school shootings…" *See* Plaintiffs' Complaint, ¶ 79. Plaintiffs have asserted Count I against both Dr. Southwick and the District. However, the District cannot be held liable on the basis of Dr. Southwick's alleged actions:

> Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, **a municipality cannot be held liable under § 1983 on a respondeat superior theory**.

Monell, 436 U.S. at 691 (emphasis added).

Although there is some reference in Count I to District "policy" (presumably based upon actions allegedly taken by Dr. Southwick), Count I is clearly predicated upon the alleged personal actions of Dr. Southwick. Indeed, Plaintiffs have expressly reserved their "municipal liability" claim based upon "District custom and policy" for Count II. Plaintiffs' attempt to assert a claim against the District in Count I on account of Dr. Southwick's alleged conduct are improper and should be dismissed.

c. Dr. Southwick Cannot Be Held Personally Liable on the Basis of District Custom or Policy and Should Be Dismissed from Count II.

Contrary to Count I, Plaintiffs' claim under Count II (expressly defined as "municipal liability") is predicated upon the District's "own actions including its policy and custom of restricting the content of students' political speech…" *See* Plaintiffs' Complaint, ¶ 84. Count II

is asserted against both the District and Southwick[5]. However, to establish personal liability against an official, the plaintiff must show that "the official, acting under color of state law, caused the deprivation of a federal right." *E.g., Kentucky* 473 U.S. at 166. By contrast, municipal liability is established by demonstrating that the entity's "custom or policy" is the "moving force" behind the deprivation of rights." *Id*. These are two different and wholly separate theories, which cannot be synthesized into a single claim. In sum, Count II of Plaintiffs' Complaint is explicitly one for "municipal liability" based upon the District's alleged policy or custom. Plaintiffs' attempt to bring this claim against Dr. Southwick in his personal capacity[6], based upon independent actions he took "under color of law" is improper and should be dismissed.

4. Plaintiffs Failed to Assert Sufficient Factual Allegations Regarding Dr. Southwick to State a Claim.

Plaintiffs allege that Defendants censored Plaintiffs' speech and restricted their press activities, in violation of the First and Fourteenth Amendments and the Student Publications Act. The alleged violations occurred while Plaintiffs "attempted to either engage in political debate about the subject of gun violence by participating in student-led, school-permitted walkout of April 20, 2018, or to document these same walkouts in their role as student journalists." *See* Plaintiffs' Complaint, ¶ 11. Plaintiffs' claims center upon actions allegedly taken by two building administrators: (1) Alisha Gripp, Assistant Principal for Hocker Grove Middle School; and (2) Brock Wenciker, Associate Principal for Shawnee Mission North High School. Neither is joined

[5] Although Plaintiffs do not specify against whom Count II is directed, it is presumably against both Defendants, since Paragraph 89 states, "As a direct and proximate result of **Defendants'** actions, Plaintiffs have suffered and continue to suffer damages." (emphasis added)

[6] Again, as set forth previously, Plaintiffs' official capacity claims against Southwick should be dismissed, leaving only his personal capacity claims for further consideration.

as a defendant in this lawsuit. Instead, Plaintiffs named Kenneth Southwick, former Interim Superintendent for the District.

However, Plaintiffs' factual allegations with respect to Dr. Southwick relate solely to statements made by Dr. Southwick *after* the alleged Constitutional violations took place. *See* Plaintiffs' Complaint, ¶¶ 53-66 (under the heading "**Events Subsequent to Protests**"). Specifically, Plaintiffs complain of Dr. Southwick's handling of an investigation into the alleged Constitutional violations, including that the investigation took too long and that Plaintiffs did not care for the wording of his apologies on behalf of the District. These allegations regarding Dr. Southwick have no bearing on and do not support Plaintiffs' claims against Dr. Southwick.

In Count I for violation of Section 1983 against Defendants, Plaintiffs allege, "Defendant Southwick, acting under color of law, unconstitutionally and deliberately banned students from discussing guns, gun violence, and school shootings while permitting students' discussion of "school safety" and other politically neutral topics during the April 20th walkouts." *See* Plaintiffs' Complaint, ¶ 79. This is the only allegation against Dr. Southwick related to his alleged conduct with respect to the alleged Constitutional violations. This lone allegation against Dr. Southwick is nothing more than a "formulaic recitation of the elements of a cause of action," and at most, "naked assertions [of fact] devoid of further factual enhancement" which is not sufficient under the Federal Rules of Civil Procedure. *See Iqbal*, 129 S. Ct. at 1951.

Similarly, in Count II (municipal liability under Section 1983), Plaintiffs asserted ***no*** additional factual allegations related to Dr. Southwick, which might support their claims against Dr. Southwick under either Count I or II. For example, Plaintiffs allege that Dr. Southwick "through his actions violated and exhibited deliberate indifference to Plaintiffs' clearly established constitutional rights." *See* Plaintiffs' Complaint, ¶ 85. Again, this is nothing but a recitation of a

purported element of Plaintiffs' cause of action. Plaintiffs have asserted **no allegations of fact**, such as the vague "actions" of Southwick referenced in Paragraph 85. Plaintiffs have again asserted a mere "recitation of the elements," which is not sufficient to state a claim against Southwick.

Plaintiff fails to allege sufficient factual content to allow the court to draw the reasonable inference that Dr. Southwick is liable, as required by Rule 12(b)(6). Instead, they have alleged a single, conclusory allegation, which is insufficient under the framework established under *Iqbal* and *Twombly*, and for that reason, Plaintiffs' claims against Dr. Southwick should be dismissed.

5. The Student Publications Act Does Not Authorize a Private Cause of Action.

In Count III of the Complaint, Plaintiffs assert that Defendants violated the Student Publications Act, K.S.A. § 72-7209, et seq. (the "Act"). In support of their claim, Plaintiffs specifically cite to Section 72-7211(a), which states, in part, "The liberty of the press in student publications shall be protected," and "Material shall not be suppressed solely because it involves political or controversial subject matter.[7]" Plaintiffs further allege that "the confiscation of Plaintiff S.W.'s camera by Defendants' agent amounts to an attempt to suppress material – namely, the images that S.W. was attempting to gather through her photojournalism efforts – solely because of the political or controversial subject matter." *See* Plaintiffs' Complaint, ¶ 92.

The Act does *not* create an express private right of action. Thus, Plaintiff must demonstrate that despite the absence of any language creating such a cause of action, the legislature nevertheless intended to create one by implication. Whether a private right of action exists under a statute is a question of law and generally involves a two-part test. *Nichols v. Kansas Political Action Comm.*,

[7] Plaintiffs omitted key portions of Section 72-7211(a) in the Complaint, which have significant bearing on the validity of their attempted claim. These will be discussed in detail in the following Section.

270 Kan. 37, 48, 11 P.3d 1134, 1143 (2000). First, the party must show that the statute was designed to protect a specific group of people rather than to protect the general public. *Id*. Defendants acknowledge the first part of the test is likely met in this case, since the referenced "protection" applies to members of the press involved in "student publications." *See* Section 72-7211(a).

Plaintiffs cannot, however, establish the second part of the test: the court must review legislative history in order to determine whether a private right of action was intended. *Id*. The legislative intent to grant or withhold a private cause of action for a violation of a statute, or the failure to perform a statutory duty, is determined primarily from the form or language of the statute. *Pullen v. West*, 278 Kan. 183, 194, 92 P.3d 584, 593–94 (2004). The nature of the evil sought to be remedied and the purpose the statute was intended to accomplish may also be taken into consideration. *Id*.

Here, there is no language in the Act, which suggests that the legislature intended to create a private right of action. Nor is there any legislative history supporting such a notion. Defendants have been unable to locate a single citation or reference to the Act in any reported cases, whether as an attempted private cause of action or otherwise. Significantly, the Student Publications Act contains the following provisions:

1) Encourages the protection of the liberty of the press in student publications;

2) Confirms the school district's right to regulate the number, length, frequency, distribution, and format of student publications;

3) Confirms that a school district's review and encouragement of "high standards of English and journalism" in student publications is *not* a violation of the right to freedom of expression;

4) Confirms that material "which creates a **material or substantial disruption** of the normal school activity" is not protected;

5) Protects student publication advisers and other certified employees from retaliation for refusing to infringe upon rights to freedom of expression;

6) Grants immunity to school districts and their employees for civil and criminal liability stemming from the content of student publications; and

7) Shifts liability stemming from student publications to the student editors and other students (who have reached the age of majority) who contributed to preparing and/or publishing such material.

See Section 72-7211.

Considering these items as a whole, and in light of the entire statute, the primary purpose of the Student Publications Act is to immunize school districts and their employees from liability stemming from student publications, and instead shift civil and criminal liability for such publications to the students themselves. The primary purpose is not to create a private right of action on the part of students, especially when considering the Act did not *create* a new or unique right. Rather, references to free press for student publications stems from the pre-existing rights established in the First Amendment. The Act even incorporates language from the *Tinker* analysis by affirming that student publication material "which creates a material or substantial disruption of the normal school activity" is not protected. Section 72-7211(c). This language is co-extensive with *Tinker* and further reflects that the legislature did not intend to create an implied right of action, but rather, incorporated pre-existing First Amendment case law to define the contours of the Act.

For these reasons, it is apparent that the legislature did not intend to imply a private right of action under the Student Publications Act, and as such, Plaintiffs' claim should be dismissed.

6. Defendants' Alleged Conduct Did Not Violate the Kansas Publications Act.

Even if we assume that the Student Publications Act does create a private right of action, the facts alleged by Plaintiffs do not amount to a violation. Again, Plaintiffs allege that "the

confiscation of Plaintiff S.W.'s camera by Defendants' agent amounts to an attempt to suppress material – namely, the images that S.W. was attempting to gather through her photojournalism efforts – solely because of the political or controversial subject matter." *See* Plaintiffs' Complaint, ¶ 92.

Plaintiffs' claim is predicated on alleged violation of Section 72-7211(a), which provides as follows:

> The liberty of the press in student publications shall be protected. **School employees may regulate the number, length, frequency, distribution and format of student publications.** Material shall not be suppressed solely because it involves political or controversial subject matter.

Significantly, Plaintiffs omitted the bold portion from their Complaint, and for good reason. Section 72-7211 expressly grants (or rather, confirms) that a school district may regulate the "format" of student publications, among other things. Thus, Defendants' right to limit Plaintiffs' use of a camera is expressly permitted by the statute.

Moreover, the Student Publications Act governs suppression of student publications, which is defined by the Act as "any matter which is prepared, substantially written, or published by students, which is distributed or generally made available, either free of charge or for a fee, to members of the student body, and which is prepared under the direction of a certified employee." Section 72-7210(b). In other words, the Act does not govern a student's newsgathering, but rather the publication and/or suppression of publication thereof. Plaintiffs seem to acknowledge that the facts of this case do not amount to a violation of the Student Publications Act, since they allege that the confiscation "amounts to an **attempt**" to suppress material." At risk of stating the obvious, an "attempt" to violate the Act is not a violation of the Act, and Plaintiffs' claim fails on that basis alone.

Alternatively, and at a minimum, Plaintiffs' claim is erroneously asserted on behalf of all Plaintiffs, and against all Defendants. Plaintiff S.W. is the sole Plaintiff to contend that her rights under the Student Publications Act were violated. As such, any such claim by Plaintiffs G.A. and M.C. must be dismissed. Likewise, Plaintiff S.W.'s claim is predicated on actions taken by Brock Wenciker, Assistant Principal for Shawnee Mission North High School. Plaintiffs refer to Wenciker as **Defendants'** agent; however, at most, Wenciker is an agent for the District – not Dr. Southwick. As such, Plaintiffs' claim against Dr. Southwick must be dismissed.

CONCLUSION

For the forgoing reasons, Defendants respectfully request that the Court dismiss Plaintiffs' Complaint, and grant such other relief as is fair and just.

Respectfully submitted,

EDCOUNSEL, LLC

By: *s/ J. Drew Marriott*

Duane A. Martin, #17464
dmartin@edcounsel.law
J. Drew Marriott, #24900
dmarriott@edcounsel.law
Ryan S. VanFleet, MO #25352
rvanfleet@edcounsel.law
201 North Forest Ave., Ste. 200
Independence, Missouri 64050
(816) 252-9000
(816) 252-9009 (facsimile)
ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed with the Court electronically via PACER, and served upon the below individuals through the Court's electronic service system, on August 3, 2018:

Lauren Bonds
ACLU Foundation of Kansas
6701 W. 64th Street, Suite 210
Overland Park, Kansas 66202
P: 913-490-4114
F: 913-490-4119
lbonds@aclukansas.org
ATTORNEY FOR PLAINTIFFS

J. Eric Weslander
Stevens & Brand, LLP
P.O. Box 189
900 Massachusetts Street
Lawrence, Kansas 66044
P: 785-843-0811
F: 785-843-0341
eweslander@stevensbrand.com
ATTORNEY FOR PLAINTIFFS

/s/ J. Drew Marriott