

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
BLUEFIELD DIVISION**

FREEDOM FROM RELIGION  
FOUNDATION, INC. et al.,

Plaintiffs,

v.

MERCER COUNTY BOARD OF  
EDUCATION et al.,

Defendants.

Civil Action No. 1:17-cv-00642

Hon. David A. Faber

Oral Argument: June 19, 2017

**REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT**

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Plaintiffs' Opposition to Defendants' Motion to Dismiss ("Opp." (ECF No. 28))<sup>1</sup> only further illustrates that no plaintiff has standing to prosecute this case. The Doe Plaintiffs have never encountered the Bible classes of which they complain, and any potential encounter was over half a year away when they filed suit, meaning any purported future injury was not certainly impending and thus definitionally speculative. Intervening events have confirmed the wholly speculative nature of their claims: the Bible in the Schools classes have been suspended for at least a year while the Mercer County Board of Education undertakes a thorough review of and modification to the Bible in the Schools curriculum. This means that the Does cannot possibly encounter any Bible in the Schools classes for at least fifteen months (nineteen months after they filed this lawsuit), and can only speculate about the content of an as yet undetermined future curriculum at some as yet undetermined future point in time.

Plaintiffs Deal and Roe also lack standing because Plaintiffs never allege that Deal has any intention of enrolling Roe in Mercer County Schools in the future. Even if Deal did so intend, she and Roe are not entitled to prospective relief because, now that the Bible in the Schools classes are suspended, neither would be immediately in danger of contact with the classes if Roe did return to school in Mercer County. That leaves as the sole ground for this federal lawsuit a claim for nominal damages, which is insufficient for standing: nominal damages are incidental to other relief sought and cannot redress an injury.

In addition, Plaintiffs' claims against Defendants do not meet even the low threshold of pleading Rule 8 sets forth. The Opposition asks this Court to further lower the bar so that Plaintiffs can conduct discovery and reverse-engineer a lawsuit. The Court should reject that request out of hand and dismiss this case.

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<sup>1</sup> As with the opening Memorandum, the term "Defendants" does not apply to Rebecca Peery.

**I. NO PLAINTIFF HAS STANDING**

**A. Plaintiffs Doe and Plaintiff FFRF Do Not Have Standing**

Plaintiffs do not dispute that when they filed this lawsuit, Jamie Doe was *at least* seven months away from either encountering the Bible in the Schools curriculum (as it existed at the time FFRF received a response to a freedom of information request) or from Jane Doe facing the decision whether to opt Jamie out of the classes. (Opp. 10.) Plaintiffs argued that this set of facts “demonstrate[d] that” the purported injury “is certain and unavoidable” because the Does “*will* face the dilemma of having to choose between unwanted exposure to *this bible [sic] class* or the burden of removing Jamie from her classmates” next school year. (Opp. 11-12 (emphasis added).) Assuming *arguendo* Plaintiffs’ argument is correct (it is incorrect because the Does were months away from *potential* exposure to injury when they filed their lawsuit and thus they and FFRF lacked—the injury they say may be suffered in the future is not “certainly impending” (Memorandum in Support of Motion to Dismiss, “Memo,” 5-8 (ECF No. 26)), it necessarily follows that the Does and FFRF lack standing if they do not face this choice in August.

Defendants further explained that the Does are attempting to bring a facial challenge to the *ipso facto* existence of classes that have anything to with the Bible, asking the Court for a broad injunction forever eliminating any such classes in Mercer County. (Memo. 2, 14-17.) The Does have never encountered the specific Bible in the Schools curriculum, the FAC says that Jane Doe does not want Jamie Doe to “any school bible [sic] courses,” and the FAC asks for a broad injunction against Bible classes of any kind. (*Id.* at 9-10, 14.) Although that is not a cognizable legal theory (*see id.* at 14-17), it helps illustrate why the Does are convinced they have standing: they believe this case is one of absolutes—any classes that have to do with the Bible (they think) are necessarily unconstitutional and must be enjoined. But the law in this type of case does not countenance such absolutes; Bible classes in public schools are *per se*

constitutional and can become unconstitutional only if the particular way in which they are conducted presents an Establishment Clause issue. (*Id.*)

This is the folly of the Does' standing theory: it assumes that either 1) the particular curriculum of the Bible in the Schools program has no bearing on the case, contrary to law, because all classes that have to do with the Bible are unconstitutional; or, 2) the Bible in the Schools curriculum is necessarily static, such that what FFRF received in response to its litigation-driven freedom of information request last year is what Jamie Doe would be taught if he attends the Bible in the Schools program next school year. More importantly, it rests heavily on the assumption that the Bible in the Schools program will be offered at all. This is precisely the type of "speculative chain of possibilities" the Supreme Court again in *Clapper* clarified is insufficient to satisfy the requirements of Article III. *Clapper v. Amnesty Int'l, USA*, 133 S. Ct. 1138, 1150 (2013). Even assuming *arguendo* the particular curriculum was relevant to them, the speculative chain of possibilities the Does say will lead to future injury is this:

**1.** More than seven months after filing this lawsuit, Jamie Doe will attend a public school in Mercer County that at that time will offer Bible in the School classes.

**2.** The Bible in the School classes offered in Jamie Doe's school will use the curriculum FFRF received in response to its freedom of information request.

**3.** Jane Doe will choose for Jamie Doe to opt out of taking the classes and thus experiencing the curriculum.

**4.** Jamie Doe will face a of risk being ostracized because he does not attend the Bible in the Schools classes.

(Opp. 11-13; FAC ¶ 33.)<sup>2</sup> This “attenuated chain of inferences necessary to find harm,” 133 S. Ct. at 1150 n.5, cannot create standing because “[a]llegations of possible future injury do not satisfy the requirements of Art. III,” *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

Developments that have taken place since Plaintiffs filed their lawsuit prove the speculative nature of their theories. On March 20, 2017, the Board of Education provided notice to the Bible in the Schools teachers that their employment may be terminated, and the Board finalized the terminations on April 11, 2017. (Supplemental Declaration of Kermit J. Moore (“Suppl. Moore Decl.”) ¶ 4 & Ex. E.) And on May 23, 2017, the Board of Education voted to suspend the teaching of the Bible in the Schools classes in all Mercer County Schools for “at least a year.” (See Suppl. Moore Decl. ¶ 3 & Ex. D.) Accordingly, Jamie Doe will *not* have the option of attending any Bible in the Schools class during the 2017-2018 school year.<sup>3</sup> The

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<sup>2</sup> Jane Doe cannot claim she is currently injured because she says she “already feels coerced to subject Jamie to the class” (Opp. 12) due to future “risk of ostracism from peers and even school staff” (FAC ¶ 33). See *Clapper*, 133 S. Ct. at 1151 (“[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.”).

<sup>3</sup> Defendants recognize that bringing this information into this Reply in effect changes their Motion to Dismiss for lack of standing pursuant to Fed. R. Civ. P. 12(b)(1) from a pure facial challenge into a hybrid (or alternative) facial-factual challenge. Unlike the ordinary dichotomy between these two types of challenges (with only one being presented at a time), Defendants maintain that the allegations in the FAC show that Plaintiffs do not have standing *and*, due to the passage of time and intervening events, it has now become clear that the allegations Plaintiffs made in the FAC and in the Opposition were not just speculative and insufficient to ground standing, but—because they were so speculative—have now also proven untrue. *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1352 (S.D. Fla. 2003) (“[T]he motion to dismiss for lack of subject matter jurisdiction will be analyzed as both a facial and a factual challenge.”); see also *Rose v. Kanawha Cty. Bd. of Educ.*, No. 2:15-CV-02473, 2016 WL 1229112, at \*4 (S.D.W. Va. Mar. 28, 2016) (Johnston, J.) (“In determining whether jurisdiction exists in the context of a factual attack, the district court is to regard the pleadings’ allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.”) (quotations omitted). Because Defendants recognize that these new factual developments are being submitted with this Reply brief (by necessity) for the first time, Defendants would not object to Plaintiffs filing a surrebuttal to this Reply limited to that discrete

earliest potential contact with the program is now *at least nineteen months* after this lawsuit was filed. (*Contra* Opp. 11-12, 15.)

Even if the Court concludes that this potential contact over a year from now is sufficient for standing (it is not), the Does' theory fails at the second link in their chain of contingencies. Mercer County suspended the Bible in the Schools program to allow a "thorough review" of the curriculum by the Board and by "community members and religious leaders along with our teachers." (Suppl. Moore Decl. **Ex. F** (Mercer County School Board Memo #344).) There is no way of knowing now the contents of the curriculum of a Bible in Schools program that may return to Mercer County Schools no earlier than the fall of 2018. It is entirely indeterminate, can only be the subject of the Does' speculation, and is only relevant to the extent that the Does' actual claim is as against Bible classes of any sort (which does not state a claim (*see* Memo. 14-17; Section II, *infra*)).

The fact that the second link is indeterminate also renders the third link speculative. Learning about the Bible is a fundamental part of every child's education. *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963) ("[O]ne's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment."). Assuming Jane Doe does not actually oppose and want an injunction against *all* Bible classes of *any* kind, she might well want Jamie Doe to attend any revised Bible in the Schools classes.

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issue. Counsel for Defendants informed counsel for Plaintiffs of this development and Defendants' position on surrebuttal prior to filing this Reply. (*See* Suppl. Moore Decl. ¶ 9.)

And the fourth link is (and always has been) speculative because it is based on a hypothetical risk of what the Does say third parties who are not before this Court may do well into the future. *Clapper*, 133 S. Ct. at 1150 n.5 (“Plaintiffs cannot rely on speculation about the unfettered choices made by independent actors not before the courts.”) (quotation omitted).

The Does’ brittle chain of inferences has thus already been broken by the passage of time since the Complaint was filed. This is exactly why the Constitution prohibits federal courts from considering hypothetical claims of injury that do not “proceed with a high degree of immediacy”; to allow otherwise would be to, as here, open the floodgates for courts deciding cases “in which no injury would have occurred at all.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992); *see also, e.g., McConnell v. FEC*, 540 U.S. 93, 226 (2003)

§ 305 amended the Communication Act’s requirements with respect to the lowest unit charge for broadcasting time. But this price is not available to qualified candidates until 45 days before a primary election or 60 days before a general election. Because Senator McConnell’s current term does not expire until 2009, the earliest day he could be affected by § 305 is 45 days before the Republican primary election in 2008. This alleged injury in fact is too remote temporally to satisfy Article III standing.

*Beck v. McDonald*, 848 F.3d 262, 271 (4th Cir. 2017) (“[A]n injury-in-fact must be concrete in both a qualitative *and* temporal sense.”) (quoting *Whitmore*, 495 U.S. at 155).

The two cases the Opposition cites on this point are not to the contrary. (Opp. 12 (citing *Lee v. Weisman*, 505 U.S. 577 (1992); *Freedom From Religion Found. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469 (3d Cir. 2016).) In both cases, the plaintiff had already experienced the alleged religious establishment of which he or she complained, making it far from speculative. *See Weisman*, 505 U.S. at 584 (“Deborah and her family attended the graduation, where the prayers were recited.”); *New Kensington*, 832 F.3d at 473-74 (“Schaub had visited the high school and come into contact with the monument . . .”). In addition, the alleged religious establishment in both cases was very much a binary question: in *Weisman*, it was

prayers (irrespective of particular content) made at school graduations, 505 U.S. at 581.<sup>4</sup> In *New Kensington*, it was a public monument of the Ten Commandments (the content of which has literally been “set in stone” for millennia<sup>5</sup>), 832 F.3d at 472.

The facts in each case were clear cut—the alleged religious establishment, having been established and not subject to relevant change, was certainly impending and was either constitutional or not. But Bible classes in public school do not lend themselves to this kind of up-or-down analysis; because they are *per se* constitutional, only the specific curriculum taught in a particular class can push one over the line into unconstitutional territory. (*See* Memo. 14-17 (citing, *inter alia*, *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam) (“The Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.”)).) Because the particular curriculum taught is what matters, filing suit well in advance of when such a class may be offered, and not actually knowing what will be taught in that class, necessarily means the case is an exercise in speculation—the curriculum can and very likely will change from one school year to the next, as has already been shown in this very case.

This should not come as any surprise: school curricula are routinely reviewed and revised by teachers, administrators, Board members, and experts. (*See, e.g.*, Suppl. Moore Decl. **Ex. F** (“The review cycle for state required courses in the elementary schools is six (6) years, so it makes sense to review our elective elementary Bible curriculum at this time.”); *id.* **Ex. I** at 4

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<sup>4</sup> *See also id.* at 588-89 (“The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce *a prayer* to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend.”) (emphasis added).

<sup>5</sup> *See* Exodus 34:27-28 (NIV) (“Then the Lord said to Moses, ‘Write down these words, for in accordance with these words I have made a covenant with you and with Israel.’ Moses was there with the Lord forty days and forty nights without eating bread or drinking water. And he wrote on the tablets the words of the covenant—the Ten Commandments.”).

(“After forming hypotheses about students’ learning needs, teachers can examine current instruction and test the hypotheses by implementing instructional changes they believe are likely to raise student achievement. Drawing from the data, teachers need to determine whether to continue the instructional improvement in its current form, modify or extend the approach, or try a different approach.”.) Although the imminence of a purported future injury is “somewhat elastic” depending on the facts and circumstances of a case, the Does complaint far stretches this concept too far “beyond its purpose.” *Clapper*, 133 S. Ct. at 1147 (quotation omitted).

**B. Plaintiffs Deal and Roe Do Not Have Standing**

Plaintiffs Deal and Roe do not have standing to sue for prospective relief because the FAC does not allege that Deal intends for Roe to re-enroll in public school in Mercer County. Therefore, they would not benefit from any prospective relief. In fact, the FAC goes out of its way to artfully plead that at least one other (unspecified) reason undergirded Deal’s decision to school Roe outside Mercer County.<sup>6</sup> (FAC ¶ 48.) The Opposition attempts to amend the FAC by carefully saying that Deal “could send” Roe back to school in Mercer County “were it not for the ongoing administration of the Bible in the Schools program.” (Opp. 16.) This is not permissible: “It is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss. To hold otherwise would mean that a party could unilaterally amend a complaint at will, even without filing an amendment, and simply by raising a point in a brief.” *Marsh v. Virginia Dept. of Transp.*, No. 6:14-CV-00006, 2014 WL 6833927, at \*8 (W.D. Va. Dec. 3, 2014) (citation omitted); cf. *Barclay White Skanska, Inc. v. Battelle Mem’l Inst.*, 262 F.

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<sup>6</sup> Defendants do not “baldly speculate” that Deal would not re-enroll Roe in school in Mercer County. (*Contra* Opp. 17 n.4.) Defendants simply observed that the FAC starkly fails to say it, even though it’s obviously a necessary element of Plaintiffs’ claims. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009) (“Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a short and plain statement of the claim *showing that the pleader is entitled to relief.*”) (emphasis added, quotation omitted).

App'x 556, 563 (4th Cir. 2008) (“A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment.”) (quotation omitted).

But even if such an amendment was permitted, it would be futile because what Deal “*could*” do with Roe—more of the same artful language—is not relevant to the question (as opposed to what Deal “*will*” do with her). *E.g.*, *Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 126 n.2 (3d Cir. 2017) (plaintiff brothers “decided they no longer wished to attend school in the School District. . . . the brothers have ‘chosen not to enroll’ and disavowed any intention to ‘further their education’ within the School District. Their claims for equitable relief are therefore moot.”); *Seamons v. Snow*, 84 F.3d 1226, 1239 (10th Cir. 1996) (“Brian does not allege in the complaint that he wants to return to the school.”). Moreover, as discussed in Section I.A, *supra*, all Bible in the Schools classes have been suspended for at least a year. If Deal actually wants Roe to begin attending school in Mercer County again, that desire will be borne out by her decision to enroll Roe for the next school year. And because the Bible in the Schools classes are not being offered for at least a year, Deal and Roe are not entitled to prospective relief incident to Roe’s purported return to school in Mercer County. (*See* Memo. 11 (citing, *inter alia*, *Lebron v. Rumsfeld*, 670 F.3d 540, 560 (4th Cir. 2012) (“A plaintiff who seeks . . . to enjoin a future action, must demonstrate that he is *immediately in danger* of sustaining some direct injury as the result of the challenged official conduct.”) (citation omitted)).)

That leaves as the sole basis for Deal and Roe’s federal lawsuit a request for nominal damages. Such a request standing alone is insufficient to invoke the jurisdiction of this Court because nominal damages cannot redress an injury. *E.g.*, *New Kensington*, 832 F.3d at 483-84 (Smith, J., concurring dubitante) (“[J]ust as the ‘psychic satisfaction’ from being told that you were right . . . does not redress past harm, nominal damages do not serve to redress past injury. . .

. If a plaintiff were seeking to be compensated for past harms, he would seek compensatory damages.”) (citation omitted).<sup>7</sup> Nominal damages are “clearly incidental” to other relief sought—which, here, is nothing—and so “cannot properly be the basis upon which a court should find a case or controversy where none in fact exists.” *Kerrigan v. Boucher*, 450 F.2d 487, 489-90 (2d. Cir. 1971). And it is little surprise that such an “incidental” request must be predicated on some *other* claim and cannot stand alone; this principle of law is well-settled, particularly when it comes to remedies. *Freedom From Religion Found., Inc. v. City of Green Bay*, 581 F. Supp. 2d 1019, 1030 (E.D. Wis. 2008) (“Thus, for justiciability purposes, there is no reason to treat nominal and declaratory relief differently. Each is a different form of *remedy* available in cases where the court has Article III jurisdiction. But neither were intended to confer jurisdiction that did not otherwise exist.”) (citation omitted); *Shank v. Safeco Ins. Co. of Am.*, No. 2:15-CV-09033, 2016 WL 4534028, at \*2 n.1 (S.D.W. Va. Aug. 30, 2016) (Goodwin, J.) (“A demand for punitive damages is not a standalone claim under West Virginia law.”).

## **II. THE FAC DOES NOT STATE A COGNIZABLE LEGAL CLAIM**

The Opposition says that Plaintiffs’ goal is not a broad injunction prohibiting Bible classes of any kind in Mercer County, arguing that is just a “fanciful” reading of the FAC. (Opp. at 7.) That is contrary to the FAC’s actual allegations particular to the Does, and contrary to the express relief the FAC requests. (Memo. 14-17; FAC pp. 20-21 at § C (requesting the Court issue a permanent injunction against “organizing, administering, or otherwise endorsing bible [*sic*] classes” of any kind).) The Opposition’s cherry-picked quotations from *Charles v. Front*

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<sup>7</sup> Judge Smith also explained that the Fourth Circuit’s decision in *Covenant Media of South Carolina, LLC v. City of North Charleston*, 493 F.3d 421 (4th Cir. 2007) may have “suggested” that a claim for nominal damages might suffice for standing purposes, but explained that “like many of the cases that seem to say that a case is saved from mootness *at least* by nominal damages, the plaintiffs sought both compensatory and nominal damages.” *Id.* at 484 n.3.

*Royal Volunteer Fire & Rescue Dept., Inc.*, 21 F. Supp. 3d 620 (W.D. Va. 2014), in an effort to induce the Court to ignore what the FAC actually requests, miss the point. (Opp. 8.) *Charles* stands for the uncontroversial proposition that a Rule 12(b)(6) motion can only be used to dismiss a “‘claim’ in its entirety,” not to snipe at a portion of the relief requested with respect to an otherwise sound claim. 21 F. Supp. 3d at 629 (“[D]efendants concede that Ellinger has stated a claim . . .”). Here, in contrast, the FAC’s requested relief (and factual allegations) demonstrates that Plaintiffs have no cognizable claim because they do not want an injunction against the particular Bible in the Schools curriculum but instead a sweeping injunction against Bible classes of every stripe. *Compare Bontkowski v. Smith*, 305 F.3d 757, 762 (7th Cir. 2002) (“It would be appropriate and indeed quite sensible for a judge confronting a complaint that does not demand proper relief to ascertain whether the plaintiff wants the improper relief sought in the complaint or nothing; if so, the complaint must be dismissed.”). The Opposition’s contrary arguments also appear somewhat disingenuous in view of statements that counsel for FFRF has made to the media about this case.<sup>8</sup> (*See* Suppl. Moore Decl. **Ex. G** (“Elliott said the suit seeks to end Mercer County’s current Bible in the Schools program all together, rather than change the course content and how it is taught.”); *id.* **Ex. H** (“The program is ‘unconstitutional at its core and cannot be saved via modifications,’ said Patrick Elliott . . . . ‘There is no legally permissible way for Mercer County Schools to continue with *any type of program like this.*”) (emphasis added); *id.* **Ex. D** (“Patrick Elliot, an attorney for the foundation, said the lawsuit does seek to end the program. ‘We see no way the program can meet the guidelines’ that would make it constitutional, he said, regardless of any changes that may be made in lesson plans.”).)

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<sup>8</sup> The Court “may take judicial notice of matters of public record in considering a motion to dismiss.” *Lewis v. Newton*, 616 F. App’x 106, 106 (4th Cir. 2015).

**III. DR. AKERS SHOULD BE DISMISSED FROM THIS LITIGATION**

The Opposition admits that the FAC does not state a claim against Dr. Akers, but entreats the Court to allow Plaintiffs to conduct discovery so they “may develop facts about her more specific conduct” and thereby reverse-engineer a claim against her. (Opp. 20.) The law demands otherwise. *Iqbal*, 556 U.S. at 678-79 (“Rule 8 . . . demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation . . . [and] does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”) (citations omitted).

**IV. PLAINTIFFS’ SECTION 1983 CLAIMS AGAINST MERCER COUNTY BOARD OF EDUCATION AND MERCER COUNTY SCHOOLS SHOULD BE DISMISSED**

The Opposition misstates the law with respect to municipal liability for claims brought under § 1983, which “attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered.” *Riddick v. School Bd. of City of Portsmouth*, 238 F.3d 518, 523 (4th Cir. 2000); (*contra* Opp. 19 n.6). Mercer County Schools does not have final authority to create municipal policy, and Plaintiffs do not contend otherwise. (Memo. 18-19.) The Board of Education does have such final authority (*id.*), but the FAC does not identify with particularity any of *its* policies that caused any constitutional violation. *Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999) (requiring “litigants to identify the offending municipal policy with precision”); *Barrett v. Bd. of Educ. of Johnston Cnty.*, 590 F. App’x 208, 210 (4th Cir. 2014) (“There were no factual allegations showing that *the Board* had a policy, custom, or practice that led to the alleged violations.”) (emphasis added). Because the FAC says that Board of Education policy is responsible for the alleged violations at issue (FAC ¶ 93) but does not identify any such policy with particularity (and the Opposition does not contend that Board Policy I-45 caused the violation (*compare* FAC ¶ 101-02 *with* Memo. 19)), Plaintiffs have not met the requirements of Rule 8 with respect to this claim.

\* \* \*

For the reasons discussed above and in the Memorandum, the FAC should be dismissed.

Dated: May 24, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 24, 2017 the foregoing REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic case filing system and constitutes service of this filing under Rule 5(b)(2)(E) of the Federal Rules of Civil Procedure. Parties may access this filing through the Court's ECF system.

By: /s/ David R. Dorey  
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