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

FREEDOM FROM RELIGION FOUNDATION, INC., et al.,	§	
Plaintiffs,	§	
v.	§	Civil Action No.: 1:17-cv-00642
MERCER COUNTY BOARD OF EDUCATION, et al.,	§	Hon. David A. Faber
Defendants.	§	

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

After conducting extensive discovery, Plaintiffs have failed to elicit any evidence refuting that on January 3, 2019, Defendant Mercer County Board of Education ("MCBOE") terminated the Bible in the Schools ("BITS") program permanently, with no avenue for reinstatement. Instead, Plaintiffs' Response ("Opp.", ECF No. 114) relies on three arguments clearly refuted by the record before the Court. First, contrary to Plaintiffs' argument that the Fourth Circuit's holding precludes mootness, the panel expressly stated that it's holding "does not prevent the district court from addressing mootness in the future if presented with that issue." Second, Plaintiffs argue in that Mercer County's new curriculum, *The Bible and its Influence*, is simply the BITS program by another name. Yet Plaintiffs' counsel Patrick Elliott has publicly stated that FFRF has "legally vetted" the new Mercer County curriculum and "has no issue with it." (*See* Declaration of Dr. Deborah Akers ("Akers Dec.", attached hereto as Exhibit A), Ex. C). Third, Plaintiffs argue that the Board's Resolution ending the BITS program has no binding effect, ignoring Defendants'

sworn deposition testimony that a Board Resolution is "set in stone." Moreover, an additional fact compels a finding of mootness in this case—Plaintiff Jessica Roe is now in seventh grade (FAC ¶34) and *will never be subject to a future Mercer County Schools (MCS) elementary curriculum.*

Regarding other claims, Dr. Akers timely raised a defense of qualified immunity and at no time violated a clearly established right. Dr. Akers is therefore entitled to qualified immunity. Plaintiffs' sweeping statements fail to allege affirmative, individual conduct sufficient to plead a claim of personal liability or to satisfy Fourth Circuit criteria to state a claim for supervisory liability against Defendant Dr. Deborah Akers ("Dr. Akers") under 42 USC §1983. As with their mootness arguments, Plaintiffs argue that the Court should find *any* biblical curriculum is clearly unconstitutional despite numerous federal courts, the West Virginia Attorney General, and Plaintiffs' own counsel indicating that biblical curricula are not inherently suspect. Similarly, based on the record and Fourth Circuit precedent, the Court must not subject MCS to liability under 42 USC §1983.

Finally, Plaintiffs' alleged injuries resulted from discrete acts capable of redress and Plaintiffs have suffered no injury following Roe's departure from MCS. Plaintiffs' claims are barred by the West Virginia Statute of Limitations. The Court must grant Defendants' Motion to Dismiss in its entirety.

ARGUMENT IN REPLY

I. UNDER FOURTH CIRCUIT PRECEDENT, PLAINTIFFS' CLAIMS ARE MOOT

A. The Fourth Circuit Invited This Court To Address "Mootness In The Future"

The Fourth Circuit's issuance of a mandate does not foreclose this Court's consideration of mootness. *See Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414-415 (4th Cir. 2005). The Fourth Circuit, in accord with federal and local rules, reviews a petition for a particular

material fact or legal matter "the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition." Fed. R. App. Proc. 40(a)(2); Local Rule 40(b). Where, as here, new facts arise following the decision of the lower court, these facts are not properly the subject of review in a petition for rehearing. The Fourth Circuit clearly contemplated the probability of this eventuality, stating, "Of course, this does not prevent the district court from addressing mootness in the future if presented with that issue." (ECF No. 59, 15).[1]

Assuming, *arguendo*, the mandate "laid to rest" the question of mootness under the mandate rule, deviation from the mandate rule is permitted when "significant new evidence…has come to light." *Invention Submission Corp*., 413 F.3d at 415 (upholding the lower Court's decision denying review because Plaintiff simply attempted to assert a new legal theory, no new evidence existed). In addition to the termination of the BITS program, significant new evidence has come to light. Defendants have eradicated all BITS program materials and resources from MCS elementary schools. (Deposition of Amanda Aliff ("Aliff Depo.", attached hereto as Exhibit B) 41:20-42:7; ECF No. 79-1, ¶5). As a result of ongoing research, evaluation and review over the last two years Defendants' paradigm has forever changed. Defendants' consistent message to the community is that the BITS program will never be reinstated. Since the Board officially resolved to permanently terminate the BITS program, no representative of MCS, the MCBOE or Dr. Akers herself has issued a single message indicating a) remorse with their decision, b) an inclination to reverse their decision, or c) a desire to implement an alternative Bible curriculum in the elementary schools. Rather, every statement made by Defendants since January 3, 2019 confirms that the

[1] Indeed, if the mandate did "lay to rest" the question of mootness, Plaintiffs would have seen no need to request discovery on the limited issue of mootness (ECF No.86) and the District Court would not have permitted "plaintiffs to engage in limited discovery regarding the issue of mootness." (ECF No. 103).

challenged BITS program, or any iteration of the same, can never, and *will* never, return to the MCS. (Akers Dec. ¶19).

B. Defendants Terminated The Bible in the Schools ("BITS") Program

MCBOE's Resolution, memorialized in Memo 171, confirms: "We, the Board of Mercer County Schools, hereby resolve that its schools will never offer or employ the BITS program in any of its schools." (*See* Opp. Ex. L). As the Fourth Circuit has noted, the "repeal or amendment of a statute moots a challenge even where re-enactment of the statute at issue is within the power of the legislature." *Am. Legion Post 7 of Durham, N.C. v. City of Durham*, 239 F.3d 601, 606 (4th Cir. 2001). Plaintiffs arguments that Defendants are likely to reinstate the BITS curriculum finds no support in the record. Upon service of this suit, Defendants immediately submitted the BITS program to review. In short order Defendants suspended the BITS program and offered no BITS classes. (ECF No. 30-1, ¶3). Further, Defendants terminated all BITS teachers almost simultaneous to the program's suspension. (ECF No. 30,4; Akers Depo. 60:23-61:10); Akers Dec. ¶13). Defendants took immediate, decisive action, belying any hint of reluctance to permanently end the BITS program. (*Contra. Porter v. Clarke*, 852 F.3d 358, 360-64 (4th Cir.2017) (Porter defendants "repeatedly have refused to rule out a return to the challenged policies" and plaintiffs had not "received…reasonable assurances that any of the [revised policies] will remain in place."). A review of Defendants' behavior conclusively establishes Defendants' behavior regarding termination of the BITS program was intentional, deliberate and earnest to ensure constitutional compliance and sensitivity to the termination of a long-standing program that garnered vast support in the local community. This Court should rely upon Defendants' actions rather than Plaintiffs' empty rhetoric to assess Defendants' motivation.

On May 24, 2017 the MCBOE "initiated a thorough review of its options concerning the BITS program…including evaluating other curricula, gauging community interest, and interviewing key stakeholders." (Akers Depo. 58:6-23; Opp. Ex. L). Ms. Akers asked Defendant Ms. Amanda Aliff ("Ms. Aliff") to create a committee to review the BITS program. (Akers Depo. 28:21-29:2, 32:15-23; Opp. Ex. L) Ms. Aliff created an *ad hoc* committee comprised of hand-picked school personnel and community members to review the BITS program and to determine whether the program could be amended to comply with the educational mission of the MCS. (Aliff Depo. 12:7-24, 16:8-23, 21:15-28:16, 29:18-30:2, 37:3-12; Deposition of Elijah Hodges ("Hodges Depo.", attached hereto as Exhibit C) 19:1-14). The committee determined 1) the BITS program was incompatible with the educational mission of MCS and 2) the committee did not have the expertise necessary to redesign the BITS program in an appropriate manner. (Akers Depo. 42:20-43:1; Akers Dec. ¶12; Aliff Depo. 38:6-14; Declaration of Kermit J. Moore ("Moore Dec.") ¶4, Ex. F). The committee advised the MCBOE to eliminate the BITS program. Around the same time, Dr. Akers reviewed the BITS program herself, and determined it was incompatible with the educational mission of MCS. (Akers Depo. 80:15-81:8).[2] The MCBOE agreed. (Hodges Depo. 46:18-47:15). After the conclusions of the committee were conveyed to Dr. Akers, the BITS program class materials were removed from all schools in Mercer County (there were no textbooks). (Aliff Depo. 40:24-41:4, 41:11-13).

The January 3, 2019 Board meeting was hardly "shrouded in secrecy" as Plaintiffs contend. Rather, Defendants issued a press packet three days prior to the January 3, 2019 Board meeting

[2] Prior to the instant suit, Dr. Akers had not reviewed individual BITS classes. Dr. Akers believed the BITS program was being implemented in accordance with guidance issued by former West Virginia Attorney General Charlie Brown in 1985, based on her annual meetings with elementary school principals. (Akers Depo.26:21-27:6; Akers Dec. ¶11, Ex. A).

containing the exact text of the proposed Board Resolution, in the normal and customary manner, in accordance with MCBOE protocol for issuing public notice of Board meetings. (Akers Depo. 55:11-19, 57:2-21; Akers Dec. ¶4; Hodges Depo. 17:10-17, 40:12-17; Moore Dec. ¶3, Ex. E, 3.2.G). Dr. Akers' secretary prepared the meeting agenda for January 3, 2019, Dr. Akers approved it, and her office publicized the agenda in the press packet. (Akers Depo. 52:24-53:10; Hodges Depo. 41:13-19, 42:17-43:1). The press release listed the BITS program in the same manner as any other agenda item. (Akers Depo. 53:11-54:6).

The January 3rd meeting was open to the public (labeled a "special session" to distinguish it from the "regular session" public meetings convened every second and fourth Tuesday) and a work session (a "work session" is a gathering where Board members engage in general discussion but do not take action). (Akers Dec. ¶7; Hodges Depo. 6:16-23; Opp. Exs. I, J, K). In fact, this meeting was scheduled far in advance, as it is annually, to accommodate the busy schedules of Mercer County and West Virginia legislators who came to the concurrent work session to discuss MCBOE's recommendations for legislative priorities in the year ahead. (Akers Depo. 52:7-11; Hodges Depo. 32:8-12; Opp. Ex. M). It is normal MCS policy and practice to have two types of meetings concurrently on the same date. (Akers Dec.¶7; *See e.g.* Opp. Ex. A). The MCBOE voted on the Board Resolution terminating the BITS program during the public meeting, because such a Resolution cannot be passed during a work session. (Akers Depo. 56:18-57:21; Hodges Depo. 31:4-14, 33:7-10, 33:14-24; Moore Dec.¶3, Ex. E, 2.4). The Board did this efficiently and in accordance with well-established procedures. (Akers Depo. 56:18-57:21).

The Board Resolution terminating BITS is not a "mere litigation tactic" and Defendants' suspension and termination of the BITS program does not naturally imply a "pattern of manipulation." (*Contra*. Opp. 6, 19, 23). Plaintiffs rely on authority in which a government body

acted *after a merits decision*. In *Ne. Fla Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, the Court found the City's action late in the litigation because the City changed the contentious policy at issue 22 days after the United States Supreme Court granted certiorari. *Ne.Fla Chapter of Associated Gen. Contractors of Am. v. City of* Jacksonville, 508 U.S. 656 (1993); *see also Burns v. Pa. De't of Corr*., 544 F.3d 279 (3d Cir. 2008) (defendants took action only after completing appellate oral argument). In comparison to Plaintiffs' authority, Defendants' action in this case has been swift, as Defendants have yet to file an Answer, and the merits of Plaintiffs' constitutional challenge have yet to be reached. (*Contra*. Plaintiffs' assertion Defendants have been "defending the constitutionality of BITS for nearly two years." (Opp. 25).[3]

Although establishing mootness through voluntary cessation is often a "heavy burden," courts will find cases involving repealed policies moot unless "reenactment is not merely possible but appears probable." *Brooks v. Vassar*, 462 F.3d 341, 348 (4th Cir. 2006); *see also Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000) ("statutory changes that discontinue a challenged practice are 'usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed.'") (internal citations omitted). Defendants have carried this burden, and surpassed it. It is absolutely clear that the now-terminated BITS program will never again return in identical or materially indistinguishable form. (Akers Depo. 63:1-10; Opp. Ex. L). The MCBOE terminated the BITS program and then took the extraordinary step of adopting a Board Resolution in a public meeting, declaring that the BITS program, or any other Bible elective curriculum, will never be reinstated in its elementary schools. (Akers Depo. 63:14-23; 64:8-66:8; Hodges Depo. 44:8-15; Opp. Ex. L). The MCBOE further

[3] Defendants' counsel repeatedly instructed deposition witnesses not to answer questions regarding the constitutionality of the BITS program because the District Court specifically limited the scope of discovery to the issue of mootness.

resolved that MCS will never employ teachers to provide Bible course instruction in an elementary school. (Opp. Ex. L). Reenactment of the BITS program is highly improbable if not impossible. *See Brooks*, 462 F.3d at 348.

C. Termination of the BITS Program Constitutes a Legislative Repeal

The MCBOE implemented the BITS program several decades ago, sanctioning the creation and instruction of the BITS curriculum in Mercer County elementary schools, and continuing its operation under the auspices of guidance issued by the state's former Attorney General. Plaintiffs go to great lengths to convince the Court that a MCBOE Board Policy ("Board Policy") has more permanence and authority than a MCBOE Board Resolution ("Board Resolution") and to draw distinctions between the two. (Opp. 3). Plaintiffs self-style the Board Resolution contained within Board Memo #171 as a "Memo" and a "practice." (Opp. 30).

Plaintiffs suffer a fundamental misapprehension of the facts. The Board Resolution memorialized in Board Memo #171 carries at least the same weight, authority and permanence as a Board Policy.[4] (Akers Depo. 66:2-68:18). In fact, a Board Resolution is more permanent and long-ranging than a Board Policy, binding future MCBOE action, with no avenue for change. (Akers Dec. ¶6; Hodges Depo. 8:10-14). A Board Resolution is an official action of the MCBOE to "set in stone" the MCBOE's decision.[5] (Akers Depo. 68:10-18; 74:5-75:1; Hodges Depo. 37:17-38:8). MCS does not have a policy or practice of providing a public notice and comment period

[4] Arguing that Defendants were dilatory, Plaintiffs conflate administrative oversight with malicious intent. The MCBOE voted on the January 3, 2019 meeting minutes during the January 22, 2019 regular session meeting of the MCBOE and did not immediately post the January 3, 2019 meeting minutes on the MCBOE website. Neither behavior voids the legal effect of the Board Resolution adopted at the January 3, 2019 meeting. (*See* Opp. 14).

[5] As defined by MCS, a "decision shall mean any determination, action, vote or final disposition of a motion, *proposal, resolution*, order, ordinance or measure on which a vote of the governing body is required at any meeting at which a quorum is present." (emphasis added). (Moore Dec. ¶3, Ex. E, 2.2, *see also* Moore Dec. ¶3, Ex. E, 2.4 and 2.5).

prior to passage of a Resolution, as it does for a Policy, other than the three days' notice immediately preceding a scheduled MCBOE meeting. (Akers Dec. ¶5). Time is always reserved during meetings for public comment. (Akers Dec. ¶5). Board Resolutions are the day-to-day legislative acts largely related to the administration and governance of the MCBOE and its various functions, and are within the province of the MCBOE to enact. Policies, which are generally broader in scope, elicit public comment to ensure community compliance. Both Resolutions and Policies are official acts of the MCBOE, with the same legal effect upon adoption. The Board Resolution adopted on January 3, 2019 had the immediate legal effect of permanently terminating the BITS program. It is the obligation of the Court to view it as it is—a legislative act by a government body formally repealing an existing policy. (Opp. Ex. L).

The termination of the BITS program by Board Resolution, an official action of the MCBOE (a government entity), rescinds the BITS program policy with the force necessary to constitute legislative repeal. Since Defendants have revoked the government policy Plaintiffs challenge in this suit, Plaintiffs' claim for nominal damages does not prevent mootness. *Am. Legion Post 7 of Durham, N.C. v. City of Durham*, 239 F.3d 601, 606 (4th Cir. 2002). Nor does Plaintiffs' claim for nominal damages keep this action alive if the Court determines Plaintiffs are not entitled to injunctive or declaratory relief. *U.S. v. Hardy*, 545 F.3d 280, 283 (4th Cir.2008) (a specific and concrete continuing injury, some "collateral consequences" must exist if the suit is to be maintained."); *Chapin Furniture Outlet, Inc. v. Town of Chapin*, 252 Fed.Appx. 566, 572 (4th Cir. 2007) ("In the absence of a constitutional deprivation, [plaintiff's] nominal damages claim does not save this case from mootness."). As Defendants asserted in their Motion to Dismiss and supporting Memorandum (ECF Nos. 79, 80), the instant matter is akin to the situation in *Morrison*, in which judicial efficiency and lack of redressability obviate the need to proceed. *Morrison v. Bd.*

of Educ., 521 F.3d 602, 611 (6th Cir. 2008) ("allowing [the case] to proceed to determine the constitutionality of an abandoned policy – in the hopes of awarding the plaintiff a single dollar- vindicates no interest and trivializes the important business of the federal courts").

D. The BITS Program Cannot and Will Not Be Reinstated

The BITS program cannot and will not be reinstated. (Akers Dec. ¶9). (*Contra*. "…there is no meaningful obstacle to [BITS] eventual reimplementation." (Opp. 1-2)). Plaintiffs express apprehension that Dr. Akers will mandate the installation of a new Bible course in MCS elementary schools of her own accord "without regard for existing Board policy." (*See* Opp. 29). Dr. Akers does not "creat[e] policies supporting and implementing the BITS program." (Opp. 5). (Akers Depo. 7:8-14; Akers Dec.¶¶ 2-3; ECF No. 79-1, Hodges Dec. ¶2; W.VA. CODE Sec. 18-5-1). As Superintendent of MCS, Dr. Akers has duties and powers proscribed by West Virginia law. Creating curriculum, hiring teachers and creating policies are not among these duties. *See* W.VA. CODE §§ 18-4-10 and 18-4-11. Dr. Akers has taken an oath to uphold the policies and advance the educational mission of the Mercer County Schools, and she has adhered to that oath every day of her 28-year tenure as Superintendent. (W.VA. CONST. ART. IV, §5; Akers Dec. ¶18). Dr. Akers has never "coerced students into receiving religious instruction," as Plaintiffs gratuitously assert (Opp. 5; Akers Dec. ¶8), nor would she do so. Simply put, Dr. Akers will not reinstate a Bible curriculum in MCS elementary schools.

Plaintiffs obfuscate the distinction between a Board Memo and a Board Resolution, portending an absurd result. A Board Memo is not a Board Resolution. A Board Memo may contain a *proposed* Board Resolution. (Akers Depo. 13:16-23). Of course, there is no "formal process in place for the Board to adopt memos or…provide notice for public comment or… consider past memos before acting or…maintaining a permanent record of memos" (Opp. 30) as

Plaintiffs suggest, because a Board Memo is, simply put, a brief written message containing a recommendation regarding a proposed action.[6] A Board Memo is not the proposed action itself, but simply a vehicle for conveying a recommendation about a proposed action. Dr. Akers often makes recommendations regarding proposed Policies or Resolutions to the Board in a Board Memo in advance of Board meetings. (Akers Depo. 13:16-15:16; Moore Dec. ¶3, Ex. E, 3.2). At Board meetings, the MCBOE votes on proposed Policies and Resolutions, the Board does not vote on Dr. Akers' "recommendations." (Akers Depo. 13:16-15:16). MCS has never, nor will it ever, institute a Bible curriculum by voting on a Board Memo.

C. Plaintiffs Do Not Challenge *The Bible and Its Influence* Curriculum In This Litigation

The Bible and Its Influence curriculum is not at issue in this suit, and is therefore irrelevant to determining whether Plaintiffs' claims are moot. "Appellants challenge only the BITS program as it existed at the time the suit was filed." (ECF No. 59,12). It is not within the court's jurisdiction or indeed, within its ability, to assess this curriculum in light of the intense fact-finding involved in assessing constitutionality under the Establishment Clause. *See* ECF No. 21, 28 ("Indeed, the court must engage in a case-by-case adjudication of whether the content of the class is consistent with *Lemon v. Kurtzman*." citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

The MCBOE wanted to identify and implement a Bible elective course that would meet the standards of constitutionality, academic soundness and acceptability to a diverse public. Defendants followed normal procedures for the creation of an elective course when they formed a committee, reviewed curricula, and chose a well-established curriculum. (Opp. Ex. R, 2.2-2.4; Akers Depo. 33:4-12). Ms. Aliff gathered together a diverse group of people (district personnel,

[6] A memo is "a brief written message or report." Merriam Webster, https://www.merriam-webster.com/dictionary/memo, accessed on November 10, 2019.

community members, parents) who understood the educational mission of Mercer County Schools to identify a curriculum for a new elective course offering to teach middle school students about the Bible from an historical and literary perspective. (Akers Depo. 40:1-20; Aliff Depo. 25:14-17, 34:20-35:10, 36:1-20).

The options being explored by the BITS Advisory Committee were not a response to eliminating the BITS program in Mercer County elementary schools. (Aliff Depo. 33:7-13; Opp. Ex. E). The Advisory Committee identified *The Bible and Its Influence* as a possible source from which they could create a middle school curriculum because it had already been deemed suitable for MCS secondary schools. (Hodges Depo. 24:10-17). *The Bible and Its Influence* curriculum has been vetted in multiple school districts across the country and it is well-established that it passes constitutional muster.[7] (Akers Dec. ¶14, Ex. B). MCS and the MCBOE are also impressed that the FFRF publicly admits that *The Bible and Its Influence* is constitutional and appropriate for public school students. (Akers Dec. ¶14, Ex. C).

Plaintiffs argue that the current *The Bible and Its Influence* curriculum, taught in middle schools, is actually the BITS program in disguise (Opp. 16), alleging that Defendants have "continuously offered bible [sic] elective courses to middle school students since the suspension [of the BITS program]." (Opp. 2). *The Bible and Its Influence* is a unique course in no way associated or similar to the BITS program. (Hodges Depo. 45:12-21). Two full school years transpired between the termination of the BITS program and the launch of *The Bible and Its Influence* course in middle schools. (Akers Depo. 40:15-20, 43:11-23; Aliff Depo. 34:11-35:4, 36:1-16; Hodges Depo. 24:24-25:3). The teachers are different, the textbook is different, and the

[7] The Bible and Its Influence "meets the legal requirements for academically teaching the content of the Bible in American public schools. More than 140,000 students in 640 schools in 44 states have used it." https://store.essentialsineducation.org/product/the-bible-and-its-influence/

students are different. (Aliff Depo. 43:4-7). The MCBOE approved *The Bible and Its Influence* in accordance with normal curriculum-development policy in Mercer County. (Akers Dec. ¶15; Akers Depo. 19:9-22, 33:4-12, 42:1-7; Hodges Depo. 24:21-25:6; Opp. Ex. R).

D. Jessica Roe Can Never Again Be A Student In A Mercer County Elementary School

During the 2019/20 school year, Roe is in seventh grade. (*See* FAC ¶34). There is no "reasonable expectation" that Plaintiffs "will be subject to the same action again" because it is a physical impossibility. *Contra. Town of Nags Head v. Toloczko*, 728 F.3d 391, 395 n.3 (4th Cir. 2013) (internal citations omitted). On January 3, 2019, the MCBOE resolved "MCS does not now or in the future intend to offer a Bible elective curriculum in any of its elementary schools." (Opp. Ex. L). MCBOE further resolved "MCS will not now or in the future employ teachers for the purpose of teaching a Bible elective curriculum in any of its elementary schools." (Opp. Ex. L). Furthermore, no elementary curriculum using *The Bible and Its Influence* exists, so even if there was a will to create a derivative elementary course, this is not possible. (Akers Dec. ¶16). Roe will never again be enrolled in an elementary school in Mercer County and a Bible elective curriculum will never be offered in an elementary school in Mercer County. Thus, Roe's claims are moot. *Mellen v. Bunting*, 327 F.3d 355, 364 (4th Cir. 2003) ("When students challenge the constitutionality of school policies, their claims for declaratory and injunctive relief generally become moot when they graduate.").

II. DR. AKERS IS ENTITLED TO QUALIFIED IMMUNITY

A. Plaintiffs Fail To Allege A Claim Of Personal Or Supervisory Liability Against Dr. Deborah Akers

Plaintiffs conflate the analyses for personal and supervisory liability and, after cursory consideration, conclude they state a plausible claim against Dr. Akers for both. (Opp. 35). In fact,

they fail to state either claim. Under a theory of supervisory liability, a supervisor may only be liable for an omission and so involves a more intensive inquiry. Personal liability must be based on the affirmative misconduct of a defendant and is analyzed using a "functional approach." *Randall v. Prince George's County*, 302 F.3d 188, 204 (4th Cir. 2002); *Forrester v. White*, 484 U.S. 219, 224 (1988). Plaintiffs fail to employ either framework. (*See* Opp. 35).

1. Plaintiffs State No Claim For Personal Liability Against Defendant Dr. Deborah Akers

Plaintiffs fail to allege affirmative, individual conduct by Dr. Akers sufficient to hold her personally liable under 42 USC § 1983. Both factors employed by the Supreme Court to analyze personal liability: the "nature of [her] functions" and the "effects that exposure to particular forms of liability" would cause, weigh against allowing personal liability. *Forrester*, 484 U.S. at 224. Further, since a MCBOE-enacted program is the alleged violation, the governmental entity is the real party in interest, making personal liability inappropriate. *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (internal citations omitted).

Plaintiffs vaguely claim that Dr. Akers "coerced students" and "worked in concert" with others to "administer religious instruction," yet fail to cite particular facts to support their accusations. (Opp. 5, 36, 38). Such ambiguous statements fall far short of the requirement to state a claim with a "high level of particularity." *Doe v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 176 (4th Cir. 2010).

In fact, Plaintiffs' alleged violation is properly claimed against the MCBOE, the governmental entity, not Dr. Akers individually. As Superintendent, Dr. Akers has an administrative role in ensuring implementation of the policies and programs of MCS; however, it is not Dr. Akers but the "Board [that] creates policies for the operation of the schools." (Akers

Dep.7:8-14). As Superintendent, Dr. Akers is not responsible for understanding the minutiae of each class lesson plan. (Akers Dep. 20:3-6). The longevity of the BITS program further illustrates that the root of the alleged violation is an action by the governmental entity, not individual conduct. (Akers Dep.20:13-15, 21:16-21; *Deal v. Mercer Cty. Bd. Of Educ.*, 911 F.3d 183, 186 (4th Cir. 2018); *see* Opp. 35; *see also Hafer*, 502 U.S. at 25). Since Plaintiffs' claim is not based on an alleged rights violation caused by individual action but a claim against what had been a well-established program enacted by a governmental entity, personal liability is inappropriate. *Hafer*, 502 U.S. at 25.

2. The Test For Supervisory Liability Cannot Be Satisfied Against Dr. Deborah Akers

Plaintiffs incorrectly conclude they have alleged a claim for supervisory liability under 42 USC § 1983 without considering the Fourth Circuit's test. (Opp. 35). In the Fourth Circuit, supervisory liability does not attach in a § 1983 case unless *each* of three criteria is met. *Carter v. Morris*, 164 F.3d 215, 221 (4th Cir. 1999). First, Dr. Akers was not actually or constructively aware that the BITS program might be found to violate a federal right. (Akers Dep. 25:13-19, 26:14-24, 27:1-6). She had no awareness that the elective might conflict with the educational mission of the school and believed it had been implemented in compliance with guidance set forth by a former West Virginia Attorney General. *Id.* This also illustrates that Dr. Aker's conduct as Superintendent did not amount to "'deliberate indifference'" or "'tacit authorization of'" a potential violation of rights. *Randall*, 302 F.3d at 206. Upon learning of the instant litigation**,** Dr. Akers recommended that the MCBOE suspend the BITS program until it determined whether the program was in line with current Establishment Clause jurisprudence, showing a clear lack of indifference. (ECF No. 80, 3, Ex. 1 at ¶3). Finally, Dr. Akers cannot plausibly be viewed as having been an essential link in the existence of the program. *Randall*, 302 F.3d at 206. The BITS program

existed well before Dr. Akers began serving as Superintendent and its existence did not hinge on her holding the position. (Akers Dec. ¶10). Plaintiffs have made seemingly no effort to support their claim of supervisory liability and Dr. Akers cannot be held responsible for Plaintiffs' alleged injuries under this theory of liability. (*See* Opp. 35-36).

B. Dr. Akers Is Entitled To Qualified Immunity

This Court must determine whether the constitutional rights Plaintiffs allege Dr. Akers violated have been "clearly established" before determining whether Dr. Akers should have reasonably known her behavior would result in a deprivation of those rights. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). If the law is clearly established, a "reasonably competent public official" like Dr. Akers "should know the law governing [her] conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The murkiness of Establishment Clause jurisprudence, generally and in the school context specifically, makes it obvious that determining a clearly established right requires a very fact-intensive analysis. *Wood v. Arnold*, 915 F.3d 308, 314 (4th Cir. 2019) ("for purposes of Establishment Clause analysis, context is crucial"). Plaintiffs have not engaged in a fact-intensive analysis, nor is it clearly established that the BITS program violated the First Amendment to the U.S. Constitution. In the absence of a clearly established right it is impossible for Dr. Akers to "anticipate subsequent legal developments" or to "know that the [Establishment Clause] forbade conduct not previously identified as unlawful." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This is particularly true of Dr. Akers because she believed the MCBOE operated the BITS program in accordance with guidance issued by a former West Virginia Attorney General. (Akers Dec. ¶11, Ex. A). Dr. Akers had no apprehension of impropriety or illegality with respect to the implementation of the BITS program. Plaintiffs have failed to allege that Dr. Akers violated a clearly established right, thus Dr. Akers is entitled to qualified immunity.

III. DR. AKERS TIMELY RAISED A QUALIFIED IMMUNITY DEFENSE

Dr. Akers timely brought the defense of qualified immunity by raising it in her original motion to dismiss. (ECF No. 26, 17-18 n. 15). Plaintiffs take issue with the manner in which Dr. Akers raises her qualified immunity defense in the instant motion, concluding that Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 12(g) now bars this defense. (Opp. 36-37). Dr. Akers does not assert a separate defense and Fed. R. Civ. P. 12(g)(2) is not implicated.

Qualified immunity may only be denied if a state official violates an individual's clearly established federal right. *Mellen*, 327 F.3d at 376. If either the "violation" or "clearly established" element is missing, qualified immunity protection remains. *Id.* Plaintiffs contention that Fed. R. Civ. P. 12(g)(2) is applicable to Dr. Akers' defense contravenes the rule's text and intent. By timely raising the defense of qualified immunity, Dr. Akers compels the Court to afford her qualified immunity.

Plaintiffs cite non-dispositive and unpersuasive authority to support their assertion. *See English v. Dyke*, 23 F.3d 1086 (6th Cir. 1994). In *English*, defendants failed to raise the qualified immunity defense in their pre-answer motion to dismiss. *Id.* at 1090-91. The *English* court held that defendants would not have been permitted to raise the defense in a separate and additional motion to dismiss, but for the fact the Court treated their post-answer motion as a motion for judgment on the pleadings. *Id.* at 1090. It is undisputed that Dr. Akers raised a qualified immunity defense in her first pre-answer motion to dismiss. (*See* ECF No. 26, 18 n. 15). The Court should deny Plaintiffs' request to expand Fed. R. Civ. P. 12(g)(2) beyond the scope of statutory construction and established precedent and conclude that Dr. Akers is properly entitled to qualified immunity.

IV. MCS IS NOT SUBJECT TO LIABILITY UNDER 42 USC § 1983 BECAUSE IT HAS NO FINAL POLICYMAKING AUTHORITY

Plaintiffs have failed to adequately allege that MCS had "final authority to establish municipal policy" and have failed to allege that MCS engaged in "deliberate indifference to [Plaintiffs'] rights," relying solely on allegations in the FAC. Plaintiffs have summarily "expressed a belief or an opinion without any supporting factual allegations." *Barrett v. Board of Educ. of Johnston County, N.C.*, 590 F. App'x 208, 210 (4th Cir.2014).

MCS has not engaged in a pervasive custom of unconstitutional behavior. The *Monell* court held that a government entity could be held liable for a "pervasive custom," to ensure that simply because a discriminatory practice was not enshrined in written law, the entity would still be held liable. *Monell v. Dep't of Soc. Servc. Of City of New York*, 436 U.S. 658, 690 (1978). The MCBOE had always observed that the BITS program was implemented in accordance with the 1985 West Virginia Attorney General guidelines. (ECF No. 30-1, Ex. D). MCS has not engaged in a "pervasive custom" and did not "cause" the MCBOE to allegedly deprive Plaintiffs of any right, privilege or immunity secured by the U.S. Constitution. The language of § 1983 was not intended to "impose liability vicariously…solely on the basis of a … relationship." *Id*. at 692. Thus, neither can the Court hold MCS liable solely on a theory of *respondeat superior*. *Id*. at 691.

The MCBOE creates policies.[8] (FAC ¶90; Opp. 4; Hodges Depo.7:4-6). MCBOE is the final policymaker with regard to the creation and implementation of curricula in Mercer County elementary, middle and secondary schools. (Opp. Ex. R). There is no pattern and practice of BITS

[8] *See Carr-Lambert v. Grant Cnty. Bd. of Educ*., No. 2:09-cv-61, 2009 U.S. Dist. LEXIS 58194 (N.D.W. Va July 2, 2009) ("Under West Virginia law, the final policy making authority for a school district resides with the members of its county board of education."); *See also* Mercer County Schools Policy BF (Moore Dec.¶5, Ex. G).

curriculum review by the MCS, nor does MCS have knowledge of a "widespread practice" of causing Plaintiffs injury prior to the filing of this suit. Plaintiffs fail to allege MCS is not a final policymaking body and does not have final policymaking authority, a fact that Plaintiffs readily acknowledge. (*See* FAC ¶90) ("Mercer County Board of Education is responsible for adopting policies that govern Mercer County Schools"). Accordingly, MCS is not subject to liability under 42 USC § 1983, and the Court should dismiss Plaintiffs' claims against MCS.

V. PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

Plaintiffs assert that West Virginia's two-year statute of limitations does not preclude them from raising their claims now, despite the fact that the claims accrued over two years prior to when Plaintiffs' filed the Complaint. (Opp. 43-44). *Bell v. Bd. of Educ.*, 290 F. Supp. 2d 701, 709 (S.D.W. Va. 2003). To support their contention, Plaintiffs point to the Fourth Circuit's acknowledgement that Plaintiffs allege two ongoing injuries. (Opp. 43-44). The Fourth Circuit analyzed Plaintiffs' alleged injury for the purpose of determining whether Plaintiffs had standing. *Deal v. Mercer Cty. Bd. of Educ.*, 911 F.3d 183, 187-89 (2018). To analyze whether the statute of limitations applies, the Court must evaluate whether a "pattern or practice" violation or a "continuing" violation is alleged. *See Williams v. Giant Food, Inc.*, 370 F.3d 423 (4th Cir. 2004); *AMTRAK v. Morgan*, 536 U.S. 101 (2002).

Plaintiffs assert that an alleged ongoing injury requires a *per se* application of the continuing violation doctrine. (Opp. 43-44). The continuing violation doctrine is applied in certain instances in which a "pattern or practice" violation occurred, to prevent the statute of limitations barring claims comprised of a series of incidents that amount to a violation in the aggregate, but on their own would not suffice to constitute a violation. *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (2007). Here, Plaintiffs allege no injury after Roe left MCS, rendering the continuing

violation doctrine inapplicable. The Fourth Circuit has, in fact, precluded use of the continuing violation doctrine to extend the filing time for a claim involving discrete acts even when alleged to be part of a pattern or practice in violation of an individual's rights. *Williams*, 370 F.3d at 429. Reasoning from the premise in *Williams*, the Court must not toll the statute of limitations. Plaintiffs suffer no continuing violation, as a matter of law. *See AMTRAK*, 536 U.S. 101; *Miller v. King George Cty.*, 277 F. App'x 297, 299 (4th Cir. 2008); *Williams*, 370 F.3d 423.

CONCLUSION

For the foregoing reasons, and those argued in Defendants' Motion to Dismiss (ECF No.79) and supporting Memorandum (ECF No. 80), the Court should dismiss the First Amended Complaint in its entirety.

Dated: November 14, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2019 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/ Kermit J. Moore
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