UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
No. 24-CV-380

C.M., *a minor, through his parents*, LEAH MCGHEE *and* CHAD MCGHEE, Plaintiff, v. DAVIDSON COUNTY BOARD OF EDUCATION; *and* ERIC R. ANDERSON, *in his individual capacity*, Defendants.	**PLAINTIFF'S RESPONSE BRIEF IN OPPOSITION TO DEFENDANT BOARD OF EDUCATION'S PARTIAL MOTION TO DISMISS SECOND CAUSE OF ACTION** **ORAL ARGUMENT REQUESTED PURSUANT TO LR 7.3(c)(1)(2)**

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PRELIMINARY STATEMENT

On April 9, 2024, 16-year-old C.M. was suspended from Central Davidson High School (the "School") for three days, out of School, for using the term "illegal aliens"—a term used by the Supreme Court, this Court, and throughout the news media to refer to immigrants without proper legal authorization or documentation. The School's assistant principal wrongfully branded C.M.'s comment as racist, equating it to using "the n word," and denied him and his parents any opportunity to appeal the suspension.

This lawsuit was brought to vindicate C.M.'s free speech and due process rights under the First and Fourteenth Amendments against Eric Anderson, the School's assistant principal who issued the suspension pursuant to policy, and the Davidson County Board of Education ("the Board") that promulgated and implemented the policy and ratified and upheld C.M.'s suspension. The Board has now moved to partially dismiss C.M.'s Second Cause of Action—the due process claim. Motion, ECF No. 18. This Court should deny the Motion.

The Board concedes, as it must, 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 (1969).

Nevertheless, the Motion and Memorandum (ECF No. 19) cite a patchwork of caselaw cobbled together in an attempt to undermine *Tinker*'s application here. But the Board virtually ignores the Fourth Circuit's most recent application of *Tinker*, which reinforced this Circuit's steadfast support of students' First Amendment rights:

> Schools cannot silence such student speech on the basis that it communicates controversial or upsetting ideas. To do so would be incompatible with the very purpose of public education. . . . The First Amendment does not permit schools to prohibit students from engaging in the factual, nonthreatening speech alleged here.

Starbuck v. Williamsburg James City Cty. Sch. Bd., 28 F.4th 529, 536 (4th Cir. 2022) (internal citation omitted). Under the backdrop of *Starbuck*, none of the Board's three arguments have merit.

First**,** the Board's argument that its policies are constitutional because they recite the *Tinker* standard is wrong: the Fourth Circuit rejected that argument a mere five years after *Tinker*, striking down an analogous policy as unconstitutionally vague. That same result is required here, since the policy allowed the assistant principal to harshly punish C.M.s nonthreatening and factual speech.

Second, the Board's argument that permitting C.M. to have a brief conversation with the assistant principal satisfied its due process obligations is wrong. C.M. alleges that he was denied any meaningful opportunity to

challenge the suspension or appeal it to the Board. And dismissal would be premature here anyway, as the Board has recently attempted to shift its narrative regarding the suspension, buttressing C.M.'s allegations that he was denied proper notice and an opportunity to be heard.

***Third*,** the Board's attempt to escape liability under *Monell v. NYC Dep't of Social Services*, 436 U.S. 658 (1978) simply cannot be squared with the facts alleged in C.M.'s Complaint and *Starbuck*, which upheld board liability under virtually identical circumstances.

BACKGROUND[1]

C.M.'s Suspension

C.M. fully incorporates all factual allegations set forth in his Complaint ("Compl.") as if completely restated. Compl., ECF No. 1.

On April 9, 2024, 16-year-old C.M. returned to his Central Davidson High School English class after using a bathroom pass. Compl. ¶ 20. While catching up on class, he asked his teacher whether an ongoing class discussion regarding "aliens" referred to "space aliens or illegal aliens who

[1] The Complaint details C.M.'s factual allegations and the constitutional violations underpinning C.M.'s three causes of action. For purposes of brevity here, Plaintiff only recites those allegations critical to addressing the Board's partial motion to dismiss.

need green cards." Compl. ¶¶ 20-21. In response, a student jokingly said he was going to "kick C.M.'s ass." Compl. ¶ 22.

Defendant Eric Anderson, the assistant principal, issued a written Suspension Notification and suspended C.M. for three days out of school for "making a racially insensitive remark that caused a class disturbance." Compl. ¶ 33 & Ex. 2, ECF No. 1-2. The Suspension Notification stated that C.M. violated Board Policy "6.11 Using/Making racially motivated comment which disrupts class." Compl. ¶ 35 & Ex.2. It said: "[C.M.] made a racially insensitive comment, in class today, about an alien 'needing a green card.'" Compl. ¶ 36. And it warned: "There shall be no right to an appeal of the principal's decision to impose a short term suspension (10 days or less) to the Superintendent or Board of Education." Compl. ¶ 37. Defendant Anderson spoke to C.M. about the suspension. Compl. ¶ 31.

When C.M's parents met with Defendant Anderson to discuss the suspension, Anderson stated that it is the School and Board's practice and custom since August of 2023 to mete out "harsh" punishment "[a]nytime there is something said that's racially insensitive," and that reversing C.M.'s suspension would be "unfair to the 15 other kids who have served [suspension] for saying the n word or anything else under the sun that's racially charged that creates a disruption in the classroom." Compl. ¶ 38-39.

C.M.'s parents' attempts to appeal the suspension to other school officials and the Board were disregarded. Compl. ¶¶ 40-43.

The Board's Policies

The Suspension Notification's reference to Board Policy 6.11 is a reference to policy 6.11 that is referenced in the Student Handbook and attached as Ex. 4 to the Complaint (the "Policy"). ECF No. 1-1 and 1-4. The Policy has two separate sections potentially bearing on C.M.'s suspension.

Policy 6.11.1, Rule 1 states that Students are prohibited from disrupting teaching, the orderly conduct of school activities, or any other lawful function of the school, with a list of inapplicable "illustrative conduct" such as "blocking access to school functions" and "interfering with the operation of school busses." Compl. ¶ 15 & Ex. 1 at 16.

Policy 6.11.1, Rule 10 addresses "Integrity and Civility" and proscribes, among other things, "profanity, obscenity, fighting or abusive words, or other[] speech that . . . materially and substantially disrupts the classroom or school activities." Compl. ¶ 18 & Ex. 1 at 22-23. No examples of materially disruptive speech are provided, but Rule 10 does state that it is not "intended to limit a student's right to express his or her thoughts and opinions at reasonable times and places, consistent with the protections of the First Amendment." Compl. ¶ 18 & Ex. 1 at 22-23.

LEGAL STANDARD

When stating facts in a complaint to sufficiently support a claim, a plaintiff must only set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

This standard does not require "detailed factual allegations," but it demands more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* A claim is facially plausible when the plaintiff provides enough factual content to enable the court to reasonably infer that the defendant is liable for the misconduct alleged. *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

In this way, Rule 12(b)(6) protects against meritless litigation by requiring sufficient factual allegations "to raise a right to relief above the speculative level" so as to "nudge[] the[] claims across the line from conceivable to plausible." *Twombly*, 500 U.S. at 555, 570; *see Iqbal*, 556 U.S. at 680.

The Court must accept as true all of the factual allegations contained in a complaint, but is not bound to accept legal conclusions. *Iqbal*, 556 U.S. at 678. Thus, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679.

ARGUMENT

I. C.M. has sufficiently pleaded in his Second Cause of Action that his Due Process rights were violated.

A. Board Policy 6.11 is unconstitutionally vague.

According to the Suspension Notification, C.M. was suspended from School for violating Board Policy 6.11 by "using/making [a] racially motivated comment which disrupts class." Compl. ¶ 36. At the outset, ascribing "racial motivation" to the terms "illegal aliens" or "green cards" absent extrinsic evidence is senseless—those are benign legal terms with no reasonable racial connotations. Compl. ¶¶ 47-57.[2] In any event, Policy 6.11 says nothing about racially insensitive comments. Rule 1 of the Policy proscribes "disruption of school," with a list of "illustrative conduct" that has no bearing on C.M.'s actual in-class question to his teacher. And Rule 10 of the Policy broadly

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[2] *See also AT by HT v. Univ. of N.C.*, No. 1:16-CV-489, 2016 WL 10586289, at *1 n.1 (M.D.N.C. Jul. 7, 2016) (Eagles, J.) (recognizing "the absence of a better choice" to the term "illegal aliens")

proscribes "profanity, obscenity, fighting or abusive words, or . . . speech that . . . materially and substantially disrupts the classroom or other school activities" as an example of its "standards of integrity and civility" but provides no illustrative conduct regarding what speech would be considered materially or substantially disruptive.

The Board's argument that "the Policy is guided by *Tinker*," and therefore necessarily passes constitutional muster, is irreconcilable with the Fourth Circuit's holdings. In *Nitzberg v. Parks*, which struck down as vague a school's ban on student distribution of literature that could "reasonably lead the principal to forecast substantial disruption of or material interference with school activities," the Fourth Circuit noted flaws with the policy at issue:

> A crucial flaw exists in this directive since it gives no guidance whatsoever as to what amounts to a "substantial disruption of or material interference with" school activities; and, equally fatal, it fails to detail the criteria by which an administrator might reasonably predict the occurrence of such a disruption. Though the language comes directly from the opinion in *Tinker*, we agree with [the Seventh Circuit] that it does not at all follow that the phrasing of a constitutional standard . . . is sufficiently specific in a regulation to convey notice to students or people in general of what is prohibited.

Nitzberg v. Parks, 525 F.2d 378, 383 (4th Cir. 1975) ("We have both compassion and understanding of the difficulties facing school administrators, but we cannot permit those conditions to suppress the First Amendment rights of individual students.").

Nitzberg forecloses the Board's argument here. Given the ubiquity of the term "illegal alien" in the media, courts, law, and culture, a student like C.M. would not be on fair notice that using such a term or phrase at School was banned by general Board policy prohibiting conduct that "materially and substantially disrupts the classroom."

In defending the Policy, the Board primarily relies on the Fourth Circuit's decision in *Hardwick v. Heyward*, 711 F.3d 426 (4th Cir. 2013). But *Hardwick* is not a good fit for this case and, if anything, actually weighs in Plaintiff's favor. *Hardwick* rejected a challenge to a South Carolina school's dress code prohibiting disruptive, offensive, obscene, profane or derogatory clothing—a policy that was interpreted to prohibit displays of the confederate flag. While acknowledging that schools "have greater leeway when crafting school policy than legislatures do in adopting criminal statutes," *Hardwick* nevertheless affirmed that schools may not implement overly vague policies subjecting students to "arbitrary and discriminatory enforcement." 711 F.3d at 442.

The factors relied upon by the Fourth Circuit in *Hardwick* are absent here. That court considered the full factual record on summary judgment, including a long history of disruptions at the school caused by confederate

imagery, and the school's consistent and repeated warnings to the student, prior to punishment, of its policy prohibiting confederate flag apparel:

> The school officials explicitly informed [the student] on multiple occasions that Confederate flag shirts were not permitted under the dress codes. The dress codes were therefore interpreted by the school officials for [the student] in the specific context of her shirts. Nothing in the record plausibly supports any claim that she was unaware of this prohibition on Confederate flag apparel.

Hardwick, 711 F.3d at 442. There are no allegations in C.M.'s Complaint that suggest he was repeatedly warned by the School or Board that he could not use the phrase "illegal aliens" like the student was warned by officials in *Hardwick*; in fact C.M. alleges the exact opposite. *See* Compl., ECF No. 1.

For the same reason its reliance on *Hardwick* fails, the Board's reliance on *Bethel School District No. 403 v. Fraser* must also fail. In that case, the U.S. Supreme Court upheld a student's suspension for a sexually suggestive speech at an assembly under its policy banning "obscenity," but only after the evidentiary record showed that teachers had warned the student prior to his speech that it was "inappropriate" under school policy and that the student would face "severe consequences" if he delivered it. *Bethel Sch. Dist. No. 403,* 478 U.S. 675, 678 (1986).

The Board's other authorities also do not support dismissal. For example, the Third Circuit in *Sypniewski v. Warren Hills Regional Board of Education* upheld the denial of a motion seeking to preliminarily enjoin

enforcement of a school's racial harassment policy that was used to prohibit a shirt featuring jokes about "rednecks." 307 F.3d 243 (3d Cir. 2002).

Like *Hardwick*, the *Sypniewski* court acknowledged that "courts have been less demanding of specificity than they have when assessing the constitutionality of other regulations" but nevertheless affirmed that policies must not be so vague that students are "left to guess at the contours of its proscriptions." 307 F.3d at 266-67 (finding that the school's ban on "ill-will" presented a vagueness concern). The court ultimately upheld the racial harassment policy there as "specific enough to give fair notice to the students and to provide school officials with standard by which to enforce the policy." *Id.* Notably, unlike the Board's policy here, the *Sypniewski* policy included a detailed list of conduct, speech, and even specific items of clothing or materials that were not allowed (e.g. "racial or derogatory slurs," "racially divisive" material, speech "implying racial hatred or prejudice" and items supporting the KKK, neo-Nazis, or white or black supremacy). *Id.* at 260 n.17.[3]

There could be no starker contrast between those cases cited by the Board and this one. *Hardwick*, *Fraser*, and *Sypniewski* each involved detailed

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[3] *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) has nothing to do with unconstitutional vagueness—it is about whether the Fourth Amendment applies to searches by school officials.

and specific policies buttressed by pre-punishment warnings to a student that the specific conduct at issue was prohibited by the policies. Here, C.M. was never warned—either by the Policy itself or through the Board's stated interpretation of that policy—that he could not say the words "alien" or "illegal alien" or "green cards." *E.g.*, Compl. ¶¶ 24—28.[4] In fact, Defendant Anderson stated that the Board's policy is to always harshly punish racially sensitive incidents, even though such a policy is not written in the Student Handbook or the Board's policies.[5]

Moreover, *Hardwick*, *Sypniewski*, and *Fraser* were not decided on the pleadings but upon factual submissions that established a likelihood of substantial disruption for the conduct covered by the policies. This case is much more akin to the Eighth Circuit's recent decision in *Parents Defending*

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[4] The Board distorts the facts, stating, without any basis to the facts in the Complaint, that C.M.'s question was "Based on offensive stereotypes" and "directed at a Hispanic classmate" (Mot. at 9). The Board's reliance on conjecture about the facts—in violation of its obligation at the Rule 12 stage to accept the facts as pled by C.M.—underscores that it would be inappropriate to decide this Motion on the pleadings.

[5] Unwritten policies, by nature, are unconstitutionally vague. *See Anthony v. State*, 209 S.W. 296, 306 (6th Cir. 2006) (unconstitutional vagueness; "Not only are the policy's prohibits not clearly defined, the policy presents a substantial risk of arbitrary and discriminatory enforcement"); *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970) (student suspended because of an unwritten policy prohibiting "unusual long hair" reinstated by injunction because hair style and length is a personal right of liberty protected by the due process clause) (cited approvingly, *Massie v. Henry*, 455 F.2d 779, 782 (4th Cir. 1972)).

Education v. Linn Mar Community School District, which enjoined a school policy requiring that students "respect" another student's gender identity:

> The undefined term "respect" leaves the policy open to unpredictable interpretations, and creates a substantial risk that school administrators may arbitrarily enforce the policy. Without meaningful guidance, District officials are left to determine on an "ad hoc and subjective basis" what speech is "disrespectful" and subject to discipline, and what speech is acceptable.

83 F.4th 658, 669 (8th Cir. 2023) (finding the policy unconstitutionally vague). Here, the facts alleged by C.M. demonstrate that same risk of district officials—like Defendant Anderson—determining on an ad hoc and subjective basis what types of speech can be punished under the Policy.

B. C.M.'s Due Process rights were violated because he was subjected to reputation-tarnishing punishment without notice and an opportunity to be heard.

The Board argues that due process entitled C.M. only to a cursory meeting with the Assistant Principal with the Assistant Principal with no opportunity to appeal to the Board. That argument is irreconcilable with *Starbuck* and, regardless, inappropriate to decide on the pleadings.

Due process is required "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." *Goss v. Lopez*, 419 U.S. 565, 574 (1975). A student has a liberty interest in his reputation because a stain on his record "could seriously damage [his] standing with [his] fellow pupils and their teachers as well as interfere with

later opportunities for higher education and employment." *Id.* at 575. "At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing." *Id.* at 579. The *Goss* decision was rendered after a full evidentiary hearing on the underlying issues. *Id.*

Applying *Goss*, the Fourth Circuit addressed a due process challenge in *Starbuck*. There, the court found that a two-day suspension "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." 28 F.4th at 536 (quoting *Goss*, 419 U.S. at 575). In finding that the school satisfied its due process obligations, the court looked to the student's "multiple opportunities to characterize his conduct" both to administrators and when "appealing [the suspension] to the School Board." *Id.* at 537. The *Starbuck* district court likewise focused its due process analysis on the students' opportunity to "have an informal meeting with the [school board] to allow them to present their version of the facts . . . and allow new evidence found under the second scope of the investigation"). *Starbuck v. Williamsburg James City Cty. Sch. Bd.*, No. 4:18cv63, 2020 U.S. Dist. LEXIS

237077, at *17 (E.D. Va. Nov. 20, 2020).[6] C.M., by contrast, was not provided with any opportunity to appeal, even informally.

In any event, it would be inappropriate for this Court to dismiss Plaintiff's due process claim on the pleadings without the opportunity to create a full evidentiary record. Consider the recent decision of *Heward v. Board of Education of Anne Arundel County,* No. 1:23-cv-00195-ELH, 2023 U.S. Dist. LEXIS 174960 (D. Md. Sep. 29, 2023). In that case, a student was suspended for two days for "racially biased conduct" after the school construed her gold-painted face as "blackface." *Id.* at *1-2. Her suspension notification stated that she was suspended for "posting an offensive picture via SnapChat," but the school later (including in its arguments to the district court) included other reasons for the suspension not identified on the notification. *Id.* at *128-131. The district court acknowledged this shifting rationale as a reason to deny the school district's motion to dismiss, finding it

[6] Other courts likewise recognized the importance of the opportunity to appeal a short-term suspension in connection with a *Goss* analysis. *See* e.g., *Hillman v. Elliott,* 436 F. Supp. 812, 815 (W.D. Va. 1977) (due process was satisfied because "plaintiff and his parents received written notice of the charges and were advised of a hearing before the principal at which they had the right to be present, to have a representative with them, and to speak in plaintiff's behalf. Plaintiff was afforded two appeals, both of which he utilized"); *Heward v. Bd. of Educ. of Anne Arundel Cty.,* No. 1:23-cv-00195-ELH, 2023 U.S. Dist. LEXIS 174960, at *125 (D. Md. Sep. 29, 2023) ("K.H.'s parents were permitted to appeal the decision to issue K.H. a suspension and were repeatedly afforded the opportunity to present any and all arguments for rescinding the suspension of K.H.").

was not shown that the student and her family were provided with adequate notice to satisfy *Goss*. *Id.*

Here, the Board has apparently also resorted to a shifting rationale for C.M.'s suspension. While Plaintiff has not yet been given access to Defendants' fully unredacted papers opposing Plaintiff's preliminary injunction motion, Defendants are now alleging that there was "more" to Plaintiff's suspension than what is on the Suspension Notification, arguing that they must be permitted to "shift [their] description of the reason for a suspension." Defs' Opp. to PI Mot, ECF No. 21 at 14 n.3 (footnote to otherwise redacted text). Under these circumstances, it would be inappropriate to summarily dismiss C.M.'s due process claims without discovery.[7]

II. C.M. has sufficiently alleged that the Board is liable under *Monell* because it established the policy and ratified his suspension from School.

In *Starbuck*, the Fourth Circuit held that a student may establish a school board's liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978) in four ways:

> (1) through an express policy, such as a written ordinance or regulation; (2) through the decisions of a person with final policymaking authority; (3) through an omission, such as a failure

[7] The Board's citation to N.C.G.S. 115C-390.6 is a red herring; the school is obligated to provide constitutional due process regardless of the state's statutory scheme. *See Doe v. Rockingham Cty. Sch. Bd.*, 658 F. Supp. 403, 407 (W.D. Va. 1987) ("The necessity of a prompt hearing is a constitutional prerequisite despite the fact that Virginia's statutory law appears to [the contrary].")

> to properly train officials; or (4) through a practice that is so persistent and widespread as to constitute a custom or usage with the force of law.

Starbuck, 28 F.4th at 537 (citing *Lytle v. Doyle*, 326 F.3d 463, 471 (4th Cir. 2003)) (cleaned up). *Starbuck* controls the *Monell* analysis in this case.

In that case, the board of education defendant contended in its motion to dismiss that the plaintiff high school student failed to raise the *Monell* "theory of municipal liability in his complaint." *Id.* at 534. But the Fourth Circuit rejected the school board's argument. *Id*. After examining the facts that were pleaded in the complaint, the Court noted that the plaintiff had alleged sufficient facts to establish the school board's liability under *Monell*. *Id*. And the Court pointed to two examples where the plaintiff alleged sufficient facts in his complaint to establish the school board's *Monell* liability: "The School suspended Jonathan with approval from the School Board" and "When the Defendant [School Board] responded to the written appeal in May of 2018, the Defendant[] [School Board] found the suspension was proper. . . ." *Id*.

Here, the Board first argues in general that C.M.'s Complaint fails to allege sufficient facts to establish its liability under *Monell*. The Board further claims that C.M.'s preliminary injunction brief alleges other facts related to *Monell* that are not set forth in the Complaint. Board's

Memorandum, ECF No. 19, p. 13-16. And the Board attempts to advance the same argument that the Fourth Circuit in *Starbuck* rejected. Indeed, the Board said, "Minor Plaintiff's Complaint contains no reference to *Monell*, nor any assertion that Minor Plaintiff intends to rely on this theory of liability." Board's Memorandum, ECF No. 19 at p. 14. The Board's arguments are wholly without merit.

The Board's *Monell* argument cannot overcome *Starbuck*. *Starbuck* is clear that the proper analysis in determining *Monell* liability is to focus on the *facts* pleaded in the complaint, not whether the plaintiff *referred* to or *relied* upon *Monell* in the complaint as the Board erroneously argues. *See Starbuck*, 28 F.4th at 534.

And like the complaint in *Starbuck*, C.M.'s Complaint is replete with factual examples that he pleaded which establishes the Board's *Monell* liability:

- "Defendant Davidson County Board of Education is the governing body responsible for establishing policies for all students enrolled in member schools in the district, which includes the School where C.M. attended." Compl., ECF No. 1, ¶ 10.

- "The Suspension Notification further stated that C.M. violated Board Policy '6.11 Using/Making racially motivated comment which disrupts class.'" *Id.*, ¶ 35.

- "The Notification further says: 'There shall be no right to an appeal of the principal's decision to impose a short-term

suspension (10 days or less) to the Superintendent or Board of Education.'" *Id.*, ¶ 37.

- "Anderson further explained that it is the School and Board's practice and custom since August of 2023 to mete out 'harsh' punishment anytime there is something said that's racially insensitive. He declared that reversing C.M.'s suspension would be 'unfair to the 15 other kids who have served [suspension] for saying the N word or anything else under the sun that's racially charged that creates a disruption in the classroom.'" *Id.*, ¶ 39.

- "The Board upheld Assistant Principal Anderson's decision to suspend C.M. from School for making a racially motivated and insensitive comment that disrupts class in violation of Board Policy 6.11." *Id.*, ¶ 40.

- "For example, after Anderson's decision to suspend C.M. from School for his comment in class, C.M.'s parents asked School and Board officials to reverse his suspension and permanently remove from his record the Suspension Notification for violation of Board Policy 6.11, but they refused to do either." *Id.*, ¶ 41.

- "And C.M.'s parents also asked School and Board officials to remove from his record the unexcused absences as a result of the suspension as well as any reference to C.M.'s comment being 'racially' motivated or insensitive in violation of Board Policy 6.11, but they refused to do so." *Id.*, ¶ 42.

- "C.M.'s mother, Leah McGhee, sent two emails on April 12, 2024, to Board Chairman Beck and Board member Nick Jarvis, attached hereto as **Exhibit 3**. Chairman Beck and Board member Jarvis have never responded to these emails." *Id.*, ¶ 43.

- "The Board has control and authority over all public schools in Davidson County, including the School. *See* Board Policy 1.1. In accordance with North Carolina law, the Board is required to provide C.M. with a 'sound basic education.' *See* Board Policy 1.1 at ¶ 1; *Leandro v. State*, 488 S.E. 2d 249, 255 (N.C. 1997) (holding that the state constitution 'guarantee[s] every child of

this state an opportunity to receive a sound basic education in [the] public schools.')." *Id.*, ¶ 45.

- "This control by the Board includes authority over all matters pertaining to the School in accordance with state law. *See* Board Policy 1.1. Board Policy 6.11 regarding 'Disruption of School' is attached as **Exhibit 4**. It does not prevent students from using in class the words 'alien,' 'illegal alien,' or 'green cards.' *See id.* Nor does Board Policy 6.11 state that the use of such words by a student in class is considered racially insensitive or abusive. *See id.*" *Id.*, ¶ 46.

- "In other words, but for Board Policy 6.11, and the manner in which it was enforced to wrongly label C.M.'s comment as racially motivated and insensitive, C.M. would still be enrolled as a student at the School." *Id.*, ¶ 63.

- "According to the policy language directed to C.M.'s parents in the School's Suspension Notification, C.M. is unable to appeal Assistant Principal Anderson's decision to suspend him from School." *Id.*, ¶ 65.

- 'The School's charge that C.M.'s comment in class was racially motivated and insensitive in violation of Board Policy 6.11 that the Board upheld, and the Suspension Notification placed in his record could seriously damage his standing with classmates, teachers, and coaches, as well as negatively impact and interfere with C.M.'s opportunities for higher education, earning a track scholarship, and his future employment and earning capacity." *Id.*, ¶ 66.

- Suspension Notification, ECF No. 1-2, p. 1-4.

- Leah McGhee emails to Board members Beck and Jarvis, ECF No. 1-3, p. 1-5.

- Board Policy 6.11, ECF No. 1-4, p. 1-2.

Next, the Board advances another curious argument. The Board argues that C.M.'s "Suspension Notification" issued by Assistant Principal Anderson for "violating Board Policy 6.11" is a *legal conclusion*. Board's Memorandum, ECF No. 19 at p. 14-15. But this assertion as discussed above is set forth in C.M.'s Complaint: "The Suspension Notification further stated that C.M. violated Board Policy '6.11 Using/Making racially motivated comment which disrupts class.'" Compl., ECF No. 1, ¶ 35. And this assertion is a *fact*, not a legal conclusion, because the Suspension Notification itself contains this precise handwritten language regarding Board Policy 6.11 and is signed by Assistant Principal Anderson. ECF No. 1-2, p. 3-4.

The Board makes another argument rejected in *Starbuck* when it asserts that the Complaint does not establish that the Board ratified the School's actions in suspending C.M. Board's Memorandum, ECF No. 19 at p. 15. Contrary to the Board's contentions, in *Starbuck*, the Fourth Circuit discussed "ratification liability" and held that the school board's actions "did constitute the moving force behind the asserted constitutional violation—the alleged punishment of protected speech." *Starbuck*, 28 F.4th at 535. The court reached this conclusion because the plaintiff alleged in the complaint "that only because the School Board *upheld* the suspension does it remain on his permanent record." *Id*. (emphasis added).

Here, that is exactly what C.M. alleged in the Complaint: "The Board upheld Assistant Principal Anderson's decision to suspend C.M. from School for making a racially motivated and insensitive comment that disrupts class in violation of Board Policy 6.11." Compl., ECF No. 1, ¶ 40.

C.M. further supported this assertion and provided additional examples of how the Board *upheld* Anderson's decision to suspend C.M. from the School, including that: (1) "C.M.'s parents asked School and Board officials to reverse his suspension and permanently remove from his record the Suspension Notification for violation of Board Policy 6.11, but they refused to do either." *Id.*, ¶ 41; (2) "C.M.'s parents also asked School and Board officials to remove from his record the unexcused absences as a result of the suspension as well as any reference to C.M.'s comment being 'racially' motivated or insensitive in violation of Board Policy 6.11, but they refused to do so." *Id.*, ¶ 42; and (3) "C.M.'s mother, Leah McGhee, sent two emails on April 12, 2024, to Board Chairman Beck and Board member Nick Jarvis, attached hereto as **Exhibit 3**. Chairman Beck and Board member Jarvis have never responded to these emails." *Id.*, ¶ 43; *see Starbuck*, 28 F.4th at 534 (holding a school board is liable under Section 1983 for First Amendment free speech deprivations when it ratified "the suspension of a student by subordinates").

Finally, the Board argues it cannot be held liable for a practice, custom, or usage that constitutes the force of law based on "Assistant Principal Anderson's decisions" and that his decisions may not be equated "with Board decisions." Board's Memorandum, ECF No. 19 at p. 15-16. But those are not the facts that C.M. asserted in his Complaint. Rather, C.M. alleged that "Anderson further explained [to C.M.'s parents] that it is the *School and Board's* practice and custom since August of 2023 to mete out 'harsh' punishment anytime there is something said that's racially insensitive." Compl., ECF No. 1, ¶ 39 (emphasis added). Thus, the Board is "liable for *its own decision* to uphold the actions of [the School]." *See Starbuck*, 28 F.4th at 534 (emphasis in original).

CONCLUSION

For these reasons, the Court should deny the Board's Motion.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to LR 7.3(d), the undersigned certifies that the Plaintiff's Brief does not exceed 6,250 words and is in compliance with this Rule. The total word count is 5,383. The undersigned relied on the word count feature on the software utilized to draft this Brief, and the word count includes the body of the brief, headings, and footnotes. The word count does not include the caption, signature lines, certificate of service, and any cover page or index.

Respectfully submitted this the 26th day of July 2024.

/s/ Dean McGee
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