IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JORDAN ECK, HALEY HARTLINE, and VINCENT FERRIZZI, Plaintiffs,	:	
v.	:	NO.: 5:19-CV-1873-MAK
	:	JURY TRIAL DEMANDED
OLEY VALLEY SCHOOL DISTRICT; TRACY SHANK, individually and as Superintendent of the Oley Valley School District; CHRISTOPHER M. BAKER, individually and as Principal of Oley Valley High School; and STACEY LYONS, individually and as employee of Oley Valley High School, Defendants.	:	

BRIEF IN SUPPORT OF PARTIAL MOTION TO DISMISS AMENDED COMPLAINT PURSUANT TO F.R.C.P. 12(b)(6)

Defendants, Oley Valley School District ("OVSD"), Tracy Shank, individually and as Superintendent of the Oley Valley School District, ("Shank"), Christopher M. Baker, individually and as Principal of Oley Valley High School, ("Baker"), and Stacey Lyons, individually and as employee of Oley Valley High School, ("Lyons"), (collectively, "Defendants"), submit this brief in support of their Partial Motion to Dismiss Amended Complaint Pursuant to F.R.C.P. 12(b)(6), and request that this Honorable Court, upon consideration thereof, dismiss portions of the Amended Complaint filed by Plaintiffs, Jordan Eck ("Eck"), Haley Hartline ("Hartline"), and Vincent Ferrizzi ("Ferrizzi"), with prejudice, in the above-captioned matter.

Standard of Review

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the allegations in the Complaint. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). In deciding a Rule 12(b)(6) motion to dismiss, the court does not opine whether the plaintiff will be likely to prevail on the merits; rather, the court accepts as true all well-pleaded factual allegations in the plaintiff's Complaint and views

them in a light most favorable to the plaintiff. *U.S. Express Lines Ltd. v. Higgins*, 281 F.3d 383, 388 (3d Cir. 2002).

While Plaintiffs' Amended Complaint need not set forth detailed factual allegations to survive a Rule 12(b)(6) motion to dismiss, it must provide more than labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A "formulaic recitation of the elements of a cause of action will not do." *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "Factual allegations must be enough to raise a right to relief above the speculative level" and "sufficient to state a claim for relief that is plausible on its face." *Id.*

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)(citing *Twombly*, 550 U.S. at 556). 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 – where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 556)(internal citations omitted).

Two working principles underlie *Twombly*. *Id.* First, with respect to mere conclusory statements, a court need not accept as true all the allegations contained in a complaint. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555). Second, to survive a Rule 12(b)(6) motion to dismiss, a claim must state a plausible claim for relief. *Id.*, at 679. "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]—that the pleader is entitled to relief.'" *Id.* (quoting *F.R.C.P. 8(a)(2)*). A court

considering a Rule 12(b)(6) motion to dismiss may begin by identifying pleadings that are not entitled to the assumption of truth because they are mere conclusions:

> While legal conclusions can provide the framework of the complaint, they must be supported by factual allegations. When 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.

Finally, the court may grant a plaintiff leave to amend a complaint under Federal Rule of Civil Procedure 15 ("Rule 15"), which provides that the court "should freely give leave [to amend] when justice so requires." *F.R.C.P. 15.* Rule 15, however, does not permit amendment when it would be futile. Futility "'means that the complaint, as amended, would fail to state a claim upon which relief could be granted.'" *Kenny v. United States*, 489 Fed. Appx. 628, 633 (3d Cir. 2012)(citing *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 231 (3d Cir. 2011)). "The standard for deciding whether claims are futile for the purpose of granting leave to amend a complaint is the same as a motion to dismiss." *Markert v. PNC Fin. Servs. Grp., Inc.*, 828 F. Supp. 2d 765, 771 (E.D. Pa. 2011). "[I]f the court determines that [the] plaintiff has had multiple opportunities to state a claim but has failed to do so, leave to amend may [also] be denied." *See* 6 Charles A. Wright et al., Federal Practice and Procedure § 1487 (2d ed. 2010).

Statement of Questions Involved

I. Must Count I for First Amendment Retaliation brought under 42 U.S.C. § 1983 (or portions thereof) be dismissed because the Amended Complaint does not sufficiently allege that: a.) Plaintiffs' alleged speech is protected by the First Amendment; b.) a "causal link" exists between the students' allegedly constitutionally protected speech and the school's punishment or sufficiently adverse action; c.) that Baker had any personal involvement in any adverse action against Ferrizzi, or that Lyons had any personal involvement in any adverse action against Eck?

Suggested Answer: *Yes.*

II. Must the Section 1983 claims in Counts I-II against all of the individual Defendants (Shank, Baker, and Lyons) in their official capacities be dismissed as redundant and duplicative of the claims against OVSD?

Suggested Answer: *Yes.*

III. Must Plaintiffs' Count V against Lyons be dismissed when the Amended Complaint does not sufficiently allege that Lyons' alleged acts or omissions rise to the level of outrageousness required under Pennsylvania law?

Suggested Answer: *Yes.*

Procedural History

On May 1, 2019, Plaintiffs filed a Complaint against OVSD. *See gen.*, *ECF Doc. No.: 1* ("Complaint"), at ¶¶ 2-5. Plaintiffs served the Complaint upon OVSD.

OVSD filed a motion to dismiss and brief in support. *ECF Doc. No.: 5*. This Court permitted Plaintiffs to file an Amended Complaint, and ordered that any response be filed on or before July 23, 2019. *ECF Doc. No.: 9*. This Motion to Dismiss is timely filed, having been filed on or before June 23, 2019.

Facts

Plaintiffs bring five causes of action in their Amended Complaint. Only Counts I-II and V are discussed herein.

The Amended Complaint provides that Eck and Hartline were and had been members of the drama club and school since they had entered Oley Valley High School. *Amended Complaint*, at ¶ 15. Plaintiffs aver that both Eck and Hartline had parts in the 2019 High School musical directed by Lyons and Eck was president of the Drama Club. *Amended Complaint*, at ¶¶ 16-17. As per the Amended Complaint, at various times, both students and their parents had expressed to other

students and school administration concerns about Lyons' leadership of the school play but administration declined to act against her. *Amended Complaint*, at ¶ 18.

Plaintiffs relate that, on March 19, 2019, having learned that Eck would be speaking at the upcoming school board meeting and in anticipation of the same, Lyons (with the apparent approval of Shank – the Superintendent of OVSD) sent an email to the parents of other students in the drama club, alleging that Eck and his mother were making problems for the school show and that Eck would be attending the March 20th School Board meeting to speak out against Lyons. *Amended Complaint*, at ¶ 20. According to Plaintiffs, in the March 19, 2019 email, Lyons further stated that Eck's actions were at risk of destroying the school show and that it was Eck's desire to have the school show done away with completely, and contended that, without justification, that Eck had expressed dangerous and violent tendencies toward his classmates and that his violent tendencies had gotten so bad that "the police were called in." *Amended Complaint*, at ¶¶ 21-22. The Amended Complaint avers that Lyons' email indicated that she had been working with Shank and the administration since January 2019 concerning Eck and his mother and that Shank had let her know that Eck's mother was planning on attending the March 20, 2019 School Board meeting. *Amended Complaint*, at ¶ 23. Plaintiffs allege that Lyons requested that other students and their parents attend the School Board meeting to speak in favor of her and her leadership of the school show. *Amended Complaint*, at ¶ 24.

In this regard, Eck, Hartline, and Ferrizzi allege that, at a March 20, 2019 School Board meeting, they "spoke against Mrs. Lyons . . . ." *Amended Complaint*, at ¶ 26. Plaintiffs aver that the School Board announced at the outset of the meeting that it would not allow any "character assassination" of Mrs. Lyons, that no one could be referred to by name, and that only positive comments about her character would be tolerated. *Amended Complaint*, at ¶¶ 27-28. Plaintiffs state

that, as a result, Eck, Hartline, and Ferrizzi were severely curtailed in their ability to speak out about the school show "situation." *Amended Complaint*, at ¶ 29.

Plaintiffs contend that, after the meeting, a "locked down" rehearsal for the school show was held, wherein Lyons asked students what Eck, Hartline, and Ferrizzi had said against her. *Amended Complaint*, at ¶¶ 31-33. It is pleaded that, eventually, Eck, Hartline, and Ferrizzi returned to the rehearsal and Eck stated to the other students that he hoped everyone could move on together and have a great show. *Amended Complaint*, at ¶¶ 34-36.

Plaintiffs state that, after addressing the students, Eck asked to speak with Mrs. Lyons privately and spoke with her in the hallway, with school secretary, Maria Jones, and a Mrs. Hartenstine, an assistant staff member for the school show, also present because Mrs. Lyons claimed to be uncomfortable with speaking with him privately. *Amended Complaint*, at ¶¶ 37-38. Plaintiffs allege that, during the conversation, Eck expressed his desire to "patch things over" and productively work together for the duration of rehearsals and the final program, and that the conversation was not aggressive and required no intervention by Ms. Jones. *Amended Complaint*, at ¶¶ 39-41.

It is averred that, after the conversation, Ms. Jones spoke to Plaintiffs and Eck's parents, telling them that everything would be okay, and encouraged them, expressing her desire that the school show move forward with everyone working together. *Amended Complaint*, at ¶ 42. Plaintiffs contend that Ms. Jones never stated or implied that Eck had "crossed the line" in his conversation with Mrs. Lyons, and Eck left believing that they had "agreed to disagree" about Mrs. Lyons' leadership of the school play, and that he would finish out the school show with a tacit understanding of mutual respect between them. *Amended Complaint*, at ¶¶ 43-44.

Yet, according to Plaintiffs, the next day, Eck was called to the office, where he was told he could have a guardian present (and called his guardian – Tara Eck), for a 10 AM meeting with

Superintendent Shank, and the principal of OVSD High School, Mr. Baker. *Amended Complaint*, at ¶ 45. The Amended Complaint provides that Eck was given no advance notice of what the meeting concerned and, when the meeting commenced, he was informed that he was being suspended for "insubordination," and for making Ms. Hartenstine (who alleged to Principal Becker that Eck had lunged at her the day before) feel threatened. *Amended Complaint*, at ¶¶ 47-51.

It is averred that subsequent to the above-meeting between Eck and Principal Baker, Hartline was also suspended for her alleged actions that took place at an 11 AM group meeting with the other students in the school show, during which she was allegedly insubordinate to Superintendent Shank. *Amended Complaint*, at ¶¶ 56-63. To wit, it is asserted by Plaintiffs that, at the 11 AM meeting, the students were instructed by Superintendent Shank that there would be no further discussions of Mrs. Lyons leadership among the students and that, if anyone had a problem with that, they "could leave right now." *Amended Complaint*, at ¶¶ 56-59. Plaintiffs state that, after said instruction, Hartline began to quietly pack up her belongings, at which time Superintendent Shank publicly addressed her and said it looked like she was ready to leave and that she could be dismissed at that time before the meeting had concluded. *Amended Complaint*, at ¶ 60. According to the Amended Complaint, upset at being publicly accused of being insubordinate, and after Superintendent Shank's direct comments to her, Hartline stated "Fine, I quit," and left to speak with a school counselor, who requested that Principal Baker excuse Hartline early, which request was granted by Principal Baker, who also told Hartline she could have the next day off as well. *Amended Complaint*, at ¶¶ 61-62. Plaintiffs allege that, several days later, Hartline and her parents received a letter informing them for the first time that Haley had been suspended from school due to insubordination. *Amended Complaint*, at ¶ 63.

The Complaint indicates that the final performance of the show ran on April 13, 2019, and a cast and crew party was held, during which Mrs. Lyons praised each student involved, except for

Ferrizzi (who she criticized and told she would never forgive for what he had said about her at the School Board meeting), and also permitted another student to verbally attack Eck, Hartline, and Ferrizzi. *Amended Complaint*, at ¶¶ 68-71. Plaintiffs aver that, later that morning, after the students had returned for final cleanup, Ferrizzi was called into the auditorium by Mrs. Lyons, who was accompanied by three men (who were fathers of students in the show), and told that it was "best for everyone" that he be removed from the premises due to safety concerns for other students, whereupon he was removed from the premises by the three men without being permitted any protest or appeal. *Complaint*, at ¶¶ 72-76.

As a result of the foregoing, Plaintiffs bring five causes of action. Those counts include: a.) Count I – First Amendment Retaliation (42 U.S.C. § 1983) against all Defendants; b.) Count II – Fourteenth Amendment Violation Due Process Requirements (42 U.S.C. § 1983) against all Defendants; c.) Count III – Failure to Supervise the Protection of First Amendment Rights against Shank; d.) Count IV – Defamation (brought on behalf of Eck only) against Lyons; and e.) Count V – Intentional Infliction of Emotional Distress against Lyons. *See gen.*, *Complaint*, at ¶¶ 90-134.

Count I is brought under 42 U.S.C. § 1983 for alleged First Amendment Retaliation against all Defendants. *See gen.*, *Amended Complaint*, at ¶¶ 90-98. That action asserts that, "[w]ithin twenty-four hours of having spoken out against a staff member of the school at a School Board meeting that was open to the public for public comment, both Jordan [Eck] and Haley [Hartline] were suspended from school and removed from the school show. *Amended Complaint*, at ¶ 91. It provides that "Vinny [Ferrizzi] was disciplined by Mrs. Lyons on the final day of the show, and removed from school premises and not permitted to finish the final school show activities with his classmates," which Plaintiffs contend occurred within 24 hours of having been told by Lyons that she had never forgiven him for speaking out at the School Board meeting. *Amended Complaint*, at ¶

92. Plaintiffs allege that the foregoing actions were retaliation due to the exercise of their First Amendment free speech rights. *Amended Complaint*, at ¶¶ 93-95.

Count II is a Fourteenth Amendment Due Process claim made against all Defendants. More specifically, Plaintiffs state that they were entitled to due process under the Fourteenth Amendment, state law/regulations, OVSD Policy 233 and the Oley Valley High School Student Handbook, and that the failure to provide notice and hearing prior to taking disciplinary action against them violated their Fourteenth Amendment rights. *See*, *Amended Complaint*, at ¶¶ 99-108.

Finally, Count V for Intentional Infliction of Emotional Distress, is made by Plaintiffs against Lyons. Plaintiffs allege that Lyons "bullied" Plaintiffs in violation of OVSD Policies 248 and 252. *Amended Complaint*, at ¶¶ 126-130. According to the Amended Complaint, Lyons held a position of trust and authority over Plaintiffs and used that position to bully Plaintiffs by demeaning, intimidating, and humiliating them in the presence of their peers and by encouraging their peers to engage in demeaning, intimidating, and humiliating behavior towards Plaintiffs "including the use of expletives to describe Plaintiffs." *Amended Complaint*, at ¶ 130. Plaintiffs contend that Lyons created a threatening environment of fear and intimidation toward Plaintiffs. *Amended Complaint*, at ¶ 130. It is alleged that Lyons also bullied Plaintiffs by making false statements and encouraging others to make false statements about Plaintiffs having violent tendencies or posing a threat to the health, safety, and welfare of Lyons, the school community, or both. *Amended Complaint*, at ¶ 131. Lastly, Plaintiffs state that Lyons timed her allegations to result in the suspensions of Plaintiffs and purposefully deprive them of their involvement in the school play and drama club events. *Amended Complaint*, at ¶ 131.

Argument to Dismiss

I. Count I for First Amendment Retaliation brought under 42 U.S.C. § 1983 (or portions thereof) must be dismissed because the Amended Complaint does not sufficiently allege that: a.) Plaintiffs' alleged speech is protected by the First Amendment; b.) a "causal link" exists between the students' allegedly constitutionally protected speech

and the school's punishment or sufficiently adverse actions; or c.) that Baker had any personal involvement in any adverse action against Ferrizzi, or that Lyons had any personal involvement in any adverse action against Eck.

Count I for First Amendment Retaliation against Defendants brought under 42 U.S.C. § 1983 fails. The Amended Complaint lacks sufficient averments that Plaintiffs' speech is protected by the First Amendment and that there is a causal link between the students' allegedly constitutionally protected speech and the school's punishment or adverse actions. It also fails to allege personal involvement on the part of Baker in any retaliation against Ferrizzi, or on the part of Lyons in any retaliation against Eck.

A. Constitutionally-protected conduct.

Section 1983 affords individuals with a remedy when state actors violate their federally protected rights. *See*, *Kopec v. Tate*, 361 F.3d 772, 775-776 (3d Cir. 2004). In order to make out a cognizable § 1983 claim, a plaintiff must establish "that a person acting under color of law deprived him of a federal right." *Berg v. City of Allegheny*, 219 F.3d 261, 268 (3d Cir. 2000).

In order to prove a First Amendment violation claim, a plaintiff must show: (1) constitutionally protected conduct, (2) retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link between the constitutionally protected conduct and the retaliatory action. *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003). "[T]he key question in determining whether a cognizable First Amendment claim has been stated is whether 'the alleged retaliatory conduct was sufficient to deter a person of ordinary firmness from exercising his First Amendment rights.'" *Thomas v. Indep. Twp.*, 463 F.3d 285, 296 (3d Cir. 2006)(citing *McKee v. Hart*, 436 F.3d 165, 170 (3d Cir. 2006)(quoting *Suppan v. Dadonna*, 203 F.3d 228, 235 (3d Cir. 2000)). *See also*, *Hill v. Borough of Kutztown*, 455 F.3d 225, 241 (3d Cir. 2006)(to succeed on a First Amendment retaliation claim brought pursuant to § 1983, a plaintiff must demonstrate "that the activity in question is protected by the First Amendment, and . . . that the protected activity

was a substantial factor in the alleged retaliatory action."). If a plaintiff is able to meet her burden to demonstrate a *prima facie* case of retaliation, the burden shifts to the defendant to demonstrate that it would have taken the same action even in the absence of plaintiff's protected activity. *Lauren W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007). Plaintiffs' retaliation claim must be dismissed for several reasons.

Initially, the Amended Complaint fails to sufficiently identify the the speech that Plaintiffs allegedly engaged in to determine whether it is protected by the First Amendment. The threshold inquiry under standard First Amendment analysis is whether the plaintiff's speech is protected. *Rauser v. Horn*, 241 F.3d 330, 333 (3d Cir. 2001). Less protection is afforded to student speech in several circumstances. *See also e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513-514 (1969)(student speech that would not materially disrupt school or invade the rights of others is protected); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001)(Alito, J.)(under the Supreme Court's student speech precedents, there are four rules: (1) "Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language[;]" (2) "Under [*Kuhlmeier*], a school may regulate school-sponsored speech . . . on the basis of any legitimate pedagogical concern[;]" (3) Under *Morse*, a school may categorically prohibit speech that can reasonably be regarded as encouraging illegal drug use; and (4) "Speech falling outside of these categories is subject to *Tinker's* general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others."); *Pinard v. Clatskanie Sch. Dist. 6J*, 446 F.3d 964, 975-976 (9th Cir. 2006)(quoting *Tinker*, 393 U.S. at 514)(the First Amendment protects all student speech that is neither school-sponsored, a true threat nor vulgar, lewd, obscene or plainly offensive unless school officials show "facts which might reasonably have led [them] to forecast substantial disruption of or material interference with school activities.").

The authority of the school to restrict or punish student speech is not limited to in-school speech, as "schools may punish expressive conduct that occurs outside of school, as if it occurred inside the 'schoolhouse gate.'" *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011). "[I]f a school can point to a well-founded expectation of disruption . . . the restriction may pass constitutional muster." *Saxe*, 240 F.3d at 212. This burden cannot be met, however, if school officials are driven by "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 926 (3d Cir. 2011).

In their Amended Complaint, Plaintiffs merely allege that they "spoke out" against a staff member of the school, Lyons, at a School Board meeting. *Amended Complaint*, at ¶ 91. However, they also allege that "students and others attending the meeting were told that they were allowed to make positive but not negative comments about Mrs. Lyons, and where supporters were allowed to identify her by name but detractors were not." *Amended Complaint*, at ¶ 95. *See also*, *Amended Complaint*, at ¶ 29 ("Jordan, Haley and Vinny, along with all others who spoke against Mrs. Lyons, were severely curtailed in their ability to speak their viewpoints about the situation as it had developed in regards to the school show."). Therefore, it is unclear whether Plaintiffs' speech was protected under First Amendment precedent. It may have been the type of student speech that is not protected, i.e., speech that would substantially disrupt school operations or interfere with the right of others. Moreover, it is also unclear from the allegations of the Amended Complaint that what Plaintiffs said would even possibly be anything that would possibly engender retaliatory actions by Defendants given the alleged restrictions in place at the board meeting. Absent sufficient averments showing that their speech was constitutionally protected, or supporting a reasonable inference that said speech could lead to retaliatory conduct, Count I against all Defendants is insufficient and must be dismissed. *See*, *Jackson v. Dallas Sch. Dist.*, 954 F.Supp.2d 304, 311-312 (M.D.Pa. 2013)(" . . .

plaintiff has not made sufficient allegations for the court to make a reasoned determination as to whether his speech is constitutionally protected. Plaintiff's complaint contains conclusory allegations that the speech is 'constitutionally protected' and that it 'implicated a matter of public concern as to content, form and context [as] it involved a matter of political, social or other concern to the community.'"). *See also*, *Blasi v. Pen Argyl Area Sch. Dist.*, 2011 U.S. Dist. LEXIS 112412, *30-34 (E.D.Pa. Sept. 30, 2011)(granting motion to dismiss where "Mr. Blasi and his two sons were aware of certain behaviors expected by the School District at its supported sporting events and of the consequences for violating those policies which they agreed to uphold. Rather than retaliation for exercising his First Amendment rights, Mr. Blasi has shown that he and his children violated separate provisions of the regulations found in the Guidelines and the Code, and were sanctioned accordingly.")

B. Causal link.

In addition, Count I must be dismissed because Plaintiffs fail to sufficiently plead that a "causal link" exists between the students' allegedly constitutionally protected speech and the school's punishment or sufficiently adverse action. *Rauser*, 241 F.3d at 333. Here, the paragraphs of the Amended Complaint set forth that the alleged retaliatory actions against Plaintiffs – Eck's and Hartline's suspensions and Ferrizzi's removal from school premises during cleanup after the show – were taken for reasons that had nothing to do with their allegedly constitutionally protected speech. The Amended Complaint avers that: a.) Eck was suspended for insubordination and for his threatening behavior towards a teacher, *Amended Complaint*, at ¶ 47; b.) Hartline was suspended for her insubordination at the 11:00 A.M. meeting with the other students in the school show, *Amended Complaint*, at ¶¶ 56-63; and c.) Ferrizzi was removed from school premises during cleanup after the show because of concerns for the safety of other students. *Amended Complaint*, at ¶¶ 72-75. Plaintiffs conclude and unreasonably infer that Defendants knew the reasons for Eck's suspension were false,

See, *Amended Complaint*, at ¶ 55, or that the reasons for Eck's and Hartline's suspensions were improper, *Amended Complaint*, at ¶¶ 67, 79, or that there wasn't a clear factual basis for Ferrizzi's suspension, *Amended Complaint*, at ¶ 76, but do not deny that the OVSD provided the reasons stated in the Amended Complaint for the actions allegedly taken, which had nothing to do with any speech before the School Board. Their conclusions and unreasonable inferences may not be accepted by this Court in deciding this motion to dismiss. *See*, *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-211 (3d Cir. 2009)(explaining that when deciding a 12(b)(6) motion "[t]he District Court must accept all of the complaint's well pleaded facts as true, but may disregard any legal conclusions."); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)(a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). As a result, Count I should be dismissed for Plaintiffs' failure to sufficiently plead causation. *See*, *Rauser*, 241 F.3d at 333 (there must be a "causal link" between the student's protected speech and the school's punishment or sufficiently adverse action). *See also*, *Berkery v. Wissahickon Sch. Bd.*, 99 F.Supp.3d 563, 575 (E.D.Pa. 2015)("*as pled*, Plaintiff was suspended "solely" because of the information provided to Defendants by Plaintiff's substitute regarding the time required for the assigned route. As such, Plaintiff has not pled facts that could establish that Defendants suspended Plaintiff because of her protected speech.").

C. Personal involvement.

Additionally, there is no averment in the Amended Complaint that Baker had any personal involvement in any adverse action against Ferrizzi, or that Lyons had any personal involvement in any adverse action against Eck. "A defendant in a civil rights action must have personal involvement in the alleged wrongs; liability cannot be predicated solely on the operation of respondeat superior." *Rode v. Dellarciprete*, 845 F.2d 1195, 1207-1208 (3d Cir. 1988). *See also*, *Sutton v. Rasheed*, 323 F.3d 236, 249 (3d Cir. 2003)(citing *Rode*). "Personal involvement can be shown through

allegations of personal direction or of actual knowledge and acquiescence." *Rode*, 845 F.2d at 1207. *Accord*, *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1293-1296 (3d Cir. 1997); *Baker v. Monroe Township*, 50 F.3d 1186, 1190-1191 (3d Cir. 1995). As explained in Rode:

> A defendant in a civil rights action must have personal involvement in the alleged wrongs. . . . [P]ersonal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence. Allegations of participation or actual knowledge and acquiescence, however, must be made with appropriate particularity.

Rode, 845 F.2d at 1207. As a result, if Count I is not dismissed in its entirety, the portion of Count I relating to alleged First Amendment retaliation against Eck must be dismissed as to Lyons, and and the portion of Count I relating to First Amendment retaliation against Ferrizzi must be dismissed as to Baker.

II. The Section 1983 claims in Counts I-II against all of the individual Defendants (Shank, Baker, and Lyons) in their official capacities must be dismissed as redundant and duplicative of the claims against OVSD.

In Counts I-II, Plaintiffs appear to bring Section 1983 claims against all of the individual Defendants (Shank, Baker, and Lyons) in their official capacities. *See*, *Amended Complaint*, at ¶¶ 90-108. Plaintiffs also bring claims against OVSD in the above-referenced Counts of the Amended Complaint. *See*, *Id.* This Court should dismiss the official capacity claims against the individual Defendants under these counts, since they are redundant and duplicative of the same claims made against OVSD. *See*, *Moore v. City of Philadelphia*, 2014 U.S. Dist. LEXIS 27894, at *7-11 (E.D. Pa. March 5, 2014)(reviewing cases dismissing official capacity Section 1983 claims as redundant and dismissing redundant official capacity claims based on court's inherent authority to "achieve the orderly and expeditious disposition of cases"). *See also*, *Gilyard v. Dusak*, 2016 U.S.Dist.LEXIS 137429, at *5-7 (E.D. Pa. Oct. 4, 2016); *Thomas v. City of Chester*, 2016 U.S. Dist. LEXIS 36681, at *6-7 (E.D. Pa. Mar. 21, 2016); *Koreny v. Smith*, 2018 U.S.Dist.LEXIS 34841, at *41-42 (W.D.Pa. Mar. 2, 2018); *Blair v. City of Pittsburgh*, 2015 U.S. Dist. LEXIS 89173, at *12 (W.D. Pa. July 9, 2015).

III. Plaintiffs' Count V against Lyons must be dismissed when the Amended Complaint does not sufficiently allege that Lyons' alleged acts or omissions rise to the level of outrageousness required under Pennsylvania law.

In Count V, Plaintiffs bring a claim for intentional infliction of emotional distress against Lyons. *See*, *Amended Complaint*, at ¶¶ 125-134. Plaintiffs base this claim on alleged bullying of Plaintiffs in the presence of their peers. *Id.* They allege that Lyons demeaned, intimidated and humiliated them in the presence of their peers and encouraged their peers to engage in demeaning, intimidating and humiliating behavior toward them, including through the use of expletives. *Amended Complaint*, at ¶ 130. It is further contended that Lyon made false statements and encouraged others to make false statements about Plaintiffs having violent tendencies. *Amended Complaint*, at ¶ 131. Lyons' alleged acts or omissions do not rise to the level of outrage required for a claim of intentional infliction of emotional distress.

Pennsylvania courts typically refer to Restatement (Second) of Torts § 46 as establishing the "minimum requirements" for a claim of intentional infliction of emotional distress. *See e.g.*, *Taylor v. Albert Einstein Med. Ctr.*, 754 A.2d 650, 652 (Pa. 2000)(citing *Kazatsky v. King David Mem'l. Park, Inc.*, 527 A.2d 988 (Pa. 1987); *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1273 (3d. Cir. 1979). Thus, an action for intentional infliction of emotional distress requires that (1) the conduct be extreme, (2) the conduct be intentional and reckless, (3) the conduct cause emotional distress, and (4) the distress be severe. *Chuy*, 595 F.2d at 1273. "[O]nly the most egregious conduct" will sustain such a claim. *Hoy v. Angelone*, 720 A.2d 745 (Pa. 1998). The conduct complained of must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Kazatsky*, 527 A.2d at 991. The Pennsylvania Supreme Court explained that another way to describe 'outrageous or extreme conduct' is: "'[i]t has not been enough that the defendant has acted with intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his

conduct has been characterized by 'malice,' or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort.'" *Hoy*, 720 A.2d at 753-754 (quoting *Restatement (Second) of Torts § 46*, *comment d*; *Daughen v. Fox*, 539 A.2d 858, 861 (Pa.Super. 1988)).

Plaintiffs' Amended Complaint, even when viewed in the most favorable light, does not sufficiently allege that Lyons' acts or omissions rise to the level of outrageousness required under Pennsylvania law. *See e.g.*, *Papieves v. Lawrence*, 263 A.2d 118 (Pa. 1970)(mishandling of a corpse); *Hackney v. Woodring*, 622 A.2d 286 (Pa.Super. 1993)(sexual assault). Cases which have found a sufficient basis for a cause of action of intentional infliction of emotional distress have presented only the most egregious conduct. *See*, *Doe v. Plum Borough Sch. Dist.*, 2017 U.S. Dist. LEXIS 129464, *31-32 (W.D. Pa. Aug. 15, 2017)(listing cases).

While Plaintiffs may disagree with how they allege that they were treated at school, this does not render Lyons' alleged conduct outrageous or extreme. Taken in the light most favorable to Plaintiffs, Lyons' alleged conduct nowhere approaches even criminal intent.[1] Intentional infliction of emotional distress cannot be supported. Count V must be dismissed.

Conclusion

Defendants respectfully contend that this Honorable Court must grant this motion to dismiss and dismiss Counts I and V of the Amended Complaint, with prejudice. The official capacity claims against the Individual Defendants contained in Counts I-II must also be dismissed to the extent not previously dismissed under Count I.

Respectfully submitted,

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN

DATE: July 24, 2019 BY: */s/ Sharon M. O'Donnell*

[1] Further, in addition to alleging outrageous conduct, the plaintiff must also suffer physical harm. *Reeves v. Middletown Athletic Ass'n*, 866 A.2d 1115, 1122-1123 (Pa. Super. 2004). No such harm is alleged anywhere in the Amended Complaint.

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CERTIFICATE OF SERVICE

I, Sharon M. O'Donnell, Esquire, of Marshall Dennehey Warner Coleman & Goggin, do hereby certify that on this 24th day of July, 2019, I served a copy of the foregoing document, electronically, as follows:

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