UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SANDRA HERNDEN,

Plaintiff,

v

CHIPPEWA VALLEY SCHOOLS, FRANK BEDNARD and ELIZABETH PYDEN,

Defendants.
_____/

Judge Mark A. Goldsmith
Magistrate David R. Grand
No. 22-12313

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CHIPPEWA VALLEY SCHOOLS MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(C)

Statement Regarding Concurrence: The undersigned counsel certifies that counsel communicated in writing with opposing counsel, explaining the nature of the relief to be sought by way of this motion and seeking concurrence in the relief, and three business days have lapsed without opposing counsel expressly agreeing to the relief, orally or in writing. In fact, in responding to a request for concurrence, Plaintiff counsel essentially admitted that they were not aware of any facts that could support a claim against the School District itself, but they were hopeful they may discovery something during discovery.

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ISSUES PRESENTED
and
Most Controlling Authority

Plaintiff disagreed with the School District's COVID protocols that were implemented to keep children and staff members safe. In vocalizing her disagreements, she admits that her interactions became "heated." Concerned that Plaintiff's actions and words were threatening, two individual school board members reported her behavior to law enforcement. Plaintiff argues that these two emails violated her First Amendment Rights. In addition to suing the board members who allegedly reported Plaintiff's behavior, Plaintiff sued the School District and the School Board itself, despite failing to plead any facts that the Board of Education did anything whatsoever. As Plaintiff has failed to plead any facts against the Board/District itself, should the Board/District be dismissed?

- *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); *Graves v. Mahoning Cty.*, 821 F.3d 772 (6th Cir. 2016); *Heyerman v. Cty. of Calhoun*, 680 F.3d 642, 648 (6th Cir. 2012)(collectively explaining that a School District cannot be liable under § 1983 unless a custom, policy, or practice attributable to the municipality was the moving force behind the violation of the plaintiff's constitutional rights.)
- *Tavener v. Elk Rapids Rural Agr. Sch. Dist.*, 341 Mich. 244, 251, 67 N.W.2d 136, 139 (1954)(explaining that a school board "**speaks only through its**

minutes and resolutions," not through an individual member's public commentary.)

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FACTS

1. THE PARTIES

Plaintiff is a police officer in Hazel Park, and she had a child in attendance at Chippewa Valley Schools.

Plaintiff has sued former Board Members Frank Bednard and Beth Pyden. Plaintiff also inappropriately named the Chippewa Valley Schools Board of Education. The party is correctly designated on the above caption as the District itself. *See Carlson v. North Dearborn Heights Bd. of Education*, 157 Mich.App. 653, (Mich. Ct. App. 1987)("[A] school board, as opposed to a school district, is not a corporate body which may sue or be sued.")

2. FACTUAL BACKGROUND

The last several years of the Covid crisis have been difficult for school districts, their board members, and their employees. "Local school officials across the United States are being inundated with threats of violence and other hostile messages from anonymous harassers nationwide, fueled by anger over culture-war issues. Reuters found 220 examples of such intimidation in a sampling of districts."[1]

As a result of this nationwide problem, the United States Attorney General issued the following memorandum, (**Compl. Ex. C.**):

[1] https://www.reuters.com/investigates/special-report/usa-education-threats/

Office of the Attorney General
Washington, D. C. 20530

October 4, 2021

MEMORANDUM FOR DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
DIRECTOR, EXECUTIVE OFFICE FOR U.S. ATTORNEYS
ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
UNITED STATES ATTORNEYS

FROM: THE ATTORNEY GENERAL

SUBJECT: PARTNERSHIP AMONG FEDERAL, STATE, LOCAL, TRIBAL, AND TERRITORIAL LAW ENFORCEMENT TO ADDRESS THREATS AGAINST SCHOOL ADMINISTRATORS, BOARD MEMBERS, TEACHERS, AND STAFF

In recent months, there has been a disturbing spike in harassment, intimidation, and threats of violence against school administrators, board members, teachers, and staff who participate in the vital work of running our nation's public schools. While spirited debate about policy matters is protected under our Constitution, that protection does not extend to threats of violence or efforts to intimidate individuals based on their views.

Threats against public servants are not only illegal, they run counter to our nation's core values. Those who dedicate their time and energy to ensuring that our children receive a proper education in a safe environment deserve to be able to do their work without fear for their safety.

The Department takes these incidents seriously and is committed to using its authority and resources to discourage these threats, identify them when they occur, and prosecute them when appropriate. In the coming days, the Department will announce a series of measures designed to address the rise in criminal conduct directed toward school personnel.

Coordination and partnership with local law enforcement is critical to implementing these measures for the benefit of our nation's nearly 14,000 public school districts. To this end, I am directing the Federal Bureau of Investigation, working with each United States Attorney, to convene meetings with federal, state, local, Tribal, and territorial leaders in each federal judicial district within 30 days of the issuance of this memorandum. These meetings will facilitate the discussion of strategies for addressing threats against school administrators, board members, teachers, and staff, and will open dedicated lines of communication for threat reporting, assessment, and response.

The Department is steadfast in its commitment to protect all people in the United States from violence, threats of violence, and other forms of intimidation and harassment.

Against this backdrop, Plaintiff admittedly had "heated" interactions with the District's Board of Education regarding masking and its efforts to keep students safe.

(**Compl. ¶ 18.**) As an example, Plaintiff sent a threatening email, (**Compl. Ex. B, Pg. Id. 24**), as follows:

> Once again, law on parents side. Maybe a lil more due care and caution at the next meeting Frank. You know, when you let your hatred you have for me take hold and you interrupt me.
> 1st 2 were free...

The above email indicates a board member needed "due care and caution" and then threatened that the "1st 2 [interruptions?] were free. . . ."

As a result of Plaintiff's constant and aggressive conduct towards the School Board and its individual members, she alleges that two school board members sent emails that violated her First Amendment Rights.[2] The first was an email alleged to have been sent by former Board Member Beth Pyden to the Hazel Park Police Department, which alerted it to Plaintiff's conduct. (**Compl. Ex. A**). The second email was allegedly sent by former Board Member Frank Bednard to the Department of Justice, which alerted the DOJ to Plaintiff and the Mothers of Liberty's threatening behavior. (**Compl. Ex. B**.) As a society, we encourage school officials to report concerning behavior to law enforcement when appropriate. Certainly, the public policy is to not discourage reporting of concerns out of a fear of being sued. *See, e.g.*, MCL 722.623 and .633 (requiring certain school officials to make reports or face criminal liability).

[2] These individuals are no longer school board members. *See* https://www.chippewavalleyschools.org/our-district/board-of-education/

Conspicuously absent from Plaintiff's Complaint, however, is any allegation that the Board of Education or the School District as an entity retaliated against Plaintiff in any manner. As a matter of law, School Boards only act through public meetings—and its actions can only be accomplished by a majority of the Board by passing a resolution. MCL 380.1201("The business that the board of a school district is authorized to perform shall be conducted at a public meeting of the board held in compliance with the open meetings act. . . . An act of the board is not valid unless the act is authorized at a meeting by a majority vote of the members elected or appointed to and serving on the board and a proper record is made of the vote.") Here—again—Plaintiff's Complaint makes no such allegation against the Board because the Board took no action. Rather, the entirety of her Complaint is focused on only two board members—not the Board itself. When seeking concurrence in this Motion, Plaintiff's counsel essentially admitted that they are aware of no such facts suggesting the Board itself did anything but they hope the "discovery process will yield evidence demonstrating Defendants Bednard and Pyden were acting at the Board's direction or on its behalf." (Exhibit 1.)[3]

[3] "Such extraneous discovery is not permitted by the Rules." *Braxton v. Heritier*, No. CV 14-12054, 2015 WL 5123613, at *2 (E.D. Mich. Aug. 31, 2015). Indeed, Rule 26(b) was amended in 2000 specifically to curtail these kinds of fishing expeditions. Fed. R. Civ. P. 26(b)(1) Advisory Committee notes to 2000 Amendments (noting that substitution of phrase "claims or defenses" for previous phrase "subject matter" intended to "signal[ ] to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.").

Plaintiff's Complaint is purely ideological. Plaintiff has not suffered any tangible injury. Rather, she is seeking a declaratory judgment. This Motion is now being filed under Federal Rule of Civil Procedure 12(c) because Plaintiff has not made any allegations that the Board/District itself can be liable for the alleged constitutional violation.[4]

STANDARD OF REVIEW

The School Board seeks dismissal of these matters pursuant to Federal Rule of Civil Procedure 12(c). "A Rule 12(c) motion for judgment on the pleadings for failure to state a claim upon which relief can be granted is nearly identical to . . . a Rule 12(b)(6) motion to dismiss." *Kottmyer v. Maas*, 436 F.3d 684, 689 (6th Cir. 2006) (citations omitted).

Fed R Civ P 12(b)(6) provides for the dismissal of a case where the complaint fails to state a claim upon which relief can be granted. When reviewing a motion to dismiss under Rule 12(b)(6), a Court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directive, Inc v Treesh*, 487 F3d 471, 476 (6th Cir 2007). However, the Court "need not accept as true legal conclusions or unwarranted factual inferences." *Id* (quoting *Gregory v Shelby County*, 220 F3d 433, 446 (6th Cir 2000)).

[4] A separate motion will be filed on behalf of Defendants Bednard and Pyden.

In the landmark case, *Bell Atlantic Corp v Twombly*, 550 US 544, 127 S Ct 1955, 167 L Ed 2d 929 (2007), the Supreme Court explained that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. . . ." *Id* at 555 (internal citations omitted). The Supreme Court clarified, in *Ashcroft v Iqbal*, 129 S Ct 1937, 173 L Ed 2d 868 (2009), that:

> 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. 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. 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 at 1949-50 (internal citation and quotation marks omitted and emphasis added). To pass muster under Rule 12(b)(6), it is no longer enough that a plaintiff makes "an unadorned, the-defendant unlawfully-harmed-me accusation." *Ashcroft*, 129 S Ct, at 1949. Rather, a district court must conclude that the claim is plausible in the context of the alleged cause of action. The "mere possibility of misconduct" is insufficient to survive a motion to dismiss; the complaint has to "show" that the plaintiff is entitled to relief. *Id* at 1950.

Moreover, factual allegations that are "merely consistent with" liability fall short under *Ashcroft* and *Twombly*. *Id* at 1949. In particular, plausibility is not established where liability is conceivable but "more likely explanations" of the conduct can be imagined. *Id* at 1951. Where such alternative explanations exist, it is less likely that the complaint "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S Ct at 1950. In fact, *Twombly* directly endorsed this practice by discounting the likelihood of an antitrust conspiracy because, in light of industry history, the parallel conduct alleged had an "obvious alternative explanation." The Supreme Court reasoned that the parallel conduct was "consistent with … a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."

When deciding a motion to dismiss, it is also appropriate to consider certain documents in addition to just the complaint. In ruling on a motion to dismiss, the court may consider the complaint as well as: (1) documents that are referenced in the plaintiff's complaint and that are central to plaintiff's claims; (2) matters of which a court may take judicial notice; (3) documents that are a matter of public record; and (4) letters that constitute decisions of a governmental agency. *Thomas v. Noder-Love*, 621 F. App'x 825, 829 (6th Cir. 2015); *Armengau v. Cline*, 7 F. App'x 336, 344 (6th Cir. 2001) ("take[] liberal view of what matters fall within the pleadings for purposes of Rule 12(b)(6).").

LEGAL ARGUMENT

Assuming Plaintiff could establish a constitutional violation—which she cannot—that alone is not enough to hold the Board/District liable. *Graves v. Mahoning Cty.*, 821 F.3d 772, 776 (6th Cir. 2016); *see also Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 694–95, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Under § 1983, municipal liability attaches "only" if "a custom, policy, or practice attributable to the municipality was the 'moving force' behind the violation of the plaintiff's constitutional rights." *Heyerman v. Cty. of Calhoun*, 680 F.3d 642, 648 (6th Cir. 2012) (quotation omitted). The Sixth Circuit has instructed that the plaintiff must "(1) identify the municipal policy or custom, (2) connect the policy to the municipality, and (3) show that his particular injury was incurred due to execution of that policy," not just an injury. *Vereecke v. Huron Valley Sch. Dist.*, 609 F.3d 392, 403 (6th Cir.2010) (quoting *Turner v. City of Taylor*, 412 F.3d 629, 639 (6th Cir.2005)).

1. THE ACTIONS OF AN INDIVIDUAL SCHOOL BOARD MEMBER IS NOT AN ACTION OF THE BOARD OF EDUCATION

Plaintiff apparently seeks to attribute the alleged actions of individual board members to the District itself. That is not proper. In fact, otherwise, the statements of a single Senator would suddenly become an action of the Senate itself. That is not how legislative bodies function.

"[N]ot every decision by municipal officers automatically subjects the municipality to § 1983 liability. Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." See, *e.g., Oklahoma City v. Tuttle,* 471 U.S., at 822–824, 105 S.Ct., at 2435–2436. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481–83, 106 S. Ct. 1292, 1299–300, 89 L. Ed. 2d 452 (1986). "[A] municipality cannot be made liable by application of the doctrine of *respondeat superior*. . . ." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478, 106 S. Ct. 1292, 1297, 89 L. Ed. 2d 452 (1986).

In this case, Plaintiff has relied solely on two emails sent by two individual board members. However, no individual board member can bind the School District or promulgate Policy. It takes a quorum and a majority vote, which is then memorialized in minutes or a resolution. The Michigan Supreme Court has made this clear. *Tavener v. Elk Rapids Rural Agr. Sch. Dist.*, 341 Mich. 244, 251, 67 N.W.2d 136, 139 (1954)(a school board "resolution speaks for itself. . . .Defendant [school board] **speaks only through its minutes and resolutions**.") Here, Plaintiff

has pled no facts suggesting the Board of Education did anything. Because it didn't. Plaintiff's inclusion of the School District in this lawsuit—absent any factual allegations against it—is frivolous and in bad faith. Public school money should be spent on students—not litigating frivolous claims brought for ideological reasons. As such, the District should be dismissed because there are no allegations under *Twombly* against the School District.

2. PLAINTIFF HAS NOT IDENTIFIED—OR ALLEGED—THAT A POLICY OR CUSTOM OF THE SCHOOL BOARD ITSELF CAUSED THE ALLEGED CONSTITUTIONAL VIOLATION

Here, Plaintiff does not factually claim that the school board has an official policy that authorizes the retaliation against community members for exercising protected speech. See *Claiborne Cnty*, 103 F.3d at 507. To the contrary, the Board of Education has adopted policies that expressly authorize persons to speak during public comment. In fact, the Board has specifically adopted a Policy providing that "[t]he Board of Education recognizes the value of public comment on educational issues and the importance of allowing members of the public to express themselves on District matters."[5] There is no suggestion that these Policies authorize board members to engage in unconstitutional retaliation. Thus, whether Defendant Board

[5] Policy 0167.3 *available at* https://go.boarddocs.com/mi/chip/Board.nsf/Public?open&id=policies#.

is liable turns on whether it had an unlawful "custom" of allowing constitutional violations.

A "custom" to establish school board liability under Section 1983 must "be so permanent and well settled as to constitute a custom or usage with the force of law." *Claiborne County*, 103 F.3d at 505. "In turn, the notion of 'law' must include 'deeply embedded traditional ways of carrying out state policy.'" *Id*. A custom "must reflect a course of action deliberately chosen from among various alternatives." *Id*. Thus, "a 'custom' is a 'legal institution' not memorialized by written law." *Id*.

Further, to establish *Monell* liability against the school district, it is not enough to establish deliberate indifference to Plaintiff's particular claim. Rather, to establish liability against the school district, the Sixth Circuit found that the plaintiff has to establish that the District had a policy of "always" being deliberately indifferent to unconstitutional actions. *Claiborne Cnty*, 103 F.3d at 508–09 ("There is an analytical distinction between being deliberately indifferent as to one particular incident, and having a 'policy' of **always** being deliberately indifferent to unconstitutional actions."). No credible case of deliberate indifference has been pled or can be made in this case, and sufficient facts have not been pled to support such claim.

Claiborne County is instructive in assessing Plaintiff's § 1983 claim against the School District in this case. *See Doe v. Claiborne Cnty.*, 103 F.3d 495, 508 (6th Cir.1996) In *Claiborne County*, parents made complaints of sexual misconduct

against a high school teacher during the 1989–1990 school year, which culminated in a state agency investigation of nine instances of abuse. *Claiborne Cnty.*, 103 F.3d at 502. Although the investigation did not lead to criminal charges, the school board did not renew the teacher's contract for the 1990–1991 school year. *Id.* After the teacher entered into an agreement with the state agency that it would not pursue charges against him, the school board decided to re-hire the teacher in Fall 1990 on the recommendation of the school district superintendent. *Id.* at 503. During the teacher's second stint of teaching, a board member supervised the teacher due to the previous agency investigation. *Id.* The board member received two complaints that the teacher had acted inappropriately around female students during the second stint, and it was later determined that the teacher had an abusive sexual relationship with a student from Fall 1991 until December 1992. *Id.*

After the illicit relationship was uncovered, the student filed a civil action, which included a *Monell* claim against the school board for having a "custom" of ignoring the unconstitutional behavior of its employees. *Id.* at 503–504. The Sixth Circuit held that the school board could not be held liable because the plaintiff never presented evidence that showed "that the School Board, as an official policymaking body, had a 'custom' that reflected a deliberate, intentional indifference to the sexual abuse of its students." *Id.* at 508. The evidence may have demonstrated that the school board was reckless or negligent in inquiring further into the teacher's conduct,

but the evidence did not demonstrate that the school board's "failure to act ... was the direct result of a custom in the sense that the School Board consciously never acted when confronted with its employees' egregious and obviously unconstitutional conduct." *Id.*

Like the plaintiff's complaint against the school board in *Claiborne County*, Plaintiff's § 1983 claim against the District fails. The Complaint does not include facts that the School Board had any policy or custom responsible for depriving community members of their First Amendment Rights.

CONCLUSION

This lawsuit is purely ideological. Plaintiff was unhappy that the School Board had rules in place to prevent the spread of COVID, and her attacks and threats against the Board of Education were relentless and severe. Inversely, Plaintiff has not sustained any injury whatsoever. This Motion presents a straightforward question: Should the Board of Education be dismissed when Plaintiff made no factual allegations against the Board/District itself? The answer is yes.

/s/TIMOTHY J. MULLINS
Timothy J. Mullins (P28021)
Kenneth B. Chapie (P66148)
John L. Miller (P71913)
Attorney for Defendants

DATED: March 27, 2023

CERTIFICATE OF ELECTRONIC SERVICE

TIMOTHY J. MULLINS states that on March 27, 2023, he did serve a copy of **Chippewa Valley Schools Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(C)** via the United States District Court electronic transmission.

/s/TIMOTHY J. MULLINS
Timothy J. Mullins (P28021)
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Bunny Binno

From: Delie, Steve <Delie@mackinac.org>
Sent: Wednesday, March 22, 2023 12:19 PM
To: John Miller
Cc: Bunny Binno; Wilcox, Derk
Subject: RE: Chippewa Valley Demand

Good afternoon John,

Unfortunately, we cannot concur at this time. It's our belief that, without the benefit of discovery, it would be premature for us to agree to a dismissal. We believe that the discovery process will yield evidence demonstrating Defendants Bednard and Pyden were acting at the Board's direction or on its behalf.

I'd be happy to reconsider following discovery, although I recognize you have no obligation to not file.

Sincerely,

Steve

From: John Miller <jmiller@gmhlaw.com>
Sent: Wednesday, March 22, 2023 11:39 AM
To: Delie, Steve <Delie@mackinac.org>
Cc: Bunny Binno <ebinno@gmhlaw.com>
Subject: RE: Chippewa Valley Demand

Hey Steve –

After having met with the Board, I need to get the Board/District dismissed. As we discussed, the Board itself didn't do anything. All of the allegations are against two former board members. Are you agreeable to dismissing the Board/District? I think that would make it easier to come to a resolution as to the actual claims against the two target defendants.

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EXHIBIT 1