IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

K.B., **by and through his father,** **Russell Brooks,** **Plaintiff,** **v.** **DEKALB COUNTY SCHOOL DISTRICT, DR. R. STEPHEN GREEN, Superintendent, Officially and Individually, REBECCA BRAATEN, Officially and Individually, and CLIFTON SPEARS, Officially and Individually,** **Defendants.**	**CIVIL ACTION FILE** **NO. 1:18-CV-5201-MHC**

ORDER

This case comes before the Court on Plaintiff's Motion Seeking Leave to Amend Complaint [Doc. 10] ("Mot. to Amend") and Defendants' Motion to Dismiss [Doc. 8] ("Mot. to Dismiss"). This case arises from Plaintiff K.B.'s suspension for wearing a sticker calling for the termination of his public high school's principal and distributing the stickers to a few other students. It involves the delicate balance between students' First Amendment freedom of expression,

and the ability of public schools to maintain discipline so that all students can learn and grow—both important constitutional interests implicated when "educating the young for citizenship." See W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("Boards of Education. . . . have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.").

I. BACKGROUND

K.B. is a freshman at Chamblee Charter High School ("CCHS") in the DeKalb County School District ("District"). Verified Amended Compl. for Injunctive Relief and Damages [Doc. 10-1] ("Proposed Compl.") ¶ 4.[1] The Proposed Complaint alleges that K.B. is an active member of the school community. Id. All of K.B.'s current grades are A's and B's; he is enrolled in two Advanced Placement courses, including Advanced Placement American

[1] K.B. filed his initial Complaint [Doc. 1] on November 13, 2018. He filed an Amended Complaint [Doc. 5] on November 15, 2018. On January 28, 2019, Defendants filed their Motion to Dismiss. K.B. filed his Motion to Amend on February 8, 2019, contending that after his Amended Complaint was filed, his counsel received documents in response to a request for public records and the District made new public statements relevant to this case. See Mot. to Amend at 2. The Proposed Complaint contains new allegations related to new facts K.B. learned from the requested public records and the District's statements. See id.; see also Compl.; Proposed Compl.

Government, and is especially interested in government and political science. Id. ¶¶ 4, 17, 19-20. Having skipped a grade in elementary school, K.B. is the youngest student at CCHS. Id. ¶ 17.

Defendant Rebecca Braaten ("Braaten") was hired as CCHS's principal at the beginning of the 2017-2018 school year. Id. ¶ 10. During that school year, several public controversies related to Braaten's performance erupted in the community. Id. During the second half of that school year, the CCHS community expressed dissatisfaction with Braaten's leadership style, personnel decisions, and the overall direction of the school through a series of public meetings, public statements, and social media activities. Id. ¶ 11. In June 2018, members of the community appeared at a DeKalb County Board of Education ("Board") meeting and openly complained about Braaten and called for her resignation. Id. ¶ 12. On June 27, 2018, members of the community voiced continued opposition to Braaten's leadership at another public meeting with District leaders. Id. ¶ 13. The CCHS community created an online petition calling for Braaten's immediate reassignment. Id. ¶ 14. Local media, including WSB-TV and the Atlanta Journal-Constitution, covered this matter. Id. ¶ 15. The CCHS community convened multiple public meetings about the matter and engaged the Board before the beginning of the 2018-2019 school year. Id.

In August 2018, Braaten returned for her second year as principal and K.B. began attending CCHS. Id. ¶¶ 16-17. K.B. was aware of the criticism regarding Braaten after discussing the issue with friends and family, reading about it online, and watching a series of television news programs about it in June 2018. Id. ¶ 23. After less than two months at CCHS, K.B. was concerned about Braaten's leadership and discussed the matter with his friends at school. Id. ¶ 25. He and his family signed the online petition calling for Braaten's reassignment. Id. ¶ 24.

On October 1, 2018, K.B. designed stickers with Braaten's professional headshot photograph and the words "Fire Braaten" overlaid on a waving United States flag "to express his political views on the controversy regarding the principal." See id. ¶ 26. K.B. placed a sticker on his phone case and openly displayed it at school. Id. ¶ 30. K.B. printed "no more than thirty-six" stickers and handed some to other students who requested them. Id. ¶ 29. He assumed the students would wear the stickers to express their viewpoints, and no one indicated to K.B. that they had other plans for display of the stickers. Id. K.B. distributed some stickers to students during lunch who requested them. Id. ¶ 30. The stickers were openly displayed on personal backpacks, lunch boxes, and phone cases. Id. K.B. was not aware of and had no reason to be aware of any stickers placed on

school property and did not see his stickers displayed on anything other than students' own personal property. Id. ¶ 32.

Other students frequently wear stickers, buttons, and other messages on their clothing supporting school teams and clubs, political candidates, and individual grade levels at CCHS without discipline. Id. ¶ 27. Earlier in the 2018-2019 school year, several students "wore vulgar t-shirts" as a message of support for the football coach. Id. ¶ 28. CCHS administrators were aware of the t-shirts and agreed with the students' viewpoint; they did not discipline the students for wearing the shirts with a vulgar message. Id.

On October 3, 2018, K.B. was called to Defendant Assistant Principal Clifton Spears ("Spears")'s office and required to submit a written statement describing his conduct. Id. ¶¶ 9, 33. K.B. wrote that, "I gave them out to a couple of people that asked for them. I only printed out three sheets . . . We didn't put them anywhere except on our bookbags." Id. ¶ 33. Because he feared Spears would expel him, K.B. felt that discounting his own criticism of Braaten would lead the school to be less harsh and called the stickers "a joke" that "would be funny." Id. Spears created a Behavior Detail Report ("Report") which lists the

names of four students to whom K.B. gave stickers and states that "Student[2] also stated that [the stickers] are placed in the locker room and in classrooms." Id. ¶ 34. However, K.B. did not know of any students who placed any stickers in the locker room or classrooms. Id. ¶ 35. The Report describes K.B.'s conduct as "severe" and a violation of Rule 12 – Disorderly Conduct.[3] Id. ¶ 37.

At 3:15 p.m. on October 3, 2018, Spears called K.B.'s father, Russell Brooks ("Brooks"), and notified him that K.B. had violated the code of conduct rules regarding "disrespectfulness" and "creating a disturbance" and was suspended for a week as punishment. Id. ¶ 39. While Brooks picked up K.B. from CCHS, Spears told Brooks that the disturbance was that "Spears had to spend half of the

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[2] It is unclear from the quoted except of the Report whether "Student" refers to K.B. or someone else. See id. ¶ 34.

[3] Rule 12 defines the offense of "School Disturbance":

> Students will not engage in acts that cause or may cause disruption of the school and/or threaten the safety or well-being of other students. Prohibited acts include, but are not limited to, terroristic threats, gang-related activities, walk-outs, sit-downs, rioting/chaos, picketing, trespassing, inciting disturbances, threats to the school, pranks, bomb threats, pulling fire alarm, calling 911, and actual violence during period of disruption, etc.

See DeKalb Cty. Sch. Dist., CODE OF STUDENT CONDUCT – STUDENT RIGHTS AND RESPONSIBILITIES AND CHARACTER DEVELOPMENT HANDBOOK 37 (2018-2019) [Doc. 10-3] (attached as Ex. 4 to Proposed Compl.).

day tracking down students who possessed the stickers, retrieving the stickers, and punishing them." Id. ¶ 40 (alteration accepted).

On October 4, 2018, Spears called Brooks and reduced the week-long out-of-school suspension to a one-day in-school suspension for "creating a disturbance." Id. ¶ 42. K.B. served one day of in-school suspension on October 9, 2018, where he attended school in a trailer and missed all of his classes and several assignments from both Advanced Placement courses. Id. ¶ 47. Brooks pursued administrative appeals to Braaten and Region I Assistant Superintendent Sherry Johnson ("Johnson"), asserting that K.B.'s conduct was not a disturbance and any penalty would violate K.B.'s right to freedom of expression. Id. ¶ 43. On October 15, 2018, Johnson denied the final appeal. Id. ¶ 44. During a telephone conversation with Brooks, Johnson explained that K.B.'s conduct violated Rule 12 at the "point when it involved other students" and "because it could have been a major school disturbance." Id. At the end of the call, Brooks asked if K.B. could wear the sticker to school the next day; Johnson said that "would be a repeat of Rule 12 school disturbance." Id. ¶ 45.

Brooks sought the public records related to the discipline imposed on K.B. Id. ¶ 50. Included in the records produced were e-mails between District employees indicating that no material or substantial disruption occurred or was

reasonably forecast. Id. ¶ 51. The teacher who delivered the sticker to Braaten wrote, "for the record, the students did not disrupt class or in any way impede learning. They were respectful and removed the sticker when I asked them to, and voluntarily gave it to me . . . ." Id. ¶ 53. Another student who was disciplined for wearing a sticker and appealed wrote:

> In 5th period today, I took [a sticker] out and put it on my friend, [NAME REDACTED] who also had some. Later in the day, he got stopped in the hallway and sent to the discipline office for the sticker. Other than that, I did not give them to anyone, did not display it at all, nor did I place them on anything, mine or the schools.

See id. ¶¶ 54-55. On November 14, 2018, in response to media requests, Defendants issued a public statement approved by Defendant Superintendent Dr. R. Stephen Green ("Green"):

> Three students at Chamblee Charter High School were found to have violated that standard (Student Code of Conduct) and were held accountable. Two students received verbal warnings, along with a parent conference, for posting stickers critical of the school's leadership. The third student was given a one-day in school suspension for printing and wearing the stickers. The violations were considered disruptions of the school environment as per the [District] Student Code of Conduct.

Id. ¶ 58.

K.B.'s educational record will permanently include the disciplinary infraction and the punishment imposed, as well as other documents related to this matter. Id. ¶ 48. He intends to apply for college but worries about his ability to

gain admission with a suspension on his record. Id. ¶ 49. He suffers anxiety and does not think he can express any views contrary to the school administration and fears further sanction if he even tried to do so. Id.

K.B.'s Proposed Complaint alleges that the District, as well as Green, Braaten, and Spears, in their individual and official capacities, violated K.B.'s First Amendment right to freedom of speech. Id. ¶¶ 59-67.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure Rule 15(a), a party may amend its complaint once as a matter of course within twenty-one days after service of a response by answer or motion. FED. R. CIV. P. 15(a)(1). Otherwise, the party may amend its complaint "only with the opposing party's written consent or the court's leave." FED. R. CIV. P. 15(a)(2). Rule 15(a) further instructs that "[t]he court should freely give leave when justice so requires." Id. "[U]nless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial." Thomas v. Town of Davie, 847 F.2d 771, 773 (11th Cir. 1988) (quoting Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 598 (5th Cir. 1981)); see also Spanish Broad. Sys. v. Clear Channel Commc'ns, 376 F.3d 1065, 1077 (11th Cir. 2004) ("The Supreme Court has emphasized that leave

to amend must be granted absent a specific, significant reason for denial.") (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

Nevertheless, courts may deny a motion to amend for numerous reasons, including "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment. . . ." Foman, 371 U.S. at 182; see Carruthers v. BSA Adver., Inc., 357 F.3d 1213, 1218 (11th Cir. 2004). "[D]enial of leave to amend is justified by futility when the complaint as amended is still subject to dismissal." Burger King Corp. v. Weaver, 169 F.3d 1310, 1320 (11th Cir. 1999) (citing Halliburton & Assoc. v. Henderson, Few & Co., 774 F.2d 441, 444 (11th Cir. 1985)).

Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Under Federal Rule of Civil Procedure 12(b)(6), a claim will be dismissed for failure to state a claim upon which relief can be granted if it does not plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). The Supreme Court has explained this standard as follows:

> 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.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citation omitted). Thus, a claim will survive a motion to dismiss only if the factual allegations in the pleading are "enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555.

At the motion to dismiss stage, the court accepts all well-pleaded facts in the plaintiff's complaint as true, as well as all reasonable inferences drawn from those facts. McGinley v. Houston, 361 F.3d 1328, 1330 (11th Cir. 2004); Lotierzo v. Woman's World Med. Ctr., Inc., 278 F.3d 1180, 1182 (11th Cir. 2002). Not only must the court accept the well-pleaded allegations as true, but these allegations must also be construed in the light most favorable to the pleader. Powell v. Thomas, 643 F.3d 1300, 1302 (11th Cir. 2011). However, the court need not accept legal conclusions, nor must it accept as true legal conclusions couched as factual allegations. Iqbal, 556 U.S. at 678. Thus, evaluation of a motion to dismiss requires the court to assume the veracity of well-pleaded factual allegations and "determine whether they plausibly give rise to an entitlement to relief." Id. at 679.

III. ANALYSIS

Defendants contend that the Motion to Amend should be denied because it would be futile. Resp. in Opp'n to Pl.'s Mot. Seeking Leave to Amend Compl. or, in the Alternative, Renewed Pre-Answer Mot. to Dismiss the Am. Compl. and Mem. of Law in Supp. [Doc. 11] at 2-3. To the extent the Court treats the Motion to Amend as a filing of a Second Amended Complaint, Defendants renewed their Motion to Dismiss and incorporated by reference their briefs supporting their Motion to Dismiss. Id. at 4-5. Accordingly, the Court will evaluate whether the Proposed Complaint states a claim under Federal Rule of Civil Procedure 12(b)(6) and rule on the parties' motions accordingly.

The Speech Clause of the First Amendment provides that, "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. "The First Amendment, as incorporated through the Due Process Clause of the Fourteenth Amendment, applies to state and municipal governments, state-created entities, and state and municipal employees." Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1268 (11th Cir. 2004) (citing Barnette, 319 U.S. at 637; Near v. Minnesota, 283 U.S. 697, 707 (1931)). "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers 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).

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin, speaking for the Fifth Circuit, said, school officials cannot suppress "expressions of feelings with which they do not wish to contend."

Id. at 511 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)[4]). At the same time, one "of the objectives of public education [i]s the 'inculcation of fundamental values necessary to the maintenance of a democratic political system.'" Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting Ambach v. Norwich, 441 U.S. 68, 76-66 (1979) (alteration accepted)).

> These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school,

[4] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

> the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

Id.

A. Whether Defendants Violated the First Amendment by Restricting K.B.'s Speech[5]

Defendants characterize K.B.'s stickers as a "disparaging joke about his school's principal" that were "blatantly hostile toward school leadership and designed to humiliate . . . Braaten and undermine her authority" and not speech protected by the First Amendment. See Mem. of Law in Supp. of Defs.' Mot. to Dismiss [Doc. 8-1] ("Defs.' Mem.") at 2, 4.

School officials "cannot infringe on their students' right to free and unrestricted expression . . . where the exercise of such rights in the school buildings and schoolrooms do[es] not materially and substantially interfere with

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[5] "The Constitution guarantees students (and all people) the right to engage not only in 'pure speech,' but 'expressive conduct,' as well." Holloman, 370 F.3d at 1270 (citing United States v. O'Brien, 391 U.S. 367, 376-66 (1974)). K.B.'s sticker was, if not pure speech, certainly expressive conduct because a reasonable person would interpret it as a message that Braaten should be fired. "It does not ultimately matter whether [K.B.]'s act is characterized as 'pure speech' or 'expressive conduct' because [the Eleventh] [C]ircuit appears to apply the same test in assessing school restrictions on either kind of expression." Id.

the requirements of appropriate discipline in the operation of the school." Hollomon, 370 F.3d at 1271 (emphasis added) (citing Burnside, 363 F.2d at 749); see also Tinker, 393 U.S. at 513 (emphasis added) (citation omitted) ("[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."). "This doctrine allows school authorities to prohibit, among other things, 'lewd, indecent, or offensive speech . . . . The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school's basic educational mission.'" Holloman, 370 F.3d at 1271 (quoting Fraser, 478 U.S. at 683, 685).

> However, in assessing the reasonableness of regulations that tread upon expression, we cannot simply defer to the specter of disruption or the mere theoretical possibility of discord, or even some *de minimis*, insubstantial impact on classroom decorum. Particularly given the fact that young people are required by law to spend a substantial portion of their lives in classrooms, student expression may not be suppressed simply because it gives rise to some slight, easily overlooked disruption, including but not limited to "a showing of mild curiosity" by other students, "discussion and comment" among students, or even some "hostile remarks" or "discussion outside of the classrooms" by other students.

Id. at 1271-72 (emphasis added) (citing Tinker, 393 U.S. at 508, 514; Burnside, 363 F.2d at 748; Reineke v. Cobb Cty. Sch. Dist., 484 F. Supp. 1252, 1261 (N.D. Ga. 1980)). "While certain types of expression unquestionably cause enough of a threat of disruption to warrant suppression even before negative consequences occur, 'undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression,' even in schools." Id. at 1273 (emphasis added) (quoting Tinker, 393 U.S. at 508). "There must be demonstrable factors that would give rise to any reasonable forecast by the school administration of 'substantial and material' disruption of school activities before expression may be constitutionally restrained." Id. (emphasis added) (quoting Shanley v. N.E. Ind. Sch. Dist., Bexar Cty., Tex., 462 F.2d 960, 974 (5th Cir. 1972)).

Defendants contend that K.B.'s stickers were materially disruptive and therefore not protected speech. Defs.' Mem. at 5-13. According to the Proposed Complaint, Spears said that the disruption was that he had to spend half of the day tracking down students who possessed the stickers, retrieving the stickers, and punishing those students. Although inconvenient to Spears, the fact that he spent time finding and disciplining the few students to whom K.B. distributed stickers does not demonstrate that K.B.'s speech caused a material and substantial disruption. Johnson said that K.B.'s conduct violated Rule 12 when it involved

other students and it *could have* caused a major disruption. Given the allegations in the Proposed Complaint, the Court is not persuaded. K.B. printed no more than thirty-six stickers and distributed them to a few students. K.B. is not aware of anyone putting the stickers on other people's property or on school property. In fact, another student who was disciplined stated that he gave a sticker to his friend, but did not put a sticker on anyone else or on anything. Although Spears's Report states that a student (potentially K.B.) told him that stickers were placed in the locker room and in classrooms, K.B. alleges that he did not know of any students who placed stickers in the locker rooms or classrooms. Furthermore, one teacher reported that "the students did not disrupt class or in any way impede learning. They were respectful and removed the sticker when I asked them to, and voluntarily gave it to me . . . ." Proposed Compl. ¶ 53.

Taking the allegations in the Proposed Complaint as true and making all reasonable inferences in K.B.'s favor, as the Court must do at this stage in the proceedings, the Court cannot identify "demonstrable factors that would give rise to any reasonable forecast by the school administration of 'substantial and material' disruption of school activities." See Holloman, 370 F.3d at 1273. Rather, it appears that K.B.'s stickers could have "give[n] rise to some slight, easily overlooked disruption" at most. See id. at 1271-71; see also Tinker, 393

U.S. at 509 ("[O]ur independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the [black] armbands [to protest the Vietnam war] would substantially interfere with the work of the school or impinge upon the rights of other students."); DePinto v. Bayonne Bd. of Educ., 514 F. Supp. 2d 633, 635, 645 (D. N.J. 2007) (citation omitted) (finding that prohibition on two fifth grade students wearing buttons protesting the district's mandatory uniform policy was unwarranted because the buttons did not cause any disruption and defendants failed to demonstrate a specific and significant fear of disruption).

Despite applying Tinker's framework in their initial brief, in their reply Defendants contend that Fraser and not Tinker "provides the best lens through which to evaluate K.B.'s speech."[6] Reply in Supp. of Defs.' Mot. to Dismiss [Doc. 12] ("Defs.' Reply") at 3. "Unlike the sanctions imposed on the students wearing armbands in Tinker, the penalties imposed in [Fraser] were unrelated to any political viewpoint." Fraser, 478 U.S. at 685. In Fraser, a student gave an

[6] "Within scholastic nonpublic fora, there are four clear categories of expression: vulgar expression, pure student expression, government expression, and school-sponsored expression." Bannon v. Sch. Dist. of Palm Beach Cty., 387 F.3d 1208, 1213 (11th Cir. 2004). Tinker involved pure student expression, and Fraser involved vulgar expression. The other two categories are not relevant here.

"indecent speech" and engaged in "lewd conduct" a high school assembly in support of a student government candidate. Id. at 680, 687. The Supreme Court characterized the student's language as "vulgar and offensive" and "highly offensive or highly threatening to others." See id. at 683.

> The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy. The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students.

Id. at 683. The Supreme Court held that the school district acted within its authority to impose sanctions "in response to [the student's] offensively lewd and indecent speech[,]" explaining that

> [t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.

Id. at 685.

"The decision in Fraser rested on the 'vulgar,' 'lewd,' and 'plainly offensive' character of a speech delivered at an official school assembly rather than on any propensity of the speech to 'materially disrup[t] classwork or involv[e]

substantial disorder or invasion of the rights of others.'" Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 n.4 (1988) (quoting Fraser, 478 U.S. at 686). K.B.'s sticker is a far cry from the lewd, sexually-explicit speech the Fraser court found to be unprotected speech. This Court cannot characterize a sticker with the words "Fire Braaten" above Braaten's professional headshot photograph and superimposed on a waving United States flag as "vulgar," "lewd," "indecent," "sexual inuendo," or "plainly offensive." Certainly, the sticker may have upset Braaten and challenged her authority, but that does not mean it is vulgar, lewd or plainly offensive such that it is not protected. See Tinker, 393 U.S. at 509 ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."); Burnside, 363 F.2d at 749 ("We wish to make it quite clear that we do not applaud any attempt to undermine the authority of the school. . . . But, with all of this in mind, we must also emphasize that school officials cannot ignore expressions of feelings with which they do not wish to contend.").

Binding Eleventh Circuit precedent supports this Court holding that K.B.'s Proposed Complaint states a claim that Defendants violated his First Amendment

right to freedom of speech. In Holloman, 370 F.3d 1242, the Eleventh Circuit Court of Appeals reversed a grant of summary judgment for the defendants where the plaintiff student silently raised his fist during the Pledge of Allegiance. Holloman, 370 F.3d at 1269-70.

> The dissent argues that Holloman's act was "meant to compete for students' attention." The same can be said of any of the forms of student expression that have been found to be protected, including the wearing of armbands or buttons in class. A student expressing himself in those ways clearly intends to attract the other students' attention and have them consider, however briefly, the meaning behind the symbolism. Indeed, if a student's attention is never focused, if even for a moment, on the expression, it becomes pointless.

Id. at 1273 (emphasis added). The teacher "expressed concern that [Holloman's] behavior would lead to further disruptions by other students." Id. at 1274. The court was not persuaded:

> Even if [the teacher] were correct in fearing that other students may react inappropriately or illegally, such reactions do not justify suppression of Holloman's expression. Holloman's expression was constitutionally protected because the record reveals no way in which he "materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school."

Id. at 1276 (quoting Burnside, 363 F.2d at 749).

The Holloman court found two cases involving schools banning "freedom buttons" worn by students in support of the civil rights movement decided by "the same panel of this court, on the same day" instructive. Id. at 1274. In the first

case, Burnside, thirty or forty students at an all-black high school wore buttons "circular, approximately 1 1/2 inches in diameter, containing the wording 'One Man One Vote' around the perimeter with 'SNCC' inscribed in the center." Burnside, 363 F.2d at 746-47. The school forced the students to either remove the buttons or be suspended. Id. at 747. The court reversed the district court's denial of a preliminary injunction against the school, id. at 749, explaining:

> The record indicates only a showing of mild curiosity on the part of the other school children over the presence of some 30 or 40 children wearing such insignia. . . . Thus it appears that the presence of 'freedom buttons' did not hamper the school in carrying on its regular schedule of activities; nor would it seem likely that the simple wearing of buttons unaccompanied by improper conduct would ever do so. Wearing buttons on collars or shirt fronts is certainly not in the class of those activities which inherently distract students and break down the regimentation of the classroom such as carrying banners, scattering leaflets, and speech making, all of which are protected methods of expressions, but all of which have no place in an orderly classroom.

Id. at 748 (emphasis added); see also DePinto, 514 F. Supp. 2d at 645 (citation omitted) ("Further, as a general matter '[t]he passive expression of a viewpoint in the form of a button worn on one's clothing "is certainly not in the class of those activities which inherently distract students and break down the regimentation of the classroom."'").

In the second case, Blackwell v. Issaquena Cty. Bd. of Educ., 363 F.2d 749 (5th Cir. 1966), approximately thirty students at another all-black high school wore

buttons "about an inch in diameter depicting a black and white hand joined together with 'SNCC' inscribed in the margin." Blackwell, 363 F.2d at 750. Some of the students "were creating a disturbance by noisily talking in the hall when they were scheduled to be in class." Id. at 750-51. The next day, approximately 150 students wore the buttons and "distributed buttons to students in the corridor of the school building and accosted other students by pinning the buttons on them even though they did not ask for one. One of the students tried to put a button on a younger child who began crying." Id. at 751. On the third day, close to 200 students wore the buttons. Id. On the fourth day, the students returned to school again wearing the buttons and were suspended. Id.

> As the students gathered their books to go home, classes were generally disturbed by students' comments inviting others to join them. One of the suspended students entered a classroom while class was in session, ignored the teacher and without permission importuned another student to leave class. Before the students left, a bus driver, Charles Cole, entered the school building with a cardboard box full of buttons, and began distributing them and even entered a classroom without permission, offering buttons to the students. Also, some students after boarding the busses, re-entered the school building with buttons, trying to pin them on anyone walking in the hall, and some threw buttons into the building through the windows.

Id. at 751-52. Under these circumstances, the court affirmed the district court's denial of a preliminary injunction against the school, id. at 754, explaining:

> In the instant case, as distinguished from the facts in Burnside, there was more than a mild curiosity on the part of those who were wearing,

> distributing, discussing and promoting the wearing of buttons. There was an unusual degree of commotion, boisterous conduct, a collision with the rights of others, an undermining of authority, and a lack of order, discipline and decorum. . . . In this case the reprehensible conduct described above was so inexorably tied to the wearing of the buttons that the two are not separable. In these circumstances we consider the rule of the school authorities reasonable.

Id. After examining Burnside and Blackwell, both binding authority from the former Fifth Circuit, the Holloman court stated that "[w]here students' expressive activity does not materially interfere with a school's vital educational mission, and does not raise a realistic chance of doing so, it may not be prohibited simply because it conceivably *might* have such an effect." Holloman, 370 F.3d at 1274.

The facts alleged in K.B.'s Proposed Complaint do not show a realistic chance that wearing and distributing at most thirty-six stickers containing Braaten's professional headshot photograph and the words "Fire Braaten" superimposed on a waving United States flag raised a realistic chance of interfering with CCHS's educational mission. Unlike Blackwell where the students accosted others, interrupted class, ignored teachers, re-entered the school, threw buttons, and more, the allegations here show that K.B. and the other students wore the stickers on their personal property and respectfully removed them when asked. This case is more similar to Burnside and Holloman because K.B. and the other students merely expressed themselves without engaging in any improper

conduct. Nothing in the Proposed Complaint indicates that K.B.'s actions posed a realistic chance of "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school." See Tinker, 393 U.S. at 513; see also Heinkel ex rel. Heinkel v. Sch. Bd. of Lee Cty., 194 F. App'x 604, 609-10 (11th Cir. 2006) (finding school administrator reasonably concluded that a middle schooler distributing materials about abortion and abortion alternatives to her classmates ages eleven to fourteen would cause a material and substantial disruption to discipline, noting that the district's lead health education teacher testified at her deposition that abortion and birth control were not part of the curriculum and not discussed in school because it is an emotional issue that creates some anger, polarizes a class, and becomes disruptive) (unpublished).

Defendants direct the Court to four out-of-circuit cases involving student expression they contend are "analogous to" K.B.'s stickers. Defs.' Mem. at 8. In Smith ex rel. Smith v. Mt. Pleasant Pub. Schs., 285 F. Supp. 2d 987 (E.D. Mich. 2003), the court found that a student's "statements concerning the marital infidelity and sexual identity of certain, named school administrators fell beyond the protection of the First Amendment." Smith, 285 F. Supp. ed. at 996. The court noted that the student's remarks about the school's new tardy policy were

"political speech," but then "degenerated into a salacious commentary on the private lives of his superiors" that "did not constitute political discourse." Id. at 997. The court found that the student's speech was not protected because

> [the student]'s statements were disruptive and interfered with discipline. Although he professes that he intended nothing more than humor, [the student] clearly attempted to undermine the moral authority of the principal and assistant principal by questioning Mrs. Kirby's marital fidelity and Mr. Travis' sexuality. Spreading such gossip, and calling the school principal a "skank" and a "tramp," invited discipline, and would have rendered ineffective a school administrator who would not respond to such a display of disrespect. Moreover, Smith's conduct (reading aloud a letter about school policy and personnel in a school cafeteria) "substantially interfered with the work of the school" and caused a disruption. At least two students, one of whom was demonstrably upset, complained to the school's vice-principal that they felt uncomfortable after hearing the plaintiff's commentary. One student said that she tried without success to avoid listening to it because the personal comments denigrating high school administrators offended her. Imposing discipline for such commentary is consistent with the limitations stated by the Supreme Court in Tinker. Smith's comments referring to the sexual activity of school administrators also constitute lewd and vulgar speech, which falls into the category of sanctionable expression under Fraser.

Id. Furthermore, the court observed that "there is no evidence that the discipline given the plaintiff was imposed in retaliation for his views on the tardy policy. Rather, the suspension appears to be a punishment for personally insulting the principal and vice-principal, and spreading rumors about their personal and private matters." Id. at 998 (emphasis added). This case clearly is distinguishable from Smith in that, among other reasons, (1) K.B.'s sticker was not a personal

commentary about Braaten's private life that displayed disrespect, (2) the allegations in the Proposed Complaint do not show the stickers caused or were likely to cause disruption, and (3) K.B.'s speech was not a personal insult or rumor about a private matter.

In Requa v. Kent Sch. Dist. No. 415, 492 F. Supp. 2d 1272 (W.D. Wash. 2007), the court found that a student's filming of a teacher was not protected speech under either Tinker or Fraser. Requa, 492 F. Supp. 2d at 1279. The Court found that part of the video was more than criticism of the teacher:

> There are portions of the piece which are intended to highlight and comment upon the disorganized state of her classroom (including the clutter on her desk and shelves and the pieces of chalk littering her classroom floor) and upon the teacher's hygiene. Those portions of the video featuring (1) footage of a student making "rabbit ears" and a pelvic thrust behind her back, and (2) footage of her buttocks accompanied by graphics stating "Caution Booty Ahead" and a "booty" rap song, however, cannot be denominated as anything other than lewd and offensive and devoid of political or critical content.

Id. at 1279 (emphasis added).

> The Court has no difficulty in concluding that one student filming another student standing behind a teacher making "rabbit ears" and pelvic thrusts in her direction, or a student filming the buttocks of a teacher as she bends over in the classroom, constitutes a material and substantial disruption to the work and discipline of the school . . . . The "work and discipline of the school" includes the maintenance of a civil and respectful atmosphere toward teachers and students alike—demeaning, derogatory, sexually suggestive behavior toward an unsuspecting teacher in a classroom poses a disruption of that mission whenever it occurs.

Id. at 1280 (emphasis added). Once again, this case is distinguishable from Requa in that, among other reasons, (1) K.B.'s sticker was not lewd and offensive, demeaning, derogatory, or sexually suggestive, (2) the allegations in the Proposed Complaint do not show the stickers caused or were likely to cause disruption, and (3) K.B.'s stickers were criticism of the principal's leadership and not devoid of political or critical content. Furthermore, in both Smith and Requa, the courts pointed out that the portion of the student's speech that was unprotected was unrelated to political discourse. The same cannot be said about K.B.'s stickers. The Proposed Complaint alleges a public controversy surrounding Braaten's leadership existed before and at the time K.B. wore and handed out his stickers. An online petition called for Braaten's re-assignment, and newspaper articles and television stories covered the controversy.

In Acevedo v. Sklarz, 553 F. Supp. 2d 164 (D. Conn. 2008), the court found that the school official "was justified in believing [the student]'s conduct represented a substantial disruption and that it was materially interfering with her efforts to regain order in the hallways during a very hectic and incident-filled day." Acevedo, 553 F. Supp. 2d at 170.

> Acevedo's behavior cannot reasonably be characterized as non-disruptive because he was shouting that [a police officer] had hit, or was about to hit, a student in the midst of an already large and noisy

> crowd and he responded in a loud, aggressive, and disrespectful manner to Zytka's demand that he stop filming. . . . his speech falls into the constitutional gray area between protected and unprotected speech
> . . . .

Id. Even though Acevedo is not factually analogous to this case, Defendants seize upon that court's statement that "insubordinate speech towards school officials is generally not recognized as protected under the First Amendment." See Defs.' Mem. at 10 (citing Acevedo, 553 F. Supp. 2d at 170). The court further explained:

> As Judge Kravitz stated in a recent school grounds First Amendment decision, school officials are faced with the difficult task of "teach[ing] our children to think critically and to object to what they perceive as injustice" while simultaneously "inculcat[ing] the values of civil discourse and respect for the dignity of every person." Doninger v. Niehoff, 514 F. Supp. 2d 199, 203 (D. Conn. 2007). Acevedo's rights to exercise his freedom of speech were not unlimited when he was on school grounds and he was certainly expected to maintain a level of decorum and dignity in his interactions with school officials that he failed to display on June 15, 2006. The tone of his voice and argumentative stature against [the school official] could foster an atmosphere of disrespect toward school officials that certainly disrupts the educational process and interferes with the need for maintaining an appropriate level of discipline in public schools.

Acevedo, 553 F. Supp. 2d at 170 (emphasis added);

Defendants imply, based on Acevedo, that K.B.'s speech was so insubordinate as to be unprotected. However, in this case there is no indication based on the allegations of the Proposed Complaint that K.B., or other students possessing the stickers, broke decorum or acted disrespectfully toward school

officials. See Holloman, 370 F.3d at 1276 ("School officials may not punish indirectly, through the guise of insubordination, what they may not punish directly."). Rather, the Proposed Complaint alleges that a teacher reported that "the students did not disrupt class or in any way impede learning. They were respectful and removed the sticker when I asked them to, and voluntarily gave it to me . . . ." Moreover, another student who was disciplined for wearing a sticker wrote that he gave one sticker to a friend and "other than that, I did not give them to anyone, did not display it at all, nor did I place them on anything, mine or the schools." Proposed Compl. ¶¶ 53-55.

Finally, in Lowery v. Euverard, 497 F.3d 584 (6th Cir. 2007), the court considered "whether [p]laintiffs had a right to remain on the football team after participating in a petition that stated "I hate Coach Euvard [sic] and I don't want to play for him." Lowery, 497 F.3d at 589. The court found that "[i]t was reasonable for Defendants to forecast that Plaintiffs' petition would undermine [the coach]'s authority and sow disunity on the football team. Thus, there was no constitutional violation in [p]laintiffs' dismissal from the team." Id. at 600-01; but see Pinard v. Clatskanie Sch. Dist., 467 F.3d 755, 760-61, 768 (9th Cir. 2006) (holding that high school basketball players' petition requesting the coach's resignation was protected speech); Seamons v. Snow, 84 F.3d 1226, 1237-38 (10th Cir. 1996) (finding that

high school football player's report of hazing in the locker room was protected speech). In reaching its decision, the court considered the unique context of a high school athletics team:

> The success of an athletic team in large part depends on its coach. . . . The ability of the coach to lead is inextricably linked to his ability to maintain order and discipline. . . . Plaintiffs' circulation of [the] petition . . . was a direct challenge to Euverard's authority, and undermined his ability to lead the team. It could have no other effect.

Lowery, 497 F.3d at 594. The court stressed that

> there is a difference between the way a school relates to the student body at large, and to students who voluntarily "go out" for athletic teams. This [c]ourt has specifically recognized the distinction between the role of a teacher and a coach. Restrictions that would be inappropriate for the student body at large may be appropriate in the context of voluntary athletic programs.

Id. at 597 (emphasis added) (citation omitted). Moreover, the Lowery court noted that "Plaintiffs' regular education has not been impeded, and, significantly, they are free to continue their campaign to have Euverard fired. What they are not free to do is continue to play football for him while actively working to undermine his authority." Id. at 600. This case is easily distinguishable from Lowery: K.B. created, wore, and passed out the stickers as a member of the student body at large, not as a participant in a voluntary athletic program or other school group. The District did not permit K.B. to continue wearing his sticker to school. Lowery's holding—which other courts disagree with—was specific to the context of high

school athletics and is not relevant here. See Pinard, 467 F.3d at 760-61, 768; Seamons, 84 F.3d at 1237-38; see generally Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995) ("By choosing to 'go out for the team,' [school athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.").

Defendants contend that accepting Plaintiff's position is equivalent to "condoning a coordinated effort by an entire student population to wear clothing or accessories urging a particular teacher or administrator to be fired." Defs.' Reply at 4 (emphasis added). That situation is a far cry from the allegations in the Proposed Complaint—one student bringing at most thirty-six stickers to school, wearing one, and giving them to a few classmates to wear. Defendants further imply that a student wearing a sticker demanding the principal's removal can *never* be protected speech. See Defs.' Reply at 4-5. Again, as Burnside and Blackwell demonstrate, the law is not that simple.

> Conduct that may be constitutionally protected in one school or under one set of circumstances may tend to incite disruption or disorder—and so be constitutionally proscribable—in others. Where students' expressive activity does not materially interfere with a school's vital educational mission, and does not raise a realistic chance of doing so, it may not be prohibited simply because it conceivably *might* have such an effect.

Holloman, 370 F.3d at 1274. Far from "creat[ing] precedent that jeopardizes the authority structure of every school" or "allowing each student to demand the firing of any teacher or administrator he or she does not like[,]" denying Defendant's Motion to Dismiss and allowing this case to proceed merely recognizes that, taking K.B.'s factual allegations as true and making all reasonable inferences in his favor, as the Court must at this stage, K.B.'s conduct under the specific circumstances may have been constitutionally protected.

B. Whether K.B. States a Claim for Viewpoint Discrimination

K.B. also alleges that Defendants punished him because they disagreed with what he said. Proposed Compl. ¶¶ 61, 65; Pl.'s Resp. to Defs.' Mot. to Dismiss [Doc. 9] at 13. "Government actors may not discriminate against speakers based on viewpoint, even in places or under circumstances where people do not have a constitutional right to speak in the first place. . . . this fundamental prohibition against viewpoint-based discrimination extends to public schoolchildren . . . ." Holloman, 370 F.3d at 1280 (citations omitted). "Consequently, even if [K.B.] did not have the right to express himself in the manner he did, his rights were still violated if he was punished because [Defendants] disagreed or w[ere] offended by what he said." See id.

The Proposed Complaint alleges that other CCHS students wore clothing supporting school teams and clubs, political candidates, and individual grade levels without sanction. CCHS operates a retail store where students can buy clothing with pro-CCHS messages on them. CCHS permitted students to wear vulgar t-shirts as a message of support for the football coach. However, K.B. alleges that he was not permitted to wear and distribute stickers that challenged the school's principal. See Tinker, 393 U.S. at 510 ("It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance.").

Furthermore, the Court can reasonably infer from the allegations in the Proposed Complaint that K.B. was punished because of his anti-Braaten viewpoint. In its public statement, the District stated that students were disciplined "for posting stickers critical of the school's leadership." Proposed Compl. ¶ 58. After Johnson told Brooks that K.B.'s conduct violated Rule 12 when it involved other students because it could have been a major school disturbance, Brooks asked if K.B. could wear the sticker. Id. ¶ 45. However, Johnson told Brooks that it "would be a repeat of, Rule 12 school disturbance." Id. (alteration accepted). Viewing these allegations in the light most favorable to K.B. and making all

reasonable inferences in his favor, K.B. alleges sufficient facts to state a claim for viewpoint discrimination.

C. Whether Qualified Immunity Bars K.B.'s Claim Against the Individual Defendants

Defendants contend that even if the First Amendment protected K.B.'s speech, the claims against Green, Braaten, and Spears should be dismissed because these individuals are protected by qualified immunity. Defs.' Mem. at 13.

"Qualified immunity offers complete protection for individual public officials performing discretionary functions 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Sherrod v. Johnson, 667 F.3d 1359, 1363 (11th Cir. 2012) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). To claim qualified immunity, a defendant must first show he was performing a discretionary function. Moreno v. Turner, 572 F. App'x 852, 855 (11th Cir. 2014) (citing Whittier v. Kobayashi, 581 F.3d 1304, 1308 (11th Cir. 2009)). Teachers and school administrators perform a discretionary function when they administer student discipline within the scope of their authority. See, e.g., Holloman, 370 F.3d at 1267 (citing Kirkland v. Greene Cty Bd. of Educ., 347 F.3d 903, 903 n.1 (11th Cir. 2003)) ("Disciplining students is a legitimate discretionary function performed by principals."); Foster v. Raspberry, 652 F. Supp. 2d 1342, 1355 (M.D.

Ga. 2009) (collecting cases) ("Georgia courts have repeatedly held that the supervision and discipline of students are discretionary acts."). The parties do not dispute that Green, Braaten, and Spears were performing a discretionary function.

"Once discretionary authority is established, the burden then shifts to the plaintiff to show that qualified immunity should not apply." Edwards v. Shanley, 666 F.3d 1289, 1294 (11th Cir. 2012) (quoting Lewis v. City of W. Palm Beach, 561 F.3d 1288, 1291 (11th Cir. 2009)). A plaintiff demonstrates that qualified immunity does not apply by showing: "(1) the defendant violated a constitutional right, and (2) the right was clearly established at the time of the alleged violation." Kobayashi, 581 F.3d at 1308. "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting White v. Pauly, 137 S. Ct. 548, 551 (2017) (per curiam)). It "protects all but the plainly incompetent or those who knowingly violate the law." Id. (quoting Pauly, 137 S. Ct. at 551). As discussed above, K.B. sufficiently states a claim that Defendants violated his First Amendment right to freedom of speech.

A constitutional right is clearly established "only if its contours are 'sufficiently clear that a reasonable official would understand what he is doing

violates that right.'" Vaughan v. Cox, 343 F.3d 1323, 1332 (11th Cir. 2003) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). "When we consider whether the law clearly established the relevant conduct as a constitutional violation at the time that [the government official] engaged in the challenged acts, we look for 'fair warning' to officers that the conduct at issue violated a constitutional right." Jones v. Fransen, 857 F.3d 843, 851 (11th Cir. 2017) (citing Coffin v. Brandau, 642 F.3d 999, 1013 (11th Cir. 2011) (en banc)). There are three methods to show that the government official had fair warning:

> First, the plaintiffs may show that a materially similar case has already been decided. Second, the plaintiffs can point to a broader, clearly established principle that should control the novel facts of the situation. Finally, the conduct involved in the case may so obviously violate the constitution that prior case law is unnecessary. Under controlling law, the plaintiffs must carry their burden by looking to the law as interpreted at the time by the United States Supreme Court, the Eleventh Circuit, or the [relevant state supreme court].

Terrell v. Smith, 668 F.3d 1244, 1255-56 (11th Cir. 2012) (citations, quotation marks, and alterations omitted).

Defendants characterize the constitutional right at issue as "a constitutional right to wear and distribute the 'Fire Braaten' stickers at school" or "K.B.'s right to call for his principal's termination." See Defs.' Mem. at 18; Defs.' Reply. at 11-12. However, the Eleventh Circuit has not proscribed the constitutional issue so narrowly when applying the clearly established Tinker-Burnside standard:

"[W]e find that, as of May 16, 2000, the Tinker-Burnside standard was clearly established and sufficiently specific as to give the defendants 'fair warning' that their conduct was constitutionally prohibited." Holloman, 370 F.3d at 1278; see Evans v. Bayer, 684 F. Supp. 2d 1365, 1376 (S.D. Fla. 2010) ("[H]is actions do not even comport with the requirements for the regulation of on-campus speech. Tinker requires established prerequisites."); see also Acevedo, 553 F. Supp. 2d at 170 ("The clearly established right is that students may not be punished or stopped from engaging in non-disruptive speech.").

> The Tinker-Burnside test calls for teachers to assess two factors: (1) whether a student is engaged in expression (either pure speech or expressive conduct) and (2) whether the expression is having a non-negligible disruptive effect, or is likely to have such an effect, on classroom order or the educational process. We do not find it unreasonable to expect the defendants—who holds themselves out as educators—to be able to apply such a standard, notwithstanding the lack of a case with material factual similarities.
>
> ***
>
> A teacher or principal should be able to instantly recognize whether a student is disrupting class, and it should not be too hard to determine whether a student's activities are likely to have such an effect. Consequently, we do not find the Tinker-Burnside test to be of such an unreasonable level of generality that Allred and Harland could not have been expected to apply it in this case. Because this standard is "clearly established," is not at an unreasonable high level of generality, and when applied to the facts of Holloman's case yields a fairly determinate result that should have been clear, Allred and Harland are not entitled to summary judgment on qualified immunity grounds against Holloman's Speech Clause claim concerning his right to affirmative

> expression. The Tinker-Burnside principle gave them "clear notice" that their conduct violated Holloman's constitutional rights; unlike the dissent, we believe that teachers are well equipped to "readily determine what conduct falls within" the Tinker-Burnside standard.

Holloman, 370 F.3d at 1279-80.

The Tinker-Burnside standard gave Green, Braaten, and Spears clear notice that on-campus pure student expression that has, or is likely to have, no or only a negligible disruptive effect on classroom order or the educational process is protected by the First Amendment. Furthermore, Burnside gave them specific notice that students wearing buttons in these circumstances is protected speech. If K.B. proves that his speech had or was likely to have only a negligible disruptive effect on classroom order and the educational process, then Green, Braaten, and Spears are not entitled to qualified immunity.[7]

IV. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that Plaintiff's Motion Seeking Leave to Amend Complaint [Doc. 10] is **GRANTED** and Defendants' Motion to Dismiss [Doc. 8] is **DENIED**.

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[7] Aside from contending that K.B.'s speech was not protected by the First Amendment, Defendants made no argument that the official capacity claims against Green, Braaten, and Spears should be dismissed.

The Clerk is **DIRECTED** to docket the Proposed Complaint [Doc. 10-1] as the Second Amended Complaint.

IT IS SO ORDERED this 29th day of April, 2019.

MARK H. COHEN
United States District Judge