IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 15-cv-01925-RPM

ERIK WILK,
DEREK WILK, and
JAMI WILK,

Plaintiffs,

v.

ST. VRAIN VALLEY SCHOOL DISTRICT,
JOHN CREIGHTON, JOIE SIEGRIST, BOB SMITH, DEBBIE LAMMERS, JOHN AHRENS, PAULA PEAIRS, and MIKE SCHIERS, members of the District's Board, in their individual and official capacities,
DON HADDAD, Superintendent of Schools, in his individual and official capacity,
GREG WINGER, Expulsion Officer of the District, in his individual capacity,
MATTHEW BUCHLER, Principal of Erie High School, in his individual capacity,
MARC VASQUEZ, in his individual capacity,
DAN NIEMOTH, Erie Police Department, in his individual capacity, and
AARON HADDOX, Erie Police Department, in his individual capacity,

Defendants.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

After being expelled from Erie High School during his junior year, Erik Wilk was arrested and charged with a violation of C.R.S. § 18-9-109(6) reading:

> (a) A person shall not knowingly make or convey to another person a credible threat to cause death or to cause bodily injury with a deadly weapon against:
>
> (I) A person the actor knows or believes to be a student, school official, or employee of an educational institution.

Erik was acquitted of that charge after a bench trial before a Weld County District Court Magistrate in September, 2014.

Erik and his parents, Derek Wilk and Jami Wilk, filed this civil action on September 4,

2015, seeking damages under 42 U.S.C. § 1983 from the named defendants for infringement of the rights protected by the First, Fourth and Fourteenth Amendments to the United States Constitution. The plaintiffs filed an Amended Complaint with the initial filing and have since agreed to dismiss claims made against the members of the School Board and official capacity claims against individual defendants.

The defendants remaining are: with respect to the expulsion, the St. Vrain Valley School District; Don Haddad, Superintendent of Schools; Greg Winger, Expulsion Officer; and Matthew Buchler, Principal of Erie High School; and, with respect to search and arrest warrants affidavits submitted to the Weld County District Court, Chief Marc Vasquez, Detective Dan Niemoth, and Sergeant Aaron Haddox, of the Town of Erie police department.

After full discovery, the school defendants and Erie police officers filed separate motions for summary judgment dismissing all claims.

Oral arguments were heard on July 18, 2017.

There are factual disputes but the following material facts are not subject to genuine dispute:

The initiating event was on February 28, 2014, when teacher Erin Brueggeman told Buchler that two students reported a conversation they had the previous evening with Sean McGinnis, a classmate and friend of Erik, which they perceived as a threat that Erik was planning to shoot up the school. The words used are in dispute but Buchler was alarmed and called Sgt. Haddox at the Erie Police Department. He asked Buchler to come in to give more information.

Coincidentally, shortly after this call, Haddox saw Erik and Sean McGinnis skateboarding near the police station. He recognized them and asked them to come into the

station to talk, letting them know they were free to leave.

Buchler arrived at the station and was present when Haddox talked with Sean who said that he had talked with the cheerleaders, mentioning shooting up the school and saying that he would not do it but his friend Erik Wilk hated the place more than he did so he would more likely do it but that it was not likely that Erik would do it.

When Haddox interviewed Erik in the presence of his mother and with his father participating by telephone, Erik appeared shocked and denied any plan to attack the school. Both parents and Erik said there were no firearms in their residence. The parents consented to a search of Erik's bedroom which took place. No evidence of a plan to attack the school was found. There were military items, including uniforms and empty ammunition boxes which the Wilks said were related to Erik's hobby of performing reenactment of World War II events with a group that had that interest.

Cole McGinnis, Sean's father, consented to a search of Sean's bedroom during which Haddox saw firearms in a locked gun safe. Cole McGinnis said that his ex-wife had the only key to the safe and she lived in Colorado Springs.

Haddox interviewed the cheerleaders on March 1 but could not determine what Sean actually said to them about a threat to the school. Lacking that information Haddox wrote a report finding the case should be cleared as unfounded with no follow up needed.

Principal Buchler had a different view. He had looked at social media pages and found photos of Erik in military uniform, holding firearms, images of Nazi soldiers and a "like" of a graphic novel character named "Johnny the Homicidal Maniac." Buchler was present during the interviews of Erik and Sean at the EPD. Before leaving he told the Wilks that he would conduct an investigation for the school and asked that they meet with him on Monday, March 3, and for

Erik to write a "due process statement."

That meeting was held on March 3 at Erie High School at 7:00 a.m. Stacy Davis, the District's Director of Safety and Security attended with Buchler. The Wilks were told that the purpose was to begin a formal threat assessment pursuant to the District's protocol for evaluating potential threats to safety of the school community. Erik submitted a written due process statement denying any intent to attack the school. Buchler and Davis told Erik he should not discuss this threat assessment with the students.

Later in the day a teacher told Buchler that Erik had created a class disturbance by saying he had been questioned and that he had drawn a figure shooting a flame thrower and throwing a hand grenade. Buchler informed Derek Wilk about this report and the drawings and said that Erik was "creating a climate of fear" that was "detrimental to the welfare of students." Buchler invited Erik to respond in writing which he did saying he was "sorry for the mess" he had caused and assuring that he had "nothing against the school or staff" and "I do not perceive of myself as a threat, but understand how I may be perceived by others through the way I dress, act and speak." Ex. D (Doc.65-4).

Buchler proceeded with a threat assessment, gathering information from teachers and administrators and reviewing written materials in journals and notebooks. The team of Buchler, the assistant principal and two teachers signed off on a threat assessment form concluding that Erik was a "High Level" threat appearing to pose an imminent danger. Ex. E (Doc. 65-5). The form does not include specific factual findings to support that conclusion.

On March 5, 2014, Buchler wrote to Derek Wilk notifying him that Erik was suspended from school and that a recommendation for expulsion for detrimental behavior had been made

with an expulsion hearing to be held within 10 days. Ex. G (Doc. 65-7).[1]

On March 7, Buchler and Assistant Superintendent Mark Mills went to the Erie Police Department expressing their concerns and a sense of urgency because of the threat assessment and their view that Erik and Sean presented a danger to the school. Chief Vasquez asked Commander Stewart to contact the Weld County District Attorney's Office and the municipal prosecutor to assess probable cause. Both of them opined that the information did not give probable cause for an arrest.

Greg Winger, the District Expulsion Hearing Officer, conducted an expulsion hearing on March 13, 2014, attended by all three Wilks and their attorney, Igor Raykin. Buchler presented the School's information. Erik and his parents were heard and Raykin made the argument that there was no evidence of a credible threat. The threat assessment was discussed but the form was not presented.

Winger sent his report to Superintendent Haddad on March 14, 2014, recommending expulsion pursuant to C.R.S. § 22-33-106(1)(c) because Erik was a credible threat to engage in violence. Ex. K (Doc. 65-11).

On March 16, 2014, Derek Wilk, Jami Wilk and Erik Wilk wrote to Haddad complaining about Buchler and asserting that they did not have time to review the information provided by Buchler at the expulsion hearing and respond appropriately. Ex. P (Doc. 65-16). As a result, Haddad ordered a second expulsion hearing which was held by Winger on March 21, 2014. The Wilk parents and their lawyer appeared but Erik was not present because he had been arrested on March 18. Winger made a second recommendation for expulsion and on March 24, 2014, Haddad sent a letter to the Wilk parents notifying them that Erik was expelled from the School

[1] A Colorado statute, C.R.S. § 22-33-105, requires a hearing before expulsion. The plaintiffs do not dispute compliance with that statute.

District for one year, March 21, 2014, through March 20, 2015. Ex. Q (Doc. 65-17).

Erik's arrest was pursuant to an arrest warrant based on an affidavit authored by Niemoth on March 17, 2014. At the same time Haddox submitted an affidavit for a warrant to search the Wilk residence. Applications for the arrest of Sean McGinnis and search of the McGinnis residence were submitted at the same time. The affidavits have the same language for probable cause. All four affidavits were approved by a Weld County deputy district attorney and all four warrants were signed by a Weld County District Judge on the evening of March 17. The warrants were executed simultaneously on March 18 by the Erie Police Department and Boulder County Sheriff's officers. Sean McGinnis and Erik Wilk were arrested.

The Erie Police Department had changed its view of the case as a result of additional investigation initiated by Buchler's call to Vasquez on March 17 that two more students, Jonathan Nations and Cameron Berger, had reported threats. Officer Alfredo Nevarez went to the school to interview those two students.

Nations told Nevarez that he had been in school with Erik Wilk and Sean McGinnis since second grade and knew them "pretty well." He told Nevarez that McGinnis had mentioned specific school personnel who were on a list of targets in a potential shooting, including Principal Buchler, Assistant Principal Doug Kudrna, Dean of Students Paul Stecina, and Campus Supervisor Molly Irwin. Nations reported that he had heard about a notebook with specific plans to target the school, although he had not seen the notebook.

Cameron Berger told Officer Nevarez that he worked with McGinnis at a local ice cream shop, Snowcap Creamery and Café, and that McGinnis had been acting weird lately and was upset because he and Erik Wilk were being expelled. Like Nations, Cameron Berger stated that potential targets of a school attack were Buchler, Kudrna, and Stecina. He further reported that

his mother, April Berger, had been at Snowcap Creamery and Café the previous weekend and had a conversation with McGinnis about his and Erik Wilk's purported plan to "shoot up the school."

Officer Nevarez reported the two student interviews to Commander Stewart, who was incident commander and in charge of the investigation on March 17. Commander Stewart briefed Chief Vasquez, after which Det. Niemoth was dispatched to again interview the two students and April Berger.

When interviewed by Det. Niemoth, Nations repeated that McGinnis had told him that Erik Wilk wanted to shoot Buchler and other administrators, that "Erik had been planning it for a while," and that "it was all in the notebook that Erik had." Cameron Berger confirmed his earlier statements that McGinnis had been acting "weird" and had been talking about being expelled "and how he and Erik were like going to shoot the school up." Cameron Berger also said again that McGinnis named specific people—Buchler, Kudrna, and Stecina.

When Det. Niemoth interviewed April Berger about her March 15 conversation with Sean McGinnis at Snowcap Creamery, she said she went to Snowcap to visit Cameron, who was working with Sean that night. She first spoke with the bartender, who told her that Sean was talking about shooting up the school but the bartender did not take him seriously and opined that Sean was just a "crazy little punk kid." Her recorded interview with Det. Niemoth includes the following account of part of her conversation with McGinnis:

> And then he started talking about this kid Erik and how they had these plans to shoot up the school. And he -- you know, they had been talking about it for a while now, a few months now. And Erik -- he called him "the Nazi." He just kept saying -- referring to him as "the Nazi." And he said, He's my best friend and I don't really want to do it. I'm not happy with my life, but he's my best friend and I'm going to do what he wants me to do. And I said, What about your parents? Can you talk to your parents about this? Can they get you help? And he said, I hate my parents. I might take them out, too. And my parents hate me.

> And I said, You have so much to live for…. Just get through high school. Get through high school. And he said, I don't care. I don't want a future; I don't want my family; I don't want any of that. And he said, And now that we just got expelled, Erik is saying it's go time.
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> And so finally, after all of that, I started crying and I hugged him. I was like, Can I hug you? And I hugged him and I was like, Whatever you do -- whatever you decide to do, don't hurt my son. Please don't hurt Cameron. He's a good kid and we love him. And he was, Oh, no, no, we love Cameron. Cameron has always been nice to me and Erik in the halls. And we have – don't worry, we have our – we're going to go like this to Cameron (indicating). And he goes, We have a bunch of people that we're going to go like this to (indicating). There's those who we know are going to get out and those who we know aren't going to get out. And -- but the one thing he kept saying was "Buchler is the first to go." "Buchler is the first to go."
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> … He … called [Buchler] a prick and an asshole and a piece of shit. And I wish I knew where he lived and he's the first to go. And he said that -- just things like the -- Eric and Dylan, the Columbine killers, are heroes. And how appropriate is it that one of us is already named Erik? And what they did was heroic.
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> He -- excuse my language again, but he said, They're our fucking heroes, man. They were heroes…. And he was like, We -- we can only be so lucky to follow in the footsteps that they laid, or something like that. Like, If we could take out that many people, it was like 13, and the principal, or something like that. And just was going on and on. And like had light in his eyes. He was like -- you know, was just really excited about it. And he was like, And how appropriate that one of us is already named Erik.

Ex. W, Trans. of Recorded Interview of Cameron and April Berger (Doc. 55-3), 9:18–19:13 (excerpts).

Chief Vasquez believed that by the afternoon of March 17 there was sufficient evidence to establish probable cause, and he, along with Sgt. Haddox, Det. Niemoth, and Commander Stewart, felt a sense of heightened urgency given the information obtained from additional witnesses, including the reports that Erik Wilk and Sean McGinnis were upset about their expulsion proceedings and that Wilk had said it was "go time." Niemoth and Haddox were

directed to proceed to obtain arrest and search warrants immediately.

On the day of the arrests, March 18, a Colorado Bureau of Investigation agent went with Niemoth to interview Sear McGinnis at the detention center. After a *Miranda* waiver and with his father's consent, Sean gave details of a plan to attack Erie High School and said that Erik had military gear. Upon receiving that information the deputy district attorney instructed Niemoth to prepare an affidavit for a second search warrant of the Wilks' residence. He did so on March 19 and the second warrant was issued and executed that day resulting in the recovery of military items.

The Wilks appealed the expulsion decision to the Board of Education. The Board held a hearing in executive session on April 16, 2014.

Each Board member was provided a packet of information relating to the expulsion decision before the hearing. Plaintiffs object to the content of some of the information that was included in the packet, but do not dispute that they were provided a copy of the same packet in advance of the hearing. Plaintiffs attended the hearing with their attorney and had the opportunity to object to any evidence and made statements and arguments.

The Board voted unanimously to affirm the expulsion decision. The Wilks were apprised of this decision both orally and in a letter dated April 23, 2014, signed by the Board President. The letter stated the Board found that District procedures had been followed and that there was a sufficient and reasonable factual basis to support Haddad's determination that Erik's behaviors were detrimental to the welfare or safety of students or school personnel. It further found that Erik's behaviors created apprehension and fear among students and teachers that Erik, either acting alone or with a friend, would engage in a serious act of violence at school.

Erik's trial was conducted by Weld County Magistrate Gonzales in September, 2014. The

magistrate denied a motion for judgment of acquittal but after hearing all of the evidence determined that the charge had not been proven beyond a reasonable doubt.

The affidavits supporting the arrest warrants for Sean McGinnis and Erik Wilk are identical. In each the date of the offense is February 27. That is when Sean talked to the cheerleaders. There is no evidence of any statements by Erik on that date. That error is not material because Sean's statements include numerous threatening statements made by Erik to him and those statements support a charge with different dates. An error of a date even in an indictment or information would not result in a dismissal at trial if the actual date is near that alleged.

It should be noted that the statute has a pre-emptive purpose. It criminalizes threats of attack to enable law enforcement to prevent their happening. It is suggested that Sean's statements should not have been taken seriously given the immaturity or impulsiveness of teenagers. In different times that might be considered. But both the Erie police officers and the school officials were working in the shadow of the Arapahoe and Columbine High School ruthless killings by teenagers.

The plaintiffs claim that the searches and the arrest of Erik were violations of the Fourth Amendment because the affidavits of Niemoth and Haddox included false or misleading information and omitted material facts which would negate probable cause to believe that Erik had committed a crime and that their residence contained evidence of that crime. All of the plaintiffs have standing to challenge the searches of their house but only Erik's liberty interest was affected by his arrest.

Since *Franks v. Delaware*, 438 U.S. 154 (1978), it has been clearly established law that a search or arrest warrant is void if issued on the basis of an affidavit that includes a false

statement made knowingly and intentionally or with reckless disregard for the truth and the statement is necessary for a finding or probable cause. The Tenth Circuit Court of Appeals has extended that principle to the omission of material facts. *United States v. Avery*, 295 F.3d 1158, 1166 (10th Cir. 2002).

The thrust of the plaintiffs' claim is that the affidavits are based on the statements of Sean McGinnis who the police knew was not credible given the variability of what the witnesses said he said. There is nothing directly attributable to Erik. What does implicate him are the reports from Buchler and the threat assessment, but that document was not seen by the police officers. The expulsion was referred to in the affidavits as an additional factor.

Whatever this Court may determine about probable cause from these affidavits and the errors and omissions asserted by the plaintiffs, the Erie police defendants are entitled to qualified immunity using the objective standard of a reasonable police officer in the same circumstances. The affidavits were affirmed by a prosecuting attorney and relied on by a district judge. There was an undeniable sense of urgency as a result of April Berger's statements, including that Sean had said the expulsions made it "go time."

These affidavits would not in themselves provide qualified immunity if they were false or misleading. It must have been clear upon reading them that the primary source of information about the criminal conduct was Sean McGinnis but the statements attributed to him by five witnesses made at different times and places are sufficiently consistent to warrant belief in what he said about Erik's statements about a plan to attack the school and kill Buchler and other specified school officials. A reasonable officer would also give credit to the expressed concerns of school officials about Erik's behavior.

The Erie police defendants are entitled to qualified immunity.

The plaintiffs claim that the school defendants violated the First Amendment causing economic and non-economic damages to them. Derek and Jami Wilk do not claim or argue that their own free expression was suppressed, and they cite no authority supporting a right to recover indirectly for a violation of Erik's right of free expression.[2]

Plaintiffs have failed to meet their burden of showing that any asserted violation of Erik's First Amendment rights in the context of this case was a violation of clearly established law.

A plaintiff "shoulders the responsibility in the first instance of citing what [he] thinks constitutes clearly established law…." *A.M. v. Holmes*, 830 F.3d 1123, 1152 (10th Cir. 2016). A plaintiff cannot establish a violation of clearly established law at a "high level of generality," but rather the clearly established law must be "particularized" to the facts of the case. *White v. Pauly*, 137 S.Ct. 548, 552 (2017).

Plaintiffs cite only *Worrell v. Henry*, 219 F.3d 1197 (10th Cir. 2000), and *Klen v. City of Loveland*, 661 F.3d 498 (10th Cir. 2011), arguing from these cases that in 2014 "the elements of a First Amendment retaliation claim were clearly established in the Tenth Circuit." Plaintiffs' reliance on general principles from these authorities in the unique circumstance of this case is insufficient. *Worrell* addressed the application of First Amendment principles in the context of an employer's alleged withdrawal of a job offer as retaliation for truthful testimony in a murder trial. *Worrell*, 219 F.3d at 1200. *Klen* involved defendants' alleged imposition of deliberate delays and unreasonable requirements for a building permit sought by plaintiffs, in retaliation for criticism of city employees. *Klen*, 661 F.3d at 501. Plaintiffs have failed to identify a case even remotely similar to this one in which school officials were held to have violated a student's First Amendment rights, such that the unlawfulness of the school defendants' actions would have

[2] Because Erik is not a minor, the parents do not seek to recover on his behalf, but rather for themselves.

been "beyond debate" when they occurred. *See White*, 137 S.Ct. at 551.

Plaintiffs have also failed to present evidence sufficient to survive summary judgment on their claim of a First Amendment violation. Their First Amendment retaliation claim requires proof: (1) that Erik was engaged in constitutionally protected activity; (2) that the school defendants' actions caused Erik to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the school defendants' adverse action was substantially motivated as a response to the exercise of constitutionally protected conduct. *Worrell*, 219 F.3d at 1212.

Student speech may be limited when school authorities reasonably believe a student's uncontrolled exercise of expression might "substantially interfere with the work of the school or impinge upon the rights of other students." *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th Cir. 2000) (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 509 (1969) (holding that black armbands worn by students were protected speech absent facts that might reasonably lead school officials to forecast the expression would lead to "substantial disruption of or material interference with school activities")).

Here, to the extent that the school defendants' decision to discipline Erik was "substantially motivated" by Erik's drawings, writings, doodles, and statements in class,[3] the undisputed facts show that those expressions were only part of the much larger body of evidence that precipitated and was considered during the disciplinary proceedings. It is undisputed that students and other witnesses—including Sean McGinnis, a self-described co-participant—provided evidence of a potential plan to attack Erie High School. Erik's expressions

[3] There is serious doubt whether the school defendants' actions were even "substantially motivated" by Erik's expressions. The investigation was triggered by reports from two students about Sean McGinnis' discussion of a possible plan to "shoot up the school," and by the time of the decision to expel Erik there was substantial additional evidence along those lines.

were additional evidence supporting an inference that he might, in fact, be capable of executing the threat McGinnis was describing. Teachers, students, and others voiced concern and fear generated by these expressions. Based on these undisputed facts, there is no genuine basis to dispute that the individual school defendants reasonably believed that, in the context of all of the evidence, Erik's expressions might substantially interfere with the work of the school or impinge upon the rights of other students. Basing Erik's discipline in part on the violent themes and tendencies his statements, drawings, and writings contained was therefore not a constitutional violation.

The plaintiffs claim a denial of due process under the Fourteenth Amendment in the expulsion hearings. They contend that the law governing Erik's procedural due process rights is clearly established by *Goss v. Lopez*, 419 U.S. 565, 574 (1975); *Patrick v. Miller*, 953 F.2d 1240, 1244 (10th Cir. 1992); and *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). *Patrick* and *Mathews* addressed procedural due process requirements in proceedings concerning, respectively, termination of employment and termination of social security disability benefits. They provide no specific guidance to school officials in student disciplinary proceedings. *Goss* involved school disciplinary proceedings, but held merely that "due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Goss*, 419 U.S. at 581–82; *see also id*. at 579 ("students facing suspension … must be given some kind of notice and afforded some kind of hearing"). The Court expressly noted that it was addressing only short suspensions, and that "[l]onger suspensions or expulsions … may require more formal procedures." *Id.* at 583. It did not elaborate, however, nor have later decisions of either the Supreme Court or the Tenth

Circuit.

Plaintiffs' reliance on these cases fails to meet their burden of establishing that reasonable school officials in the circumstances of this case would have known from clearly established law that the disciplinary proceedings provided to Erik violated his procedural due process rights.

Plaintiffs also fail to present evidence sufficient to show a procedural due process violation. The undisputed evidence establishes that the school defendants provided Erik and his parents with notice (typically both oral and written) at each step in the disciplinary proceedings; multiple opportunities, including three formal hearings, to hear and respond to the evidence and arguments being made against him; the right to appeal; and the right to be represented by an attorney. Plaintiffs availed themselves of those opportunities.

Plaintiffs argue that these procedures did not provide an opportunity to be heard at a "meaningful time and in a meaningful manner" and "protect against unfair or mistaken findings of misconduct and arbitrary exclusion from school." They cite no authority defining when an opportunity to be heard is or is not "meaningful" beyond the minimal requirements established in *Goss*. *See West*, 206 F.3d at 1366 ("*Goss* sets forth the requirements of a 'meaningful' hearing … in the context of suspensions of ten day [sic] or less"). Plaintiffs' lengthy recitation of asserted instances of unfairness does not create a genuine issue of material fact on the issue of whether they were provided procedural due process. They disagree with school officials' thought processes, inferences, conclusions, determinations of credibility, weighing of the evidence, reliance on hearsay or speculation, and, ultimately, their decisions on the merits of the disciplinary case. None of the cited instances creates a genuine material fact issue on whether Plaintiffs received procedural due process as defined by existing law. *See id.* at 1364 ("public

school districts are not courts of law and their disciplinary policies and procedures do not equate with penal codes"); *see also Remer v. Burlington Area School Dist.*, 286 F.3d 1007, 1010 (7th Cir. 2002) (school expulsion procedures must provide a meaningful opportunity to be heard; they need not take the form of a judicial or quasi-judicial trial).

Plaintiffs also assert that they were deprived of a meaningful opportunity to review and respond to evidence—specifically, the threat assessment report—because they were never given a copy of it. But they acknowledge Derek Wilk was allowed to review that document the day before the first expulsion hearing, and another opportunity to review and respond to it at the second, continued expulsion hearing. Plaintiffs do not explain how the failure to receive a copy they could keep affected Erik's, his parents', or his attorney's ability to understand and respond to the allegations made against him.

Similarly, Plaintiffs' general arguments of possible bias are unsupported by specific evidence, and fail to provide evidence or a cogent explanation of how, even hypothetically, the alleged bias of any of the individual school defendants could have permeated the entire process in which Principal Buchler, Expulsion Officer Winger, Superintendent Haddad, and finally the entire School Board considered the evidence and allegations against Erik and determined the appropriate discipline.

The individual school defendants are therefore entitled to qualified immunity on Plaintiffs' procedural due process claim.

Finally, the plaintiffs claim that expulsion from District schools for one year is a violation of substantive due process. Assuming the existence of an interest triggering substantive due process guarantees,[4] a school's decision to impose disciplinary action will be upheld in the

[4] *See Butler v. Rio Rancho Public Schools Bd. of Educ.*, 341 F.3d 1197, 1200 (10th Cir. 2003) (observing that neither the Supreme Court nor the Tenth Circuit had clarified what type of

face of a substantive due process challenge "if the decision is not arbitrary, lacking a rational basis, or shocking to the conscience of federal judges." *Butler,* 341 F.3d at 1200-01 (citing *Tonkovich v. Kansas Bd. of Regents,* 159 F.3d 504, 528 (10th Cir.1998); *Curtis v. Oklahoma City Pub. Sch. Bd. of Educ.*, 147 F.3d 1200, 1215 (10th Cir. 1998); *Abeyta v. Chama Valley Indep. Sch. Dist.*, 77 F.3d 1253, 1256 (10th Cir. 1996)).

"There is no doubt [a school] has a legitimate interest in providing a safe environment for students and staff." *Butler,* 341 F.3d at 1201. Based on the undisputed facts in this case, it was not unreasonable, arbitrary, or conscience-shocking for the school defendants to conclude that expulsion was an appropriate discipline based on the considerable evidence of a credible threat to the safety of students and staff at EHS.

Even if these claims had some merit the individual school defendants are entitled to qualified immunity.

Plaintiffs' failure to provide evidence supporting a constitutional violation by a District employee is fatal to their claim against the District as well. *Hinton v. City of Elwood, Kan.*, 997 F.2d 774, 782–83 (10th Cir. 1993).

In addition, even if there were an underlying constitutional violation, Plaintiffs have provided no evidence to support a finding of District liability. Plaintiffs must show that the District through its deliberate conduct was the "moving force" behind the violation. *Board of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 404 (1997). This causal connection may be established by proof that a governing body exercised its decisionmaking authority "with deliberate indifference to the constitutional rights of those affected by its decisions." *Ware v. Unified Sch. Dist. No. 492, Butler Cnty., State of Kan.*, 902 F.2d 815, 819 (10th Cir. 1990).

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interest triggers substantive due process guarantees).

Alternatively, a municipality may be found liable under a ratification theory if a final decisionmaker "ratifies an employee's specific unconstitutional actions, as well as the basis for these actions." *Bryson v. City of Okla. City*, 627 F.3d 784, 790 (10th Cir. 2010).

Plaintiffs provide nothing more than that the District's Board of Education made the final decision to expel Erik, and the Board is the District's final policymaker. They have provided no evidence that would support a finding that the Board made its decision with deliberate indifference to Erik's constitutional rights, or that it ratified any employee's specific unconstitutional actions.

ORDER

Based on the foregoing, it is

ORDERED that pursuant to agreement of the parties, Plaintiffs' claims against Defendants John Creighton, Joie Siegrist, Bob Smith, Debbie Lammers, John Ahrens, Paula Peairs, and Mike Schiers, in their individual and official capacities, and against Don Haddad in his official capacity, are hereby dismissed with prejudice; it is

FURTHER ORDERED that the motion for summary judgment filed by the school defendants (Doc. 65) is GRANTED, and judgment shall enter dismissing Plaintiffs' claims against St. Vrain Valley School District, Don Haddad, Greg Winger, and Matthew Buchler; and it is

FURTHER ORDERED that the Erie Defendants' Motion for Summary Judgment (Doc. 55) is GRANTED and judgment shall enter dismissing Plaintiffs' claims against Defendants Dan Niemoth, Aaron Haddox, and Marc Vasquez.

DATED: July 27, 2017

BY THE COURT:

s/Richard P. Matsch

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Richard P. Matsch, Senior District Judge