IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

PARENTS, FAMILIES, AND FRIENDS OF LESBIANS AND GAYS, INC., et al.,	)	
Plaintiffs,	)	
v.	)	**Case No. 2:11-cv-04212-NKL**
CAMDENTON R-III SCHOOL DISTRICT, et al.,	)	
Defendants.	)	

DEFENDANTS' REPLY SUGGESTIONS IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT WITH PREJUDICE

COME NOW Defendants Camdenton R-III School District ("District") and Timothy E. Hadfield, in his individual and official capacity, by and through their undersigned counsel, and hereby submit their Reply Suggestions in Support of their Motion to Dismiss Plaintiffs' First Amended Complaint with Prejudice and state as follows:

Introduction

Plaintiffs' Suggestions in Opposition to Defendants' Motion to Dismiss Plaintiffs' Complaint fail to demonstrate that Plaintiffs meet the requisite level of standing to pursue their claims against the Defendants or that they have stated a claim upon which relief can be granted. Further, as Defendant Hadfield is entitled to qualified immunity from Plaintiffs' claims asserted against him in his individual capacity and the claims asserted against him in his official capacity are redundant to the claims asserted against the District, Defendant Hadfield must be dismissed from this case.

Argument

I. The Organizational Plaintiffs Lack Standing to Bring this Lawsuit.

In Plaintiffs' Suggestions in Opposition to Defendants' Motion to Dismiss Plaintiffs' Complaint (hereinafter "Suggestions in Opposition"), Plaintiffs attempt to support their standing argument based on the principle that the First Amendment right to freedom of speech belongs to both the willing speaker and the recipient. (Suggestions in Opposition p. 1, 5). However, Plaintiffs' reliance on this principle is misplaced, as the organizational Plaintiffs (Parents, Families, and Friends of Lesbians and Gays, Inc., Dignity, Inc., Matthew Shepard Foundation, and Campus Pride, Inc.) ***have no right to speak to public school students in the first place***. Plaintiffs state that, "website publishers have served as plaintiffs in many of the leading cases challenging libraries' use of Internet filtering software." (Suggestions in Opposition p. 3). However, the cases Plaintiffs cite in support of this assertion, *Mainstream Loudoun v. Bd. of Trustees of Loudon County Library*, 24 F. Supp. 2d 552 (E.D. Va. 1998) (decided before *United States, et al., v. American Library Association, Inc. et al.*, 539 U.S. 207 (2003)) and *Bradburn v. N. Cent. Reg'l Library Dist*., 231 P.3d 166 (Wash 2010), are cases about public libraries, and are not about the right of website publishers to speak to public school students through the Internet.[1]

Plaintiffs' claims must be evaluated "in light of the special characteristics of the school environment." *Tinker v. Des Moines Sch. Dist*., 393 U.S. 503, 506 (1969). Examining Plaintiffs' claims in light of the school environment and taking into account the District's limited purpose in providing Internet access to students at school, the Organizational Plaintiffs do not have standing to challenge the District's Internet filtering practices. To open the door to grant

[1] Similarly, the other cases relied upon by Plaintiffs (See Suggestions in Opposition p. 4) to bolster their standing argument are not about communication with public school children and are inapposite to this matter where forum analysis is inapplicable. Further, the cases cited by Plaintiff (See Suggestions in Opposition p. 4) do not address standing.

standing to every organization with a website that wants to communicate their ideas to public school students, when the District has not created a forum for such expression, is a dangerous path to travel and Defendants urge this Court not to open this door.

II. Plaintiff Jane Doe's Claims Must be Dismissed as Jane Doe Lacks Standing to Assert Claims as She has not Plead a Particularized "Injury-In-Fact" and She has not Plead a Facial Challenge to District Policies.

Plaintiffs cannot overcome the fact that Jane Doe's vague allegations in the First Amended Complaint fail to demonstrate that she suffered an injury that is, (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical," in order to meet the essential elements of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In the First Amended Complaint, Plaintiff Jane Doe has not set forth *any* facts which would put the District on notice that she has attempted to access particular websites at school and was denied, or that she utilized the District's practice and policies to make an anonymous request and was denied access. *See generally* First Amended Complaint.

As Plaintiffs have failed to properly assert an as-applied challenge to District Internet filtering practices, it appears in the Suggestions in Opposition that Plaintiffs attempt to distinguish *Heinkel v. Sc. Bd. of Lee County, Fl*, 194 Fed. Appx. 604 (11th Cir. 2006), by implying that Jane Doe is making a facial challenge to the District's practices. (Suggestions in Opposition p. 7). However, simple review of the First Amended Complaint makes it clear that Plaintiffs have (attempted to) plead this matter as an as-applied challenge to District Internet filtering practices. *See egs.* ¶¶ 79, 85 of the First Amended Complaint, "Defendants' Internet filtering policies, customs and practices violate the right of Plaintiff Jane Doe to access information…." If Plaintiffs are now attempting to state that they are asserting a facial challenge to the District's practices, the First Amended Complaint is insufficiently drafted to support this tactical change. Indeed, the Complaint is devoid of facts which put the District on notice as to

whether Plaintiffs are asserting a facial challenge based on overbreadth, vagueness, or otherwise. Nonetheless, facial challenges are disfavored as they often "rest on speculation" and "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 450 (2008)(internal quotations omitted).

Indeed, it is clear from the Suggestions in Opposition that Plaintiffs cannot identify what type of constitutional challenge Jane Doe is asserting. At one point it appears as though Plaintiffs are making a claim of prior restraint (See Suggestions in Opposition p. 7, stating, "A Plaintiff does not have to request permission and be denied access in order to challenge a viewpoint based prior restraint.") However, the Supreme Court has made it clear that it is a mistake to extend "prior restraint to the context of public libraries/collection decisions. A library's decision to use filtering software is a collection decision, not a restraint on private speech." *American Library Association, Inc. et al.,* 539 U.S. at 209 n. 4.

Plaintiffs also state that Plaintiff Jane Doe has standing to challenge the "unconstitutional stigma that the District's policy places on particular disfavored viewpoints." (Suggestions in Opposition p. 7). However, Plaintiffs seem to intentionally ignore the fact that there is no element of student stigma in this matter as the District has several anonymous avenues in place for requesting access to blocked websites. *See* Affidavit of Timothy E. Hadfield attached to Defendants' Suggestions in Support of their Motion to Dismiss and incorporated herein by reference, at ¶¶ 10, 13 and Board Policy EHB-AP and IIAC-R attached thereto. Indeed, Plaintiffs eagerly seek to sweep aside the ease of the District's process for requesting access to

blocked websites, which has been incorporated into District Board of Education Policies to provide alternative and anonymous avenues for District students and employees to make requests for access to particular websites. As noted in the concurring opinion in *American Library Association, Inc. et al*., by Justice Kennedy, that if upon request by a public library patron a librarian will unblock filtered material without significant delay, "there is little to this case." *Id.* at 214.

As Jane Doe's claims are too speculative, she has not plead an "injury in fact", she has not properly asserted a facial challenge to District Policies, and she is essentially asking this Court to render an advisory opinion, Jane Doe's claims should be dismissed.

III. Defendant Hadfield Must be Dismissed from this Case.

Defendant Hadfield is entitled to qualified immunity from Plaintiffs' claims asserted against him in his personal capacity and thus, Count III of the Amended Complaint should be dismissed. As the claims asserted against Defendant Hadfield in Counts I and II of the Amended Complaint are asserted against him in his official capacity and these claims are redundant to the claims asserted against the District, these claims should also be dismissed and Defendant Hadfield must be dismissed from this case.

In order to defeat Defendant Hadfield's right to qualified immunity, Plaintiff must show: (1) that Defendant Hadfield violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct. *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2080 (2011). Plaintiffs cannot demonstrate either of these elements. Specifically, Plaintiffs cannot demonstrate that the rights of website publishers to speak to public school children through the Internet or the rights of public school students to have unrestricted access to material on the Internet at school are "clearly established." To the contrary, Plaintiffs have not cited one

case directly on point in this matter and will be unable to as this appears to be a case of first impression in the country.

Qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law," so immunity should not be denied unless existing precedent "placed the statutory or constitutional question *beyond debate."* *Morgan et al., v. Swanson et al.*, 2001 WL 4470233, *6 (5th Cir. 2011)(quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986) and *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2083 (2011)). The constitutional questions to be examined by this Court in the instant matter are certainly not *beyond debate.* To the contrary, as Plaintiffs cannot point to any controlling authority or a "robust consensus of persuasive authority" that controls this case, the law that will be persuasive in this matter is far from "clearly established." *Id.* at 2083; *see also Morgan et al., v. Swanson et al.*, 2001 WL 4470233, *13 (5th Cir. 2011)(granting public school principals qualified immunity because the general state of the controlling law in that matter was "abstruse, complicated, and subject to great debate among jurists.")

Plaintiffs attempt to defeat qualified immunity on the generalization that Plaintiffs have "a clearly established right to freedom of speech without being subjected to viewpoint-based censorship." (Suggestions in Opposition p. 11, 13). However, as noted by the Fifth Circuit on September 29, 2011, in granting qualified immunity to school district principals in a First Amendment view point discrimination case, **the generalized prohibition against viewpoint discrimination is far too abstract to clearly establish the law in this case.** *Morgan et al., v. Swanson et al.*, 2001 WL 4470233, *11 (5th Cir. 2011)(also noting that "there is no categorical ban on view-point discrimination in public schools," and the circuits are divided over this question, specifically as applied to elementary school students).

Additionally, contrary to Plaintiffs' assertions that Defendant Hadfield has violated "clearly established law" the closest case on point to the instant dispute demonstrates that Defendant Hadfield acted properly in his role as the Superintendent of the District, and acted in line with *United States v. American Library Association, Inc. et al.*, 539 U.S. 194 (2003) by utilizing his discretion and selecting categories of material on the Internet to block in order to comply with the Children's Internet Protection Act. As Defendant Hadfield reasonably exercised his discretion and has not violated a clearly established right, Plaintiffs face an insuperable bar to recovery as Defendant Hadfield is entitled to qualified immunity from Plaintiffs' claims as asserted against him in his individual capacity.

As Defendant Hadfield is entitled to qualified immunity and Count III of the Amended Petition must be dismissed, Plaintiffs' remaining claims as asserted against Defendant Hadfield in his official capacity must be dismissed as redundant to the claims against the District. *See e.g. Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989) (finding, "suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself.") Plaintiffs cite several cases from district courts outside of the Eighth Circuit for the notion that this Court has *discretion* not to dismiss the redundant claims against Defendant Hadfield. However, courts in the Eighth Circuit routinely dismiss official capacity claims against public officials as redundant to claims against the entity. *See e.g. Artis v. Francis Howell North Band Booster Association, Inc*., 161 F.3d 1178; *Veatch v. Bartels Lutheran Home*, 627 F. 3d 1254, 1257 (8th Cir. 2010); *McClasky v. LaPlata R-II Sch. Dist.*, 2006 WL 2228971 (E.D.Mo. 2006)(not reported). Accordingly, Defendant Hadfield should be dismissed from this case.

Conclusion

A live case or controversy does not exist between the parties to this litigation and thus, this Court does not have jurisdiction over this matter. Assuming *arguendo*, Plaintiffs had standing to pursue their claims, which they do not, Plaintiffs cannot state a claim for relief against Defendant Hadfield or the District. For the reasons stated herein, this case must be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of October, 2011, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of filing to the following counsel of record:

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