No. 20-1320

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CL.G. ON BEHALF OF HIS MINOR SON,
C.G., THE AGGRIEVED PARTY,
Plaintiff/Appellant
v.
SCOTT SIEGFRIED, SUPERINTENDENT
OF CHERRY CREEK SCHOOL DISTRICT, ET AL.

Defendants/Appellees.

On Appeal from the United Stated District Court
For the District of Colorado
The Honorable R. Brooke Jackson
District Court No. 1:19-cv-03346-RBJ

C.G.'s Opening Brief

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Statement of Related Cases

There are no previous or related cases or appeals.

Jurisdictional Statement

C.G. asserts constitutional claims under 42 U.S.C. §§ 1983, 1985, and 1988, and 28 U.S.C. §§ 2201 and 2202, for which 28 U.S.C. §§ 1331, 1343, and 1367 confer jurisdiction in federal court. The district court had jurisdiction over Plaintiff's claim for attorney fees and costs under 42 U.S.C. § 1988.

The district court entered an order on August 10, 2020 ("Order") granting a motion to dismiss brought by Defendants under Fed. R. Civ. P. 12(b)(6). Order, App. 197.[1] The Order dismissed all of C.G.'s claims. Final judgment was entered on August 10, 2020. App. 198-99.

As an appeal from a final decision of a federal district court, jurisdiction in this Court is proper under 28 U.S.C. § 1291. C.G. timely filed his Notice of Appeal on September 9, 2020. App. 200-201. This Opening Brief is timely filed pursuant to the deadlines imposed by this Court.

[1] All citations to the record refer to the Appellant's Appendix in the hereinafter format: App. [page number].

Issues Presented for Review

(1) Whether the District Court erred in dismissing C.G.'s First Amendment claim against Defendants Thomas, Uhlig, Silva, Stearns, Smith, Siegfried, and the Board when C.G. plausibly pleaded that those Defendants repeatedly suspended and then expelled C.G. for his protected, off-campus, non-disruptive speech in violation of C.G.'s First Amendment rights.

(2) Whether the District Court erred in dismissing C.G.'s First Amendment claim against CCSD and the Board when C.G. plausibly pleaded that their actions, policies, practices, and procedures caused violation of C.G.'s First Amendment rights.

(3) Whether the District Court erred in dismissing C.G.'s procedural due process claim against the District when C.G. plausibly pleaded that the District violated C.G.'s due process rights when it repeatedly suspended C.G. without giving him the opportunity to tell his side of the story and then denied him the opportunity to be heard on the issue of whether his speech was protected and the District had the authority to discipline it.

(4) Whether the District Court erred in dismissing C.G.'s procedural due process claim against CCSD and the Board for maintaining policies and procedures that allow students to be disciplined for off-campus speech without any consideration of whether that speech is protected.

(5) Whether the District Court erred in dismissing C.G.'s civil conspiracy claim against Defendants when C.G. plausibly pleaded that Defendants conspired to deprive C.G. of his First and Fourteenth Amendment rights by working together to create a disruption at the school that could justify their decision to expel C.G.

Statement of the Case

The Snapchat Post

C.G. was at a thrift store with some friends on a Friday night during the school year. App. 45, ¶ 34. They were goofing around and trying on various costume sort of items. *Id.* Three of his friends tried on silly hats, including one that resembled a Russian military hat from the World War II era. *Id.* The boys asked C.G. to take their picture and post it to Snapchat. *Id.* at 46, ¶ 36. C.G. assented and took a photo of his friends smiling and wearing their hats. *Id.* C.G. posted the picture to his Snapchat story with a caption patterned after a popular meme[2] that said: "Me and the boys bout to exterminate the Jews." *Id.* at 46, ¶¶ 36, 38.

The boys depicted in the photo are wearing casual gym clothes and grinning. *Id.* at 47, ¶ 42. They are not holding weapons or otherwise acting threatening. *Id.* Nothing about the boys' clothing or appearance linked them to Cherry Creek School District (CCSD), Cherry Creek High School (CCSD) or any of its sports teams or other activities. *Id.*

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[2] The term meme was coined by evolutionary biologist Richard Dawkins in his 1976 book *The Selfish Game* and was used to describe an idea, behavior or style that rapidly spreads from person to person in a culture, like the spread of a virus. The word meme has been appropriated in the internet age such that it now refers to a virtually transmitted image embellished with text, usually sharing pointed commentary on cultural symbols, social ideas, or current events. *See* https://www.lifewire.com/what-is-a-meme-2483702 (accessed September 8, 2021).

"Me and the Boys" is a meme that originated in November 2018 and quickly grew in popularity on reddit, Instagram, and other social media platforms. *See* https://knowyourmeme.com/memes/me-and-the-boys (accessed September 8, 2021).

C.G.'s caption was inspired by the foreign military hat from the World War II period. *Id.* at 46, ¶ 37. C.G. intended the caption to be humorous, and he believed it was so outrageous that no one could possibly take his words seriously. *Id.*

When C.G. posted the photo and caption, he was away from school, not at a school-sponsored event, and was not posting the photo in connection with a school assignment or activity. *Id.* at 45-47, ¶¶ 33-42. The post was a private one — viewable only by those who were "friends" with C.G. on Snapchat. *Id.* at 46, 47, ¶¶ 38, 43. It was not directed towards anyone, and he did not tag[3] the school, any school employee, or student. *Id.* at 46, ¶¶ 40-41. C.G. used his private cell phone and put the photo on Snapchat stories, which automatically deletes posts after 24 hours. *Id.* at 40, 39, ¶¶ 6, 39. C.G.'s post would have automatically been removed on Saturday, before school was back in session. *Id.* at 40, ¶ 39.

C.G. deleted the image and apologized well before then. *Id.* at 46-47, ¶¶ 39, 45. Upon learning people had a negative reaction to his post, C.G. posted an apology to his Snapchat story that stated: "I'm sorry for that picture it was ment

[3] A Snapchat user can "tag" or "mention" another user in their post. "Tagging" another person in a post is a way to highlight or call attention to another user. Everyone who views the Snapchat story sees all users who are "tagged" or "mentioned" in the story. Any post a user is tagged in will be linked to the tagged user's profile. *See* https://www.romper.com/p/can-you-remove-tags-on-snapchat-heres-what-you-need-to-know-about-the-new-feature-8700020 (accessed September 8, 2021).

[sic] to be a joke." *Id.* at 47, ¶ 45. He deleted the post and apologized that same Friday evening, within hours of the original post. *Id.*

The School Suspends C.G. for Five Days

Before the post was taken down, one of C.G.'s Snapchat friends who was a CCHS student took a screenshot of the post and showed it to her father, who called the police and contacted administrators at C.G.'s public high school. *Id.* at 47, 50, ¶¶ 43, 56. Law enforcement responded to C.G.'s house and quickly determined there was no threat and no crime. *Id.* at 47, ¶ 44. The student's parents asked the school to use the post as an educational opportunity to address the rise in hate speech and hate crimes in the overall community. *Id.* at 50, ¶ 56.

Based on the email from the parents of a single student — who did not urge disciplinary action – and without first talking to C.G. or the students from the photo, school officials decided to suspend C.G. for five school days. *Id.* at 48, ¶ 47.

Despite this decision, it was clear that school officials did not consider C.G. a threat. *Id.* at 48, ¶ 49. On Monday morning, C.G. was allowed to park his car in the school parking lot, walk past an exterior security booth, enter the school, and walk down the hallways past the school security office and to his first period class. *Id.* Security met C.G. at his first period class and escorted him to Dean Thomas's

office. *Id.* at ¶ 50. No one searched his backpack upon his arrival at school or upon entering the office.[4] *Id.* ¶¶ 49-50.

Dean Thomas notified C.G. that he was suspended for five school days. *Id.* at 48, ¶ 51. Despite the fact that school officials had previously acknowledged that C.G.'s Snapchat post occurred off-campus, over a weekend, and not during a school-sponsored activity, C.G.'s five-day suspension was premised on a supposed violation of District Policy JICDA-13, which prohibits verbal abuse on school property or in connection with a school event. *Id.* at 49, ¶ 52. The school provided no explanation as to how C.G.'s Snapchat post violated this policy. *Id.* at 48-49, ¶¶ 51-55.

By 10:30 that morning, school officials (including Principal Silva, Assistant Principal Uhlig, and Dean Thomas) had decided to pursue expulsion of C.G. for the post. *Id.* at 49, ¶ 54. At this point, the school had been contacted only by the one family whose student saw the post. *Id.* at 49, ¶ 55. There had been no media coverage. *Id.*

The School Takes C.G.'s Private Post Public

On Monday afternoon, the principal sent an email to the entire school community making them "aware of an anti-Semitic social media post" from over

[4] Hours later school officials searched C.G.'s backpack and found nothing suspicious, illegal, or dangerous. *Id.* at 48-49, ¶ 51.

the weekend. *Id.* at 50, ¶ 58. The principal stated that the school "does not tolerate hateful speech or actions" and that the school was "investigating to determine the impact on the school environment and will take appropriate action." *Id.*

It was only after the principal's email that media sources ran stories on the Snapchat post. *Id.* at 50-51, ¶ 59. All of the press coverage was based on the principal's email and not the post itself. *Id.* Many articles also included a statement from the Arapahoe County Sheriff's Office expressing its belief that the post did not represent a credible threat. *Id.* at 51, ¶ 59.

Similarly, it was only after the principal's email that three additional parents contacted the school. *Id.* at 51, ¶ 60. These parents asked the school to use the incident to promote tolerance. *Id.* Only one asked for disciplinary action against C.G. *Id.*

School officials decided to use the incident as a learning experience for CCHS students. *Id.* at 51, ¶ 61. The school devotes two 30-minute blocks per week to allow for conversations among students and staff and to manage the administrative and counseling tasks that have historically interrupted educational time. *Id.* at 51-52, ¶¶ 61-62. The school later used one of these non-academic advisory blocks to discuss the impact of hate speech. *Id.* at 52, ¶ 63.

The School Extends the Suspension for an Additional 16 Days

Two days after the initial suspension Dean Thomas informed C.G.'s mother that the school was extending C.G.'s suspension for an additional five school days. *Id.* at 52, ¶ 64. Assistant Principal Uhlig sent a follow up email confirming this decision. *Id.* Later that very same day, Chris Smith notified C.G. that his suspension was being extended for an additional 11 school days. *Id.* at 53, ¶ 66.

In violation of District Policy JKD-1-R, the District denied C.G. the opportunity to appeal the extensions. *Id.* In violation of the same policy, C.G.'s parents were not given notice of a time and place they could meet with school officials to review the suspension. *Id.*

Moreover, the District repeatedly rebuffed C.G. and his parents' efforts to discuss the matter with school officials. *Id.* at 53, ¶¶ 67-69. C.G. and his parents sent Superintendent Siegfried, Chris Smith, Carla Sterns, Principal Silva, Assistant Principal Uhlig, and Dean Thomas a packet that included the following:

a. A letter from C.G. in which he took full responsibility for the Snapchat post. C.G. apologized for his conduct and explained the Snapchat post was a stupid, impulsive lapse in judgment that was never intended to hurt anyone. C.G. stated that he had spent time since the post talking directly with Jewish members of the community to understand how his words impacted them, reading books about the

Holocaust to improve his knowledge, and educating himself about the efforts of the Anti-Defamation League and other Jewish-oriented advocacy groups.

b. A letter from C.G.'s parents explaining that the Snapchat post was a juvenile attempt at dark humor that C.G. realizes was wrong and for which C.G. is remorseful. C.G.'s parents reiterated the journey of education and understanding C.G. had engaged in since the post. C.G. and his parents asked for a process of restorative justice with the school, students, and community members.

c. Letters from community members who know C.G. and his family. These community members—like the CCHS parents who had directly contacted the school—implored Defendants, CCHS, and CCSD to turn this incident into a learning opportunity from which C.G. could grow and an educational opportunity for the community at large.

Id. at 53-54, ¶ 68.

C.G.'s mother then requested a meeting with District officials. *Id.* at 54, ¶ 69. Her request was flatly denied. *Id.* at 54-55, ¶ 69.

The School Forges Ahead and Expels C.G.

With C.G.'s attempts to contest the suspensions and tell his side of the story brushed aside, the matter proceeded to an expulsion hearing on October 7, 2019.

Id. at 55, ¶ 70. By this time, the District had kept C.G. out of school for more than three weeks on the basis of his private, Friday-night post.

During the expulsion hearing, Assistant Principal Uhlig testified under oath that, at the time he made the decision to pursue expulsion against C.G., he was unaware that C.G. had posted an apology to his Snapchat feed. *Id.* at ¶ 71. Assistant Principal Uhlig concealed the fact that, four hours before he decided to recommend expulsion, he received a screenshot of C.G.'s apology post via email and forwarded that screenshot to other school officials. *Id.*

Assistant Principal Uhlig also testified C.G.'s Snapchat post caused "extreme outcry of concerned community members and students … over fear to come to school. Fear to access education." *Id.* at ¶ 72. He did not reference any specific support for this comment. *Id.* No student was afraid of coming to school as a result of the Snapchat post. *Id.*

At the expulsion hearing, C.G. attempted to assert his First Amendment rights and argue that the District could not discipline him for his off-campus speech. *Id.* On this point, after considering the evidence presented, the hearing officer found that (1) C.G. was not on campus or at a school-sanctioned activity when he created the post; (2) he did not use a device or website related to CCSD or CCHS to post the photo; (3) he did not tag CCHS or CCSD or any of their employees in his post; (4) there was no evidence to show C.G.'s actions were

directed towards CCHS, any CCHS activity or the CCSD community; and (5) C.G. did not make a specific threat to any individual in his post. *Id.* at 55-56, ¶ 73. Despite these findings, the hearing officer concluded that she could not determine issues of law, such as whether C.G.'s speech was protected by the First Amendment. *Id.* at 56, ¶ 73.

The hearing officer found that JICDA(13)—the provision relied on by Dean Thomas for C.G.'s initial suspension—applied to behaviors engaged in while students are in school buildings, on school grounds, in school vehicles, or during a school-sponsored activity. *Id.* at ¶ 74. Because C.G.'s conduct occurred off-campus and was not associated with any CCHS activity or event, the hearing officer found C.G. had not violated JICDA(13).

The hearing officer did find, however, that C.G. violated other CCSD policies and recommended expulsion. *Id.* at ¶ 75. Again, the hearing officer did not believe it was within her purview to consider the First Amendment and whether C.G.'s post was protected speech. *Id.*

Colorado law and District policy require the Superintendent to review the hearing officer's factual findings and recommendation and issue a written decision within five days of the hearing. *Id.* at ¶76. On October 21, 2019, fourteen days after the expulsion hearing, and more than a month after the District first took C.G.

out of school, Superintendent Siegfried notified C.G. that he was expelled from CCHS for one year. *Id.* at 57, ¶ 77.

C.G. appealed Superintendent Siegfried's decision to expel him to the School Board. *Id.* at ¶ 78. A hearing was held on December 2, 2019, in which all Board members were present. *Id.* The same day, the School Board voted to affirm Superintendent Siegfried's decision to expel C.G. for one year. *Id.* No written findings were made nor was any written explanation of the School Board's decision provided to C.G. or his family. *Id.*

C.G. Seeks to Vindicate His First Amendment Rights in Federal Court

C.G. filed the instant action in federal district court. *Id.* at 38-72. Appellees moved to dismiss the complaint and discovery was stayed. *Id.* at 73-113, 145. The district court granted the motion and entered judgment against C.G. on all claims. *Id.* at 168-197. This appeal followed.

Summary of the Argument

The First Amendment limits schools' authority to regulate students' off-campus speech. First Amendment protections shield speech that is not created or shared in connection with a school activity or directed at specific members of the school community.

The United States Supreme Court recently affirmed this principle in *Mahanoy Area School District v. B.L.*, 141 S.Ct. 2038 (2021). In *Mahanoy*, the Court held that a public school violated the First Amendment when it suspended a student from the cheer team for posting a Snapchat story stating "Fuck school fuck softball fuck cheer fuck everything." There, like here, the post was private, created off-campus and outside school hours, and not directed at any member of the school community. Both posts caused a reaction from those offended, but neither disrupted the school environment or took away from class time. B.L.'s post specifically referenced a school-sponsored activity. C.G.'s did not.

If the school district in *Mahanoy* cannot punish B.L. for her private, off-campus Snapchat post, the District cannot punish C.G. for his. The District violated C.G.'s First Amendment rights when it suspended him for five days, then five more days, then eleven more days, and then expelled him for the contents of his private, off-campus Snapchat post.

District officials are not entitled to qualified immunity because the law at the time placed clear limits on schools' authority to punish students for speech that occurs off-campus and without a clear connection to the school. *Mahanoy* simply affirmed this long-standing precedent.

In addition, the District's policies are facially overbroad because they fail to account in any way for the difference between student speech that is connected with campus and student speech that bears no connection to campus. The District's procedures violated C.G.'s due process rights because he was not afforded adequate notice or opportunity to be heard with respect to the suspension and was denied the opportunity to be heard regarding his First Amendment rights. The District's policies further violate due process because they deny all students the opportunity to be heard with respect to their First Amendment rights.

The District Court supported its dismissal of C.G.'s claims with repeated adverse factual inferences that are impermissible at the motion to dismiss stage and not supported by the record. The District Court's Order should be reversed.

Argument

I. Standard of Review

This Court reviews *de novo* the district court's decision to grant a Rule 12(b)(6) motion. *Butler v. Bd. of Cty. Comm'rs. for San Miguel Cty.*, 920 F.3d 651, 655 (10th Cir. 2019). In doing so, the Court accepts "as true all well-pled factual allegations, viewing those facts in the light most favorable to [the plaintiff]." *Id*. "To withstand a motion to dismiss, a complaint must contain enough allegations of fact 'to state a claim to relief that is plausible on its face.'" *Id*. (citing *Straub v. BNSF Railway Co.*, 909 F.3d 1280, 1287 (10th Cir. 2018)). Plausible does not mean likely to be true. *Robbins v. Okla ex rel. Dep't of Human Servs.*, 519 F.3d 1242, 1247 (10th Cir. 2008). Rather, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 566 U.S. 662, 678 (2009).

"[G]ranting a motion to dismiss is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Dias v. City & Cty. Of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (citation omitted).

II. This Court Must Reverse the District Court's Dismissal of Plaintiff's First Amendment claim.

A. Long-Standing Supreme Court Precedent Acknowledges that Off-Campus Speech is Treated Differently from On-Campus Speech

The Supreme Court has granted schools the ability to regulate student speech under limited circumstances, none of which apply here. Schools can closely police the language used in a school newspaper or school-sponsored publication. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1229-30 (10th Cir. 2009). Schools may regulate speech that is delivered in a lewd or vulgar manner when it occurs on-campus as part of a high school program. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). Speech that promotes drug use at a school-sponsored event occurring off-campus may be regulated. *Morse v. Frederick*, 551 U.S. 393 (2007).

The Supreme Court has repeatedly observed that speech which can be regulated by school authorities is protected by the First Amendment if the same speech occurs away from school. In addressing vulgar language during an on-campus student presentation, Justice Brennan noted: "If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate." *Fraser*, 478 U.S. at 688 (Brennan, J., concurring). When affirming a student's suspension for unveiling a "Bong hits 4 Jesus" banner at a school-sponsored rally,

the Supreme Court held that, the "same speech in a public forum outside the school context … would have been protected." *Morse*, 551 U.S. at 405. Following this binding Supreme Court authority, this Court has held that speech which can be regulated when it occurs on-campus would be protected if it occurred off-campus. *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1365 (10th Cir. 2000).

B. The *Mahanoy* Decision Affirms Schools' Limited Ability to Regulate Off-Campus Speech

Earlier this year, the Supreme Court decided *Mahanoy Area School District v. B.L.*, and again refused to allow schools to regulate a student's off-campus speech. 141 S.Ct. 2038 (2021). In *Mahanoy*, a high school student ("B.L.") used her personal smartphone to post two photos to her Snapchat story that were viewable by her group of about 250 "friends" for a period of 24 hours. *Id.* at 2043. The first photo showed B.L. and a classmate with their middle fingers raised with a caption: "Fuck school fuck softball fuck cheer fuck everything." *Id.* The second photo was blank but contained a caption stating: "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" *Id*.

B.L.'s post was made over the weekend while she was visiting the Cocoa Hut, a local convenience store located away from the high school campus. B.L. did not identify the school in her post and did not target any particular member of the school community. *Id*. at 2047. B.L.'s photos eventually made their way to the

school campus and were shared with members and coaches of the cheerleading squad. *Id.* at 2043. Members of the cheerleading squad were "visibly upset" by the posts, and the post was discussed during an algebra class in the middle of the school day. *Id.* B.L. was suspended from the cheerleading squad for the upcoming year because the profanities in her speech violated team and school rules. *Id*.

In finding B.L.'s posts were protected speech, the *Mahanoy* Court declined to "set forth a broad, highly general First Amendment rule stating just what counts as 'off campus' speech." *Id*. at 2045. Instead, the Court announced "three features of off-campus speech that often, even if not always, distinguish schools' efforts to regulate [off-campus] speech from their efforts to regulate on-campus speech." *Id*. at 2045-46. "Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished." *Id*. at 2046.

First, the Supreme Court held that a school "will rarely stand *in loco parentis*" with respect to off-campus speech because off-campus speech "will normally fall within the zone of parental, rather than school-related, responsibility." *Id*. at 2046. Justice Alito's concurrence expands on this notion: "In our society, parents, not the State, have the primary authority and duty to raise, educate, and form the character of their children." *Id*. at 2053 (Alito, J,

concurring). "Parents do not implicitly relinquish all that authority when they send their children to public school." *Id*.

Second, the Supreme Court noted that allowing schools to regulate off-campus speech the same as on-campus speech would leave students unable to express themselves. The Court held that schools "have a heavy burden to justify intervention" regarding political or religious speech that occurs outside of school. *Id*.

Third, the Supreme Court recognized that schools are "the nurseries of democracy" and have an obligation to "protect the 'marketplace of ideas" so students grow into informed citizens. *Id*. The Court held that this obligation extends to "protection of unpopular ideas" and that "schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Id*. at 2046.

After considering these three features, the *Mahanoy* court held that B.L.'s speech was protected by the First Amendment. The Court noted that B.L.'s speech, while offensive, did not constitute fighting words or a true threat and were not obscene. *Id*. at 2046-47. The Court emphasized that B.L.'s posts appeared outside of school hours, away from the school campus, did not identify the school or target any member of the school community, and were transmitted through a personal

cellphone to an audience "consisting of her private circle of Snapchat friends." *Id*. at 2047. The Court held that these features of B.L.'s speech "diminish[ed] the school's interest in punishing B.L.'s utterance" such that the school lacked authority to regulate the speech. *Id*.

C. *Mahanoy* Establishes that C.G.'s Speech Is Protected First Amendment Activity

The facts of *Mahanoy* are nearly identical in all material respects to those outlined in the Amended Complaint. If B.L.'s off-campus speech could not be regulated by the school in *Mahanoy*, CCSD lacked the authority to discipline C.G. for his off-campus speech.

Both B.L. and C.G. engaged in "the kind of pure speech to which, were [they] adults, the First Amendment would provide strong protection." *Id.* at 2046–47. B.L.'s speech involved vulgar words, and C.G.'s involved an offensive anti-Semitic attempt at a joke. While the students' speech is different, neither student used speech that falls into those few "limited areas" the government is permitted to regulate. *United States v. Stevens*, 559 U.S. 460, 468 (2010); *see also Matal v. Tam*, 137 S.Ct 1744, 1751 (2017) (noting that speech may not be banned on the ground that is expresses ideas that offend). C.G.'s Snapchat post did not rise to the level of fighting words. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572–73 (1942) (defining fighting words as those words that by their very utterance inflict injury or tend to incite an immediate breach of the peace). C.G.'s post was not a

true threat, and indeed the school did not take it as such. *See Virginia v. Black*, 538 U.S. 343, 359 (2003) (describing true threats as those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence). Finally, C.G.'s post did not contain obscenities. *See Miller v. California*, 413 U.S. 15, 23–25 (1973) (defining obscene materials as appealing to the prurient interest in sex, which portray sexual conduct in a patently offensive way). As such, C.G.'s speech itself does not contain elements that place it outside the First Amendment.

While C.G.'s speech may be viewed as offensive, that is not sufficient to remove it from the ambit of the First Amendment. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). It is a fundamental principle that "[s]peech may not be banned on the ground that it expresses ideas that offend." *Matal*, 137 S.Ct. at 1751. Through that principle, the First Amendment has protected some of the most offensive speech and expressive activity, such as burning the national flag, *Johnson*, 491 U.S. at 420, burning crosses, *R.A.V. v. City of St. Paul, Minn.,* 505 U.S. 377, 391 (1992), picketers carrying signs bearing the words "Thank God for Dead Soldiers" outside a marine's funeral, *Snyder v. Phelps*, 562 U.S. 443, 460 (2011), the Nazi's right to

march in a predominantly Jewish town, *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44 (1977), and the Ku Klux Klan's right to assemble and advocate violence, *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969). The offense taken from C.G.'s speech does not strip his speech of protection under the First Amendment. *See Snyder*, 562 U.S. at 459 ("the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer…") (quoting *Erznoznik v. Jacksonville,* 422 U.S. 205, 210–11 (1975)).

The circumstances of C.G.'s off-campus speech are nearly identical to that of the protected student speech in *Mahanoy.* C.G. used his private cell phone to post a captioned photo to his Snapchat story where it was viewable by a private circle of Snapchat friends for a few hours. Am. Compl, App. 45-46, ¶¶ 33, 38-39. C.G.'s speech occurred off-campus at a public thrift store with no association to his school. He did not name or tag the school, any school employee, or any student in the post. The post was not sent directly to any member of the school community. The speech occurred on a Friday evening, after school had ended and would not resume for over 56 hours, long after C.G.'s post would have expired if not removed.

The purported disruption at CCHS is comparable to that observed in *Mahanoy.* Several cheerleaders were bothered by B.L.'s speech and approached

school personnel "visibly upset." *Id.* at 2043. B.L.'s posts were discussed "a couple days" during academic time. *Id.* at 2047–48. In this case, the school was contacted by four families about C.G.'s post and used a short period of time during one school day to address the impact of hate speech, using C.G.'s post as an example. App. 50, 52 ¶¶ 56, 60-63. The disruption here was nothing more than "the discomfort and unpleasantness that always accompany[ies] an unpopular viewpoint." *Tinker*, 393 U.S. at 509. As in *Mahanoy*, "the alleged disturbance here does not meet *Tinker's* demanding standards." 141 S.Ct. at 2048.

Further, to the extent C.G.'s speech is distinguishable from *Mahanoy*, it is distinguishable largely in a way that removes it even further from the school environment. The content of B.L.'s speech related to her school's cheer and softball teams and decisions made by those coaches. *Id.* at 2043. The school justified B.L.'s suspension, in part, based on its interest in maintaining team morale. *Id*. at 2047-48. C.G.'s speech, by contrast, was devoid of any connection to his school. His crude joke was not directed towards any school activity, organization, or student at CCHS. Because C.G.'s speech is even further removed from the school environment than the protected student speech in *Mahanoy*, CCHS had even less interest in regulating the speech.

Ultimately, like in *Mahanoy*, Defendants did not stand *in loco parentis* when C.G.'s speech occurred. C.G.'s speech was uttered off-campus, under

circumstances that are largely indistinguishable from B.L.'s protected speech. It did not target the any member of the school, or the school itself. C.G.'s off-campus speech is protected by the First Amendment.[5]

D. The District Court Erred in Finding CCSD Could Regulate C.G.'s Speech

The District Court failed to acknowledge any meaningful distinction between speech that occurs on-campus or in connection with a school activity and speech, like C.G.'s, that occurs off-campus. The District Court applied *Tinker*'s "substantial disruption" standard to C.G.'s off-campus speech as if the speech had occurred at school. Ignoring facts to the contrary and drawing inferences against Plaintiff, the District Court found, as a matter of law, that C.G.'s speech caused a substantial disruption to the school environment and was not protected by the First Amendment. This ruling was erroneous.

1. *The District Court refused to credit well pleaded facts in the Amended Complaint and drew inferences against Plaintiff*

The District Court concluded, as a matter of law, that C.G.'s speech caused a substantial disruption to the school environment. Order, App. 185-86. In reaching this conclusion, the District Court misapplied the legal standard on a Rule 12(b)(6)

[5] In dicta, the *Mahanoy* court listed circumstances that "*may* call for school regulation," including "serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers." *Id*. at 2045 (emphasis added). C.G.'s speech does not fall into any of these categories.

motion by failing to accept Plaintiff's allegations as true and drawing all inferences in Plaintiff's favor.

The District Court's substantial disruption rationale relies on several factual findings that are not supported by the record. The district court found that C.G.'s Snapchat friend list "contained many more classmates" and, based on this fact, concluded that C.G. "must have known, or reasonably should have known" that his off-campus speech would reach the school. Order, App. 183. But the Amended Complaint does not allege that C.G. was "friends" with many of his classmates on Snapchat; no facts are pled about who was on C.G.'s friend list. The district court's finding that C.G.'s friend list "contained many more classmates" is an inference that was drawn against C.G. in violation of the applicable legal standard.

Nor is there factual support for the District Court's finding that "many students and parents" took C.G.'s post as "serious anti-Semitic hate speech." Order, App. 184. In fact, Plaintiff's Amended Complaint alleges that one student showed C.G.'s post to his parents. The parents of this student contacted CCHS over the weekend, before school resumed and C.G. was suspended. Am.Compl., App. 47, ¶ 43; App. 50, ¶ 56. After principal Silva sent out a school-wide email about C.G.'s post, three other parents contacted the school. Notably, these parents did not say that they considered C.G.'s post to be "serious anti-Semitic hate speech"; rather, they asked school officials to use this incident to promote

tolerance in the CCHS community. *Id*., App. 51, ¶ 60. The District Court did not accept these facts as true and drew inferences against C.G.

The district court also wrongly discounted facts pled by C.G.. The District Court found the allegation that the assistant principal was lying or exaggerating during the expulsion hearing to be "facially incorrect." Order, App. 193. But the Amended Complaint states the assistant principal denied knowledge of C.G.'s apology post despite having sent an email with the apology post attached. Am.Compl., App. 55, ¶ 71. He also testified that C.G.'s post caused "extreme outcry of concerned community members and student … over fear to come to school. Fear to access education" despite no student expressing fear about coming to school in the wake of the Snapchat post. *Id*. ¶ 72. The District Court was required to take these facts as true. The District Court's statement that these facts were "facially incorrect" demonstrates how it misapplied the legal standard.

2. *The District Court's conclusion that C.G.'s speech caused a "substantial disruption" is not supported by established precedent*

The District Court relied on the above erroneous factual findings to determine, as a matter of law, that C.G.'s speech caused a substantial disruption to the school environment. This ruling ignores the fact-intensive nature of the *Tinker* standard and misapplies existing law.

To constitute a "substantial disruption," school officials must show that the regulation of student speech was caused by something more than "a mere desire to

avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. A disruption must "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," for a prohibition on speech to be sustained. *Id*.

The *Mahanoy* court held that the disruption caused by B.L.'s social media posts did not meet "*Tinker's* demanding standard." 141 S.Ct. at 2048. Taking all facts pled in the Amended Complaint as true and drawing all inferences in favor of Plaintiff, the disruption here is similar to that experienced in B.L. A handful of families contacted the school about C.G.'s speech and a short portion of one school day was spent discussing the speech. Am.Compl., App.50-52. Like in *Mahanoy*, the disruption caused by C.G.'s speech does not meet the *Tinker* standard.

And, other courts applying this standard have held that the school environment is not "substantially disrupted" when a student's speech causes administrators to answer to a handful of parent and student complaints and there is a general buzz around campus. *J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d 915, 929 (3d Cir. 2011) (en banc) ("[B]eyond general rumblings, a few minutes of talking in class, and some officials rearranging their schedules to assist [the principal] in dealing with the profile, no disruptions occurred."); *see also T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 783 (N.D. Ind. 2011) (no substantial disruption when administrators had to respond to a

handful of parent complaints and arguments between students); *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1120 (C.D. Cal. 2010) ("mild distraction" insufficient).

In sum, even assuming the *Tinker* "substantial disruption" test applies to C.G.'s speech post-*Mahanoy*, C.G.'s speech did not substantially disrupt the school environment and the District Court erred in finding otherwise.

3. The District Court's "foreseeable disruption" standard allows for content-based regulation

The District Court held that, regardless of the actual disruption caused by C.G.'s speech, the school was authorized to regulate the speech because "[i]t was foreseeable that an anti-Semitic attempt at humor might cause substantial disruption to the learning environment." Order, App. 185. The District Court emphasized the offensive nature of the content of C.G.'s speech, finding that "anti-Semitic comments—even comments intended as a joke—cause a far more insidious disruption" to the school environment. *Id*.

The standard adopted by the District Court allows for (indeed may require) content-based restriction of student speech. Rather than focusing on when, where or how a student's speech occurs, the District Court's standard allows a school to examine the content of student speech and regulate any student speech that might cause a stir.

Such a content-based rule cannot stand. Content-based regulations are forbidden because they "lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). "[A] function of free speech under our system of government is to invite dispute [and i]t may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.* "That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Id.* This longstanding principle has been affirmed by the Supreme Court over the last six decades. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Forsyth County v. National Movement*, 505 U.S. 123, 135 (1992); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011).

In *Mahanoy*, the Supreme Court reiterated application of this principle in the context of student speech, noting that "the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus." 141 S.Ct. at 2046. Although recognizing B.L.'s speech was not political or religious speech, the Court held that "sometimes it is necessary to protect the superfluous in order to preserve the necessary." *Id*. at 2048. The District Court's

"reasonably foreseeable" disruption standard invites content-based discrimination and must be rejected.

4. The District Court's Decision Encourages a Heckler's Veto

Quoting a decision out of the Ninth Circuit, the District Court held that whether the disruption was caused by C.G.'s speech or the response thereto was immaterial for First Amendment purposes. Order, App. 185. This holding flies in the face of long-standing precedent that prohibits a so-called "Heckler's Veto" or the idea that a listener's response to speech cannot be used as a justification to restrict protected speech.

In *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), the county established a policy requiring any group wanting to meet in a public space to pay for their own protection if the costs exceeded normal bounds. The Supreme Court struck down this regulation as violating the First Amendment. The Court feared the fee would be administered based on the content of the speech and "the administrator's measure of the amount of hostility likely to be created by the speech based on its content." *Id*. at 134. The Court emphasized that speech cannot be restricted (even financially) "simply because it might offend a hostile mob." *Id*. at 135; *see also Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearer.").

The *Mahanoy* decision does not permit regulation of student speech based on some vague possibility of future disruption by those who take offense to the speech. In his *Mahanoy* concurrence, Justice Alito noted that any attempt to punish a student for speech that was "deeply offensive to members of the school community and may cause a disruption" would be "a heckler's veto." 141 S.Ct. at 2055. "Speech cannot be suppressed just because it expresses thoughts or sentiments that others find upsetting." *Id*. Justice Alito commented that a school could "suppress the disruption, but it may not punish the off-campus speech" that prompted the reaction. *Id*.

Under the District Court decision, whether speech can be regulated by a school depends largely on listener's reaction to that speech. A school administrator who is offended by off-campus student speech can manufacture a large reaction to the speech, create a disruption to the school environment, and then discipline the student for "causing" that disruption. Another student can re-distribute or amplify a classmate's social media post in a way that causes a disruption to the school environment and the original speaker would be disciplined. A parent could widely distribute a student's speech and cause community backlash that impacts the school environment and the student, not the parent, would be disciplined. This standard not only allows, it promotes, a "heckler's veto" of unpopular or offensive speech.

5. The District Court Over-Emphasized the Importance of the Speech Occurring on Social Media

The District Court recognized that C.G.'s speech occurred off-campus and away from school or any school activity. However, it discounted these circumstances because the speech was posted on social media. Order, App. 183. Because "social media use in today's world must generally be expected to reach the school," the District Court held that C.G. "must have known or should reasonably have known" that his speech would reach the school environment. *Id*.

The District Court's focus on the reach of social media finds no support in Supreme Court precedent. The Supreme Court has long focused not on the method used to deliver the speech, but on whether the student was under the control of the school at the time the speech occurred. *See, e.g., Morse*, 551 U.S. at 405 (holding that speech a school could regulate when it occurred at a school-sponsored activity "would have been protected" if it occurred "in a public forum outside the school context"). The *Mahanoy* court affirmed this approach, emphasizing the circumstances surrounding the speech and stressing the importance of whether the student's parents had delegated their authority to the school when the speech occurred. 141 S.Ct. at 2046. That B.L.'s speech occurred on social media where it was accessed by her classmates and brought into the school environment was largely immaterial to the Court's analysis. *Id*. at 2047.

For all of these reasons, the District Court erred in finding that C.G.'s speech was not protected by the First Amendment.

E. The Individual Defendants are not Entitled to Qualified Immunity

The individual Defendants are not entitled to qualified immunity because Plaintiff's right to engage in offensive, off-campus speech was "sufficiently clear that every reasonable official would have understood that what he [or she] [was] doing violate[d] that right." *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) (citation omitted).

The Supreme Court has made clear that a finding of clearly established law does "not require a case directly on point, [as long as] existing precedent…[has] placed the…constitutional question beyond debate." *Id.* at 308. Both the Supreme Court and this Court have long held that "general statements of the law are not inherently incapable of giving fair and clear warning." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (quoting *White v. Pauly*, 137 S. Ct. 548, 552 (2017). Fundamentally, courts "cannot find qualified immunity wherever [they have] a new fact pattern." *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007). Instead, "[e]ven when no precedent involves facts materially similar to [the case at issue], the right can be clearly established if a precedent applies with obvious clarity.

The United States Supreme Court and Tenth Circuit have long held that while schools may regulate speech that occurs within the school environment or in connection with a school-sponsored activity, the same speech is protected when it occurs off-campus and without connection to the school. schools may regulate speech that is delivered in a lewd or vulgar manner when it occurs on-campus as part of a high school program. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). Similarly, speech that promotes drug use at an off-campus but school-sponsored event may be regulated. *Morse v. Frederick*, 551 U.S. 393 (2007).

But when the speech occurs outside the school environment, a different standard applies. In *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988), the Supreme Court recognized that, while a "school need not tolerate student speech that is inconsistent with its education mission" inside the school, the "government could not censor similar speech outside the school." In *Morse*, the Court stated that "[h]ad [the student] delivered the same speech in a public forum outside the school context, it would have been protected." *Morse*, 551 U.S. at 405 (discussing *Fraser*); *see also Fraser*, 478 U.S. at 688 (Brennan, J. concurring) ("If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate.").

This Court made the same distinction in *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1365 (10th Cir. 2000). The court held that the school had the authority to discipline a student for drawing a confederate flag during math class but recognized that the student's "display of the [c]onfederate flag could well be considered a form of political speech to be afforded First Amendment protection outside the educational setting." *Id*.

The *Mahanoy* decision did not set a bold new standard that disrupted prior precedent. Rather, the *Mahanoy* court affirmed the long-established precedent that off-campus speech is protected under the First Amendment and not subject to regulation by the school absent unique circumstances not present here. Because the protected nature of C.G.'s off-campus speech was clearly established at the time C.G. was suspended and then expelled, the individual Defendants are not entitled to qualified immunity.

III. The District Court Erred in Dismissing Plaintiff's Facial Challenge to CCSD's Policies

The District Court dismissed Plaintiff's facial challenge to CCSD's policies that allow discipline of students for engaging in protected speech. Order, App. 187. The Court held that the challenged policies were not overbroad because they "facially fall within the *Tinker* standard" by allowing CCSD to discipline students "only to the extent that off-campus behavior could foreseeably cause substantial disruption to the learning environment." *Id*. This ruling was erroneous.

A. The District Court Put the Burden on Plaintiff to Establish the Policy was Unconstitutional

Ordinarily, for a party to succeed in facially challenging a statute, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). But that burden is switched in the First Amendment context. The presumption that a statute is constitutional "does not apply when the challenged statute infringes upon First Amendment rights." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1120 (10th Cir. 2012). When a policy regulates speech, the State "bears the burden of establishing [the law's] constitutionality." *ACORN v. Municipality of Golden*, 744 F.2d 739, 746 (10th Cir. 1984).

Long-standing Supreme Court precedent establishes a student's First Amendment right to engage in speech away from the school environment. *See, e.g., Morse*, 551 U.S. at 405; *Hazelwood*, 484 U.S. at 266; *Fraser*, 478 U.S. at 688. On their face, CCSD's policies allow the school to discipline a student for protected speech that occurs off school property and outside of school-related activities. Despite this obvious regulation of protected speech, the District Court inappropriately placed the burden on Plaintiff to show that CCSD's policies were unconstitutional. Order, App. 187.

B. The District Court's Construction of the Policies is Contrary to Their Plain Language

CCSD policy JKD-1-E allows students to be suspended or expelled for any off-campus behavior that is "detrimental to the welfare or safety of other pupils or of school personnel." Am.Compl., App. 43-44 ¶¶ 24-26. The District Court found that this policy "facially f[e]ll within the *Tinker* standard." Order, App. 187.

The plan language of JKD-1-E shows it is not equivalent to the *Tinker* standard. *Tinker* requires that speech "materially and substantially disrupt the work and discipline of the school." 393 U.S. at 513. A school's decision to discipline a student for his speech cannot be justified by a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id*. at 509. Policy JKD-1-E does not reference or incorporate the *Tinker* "substantial disruption" standard. It requires only that conduct be "detrimental to the welfare" of another student, which is a far lower burden.

While a court can consider any limiting construction applied by a school district, *West*, 206 F.3d at 1368, CCSD did not offer any limiting language here. CCSD's Motion to Dismiss argued the policies are constitutional on their face and does not assert any construction other than the plain language of the policies. Motion to Dismiss, App. 81. The District Court erred in *sua sponte* construing JKD-1-E's "detrimental to the welfare" language as functionally equivalent to

Tinker's "substantial disruption" standard in an attempt to construe the policy as constitutional.

C. CCSD's Policies Infringe on a Substantial Amount of Protected Student Speech

A policy that impacts speech or expression is overbroad if it regulates substantially more speech than the First Amendment allows and is likely to chill third parties from engaging in protected expression. *Members of the City Council of LA v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). CCSD's policies meet this standard.

First, the policies regulate speech that is clearly protected. A student's welfare could be detrimentally impacted seeing a sexually explicit social media post of another student while away from school. Sexually explicit speech that occurs off-campus is protected by the First Amendment, *Fraser*, 478 U.S. at 685-86, but JKD-1-E would allow CCSD to suspend or expel a student for such off-campus speech.

Similarly, the welfare of a devoutly religious student may be detrimentally impacted by a student's social media post about Jesus using drugs. Or a student who has experienced addiction issues may feel their welfare is detrimentally impacted by another student's jokes about drug use. Under *Morse*, 551 U.S. at 405, a student can display a banner announcing "Bong Hits 4 Jesus" so long as that

speech is not on-campus or connected to a school-sponsored event or activity, but JKD-1-E allows CCSD to suspend or expel a student for this off-campus conduct.

CCSD's policies infringe on a substantial amount of protected student speech because they fail to account for where such speech occurred. JKD-1-E applies to student conduct—including speech—that is "detrimental to the welfare" of another student, regardless of where such conduct occurs.

This does not comport with the First Amendment. Speech that occurs off-campus and is not connected to any school activity, is afforded significantly greater protection than speech connected to the school. *Mahanoy*, 141 S.Ct. at 2045-2046. In fact, student speech "that is not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern, including sensitive subjects like politics, religion, and social relations" lies at the heart of the First Amendment and "is almost always beyond the regulatory authority of a public school." *Id*. at 2055 (Alito, J. concurring). Even if CCSD's policies were equivalent to *Tinker* (they are not), they would be overbroad because they would apply the substantial disruption standard to all off-campus speech.

Because CCSD's policies do not differentiate between on-campus and off-campus conduct, they may have a chilling effect on the free speech rights of parties not before the court. Students who want to attend a weekend protest on a

controversial issue may be dissuaded by the threat of suspension or expulsion under JKD-1-E. Students who want to write a letter to the editor expressing a minority view may opt not to air their grievance. Students who are inspired to create art that could be considered offensive may sanitize their vision to avoid engaging in conduct that could be "detrimental" to another student's welfare.

The District Court's unsupported assumption that JKD-1-E does not suppress protected speech cannot stand. *West*, 206 F.3d at 1367. CCSD's policies do not account for the increased protection afforded to student's off-campus speech. Indeed, JKD-1-E does not even reference the First Amendment or student free speech rights. Rather, the policy allows administrators to consider only whether off-campus conduct is detrimental to the welfare of another student without regard to whether the off-campus conduct is constitutionally protected.

Because CCSD's policies—on their face—infringe on a substantial amount of student speech protected by the First Amendment, the District Court erred in dismissing Plaintiff's facial challenge.

IV. The District's Suspension and Expulsion Procedures Violated Due Process

The District Court erred in dismissing C.G.'s due process allegations for failure to state a claim. First, C.G. was denied due process because he was suspended repeatedly without an opportunity to be heard. In dismissing the due process claim, the District Court disregarded the basic principle that the court must

take plaintiff's allegations as true, view them in the light most favorable to the plaintiff, and draw all reasonable inferences in favor of the plaintiff. *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009); *see also Iqbal*, 556 U.S. at 679 (stating that the court must view the allegations in the light most favorable to the plaintiff). Second, C.G. was suspended and expelled without any consideration of his First Amendment rights.

Students facing suspension or expulsion from public school have property and liberty interests that are entitled to protection under the due process clause. *Goss v. Lopez*, 419 U.S. 565, 572-76 (1975). Due process requires, at minimum, notice of the charges and an opportunity for the student to present his side of the story. *Id.* at 581. Except in cases of immediate danger, notice and the opportunity to be heard should come *before* the suspension decision. *Id.* at 582-83.

As the District Court recognized in its order, "total exclusion from the education process for more than a trivial period . . . is a serious event in the life of the suspended child." *Id.* at 576 (quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)). A suspension, "[i]f sustained and recorded . . . could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." *Id.* at 575. It is no trivial matter.

Despite the clear and undisputed importance of this right, the district court concluded that due process was satisfied — and that C.G. was afforded the opportunity to tell his side of the story — with respect to a 21-day suspension on the sole ground that the Amended Complaint states C.G. was detained in Dean Thomas's office "for hours" after he was told he had been suspended. Order, App. 190. To reach this conclusion, the District Court made numerous inferential leaps adverse to C.G. and in direct contravention of the requirement that the court takes the plaintiff's allegations as true and make all reasonable inferences in his favor. In fact, the court did the exact opposite at each and every opportunity. The Court *inferred* that Dean Thomas was actually in the office the whole time C.G. was detained there. The court *inferred* that C.G. was afforded an opportunity to give his side of the story during that time. The court *inferred* that this opportunity was adequate. Absent substantial and repeated adverse inferences, the factual allegations in the Complaint simply do not support the conclusion that C.G. was afforded due process with respect to the initial 5-day suspension, the subsequent 5-day extension, or the later 11-day extension. And he was certainly not afforded the heightened procedures required for a suspension of more than ten days. *Goss*, 419 U.S. at 584.

Even if the Court were to accept these adverse inferences, due process was denied. To satisfy due process, the procedures must "be tailored, in light of the

decision to be made, to 'the capacities and circumstances of those who are to be heard.'" *Watson ex rel. Watson v. Beckel*, 242 F.3d 1237, 1241 (10th Cir. 2001) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 349 (2001)). C.G.'s purported opportunity to be heard came *after* the suspension decision was made even though it was clear there was no immediate safety threat. C.G. was expected to respond — if he was given the opportunity at all — immediately after being informed of the suspension decision. At that time, his parents had not been notified, and he had no opportunity to prepare or consult with his parents. C.G. could not have known at that time that the policy cited for his suspension was facially inapplicable. When his parents later asked for the opportunity to present C.G.'s side of the story, they were flatly denied. Thus, even if C.G. were afforded the opportunity to present his side of the story in Dean Thomas's office, basic due process requirements were not met, and the heightened procedures required for a suspension of more than 10 days certainly were not met. C.G. has stated a plausible due process claim, and the district court erred in dismissing it under Rule 12(b)(6). *Goss*, 419 U.S. at 581, 584.

In addition, the District failed, at every turn, to consider C.G.'s First Amendment rights and assess whether the District in fact had the authority to expel C.G. for his speech. The district court dismissed this claim as well, applying the balancing test in *Mathews*. Under *Mathews*, a court must balance three factors in

determining whether the heightened due process requirements for a long-term suspension or expulsion have been met:

> (1) the private interest that will be affected by the official action,
> (2) the probable value, if any, of additional or substitute procedural safeguards, and
> (3) the government's interest, including the fiscal and administrative burden, that the additional or substitute procedural requirements would entail.

Watson, 242 F.3d at 1240 (citing *Mathews*, 424 U.S. at 334-35).

As the district court recognized, and as discussed above, a child's interest in his public education is a critical and well-recognized one. Further procedural safeguards, such as providing C.G. with notice and an opportunity to be heard *before* deciding to suspend him and pursue expulsion would likely have made a dramatic impact on this case. It would have given the District the opportunity to consider the statement, the muted reaction to it (a single email), the fact that to post had been taken down right away, and the fact that C.G. apologized, and avoid a knee-jerk reaction. By failing to afford C.G. these basic due process procedures, the District forged ahead with little to no reflection, consultation, or consideration and committed to expulsion without first hearing from C.G., and this resulted in substantial prejudice to him.

In dismissing this claim, the district court conflated C.G.'s contention that the District was required to take into account his First Amendment liberties and