UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

CARVER MIDDLE SCHOOL GAY-STRAIGHT ALLIANCE, an unincorporated association; and H.F., a minor by and through parent Janine Faughnan,

Plaintiffs,

v.

SCHOOL BOARD OF LAKE COUNTY, FLORIDA,

Defendant.

No. 5:13-cv-00623-WTH-PRL

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs Carver Middle School Gay-Straight Alliance ("Carver GSA") and H.F. (collectively, "Plaintiffs") respond to Defendant School Board of Lake County, Florida's ("Defendant" or "School Board") Motion to Dismiss (Doc. 10) and request that it be denied.

In its motion, the School Board advances five arguments for dismissal: (1) lack of standing; (2) failure to comply with pleading requirements; (3) inapplicability of the Equal Access Act to middle schools; (4) failure of the First Amendment claim due to "reasonable restrictions upon student expression within a middle school given the nature of the forum, the nature of the expression and the age and maturity level of middle school

students"; and (5) failure to state claim for relief under 42 U.S.C. § 1983. Mot. to Dismiss (Doc. 10) at 1-2. Each argument fails.

I. STANDING

Plaintiff H.F. has standing because she has been injured—and will continue to be injured—as a result of the School Board denying her access to the limited public forum for non-curricular student clubs. She has been denied access to a forum in which she could discuss work to end bullying at her school. *See* Compl. (Doc. 1), ¶¶ 22, 29, 31. Additionally, she has been denied the benefits attendant to the forum. *See id*., ¶ 17. The Carver GSA has representational standing to assert the injuries of H.F. and standing in its own right for its own injuries. *See id*., ¶ 31. The School Board's claims to the contrary, Mot. to Dismiss (Doc. 1) at 2-3, are unavailing.

Article III standing requires a showing of (1) a concrete "injury in fact" to a legally protected interest, that is actual and imminent, (2) a causal connection that is "fairly traceable" between the injury and the conduct complained of, and (3) a judicially redressable injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *accord Summers v. Earth Island Inst.*, 555U.S. 488, 493 (2009). The requirements of standing are plainly met.

Plaintiffs alleged in the complaint that the School Board has created a limited open forum because it granted recognition to non-curricular clubs, *see* Compl. (Doc. 1), ¶¶ 15-18; that Plaintiffs submitted a properly completed application for the Carver GSA to be

recognized as a student club and receive the attendant benefits of that recognition, *see id*., ¶¶ 21-23; that the application was denied, *see id*., ¶ 25; and, thus, Plaintiffs are denied the benefits of having their club recognized, *see id*., ¶¶ 29, 31-32, 34. This constitutes concrete, particularized, actual injury.[1] Were the Court to rule in Plaintiffs' favor, the School Board would be required to recognize the Carver GSA as a student club and provide it the attendant benefits of such recognition—in other words, Plaintiffs' injury would be redressed. The standing requirements cited by Defendant having been met, Defendant's argument on standing fails. *Cf. Gay-Straight Alliance of Okeechobee High Sch. v. Sch. Bd. of Okeechobee Cnty*. 477 F.Supp.2d 1246, 1253 (S.D. Fla. 2007) (students' allegations of school's refusal to recognize a GSA as a student club gave them standing).[2]

The Carver GSA also has standing. Establishing representational associational standing requires the association to demonstrate (1) that its members would otherwise have standing to sue in their own right; (2) that the interests the association seeks to protect are germane to its purpose; and (3) that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash.*

[1] In the context of a preliminary injunction, this infringement constitutes irreparable injury *per se* because, as the Supreme Court has noted, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion), *cited in KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1271-72 (11th Cir. 2006).

[2] Plaintiffs obviously could not have been disciplined or reprimanded for availing themselves of the benefits of being a student club because Defendant has denied the club recognition and the attendant benefits altogether.

State Apple Adver., 432 U.S. 333, 343 (1977). Here, Carver GSA member H.F. has standing, *see supra*, the GSA's efforts to work to end bullying in the forum of student clubs is germane to its purpose, *see* Compl. (Doc. 1), ¶ 22, and participation of the individual members in this lawsuit are unnecessary. Furthermore, because denying the Carver GSA access to the forum of student clubs forces it to divert time and resources to meeting outside the school and advertising meetings without using school resources, *see id.*, the club has standing in its own right. *See Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165-66 (11th Cir. 2008).

For these reasons, the School Board's arguments regarding standing are meritless.

II. PLEADING REQUIREMENTS

Plaintiffs have sufficiently pleaded claims upon which relief can be granted. The School Board's claim that the pleadings contains only legal conclusions that fail the "plausibility" requirement of *Twombly*[3], *see* Mot. to Dismiss (Doc. 1), at 3-5, are unsubstantiated. The Complaint specifically alleges the facts giving rise to Plaintiffs' injury and why the School Board is liable.

Plaintiffs have easily satisfied the pleading requirements. The foundational rule of *Iqbal* is that a complaint must be facially plausible, and this is satisfied "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678

[3] *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007).

(2009). The "misconduct alleged" is that Defendant has unlawfully denied Plaintiffs access to the forum for student clubs at Carver Middle School, which is the basis for both the Equal Access Act and First Amendment claims, the allegations concerning which are quite explicitly laid out in the complaint as factual statements, not legal conclusions. *See, e.g.*, Compl. (Doc. 1), ¶ 18 ("Non-curricular groups at Carver include 'Junior National Honor Society' and a cheerleading squad."); ¶ 19 ("These non-curricular student groups meet on school premises during non-instructional time."); ¶ 20 ("The Carver GSA and H.F. wanted and still want to avail themselves of this limited public forum for student clubs."); ¶ 21 ("On October 29, 2013, the Carver GSA club application was submitted to Principal Mollie Cunningham by the Carver GSA's faculty advisor at Plaintiffs' request."); ¶ 23 ("Plaintiffs' application to operate a GSA at Carver complied with all procedural requirements to gain recognition as a student club."); ¶ 25 ("On December 5, 2013, Defendant's counsel informed Plaintiffs' counsel that the Superintendent had denied the club application and would not permit it to operate as a school club."); ¶ 29 ("Through the exclusion from this forum, Plaintiffs are and will be deprived of the many benefits of participating in the forum. Plaintiffs are and will be deprived of the opportunity at school to educate the school community about discrimination and bullying and to create a safe forum for LGBT students and their allies to discuss these issues.").

Given that the core requirements for an Equal Access Act claim are that (1) a school permits non-curricular clubs, and (2) a non-curricular has been denied access to that forum, it is difficult to discern what further allegations Defendant would have

Plaintiffs plead.[4] The same applies to the First Amendment claim, which is based on the denial of access to this limited open forum. Contrary to Defendant's suggestion, the complaint makes clear that Defendant is responsible for the denial of the Carver GSA's club application. *See, e.g.*, Compl. (Doc. 1), ¶ 9 ("Pursuant to School Board Policy 4.502, the School Board has delegated final decision making authority to Superintendent Susan Moxley with respect to approval of student clubs in the School District. Accordingly, through its delegation of final decision making authority to Superintendent Moxley with respect to approval of student clubs at Carver, the School Board is liable for Superintendent Moxley's refusal to allow the Carver GSA to meet at school as an official student club."); ¶ 25 ("On December 5, 2013, Defendant's counsel informed Plaintiffs' counsel that the Superintendent had denied the club application and would not permit it to operate as a school club.").

Iqbal was concerned with "unlock[ing] the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678. Plaintiffs have much more than conclusions here—indeed, the information necessary to demonstrate the Equal Access Act and First Amendment claims is already before the Court. Defendant's empty arguments regarding the adequacy of Plaintiffs' pleading should be rejected.[5]

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[4] The other requirements of an Equal Access Act claim are that the school be a public secondary school that receives financial assistance. *See* 20 U.S.C. § 4071(a). Plaintiffs have alleged these elements. *See* Compl. (Doc. 1), ¶¶ 37-38.

[5] Defendant's contention that the complaint is a "shotgun pleading" similarly errs. The Eleventh Circuit has described the "quintessential" shotgun pleading as one in which, among other things, "each count is replete with factual allegations that could not possibly be material to that specific count, and that any allegations that are material are

III. EQUAL ACCESS ACT

Plaintiffs properly pleaded a violation of the Equal Access Act. The School Board's contention that Carver Middle School is not a "secondary school" and thus the Equal Access Act does not apply, Mot. to Dismiss (Doc. 10) at 5-8, is incorrect as a matter of law.

The Equal Access Act applies to "public secondary school[s]." *See* 20 U.S.C. § 4071(a), (b). "The term 'secondary school' means a public school which provides secondary education as determined by State law." 20 U.S.C. § 4072(1).

Although Florida law on this particular question is not a model of clarity, the only logical reading of state law is that Florida middle schools are secondary schools and thus covered by the Equal Access Act. More often, when defining the scope of a given provision, Florida law refers to schools in one of two ways. Some statutes exhaustively list each possible school description to cover all the bases. *See, e.g.*, § 1012.467, Fla. Stat. ("School grounds" means the buildings and grounds of any public prekindergarten, kindergarten, elementary school, middle school, junior high school, high school, or secondary school . . . ."). Many other statutes simply use two descriptive categories to cover the range of possible schools: elementary and secondary. *See, e.g.*, § 1001.42, Fla.

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buried beneath innumerable pages of rambling irrelevancies." *Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001). This does not remotely characterize Plaintiffs' complaint in this case; the factual allegations in this case are relevant to both claims. The complaint is not a shotgun pleading.

Stat. ("Powers and duties of district school board") ("The district school board, acting as a board, shall exercise all powers and perform all duties listed below: . . . (12) . . . (a) . . . Provide for the operation of all public schools, both elementary and secondary," as free schools . . . .").[6]

[6] Numerous other statutory provisions similarly reflect the legislature's view that "secondary school" include middle schools. *See*, *e.g.*, § 1002.22, Fla. Stat. ("'Agency' means any board, agency, or other entity that provides administrative control or direction of or performs services for public elementary or secondary schools, centers, or other institutions . . . ."); § 1002.32, Fla. Stat. ("Each lab school may establish a primary research objective related to fundamental issues and problems that occur in the public elementary and secondary schools of the state."); § 1004.02, Fla. Stat. ("'Adult student' is a student who is beyond the compulsory school age and who has legally left elementary or secondary school."); § 1007.35(2)(b), Fla. Stat. ("It is the intent of the Legislature to provide assistance to all public secondary schools, with a primary focus on low-performing middle and high schools."); § 1009.77(4), Fla. Stat. ("Public elementary or secondary school employers or postsecondary institution employers shall be reimbursed for 100 percent of the student's wages by the participating institution."); § 1012.797(1), Fla. Stat. ("Such notification shall include other education providers such as the Florida School for the Deaf and the Blind, university lab schools, and private elementary and secondary schools."); § 164.1051, Fla. Stat. (referring to the "[s]iting of elementary and secondary schools"); § 256.032, Fla. Stat ("The state flag shall be displayed at a suitable place and in the appropriate manner on the grounds of each elementary and secondary public school."); § 282.705, Fla. Stat. ("Private, nonprofit elementary and secondary schools are eligible for rates and services on the same basis as public schools if such schools do not have an endowment in excess of $50 million."); § 316.615(1)(b), Fla. Stat. ("For the purposes of this section the term 'school' includes all public and private nursery, preelementary, elementary, and secondary level schools."); § 403.714(5)(b), Fla. Stat. (requiring school boards to "provide a program of student instruction in the recycling of waste materials," stating that this instruction "shall be provided at both the elementary and secondary levels of education"); § 403.7186, Fla. Stat. ("As funds become available, the department shall inform the public about the provisions of this section and about the dangers of mercury contamination in game and fish by: (c) Distributing, in primary and secondary schools within the state, informational materials relating to recycling of mercury-containing devices and spent lamps.") § 468.505(1)(i), Fla. Stat. (referencing "[a]n educator who is in the employ of a nonprofit organization approved by the council; a federal, state, county, or municipal agency, or other political subdivision; an elementary or secondary school; or an accredited institution of higher

Each of these two conventions has an advantage and a disadvantage, yet only one interpretation applied to all the statues gives Florida law its full effect: a middle school is a "secondary school." The School Board refers to the instances where Florida law uses the "kitchen sink" listing that includes both "middle" and "secondary" as proof that a middle school is not a "secondary school." *See*, *e.g.*, § 1003.01(2), Fla. Stat. (defining "school" as "an organization of students for instructional purposes on an elementary, middle or junior high school, secondary or high school, or other public school level authorized under rules of the State Board of Education."), *cited in* Mot. to Dismiss (Doc. 10), at 6.[7] This interpretation avoids a redundancy in the handful of statutes listing both "middle" and "secondary" but renders numerous statutes that only apply to "elementary"

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education"); § 665.0501(7), Fla. Stat (referring to a capital stock association's power "[t]o contract with the proper authorities of any public or nonpublic elementary or secondary school or institution of higher learning"); § 667.009(7), Fla. Stat. (referring to a savings bank's power "[t]o contract with the proper authorities of any public or nonpublic elementary or secondary school or institution of higher learning"); § 768.135(1), Fla. Stat. ("A volunteer team physician is any person licensed to practice medicine . . . (a) Who is acting in the capacity of a volunteer team physician in attendance at an athletic event sponsored by a public or private elementary or secondary school . . . ."); § 790.06(12)(a), Fla. Stat. ("A license issued under this section does not authorize any person to openly carry a handgun or carry a concealed weapon or firearm into . . . (10) Any elementary or secondary school facility or administration building . . . ."); § 985.101(1)(b), Fla. Stat. ("Such notification shall include other education providers such as the Florida School for the Deaf and the Blind, university developmental research schools, and private elementary and secondary schools.").

[7] Defendant also cites the dual-enrollment provision. *See* Mot. to Dismiss (Doc. 10), at 7 (citing § 1007.271, Fla. Stat. (applying to "eligible secondary student[s]"). Even if it is true that school districts interpret this to apply only to high schools, the legislature's creation of such a program and use of the phrase "secondary school" does not define what constitutes secondary *education* in Florida. The better source for that, as indicated above, is the Florida Career and Professional Education Act, *see* § 1003.491(4), (5)(b) (including middle school courses as "core secondary courses").

and "secondary" inapplicable to middle schools, yielding nonsensical results. For example, according to the School Board's interpretation, the state flag would be statutorily required to be displayed at elementary schools and high schools but not middle schools, *see* § 256.032, Fla. Stat.; the physical requirements for school bus drivers would apply only to drivers who take children to elementary schools and high schools but not middle schools, *see* § 316.615, Fla. Stat.; and school boards would have the power to provide for the operation of elementary schools and high schools but not middle schools, *see* § 1001.42(12)(a), Fla. Stat. Alternatively, if a middle school is a "secondary school," numerous statutes would be given their intended effect—applying to middle schools—though at the cost of some redundant descriptive lists. Between effect and redundancy, there is little choice. The interpretation that gives all Florida statutes effect must prevail: a middle school is a "secondary school."

Moreover, Florida law at times makes more explicit what is taken for granted in other statutes: a middle school is a "secondary school." For example, the Florida Partnership for Minority and Underrepresented Student Achievement Act states that "[i]t is the intent of the Legislature to provide assistance to all public secondary schools, with a primary focus on low-performing middle and high schools." § 1007.35(2)(b), Fla. Stat. Middle schools and high schools are simply two subcategories of secondary schools. Further, the Florida Career and Professional Education Act explicitly discusses secondary education, establishing "a process for the continual and uninterrupted review of newly proposed core secondary courses and existing courses requested to be considered as core

courses to ensure that sufficient rigor and relevance is provided for workforce skills and postsecondary education and aligned to state curriculum standards," then going on to state that "All courses approved as core courses for purposes of *middle school promotion* and high school graduation shall be immediately added to the Course Code Directory." § 1003.491(4), (5)(b), Fla. Stat. (emphasis added). Again, middle school is understood by the legislature as simply a part of a secondary school education.

Before a revision last year, the Florida Secondary School Redesign Act also made explicit that "[s]econdary schools are schools that primarily serve students in grades 6 through 12," and thus middle schools were "secondary schools." § 1003.413(1), Fla. Stat. (repealed 2013), *see MP v. Fla. Dep't of Corrections*, No. 4:06cv52-SPM/WCS, 2008 WL 4525134, at *1 (N.D. Fla. Sept. 30, 2008) ("In Florida, 'secondary school' constitutes education from grades 6 through 12." (citing § 1003.413. Fla. Stat.)). However, that Act was repealed effective July 1, 2013, Ch. 2013-27, § 12, Laws of Fla. There is no indication that the legislature intended this change to affect the definition of "secondary school," because the legislature did not merely excise that single definition but repealed the entire act in which definition existed. *See* 2013 Florida Senate Bill 1076,[8] lines 640-41 ("Section 1003.413, Florida Statutes, is repealed."). The repeal of this statute did not replace that particular definition of "secondary school" with a new one; it simply left the code with less explicit statements about the definition of that term. If the

[8] Available at http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_s1076er.DOCX&DocumentType=Bill&BillNumber=1076&Session=2013.

legislature had wanted to redefine "secondary school" in the way the School Board suggests, it could have done so.

The School Board's other arguments regarding the Equal Access Act also fail. The reference to the rights of high school students in cases involving the Equal Access Act, *see* Mot. to Dismiss (Doc. 10) at 7-8 (citing *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990), and *Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd Cnty.* [hereinafter *Boyd GSA*], 258 F.Supp.2d 667 (E.D. Ky. 2003)), does not mean that the Equal Access Act is limited to high school students. Those cases simply happened to involve high schools. Moreover, and most obviously, the Equal Access Act by its very terms is not limited to high schools but rather "secondary" schools as defined by state law. *See* 20 U.S.C. §§ 4071-72. Defendant finds similarly meaningful a statement by the U.S. Secretary of Education that the Equal Access Act covers public high schools. Beyond the fact that this statement does not necessarily exclude middle schools from coverage, the Equal Access Act itself defers to state law regarding the definition of a secondary school, not the interpretation of federal officials.[9]

For these reasons, Defendant's arguments concerning the Equal Access Act are without merit. Consistent both with state law and with the mandate that remedial statutes

[9] In any event, more relevant federal materials cut the other way: the legislative history of the Equal Access Act supports a more inclusive interpretation covering middle schools. *See Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274, 299 (4th Cir. 1998) (Motz, J., concurring in part and dissenting in part) ("The original legislative proposal applied to both 'public elementary and secondary school[s],' but the law enacted by Congress applies only to secondary schools.") (alteration in original; citations omitted).

(which include the Equal Access Act) be construed broadly, *see, e.g.*, *Garcia-Celestino v. Ruiz Harvesting, Inc.*, No. 2:10-cv-542-FtM-38DNF, 2013 WL 3816730, at *6 (M.D. Fla. July 22, 2013) ("Finally, the FLSA is a remedial statute and must, therefore, be broadly construed."), this Court should find that middle schools in Florida are covered by the Equal Access Act.

IV. FIRST AMENDMENT

Plaintiffs have a First Amendment right to participate and speak in the limited public forum for student clubs and to be free from viewpoint discrimination. Yet the School Board contests this right by disputing the facts in the Complaint and arguing based on its version of those facts that it may deny Plaintiffs access to this forum. Arguments based on disputed facts are improper in a motion to dismiss, and thus the Court should dismiss these arguments. *See Lopez v. Target Corp.*, 676 F.3d 1230, 1232 (11th Cir. 2012) ("[A court] must accept all allegations in the complaint as true and construe the facts in the light most favorable to the plaintiff.").

First, the School Board argues that it has reserved its forum for student clubs only for those clubs that are curricular, and that pursuant to *Kuhlmeier*[10] it may exercise control over the content of the student groups. *See* Mot. to Dismiss (Doc. 10), at 8-10 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)). *Kuhlmeier* grants

[10] Although many court opinions refer to *Kuhlmeier* as "*Hazelwood*," the U.S. Supreme Court in *Morse* refers to the opinion as *Kuhlmeier*. Plaintiffs will follow the U.S. Supreme Court's nomenclature.

the School Board limited authority to restrict student speech: at times—for example during class time—school officials may significantly limit student speech "so long as their actions are reasonably related to legitimate pedagogical concerns." *Kuhlmeier*, 484 U.S. at 273. But school officials only have this expansive power "in the context of a curricular activity" that bears the imprimatur of the school. *Bannon v. Sch. Dist. of Palm Beach Cnty.*, 387 F.3d 1208, 1214 (11th Cir. 2004) (citing *Kuhlmeier*, 484 U.S. at 271-73). If the activity or forum is non-curricular, as Plaintiffs allege given that *non-curricular* student clubs have been approved, then the *Tinker*[11] standard applies. Plaintiffs allege that the School Board has created a limited public forum in middle schools for both curricular and non-curricular student clubs. *See* Compl. (Doc. 1), ¶¶ 15-18. To support this allegation, Plaintiffs point first to School Board Policy No. 4.502. *See* Compl. (Doc. 1), ¶¶ 15-16. Pursuant to this Policy, not only are clubs that "strengthen promote critical thinking" permitted, but "clubs that are directly related to the curriculum" "may also"—i.e., in addition to the non-curricular clubs—be established. Furthermore, the School Board's actual practice of approving non-curricular student clubs, including some clubs that fall outside the categories prescribed by the policy, *id.*, ¶¶ 17-18, supports the finding that it permits non-curricular student clubs. Although the School Board disputes that it allows non-curricular clubs in the middle school and argues that allowing the Carver GSA would disrupt its pedagogical purpose for the student clubs, this argument and factual disputes cannot be resolved on a motion to dismiss.

[11] *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969).

Next, the School Board argues that even if student speech is analyzed under *Tinker*, allowing the Carver GSA access to the forum would be "likely to cause significant disruption" in the school. *See* Mot. to Dismiss (Doc. 10) at 10-15. Plaintiffs agree that the *Tinker* standard applies to the Carver GSA's desire to meet as a group at school to discuss matters pertinent to the harassment faced by LGBT and allied students and to educate students in an effort to reduce bullying of all students. *See Gonzalez v. Sch. Bd. of Okeechobee Cnty*., 571 F.Supp.2d 1257, 1269 (S.D. Fla. 2008) (concluding that the GSA's speech best fits under *Tinker* and rejecting the other applicable tests). Indeed, this speech sounds in the pure student speech addressed in *Tinker. See Gillman v. Sch. Bd. for Holmes Cnty., Fla.*, 567 F.Supp.2d 1359, 1370 (N.D. Fla. 2008). Pursuant to *Tinker*, "student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'" *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (quoting *Tinker*, 393 U.S. at 513). However, to justify a ban on student speech under the *Tinker* standard, "[t]here must be *demonstrable factors* that would give rise to any reasonable forecast by the school administration of 'substantial and material' disruption of school activities before expression may be constitutionally restrained." *Holloman v. Harland*, 370 F.3d 1252, 1273 (11th Cir. 2004) (emphasis added). The School Board, though it tries, cannot sustain this argument based on the facts in the complaint.

The School Board argues as a matter of law in its motion to dismiss that "[s]exuality, including homesexuality [sic] and bullying based upon sexual identity, is

clearly a 'controversial' topic" and would create the required material and substantial disruption required to limit speech under *Tinker*. Mot. to Dismiss (Doc. 10) at 12.[12] Setting aside the fact that the School Board's suggestion that the GSA intends to discuss issues of sexuality is a misunderstanding of the club's purpose, *see* Compl. (Doc. 1), ¶ 22,[13] and proposed activities, *id*., Exhibit 3 (club application), and further setting aside factual allegations showing that a fear of disruption was not the School Board's actual reason for denying recognition of the club, *id*., ¶ 25, the School Board lacks the factual foundation to marshal this argument in the context of a motion to dismiss. Undeterred, the School Board oddly points to *Heinkel ex rel. Heinkel v. Sch. Bd. of Lee County, Fla.*, 194 Fed. Appx. 604, 610 (11th Cir. 2006). Far from making a ruling as a matter of law (which would allow the School Board to rely on the facts in the Complaint), the Eleventh

[12] Included in its *Tinker* argument, School Board also relies on *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) and *Walz v. Egg Harbor Tp. Bd. of Educ*. 342 F.3d 271 (3rd Cir. 2003), for the idea that preventing advocacy in classroom activities is a legitimate education purpose. Mot. to Dismiss (Doc. 10) at 12. However, this idea and these two cases are out of place in a *Tinker* argument. Both cases involved *classroom* activities (not after school activities), to which the courts applied the *Kuhlmeier* test.

[13] Even if the purposes, goals, and planned activities could reasonably be deemed controversial, this by itself would not permit the School Board to restrict Plaintiffs' expressive activity. *See Boyd GSA*, 258 F.Supp.2d at 690 ("Incorporation of the *Tinker* rule into 20 U.S.C. § 4071(f) means that a school may not deny equal access to a student group because student and community opposition to the group substantially interferes with the school's ability to maintain order and discipline, even though equal access is not required if the student group itself substantially interferes with the school's ability to maintain order and discipline. Consistent with the holdings of *Tinker* and *Terminiello* [*v. Chicago*, 337 U.S. 1 (1949)], the Equal Access Act permits Defendants to prohibit Plaintiffs from meeting on equal terms with the noncurriculum-related student groups that have been permitted to meet since December 20, 2002 only upon a showing that Plaintiffs' *own* disruptive activities have interfered with Defendants ability to maintain order and discipline. As addressed herein, Defendants have made no such showing in this case.") (alterations added; citations omitted).

Circuit simply affirmed the district court's conclusion that competent evidence reflected that school officials in that case reasonably forecasted a substantial disruption. But here, at the motion to dismiss stage, the School Board proffers no evidence as presented in *Heinkel*. Thus, dismissal would be inappropriate.[14]

Not only is the School Board violating Plaintiffs' First Amendment rights by denying them access to the limited public forum it has created, but it is also engaging in viewpoint discrimination. The School Board disputes that it has denied access to the Carver GSA because of any viewpoint inherent in the GSA's purpose, noting that there are no "heterosexual clubs" in the middle schools. Mot. to Dismiss (Doc. 10), at 14. Neither that fact nor the fact that a GSA has been approved at a high school in the district, *id.*, at 13, are relevant to the question whether the School Board, in denying recognition to *this* club, has discriminated on the basis of viewpoint. Plaintiffs have alleged that the School Board denied the Carver GSA access to the forum for student clubs on the basis that School Board Policy No. 4.502 permits only curricular clubs while in practice it approves non-curricular clubs. *See* Compl. (Doc. 1), ¶¶ 18, 25, 44. They have further alleged that the reason for this discrimination was because of a disagreement with the Carver GSA's viewpoint. *See id.*, ¶ 44 ("Defendant's denial of the GSA is based

[14] There is likely no evidence to support the School Board's assertion. *See Gay-Straight Alliance of Yulee High Sch. v. Sch. Bd. of Nassau Cnty.*, 602 F.Supp.2d 1233, 1236-37 (M.D. Fla. 2009) (rejecting school board's assertion that "the use of the name Gay–Straight Alliance would materially and substantially disrupt the operation of the school, or materially and substantially harm the well-being, or otherwise invade the rights, of others")

on its disagreement with the Carver GSA's views . . . ."). Such viewpoint discrimination is unconstitutional whether *Kuhlmeier* or *Tinker* is applied. "Government actors may not discriminate against speakers based on viewpoint, even in places or under circumstances where people do not have a constitutional right to speak in the first place." *Holloman*, 370 F.3d at 1280. Yet again, instead of taking the allegations in the complaint as true, the School Board disputes them and argues that the complaint should be dismissed on its version of the facts.

Although the facts and law will vindicate Plaintiffs, the School Board's preliminary objections depend on its dispute of the alleged facts and therefore cannot be decided on a motion to dismiss. The School Board's arguments regarding Plaintiffs' First Amendment claim should therefore be rejected.

V. § 1983 LIABILITY

The Plaintiffs have stated a claim against the School Board pursuant to 42 U.S.C. § 1983 for depriving them of the rights secured by the First Amendment of the U.S. Constitution and the Equal Access Act. The School Board nevertheless contends that the Plaintiffs have failed to allege that it was the "moving force" behind the deprivation. *See* Mot. to Dismiss (Doc. 10), at 15. Yet Plaintiffs alleged that the School Board had delegated final decision making authority to the Superintendent to approve student clubs in the school district. *See* Compl. (Doc. 1), ¶¶ 8-10. Under this theory, the School Board "may be held liable for acts or policies of individuals to whom it delegated final

decisionmaking authority in a particular area." *Holloman*, 370 F.3d at 1291. Further, School Board Policy 4.502 is itself an unconstitutional policy: the content-based criteria themselves fail the *Tinker* test because they purport to replace the inquiry whether the club's activities will cause a substantial and material disruption. *See* Compl. (Doc. 1), Exhibit 2 (School Board Policy 4.502), PageID 35. The School Board may be held liable directly for its own policy.

VI. CONCLUSION

For the reasons above, the Court should deny Defendant's motion to dismiss (Doc. 10).

Dated: February 4, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed today the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all persons registered for this case, including opposing counsel:

Stephen W. Johnson
McLin Burnsed
1000 West Main Street, P.O. Box 491357
Leesburg, FL 34749

Respectfully Submitted,

/s/ Daniel B. Tilley
Daniel B. Tilley
Trial Counsel
Florida Bar No. 102882
ACLU Foundation of Florida
4500 Biscayne Blvd., Suite 340
Miami, FL 33137

Leslie Cooper
Pro hac vice application pending
ACLU Foundation
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2627

(786) 363-2700 LCooper@aclu.org
dtilley@aclufl.org

Benjamin James Stevenson
Fla. Bar. No. 598909
ACLU Foundation of Florida
P.O. Box 12723
Pensacola, FL 32591-2723
T. (786) 363-2738
F. (786) 363-1985
bstevenson@aclufl.org

Counsel for Plaintiff