UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case Number: 6:13-cv-00922-GKS-KRS
RESPONSE TO DISPOSITIVE MOTION

FREEDOM FROM RELIGION FOUNDATION, INC., DAN BARKER, ANNIE LAURIE GAYLOR, AND DAVID WILLIAMSON,

Plaintiffs,

v.

ORANGE COUNTY SCHOOL BOARD,

Defendant,
_____/

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY FINAL JUDGMENT [Dkt. 36]

Defendant, ORANGE COUNTY SCHOOL BOARD ("Defendant" or "OCSB"), by counsel and pursuant to Rule 56, Federal Rules of Civil Procedure, files this response to the Motion for Summary Judgment for Injunctive, Declaratory, and Other Relief, and Incorporated Memorandum of Law ("Motion") filed by Plaintiffs FREEDOM FROM RELIGION FOUNDATION, INC., DAN BARKER, ANNIE LAURIE GAYLOR AND DAVID WILLIAMSON (collectively, "Plaintiffs"). The reasons the Motion should be denied are set forth in the Memorandum of Law below.[1]

INTRODUCTION

OCSB has an annual limited public forum in which OCSB permits persons to passively distribute materials on high school campuses in a passive manner as set forth in memoranda dated December 18, 2012 and April 26, 2013. As a result of Bibles being permitted for passive

[1]This Court should dismiss this action, or alternatively, enter summary judgment for OCSB. *See Artistic Entertainment, Inc. v. City of Warner Robins,* 331 F.3d 1196, 1201-1202 (11th Cir. 2003).

distribution, Plaintiffs, an atheist group, submitted materials that they wished to distribute. OCSB reviewed those materials, and OCSB determined that some of the materials requested were (1) age-inappropriate, (2) pornographic, obscene or libelous, or (3) were likely to cause substantial disruption. Some of the materials prohibited included references to enjoying "women from front and from behind", that "a man could take his wife when he wanted", that "Satan makes juices flow from a [a women's] vagina", that God is a prolific abortionist, that uses profanity such as "fucked men", that graphically discusses oral and anal sex and beastiality. OCSB did permit Plaintiffs to distribute many of the materials that expressed Plaintiffs' viewpoint.

Thereafter, Plaintiffs filed their Complaint. Plaintiffs' only claims are (1) their First Amendment free speech rights were violated by OCSB's alleged impermissible censorship of its materials which were submitted for distribution at the forum and (2) their equal protection rights were violated because (a) OCSB did not review the Bible, but reviewed Plaintiffs' materials, (b) that if OCSB allows passive distribution of the Bible, OCSB must allow all Plaintiffs' materials, and (c) that people distributed the Bible in an active manner. Plaintiffs make only an as applied claim, and nowhere in the Complaint do Plaintiffs allege a cause of action for a facial challenge to OCSB's policies.[2] The Motion appears to go impermissibly beyond Plaintiffs' claims for relief, at times straying into a facial claim. OCSB will only address Plaintiffs' claims as set forth in the Complaint. OCSB will demonstrate herein why Plaintiffs' contention that there was a Constitutional violation for which OCSB is liable is incorrect. Further, OCSB will demonstrate herein why Plaintiffs claims are moot.[3]

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[2]*Complaint (Dkt. 1)* at ¶68.

[3]The injunctive and declaratory relief sought in Counts I and II of the Complaint are moot because OCSB has voluntarily revisited and changed its position to permit distribution of all of the materials submitted by Plaintiffs. On or about December 9, 2013, counsel for OCSB notified Plaintiffs that Plaintiffs could passively distribute all of the previously prohibited materials at the

STATEMENT OF PROCEDURAL BACKGROUND

1. On or about June 13, 2013, Plaintiffs filed a complaint titled "Complaint - Injunctive Relief Sought". *(Dkt. 1).* Count I of Plaintiffs' complaint is a First Amendment claim for violation of free speech. Count II of Plaintiffs' complaint is a Fourteenth Amendment claim for violation of equal protection. Plaintiffs' relief sought is set forth on page 19 of the Complaint and seeks declaratory relief, injunctive relief, and nominal damages. Plaintiffs make only an as applied claim, and nowhere in the Complaint do Plaintiffs allege a cause of action for a facial challenge to OCSB's policies.

2. On or about August 19, 2013 OCSB filed its Answer and Affirmative Defenses to the Complaint ("Answer")*(Dkt.13).*

3. On or about March 17, 2014, OCSB filed its Motion to Dismiss Injunctive and Declaratory Relief ("Motion to Dismiss") *(Dkt. 19).* For the reasons explained in the Motion to Dismiss, the claims for injunctive and declaratory are moot, and should be dismissed.

4. On or about May 12, 2014, Plaintiffs filed their Motion seeking summary judgment on Count I and II of the Complaint, and requesting declaratory relief, injunctive relief, and nominal damages. *Motion (Dkt. 36)* at p. 2.

STATEMENT OF FACTS

1. At the heart of this matter is OCSB's annual forum in which OCSB permits persons to passively distribute materials on high school campuses. *OCSB's Affidavit.* A group requested to distribute the Bible, and in attempt to be in conformity with the current jurisprudence, OCSB allowed the passive distribution of the Bible. *OCSB's Affidavit.* Although

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school going forward at the yearly forum, including the forum to be held on January 16, 2014. On or about January 3, 2014, OCSB also informed Plaintiffs' of this change in position as to the distribution of the submitted materials.

OCSB opened its schools on the single-day forum for a limited basis, OCSB maintained its right – in conformity with existing law such as *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 507 (1969) – to exclude speech that threatened the educational mission of its schools, which included the exclusion of speech that would disrupt the learning environment and that would be age-inappropriate. *OCSB's Affidavit.*

2. Plaintiffs submitted numerous materials to OCSB to review for distribution. *OCSB's Affidavit.* OCSB reviewed the material and made a decision to exclude certain materials. *OCSB's Affidavit.* OCSB's attorneys responded with two letters explaining that some of the materials would not be permitted at the forum due to concern about the age-appropriateness of the material, lewdness of the material and the incendiary nature of the material. *OCSB's Affidavit.* Plaintiffs did not seek an appeal of the decision. *OCSB's Affidavit.* Plaintiffs were permitted to distribute numerous materials that expressed Plaintiffs' viewpoint on May 2, 2013 because they missed the January 16, 2013 forum. *OCSB's Affidavit.*

3. The purpose of the review of Plaintiffs' material is to determine whether the materials should be permitted pursuant to the standards set out in applicable jurisprudence, such as *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 507 (1969). and the Consent Decree in *World Changers of Florida, Inc. v. School District of Collier County,* Case No. 2:10-cv-419 (M.D. Fla. 2010). *OCSB's Affidavit.* OCSB did consider the law set out in both of these cases as well as other jurisprudence when reviewing Plaintiffs' materials. *OCSB's Affidavit.*

4. OCSB set out its passive distribution requirements in memoranda dated December 18, 2012 and April 26, 2013. *OCSB's Affidavit.* At no time, did OCSB authorize active distribution at the forum. *OCSB's Affidavit.*

5. After the commencement of this suit, OCSB, after due consideration, reconsidered its position on the materials previously submitted to OCSB for review. *OCSB's Affidavit.* On or about December 9, 2013, counsel for OCSB notified Plaintiffs that Plaintiffs could passively distribute all of the previously prohibited materials at the school going forward at the yearly forum, including the forum to be held on January 16, 2014. *OCSB's Affidavit.* On or about January 3, 2014, OCSB also informed Plaintiffs' of this change in position as to the distribution of the submitted materials. *OCSB's Affidavit.* While OCSB did not pre-approve materials that it had not yet seen, OCSB assured Plaintiffs that it will not prohibit the passive distribution of the previously submitted materials in the future. *OCSB's Affidavit.*

MEMORANDUM OF LAW

I. Plaintiffs Motion for Summary Judgment is Moot.[4]

There has been a voluntary cessation of the prohibition on the distribution of Plaintiffs' materials and there is no reasonable expectation that the distribution of the prohibited materials will not be permitted to be distributed in the future. *Jews for Jesus, Inc. v. Hillsborough County Aviation Authority*, 162 F.3d 627 (1998 11th Cir. 1998). Plaintiffs were given notice that all previously prohibited materials were now permitted to be passively distributed. *OCSB's Affidavit.* In fact, Plaintiffs were authorized to passively distribute all of the materials which are the subject matter of this action at the recent January 16, 2014 forum. *OCSB's Affidavit.* Plaintiffs' claims are moot and Plaintiffs are not entitled to injunctive or declaratory relief. *EPP v. Kerrey*, 964 F.2d 754 (8th Cir. 1992).

[4]OCSB incorporates its Motion to Dismiss and Reply to the Response to the Motion to Dismiss herein (Dkts. 19 and 28). The Motion to Dismiss is pending and has not yet been ruled upon by this Court.

A governmental entity's representations that the challenged conduct will not be repeated are given deference. *Seay Outdoor Advertising, Inc. v. City of Esther, Florida*, 397 F.3d 943 (11th Cir. 2005). Furthermore, when the defendant is a governmental entity, there is a rebuttable presumption that the alleged objectionable behavior will not recur. *Troiano v. Supervisor of Elections in Palm Beach, Florida*, 382 F.3d 1276 (11th Cir. 2004). Plaintiffs have not overcome the rebuttable presumption that the ceased practice will not reoccur. *Id.* There is no live controversy for this Court to determine and, for this reason alone, summary judgment should not be granted in Plaintiffs' favor. *Jews for Jesus, Inc. v. Hillsborough County Aviation Authority,* 162 F.3d 627 (11th Cir. 1998).

II. Plaintiffs' First Amendment Claims Fail.[5]

Plaintiffs argue that OCSB impermissibly prohibited some of Plaintiff's materials because of viewpoint discrimination, but this argument is now moot due to the voluntary cessation of the alleged prohibition on Plaintiffs' materials. However, to the extent this Court considers Plaintiffs' argument, OCSB will address this argument.

OCSB had a sufficiently compelling interest in restricting the requested materials because the materials were inflammatory (i.e., prone to causing substantial disruption), obscene, pornographic or libelous and age-inappropriate. OCSB was acting in a manner that was constitutionally permissible. The Supreme Court has "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with

[5]Throughout the First Amendment argument in Plaintiffs' Motion, Plaintiffs make reference to actions taken in regard to the distribution of the Bible. This reference overlooks that Plaintiffs' First Amendment claim must "stand or fall on its own merit" without regard to other groups. *Carver Middle School Gay-Straight Alliance v. School Bd. of Lake County, Fla.,* 2014 WL 897072 (M.D. Fla. March 6, 2014); *See also, Memphis County School District v. Stachore*, 477 U.S. 299 (1986); *Granite State Outdoor Advertising, Inc. v. City of St. Petersburg, Florida*, 348 F.3d 1278, 1283 (11th Cir. 2003).

fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 507 (1969). *Tinker* held that school officials have authority to circumscribe speech when they "reasonably fear that certain speech is likely to 'appreciably disrupt the appropriate discipline in the school.'" *Id.* Additionally, *Bethel School District No. 403 v. Fraser,* 478 US 675 (1986) held that even if disruption is not immediately likely, school officials are required to "inculcate the habits and manners of civility as values conducive both to happiness and to the practice of self-government."[6] As a part of that authority, school districts and school officials are entitled to proscribe what constitutes appropriate literature for students in a limited forum in a school environment as long as the decisions are content neutral. *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 507 (1969). Schools are given deference in the determination of the appropriateness of materials in schools, and First Amendment analysis is circumscribed by the unique educational environment. *Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez,* 130 S.Ct. 2971 (2010); *Hazelwood School District v. Kuhlmeier,* 484 US 260, 271 (1987); *Bethel Sch. Dist. No. 403 v. Fraser,* 478 US 675 (1986)(school has authority to prohibit vulgar, obscene, lewd, or sexual speech).

Indeed, Plaintiffs appear to overlook numerous decisions issued by this Circuit which uphold restrictions on speech at schools. *Heinkel v. School Board of Lee County,* 194 Fed.

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[6] *Bethel School District No. 403 v. Fraser,* 478 US 675, 681 (1986) explained:

> [T]hese "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

Appx. 604 (11th Cir. 2006); *Carver Middle School Gay-Straight Alliance v. School Bd. of Lake County, Fla.,* 2014 WL 897072 (M.D. Fla. March 6, 2014); *Scott v. Sch. Bd. of Alachua Cty.*, 324 F.3d 1246 (11th Cir. 2003); *Murray v. West Baton Rouge Parish Sch. Bd.*, 472 F.2d 438 (5th Cir. 1973); *Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972); *Lansdale v. Tyler Junior College*, 470 F.2d 659 (5th Cir. 1972); *Whitsell v. Pampa Indep. Sch. Dist.*, 439 F.2d 1198 (5th Cir. 1971); *Ferrell v. Dallas Indep. Sch. Dist.*, 392 F.2d 697 (5th Cir. 1968); *Smith v. Greene Cty. Sch. Dist.*, 100 F. Supp. 2d 1354 (M.D. Ga. 2000).[7] Importantly, the Eleventh Circuit in upholding an unwritten ban on displaying a Confederate flag on school grounds stated the compelling principle that:

> Although public school students' First Amendment rights are not forfeited at the school door, those rights should not interfere with a school administrator's professional observation that certain expressions have led to, and therefore could lead to, an unhealthy and potentially unsafe learning environment for the children they serve.

Scott v. Sch. Bd. of Alachua Cty., 324 F.3d 1246, 1274 (11th Cir. 2003).

Plaintiffs fail to argue that OCSB did not have the right to review materials for passive distribution and to determine if the materials were appropriate in the school environment. There is nothing unconstitutional in a requirement to review materials to be submitted to the school administration prior to distribution. *Shanley v. Northeast Independent School Dist., Bexar County, Tex.*, 462 F.2d 960 (5th Cir. 1972); *Heinkel v. School Board of Lee County, Florida*, 194 Fed. Appx, 604 (11th Cir. 2006). In reviewing materials to be provided at the forum, OCSB was in conformity with jurisprudence on distribution of materials at limited school forums, including but not limited to, *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 507 (1969), and

[7]All cases decided by the former Fifth Circuit Court of Appeals prior to the close of business on September 30, 1981 are binding on the Eleventh Circuit and on all district courts within the Eleventh Circuit. *Bonner v. City of Prichard,* 661 F.2d 1206, 1207 (11th Cir. 1981).

the Consent Decree in *World Changers of Florida, Inc. v. School District of Collier County,* Case No. 2:10-cv-419 (M.D. Fla. 2010). *OCSB's Affidavit.* The distribution of Plaintiffs' materials was not (and was not intended to be) a prior restraint on viewpoint, as urged by Plaintiffs. *OCSB's Affidavit.*

In a limited public forum OCSB is not required to allow persons to engage in every topic of speech. OCSB, however, cannot discriminate against speech based on viewpoint. *Rosenberger v. Rector and Visitors of University of VA*, 515 U.S. 819 (1955); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). Plaintiffs were permitted to distribute numerous materials that expressed Plaintiffs' viewpoint. The materials were not excluded because of the viewpoint expressed, and the exclusion was consistent with constitutional principles.

It is appropriate to regulate discussions about divisive, incendiary and libelous issues in the school environment. *Scott v. Sch. Bd. of Alachua Cty.*, 324 F.3d 1246, 1274 (11th Cir. 2003) citing to *Fraser,* 478 US at 683 ("Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others."). As the Plaintiffs are assuredly aware, abortion and sex are sensitive issues and hot button topics, leading to potential disruption in many environments, including schools. Plaintiffs were requesting to distribute graphic materials about these topics which were inappropriate for the age of the school audience. First, the use of the statements that God is the "most prolific abortionist of all", descriptions of back alley abortions, and insults about other religions are offensive and highly threatening to many students. *Scott v. Sch. Bd. of Alachua Cty.*, 324 F.3d 1246, 1274 (11th Cir. 2003); *Facing the Facts: Does the Freedom of Access to Clinic Entrances Act Violate Freedom of Speech,* 64

U. Cin. L. Rev. 947 (Spring 1996)(citing to the violence and "campaign of terror" involved in the discussion of abortion issues).

Given that very real opportunity for violence over the incendiary comments in the Plaintiffs' literature, OCSB's determination to prohibit the infiltration of inflammatory, polarizing and disruptive materials into the school environment was permissible and necessary to maintain a safe school environment. *Shanley,* 462 F.2d at 973–74 ("If the content of a student's expression could give rise to a disturbance from those who hold opposing views, then it is certainly within the power of the school administration to regulate the time, place, and manner of distribution with even greater latitude of discretion."); *Heinkel v. School Board of Lee County,* 194 Fed. Appx. 604 (11th Cir. 2006); *Scott v. Sch. Bd. of Alachua Cty.*, 324 F.3d 1246, 1274 (11th Cir. 2003); *Defoe v. Spiva,* 625 F.3d 324, 335 (6th Cir. 2010)("Indeed, *Tinker* does not require that displays of the Confederate flag *in fact* cause substantial disruption or interference, but rather that the school officials reasonably *forecasted* that such displays could cause substantial disruption or materially interfere with the learning environment").

Furthermore, the literature used profanity such as "fucked men", described sexuality graphically as "infinite orgasm" and "perpetual erection" and provides graphic information about sodomy, abortion and "clitoris cutters". *OCSB's Affidavit.* The literature referred to taking "women from front and from behind", sacrificing virgins, that "a man could take his wife when he wanted", that a wife "should never refuse herself to her husband even if it is on the saddle of a camel", "ritual prostitution" and that "Satan makes juices flow from [a women's] vagina". *OCSB's Affidavit.* Providing offensive, explicit, and deviant information about sex, abortion and women's anatomy are inappropriate in the school setting. Similarly, references to beastiality, to raping a wife, and to deviant sexual and ritual practices are age-inappropriate, offensive, lewd

and prurient. *See e.g., Gay-Straight Alliance of Okeechobee Highschool v. School Bd. of Okeechobee County,* 483 F.Supp. 2d 1224, 1228-29 (S.D. Fla. 2007)("This Court agrees with the proposition of the above cases that in public schools with students under the age of 18, the school may restrict access to and the expression of obscene and explicit sexual material and innuendo."); *Guiles v. Marineau,* 461 F.3d 320, 327 (2d DCA 2006)("Lewdness, vulgarity, and indecency normally connote sexual innuendo or profanity."); *McCorkle v. Johnson,* 881 F.2d 993, 995 (11th Cir. 1989)(finding content-based restriction on satanic materials withstood First Amendment scrutiny because "[i]t is an informed and measured response to the violence inherent in Satan worship, and to the potential disorder that it might cause within the prison"); *Morse v. Frederick,* 551 U.S. 393, 2625 (2007)(finding content-based restriction on a banner advocating the use of illegal drugs withstood First Amendment scrutiny); *Scott v. Sch. Bd. of Alachua Cty.*, 324 F.3d 1246, 1274 (11th Cir. 2003); *Heinkel v. School Board of Lee County,* 194 Fed. Appx. 604 (11th Cir. 2006)(finding no clear error in district court's determination that the distribution of abortion and birth control material by middle school student to students ages eleven to fourteen would be substantially disruptive based, in part, on the students' ages). The language employed in the materials was profane, lewd and sexual and could hardly be equated with any clinical discussions of sexuality and abortion that may or may not occur in the school curriculum.

Contrary to Plaintiffs' argument, OCSB's intent is not to promote any single viewpoint or to express the views of OCSB. *OCSB's Affidavit.* Notably, OCSB's forum is for passive distribution, which does not permit any endorsements, solicitation, sponsorship or school-employee involvement. *OCSB's Affidavit.* The letters from OCSB's attorney clearly set out that the reason for banning "An X-Rated Book", "Why Women Need Freedom From Religion" and "What is a Freethinker" were because they contained solicitation which was not permitted in the

forum. *OCSB's Affidavit.* Nonetheless, these documents were permitted with redaction of the solicitation. *OCSB's Affidavit.* The "Good without God" stickers were banned, not because of their content, but because stickers were not allowed in the forum. *OCSB's Affidavit.* Furthermore, Plaintiffs overlook that not all of the atheist viewpoint literature was banned – e.g. "What is an Atheist", "Nontheistic students in Your School", "What They Said About Religion", "What is Wrong with the Ten Commandments" were all permitted. *OCSB's Affidavit.* Surely, if viewpoint discrimination against Plaintiffs' sentiments were OCSB's goal, all of the materials espousing Plaintiffs' beliefs would have been prohibited.

OCSB reasonably determined the materials to be inappropriate, obscene and forecasted disruption and interference with the educational mission of the schools and, thus, there has been no violation. *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 507 (1969). Accordingly, the Motion should be denied.

III. Plaintiffs' Equal Protection Claim Fails.

A. OCSB's Review of Materials Was Proper.

OCSB argues that it was improper to require Plaintiffs' materials to be reviewed because OCSB did not comprehensively review the Bible. *Motion,* at 19. In posing this argument, Plaintiffs overlook that a formal re-review of the Bible was not necessary because OCSB had prior knowledge of the contents of the Bible and because the law is clearly established that Bibles are acceptable materials for educational settings including for comparative religion classes, for literary and historical purposes, and for other non-religious purposes.[8] *OCSB's Affidavit; See Peck v. Upshur County Board of Education,* 155 F.3d 274 (1996). Additionally,

[8]Are Plaintiffs actually asserting that OCSB is required to strike through certain sections of the Bible that Plaintiffs assert are similar to their materials to avoid a constitutional violation? Clearly, Florida statutes, the Constitution, and case law permit the Bible in certain situations, and, thus, the argument must fail.

F.S. 1003.45(1), specifically authorizes the use of Bible in the above situations and states: "The district school board may install in the public schools in the district a secular program of education including, but not limited to, an objective study of the Bible and of religion." *OCSB's Affidavit.* OCSB did not need to engage in a vain and futile review the Bible. On the other hand, Plaintiffs' materials were not established in jurisprudence and required a comprehensive review in order to determine the appropriateness of each material. There is no constitutional injury stemming from OCSB's review of the materials submitted by Plaintiffs.

Plaintiffs also wrongly argue that the Bible and Plaintiffs' materials are equivalent and that if the Bible was distributed then all of Plaintiffs' materials should be distributed. Plaintiffs' argument marginalizes and ignores those contextual differences between Plaintiffs' materials and the Bible and the effect of those differences on the determination of appropriateness in a school setting. *See e.g., See Peck v. Upshur County Board of Education,* 155 F.3d 274 (1996); *Abington Sch. Dist., Pa. v. Schempp,* 374 U.S. 203, 225, 83 S.Ct. 1560 (1963).[9] At the outset, it must be

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[9]*Abington Sch. Dist., Pa. v. Schempp,* 374 U.S. 203, 225, 83 S.Ct. 1560 (1963) recognizes the historical significance and social interplay of the Bible:

> It is true that religion has been closely identified with our history and government. As we said in *Engel v. Vitale*, 370 U.S. 421, 434, 82 S.Ct. 1261, 1268, 8 L.Ed.2d 601 (1962), 'The history of man is inseparable from the history of religion. And * * * since the beginning of that history many people have devoutly believed that 'More things are wrought by prayer than this world dreams of.'' In *Zorach v. Clauson, 343 U.S. 306, 313, 72 S.Ct. 679, 684, 96 L.Ed. 954 (1952),* we gave specific recognition to the proposition that '(w)e are a religious people whose institutions presuppose a Supreme Being.' The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself. This background is evidenced today in our public life through the continuance in our oaths of office from the Presidency to the Alderman of the final supplication, 'So help me God.' Likewise each House of the Congress provides through its Chaplain an opening prayer, and the sessions of this Court are declared open by the crier in a short ceremony, the final phrase of which invokes the grace of God.

noted that emotion, context and presentation play a part in determining that appropriateness or eligibility for distribution. *See e.g. Scott v. Sch. Bd. of Alachua Cty.*, 324 F.3d 1246, 1249 (11th Cir. 2003). The Bible is a historical document, it is probably the best-selling book in the United States and is generally socially acceptable to a vast majority of this country and is permitted in schools by jurisprudence for the use in comparative religion classes, for literary and historical purposes, and for other non-religious purposes. *See e.g., Abington Sch. Dist., Pa. v. Schempp,* 374 U.S. 203, 225, 83 S.Ct. 1560 (1963)(noting that the Bible has social and historical importance and is "worthy of study for its literary and historic qualities"); *Marsha v. Wernik,* 163 N.J. Super 589, 592-93 (Sup. Ct. NJ 1978)(discussing the applicability of prayer at public meetings, and acknowledging the general secular importance of the Bible in encouraging moral behavior in this country). Because of the historical and social significance of the Bible (ie: the context), it is considered subjectively appropriate material in schools even if other objectively similar material is not appropriate. This is best explained by the analogy that children may be appropriately exposed to events of historical significance even if horrific and depressing (i.e. the Civil War or the Holocaust) but that it may be inappropriate to relay other objectively similar graphic R-rated films or television news. The difference is context.

In other words, the themes and wording of Plaintiffs' material, without the historical and social context, can be taken solely as lewd, obscene and offensive. Thus, although the materials may arguably employ some of the imagery and themes of the Bible, it is not equivalent to the Bible no matter that Plaintiffs want to cry 'not fair'. As explained in the preceding section, the decision to prohibit some of the materials was based on rational and reasonable objections to the appropriateness of the materials for the students and the likely potential disruption in schools. There is no violation of Plaintiffs' equal protection rights, and this claim fails.

B. OCSB Only Permitted Passive Distribution.

Plaintiffs challenge that other persons actively distributed materials in violation of the OCSB's requirement of passive distribution. *Motion,* at 19. Plaintiffs present no evidence of a policy or custom by OCSB to allow a violation of the passive distribution procedure. Complaints about the violation of the passive distribution procedure when such violation is not a custom, practice or policy of OCSB do not rise to the level of a constitutional injury caused by OCSB. *Monnel v. Dept. of Social Services of the City of New York,* 436 U.S. 658, 691 (1978). Furthermore, Plaintiffs' complaint about how others act is not a violation of Plaintiffs' constitutional rights and Plaintiffs are prohibited from making constitutional claims unless the actions are a violation of Plaintiffs' own constitutional rights. *Memphis County School District v. Stachore*, 477 U.S. 299 (1986); *Granite State Outdoor Advertising, Inc. v. City of St. Petersburg, Florida*, 348 F.3d 1278, 1283 (11th Cir. 2003).

Plaintiffs assert that persons distributing the Bible used a white board, passed out invitations to worship at church, staffed tables with volunteers, and encouraged students to take Bibles. *Motion,* at p. 19-20. Plaintiffs do not address how OCSB was involved in this alleged active distribution and cannot do so because OCSB did not permit active distribution by any persons and was clear that only passive distribution is permitted. *OCSB's Affidavit.*

Indeed, in posing their argument on the alleged violations, Plaintiffs never address whether these alleged constitutional violations were caused by a policy or custom as enacted by the OCSB, or by OCSB's official policy-maker. It is well established that a local government entity is held liable only for constitutional deprivations where the plaintiff proved that (1) the constitutional deprivation was caused by a policy or custom of the local governmental entity, or (2) the final policymakers of the local governmental entity acted with deliberate indifference to a

constitutional deprivation, or (3) the final policymakers of the local governmental entity delegated their authority to a subordinate who, in turn, caused a constitutional deprivation, or (4) the policymakers of a local governmental entity ratified a constitutionally impermissible decision or recommendation of a subordinate or employee. *Sherrod v. Palm Beach County School District,* 424 F.Supp. 2d 1341, 1344 (S.D. Fla. 2006).

Plaintiffs present no evidence of a custom or policy as required to support their *prima facie* claim. Thus, liability for a deprivation of constitutional rights due to an official policy of OCSB fails. *Buckner v. Toro,* 116 F.3d 450, 452-53 (11th Cir. 1997)(". . . the requirement of a municipal policy or custom constitutes an essential element of a §1983 claim that a plaintiff must prove in order to establish municipal liability.").

Plaintiffs perhaps rely on the theory that the Constitutional violations were caused by OCSB's official policy-maker. Plaintiffs have the burden of proof to demonstrate as a matter of law whether an official has final policy making authority. *Tucker v. City of Florence, Ala.,* 765 F.Supp. 2d 1320 (N.D. Ala. 2011). As a matter of law "all public schools conducted within the district shall be under the direction and control of the district board with the district superintendent as executive officer", which means that OCSB and superintendent are the final decision-makers, not its employees. Fla. Stat. 1001.33; *See e.g. Am. Civil Liberties Union of Florida, Inc. v. Miami-Dade County School Bd.,* 557 F.3d 1177, 1229 (11th Cir. 2009). Plaintiffs concur with this statement of the law in the Complaint, which alleges that "the Board is responsible for governing OCSB and is the final policymaker for the limited public forum created therein." *Complaint (Dkt. 1)* at ¶13. Yet, Plaintiffs cannot and do not name a single authorizing act by OCSB's final policy makers that could have caused Plaintiffs' alleged injury. Indeed, OCSB's requirements for the forum clearly state that passive distribution is required.

OCSB's Affidavit.

To the extent that Plaintiffs are asserting that an employee of OCSB caused Plaintiffs' alleged injury, the law is clear that a governmental entity, such as OCSB, cannot be held liable for the actions of just any employee. *Sherrod v. Palm Beach County School District,* 424 F.Supp 2d 1341, 1344 (S.D. Fla. 2006). Plaintiffs do not name the person responsible to the alleged unconstitutional action attributable to OCSB. *Raben-Pastal v. City of Coconut Creek,* 573 So.2d 298, 302 (Fla. 1990)(plaintiff must show that the employee taking action had final decision making authority over the action alleged to have caused the constitutional violation for liability to attach to municipality.); *Pembaur v, City of Cincinnati,* 475 US 469, 479-80 (1986). Plaintiffs have not presented evidence that policy-makers have delegated their authority to a subordinate who caused the alleged injury or that the policy-makers ratified a constitutionally impermissible decision on a subordinate employee. *City of St. Louis v. Praprotnik,* 485 US 112 (1988)(simply going along with the discretionary decisions of one's subordinates is not a delegation to them of final policymaking authority).

Plaintiffs need to show that the actions taken by OCSB's employees were somehow ratified or authorized by OCSB, as the final decision maker to create OCSB liability. However, Plaintiffs do not present any proof that OCSB ratified its employee's actions or that OCSB delegated authority to any of its employees. Indeed, Plaintiffs do not even name the employees who allegedly caused the injury to Plaintiffs. OCSB disputes that it authorized any deviation from its passive distribution policy. *OCSB's Affidavit.* Notably, OCSB gave instructions to the schools to require passive distribution and provided guidelines to the schools to proceed accordingly. *OCSB's Affidavit.* As the facts stand, Plaintiffs cannot cause OCSB to have liability through an employee's actions. Summary judgment on this issue should be denied.

C. OCSB Properly Limited the Time Frame for Passive Distribution.

Plaintiffs argue that their rights were violated because Plaintiffs should be permitted to distribute their literature on their own schedule. *Motion,* at 20. This is simply not the law. OCSB is entitled to put time, place, and manner restrictions on non-student speech so long as the restrictions are viewpoint neutral and reasonable. *Id.; Peck v. Upshur County Bd. of Educ.,* 155 F.3d 274 (4th Cir. 1998)(upholding a one-day religious literature distribution day). There is nothing inherently partial about the dates chosen for OCSB's annual one-day forum and Plaintiffs are not treated any differently than other persons seeking to distribute literature – namely, all groups seeking to distribute materials must do so on the day of the forum. To the extent that Plaintiffs are arguing that they are burdened by trying to comply with these requirements and dates, such argument fails because the law is clear that an incidental burden imposed by neutral regulation does not constitutionally infringe on rights. *Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez,* 130 S.Ct. 2971, 2994 (2010). Moreover, no injury has been sustained by Plaintiffs because of the one-day forum because when Plaintiffs missed the January 16, 2013 forum, OCSB ensured that Plaintiffs' materials were distributed on a different day and pursuant to the same passive distribution requirement. *OCSB's Affidavit.* This argument fails, and summary judgment should be denied.

IV. Plaintiffs' Motion Improperly Argues a Facial Claim.

In the Motion, Plaintiffs attempt to raise a facial challenge to OCSB's policies (or lack thereof), which is beyond the claims raised in the Complaint. *Motion* at Section D. The Complaint has two causes of action for *as applied* constitutional violations. *Complaint (Dkt. 1)* at ¶68. The arguments in the Motion that exceed the scope of the Complaint should be disregarded by this Court as not at issue by the pleadings. *Cyprian v. Auburn University Montgomery,* 799

F.Supp. 2d 1262, 1289 (M.D. Ala. 2011)(court will not consider a claim made in a summary judgment brief that is not raised as a claim in the complaint); *Gilmour v. Gates, McDonald and Co.,* 382 F.3d 1312, 1315 (11th Cir. 2004).

CONCLUSION

For the above stated reasons, and those included in OCSB's Motion to Dismiss and related Reply, Plaintiffs are not entitled to an entry of summary judgment in this matter. Rather, OCSB is entitled to dismissal of Plaintiffs' Complaint with prejudice, or entry of summary judgment in OCSB's favor. *See Artistic Entertainment, Inc. v. City of Warner Robins,* 331 F.3d 1196, 1201-1202 (11th Cir. 2003).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of June, 2014, a true and correct copy of the foregoing was filed with the Court by using the CM/ECF system which will send notice of electronic filing and complete service of the foregoing as required by Fed.R.Civ.P. 5 to **Jerry H. Jeffrey, Esquire** *(sam1027j@aol.com)*, Jerry H. Jeffery, P.A., Post Office Box 947537, Maitland, Florida 32794; **Steven M. Brady, Esquire** *(steven@bradylaw.us)*, The Brady Law Firm, P.A., 7380 W. Sand Lake Road, Suite 500, Orlando, Florida 32819 ; and **Andrew L. Seidel, Esquire** *(aseidel@ffrf.org)*, Post Office Box 750, Madison, WI 53701.

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