IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

PARKERSBURG DIVISION

JANE DOE, et al.,

Plaintiffs,

v. CIVIL ACTION NO. 6:12-cv-04355

WOOD COUNTY BOARD OF EDUCATION, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Pending before the court is the Defendants' Motion to Dismiss [Docket 52]. A response and reply have been filed, and the motion is ripe for review. For the reasons set forth below, the court **GRANTS in part** and **DENIES in part** the defendants' motion to dismiss. The motion is **GRANTED** as to the claims against defendants Taylor and Coleman in their individual capacities and defendants Law and Taylor in their official capacities, and **DENIED** as to the remaining claims. Accordingly, the court **ORDERS** that the claims against defendants Taylor and Coleman in their individual capacities and defendants Law and Taylor in their official capacities be **DISMISSED**.

I. Background and Procedural History

This case arises from the single-sex classroom program adopted by Van Devender Middle School ("VDMS") in a commendable attempt to improve the education of its students. The plaintiffs are a mother, Jane Doe, and her three daughters, Anne Doe, Beth Doe, and Carol

Doe.[1] The daughters all attended the sixth grade at VDMS for the 2011-12 school year, and are currently attending the seventh grade for the 2012-13 school year. Defendant Wood County Board of Education ("WCBE") is the entity responsible for the administration of public schools within Wood County, West Virginia, including VDMS, and has overseen and approved the implementation of sex-separated classes at VDMS. Defendant J. Patrick Law is the superintendent of the Wood County Schools, and is responsible for the administration of all schools within the Wood County School District, including VDMS. Defendants Stephen Taylor and Penny Coleman are the Principal and Vice Principal, respectively, of VDMS, and have both overseen and implemented the sex-separated classes at VDMS.

VDMS is one of five public middle schools in Parkersburg, West Virginia. Students from grades six through eight are assigned to middle schools by WCBE based on the location of their residence. In 2010, the WCBE approved the single-sex education program at VDMS. The program was adopted for sixth grade classes in the 2010-11 school year, expanded to the seventh grade in 2011-12, and expanded to the eighth grade for the 2012-13 school year. Classes for reading, math, social studies, and science are separated by gender, while classes in other subjects are coeducational.

On August 15, 2012, the plaintiffs filed the instant lawsuit alleging that the single-sex classes at VDMS violated the Equal Protection Clause of the Fourteenth Amendment and Title IX, 20 U.S.C. § 1681, as interpreted by the Department of Agriculture and Department of Education in their respective regulations, 7 C.F.R. § 15a.34 and 34 C.F.R. § 106.34. On the same day, the plaintiffs filed a Motion for a Temporary Restraining Order and Preliminary Injunction. The court denied the plaintiffs' motion for a temporary restraining order, but granted the

[1] The plaintiffs are proceeding under pseudonym.

plaintiffs' motion for preliminary injunction in its Memorandum Opinion and Order on August 29, 2012 [Docket 51].

The defendants subsequently filed the instant motion to dismiss, arguing that (1) the plaintiffs' § 1983 action should be dismissed in light of the court's Memorandum Opinion and Order; (2) the plaintiffs' § 1983 claims against defendants Taylor and Coleman in their individual capacities should be dismissed because these defendants are entitled to qualified immunity; (3) the plaintiffs' § 1983 claims against defendants Law and Taylor in their official capacities should be dismissed because they are redundant to the claim against the WCBE; and (4) the plaintiffs' claims for damages against the individual defendants should be dismissed pursuant to the Eleventh Amendment.

II. Legal Standard for Motions to Dismiss Pursuant to Rule 12(b)(6)

A motion to dismiss filed under Rule 12(b)(6) tests the legal sufficiency of a complaint or pleading. *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008). Federal Rule of Civil Procedure 8 requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8. As the Supreme Court reiterated in *Ashcroft v. Iqbal*, that standard "does not require 'detailed factual allegations' but 'it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.'" 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986) for the proposition that "on a motion to dismiss, courts 'are not bound to accept as true a legal conclusion couched as a factual allegation'"). A court cannot accept as true legal conclusions in a

complaint that merely recite the elements of a cause of action supported by conclusory statements. *Iqbal*, 556 U.S. at 677-78. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570). To achieve facial plausibility, the plaintiff must plead facts that allow the court to draw the reasonable inference that the defendant is liable, and those facts must be more than merely consistent with the defendant's liability to raise the claim from merely possible to probable. *Id.*

In determining whether a plausible claim exists, the court must undertake a context-specific inquiry, "[b]ut where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679 (quoting FED. R. CIV. P. 8(a)(2)). A complaint must contain enough facts to "nudge[] [a] claim cross the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

III. The Defendants' Motion to Dismiss the Plaintiffs' § 1983 Claim in Light of the Court's Memorandum Opinion and Order

The defendants argue that the court should dismiss the plaintiffs' § 1983 action. The defendants contend that "Plaintiffs' sole allegation with respect to the basis for their First Cause of Action is that the classification of students by sex is unconstitutional." (Mem. in Supp. of Defs.' Mot. to Dismiss [Docket 53], at 6). Therefore, according to the defendants, because the court ruled that the separation of students by sex does not violate the Constitution *per se*, the plaintiffs' § 1983 claim necessarily fails. (*See id.* at 5-6).

The plaintiffs respond by arguing that their Equal Protection claim was properly pleaded by alleging discriminatory treatment, and by alleging "not merely that Defendants violated the Plaintiffs' rights to equal protection 'by separating the classes at Van Devender by sex,' but also

that they failed to comply with constitutional standards in doing so." (Pls.' Opp'n to Defs.' Mot. to Dismiss [Docket 58], at 2).

To state a claim under § 1983, "a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Adkins*, 487 U.S. 42, 48 (1988); *see also Crosby v. City of Gastonia*, 635 F.3d 634, 639 (4th Cir. 2011). To allege a "prima facie equal protection violation, it is enough that a plaintiff complains of governmental treatment dissimilar to that received by others similarly situated." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 953 (4th Cir. 1992). Once the plaintiff has sufficiently alleged this violation, the burden then shifts to the defendants to show that the classification does not violate the Equal Protection Clause. *United States v. Virginia*, 518 U.S. 515, 533 (1996). For gender-based classifications, "the burden of justification is demanding and it rests entirely on the State." *United States v. Virginia*, 518 U.S. at 533; *see also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

The defendants' argument fails because it confuses the extent of the court's ruling. To put the ruling in context, at the hearings for a temporary restraining order and preliminary injunction, the plaintiffs had, at one point, taken the position that single-sex classes could never withstand scrutiny under the Constitution and Title IX. The court simply rejected this position and ruled that single-sex classes are not unconstitutional *per se*, because it is entirely possible for such classes to be constitutional if the school meets the heightened scrutiny set forth in *United States v. Virginia*. (Mem. Op. & Order [Docket 51], at 10). However, the plaintiffs' complaint alleges:

> 99. By separating classes at Van Devender by sex, Defendants have intentionally classified students by sex and discriminated amongst them on the basis of sex in violation of Plaintiffs' right to equal protection of the laws, secured

> (pursuant to 42 U.S.C. § 1983) by the Fourteenth Amendment to the United States Constitution.

(Compl. ¶ 99). In several earlier paragraphs of the complaint, incorporated by reference in the plaintiffs' First Cause of Action, the plaintiffs allege that VDMS assigned students in certain grades to single-sex classes in certain subjects. (*See, e.g.*, Compl. ¶ 2, 56).[2] To survive a motion to dismiss on the equal protection claim, the plaintiffs' burden is to show a gender-based classification by the defendants, and the plaintiffs have done so here. Paragraph 99 of the complaint, combined with the earlier incorporated paragraphs, sufficiently alleges an equal protection violation to survive the motion to dismiss. Accordingly, I **DENY** the defendants' Motion to Dismiss the § 1983 claim under Rule 12(b)(6). The burden now shifts to the defendants to show an "exceedingly persuasive justification" for the single-sex classes because these classes are separated by gender. *See Virginia*, 518 U.S. at 533; *Hogan*, 458 U.S. at 724. Thus, the defendants now carry the burden of showing "at least that the classification serves important governmental objectives" and that it is "substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 533; *Hogan*, 458 U.S. at 724.

IV. The Defendants' Motion to Dismiss the Plaintiffs' § 1983 Claim Against the Individual Defendants

With respect to the individual defendants, the defendants first argue that defendants Taylor and Coleman are entitled to qualified immunity with respect to the plaintiffs' claims against them in their individual capacities. The defendants then argue that the plaintiffs' claims against defendants Law and Taylor in their official capacities should be dismissed, as these

[2] I note that the plaintiffs have further alleged that this gender classification does not meet the heightened scrutiny in *United States v. Virginia*. The complaint extensively alleges, for example, that the single-sex classes were based on the exact type of stereotypes ruled impermissible by the United States Supreme Court. (*See, e.g.*, Compl. ¶ 2, 30-32, 36, 38).

claims are redundant because the WVCBE is also a defendant to the lawsuit. I address these two arguments in turn below.

A. Defendants Taylor and Coleman are Entitled to Qualified Immunity

The defendants assert that defendants Taylor and Coleman are entitled to qualified immunity. The defense of qualified immunity "shields government officials performing discretionary functions from personal-capacity liability for civil damages under § 1983, insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Brockington v. Boykins*, 637 F.3d 503, 506 (4th Cir. 2011) (quoting *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 306 (4th Cir. 2006)); *see also Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Government officials are entitled to qualified immunity "unless the § 1983 claim satisfies a two-prong test: (1) the allegations, if true, substantiate a violation of a federal statutory or constitutional right and (2) the right was clearly established such that a reasonable person would have known his acts or omissions violated that right." *Brockington*, 637 F.3d at 506 (internal quotation marks omitted). The court may address these two elements in any order, and will first assess whether the rights at issue were clearly established. *See Merchant v. Bauer*, 677 F.3d 656, 661 (4th Cir. 2012).

A constitutional right is "clearly established when its contours are sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Ridpath*, 447 F.3d at 313 (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). While the unlawfulness must be apparent in light of pre-existing law, "the very action in question need not have previously been held unlawful." *Ridpath*, 447 F.3d at 313 (internal quotations omitted). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances. The salient question is whether the state of the law at the time of the events in question gave the

officials fair warning that their conduct was unconstitutional." *Id.* (internal quotations and citations omitted).

The defendants focus solely on their argument that the right was not clearly established. The defendants discuss *Doe ex rel. Doe v. Vermillion Parish Sch. Bd.*, 421 F. App'x 366 (5th Cir. 2011) and *A.N.A. ex rel. S.F.A. v. Breckinridge Cnty. Bd. of Educ.*, 833 F. Supp. 2d 673 (W.D. Ky. 2011), the only two published legal opinions directly discussing single-sex education prior to the instant action, and assert that neither case clearly establishes that the defendants' alleged acts would be unconstitutional or contrary to federal statute. The plaintiffs respond by asserting that *United States v. Virginia* and *Hogan* clearly established rights that a reasonable educator in defendants Taylor and Coleman's position would have been aware of.

The court has reviewed the applicable legal authorities, and recognizes that this is a close question. It seems that the defendants failed to recognize that *United States v. Virginia* establishes standards as to the issue of gender classifications generally.[3] However, the Fourth Circuit has instructed courts to identify the specific right that the plaintiffs assert at a high level of particularity, in the context of the specific facts of the case. *See Merchant*, 677 F.3d at 665; *Swanson v. Powers*, 937 F.2d 965, 969 (4th Cir. 1991). Assessing the right at the proper level of particularity, it is clear that no prior case law has directly addressed many of the specific issues prevalent in this case, involving a school's implementation of single-sex classes pursuant to the Department of Education regulations, 34 C.F.R. § 106.34(b), which "provide some foundation for a public school's attempt to experiment with single-sex education." *Vermillion*, 421 F. App'x at 369. While *United States v. Virginia* and *Hogan* addressed the standards that gender

[3] Indeed, the defendants argue merely that the plaintiffs' "reliance on *Hogan* and *Virginia*, with respect to any Qualified Immunity argument, is perplexing" because "neither case addresses efforts by a School Board to implement Single Sex Education Classes pursuant to 34 C.F.R. § 106.34(b)." (Defs.' Reply to Pls.' Opp'n to Defs.' Mot. to Dismiss [Docket 61], at 6).

classifications must meet, these cases do not put a reasonable educator in defendants Taylor and Coleman's positions on notice as to whether the specific single-sex classroom program adopted at VDMS would violate those standards.[4] Similarly, while the Department of Education provided similar standards in its regulations, neither these standards nor any case law since the adoption of these regulations provide defendants in Taylor and Coleman's positions on notice as to whether the single-sex classes at VDMS would violate the standards.[5]

In addition, while *Vermillion* and *Breckinridge* dealt directly with single-sex classrooms at schools, neither case would put the defendants on notice that the single-sex classes at VDMS would violate the plaintiffs' rights. *Vermillion* and *Breckinridge* both largely passed on the Constitutional question. Neither case addressed the issues in the instant case on their substantive merits. "When determining whether a reasonable officer would have been aware of a constitutional right, we do not impose on the official a duty to sort out conflicting decisions or to resolve subtle or open issues." *Campbell v. Galloway*, 483 F.3d 258, 271 (4th Cir. 2007). Moreover, "[i]n determining whether a right was clearly established at the time of the claimed violation, 'courts in this circuit [ordinarily] need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose.'" *Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999). Given the lack of cases on point, addressing the specific issues presented in the instant case, I cannot conclude that the law was

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[4] *United States v. Virginia* did not involve single-sex classrooms; instead, it involved the exclusion of women from the Virginia Military Institute ("VMI"). Virginia established a separate program for women, which the Supreme Court compared with VMI and found significant differences which "afford[ed] women no opportunity to experience the rigorous military training for which VMI is famed." *Virginia*, 518 U.S. at 548.

[5] The commentary regarding the regulations discusses at length, and cites, the Supreme Court's holdings in *United States v. Virginia*. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62530, 62533. The language in the regulations ultimately adopted closely tracks the standards set forth in *United States v. Virginia*. *Compare* 34 C.F.R. §§ 106.34(b)(1)(i) & (4)(i) *with Virginia*, 518 U.S. at 533.

"clearly established" such that defendants Taylor and Coleman had sufficient notice that the single-sex classroom program at VDMS would violate the Equal Protection Clause or Title IX.

Accordingly, defendants Taylor and Coleman are entitled to qualified immunity, and the motion to dismiss on this ground is **GRANTED**.

B. The Claims Against Defendants Law and Taylor in their Official Capacities are Redundant

The defendants maintain that the plaintiffs' claims against defendants Law and Taylor in their official capacities are redundant to the plaintiffs' claims against the WCBE, and should therefore be dismissed. The plaintiffs admit that "[b]oth the Supreme Court and Fourth Circuit have held that official capacity claims are essentially redundant of claims against a governmental entity," but argue that dismissal is not *required* and asks the court to allow these claims to proceed. (Pls.' Opp'n to Defs.' Mot. to Dismiss [Docket 58], at 14). Indeed, the United States Supreme Court has explained that:

> Official-capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent. As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.

Kentucky v. Graham, 473 U.S. 159, 165 (1985) (internal citations omitted). And the Fourth Circuit has held that a § 1983 claim against a school-board official "in his official capacity as Superintendent is essentially a claim against the Board and thus should be dismissed as duplicative." *Love-Lane v. Martin*, 355 F.3d 766, 783 (4th Cir. 2004); *see also Cline v. Auville*, No. 1:09-0301, 2010 WL 1380140, at *4 (S.D. W. Va. Mar. 30, 2010); *Lee v. City of South Charleston*, No. 2:08-0289, 2009 WL 2602378, at *10 (S.D. W. Va. Aug. 21, 2009). While the court may not be *required* to dismiss the claims against defendants Law and Taylor in their official capacities, the court nonetheless does so because it **FINDS** that there is little benefit in

retaining these officials as named defendants. *See Chase v. City of Portsmouth*, 428 F. Supp. 2d 487, 488-89 (E.D. Va. 2006).

Accordingly, I **GRANT** defendants Law and Taylor's motion to dismiss the plaintiffs' claims against them in their official capacities.

V. The Defendants' Motion to Dismiss any Claims for Damages against the Individual Defendants Pursuant to the Eleventh Amendment

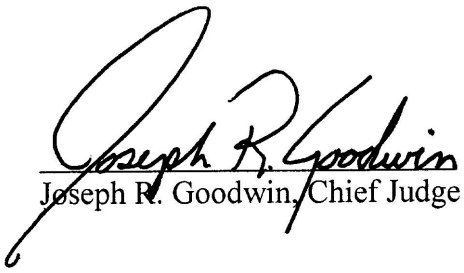
The defendants argue that, to any extent that the plaintiffs bring a claim for damages against the individual defendants Law, Taylor, and Coleman, the claim should be dismissed under the Eleventh Amendment. The plaintiffs respond by asserting that the Eleventh Amendment does not extend to counties and similar municipal corporations, including county school boards such as the WCBE. (Pls.' Opp'n to Defs.' Mot. to Dismiss [Docket 58], at 16-19). As discussed above, I granted the motion to dismiss the claims against defendants Taylor and Coleman in their individual capacities and the claims against defendants Taylor and Law in their official capacities. Since the only remaining defendant is the WCBE, the Eleventh Amendment issue regarding the individual defendants is moot and I do not reach this question.

VI. Conclusion

For the reasons set forth above, the court **GRANTS in part** and **DENIES in part** the Defendants' Motion to Dismiss [Docket 52]. The motion is **GRANTED** as to the claims against defendants Taylor and Coleman in their individual capacities and defendants Law and Taylor in their official capacities, and **DENIED** as to the remaining claims. Accordingly, the court **ORDERS** that the claims against defendants Taylor and Coleman in their individual capacities and defendants Law and Taylor in their official capacities be **DISMISSED**.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: October 15, 2012



Joseph R. Goodwin, Chief Judge