

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SETH TAYLOR; JACOB COBOS, by and through his)
parents, Ralph and Adrienne Cobos; KYRAH GRAHAM)
and MIKAYLAH GRAHAM, by and through their)
parent, Damon Graham; LACY CORMAN, by and)
through her parents, Gary and Ladonna Corman;)
ARIELLE GREEN, by and through her parents, Joseph)
and Socorro Green; and REED MAY, by and through)
his parents, Bruce and April May,)
)
Plaintiffs,)
) Case No. 2:10-cv-00606-LFG-ACT
v.)
)
)
ROSWELL INDEPENDENT SCHOOL DISTRICT)
and MICHAEL GOTTLIEB, in his capacity as)
Superintendent of Schools for)
Roswell Independent School District,)
)
Defendants.)
)

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’
MOTION FOR SUMMARY JUDGMENT**

COME NOW Plaintiffs, by and through counsel and pursuant to Fed. R. Civ. P. 7 and 56 and D.N.M.LR-Civ. 7.1, and file this memorandum of law in support of their motion for summary judgment.

INTRODUCTION

This case challenges Defendants’ denial of Plaintiffs’ attempts to distribute various items and religious literature to their friends and classmates during non-instructional time at the two

high schools in Roswell. Plaintiffs¹ seek to have their constitutional rights restored before the beginning of the next school year, so they may disseminate their messages to fellow classmates in accordance with their First Amendment rights. Plaintiffs request that this Court grant this motion for summary judgment so that the unconstitutional suppression of free speech will end.

STATEMENT OF UNDISPUTED FACTS

1. Plaintiff Seth Taylor is a recent graduate of Goddard High School, a current student at Eastern New Mexico University who also has gainful employment at Joby Morris Welding and Construction, maintained good grade point averages in both high school and in college, and remains a member of Relentless. Taylor Depo. at 4-5, 9-10 (Feb.).²
2. Plaintiff Jacob Cobos is a rising Junior at Goddard High School, and member of Relentless who participated in all of the activities included in the complaint and has agreed to take an active role in the group for the 2011-2012 academic year. Cobos Depo. at 6, Cobos Dec.
3. Plaintiff Reed May is a recent graduate of Goddard High School and member of Relentless who was described by Assistant Principal Edgett as a very respectful young man. Edgett Depo. at 164; May Depo. at 5.

¹ Since the filing of the second amended complaint, Kyrah and Mikaylah Graham have been dismissed from this action and are no longer parties.

² Plaintiff Seth Taylor was deposed twice, once in February, 2010 and once in March. For ease of reference, the February deposition will be designated “(Feb.)” and the March deposition will be designated “(Mar).”

4. Plaintiff Lacy Corman is a rising senior at Roswell High School, who has been a member of Relentless since her freshman year, and has a desire to reach other students and show them the love God has for them. Corman Depo. at 7-8.
5. Plaintiff Arielle Green is a recent graduate of Roswell High School who desires to be a nurse, began taking evening college classes towards that end while still in high school, was never in trouble for anything in her high school career, and has been a member of Relentless for two years. Green Depo. at 4-5, 8, 11.
6. Relentless members hold themselves to high academic standards, and remain committed to living with high moral character—practicing abstinence from sex, drugs and alcohol. *See* Taylor Depo. at 14 (Feb.); Cobos Depo. at 47-48.
7. Plaintiffs, as a group, are also well respected among District officials, and have been described as very respectful with an openness to work with District officials to achieve their goals in the literature distribution efforts. Luck Depo. at 148 Principal Bolanos described his dealings with them as good, and stated that Plaintiffs were all great kids. Bolanos Depo. at 57.
8. Barbara Eiffert, a teacher at Roswell High School described Plaintiffs as cooperative. Eiffert Depo. at 20.
9. Plaintiffs, as members of a religious youth group known as Relentless in Roswell (hereinafter, “Relentless”), have peacefully and systematically engaged in repeated expressive activities during non-instructional time to demonstrate their faith in Jesus Christ and His love for the students, faculty, and community of the District. *See* Taylor Depo. at 13, 21-22 (Feb.).

10. The original concept of Relentless resulted from an idea Plaintiffs had about becoming active in the schools and a conversation they initiated with their youth pastor, Tim Aguilar, but it is generally run by the Relentless students. Taylor Depo. at 18, 20 (Feb.); Corman Depo. at 8; May Depo. at 11-12.
11. Among other activities, over a period of time beginning in early November 2009, Plaintiffs distributed various items to students and faculty at both Roswell High School and Goddard High School. *See* Taylor Depo. at 32 (Feb.).

Early Distributions

12. On or about Friday, November 13, 2009, Plaintiffs distributed chicken salad lunches to the faculty, free of charge. *See* Eiffert Depo. at 7-8
13. Plaintiffs were never disciplined or reprimanded, and the distributions took place without any problems. *See* Sweet Depo. at 10-11.
14. On or about Friday, December 11, 2009, Plaintiffs distributed free hot chocolate to faculty and students. *See* Garnett Depo. at 10-11.
15. Plaintiffs received oral approval for this activity, but did not ask for or receive prior written approval for this activity, and were never disciplined or reprimanded for it. *See* Aguilar Depo. at 123-24.³

³ In fact, there was confusion among both the Relentless students and Defendants as to whether any permission had been sought or granted, with many students and District personnel testifying that it had not been obtained. *See, e.g.*, Taylor Depo. at 116-17 (Feb.); Renteria Depo. at 35; Amended Complaint at ¶¶30, 31, Defendants' Answer to Amended Complaint at ¶¶30, 31 (admitting that no permission had been sought or obtained for distributions of chicken salad lunches or hot chocolate).

16. On or about Friday, December 18, 2009, Plaintiffs distributed candy canes to faculty and students, to which were attached a detailed message. *See* Luck Depo. at 23-24; White Depo. at 28-29; Garnett Depo. at 13-14.

17. The message attached to the candy canes explained the religious significance of both the colors and the design of the cane. The message stated:

The Story of the Candy Cane is a myth, but what the myth represents is true---Jesus Christ did die for our sins.

It began with a stick of pure white hard candy to symbolize the Virgin Birth and sinless nature of Christ.

It's shape represents the staff of the "Good Shepherd" with which He reaches down into the ditches of the world to lift out the fallen lambs who, like all sheep, have gone astray.

The flavor of peppermint is similar to the herb Hyssop which symbolizes the purity of Jesus and the sacrifice He made.

Three small red stripes were added to represent the wounds Jesus suffered on His way to the cross. It also represents the Trinity: one God, who is represented in three ways: the Father, the Son, and the Holy Spirit.

See Amended Complaint ¶ 33; Defendants' Answer to Amended Complaint ¶ 33..

18. Again, Plaintiffs did not ask for or receive prior approval, and were never disciplined for this distribution, even those these were distributed by handing them out inside the classrooms before class started. *See* Luck Depo. at 68; *see also* Renteria Depo. at 64-65.

19. On or about Friday, January 22, 2010, Plaintiffs distributed painted affirmation rocks, free of charge. One side of the rocks had a short message such as "U are wonderful," and on the other was painted, "Psalm 139." *See* Luck Depo. . at 31, 33-34; Eiffert Depo. at 9-11.

20. The Relentless students had gone to great lengths to gather, paint and distribute these affirmation rocks. Courtney Renteria hand-painted innumerable rocks “and got paint everywhere.” Renteria Depo. at 65. Lacy Corman went out and gathered the rocks, and hand-painted encouraging messages on them. Corman Depo. at 24. Many students helped distribute them.
21. Plaintiffs did not seek or receive prior approval for this distribution, nor were they ever disciplined or reprimanded for it. *See* Luck Depo. at 68; Eiffert Depo. at 13.
22. Several school teachers were given the affirmation rocks as well, yet no school official ever informed Plaintiffs that they needed prior approval. *See* Luck Depo. at 68; Eiffert Depo. at 9-12.
23. These activities occurred without incident at both Roswell High School and Goddard High School. *See* Eiffert Depo. at 12-13; *see also* Luck Depo. at 34.
24. Plaintiffs also engaged in various other acts of charity and kindness at the schools. *See* Taylor Depo. at 32 (Feb.); Renteria Depo. at 69.
25. For example, they helped the janitors with trash after lunch, and they helped fellow students by clearing lunch trays. Taylor Depo. at 32 (Feb.); Renteria Depo. at 69.

The Rubber Babies

26. On Friday, January 29, 2010, however, things were different. Plaintiffs and other members of Relentless once again undertook to distribute something to their fellow students, as they had on many previous Fridays, but this time, they sought to distribute rubber babies that represented the development of an unborn child at twelve (12) weeks’ gestation. *See* Aguilar Depo. at 249; Luck Depo. at 36-38, 40.

27. Like the candy canes, the babies also had an attachment with a message on it. The attachment had a Scripture verse on one side, and on the other the contact information for the Chaves County Pregnancy Resource Center. *See* Cobos Depo. at 29; *see also* Exhibit B.
28. The Pregnancy Resource Center is a non-profit organization that is affiliated with Church on the Move. *See* Aguilar Depo. at 32.
29. Plaintiffs chose this time for distributing the rubber babies because it “was Pro-life month” (being around the anniversary of the Roe v. Wade decision, announced January 22, 1973). *See* Taylor Depo. at 67 (Feb.).
30. Plaintiffs intended to advance a pro-life and Christian message of hope for the hurting, to inform others of the evils of abortion, to show God’s love for the students in the District, to encourage them to protect the life of the unborn, to provide information concerning alternatives to abortion that result in saving the babies instead of destroying them, and educate them about the availability of the help they might need. Taylor Depo. at 67, 88 (Feb.); Cobos Depo. at 9-10, 28-29; Corman Depo. at 8, 30; May Depo. at 11-12, 14, 44.
31. Despite the resistance of school officials, Plaintiffs’ efforts were in many cases successful, because “[a] lot of people saw them as helping, a lot of people opened their eyes and realized things.” Renteria Depo. at 43.
32. Distribution of Rubber Babies at Goddard High School (January 29, 2010)
33. January 29, 2010 was a snow day in Roswell, so the schools were on a two hour delay. Bolaños Depo. at 12-13.

34. At Goddard High School, that meant that the gathering of students in the lobby was quite different from when there was no delay, because the early morning classes that met downstairs were canceled, and therefore the doors to the downstairs areas were not locked. Edgett Depo. at 18-19.
35. Consequently the upstairs lobby, where the rubber babies were distributed, was not as crowded, because the school opens up the library area for students to gather, and the library is downstairs. *Id.*
36. It was also less chaotic than usual, because the two hour delay allowed more time for students to gather and there was “not quite the throng at the door” that there is on a non-snow day. *Id.* at 19.
37. At Goddard High School, Plaintiffs were very careful not to force the babies on anyone. *See, e.g.,* Taylor Depo. at 48 (Feb.) (“We would ask the students, ‘Hey, would you like one of these?’ If they said yes then here you go. If no, fine. Let them walk on. We never forced anyone to take anything.”).
38. They were also careful not to position themselves near the doors to the school, so as not to block the ingress or egress of students and others arriving at the school. Taylor Depo at 43-44 (Feb.); May Depo. at 17; Plaintiffs’ Depo Exhibit 29.
39. Before long, however, Brian Luck, Assistant Principal at Goddard High School, approached Plaintiffs Seth Taylor, Jacob Cobos, and other Relentless students and told them, “We’re going to have to shut this down, you know people are being offended by what they see.” *See* Luck Depo. at 40; Taylor Depo. at 70 (Feb.); Edgett Depo. at 122.

40. Assistant Principal Luck then confiscated hundreds of the rubber babies with the verses attached. When asked why he was taking the rubber babies, Luck told the students he was just trying to keep them out of trouble. *See* Luck Depo. at 58-60 (also noting that Plaintiffs “did such a good job of remembering” what he said that he felt bad that he could not remember what they said specifically).
41. Although Mr. Luck never mentioned any such occurrence in his prior statements and written descriptions of the rubber baby distribution of January 29, *id.* at 91-94; *see also* Plaintiffs’ Depo. Exhibit 10, he claimed in deposition that he witnessed someone throw a dismembered baby down the hallway, and that his actions in shutting down the distribution were partly motivated by this alleged dismemberment. Luck Depo.. at 39-40, 56.
42. No one else who testified about the events of that morning of January 29 saw any such thing. *See* May Depo. at 129-30 (he thought Mr. Luck was present for 20-30 minutes, watching the distribution before shutting it down; Reed never saw anyone dismember a baby or throw one); Taylor Depo. at 59-60 (Feb.) (stating that Mr. Luck was “standing back here I guess [pointing to drawing] watching the students during the morning while we were passing them out” and estimating that he had been there for some 23 minutes, from 7:30 until 7:53 a.m., when the bell rang; Seth never saw anyone throw a baby); Cobos Depo. at 57.
43. Sharee White, a teacher at Goddard High School, also confiscated rubber babies from Relentless students while the students were walking in the hall not even trying to give the rubber babies away. *See* White Depo. at 34-35.

44. According to Assistant Principal Michelle Edgett, who did not actually witness the distribution of the babies that morning, disruption had already occurred before classes began, because “abortion is an issue that’s very – I mean, very much a topic. . . . and I think there’s strong feelings both ways.” Edgett Depo. at 30.
45. In fact, as far as Mrs. Edgett was concerned, “the disruption originated where the rubber fetuses in the bags came through the front door.” *Id.* at 32.
46. Even “the mere presence of rubber babies on campus” would “absolutely” be a disruption, according to Ms. Edgett, because kids are “naturally curious,” and a “large bag of whatever” would tend to draw a crowd. *Id.* at 32-33.
47. Unfortunately, some “immature students” apparently took the babies apart, made puppets of them, colored hair and moustaches on them, and threw them around the classrooms. *See, e.g.,* Renteria Depo. at 24-25, 36-37; May Depo. at 23-25.
48. Although Defendants claim that these activities were widespread, few who testified actually witnessed any of these things first hand. For example, Plaintiff Reed May, who played a leading role in the distributions by Plaintiffs at Goddard High School, never actually saw any such abuses, and only heard about it from a small number of other students. May Depo. at 23-24.
49. Similarly, Courtney Renteria saw very little of the inappropriate activity at Roswell High, despite her role as a leader in Relentless at that school. Renteria Depo. at 24-25, 36-37.
50. Sharee White testified that she had to confiscate some of the rubber babies from students who were “fidgeting as kids do,” and had to pick up a few pieces of one at the

end of the day, but did not have any disciplinary problems that day. White Depo. at 44-45.

51. Sharon Bell testified that she had to tell a student to put a rubber baby away during one class, and stated that she addressed the topic at the start of all her classes by telling the students that she did not want to see them playing with the rubber babies. Bell Depo. at 19, 22-23.

52. Ms. Edgett testified that she only received email reports of the alleged disruptive activity, but never saw any of it first hand. Edgett Depo. at 70.

53. Mr. Luck testified that he saw someone throw the head of one of the rubber babies down the hall, but his testimony and prior written statements are inconsistent on the subject. Luck Depo. at 39-40, 91-93.

54. Distribution of Rubber Babies at Roswell High School (January 29, 2010)

55. At Roswell High School, Plaintiffs were able to distribute rubber babies freely without interference before classes began. Renteria Depo. at 8; Bolaños Depo. at 15-16.

56. In fact, no action was taken against Plaintiffs at Roswell High School until after Principal Bolanos received a phone call from Mr. Luck and Ms. Edgett concerning the distributions taking place at Goddard High School. Bolanos Depo. at 13-14.

57. After that conversation, Principal Bolanos called Mr. Polaco, a security guard at Roswell High School, and instructed him to shut it down if it was a disruption. *Id.*

58. Barbara Eiffert, a teacher at Roswell High School, in an effort to help the Relentless students, asked to hold the rubber babies in her classroom until some questions were answered about whether the distribution could continue. *See Eiffert Depo.* at 17-18.

59. At Roswell High School, Principal Ruben Bolaños does not consider the distribution of materials by students before classes begin to be a disruption, unless of course they block an entrance or the like, but would not testify specifically regarding his opinion of after school distributions. Bolaños Depo. at 31, 41 (testifying that “I mean, you know, for most anything . . . there’s some kind of permission that’s requested and whatnot.”).
60. Principal Bolaños also distinguishes between distributions in “mass quantity” and distributions of smaller quantities. *Id.* at 29 (quoting Depo. Ex. 16).
61. Nevertheless, Principal Bolanos refused to provide a definitive answer regarding exactly what number would constitute “mass distribution.” *Id.* at 39-40 (stating that it is “any amount that is going to disrupt the school day.”).
62. Raúl Castro, a security guard at Roswell High School, came to Ms. Eiffert’s classroom with instructions to confiscate the rubber babies and bring them to the principal’s office. Eiffert Depo. at 18; Castro Depo. at 18-19.
63. Mr. Castro also stopped Courtney Renteria, and informed her that he had been instructed to photograph her t-shirt, which contained a pro-life message, because he was not sure that the students were permitted to wear such shirts. *See* Castro Depo. at 21-22.
64. Apparently the District has a policy or practice whereby District officials prohibit students from wearing shirts that have the potential to be found offensive by another student, but it is imprecise and interpreted quite differently by different school officials. *See* Garnett Depo. at 64-67; Bolanos Depo. at 37-38; Edgett Depo. at 127-28.

Second Distribution of Rubber Babies (February 11, 2010)

65. Plaintiffs and other Relentless students, believing that they had both a constitutional right and a Christian duty to express their sincerely held religious beliefs, attempted to distribute the rubber babies again on February 11, 2010. May Depo. at 32-33; Garnett Depo. at 43-44.
66. That morning, Michelle Edgett, Assistant Principal at Goddard High School, announced over the public address system: “Nothing is to be passed out that is not school related. This is school policy. *Anything* that is going to be passed out needs to be approved. This is your last warning. If this doesn’t stop now there will be disciplinary actions taken.” *See* Bell Depo. at 35; Taylor Depo. at 80 (Feb.); Edgett Depo. at 124.
67. Likewise, at Roswell High School, Principal Ruben Bolaños sent an e-mail to the faculty that students were distributing rubber babies, that it was not approved, and that all of the rubber babies were to be confiscated.. *See* Bolanos Depo. at 21-22; Plaintiffs’ Depo. Exhibit 15.
68. When Plaintiffs and other Relentless students attempted to distribute the rubber babies on February 11, 2010, they were called into the office of Patricia Garnett, Assistant Principal at Roswell High School. *See* Garnett Depo. at 43-44.
69. Ms. Garnett asked the Relentless students if they had any of the rubber babies with them, and the students replied that they did. *Id.*
70. Ms. Garnett asked the students to turn them over, but the Relentless students respectfully declined, asserting their constitutional rights. *Id.*

71. Thereafter, the Relentless students were instructed to go to the library for the remainder of the day. *Id.* at 47.
72. That afternoon, Principal Bolaños had a meeting with the students, and explained why they were prohibited from distributing the rubber babies, and why they needed prior approval before distributing anything to other students. *See* Bolanos Depo. at 24-25, 27-28.
73. The only reason District officials gave the students at the time they prohibited the distribution was that some students were getting upset. Taylor Depo. at 79 (Feb); May Depo. at 25.
74. Shortly thereafter, at a meeting with various school officials and the Senior and Youth Pastors of Church on the Move, Superintendent Gottlieb suggested Relentless change its pro-life message to a less controversial message of abstinence. *See* Gottlieb Depo. at 58-59.
75. In accordance with the Superintendent’s suggestion, Relentless secured wristbands with “I’m Worth Waiting For” imprinted upon them. *See* Taylor Depo. at 32 (Feb.); Taylor Depo. 54-55 (Mar.).
76. Plaintiff Seth Taylor and other Relentless students distributed wristbands from their backpacks before the start of the school day and during other non-instructional times on Friday, February 26, 2010. Taylor Depo. at 57-58 (Mar.); Cobos Depo. at 38-39; Garnett Depo. at 80.
77. Nevertheless, they were soon ordered to stop distributing the wristbands, and instructed to go to the Principal’s office. Taylor Depo. at 58 (Mar.).

78. Plaintiffs also engaged in distributions after the wristbands, including pencils, Easter eggs, stickers, and dog tags, but only received permission for some of those distributions. *See* May Depo. at 96.⁴
79. Plaintiffs received permission for the Easter egg distribution, but officials at Goddard High School required them to distribute them outside at a table where they could not approach students, and had to wait for students to approach them which made it an unsuccessful distribution because the weather was not cooperative. May Depo. at 124-125; Edgett Depo. 161-162 (stating that the wind was “blowing 100 miles per hour” and that the distribution was permitted on a day where students were anticipating a long weekend and anxious to leave).
80. Thereafter, Plaintiff Seth Taylor was suspended, allegedly for continued non-compliance and failure to follow a school directive. Sweet Depo. at 75-76.
81. Plaintiffs’ counsel sent a letter to the members of the School Board and Superintendent Gottlieb on February 26, 2010, demanding that Plaintiffs and other Relentless students be allowed to exercise their constitutional right of free speech, that the students’ records be expunged of any wrongdoing, and that the confiscated materials be returned. *See* Plaintiffs’ Depo. Ex. 5.

The Advertising Policy

82. Defendants’ counsel responded to Plaintiffs’ letter on March 16, 2010, citing Policy 7110, “ADVERTISING, SOLICITATIONS, ETC.” (“Advertising Policy”), as

⁴ In fact, the District had by this time implemented by practice if not by formal policy the rigid requirement that every distribution must receive prior permission from the central office. It was pursuant to that practice that Reed May and others sought and obtained (restricted) permission.

authority for Defendants' position that prior approval was required before any distribution would be permitted., and reaffirming the District's position that confiscating the rubber babies and Seth Taylor's suspension were justifiable and appropriate responses. *See* Plaintiffs' Depo. Ex. 6.

83. The Advertising Policy states in part: "*Promotional* activities must be approved by the school principal." Plaintiffs' Depo. Ex. 4 (emphasis added).

84. Defendants did not mention the Advertising Policy on any of the three occasions that they stopped Plaintiffs' distributions; the only justification ever given was that it was offensive. *See* Taylor Depo. at 79 (Feb.); May Depo. at 25; Luck Depo. at 40, 58.

Interpretation of the Advertising Policy

85. Defendants have not developed any guidelines or procedures to assist District officials with the interpretation and application of the Advertising Policy. Gottlieb Depo. at 9-10.

86. Mr. Kakuska interprets the Advertising Policy very broadly and stated that the "et cetera" was intended to allow the policy to be all encompassing and cover all forms of non-school sponsored speech. Kaksuska Depo. at 40.

87. Ms. Edgett interprets this policy very narrowly as only applicable to those materials that are advertising something, and stated that the Advertising Policy has "nothing to do with rubber fetuses." Edgett Depo. at 67.

88. Mr. Bolanos interprets this policy similar to that of Ms. Edgett and stated that it would not have covered materials distributed prior to the start of the school day or any materials that were not advertising something. Bolanos Depo. at 20.

89. Ms Sanchez interprets the Advertising policy quite broadly, and stated that it covers all of Plaintiffs' speech including the rubber fetuses, the affirmation rocks, the Easter eggs, and the wristbands. Sanchez Depo. at 28-29.

90. Mr. Sweet also interprets this policy as all encompassing and testified that it would cover anything that any student would desire to distribute at school. Sweet Depo. at 78-79.

The Literature Distribution Policy

91. Defendants adopted a new literature distribution policy, Policy 5195, on May 11, 2010. Sanchez Depo. at 93-94.

92. The purpose for adopting Policy 5195, "DISTRIBUTION OF NON-SCHOOL SPONSORED LITERATURE" ("Distribution Policy"), was to better communicate the parameters and restrictions on literature distribution in the schools, to more clearly articulate what District officials would classify as promotional and what was non-promotional, and to communicate that those desiring to distribute literature over a certain number would need approval from the Assistant Superintendent. *See* Sweet Depo. at 80-81.

93. Defendants adopted this policy after realizing that Policy 7110 was inadequate for all literature distribution, and consulted with attorneys about how to more centralize the process for approval of non-school literature. *See* Gottlieb Depo. at 14-15.

94. Defendants rely on the Distribution Policy as authority for confiscating the rubber babies. *See* Garnett Depo. at 99-102.

95. The Distribution Policy states that “[a]ny non-school sponsored literature which a student wishes to distribute or possesses to distribute will first be submitted to the Assistant Superintendent,” and gives the District substantial discretion in determining whether to permit any distribution or speech. *See* Policy 5195, Plaintiffs’ Depo. Exhibit 7; *see also* Responses 15, 18, 19, 23, and 24 Exhibit .
96. Initially, Policy 5195 required the Assistant Superintendent to respond to requests for distribution within three days, but that was subsequently amended to five days on January 11, 2011, and this deadline could be extended indefinitely by the superintendent. *See* Plaintiffs’ Depo. Exhibit 7; Sanchez Depo. at 10-13; *see also* Response 17 Exhibit A.
97. The Distribution Policy allows the District to reject proposed distributions if they are deemed “potentially offensive,” “misleading,” “demeaning,” or “inappropriate.” These terms are not defined in the Distribution Policy because it was intended to provide Defendants’ with some “wiggle room.” Policy 5195 Plaintiffs’ Depo. Exhibit 7; *see also* Response 16 Exhibit A.
98. The Distribution Policy defines “distribution” as 10 or more copies of any given document. Accordingly, under the Policy, distributions of 9 or less items are permitted. Plaintiffs’ Depo Exhibit 7; *see also* Garnett Depo. at 98, 101.
99. Despite the fact that the Distribution Policy by its plain language does not reach distributions of less than 10 items, Defendants nevertheless purport to regulate and restrict distributions of less than 10 items by means of their so-called “Standard Practice.” Edgett Depo. at 37-39.

Interpretation of the Distribution Policy

100. Defendants have not developed any guidelines to aid their employees in interpreting and applying the Distribution Policy. Gottlieb Depo. at 82-83.
101. The reason they have not developed any guidelines for the Distribution Policy is so that Defendants would have discretion in deciding how and when to apply it. *Id.* at 83 (“as in 7110, the reason it says et cetera, and you don't do that is you don't know what kind of situations are going to arise And give them some leeway”).
102. As with the Advertising Policy, Defendants always left themselves “some wiggle room” regarding when and how the Distribution Policy would apply. *Id.* at 83-84.
103. Although the Distribution Policy states that the assistant superintendent for instruction normally has five days within which to respond to a request for permission to distribute literature, it also allows her to request an extension from the superintendent, and there is nothing in the Policy that would prevent him from extending the deadline for an entire year if he so desired. *Id.* at 85-87.
104. Paragraph 2 of the Policy lists several bases on which the assistant superintendent may disapprove a request for distribution. *Id.* at 87.
105. However, the list is not intended to be all-inclusive, so while it lists sub-parts A-F, “there may be a G, H, I, J, K that just aren't written.” *Id.* at 87-88.
106. In reviewing a request for literature distribution under the Policy, the assistant superintendent is required to consider the content of the message in making her determination whether to grant permission or not. *Id.* at 88.

107. Accordingly, the assistant superintendent may conclude that a particular distribution request should be denied based on the content of the message alone, concluding that the message itself would cause a substantial disruption, or because the message is potentially offensive to a substantial portion of the school community. *Id.* at 89.
108. Although the Literature Distribution Policy defines a “distribution” as the dissemination of “ten or more copies” of a given item, it fails to identify a specific time period. Therefore, under the Policy it could be that the distribution of nine (9) items during the morning, nine (9) more at lunch time, and then nine (9) more in the afternoon may be permissible without the need for submitting a request to the assistant superintendent. *Id.* at 99-100.
109. Alternatively, it could be interpreted to mean that no more than nine (9) items may be distributed during the course of one school day. *Id.* at 100.
110. Under the Distribution Policy, materials or objects that do not fit the definition of “non-school sponsored literature” “shall be prohibited.” *Id.* at 116 (quoting the Policy).
111. According to Superintendent Gottlieb, rubber babies do not “appear to constitute non-school sponsored literature.” *Id.* at 117. Therefore, they are entirely prohibited under the Policy. *Id.*
112. Despite the fact that Valentine’s Day cards would constitute non-school sponsored literature under the Policy, Superintendent Gottlieb would nonetheless allow students to distribute more than ten (10) Valentine’s Day cards without obtaining prior permission under the Policy. *Id.* at 121-123.

113. Ms. Edgett stated that this Policy is all encompassing and that it covers all material that is either visual or auditory, and that if a student wanted to speak to ten or more friends he might need permission depending on “what you want to speak to ‘em about.” Edgett Depo. at 39-40.
114. Principal Bolanos interprets this Policy broadly and states that it covers anything that anyone wants to distribute, whether its “ten glasses, you know, or ten napkins.” Bolanos Depo. at 47-49 (stating that the rubber fetuses would be considered literature, but conceding that hot chocolate without a message attached would not constitute literature).

The “Standard Practice”

115. Defendants claim that there is a long standing practice in the District to require prior approval for distributing non-school sponsored literature. *See* Luck Depo. at 108-09.
116. Defendants cite this long standing practice as additional authority for requiring all literature to be submitted for prior approval. *Id.*; *see also* Edgett Depo. at 37-39.
117. Some school officials interpret the standard practice as meaning that whenever a student has doubt about the permissibility of their distribution, it is safe to receive prior approval for everything. Luck Depo. at 108-09.
118. Some officials interpret the standard practice as meaning that no outside literature may ever be distributed on school campuses because it will be perceived by parents as the school’s endorsement of the distributed materials. Edgett Depo. at 36-37.

119. Some officials interpret this unwritten practice as requiring one to go through the activities office to get approval for distribution, no matter who the group is. Bolanos Depo. at 28.
120. Others, such as Superintendent Gottlieb, would not require students to obtain prior approval for distributions of five (5) or more items. Gottlieb depo. at 123-24.
121. Some officials interpret this unwritten practice as a requirement that outside groups from whatever venue obtain prior approval from the school before distributing something to students, but that approval was not needed for distributing Valentine's Day cards or other student-to-student distribution of a similar nature. Kakuska Depo. at 13-15.
122. Some officials interpret this unwritten practice as requiring prior approval for only those distributions that are mass distributions, such as literature distributed to the entire school or district, but not necessary for individual student distributions such as invitations to a birthday party. Sanchez Depo. at 93-95; *see also* Response 4 Ex. A.
123. Even District officials readily admit that there are no specific guidelines that are followed under this standard practice, and that the application of this practice is subject to the interpretation of the individual school official applying it. *See* Edgett Depo. at 63-64; Gottlieb Depo. at 124; *see also* Response 2, 3, and 14 Ex. A.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGEMENT BECAUSE THERE IS NO GENUINE ISSUE OF MATERIAL FACT.

Plaintiffs are entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of

law.” Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The court views the evidence in the light most favorable to the non-moving party, and will grant summary judgment if there is no genuine issue of material fact in light of the relevant substantive law. *Comm. for the First Amend. v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992). “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is ‘no genuine issue for trial,’” and summary judgment will be granted. *Id.* (quoting *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)); *see also* WRIGHT, MILLER, & KANE, FEDERAL PRACTICE AND PROCEDURE CIVIL § 2727, 472 (3d. ed. 2008).

While Defendants may dispute the legal standard governing the speech at issue in this case, or some of the less important facts, there is no *genuine* dispute regarding the *material* facts. When viewed through the lens of the appropriate legal standard, no rational trier of fact could reach any conclusion other than that Defendants have violated Plaintiffs’ constitutional right to distribute literature during non-instructional times in a manner that neither materially disrupts the learning environment of the school, nor encroaches on the constitutional rights of others. “Factual disputes about immaterial matters are irrelevant to summary judgment determination.” *Campbell*, 962 F.2d at 1521. Since there is no genuine issue of material fact, and Plaintiffs are entitled to judgment as a matter of law, summary judgment is appropriate.

In brief, Plaintiffs, members of the religious student group Relentless, have a desire to express their Christian and pro-life beliefs to the students and teachers at both Roswell and Goddard High School. Taylor Depo. at 13-14 (Feb.). To that end, they have engaged in various acts of service and kindness at both schools. *Id.* at 32. These activities included helping janitors clean the lunchroom, clearing lunch trays for their fellow students, providing lunch for the

teachers, distributing affirmation rocks containing a message of encouragement to students, distributing candy canes with a message attached that detailed the meaning of the candy cane, distributing wristbands promoting abstinence, and distributing rubber babies during pro-life month that expressed a pro-life message and support for the unborn. *Id.* Most of these efforts were conducted without permission, and no disruptions resulted from these peaceful distributions. Luck Depo. at 68.

Defendants, however, have established a system of express prior restraints through both their policies and practices, which restraints have been applied subjectively and inconsistently, to the detriment of Plaintiffs' First Amendment rights. Policy 5195 requires that all non-school sponsored literature be submitted to the Assistant Superintendent and receive approval prior to being distributed on campus. Plaintiffs' Depo. Ex. 7. The policy allows the District to reject any submissions that are "potentially offensive," "demeaning," "inappropriate for the school environment," or "misleading," but these terms are not defined anywhere in the policy. *Id.*

Additionally, Policy 7110, the Advertising Policy, requires that all "promotional activities" be submitted to the principal and receive prior approval before being distributed to students. Plaintiffs' Depo. Ex. 4. On top of all this, District officials have also relied upon an unwritten "standard practice" that establishes additional prior restraints on student speech, but that practice is interpreted quite differently by different officials. Luck Depo. at 108-09. Some officials interpret the standard practice as a complete prohibition on student distributions. Edgett Depo. at 36-37. Others state that it is only applicable to mass distributions. Sanchez Depo. at 93-94. Others state that student-to-student distributions are permissible, but that outside groups must receive prior approval for distributions. Kakuska Depo. at 13-15.

Both Policy 5195 and 7110 were used as authority to prohibit Plaintiffs' speech, as well as the standard practice, even though it is questionable exactly what that practice exactly requires.

There is admittedly some factual dispute over the alleged disruptions surrounding the distribution of the rubber babies and whether they were material and substantial disruptions of the school's mission. However, because the undisputed facts show that any alleged disruptions that did in fact occur took place well *after* Defendants had seized Plaintiffs' property and shut down their distribution, and were not in any event properly chargeable to Plaintiffs, who had no part in the inappropriate actions, the issue is in the end immaterial to the determination of this motion. To shut down Plaintiffs' speech activities as punishment for the actions of third parties is to apply a "heckler's veto," which the First Amendment does not recognize.

Finally, Defendants' Distribution Policy (5195), Advertising Policy (7110), and so-called "standard practice" are all unconstitutionally vague and overbroad, and in addition confer unbridled discretion upon school officials charged with licensing free speech. As such, they should be declared unconstitutional both on their face and as applied, and Plaintiffs are entitled to judgment as a matter of law.

II. PLAINTIFFS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

As noted above, Defendants' policies and practices are unconstitutional both on their face and as applied. Regardless of the factual details and precise chronology of events surrounding the distribution of the rubber babies, then, Plaintiffs are entitled to judgment on the basis of Defendants' use of these policies and practice and their infringement of Plaintiffs' First Amendment rights.

The issue of whether summary judgment is appropriate on the question of Plaintiffs' distribution of the rubber babies in the face of the alleged disruption that occurred after the fact, though, depends in large measure on what standard of review this Court will use to determine the constitutionality of the Defendants' actions in banning the speech. The two most prominent cases establishing the appropriate standard of review for student speech on public school campuses are *Tinker v. Des Moines*, 393 U.S. 503 (1969), and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). The analysis to be undertaken, and the level of discretion given to school officials, differs tremendously depending on which standard is employed. As will be shown below, *Tinker* is the appropriate standard in this case and should compel this Court to grant summary judgment.

A. There is a fundamental distinction between *Tinker* and *Hazelwood*.

The primary distinction between these two Supreme Court cases, and the resulting impact on student free speech cases is whether the speech is purely private speech, or is instead school sponsored and can reasonably be perceived to bear the imprimatur of the school. The Tenth Circuit has clearly illustrated the distinction between the two:

Tinker addressed whether the First Amendment requires a school to tolerate particular **student expression** not sponsored by the school. *Hazelwood*, on the other hand, dealt with the authority of school officials over **school-sponsored** publications, theatre productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.

Miles v. Denver Pub. Sch. Sys., 944 F.2d 773, 776 (10th Cir. 1991) (emphasis added). In situations where the speech involved is not school sponsored, "the school's ability to restrict a student's speech requires a showing that such speech would **substantially interfere with the work of the school** or impinge upon the rights of other students." *Seamons v. Snow*, 84 F.3d 1226, 1237 (10th Cir. 1996) (articulating the standard announced in *Tinker*) (emphasis added).

“If the speech at issue bears the imprimatur of the school and involves pedagogical interests, then it is school-sponsored speech, and the school may impose restrictions so long as those restrictions are reasonably related to legitimate pedagogical concerns.” *Fleming v. Jefferson Cnt. Sch. Dist.*, 298 F.3d 918, 924 (10th Cir. 2002) (articulating the standard announced in *Hazelwood*).

The degree of control that school officials may exercise over speech on the public school campus depends in large measure on whether the speech is private, student speech or is instead school-sponsored, government speech. If the speech is private, student free speech which just happens to occur on a public school campus because the student is required by law to be there, *Tinker*’s “material and substantial disruption” test controls, and the school’s authority is severely limited in what it can restrict.⁵ If on the other hand the speech is school-sponsored, then the school’s authority is at its greatest, and *Hazelwood*’s lenient “reasonably related to pedagogical concerns” test applies, and officials have more latitude in what to restrict. Unquestionably, the speech at issue here is private student speech, not school-sponsored government speech. Accordingly, *Tinker* should control.

B. *Tinker* is unquestionably the governing standard in this case.

“It can hardly be argued that students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker*, 393 U.S. at 506. The constitutional rights of public school students must be carefully safeguarded because schools are

⁵ Certain narrow exceptions to this general rule have been carved out where, for example, the student speech promotes illegal drug use, *Morse v. Frederick*, 551 U.S. 393 (2007), or employs lewd, vulgar or profane language, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). Those exceptions are inapplicable here.

“educating the young for citizenship,” and the government should not “strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.” *Id.* at 507. When school officials seek to regulate the private speech of students who are required by law to be there, the discretion given to them by courts is quite minimal.

In order for the state in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would *materially and substantially interfere* with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained.

Id. at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)) (emphasis added); *see also Clark v. Dallas Indep. Sch. Dist.*, 806 F. Supp. 116, 120 (N.D. Tex. 1992); *Rivera v. East Otero Sch. Dist.*, 721 F. Supp. 1189, 1192 (D. Colo. 1989).

Schools may not punish students or restrict their speech based on a mere “undifferentiated fear or apprehension of disturbance.” *Tinker*, 393 U.S. at 508; *Seamons*, 84 F.3d at 1237. The secondary effect of the exercise of First Amendment freedoms is that, at certain times, people will be offended by the speech of others. The *Tinker* Court accepted this as an inevitable by-product of free speech:

Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take that risk.

Tinker, 393 U.S. at 508 (citing *Terminiello v. Chicago*, 337 U.S. 1 (1949)). The basic tenet of the First Amendment, as applied to the private speech of students in public schools, is that a student is free to “express his opinions, even on controversial subjects like the conflict in Vietnam, if he

does so without materially and substantially interfering with the requirements of appropriate discipline . . . and without colliding with the rights of others.” *Id.* at 512-13.

In *Tinker*, two high school students and a junior high student decided to express their opposition to the conflict in Vietnam by wearing black armbands to school. *Id.* at 504. School officials learned of the plan prior to the actual date the students planned to engage in the silent expression, and adopted a policy that students wearing such armbands would be asked to remove them or face suspension. *Id.* The students wore the armbands in violation of the new policy and were subsequently suspended. *Id.* The Court recognized that expressing an opinion or viewpoint by wearing an armband is “closely akin to pure speech,” and deserves First Amendment protection. *Id.* at 505-06.

In *Clark*, a group of high school students held religious meetings on the school campus, audibly prayed and delivered messages, and distributed religious tracts to other students. *Clark*, 806 F. Supp. at 118. The school district stated that its policy was not to allow any meetings on school campus, and that the students were not permitted to distribute literature. *Id.* The students used no coercion to force people to accept the religious tracts, and only gave them to those students who wanted one. *Id.* The only disruption that the school could prove was that other students who were recipients of the tracts were offended. *Id.* at 120. The court applied the *Tinker* standard, and upheld the First Amendment rights of the religious students, and prohibited the school from engaging in such restrictions.

The court began by setting out fundamental First Amendment principles. Among those is the well established law concerning the First Amendment’s protection of written speech as well as oral speech: “It is well settled that written expression is **pure speech**.” *Id.* at 119 (citing *Texas*

v. Johnson, 491 U.S. 397, 406 (1989)) (emphasis added).⁶ The court further proclaimed: “It is equally true that the guarantee of free speech encompasses the right to distribute written materials peacefully.” *Clark*, 806 F.Supp. at 119 (citing *United States v. Grace*, 461 U.S. 171, 176 (1983)). Finally, the court noted that the defendants had “the burden of establishing that the restriction of Plaintiffs’ activity and expression was necessary to avoid material and substantial interference” with the educational mission of the school. *Id.* at 120 (citing *Tinker*, 393 U.S. at 511).

The *Clark* court went on to find that merely because some students were offended by the content of the message was not a sufficient justification for suppressing the constitutionally protected speech of other students, because “[i]f school officials were permitted to prohibit expression to which other students objected, absent any further justification, the officials would have license to prohibit virtually every type of expression.” *Id.*

The court in *Clark* also considered and squarely rejected application of the analytical framework proffered in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). The court observed that *Kuhlmeier* itself distinguished this type of case involving private student speech from the type of case presented in *Kuhlmeier*, where the speech was school sponsored. *Clark*, 806 F. Supp. 116, 120 (quoting *Kuhlmeier*, 484 U.S. at 270-71).

In *Rivera v. East Otero Sch. Dist.*, several student members of a religious organization attempted to distribute a non-school sponsored newspaper addressing issues in the community from a religious perspective during non-instructional time. *Rivera*, 721 F. Supp at 1191. The

⁶ Defendants did not seem to appreciate this undergirding black letter principle, appearing to question whether written communications such as flyers were speech at all. *See, e.g.*, *Kakuska Depo.* at 33-35 (objection to question concerning the submission of one’s “speech” to District officials for prior review, and asking what was meant by “speech”).

students were suspended because the school district's policies, like those of Defendants here, restricted the distribution even absent any disruption. *Id.* The court employed the *Tinker* standard of material disruption, and struck down the district's policies as constitutionally impermissible. *Id.* at 1194-95. "The District cannot completely muzzle the students to save itself the difficulty of determining which speech it may constitutionally proscribe . . . A school policy completely preventing students from engaging other students in open discourse on issues they deem important cripples them as contributing citizens." *Id.* at 1194. Even though speech may be controversial or offend some students in the school, a school cannot suppress the lawful speech of its students merely because it is convenient to do so. *Id.*

Again, in *Scoville v. Bd. of Educ. of Joliet Twp. High Sch.*, 425 F.2d 10 (7th Cir. 1970), a group of students published a private newspaper expressing highly critical views of the administration, and distributed it to other students. *Id.* at 11. The distribution of these papers did not cause any material or substantial disruption, but the students were nevertheless expelled for violating the policies of the school district. *Id.* at 12. The Seventh Circuit applied the *Tinker* standard and held the decisions of the administration unconstitutional. The ideas expressed in the newspaper negatively portrayed the Dean of the school, but the court stated that "mere expressions of students' feelings with which school officials do not wish to contend is not the showing required by the *Tinker* test." *Id.* at 14.

Here, Plaintiffs' speech is textbook private, student speech which bears no connection to the school. It is therefore unquestionable that the standard governing this case is *Tinker*, and Defendants could not restrict Plaintiffs from engaging in this expressive activity unless it was the cause of a material or substantial disruption of instructional activity. Moreover, the burden of

proof falls on Defendants, not Plaintiffs, because the speech was presumptively constitutional. *See, e.g., Clark v. Dallas Indep. Sch. Dist., supra*, 806 F.Supp. at 120 (citing *Tinker*).

There is no dispute that Defendants were not involved in the creation or dissemination of the fetuses, nor would anyone reasonably perceive this expression to bear the imprimatur of the school. Not a single witness or shred of documentary evidence suggests otherwise. Additionally, the students wore shirts on the days of distribution to distinguish themselves as the group responsible for the distribution. Plaintiffs had distributed candy canes with a religious message and affirmation rocks before with no consequence from Defendants. When Defendants found the speech controversial, however, they decided to censor the expressive activity. Defendants only prohibited the distribution of the rubber babied because it was controversial speech with which they did not want to deal, or hear complaints from those who might potentially be offended. Therefore, the speech at issue here was quintessential private, student speech, not school-sponsored, government speech.

C. Forum Analysis is not Appropriate Here, Because This Case Involves Private Student Speech, and There is no Question that Plaintiffs had Access to the Forum.

Although admittedly the Supreme Court has not definitively settled the question whether forum analysis is applicable in cases involving private student speech, the better reasoned cases hold that forum analysis is inapplicable to private student speech occurring during non-instructional time, because there is no question as to the speakers' right to access the forum – they are already required to be present as a matter of law.

The threshold question for purposes of forum analysis is “the access sought by the speaker.” *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985). The

Supreme Court has consistently held that when a speaker is seeking access to a portion of public property for expressive activity, the relevant forum must be identified as the specific channel of communication within the public property, in order to discern whether the speaker had a right to be there to disseminate his message. *Id.*; see also *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-03 (1974). “[F]orum analysis is not completed merely by identifying the government property at issue. Rather, in defining the forum we have focused on the *access* sought by the speaker.” *Cornelius*, 473 U.S. at 801 (emphasis added).

“Because *Tinker* merely involved students’ personal expressions during school hours in a place where the students are entitled to be, *Tinker* and factually similar cases have nothing to do with a school’s status as a public forum.” *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp 280, 290 (E.D. Pa. 1991) (emphasis added). Although the case law is not uniform,⁷ the Tenth Circuit has acknowledged this distinction. See *Roberts v. Madigan*, 921 F.2d 1047, 1056 n.10, 1057 (10th Cir. 1990) (if student’s or teacher’s speech has no school-sponsorship

⁷ See, e.g., *M.A.L. ex rel. M.L. v. Kinsland*, 543 F.3d 841 (6th Cir. 2008) (citing *Kuhlmeier*, engaging in forum analysis for student speech during non-instructional times, and holding that a public school hallway is a non-public forum where reasonable restrictions may be placed on a student’s free speech); *Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274 (4th Cir. 1998) (engaging in forum analysis and using an intermediate level of scrutiny); *Mueller v. Jefferson Lighthouse Sch.* 98 F.3d 1530 (7th Cir. 1996) (engaging in forum analysis and holding that a public school hallway is a non-public forum even for students during non-instructional times). The problem with these cases is that the courts misunderstood the distinction between *Kuhlmeier* and *Tinker*.

Tinker did not engage in a forum analysis because the student was mandated by law to be in the forum and thus did not need any access which he did not already have. *Kuhlmeier* applied a forum analysis because it was a **school sponsored** publication, and therefore students did not have unlimited access to its pages and the school officials could restrict that access based on its pedagogical interests. As the analysis below will show, this Court should forego the forum analysis and apply the *Tinker* standard.

Even if this Court were to engage in a forum analysis, which it should not, it should nonetheless find that the forum here was at least a limited public forum, and Plaintiffs should prevail in any event because Defendants engaged in viewpoint discrimination.

nexus, the speech may only be regulated if it would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the schools”) (applying *Tinker* standard to teacher’s private speech on public school grounds).

The holding in *Tinker* does not depend on a finding that the school was a public forum. Thus, whether or not a school campus is available as a public forum to others, it is clear that the students, who of course are required to be in school, have the protection of the First Amendment while they are lawfully in attendance.

Rivera, 721 F. Supp at 1193 (emphasis added); *see also Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.) (speech falling outside of the profanity/vulgar/illegal drug use categories “is subject to *Tinker’s* general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the rights of others”); *C.H. v. Bridgeton Bd. of Educ.*, 2010 WL 1644612, *4 (D.N.J. 2010) (“if student speech is not lewd, school-sponsored, or advocating drug use, the speech can only be prohibited if it is likely to cause a disruption”: holding that school censorship of pro-life literature distribution was unconstitutional).⁸

Even the Supreme Court’s opinion in *Kuhlmeier*, on which Defendants will undoubtedly rely, supports the conclusion that forum analysis is inapposite here. As *Slotterback* court observed, the High Court in *Kuhlmeier* predicated its decision on the proposition that “public schools are dedicated to accommodate students’ *personal intercommunication*.” *Slotterback*, 766 F. Supp. 280, 289 (citing *Kuhlmeier*) (emphasis added). The analysis is

⁸ *C.H.* rightly distinguished cases that improperly applied forum analysis to student speech occurring outside instructional time, noting that “given that *Tinker* itself discusses at the outset that the case is striking a balance between school control and student speech, it seems unnecessary for lower courts to attempt that balance with a different standard, which forum analysis or intermediate scrutiny seems to attempt.” 2010 WL 1644612 at *6 (citing cases).

different, however, when the speech at issue is not “personal intercommunication” among students: “the dedication does not extend to unlimited *school-sponsored* student intercommunication.” *Id.* Other authorities agree: “forum analysis is irrelevant when neither access to public property nor state action is at issue.” *Id.* at 290 n.10 (emphasis added); see also *Perry Educ. Ass'n, supra*, 460 U.S. 37, 49 n.9 (noting that *Tinker* involved use of -- rather than access to -- school property, and stating that “*when government property is not dedicated to open communication* the government may . . . restrict use to those who participate in the forum’s official business”) (emphasis added); *Burch v. Barker*, 861 F.2d 1149, 1158-59 (9th Cir.1988) (not engaging in forum analysis, and distinguishing case from *Kuhlmeier*); Laycock, *Equal Access and Moments of Silence: The Equal Access Status of Religious Speech By Private Speakers*, 81 NW. U .L. Rev. 1, 47-49 (1986) (citizens going about their business in a place they are entitled to be are presumptively entitled to speak, *Tinker* protects students' rights to speak in halls and on school grounds during *free* time, and such rights were not contingent on school’s status as a public forum).

In cases involving speech similar to Plaintiffs’, “[t]here is thus well-reasoned authority counseling the court to leapfrog forum analysis.” *Slotterback*, 766 F.Supp. at 291. “Where private student speech occurs on school grounds during school hours, forum analysis is unneeded in determining the constitutionality of any type of content-based restriction.” *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 122 (D. Mass. 2003)

In *Rivera*, students were attempting to distribute a private, non-school sponsored newspaper addressing community issues from a religious perspective and were suspended for doing so. *Rivera*, 721 F. Supp. at 1190. The court stated that a forum analysis was not necessary,

and that students are protected by the Constitution so long as they are not disrupting the work of the school or infringing the rights of others. *Id.* at 1192. In *Tinker*, the student speech at issue was also private student speech. *Tinker*, 393 U.S. at 508. The Court struck down the school's policy as constitutionally impermissible without engaging in any forum analysis. *Id.* at 512-13.

Here, Plaintiffs were engaging in the same activity as the students in *Rivera* and *Tinker*. This case involves private student speech that does not implicate school sponsorship. Forum analysis in private student speech cases is simply irrelevant. The threshold question for forum analysis reveals why this is true in Plaintiffs' situation. Students on public school campuses are required by law to be there until a certain age. Plaintiffs do not seek any access that they do not already have. It is not a matter of the government speaking or intentionally opening up a forum for others to speak. Plaintiffs merely wish to distribute their literature in a place where they are required by law to be, and to do so during non-instructional time and in a non-disruptive manner. Forum analysis is appropriate only when an individual or group seeks access to something from which they are being excluded or do not already have the ability to utilize. In the case of students on public school campuses, not only do they already *have* access — the law *mandates* their access. They are not restricted from the halls and campus of the public school, and therefore are constitutionally entitled to distribute their literature so long as the distribution does not cause a material or substantial disruption of the instructional activities.

D. The Evidence Fails to Show that there was any Material and Substantial Disruption of Instructional Activities before Defendants Censored Plaintiffs' Speech.

Once it has been determined that the *Tinker* standard applies, the next step in the analysis requires the Court to examine whether, even though the speech at issue was private student

speech taking place during non-instructional time and therefore presumptively entitled to broad protection under the First Amendment, it was nonetheless properly censored because it had caused a material and substantial disruption of instructional activities.

While there is testimony concerning incidents that may arguably constitute substantial disruptions — e.g., boys dousing the rubber babies in flammable liquid and lighting them on fire (Garnett Depo. at 50) — it was **not Plaintiffs** who engaged in these actions or had anything to do with them. *Tinker*'s material and substantial disruption test applies to the *act* of the student speech at issue, here the peaceful distribution of expressive materials during non-instructional time. Defendants could only prohibit the distribution of these rubber babies if the *act of distribution* was causing a substantial disruption. The independent acts of third parties who **received** the distributed material do not factor into the *Tinker* analysis and should not properly be attributed to Plaintiffs. *See Tinker*, 393 U.S. at 514 (“the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred”); *contra id.* at 517-18.

It must be remembered that the situation that confronted the Court in *Tinker* was not wholly without evidence of disruption. Indeed, the evidence of disruption in *Tinker* reads very much like some of the claims of Defendants here. For example, there was “detailed testimony by some of [the witnesses showing] their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone.” *Id.* at 517 (Black, J., dissenting). In addition, “a teacher of mathematics had his lesson period practically ‘wrecked’ chiefly by disputes with Mary Beth

Tinker, who wore her armband for her ‘demonstration.’” *Id.* Further, “[e]ven a casual reading of the record shows that this armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker ‘self-conscious' in attending school with his armband.” *Id.* at 520 (Black, J., dissenting).

Additionally, the critical time period for analyzing any alleged material and substantial disruption of instructional activities is the point when Mr. Luck seized the rubber babies at **approximately 7:53 a.m. -- before classes began** -- on that morning of January 29, 2010. It is logically impossible to rely upon alleged disruptive activities that occurred **after** classes had begun as the reason why the babies were seized **before** classes started.

Regardless of what some third parties may or may not have done **after** classes started, the undisputed facts show plainly that there was no “material and substantial disruption” with the educational mission of the school. Indeed, how could there have been? Plaintiffs caused no genuine disruption at all during their distribution. They did not obstruct the flow of movement through the lobby and other places where they were distributing the rubber babies. As even the depositions of Defendants own witnesses show, Plaintiffs were careful to position themselves well away from the entrances to the buildings, and never deterred foot traffic coming and going from the facilities. Tayloy Depo. at 43-44; May Depo. at 17; Plaintiffs Depo Ex. 29. They did not cause any student to be late to class, and they did not force anyone to take a baby. These actions did not disrupt the learning environment.

Whether the learning environment was disrupted later in the day by the independent actions of those students who misbehaved⁹ is immaterial to the question whether Defendants had concrete evidence of *material* and *substantial* disruption of the learning environment merely because some students were curious and so congregated around Plaintiffs, or because a small minority of students were offended. In perhaps the most critical piece of evidence on this point, Assistant Principal Brian Luck, who was the school official who actually seized the rubber babies at Goddard High and likely started the entire controversy in motion, told Plaintiffs Taylor and May: “We’re going to have to shut this down, you know **people are being offended** by what they see.” Luck Depo. at 40 (emphasis added).

Mr. Luck did not cite to any “material and substantial disruption” of the school’s educational mission; he did not say that Plaintiffs were blocking traffic; he did not claim that classes had been shut down; in short, his **only** stated basis for censoring Plaintiffs’ speech was that “**people are being offended.**” Significantly, the controversial **content** of Plaintiffs’ speech was the first thing Assistant Principal Edgett (with whom Mr. Luck had consulted prior to seizing the babies) identified as a basis for the school’s actions, too. *See* Edgett Depo. at 30 (suggesting that a “disruption” had already occurred due to the nature of the topic of abortion, on which teenagers have “strong feelings both ways”).

⁹ Plaintiffs do not for a moment condone the actions of these third parties, whose alleged actions cannot be justified. However, the appropriate response to misbehavior by students unrelated to Plaintiffs and their First Amendment activities was not to stifle Plaintiffs’ speech, but rather to discipline the wrongdoers. To punish Plaintiffs for the actions and reactions of their audience is to impose a “heckler’s veto” on Plaintiffs’ speech. This is constitutionally impermissible. *See, e.g., Lewis v. Wilson*, 253 F.3d 1077, 1081-82 (8th Cir.2001), *cert. denied*, 535 U.S. 986 (2002) (“[t]he first amendment knows no heckler's veto”).

The salient undisputed facts as of 7:53 a.m. are as follows: Plaintiffs had already distributed hundreds of rubber babies to a roughly equal number of students; Plaintiffs had not obstructed any doors; they had not forced students to take a baby; no reports of alleged misuse of the babies had been made; and no classes had begun. In fact, because it was a snow day and the start of school was on a two-hour delay (Bolaños Depo. at 12-13), the foyer at Goddard High was less chaotic than usual, because students had more time to arrive and the library, located downstairs, was open for students to gather in. Edgett Depo. at 18-19. Therefore, at the critical time when Mr. Luck shut down Plaintiffs’ speech, no disruption of classes *could* have occurred, because classes had not started yet. The claim of “material and substantial disruption” of the school’s educational mission and discipline is thus exposed as a pretext, offered only after the fact in an attempt to cover up and excuse Defendants’ unconstitutional infringement of Plaintiffs’ First Amendment rights. The utter lack of legitimate grounds for their actions in seizing Plaintiffs’ rubber babies before classes began is highlighted by the letter of Defendants’ counsel, in which virtually the entire discussion is focused on events that occurred well *after* the babies had been seized. *See* Undisputed Fact No. 82 above.

The school officials viewed the independent actions of these other students – which occurred only **after** the distribution had been shut down -- as evidence of a material and substantial disruption, but this is a fundamental misunderstanding of *Tinker*’s test. Using the Defendants’ logic, would the District prohibit the distribution of its planners at the beginning of the year if a student did not want it, and decided to light it on fire in the parking lot? Would Defendants prohibit homework assignments from being distributed if a student took his

homework outside in the fire lane and set it on fire? The answer is unquestionably no, and this holds true for Plaintiffs' constitutionally protected activity as well.

E. Defendants' Policies and Standard Practice Unconstitutionally Vest Unbridled Discretion in the School Administration.

It is unconstitutional to allow a public official to be granted unbridled discretion to make decisions on those students permitted to distribute their literature, and it is irrelevant whether the official ever uses the grant of unbridled discretion to actually infringe on the First Amendment rights of individuals or groups. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988), *Cox v. Louisiana*, 379 U.S. 536 (1965), *Saia v. New York*, 334 U.S. 558 (1948); A constitutional violation occurs the moment the official is vested with such discretion. Allowing government officials to have absolute discretion over decisions involving expressive activity is not just problematic because of the potential for viewpoint discrimination, but also because they place tremendous burdens on the individual who might be inclined to self-censor as a result of the requirements established by the government.

[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, *even if the discretion and power are never actually abused.*

....

Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy.

City of Lakewood, 486 U.S. at 757-58 (emphasis added). Vesting a public official with unbridled discretion allows him to "stand athwart the channels of communication as an obstruction" to the right to speak, and to censor those ideas with which he disagrees. *Saia*, 334 U.S. at 561. "A more effective previous restraint is difficult to imagine. *Id.*

In *Saia*, the ordinance at issue prohibited the use of sound amplification unless an exception was granted by the police chief. *Id.* at 558. The police chief was vested with unbridled discretion to determine whether to issue a permit. The Court found this statute unconstitutional because there were “no standards prescribed for the exercise of his discretion.” *Id.* at 560.

In *City of Lakewood*, the ordinance at issue prohibited the private placement of any structure on public property. *City of Lakewood*, 486 U.S. at 753. Certain newspaper companies were prohibited from placing their news stands on the sidewalk, but the mayor had unbridled discretion to grant permits to certain organizations. *Id.* The ordinance was found unconstitutional because it failed to establish neutral and objective criteria by which the government officials could make their decisions. *Id.* at 760.

Here, Policy 5195 and the standard practice referenced by District officials in depositions unconstitutionally grant unbridled discretion to Defendants, and allows for a constitutionally impermissible chilling of Plaintiffs’ protected speech. Defendants also attempt to use Policy 7110 to restrict Plaintiffs’ speech, but it is simply inapplicable.¹⁰ The vast discrepancy between

¹⁰ Policy 7110 states that “[p]romotional activities must be approved by the school.” Policy 7111, “ADVERTISING LIMITATIONS,” outlines the limitations on Policy 7110 and states that advertisements are “postings, signs, flyers, email, web based sites, rented space, program listings, or other material used to solicit sales, votes, political support or to advertise products, persons, events, meetings, fundraisers, political positions, religious matters, campaigns, or solicitations of any kind.” The Policy is intended to ensure that commercial advertisers will rent advertising space at the District’s facilities so that the District can benefit from that revenue stream. Additionally, the Policy only applies to a “school affiliated group,” which is defined, *inter alia*, as “any person/organization . . . that in any way suggests a relationship to the District or its schools, teams or clubs.” Plaintiffs’ speech is not an advertisement under this Policy. Plaintiffs also do not fall under the category to which this Policy applies, because Plaintiffs’ distributions never suggest any relationship with the District. Plaintiffs’ speech is pure student speech that would never be seen as school-affiliated. Plaintiffs’ speech is not being used to solicit support or votes of any kind. It is simply informing those students who might need a resource of a place they can receive that assistance, and portraying to the students in the District that Relentless supports life. The fact that this Policy is being applied to Plaintiffs reveals the problem with Defendants’ argument. Plaintiffs did not cause any substantial disruption by distributing the rubber babies, or any other literature, and Defendants have been

the way Roswell High officials deal with Relentless distributions (leniently) and the way Goddard High officials deal with Relentless distributions (strictly) itself is strong evidence of the fact that these policies and the so-called “standard practice” vest unbridled discretion in the officials. This “wiggle room,” as Superintendent Gottlieb describes it, is impermissible where, as here the regulations deal with the licensing of speech.

i. Policy 5195 Grants Unbridled Discretion to School Officials.

Policy 5195, “DISTRIBUTION OF NON-SCHOOL SPONSORED LITERATURE,” requires students to submit all literature or information to the Assistant Superintendent for Instruction prior to distribution, and grants her unfettered discretion in determining what speech, if any, to allow. Those few standards that are included in the policy are undefined, which allows District officials to make ad hoc decisions that significantly restrict the constitutionally protected rights of students in the District. “[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process.” *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926) Policy 5195 fails to adequately define the terms necessary to ensure that constitutionally protected speech is not infringed, and therefore grants unbridled discretion to the District’s officials.

Under the Policy, District officials may reject submissions for distribution if they are “potentially offensive,” “inappropriate for the school environment as judged by the standards of

searching for post hoc rationalizations, such as this irrelevant policy, to justify their unconstitutional prohibitions. These are the exact type of rationalizations that the Court in *City of Lakewood* said would result from unconstitutional policies and practices. *See City of Lakewood*, 486 U.S. at 757-58. There is simply no justification for Defendants’ unconstitutional censorship, and certainly the attempt to use Policy 7111 reveals their desperate attempt to rationalize their unconstitutional policies and decisions.

the community,” “misleading,” or “demeaning.” There is no definition given for any of these terms. What are the “standards of the community,” and who makes that determination? What does it mean to be “potentially offensive?” Everything is potentially offensive to someone. Many things that students encounter on a routine basis might be offensive to their sensibilities, but that does not permit Defendants to make arbitrary decisions based on undefined standards. The testimony of Defendants’ own witnesses establishes beyond question that the Distribution Policy grants far too much discretion to officials charged with regulating speech. *See generally* Fact Nos. 100-114 above.

“If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). There is no constitutional right not to be offended, but “offensive” is the very standard by which Defendants have censored Plaintiffs’ speech. District officials have admitted that there are no guidelines from which to make these determinations. *See* Garnett Depo. at 115-16. If the very officials responsible for enforcing the policies of the District readily admit that there are no standards to guide their determination, those officials have been unconstitutionally vested with unbridled discretion. The risk of unconstitutional censorship under this Policy is simply too great.

ii. The District’s “Standard Practice” Gives Its Officials Unbridled Discretion.

The standard practice of the District is to require prior approval for the distribution of all non-school sponsored literature. *See* Luck Depo. at 108-09. Under this standard practice, there is absolutely no definition or standard by which the officials will make their decisions. It is simply left to Defendants’ whim. *See generally* Fact Nos. 117-123 above. “[A] law or policy permitting

communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. The danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of public officials.” *City of Lakewood*, 486 U.S. at 763.

Here, the standard practice provides absolutely no neutral criteria for the administration to make a decision on what speech is permissible. Similar to Policy 5195, District officials testified that distributions would not be permitted if they were potentially offensive. What is considered potentially offensive is completely discretionary. The reason laws vesting unfettered discretion are unconstitutional is that they fail to provide adequate safeguards for those exercising their fundamental rights. *Weinberg v. City of Chicago*, 310 F.3d 1029 (7th Cir. 2002); *Desert Outdoor Adver., Inc. v. City of Moreno*, 103 F.3d 814 (9th Cir. 1996). A “standard practice” with no standards is simply unconstitutional. Students have no ability to know what, if any, speech will be permitted on the school grounds. Administrators have no guidelines to instruct them on what speech they should allow, which permits them to engage in unconstitutional viewpoint discrimination. Under Defendants’ standard practice, students do shed their constitutional rights at the schoolhouse gate, and the First Amendment unquestionably forbids this.

F. Defendants’ Policies and Practice are Unconstitutional Prior Restraints.

Both Policies 5195 and 7110, and Defendants’ standard practice, are unconstitutional prior restraints since they subject student speakers to a pre-clearance requirement. *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *Saia*, 334 U.S. at 558-60. “The [First] Amendment tolerates absolutely no prior restraints predicated on surmise or conjecture that

untoward consequences may result.” *Bertot v. Sch. Dist. No. 1, Albany Cnty., Wyoming*, 522 F.2d 1171, 1183 (10th Cir. 1975) A “[p]rior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement.” *Carroll v. Presidents & Comm’rs of Princess Anne*, 393 U.S. 175, 181 (1968). “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” *New York Times, Co. v. Sullivan*, 403 U.S. 713, 714 (1971). A law or policy that prohibits the distribution of literature is a blatant form of prior restraint. *Lovell v. City of Griffin*, 303 U.S. 444, 450-52 (1938).

It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. [A] law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition.

Watchtower Bible & Tract Soc’y of N.Y. v. Vill. of Straton, 536 U.S. 150, 165-66 (2002).

“It has long been held that ordinances regulating speech contingent on the will of an official—such as the requirement of a license or permit that may be withheld or granted in the discretion of an official—are unconstitutional burdens on speech classified as prior restraints.” *Chiu v. Plano Indep. Sch. Dist.*, 339 F.3d 273, 280 (5th Cir. 2003). “[E]ven in schools there exists a clearly established right to be free of prior restraints except where they are designed to maintain discipline or to prevent school disruption and are narrowly drawn to achieve that goal.” *Id.* at 282.

In *Watchtower*, a religious group brought suit challenging the constitutionality of a city ordinance that required them to obtain a permit from the Mayor before they could distribute their literature door-to-door. *Watchtower*, 536 U.S. at 154-55. The Court invalidated the ordinance as a constitutionally impermissible prior restraint on speech. *Id.* at 168. The Court stated that because

“free speech and free assembly cannot be made a crime, we do not think that this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise.” *Id.* at 164.

Here, Defendants’ policies and practices impose an unconstitutional prior restraint on Plaintiffs’ speech. The Policies and the standard practice require that any student who wishes to engage in a constitutionally protected activity—and do so in a non-disruptive manner—must nevertheless seek the approval of the District official tasked with approving such literature. Defendants’ policies are not designed with only the goal of preventing substantial disruptions, but as many officials in the District testified, the policies and practices are designed to ensure that no one is even remotely offended by the constitutionally protected speech of others. Defendants could not prohibit students from verbally discussing issues in the hallways during non-instructional times, but have nevertheless devised a system that requires speech that is transferred to a visual medium to receive prior approval.

Defendants cannot meet the substantial burden imposed upon them to justify their prior restraint on student speech. Defendants’ policies and practices do not merely limit that speech which clearly causes a material or substantial disruption, but permit District officials to censor any speech it deems offensive or inappropriate for the learning environment. Officials testified during depositions that all literature distributed by students was subject to prior approval under the standard practice. *See Luck Depo.* at 108-09. A Valentine’s Day Card, a birthday invitation, the proverbial “check yes or no” note, and all other literature is subject to the approval of the administration. There is no adequate justification to place this kind of prior restraint on the constitutionally protected speech of students. The First Amendment does not tolerate government

officials exercising unfettered control over the content of private student speech in the form of this rigid prior approval standard. It is simply unconstitutional.

G. Defendants’ Actions are Content-Based and Viewpoint Discriminatory.

“The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. *Content-based regulations are presumptively invalid.*” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (emphasis added). Indeed, “content discrimination ‘raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.’” *Id.* at 387 (quoting *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victim’s Bd.*, 502 U.S. 102, 116 (1991)). “For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). Revealing its fundamental disdain for content-based prohibitions, the Supreme Court has stated:

But, above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content . . . The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the “profound national commitment to the principles that debate on public issues should be uninhibited, robust and wide open.”

Police Dep’t v. Mosley, 408 U.S. 92, 95-96 (1972) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1963)) (citations omitted). Content-based regulations of speech constitute “censorship in a most odious form.” *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring).

Here, Policy 5195 specifically allows for District officials to prohibit speech based solely on its content. The Policy permits school officials to prohibit speech that is “potentially offensive”

to other students, or that is “inappropriate for the school environment.” These provisions are nothing more than a euphemism for the District’s acceptance of content-based restrictions on protected speech. The standard practice also authorizes the same content-based censorship by granting broad discretion to the District over what speech it deems offensive. Before January 29, 2010, Plaintiffs had engaged in many similar activities without the District’s interference. On one occasion they had distributed candy canes with an attachment containing a religious message. *See* Transcript of Brian Luck Deposition at 23-24. On a separate occasion, Plaintiffs distributed painted affirmation rocks with Scripture verses on them. *Id.* at 31-34.

It was not until Plaintiffs attempted to distribute the rubber babies that Defendants took action. The only real difference between all of the previous distributions and the distribution of the rubber babies is that the rubber babies were potentially offensive to some students. The rocks posed no less potential for misuse by those that received them than the rubber babies. Defendants attempted to relieve themselves of any potential inconvenience by unconstitutionally suppressing Plaintiffs’ speech. “Mere expressions of students’ feelings with which school officials do not wish to contend is not the showing required by the *Tinker* test.” *Scoville*, 425 F.2d at 14. Defendants cannot engage in such a content-based restriction without valid justifications. “In the absence of a specific showing of constitutionally valid reasons to regulate speech, students are entitled to freedom of expression of their views.” *Clark*, 806 F. Supp. at 119.

Here, the potential for students to be offended is not a constitutionally valid justification for the content-based suppression of Plaintiffs’ speech. No one told Plaintiffs they could not distribute the rubber babies because of the disruption the items might cause—which is the only valid justification under *Tinker*. In fact, the only time discussion of a substantial disruption has

been discussed as a justification for the suppression of Plaintiffs' speech was after the fact in depositions. This type of post hoc rationalization cannot be taken seriously—and even if it could be—it was not Plaintiffs' who caused the disruption, but the independent actions of other students. The Assistant Principal at one of the Goddard High School told Plaintiffs, “We’re going to have to shut this down, you know people are being offended by what they see.” *See* Transcript of Brian Luck Deposition at 40. The potential for offense, without more, is simply an insufficient basis for Defendants' actions. Plaintiffs are constitutionally entitled to express their opinions about controversial issues. Surely, if the potential for offense and disturbance were not high enough during the Vietnam War to ban black armbands displayed in protest of that American war, the potential for offense and disturbance cannot provide justification for banning the peaceful distribution of pro-life literature.

Finally, Defendants' actions reveal a viewpoint discriminatory motive. While Valentines' Day cards, stuffed animals, and various other expressive materials and literature are permitted without being subjected to the rigorous prior restraint procedures, Plaintiffs' speech must always receive prior written approval. *See, e.g.,* Gottlieb Depo. at 121-122 (making exception for Valentine's Day cards because they are part of a “recognized day” and a long tradition). Viewpoint discrimination is impermissible in any forum and for any reason. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828-29 (1995) (“In the realm of private speech or expression, government regulation may not favor one speaker over another.”).

CONCLUSION

Defendants have unconstitutionally prohibited Plaintiffs' private speech without adequate justification. In fact, the only justification ever given prior to the commencement of this action was that the speech was "offensive." Never was there even mention of the potential that Plaintiffs' speech was caused a substantial disruption, and no substantial disruption ever occurred as a result of Plaintiffs' speech. Defendants have thoroughly searched their policies and practices for any justification for their unconstitutional actions, but they search in vain because there is no justification. Policy 5195 cannot be used as a justification because (1) it does not apply to Plaintiffs' speech, and (2) the policy is itself unconstitutional due to the fact that it grants unbridled discretion to Defendants. Policy 7111, the other policy Defendants cite as justification for their actions, simply does not apply to Plaintiffs and is irrelevant for purposes of this action. The standard practice that has been used as the final justification is also itself unconstitutional. The policies and practices cannot be so undefined as to leave to enormous potential for government officials to exercise their unfettered discretion in a manner that bans speech on the basis of its content. Yet, that is exactly what Defendants use to rationalize their constitutional violations. Defendant could only suppress Plaintiffs' speech if it materially and substantially disrupted the learning environment of the school, but it never did.

For all of the foregoing reasons, Plaintiffs respectfully request that this Court grant its motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of July, 2011 I filed the foregoing memorandum electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing:

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