IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND (NORTHERN DIVISION)

GRAHAM DENNIS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 13-cv-03731-GLR
	)	
BOARD OF EDUCATION OF TALBOT COUNTY, *et al.*,	)	
	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

COME NOW the Plaintiffs, Graham Dennis and Casey Edsall (hereafter "Dennis" and "Edsall"), by and through the undersigned counsel, and submit this Memorandum in Opposition to the Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (Doc. 3).

I. STATEMENT OF OPERATIVE FACTS

The Complaint (Doc. 1) alleges claims on behalf of Dennis and Edsall, who at the times relevant to the Complaint were students enrolled at Easton High School (EHS) and represented the school on the lacrosse team (Doc. 1, ¶¶ 1-2). EHS is a school within the Talbot County (Maryland) Public Schools (TCPS), which is administered and overseen by the Defendant Board of Education of Talbot County ("the Board") (Doc. 1, ¶ 3). On April 12, 2011, Defendant Lynne Duncan ("Duncan"), who was then employed by the Board as Student Services Supervisor for TCPS, received a call from the Department of Juvenile Services informing Duncan that a parent had made an allegation that unspecified members of the EHS lacrosse team carried alcohol in their water bottles and consumed it on the bus on the ride to

and from athletic events. Based on her discussions with other staff, Duncan decided to institute a search of the EHS lacrosse team buses on April 13, 2011, prior to departure to an event (Doc. 1, ¶¶ 15-16).

On that day, Duncan, Defendant David Stofa ("Stofa"), Principal of EHS, Defendant Sherry Bowen ("Bowen"), Assistant Principal of EHS, and other security staff boarded a bus on which the EHS lacrosse team had gathered, and Stofa informed team members that a search would be conducted (Doc. 1, ¶ 17). Team members were given stickers and Stofa instructed them that they should use the stickers to mark their belongings. While he was giving these instructions, Dennis informed Bowen that he (Dennis) had a pocketknife in his bag. Bowen told Dennis to retrieve the pocketknife for her, which he did, handing over a knife with a blade approximately 2.5 inches in length. Dennis was told to exit the bus and leave his bag, which he did. His bag was then searched by Bowen and a Leatherman tool was found and confiscated along with the pocketknife (Doc. 1, ¶¶ 19-22).

Edsall also was instructed to exit the bus and leave his bag, which he did. Bowen searched Edsall's bag and found a butane lighter which was confiscated (Doc. 1, ¶ 23). Although the Defendants assert for purposes of the instant motion that Edsall voluntarily told Bowen that the lighter was in his bag and handed it to Defendant Bowen, the Complaint does not allege this voluntary surrender by Edsall, who has consistently contended that he did not disclose the existence of the lighter to school officials (Doc. 1-6, Exhibit E, p. 3, fn. 3).

TCPS staff then contacted local police, who were given the confiscated items by staff when they arrived. The police thereupon arrested and took Dennis into custody for having possession of the pocketknife on school property (Doc. 1, ¶ 24-25). Stofa also suspended Dennis for ten (10) days for possession of a dangerous weapon on school property, and further recommended that Dennis be expelled from school. Dennis appealed this decision to Defendant Karen Salmon ("Salmon"), then the

TCPS Superintendent, who affirmed the ten-day suspension, but did not accept the recommendation of expulsion (Doc. 1, ¶ 32).

Stofa suspended Edsall for one day for possession of a dangerous weapon on school property. Edsall appealed this suspension, but it was upheld by Defendant Salmon (Doc. 1, ¶ 33).

Dennis and Edsall appealed Salmon's decisions to the Board, and in the course of that appeal informed the Board that the tools and lighter that were the basis for the disciplinary actions are used regularly in maintaining lacrosse sticks, a fact that was confirmed by the EHS lacrosse team's assistant coach (Doc. 1, ¶ 36; Doc. 1-5). Nonetheless, the Board affirmed Salmons' disciplinary actions. Two of the Board's members dissented on the grounds that the search of the Plaintiffs' bags was improper and that the discipline imposed on the Plaintiffs was unreasonable (Doc. 1, ¶ 37).

The Board's decision was thereafter appealed to the Maryland State Board of Education. In a decision entered April 10, 2012, the State Board ordered that the disciplinary actions against the Plaintiffs be reversed and expunged from the Plaintiffs' records (Doc. 1, ¶ 39-40).

II. MOTION TO DISMISS STANDARD

When ruling on a Rule 12(b)(6) motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. To survive the motion, a complaint must contain sufficient facts to state a claim that is plausible on its face. Nevertheless, a complaint need only give the defendant fair notice of what the claim is and the grounds upon which it rests. Further, a district court must draw all reasonable inferences in favor of the plaintiff. *E.I. du Pont de Nemours and Co. v. Kolon Industries, Inc.*, 637 F.3d 435, 440 (4th Cir. 2011). Dismissal is inappropriate unless, accepting as true the well-pled facts in the complaint and viewing them in the light most favorable to the plaintiff, the plaintiff is unable

to state a claim to relief. *Brockington v. Boykins*, 637 F.3d 503, 505-06 (4th Cir. 2011). Where the motion to dismiss involves "a civil rights complaint, [a court] must be especially solicitous of the wrongs alleged and must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999) (internal quotation marks and citation omitted).

III. ARGUMENT

A. The Board is Not Immune From All Claims Set Forth In the Complaint

The Defendants initially argue that all the claims against the Board and the other Defendants' in their official capacities should be dismissed citing the decision in *Rosenfeld v. Montgomery County Public Schools*, 41 F. Supp. 2d 581, 586 (D. Md. 1999). In *Rosenfeld*, the court held that Maryland county school boards are considered "arms of the state" and as such may not be sued in federal court under the Eleventh Amendment. However, that decision also recognized that Eleventh Amendment immunity may be waived by the state. *Id.* at 586.

In *Board of Education of Baltimore County v. Zimmer-Rubert*, 973 A.2d 233, 216 (Md. 2009), Maryland's highest court ruled subsequent to *Rosenfeld* that the State had waived the Eleventh Amendment immunity by virtue of the provisions of Md. Code Ann., Cts. & Jud. Proc. § 5-518(c).[1] In *Lee-Thomas v. Prince George's County Public Schools*, 666 F.3d 244, 251 (4th Cir. 2012), the Fourth Circuit held that the state court's decision in *Zimmer-Rubert* is binding on federal courts with respect to the waiver of Eleventh Amendment immunity. Thus, the claims against the Board under federal law are

[1] That statute provides that "[a] county board of education may not raise the defense of sovereign immunity to any claim of $100,000 or less."

not subject to dismissal on the basis of immunity. *See also Cepeda v. Board of Education of Baltimore County*, 814 F. Supp. 2d 500, (D. Md. 2011) (state had waived Eleventh Amendment immunity of county board of education with respect to claim under federal statute forbidding racial discrimination).

Moreover, the Defendants' immunity arguments provide no grounds for dismissing the claims under state law set forth in the Second and Fourth Counts of the Complaint. Claims for deprivations of rights protected by Maryland's Constitution and its Declaration of Rights may be redressed through a common law action for damages. *Randall v. Prince George's County, Md.*, 302 F.3d 188, 208 (4th Cir. 2002) (citing *Ashton v. Brown*, 660 A.2d 447, 462 (Md. 1995)). Such a claim exists under both Declaration of Rights Art. 24, *Randall*, 302 F.3d at 208, and Declaration of Rights Art. 26. *Widgeon v. Eastern Shore Hospital Center*, 479 A.2d 921, 929 (Md. 1984). Additionally, "Maryland law provides no immunity for municipalities and other local government entities from suits based upon violations of state constitutional rights," *Ashton*, 660 A.2d at 462, and Md. Code Ann., Cts. & Jud. Proc. § 5-518(c) expressly waives any immunity (at least up to $100,000). Because the Defendants have presented no basis for dismissing claims against the Board set forth in the Second and Fourth Counts of the Complaint, their request for such relief should be denied.

B. The Federal Teacher Protection Act Does Not Apply to Claims Alleging Constitutional Deprivations

The claim to absolute immunity for all the individual Defendants under the Paul D. Coverdell Teacher Protection Act of 2001, 20 U.S.C. § 6731 et seq., also must be rejected because that statutory immunity is specifically inapplicable to the claims made in the instant case. Thus, 20 U.S.C. § 6731(d)(1)(C) provides that "[t]he limitations on the liability of a teacher set forth in this subpart shall not apply to any misconduct that . . . involves misconduct for which the defendant has been found to

have violated a Federal or State civil rights law[.]" The absolute immunity the Defendants are claiming is inapplicable to the four claims set forth in the Complaint, each of which is for a violation of the Plaintiffs' state- and federally-protected civil rights. *See C.B. v. Sonora School Dist.*, 691 F. Supp. 2d 1123, (E.D. Cal. 2009) (Coverdell Act immunity did not extend to student's claims under 42 U.S.C. § 1983 and the American With Disabilities Act).

C. The Individual Defendants Are Not Entitled to Dismissal of the Claims Under the Defense of Qualified Immunity

The individual Defendants proceed to invoke qualified immunity as grounds for granting their Rule 12(b)(6) motion to dismiss the claims against them. Again, this defense is no basis for dismissing the claims under Maryland law set forth in the Second and Fourth Counts of the Complaint. The Defendants have provided no authority indicating that qualified immunity, a defense to individual liability under 42 U.S.C. § 1983, applies to claims for violations of Maryland's Declaration of Rights.

The Defendants correctly characterize the doctrine of qualified immunity; case law establishes that individual-capacity defendants to § 1983 claims are shielded from liability for civil damages insofar as their conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. *Dent v. Montgomery County Police Dept.*, 745 F. Supp. 2d 648, 659 (D. Md. 2010) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In determining whether qualified immunity bars a lawsuit, a court should address two prongs: (1) whether, taken in the light most favorable to the party asserting injury, the facts alleged show that the defendant's conduct violate a constitutional right, and (2) whether the right was "clearly established" at the time of the events at issue. *Dent*, 745 F. Supp. 2d at 660. In their motion, the individual Defendants focus exclusively on the first prong, asserting that the Complaint does not allege violation of the Plaintiffs' constitutional rights.

1. Fourth Amendment Claims

The individual Defendants' assertion of an entitlement to dismissal of the Plaintiffs' Fourth Amendment claims (First Count) must be rejected because it is entirely inappropriate to decide whether the Defendants violated clearly established law in conducting the searches of the Plaintiffs' belongings at the pleading stage. On a motion to dismiss based on qualified immunity, the facts alleged in the Complaint must be construed in a light most favorable to the Plaintiffs. *Brockington*, 637 F.3d 505-06; *Dent*, 745 F. Supp. 2d at 659. This is particularly important with respect to claims asserting violations of the constitutional protection against unreasonable searches and seizures, which are highly dependent on the facts of a particular case. Whether a clearly established Fourth Amendment right was violated is not determined as a general matter, but should be determined in a more particularized sense considering the facts and circumstances of the search or seizure and the knowledge of the officers conducting the search or seizure. *Taylor v. Waters*, 81 F.3d 429, 434 (4th Cir. 1996) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In the instant case, it cannot be determined at the pleading stage whether the Defendants search of the Plaintiffs' belongings complied with the Fourth Amendment (or violated "clearly established law) because the facts and circumstances regarding the basis for the search are too undeveloped. It is now established that a standard of "reasonable suspicion" applies to determine the legality of a search of a student by a school administrator. *Safford Unif. Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 370 (2009). The Complaint alleges that the impetus for the search was a call from the Department of Juvenile Service reporting an "allegation by a parent that unspecified member of the Easton High School Lacrosse team had, on past occasions, carried alcohol in their water bottles and consumed it in the bus on the way to and from athletic events." (Doc. 1, ¶ 16). Thus, the basis for the search was a tip, but

there is no indication who the parent was, what was the source of the parent's information, or what time frame that information related to. All of these facts and other circumstances are crucial to determining whether the information is credible and whether it gave the Defendants sufficient cause for invading the privacy interests of the Plaintiffs.

Numerous cases recognize that Fourth Amendment claims should not be dismissed on qualified immunity grounds at the pleading stage and before the circumstances of the search or seizure can be developed. Thus, in *Wofford v. Evans*, 2002 WL 32985799 (W.D. Va. Dec. 17, 2002), the court denied school officials' motion to dismiss a students' § 1983 claim asserting that she had been seized in violation of the Fourth Amendment. It held that the inquiry required by *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), is highly fact-specific, and held as follows:

> The reasonableness of the seizure of [the student] depends on the factual circumstances existing and known to the defendants at the time of the seizure. *Sibron v. New York*, 392 U.S. 40, 59 (1968); *United States v. Baker*, 78 F.3d 135, 138 (4th Cir.1996). If the school defendants wish to prevail on the grounds that the seizure of Dickson was reasonable or was justified by a "special need," they must do so under a developed factual record. A determination of reasonableness would be premature at this time.

Wofford, 2002 WL 32985799, at *3. Similarly, in *Garlanger v. Verbeke*, 223 F. Sup. 2d 596, 608 (D.N.J. 2002), the court refused to dismiss under Rule 12(b)(6) claims that the defendants violated the plaintiffs' Fourth Amendment rights, stressing that whether the defendants violated the clearly established rights of the plaintiffs turns on what information the defendants relied upon in concluding they had adequate cause to seize the plaintiffs. Because only the allegations of the complaint could be considered in ruling on a Rule 12(b)(6) motion and all reasonable inferences had to be drawn in favor of the plaintiffs, the court held that it had to deny the defendants' request for dismissal on qualified immunity grounds. *Id. See also Chin v. City of Baltimore*, 241 F. Supp. 2d 546, 550 n. 4 (D. Md. 2003) (defendant's arguments that he was entitled to qualified immunity from Fourth Amendment claim "must

be rejected" at the pleading stage because the allegations of the complaint that defendant conducted search and seizure without adequate cause had to be taken as true) and *Alexander v. Underhill*, 416 F. Supp. 2d 999, 1009-10 (D. Nev. 2006) (students' § 1983 claims for unlawful search and seizure by school officials was not subject to dismissal on basis of qualified immunity; whether or not the actions were taken with sufficient cause could not be determined at the pleading stage).

The same principle applies here and requires denial of the individual Defendants' request for dismissal of the Fourth Amendment claims on qualified immunity grounds. At this stage, it simply cannot be determined whether the Defendants had adequate grounds for searching the Plaintiffs and the other lacrosse team members, and the Complaint specifically alleges that the searches were conducted without "reasonable suspicion." (Doc. 1, ¶ 42). Although the Complaint also refers to the report from a parent that prompted the searches, the reliability of that report is crucial and it cannot be determined at this stage of the proceedings that the Defendants had grounds for believing the tip was reliable. Thus, the report may have been anonymous, in which case it would not have been sufficient for reasonable suspicion. *Kebe v. Brown*, 161 F. Supp. 2d 634, 640 (D. Md. 2001). There is no indication that the "parent" had obtained the information passed on in any reliable way and the tip could have been based upon a mere rumor. *See Florida v. J.L.*, 529 U.S. 266, 271 (2000) (tip which did not indicate how informant knew facts alleged and did not provide other grounds to support the veracity of the informant was insufficient to provide reasonable suspicion). And while the tip asserted that lacrosse team members had "on past occasions" kept alcohol in their water bottles, there is nothing to show that the "past occasions" related to the 2011 EHS team which was searched or instead related to some lacrosse team in the distant past. If the information was "stale," there clearly would not have been reasonable suspicion to support the search. *See United States v.* Powell, 732 F.3d 361, 369-70 (5th Cir. 2013)

(factors applied in determining whether a tip provides reasonable suspicion, include the credibility and reliability of the informant, the specificity of the information contained in the tip or report, the extent to which the information in the tip or report can be verified by officers in the field, and whether the tip or report concerns active or recent activity, or has instead gone stale).

Because it cannot be determined at this stage of the proceedings whether the information relied upon by the Defendants was reliable and gave them reasonable suspicion that the Plaintiffs and other members of the EHS lacrosse team were in possession of alcohol, the Defendants' motion to dismiss the Fourth Amendment claims on qualified immunity grounds must be denied. Even under the relaxed, reasonable suspicion standard established for school searches in *T.L.O.*, it cannot be said at this stage of the proceedings that the Defendants here exercised "reason and common sense" in subjecting the Plaintiffs to a search.

To the extent the individual Defendants argue here that dismissal is required because they did not need individualized suspicion in order to search the Plaintiffs and their belongings, that argument must be rejected. In *T.L.O.*, although the Court indicated it was not deciding whether individualized suspicion is always required when school officials search students, it also recognized that individualized suspicion is usually a prerequisite to a constitutional search. "Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field.'" *Id.*, 469 U.S. at 42 n. 8 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654–655 (1979)).

Neither prong of this test is applicable here. The search of the Plaintiff's belongings is by no means "minimal." *T.L.O.*, 469 U.S. at 337-38, recognizes that "[a] search of a child's person or of a

closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy." The type of search at issue here invades a student's privacy interest in a major way because they "must surely feel uncomfortable or embarrassed when officials decide to rifle through their personal belongings." *Doe by Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 354-55 (8th Cir. 2004). Nor is this the kind of case involving safeguards restraining official discretion, such as random programs for license inspection, *Prouse*, 440 U.S. at 663, or inspection of rental premises for safety violations. *Camara v. Municipal Court*, 387 U.S. 523, 538-39 (1967). Therefore, this is not a situation where no individualized suspicion was required by the Fourth Amendment to conduct the search. *See also Foster v. Raspberry*, 652 F. Supp. 2d 1342, 1349 (M.D. Ga. 2009)(with very limited exception, school officials must have reasonable ground for suspicion that the particular student searched possesses the contraband sought in order for a search to be constitutionally sound).

The decision in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995), cited by the individual Defendants, is not to the contrary. *Acton* upheld a school policy providing for the random testing of student athletes. Critical to the decision was the substantial evidence presented in the trial court that the school faced a "crisis" with respect to drug use by athletes, *id.* at 663, and that the drug testing did not involve a significant intrusion on the privacy interest of students, given the "negligible" intrusion effected by the testing procedure and the fact that test results were not used for law enforcement or disciplinary purposes. *Id.* at 658. After *Acton*, the Supreme Court pointed out in striking down a drug testing policy for candidates that did not require individualized suspicion, "'[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized

suspicion, a search may be reasonable despite the absence of such suspicion.'" *Chandler v. Miller*, 520 U.S. 305, 314 (1997)(quoting *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 624 (1989).

The factors which allowed individualized suspicion to be dispensed with in *Acton* cannot be said to exist in this case. While the purported justification for the search of the Plaintiffs and their teammates was a concern about alcohol use, there is no indication that a "crisis" existed at EHS with respect to drug or alcohol use. Indeed, as discussed above, the reliability and veracity of the tip that prompted the search cannot be determined at this stage of the proceedings and so would not justify a determination that even a temporary emergency had arisen allowing the individual Defendants to have dispensed with the individualized suspicion requirement. *See B.C. v. Plumas Unif. Sch. Dist.*, 192 F.3d 1260, 1268 (9th Cir. 1997) (where evidence was not presented of a drug crisis at the school, searches of students without individualized suspicion were not authorized under *Acton* and violated the Fourth Amendment). Moreover, unlike the "negligible" intrusion made by the drug testing in *Acton*, the search of the Plaintiffs' bags was "undoubtedly a severe violation of subjective expectations of privacy." *T.L.O.*, 469 U.S. at 337-38. Finally, as the actions of the Defendants in this case demonstrate, the aim of the search was not unrelated to enforcement of criminal laws or disciplinary rules. *See Doe*, 380 F.3d at 355 (school drug testing cases did not support suspicionless searches of student belongings where fruits of searches were used for punitive purposes).

For all these reasons, the decision in *Acton* does not support the individual Defendants' claim that individualized suspicion was not required to support their search of the Plaintiffs' belongings. Indeed, the Defendants cite no case extending the rationale of *Acton* beyond the context of random drug testing of students for non-punitive purposes. In the context presented by this case, individualized suspicion was required by the Fourth Amendment, and this legal principle was clearly established at the

time of the searches at issue here. *See Doe*, 380 F.3d at 355, and *Foster*, 652 F. Supp. 2d at 1349. Because the pleadings do not establish that the individual Defendants had such suspicion with respect to the Plaintiffs, the motion to dismiss the First and Second Counts must be denied.

The Defendants also argue that the Plaintiffs voluntarily disclosed the existence of the tools and butane lighter before the "inception" of the search, and that this consensual disclosure of the items gave the Defendants reasonable suspicion for searching the Plaintiffs' bags. However, this argument must be rejected with respect toEdsall because it is neither alleged nor undisputed that he voluntarily disclosed and surrendered the butane lighter before his bag was searched. To the contrary, Edsall has consistently denied that he disclosed the existence of the lighter to school officials (Doc. 1-6, Exhibit E, p. 3, fn. 3). For purposes of the instant motion, the contrary position asserted by the Defendants cannot be accepted. *See Brockington*, 637 F.3d at 505-06 (on a Rule 12(b)(6) motion, the facts alleged in complaint must be viewed in the light most favorable to the plaintiff).

With respect to Dennis, the Defendants argument must be rejected. The idea that the "inception" for the search was not until after Plaintiff Dennis revealed the existence of the knife is contrary to the substance of what is alleged in the Complaint. Before any of the Defendants had notice of the existence of the knife, Dennis and his teammates had been informed "that a search would be conducted." (Doc. 1, ¶ 17). "Defendants gave each student several stickers containing the student's name, and Stofa instructed students to mark their belongings with these stickers." (Doc. 1, ¶ 18). Thus, before Dennis advised Bowen of the presence of the knife, the Defendants had asserted control over the Plaintiffs' belongings and made clear that they would be intruding into those belongings. In this case, the Defendants gained knowledge of and access to the knife in response to a demand under color of authority, and as such a search occurred for purposes of the Fourth Amendment. *See United States v.*

Mowatt, 513 F.3d 395, 400 (4th Cir. 2008), *abrogated on other grds.*, *Kentucky v. King*, 131 S. Ct. 1849 (2011) (where police gain visual access to a room after an occupant opens the door in response to a demand under color of authority, a search has occurred).

The case cited by the Defendants, *DesRoches by Des Roches v. Caprio*, 156 F.3d 571 (4th Cir. 1998), is distinguishable because in that case the demand by school officials did not result in a disclosure by the student. Thus, the court there found that the Fourth Amendment was not implicated because the school officials' demand to search did not result in the student's consent to an invasion of the students' privacy interest. *Id.* at 577. By contrast, the claim of authority to search in this case did result in and cause Dennis to reveal the contents of his belongings to the Defendants. Therefore, a search did occur before Dennis revealed the presence of the knife.

2. Due Process Claims

The Third and Fourth Counts of the Complaint assert violations of the Plaintiffs' rights to due process arising from the disciplinary actions against them. As alleged in those Complaint, the Plaintiffs' possession of the knife and butane lighter as tools for maintaining their lacrosse equipment was punished as possession of "dangerous weapons" (Doc. 1, ¶¶ 30-33), a term that is undefined in the EHS Student Handbook. The Plaintiffs possessed the items as tools, not as "dangerous weapons," and they had no notice that possession of the tools was forbidden by any school rule (Doc. 1, ¶ 50). As such, the Plaintiffs were subject to disciplinary action even though they had no notice that the conduct they engaged in was prohibited by the school (Doc. 1, ¶ 51). Additionally, Talbot County Public School Policy provides that "suspensions should be used only in discipline cases of repeated rule infraction, and after all other available disciplinary means have been exhausted." (Doc. 1, ¶ 31). Neither Plaintiff had

been previously subject to any disciplinary action by any Talbot County Public School official (Doc. 1, ¶ 14), and so they were suspended even though they had no notice that the purported violation could result in a suspension.

The guarantees of the due process clauses of the Fourteenth Amendment and Maryland Declaration of Rights, Art. 26, are implicated when a school suspends a student. *Goss v. Lopez*, 419 U.S. 565, 57276 (1975); *Stevenson ex. rel. Stevenson v. Martin County Bd. of Educ.*, 3 Fed. Appx. 25, 29 (4th Cir. 2001). The Plaintiffs had a legitimate claim of entitlement to a free public education and they could be deprived of that education only in conformity with the requirements of due process. The fundamental requirements of due process are notice and an opportunity to be heard. *Goss*, 419 U.S. at 579.

The Complaint here states claims on behalf of the Plaintiffs for a deprivation of due process because it alleges facts showing that the Defendants did not provide Plaintiffs with notice that their possession of the tools on a single occasion could have resulted in suspensions from school. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). Persons subject to regulations must know what is required of them so they may act accordingly. *Id.* Civil, as well a criminal, statutes must be sufficiently clear to give fair warning that particular conduct is prohibited and they must provide a standard or guide against which conduct can be uniformly judged by courts and administrative agencies. *Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 231, 461 P.2d 375, 388 (1969) (citing *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926)). "Due process of law requires fair notice that one's conduct is subject to a law or regulation." *Monroe County Bd. of Educ. v. K.B.*, 62 So.3d 513, 516 (Ala.Civ.App. 2010).

The principle that fair notice of prohibited conduct is required before depriving a person of an interest protected by the constitution applies not only to criminal cases where liberty interests are at issue, but also to civil cases and cases involving school discipline in particular. *See Monroe County Bd. of Educ.*, 62 So. 2d at 516; *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993) (school may take an adverse action against a teacher because of the teacher's speech only if the school provided the teacher with notice of what conduct was prohibited). Thus, in *Johnson v. Angle*, 341 F. Supp. 1043, 1048 (D. Neb. 1971), the court ruled that the dismissal of a teacher for failing to satisfy a requirement of "professional growth" violated due process where the standard applied for that term to the teacher varied from the standard set forth in statutes and local rules:

> This court doubts if the superintendent under any circumstances could be permitted to substitute his own definition of professional growth for that of the statute. Certainly it cannot be done as the vehicle for the discharge of the teacher when the teacher has no knowledge of the superintendent's definition. If the Board's dismissal was based on lack of professional growth it is clear that due process was not afforded and that the evidence would not justify dismissal on this ground.

Johnson, 341 F. Supp. at 1048.

The same principle was at issue in *Fern v. Thorp Public School*, 532 F.2d 1120 (7th Cir. 1976), where a teacher obtained a preliminary injunction to prevent his discharge after he distributed controversial materials to students. Although the Seventh Circuit overturned the injunction on other grounds, it noted that the district court had found that the teacher had demonstrated a likelihood of success on his claim that a discharge would violate his constitutional rights because "when the teacher has had no advance warning that the conduct was impermissible and when the conduct was not of such a nature that its impermissibility should have been clear to the teacher," a discharge based on the conduct would violate due process. *Fern*, 532 F.2d at 1125. *See also James P. v. Lemahieu*, 84 F. Supp. 2d

1113, 1121 (D. Haw. 2000) (to satisfy due process, statute or rule must provide fair notice to students that particular conduct is prohibited before statute or rule may be basis for imposing discipline).

It is the lack of notice that his demonstration of the commonplace tools would subject them to punishment that is the basis of the Plaintiffs' due process claim here. Nothing in the EHS Student Handbook or Talbot County Public School Policies informed the Plaintiffs that they could be subject to suspension for possessing an ordinary butane lighter[2] and a small knife used for maintaining his lacrosse stick. Additionally, the Defendants imposed a suspension on the Plaintiffs for a first-time "offense" even though the controlling policy limited use of that level of discipline to "repeated rule infraction[s]." Not only were the Plaintiffs not placed on notice that they could be suspended for possessing lacrosse stick tools, they were affirmatively misled as to the punishment they might face. This lack of notice violates a fundamental tenet of due process. *F.C.C.*, 132 S. Ct. at 2317.

The Defendants' citation to *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), as support for the idea that sufficient notice was provided in this case must be rejected. In noting that school rules need not be as detailed as criminal code provision, the Court was granting leeway to schools in addressing "unanticipated conduct disruptive of the educational process[.]" *Id.* at 686. In this case, the conduct of the Plaintiffs caused no disruption (Doc. 1, ¶ 52); any disruption was caused by the Defendants decision to conduct a sweeping search of the EHS lacrosse team on the basis of a tip the reliability of which has yet to be determined. Thus, while school officials may have leeway when it comes to addressing student conduct that in fact causes disruption of the educational process, they are not allowed to impose significant discipline on students for innocuous actions that are belatedly and

[2] The Defendants make reference in their memorandum supporting dismissal to a school parking application as providing notice to Edsall that possession of a butane lighter was prohibited (Doc. 3, p. 16). But this application is not part of the record at this time and should not be considered at this stage of the proceeding.

arbitrarily deemed offenses. To do so violates the core protections of due process, and the Plaintiffs' claims asserting such deprivations should not be dismissed.

IV. CONCLUSION

For the reasons set forth above, the Plaintiffs respectfully request that the Defendants' motion to dismiss each of the Counts of the Complaint with prejudice be denied.

Respectfully submitted,

/s/ (filed electronically)
John R. Garza
Garza Regan & Associates, P.C.
Garza Building
17 W. Jefferson Street
Suite 100
Rockville, Md 20850
(301) 340-8200
jgarza@garzanet.com

Participating Attorney for
THE RUTHERFORD INSTITUTE

Counsel for the Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February, 2014, a copy of the foregoing Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss was filed in the United States District Court (Northern Division) and electronically served upon all counsel of record through the Court's CM/ECF system.

/s/ (filed electronically)
John R. Garza