IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ALICE JOHNSON, et al., Plaintiffs, vs. CODY-KILGORE UNIFIED SCHOOL DISTRICT, et al., Defendants.	4:21-CV-3103 MEMORANDUM AND ORDER

This matter is before the Court on the defendants' motion to dismiss the plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). That motion will be granted in part and denied in part.

I. BACKGROUND

Alice Johnson and Norma Leroy are parents whose children attend elementary school in the Cody-Kilgore Unified School District, a Nebraska public school district. Filing 1 at 2. Johnson and Leroy are asserting claims—both individually and as guardians and next friends of their minor children, A.S. (daughter of Johnson) and M.L. (daughter of Leroy)—against the District, Principal and Superintendent Adam Lambert, and elementary administrative assistant Marvanne Logterman. Filing 1 at 1. According to the complaint, their claims arose as follows.

The plaintiffs are members of the Rosebud Sioux Tribe and practice traditional Lakota religious tenets. Filing 1 at 4. The plaintiffs allege that the defendants were aware of the children's religious affiliation because that information was listed in their school enrollment forms and other school records. Filing 1 at 4. One particular Lakota tradition is that hair is a sacred

symbol, an extension of one's physical being, that should only be cut under specific circumstances by select individuals. Filing 1 at 4-5. When hair is removed from the head, it must be burned "to protect their overall health and life." Filing 1 at 5.

On March 2, 2020, A.S. returned home early from school. A.S. told Johnson she was sent home for head lice, that Logterman had cut her hair without her consent while checking for lice, and that Logterman had also cut the hair of one of A.S.'s cousins during a lice check. Filing 1 at 7. The same day, Johnson reported the incident to Lambert and specified that A.S.'s hair should not be cut by the school as this violated the Lakota tradition. Filing 1 at 7. On March 3, Lambert made a return call to Johnson, notifying her that he had spoken with Logterman but not disclosing the details of that conversation. Filing 1 at 7.

The plaintiffs allege that Lambert did not direct Logterman to stop cutting A.S.'s hair during this time or take any other remedial actions to ensure the haircuts would stop. Filing 1 at 7. As a result, Logterman cut A.S.'s hair again on March 4 while checking for head lice. Filing 1 at 8. On March 5, M.L. told Leroy that Logterman had cut her hair that day without her consent, and Leroy noticed two patches of shorter hair near M.L.'s scalp. Filing 1 at 8. Leroy called Lambert seeking information about who cut M.L.'s hair, and Lambert claimed to know nothing about the haircut. Filing 1 at 8.

In response to Lambert's failure to stop the haircuts, Johnson, Leroy, and the Lakota elders presented information about traditional Lakota religious tenets at the District's school board meeting on March 9. Filing 1 at 9. On March 10, Lambert wrote Johnson and Leroy and stated that "[m]oving forward, if the district suspects lice or nits on your child, a phone call will be made home for you to come and pick up your child from school." Filing 1 at 6.

Attached to the letter was also a single strand of hair labeled "A.S. 4-4-2020." Filing 1 at 18. On March 19, Lambert sent a final letter to the plaintiffs' counsel allegedly justifying the District's actions by stating that another school located on Tribal grounds uses the same head lice procedure, a statement that Leroy and Johnson say is inaccurate. *See* filing 1 at 6, 20.

The plaintiffs contend that Logterman cut the hair of A.S. and M.L. in direct violation of the District's written head lice policy, but in compliance with an unwritten policy for head lice checks that it only applied to Native American students. *See* filing 1 at 5-6, 16. Accordingly, the plaintiffs are suing all the defendants under § 1983, alleging that the defendants' conduct violated their First Amendment and Fourteenth Amendment rights. They've also brought a Title VI action against the District, alleging that the District applied its head lice procedures in a discriminatory manner based on race. Finally, the plaintiffs assert a state law battery claim against Logterman.

II. STANDARD OF REVIEW

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* While the Court must accept as true all facts pleaded by the non-moving party and grant all reasonable inferences from the pleadings in favor of the non-moving party, *Gallagher v. City of Clayton*, 699 F.3d 1013, 1016 (8th Cir. 2012), a pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. *Iqbal,* 556 U.S. at 678. Determining whether a complaint states a plausible claim for

relief will require the reviewing court to draw on its judicial experience and common sense. *Id.* at 679.

When deciding a motion to dismiss under Rule 12(b)(6), the Court is normally limited to considering the facts alleged in the complaint. If the Court considers matters outside the pleadings, the motion to dismiss must be converted to one for summary judgment. Fed. R. Civ. P. 12(d). However, the Court may consider exhibits attached to the complaint and materials that are necessarily embraced by the pleadings without converting the motion. *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 697 n.4 (8th Cir. 2003).

III. DISCUSSION

1. 42. U.S.C. 1983

"The essential elements of a § 1983 claim are (1) that the defendant(s) acted under color of state law, and (2) that the alleged wrongful conduct deprived the plaintiff of a constitutionally protected federal right." *Schmidt v. City of Bella Villa*, 557 F.3d 564, 571 (8th Cir. 2009) (citing *DuBose v. Kelly*, 187 F.3d 999, 1002 (8th Cir. 1999)). The defendants do not dispute that they acted under color of state law. Filing 18 at 12-13. But the defendants argue that the plaintiffs have failed to state a claim under § 1983 because they have not sufficiently pled facts showing that the defendants' conduct violated their rights under the First or Fourteenth Amendments.

(a) Free Exercise

"[A] person claiming that a governmental policy or action violates his right to exercise his religion freely must establish that the action substantially burdens his sincerely held religious belief." *United States v. Ali*, 682 F.3d 705, 709 (8th Cir. 2012) (citing *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997)). A substantial burden exists when a regulation "meaningfully curtail[s] a person's

ability to express adherence to his or her faith; or [denies] a person reasonable opportunity to engage in those activities that are fundamental to a person's religion." *Id.* at 709-10 (quoting *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008)).

Still, not all laws that burden religion are unconstitutional. "[A] neutral law of general applicability that incidentally impinges on religious practice will not be subject to attack under the free exercise clause." *Cornerstone Bible Church v. Hastings*, 948 F.2d 464, 472 (8th Cir. 1991) (citing *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990)). Conversely, a plaintiff can sufficiently plead a violation of his or her Free Exercise rights by establishing that he or she was subject to "a law that is not 'neutral and generally applicable' [that] burdens a religious practice." *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993)).

It can be inferred that a governmental policy impermissibly targets certain religious practices for distinctive treatment from the face of the text or the effect of the policy in operation. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 533-35; *see also McDaniel v. Paty*, 435 U.S. 618 (1978). And, policies that selectively burden certain religious practices violate the Free Exercise Clause even when they are allegedly adopted in pursuit of legitimate government interests: "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 543.

Here, the defendants do not question the sincerity of the plaintiffs' religious beliefs regarding their hair. Instead, the defendants argue that the

plaintiffs' Free Exercise rights were not violated because (1) when hair was removed from A.S. and M.L., it was done according to a neutral law of general applicability that only incidentally burdened their religious beliefs, and (2) even if the defendants' actions substantially burdened the plaintiffs' religious beliefs, this burden was eliminated when the school provided A.S. and M.L. with an accommodation. *See* filing 18 at 7-9.

Neither of these assertions negate the conclusion that the plaintiffs have stated a Free Exercise claim. The plaintiffs allege that the District had an unwritten policy or custom of removing hair from Native American students during head lice inspections. *See* filing 1 at 4. To support this claim, they first point to the District's written head lice policy which makes no indication that children's hair will be cut during head lice inspections. Filing 1 at 16. The plaintiffs also point to letters from Lambert, addressed after A.S. and M.L. were allegedly given haircuts, in which he stated that A.S. and M.L. were subjected to a procedure where "the school cuts a single hair, tapes it to a piece of paper, and sends it home to the family," but agreed that *moving forward* the District would instead conduct a visual inspection and send the children home if they suspected head lice. *See* filing 1 at 17, 20. The plaintiffs allege that, in accordance with this unwritten procedure, the District subjected Native American students to haircuts on four separate occasions in the course of one week. *See* filing 1 at 7-8. At this stage in the proceedings, these facts, in conjunction with the plaintiffs' allegation that this head lice procedure was only used on Native American children who considered their hair a sacred, religious symbol, allows a plausible inference that the governmental action was not neutral and generally applicable, but instead, selectively imposed a burden on students with specific religious beliefs.

The plaintiffs more specifically allege that pursuant to this policy or custom, the District cut and disposed of A.S. and M.L.'s hair on multiple occasions—haircuts that removed patches of hair, not single strands—and continued to do so after they were notified that this practice violated the Lakota tradition. *See* filing 1 at 7-9. Accordingly, the plaintiffs' religion was *substantially* burdened in that they were prevented from cutting and disposing of the children's hair in adherence with the fundamental religious tenets of the Lakota tradition. The plaintiffs emphasize how the defendants' actions continue to burden their religion, as only a single strand of hair was ever returned to the plaintiffs, preventing them from disposing of all of the other removed hair in accordance with their faith. *See* filing 1 at 9. In reaching the conclusion that the plaintiffs alleged sufficient facts to infer their religious practices were substantially burdened, it is also of note that the defendants admit that the practice of removing hair during head lice checks "burdens students with a particular set of beliefs." *See* filing 18 at 8-9. In conclusion, the Court can plausibly infer that the defendants' allegedly targeted actions, even if done in pursuit of the legitimate government interest of detecting head lice, in effect selectively imposed a substantial burden on the religious exercise of Native American students in violation of the Free Exercise Clause.

It is not enough at this stage for the defendants to declare the opposite—that the children's hair was removed according to a neutral and generally applicable policy—as it is not their version of the facts that is taken as true when evaluating a motion to dismiss. It is equally unpersuasive for the defendants to argue that the plaintiffs have not stated a Free Exercise claim because any burden on their religion was remedied by the District's promise to no longer cut the children's hair. *See* filing 18 at 8. Accommodations by a defendant to prevent future burdens on religion do not bar a plaintiff from

recovering damages for past unconstitutional conduct. Here, the plaintiffs are properly seeking damages for emotional harm, loss of dignity, and deprivation of their constitutional rights as a result of District employees allegedly cutting and improperly disposing of the children's hair. *See Coleman v. Rahija*, 114 F.3d 778, 786-87 (8th Cir. 1997) (citing *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986)). The fact that the defendants have promised not to cut the children's hair in the future has no impact on the availability of damages for previous improper conduct. Accordingly, the plaintiffs have alleged sufficient facts to establish that the defendants violated their Free Exercise rights.[1]

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[1] The defendants cite, in part, to the Eighth Circuit's decision in *Carter v. Broadlawns Medical Center* to support their argument that the government's granting of an accommodation alleviates its liability for previously-imposed burdens on religious practice. 857 F.2d 448, 457 (8th Cir. 1988); *see* filing 18 at 8. The Court disagrees with the defendants' interpretation of that decision and its applicability to the case at hand. In *Carter*, a county hospital hired a chaplain to prevent any state-imposed burden on the religious practices of committed patients who were not allowed to leave the hospital. *Id.* at 450, 457. In response, taxpayers filed a lawsuit against the hospital, arguing that hiring a chaplain with taxpayer dollars violated the Establishment Clause. *Id.* at 450. The Eighth Circuit ultimately held that the hiring of the chaplain did not violate the Establishment Clause and was an appropriate adjustment under the Free Exercise Clause in light of the burden imposed on the patients' religious practice. Notably, that case did not involve Free Exercise claims by committed patients seeking damages for the time during which their religious practices were substantially burdened nor did the Eighth Circuit state that the hospital's accommodation would bar such claims. Thus, *Carter* does not, as the defendants argue, state that a government entity's liability for damages caused by an improper burden on religion is eliminated once the state implements an accommodation. Other cases cited by the defendants to support this proposition are equally unpersuasive. For example, the defendants direct the Court to cases in which the plaintiffs were not seeking damages. Filing 22 at 3-6. Where a

(b) Substantive Due Process

The Court must also determine whether the plaintiffs have alleged sufficient facts to support a § 1983 claim on the theory that the defendants' conduct deprived Johnson and Leroy of their Fourteenth Amendment right to direct the religious upbringing and education of their children. The defendants argue that they did not interfere with this right, but instead, fully supported Johnson and Leroy's right to direct the religious upbringing of their children by granting A.S. and M.L. an accommodation from the head lice procedure to ensure their hair would not be cut. *See* filing 18 at 13-14. But again, a subsequent accommodation does not dictate whether the defendants' actions prior to the accommodation violated Johnson and Leroy's Fourteenth Amendment rights, thereby entitling them to damages for that injury. Instead, the Court must decide whether the haircuts that occurred before the accommodation violated Johnson and Leroy's Fourteenth Amendment rights.

It is well settled that the right of a parent to direct the religious upbringing and education of their children has "a high place in our society." *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972). For instance, the Fourteenth Amendment protects a parent's right to (1) send his or her children to a religious private school, and (2) withdraw his or her children from public education before they have

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plaintiff is seeking equitable relief, a subsequent accommodation by the government that eliminates any burden on a plaintiff's religion may impact the appropriateness of such relief. However, in a case like the one at hand, where monetary damages are being sought for past violations, a subsequent accommodation does not impact a plaintiff's right to this relief. In fact, in *Weir v. Nix*, also cited by the defendants, the Eighth Circuit held that even when the plaintiff had transferred to a different prison, and was no longer subject to his former prison's policies, his claims that the former prison's policies had violated his Free Exercise rights were not moot since he asserted a claim for damages. 114 F.3d 817, 820 n.3 (8th Cir. 1997).

completed a state's statutory educational requirements in order to comply with their religious way of life. *Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Yoder*, 406 U.S. 205.

However, this right is limited in scope, and does not provide parents with a blank check to object to every decision by public school officials related to educational instruction or health and safety. *See Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944); *see also Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694 (10th Cir. 1998) (providing a comprehensive overview of the limitations on a parent's Fourteenth Amendment right to direct the upbringing and education of his or her children). Instead, to sufficiently plead an infringement of this right, a plaintiff must allege facts supporting the inference that the state's regulation is arbitrary, having no reasonable relation to some purpose within the competency of the State.[2] *See Runyon v. McCrary*,

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[2] The issue of what level of scrutiny applies in this case is complex, but the Court will address the issue briefly, as it is necessary to determine whether the plaintiffs have stated a colorable claim under the Fourteenth Amendment. The plaintiffs make the general assertion that strict scrutiny applies to all of their claims because they have asserted a "hybrid claim," i.e., have brought a Free Exercise claim in conjunction with a claim involving the plaintiffs' constitutional right to direct the religious education of their children. *See* filing 21 at 20. However, in its holding in *Smith*, the Supreme Court made it clear that a "hybrid case" is one where a neutral, generally applicable law that would otherwise not violate the Free Exercise Clause is subject to strict scrutiny because the plaintiffs' Free Exercise claim is being brought in conjunction with other constitutional protections. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 881 (1990); *see also Telescope Media Grp. v. Lucero*, 936 F.3d 740, 759 (8th Cir. 2019). Here, the plaintiffs' Free Exercise claim rests on the assertion that the District's policy was *not* neutral or generally applicable, but instead, applied only to the Native American students. *See* filing 21 at 10. Taking this assertion as true, the defendants' burden on the plaintiffs' Free Exercise rights would only be valid if the defendants can meet strict scrutiny, regardless of what other constitutional claims are brought by the plaintiffs.

427 U.S. 160, 178-79 (1976); *Murphy v. Arkansas*, 852 F.2d 1039, 1044 (8th Cir. 1988). In this way, the rights of parenthood are not violated when states require all public school students to receive vaccinations for communicable diseases, and this is true even when a child's parents object to vaccination on religious grounds. *Prince*, 321 U.S. at 166-67.

Here, Johnson and Leroy assert that the defendants violated their Fourteenth Amendment rights by subjecting their children to haircuts during head lice checks, thereby infringing on their rights to raise A.S. and M.L. in accordance with the Lakota tradition. *See* filing 1 at 12. Johnson and Leroy no doubt have a liberty interest in the religious education and upbringing of their children. However, to state a claim, they must also plead sufficient facts for the Court to reasonably infer that the government's policy interfering with this liberty interest was not rationally related to a legitimate government interest. They have not done so. Though Johnson and Leroy have alleged that Native American children who practice the Lakota religious tenets were subjected to a different head lice procedure that substantially burdened their religious practice, nowhere do they assert that the head lice checks were wholly pretextual. To the contrary, they specifically state at the very beginning of their brief that "a Nebraska school district and its staff implemented a

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Whether the plaintiffs have stated a claim that the defendants violated their Fourteenth Amendment rights is another question entirely and, as stated above, depends on whether they have pled sufficient facts to infer that the government arbitrarily infringed on this right. If so, the plaintiffs have validly stated both a violation of their Free Exercise and Due Process rights. *See, e.g., Swanson ex. rel. Swanson*, 135 F.3d at 699-70. Only then, with both claims validly stated, would the interrelationship of the claims become relevant. And yet still, that interrelationship of the claims would only impact the level of scrutiny if later in the proceedings the evidence supported the finding that the District's policy was, in fact, neutral and generally applicable.

policy . . . treating Native American and non-Native students differently *when checking their hair for lice*." Filing 1 at 1 (emphasis supplied).

Accordingly, the Court cannot plausibly infer that the defendants' actions violated Johnson and Leroy's constitutional right to direct the religious upbringing of their children because the defendants' policy was, at least in part, rationally related to a legitimate government interest—detecting and stopping the spread head lice among students.[3] Thus, no Fourteenth Amendment violation occurred, and the Court will dismiss the plaintiffs' Fourteenth Amendment claims as to all defendants.

(i) School District

Having established that the plaintiffs sufficiently alleged, at this stage, a violation of their Free Exercise rights, this Court must determine whether, under § 1983, the District can be held liable for the violation. The defendants first argue that the District cannot be liable because no custom or policy of the District violated the plaintiffs' Free Exercise rights. Again, they argue that any head lice policy of the District was neutral and generally applicable, and that

[3] The fact that Native American students were treated differently by the school during head lice checks might be significant if an Equal Protection claim was in front of the Court. (And, in fact, this fact does affect the Title VI analysis below.) However, this fact alone is not enough when evaluating the plaintiffs' Fourteenth Amendment claim, as the Court must only consider whether the facts alleged support the inference that the District's head lice inspection procedure used on Native American students—even if different than the procedure used on other students—was unrelated to any legitimate government interest. Therefore, although the manner in which the different head lice inspection procedures were applied to the student body may allow the inference that head lice checks were intentionally done in a discriminatory manner, the Court cannot say on the facts before it that cutting the children's hair was wholly removed from any legitimate government interest.

the policy did not substantially burden the plaintiffs as they were given an accommodation. Further, they argue that the plaintiffs failed to establish that the District's failure to act or train resulted in a violation of their Free Exercise rights.

A school district can be liable for civil-rights violations under § 1983 if the deprivation of the plaintiff's rights results from (1) a policy or custom of the district, (2) the district's failure to "receive, investigate, and act upon complaints of unconstitutional conduct," or (3) the district's failure "to train its employees to prevent or terminate unconstitutional conduct." *Plamp v. Mitchell*, 565 F.3d 450, 459 (8th Cir. 2009) (cleaned up); *see Ricketts v. City of Columbia*, 36 F.3d 775, 779 (8th Cir. 1994) (quoting *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1977)).

The plaintiffs first allege that their injuries resulted from actions taken pursuant to the District's "policy or custom" of cutting Native American students' hair while checking for head lice. *See* filing 1 at 1, 5. The Eighth Circuit has recognized that at the pleadings stage, "a plaintiff may not be privy to the facts necessary to accurately describe or identify any policies or customs which may have caused the deprivation of a constitutional right." *Doe ex rel. Doe v. Sch. Dist. of the City of Norfolk*, 340 F.3d 605, 614 (8th Cir. 2003). Thus, the plaintiff need only "allege facts which would support the existence of an unconstitutional policy or custom." *Id.* An official policy does not have to be committed to writing to give rise to a school district's liability under § 1983. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 502 (1986). In fact, if the decision to adopt a "particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood . . . [so long as] the

decisionmakers possess final authority to establish municipal policy with respect to the action ordered." *Pembaur*, 475 U.S. at 502.

Whether an official has final policymaking authority over the "action alleged to have caused the particular constitutional . . . violation at issue" is a question of state law that must be decided by the trial judge after review of "state and local positive law, as well as custom or usage having the force of law." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (cleaned up); *Atkinson v. City of Mt. View, Mo.*, 709 F.3d 1201, 1215 (8th Cir. 2013). But determining which officials are given final policymaking authority under state statute does not end the inquiry, as "[a]uthority to make municipal policy . . . may be delegated by an official who possesses such authority." *Pembaur*, 475 U.S. at 502. When the delegation of policymaking authority to an official is final, in that it is not subject to review by the statutorily defined final policymakers, the decisions of that official represent "policy" for which the government entity can be liable. *Id.*

The Court finds that the plaintiffs have pled sufficient facts to support the existence of an unconstitutional District policy, the execution of which resulted in the violation of the plaintiffs' Free Exercise rights. After reviewing Nebraska law and the local usage of the District as outlined in the Cody-Kilgore Unified School District Policy, the Court finds that the plaintiffs have alleged sufficient facts to reasonably infer that the District lawfully delegated final policymaking authority over head lice checks to Superintendent Lambert. Under Neb. Rev. Stat. § 79-526, which governs Class III districts such as the defendant District, "[t]he board shall make rules and regulations as it deems necessary for the government and health of pupils."[4] Under this law, the school

[4] Both parties direct the Court to Neb. Rev. Stat. §§ 79-248 & 251 as the statutory sections at issue in deciding who holds final policymaking authority over head lice checks. However,

board would have final policymaking authority over procedures for identifying and addressing head lice. However, this statute does not limit the Board's ability to delegate rulemaking authority in this area to superintendents as they see fit.

Here, the plaintiffs argue that Lambert, as Superintendent, "possessed final authority to establish municipal policy" governing how head lice checks were conducted. *See* filing 1 at 3. To support this allegation, the plaintiffs point to section 4025 of the District's official policy, which states that the "board delegates to the superintendent the general power and authority to make necessary decisions to ensure the efficient and effective operations of the school." Notably, this delegation does not contain any language indicating that Lambert's decisions regarding general operations of the school are not final. The defendants' brief also suggests that Lambert's authority in this area was final, noting that "*Lambert* reached an agreement" with Johnson and Leroy to ensure "that the School's staff would not cut hair of A.S. or M.L. when lice was suspected." *See* filing 18 at 5, 13, 21-22 (emphasis supplied). Under Nebraska law, the Board was entitled to delegate final policymaking authority over head lice procedures to Lambert. When considering these laws and construing the

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these statutes govern routine health inspections that districts must conduct annually (in a time and manner proscribed by the Department of Health and Human Services) and which only check students' sight, hearing, weight, and height. *See* 173 Neb. Admin. Code, ch. 7, § 7-004 (2017). The only possible reference to head lice in these statutes would be encompassed by the proclamation that "[w]henever a child shows symptoms of any contagious or infectious disease, such child shall be sent home immediately or as soon as safe and proper conveyance can be found and the . . . school board . . . shall be at once notified." § 79-248. This language says nothing about who develops procedures for identifying and addressing head lice. Thus, the Board's authority over head lice checks falls under their general authority to make rules and regulations for the health of pupils. § 79-526.

facts alleged in the light most favorable to plaintiffs, the Court can reasonably infer at this stage in the proceedings that the Board delegated final policymaking authority over head lice procedures to Lambert.[5]

The plaintiffs have also presented sufficient facts to support the inference that Lambert, through his specific actions as final policymaker, adopted the "Native American head lice haircut policy" that violated their Free Exercise rights. *See* filing 1 at 5-7. Specifically, Lambert was notified on March 2 that haircuts were occurring during head lice checks on Native American students in violation of the religious tenets of the Lakota tradition. Despite this knowledge, Lambert allegedly refused to stop the procedure, speaking with Logterman on March 3 but allowing her to cut the children's hair again on March 4 and 5. *See* filing 1 at 7. Lambert's alleged decision that the school would continue to use this head lice procedure on Native American students despite the possible violation of their religious beliefs allows the inference that he adopted and approved of the "Native American head lice haircut policy." *See Shrum ex. rel. Kelly v. Kluck*, 249 F.3d 773, 779 (8th Cir. 2001) ("Even a single decision by a [final policymaker of the District] unquestionably constitutes an act of official government policy." (quoting *Pembaur*, 475 U.S. at 480)). Additionally, in his March 10 and March 19 letters, Lambert acknowledged that A.S. and M.L. did have hair removed pursuant to a head lice "procedure," further supporting the inference that he knew and approved of the practice. *See* filing 1 at 17, 20. And again, when faced at this stage of the proceedings

[5] A more developed record may reveal that Lambert's decisions regarding the District's head lice procedures were, in reality, subject to review by the Board. If there is evidence later in the proceedings showing that Lambert's decisions were not final, his actions, even if unconstitutional, would not be sufficient to hold the District liable under § 1983. *See Pembaur*, 475 U.S. at 502.

with the plaintiffs' allegation that this procedure was only used on Native American students and the defendants' claim that it was applied to all students, it is the plaintiffs' facts that are taken as true.

Considered together, these facts are enough *at this stage* to "support the existence of an unconstitutional policy." *See Doe ex rel. Doe v. Sch. Dist. of the City of Norfolk*, 340 F.3d 605, 614 (8th Cir. 2003)). As a final policymaker for the District, Lambert's deliberate choice to allow haircuts during the head lice checks of Native American students, including after the plaintiffs presented their concerns about the procedure, may be an official District policy. *See, e.g.*, *Steele v. Van Buren Pub. Sch. Dist.*, 845 F.2d 1492, 1496 (8th Cir. 1988). Taking this as true, Logterman's performance of the allegedly unconstitutional haircuts was done in execution of a District policy for which the District can be liable.[6]

(ii) Individual Defendants

The defendants next argue that the plaintiffs' § 1983 claim against Lambert and Logterman in their individual capacities should be dismissed because they are entitled to qualified immunity. Qualified immunity shields public officials performing discretionary functions from liability for conduct that does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Parker v. Chard*, 777 F.3d 977,

[6] Having established that the plaintiffs stated a sufficient Free Exercise claim against the District, the Court need not address every theory under which this liability could be established. As such, the Court will not, on a limited evidentiary record, unnecessarily evaluate whether the plaintiffs have sufficiently stated a failure to act or failure to train claim against the District, although a more developed record may, or may not, support such theories.

979 (8th Cir. 2015); *see Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012); *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly, and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. *Pearson*, 555 U.S. at 231. It gives government officials breathing room to make reasonable but mistaken judgments about open legal questions and protects all but the plainly incompetent or those who knowingly violate the law. *Parker*, 777 F.3d at 979-80.

In determining whether a government official is entitled to qualified immunity, the Court asks (1) whether the facts alleged establish a violation of a constitutional or statutory right and (2) whether that right was clearly established at the time of the alleged violation, such that a reasonable official would have known that his actions were unlawful. *Johnson v. Phillips*, 664 F.3d 232, 236 (8th Cir. 2011); *see Parker*, 777 F.3d at 980. The Court can address either step of the qualified immunity first. *Jones v. McNeese*, 675 F.3d 1158, 1161 (8th Cir. 2012). Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken. *Messerschmidt*, 565 U.S. at 546; *Pearson*, 555 U.S. at 244. The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact. *Pearson*, 555 U.S. at 231.

For a right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Parker*, 777 F.3d at 980. Clearly established law is

not defined at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced. *Id.*; s*ee Seymour v. City of Des Moines*, 519 F.3d 790, 798 (8th Cir. 2008). It is unnecessary to have a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. *Parker*, 777 F.3d at 980.

Having concluded that the plaintiffs alleged sufficient facts to establish that the defendants violated their First Amendment right to be free from non-neutral government policy that substantially burdens their religious exercise, the Court must move to the second step of the qualified immunity analysis. Specifically, it must be determined whether it was clearly established that subjecting Native American students to a separate head lice inspection procedure that included cutting their hair in violation of their religious beliefs would violate the Free Exercise Clause. The Court concludes that it was.

It has been clearly established beyond debate that the principles of general applicability required by the Free Exercise Clause are violated when the "secular ends asserted in defense of laws [are] pursued only with respect to conduct motivated by religious belief." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542-43 (1993). In this way, the Free Exercise Clause "protects religious observers against [the] unequal treatment" that occurs when the government seeks to advance legitimate interests only against conduct with religious motivation. *Id.* The Eighth Circuit has also clearly established that when wearing long hair is part of one's sincerely held religious beliefs, it is not merely a Native American tradition but "a practice protected from government regulations by the Free Exercise Clause." *Teterud v. Burns*, 522 F.2d 357, 360 (8th Cir. 1975). Additionally, the Court in *Teterud* established that if a regulation interferes with this practice, strict scrutiny is

not met when narrower means exist to achieve the government interest. Although these legal principles recited on their own summarize conduct prohibited by the Free Exercise Clause at a "level of generality," the facts in *Church of Lukumi* and *Teterud* provided clear notice to the defendants in the present case that their conduct, at least their conduct as alleged by the plaintiffs, would violate the Free Exercise Clause.

In *Church of Lukumi*, a city council adopted multiple ordinances which, in effect, prohibited all ritual animal sacrifice by the Santeria adherents while allowing almost all other killings of animals, including kosher slaughter. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 536-37. In holding that the ordinances improperly targeted the Santeria religion and were not generally applicable, the Court emphasized how the ordinances were drawn to achieve the alleged government interests of public health and preventing animal cruelty only against conduct motivated by certain religious belief. *Id.* at 542-46. As the ordinances targeted certain religious conduct for distinctive treatment, the Court applied strict scrutiny and found the laws to be unconstitutional, noting that such laws would survive strict scrutiny only in "rare cases." *Id.* at 546. Although the facts are not directly on point, that is not what the qualified immunity analysis requires. Instead, *Church of Lukumi* clearly established for any reasonable government actor that pursuing a legitimate government interest—including detecting and stopping the spread of head lice—in a manner that, in effect, distinctively targets and burdens religious conduct will rarely be constitutional.

In invalidating those ordinances under strict scrutiny, the Court in *Church of Lukumi* also noted that the ordinances were underinclusive and that the government's interests could "be achieved by narrower means that burdened religion to a far lesser degree." 508 U.S. at 546. Similarly, in *Teterud*,

the Eighth Circuit evaluated a prison's hair-length regulation which interfered with a Native American inmate's beliefs that his hair should be kept long. 522 F.2d 357. The defendants argued that any encroachment on the inmate's Free Exercise rights was no greater than necessary to serve their interests in safety and hygiene. *Id.* at 361. However, the Eighth Circuit disagreed with that conclusion, holding that the regulation impermissibly burdened the inmate's Free Exercise rights, as safety and hygiene could be achieved in ways that imposed a lesser burden on his religious beliefs even if this created a somewhat increased administrative burden. *Id.* at 361-62. Although *Teterud* was decided pre-*Smith*, it still provides clear notice that when strict scrutiny is applied in a Free Exercise case involving one's right to cut his or her hair according to his or her religious beliefs, the government's general interests in safety and hygiene will not be sufficient to justify an interference with Free Exercise rights if the regulation proscribes more religious conduct than necessary.

Therefore, in light of *Teterud*, a reasonable government official would have known that sincerely held religious beliefs surrounding the cutting of one's hair are protected by the Free Exercise Clause. Additionally, in light of *Church of Lukumi*, a reasonable official would have known that selectively enforcing a head lice policy against Native American students in a way that burdened their religious conduct would trigger strict scrutiny, regardless of whether in doing so they were pursuing legitimate government interests. Finally, *Teterud* clearly established that, under strict scrutiny, the defendants could never justify this policy based on safety or hygiene concerns, as there was a less burdensome visual inspection procedure that they could have used on A.S. and M.L. to detect head lice: the same procedure they allegedly used on non-Native students and later offered to use on A.S. and M.L. Thus, any

reasonable official would have known that the allegedly targeted head lice policy was not narrowly tailored, and therefore, was not constitutional.

Accordingly, at this stage, *when the Court is required to take the plaintiffs' recitation of the facts as true*, it was clearly established that the policy created and enforced by Lambert and Logterman—as described by the plaintiffs—would violate the plaintiffs' Free Exercise rights. As such, they are not entitled to qualified immunity *on the face of the complaint*, and the Court will deny their motion to dismiss the plaintiffs' § 1983 claim against them.

2. TITLE VI

The plaintiffs also claim that the District's policy violated Title VI of the Civil Rights Act because A.S. and M.L. were subjected to haircuts during head lice checks because of their race. The defendants argue that the plaintiffs failed to plead facts establishing that the District intentionally discriminated against A.S. and M.L. on the basis of race. Specifically, the defendants argue that the plaintiffs only allegation of the sort—that "[o]n information and belief, school officials only cut the hair of Native American students during head lice checks"—is a legal conclusion that is insufficient on its own to support a claim under Title VI. Additionally, the defendants argue that the plaintiffs did not establish a prima facie claim of discrimination as they failed to plead facts showing (1) that Native American students were treated differently from similarly situated students outside of their protected class, and (2) that the District subjected A.S. and M.L. to an adverse action. Filing 22 at 14.

Title VI "prohibits discrimination on the basis of race in federally-funded programs." *Doe v. Regents of the Univ. of Minn.*, 999 F.3d 571, 580 (8th Cir. 2021). It is undisputed that the District receives federal funds. Therefore, to state a claim at this stage in the proceedings, the plaintiffs must allege sufficient facts to allow the plausible inference that the District intentionally

or purposefully discriminated. *Id.* In cases where there is no direct evidence of intentional discrimination, plaintiffs can meet this burden by alleging facts that demonstrate they were "treated differently from similarly situated students outside [their] protected class." *Doe v. Regents of Univ. of Minn.*, 999 F.3d at 580 (quoting *Rowles v. Curators of the Univ. of Mo.*, 983 F.3d 345, 355 (8th Cir. 2020)). The students to which the plaintiffs are compared must be "similarly situated in all relevant aspects." *Id.* (quoting *Barber v. C1 Truck Driver Training, LLC*, 656 F.3d 782, 797 (8th Cir. 2011)). But, to defeat a motion to dismiss, "a plaintiff need not plead facts establishing a prima facie case of discrimination under *McDonnell Douglas*," as this is an evidentiary standard. *Hager v. Ark. Dep't of Health*, 735 F.3d 1009, 1014 (8th Cir. 2013) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002)).

One area where the Eighth Circuit has evaluated the Title VI pleading standard is in employment discrimination cases. *See, e.g., Hager*, 735 F.3d at 1015; *Coleman v. Md. Court of Appeals*, 626 F.3d 187 (8th Cir. 2010). In *Hager*, a plaintiff alleged that her employer discriminated against her because of her gender when she was terminated for refusing to cancel a necessary doctor's appointment to discuss a report. *Id.* at 1012. The Eighth Circuit held that the plaintiff did not give the defendants fair notice of her "claim and the grounds upon which it rest[ed]" because she did not "allege facts showing that similarly situated employees were treated differently." *Id.* Specifically, the plaintiff in *Hager* only alleged that she "was discharged under circumstances summarily [sic] situated nondisabled males . . . were not." *Id.* Hager did not provide any facts from which the court could infer that those who were not discharged were similarly situated employees both in terms of their positions within the company and their conduct while employed.

Similarly, in *Coleman*, the Eighth Circuit held that the plaintiff's allegation that he was treated differently than white employees who were not fired for similar conduct was insufficient. 626 F.3d at 191. Specifically, the Circuit Court found that the plaintiff failed to allege any facts supporting the inference that the white employees who were not discharged engaged in similar outside business involvements that were equally improper or that they were similarly situated within company in all other respects. *Id.* Thus, his allegations were not sufficient to give the defendants fair notice of how he was treated differently than similarly situated comparators. *Hager*, 735 F.3d at 1015 (reiterating that the plaintiff's allegations in *Coleman* were insufficient because "no factual allegations plausibly suggested the comparator was similarly situated").

The Eighth Circuit has also evaluated this pleading standard in recent cases involving institutions of higher education. For example, in *Doe v. Regents of the University of Minnesota*, the Eighth Circuit held that the plaintiffs did not allege sufficient facts to support their Title VI claim and defeat a motion to dismiss where the complaint did not "allege facts showing that similarly situated [alleged comparators] were treated differently." 999 F.3d at 581. In *Doe*, black students who were accused of sexual assault argued that they were treated less favorably "in the investigation and discipline than the University had treated persons of a different race under similar circumstances." *Id.* at 580. However, the plaintiffs in that case pointed to the investigations of two white administrators who were accused of sexual harassment, the white female student who had made the sexual assault accusations against the plaintiffs (Jane), and another white student as to who Jane was "hazy" about his involvement in the incident as evidence that they were treated differently than similarly situated individuals during their investigations because of their race.

Id. In dismissing the Title VI claim, the Eighth Circuit emphasized that the plaintiffs failed to allege facts that *appropriate* comparators—students who were accused of sexual assault under similar circumstances—were treated differently, preventing the inference that the plaintiffs were discriminated against because of their race. *See also Rowles*, 983 F.3d at 355 (plaintiff did not proffer appropriate comparator when he was graduate student and failed to allege that he was treated differently than other similarly situated graduate students, as opposed to undergraduate students).

The Court finds the instant case distinguishable from these cases. Unlike the cases outlined above, the plaintiffs have clearly alleged that they were treated differently than *appropriate* comparators. Specifically, the plaintiffs allege that A.S. and M.L. were treated differently than non-Native American students at Cody Kilgore Unified Elementary. Filing 1 at 13. In alleging that Native American students were treated differently during head lice checks, non-Native American students who attend the elementary school and who are also subject to head lice inspections are appropriate comparators in all relevant aspects. This case simply does not involve the shortcomings of *Doe* and *Rowles*, where the plaintiffs inappropriately compared the treatment of undergraduate students to the treatment of administrators or students enrolled in graduate programs. Nor does this case involve the complexities of *Hager* and *Coleman*, where the Court would need additional facts to infer that the employees who were not discharged held similar positions as and engaged in similar conduct as the plaintiffs who were in fact terminated.

Here, the issue of whether the students in an elementary school are similarly situated for purposes of head lice checks is less complex, and thus requires less factual detail to sufficiently allege. The plaintiffs have alleged such facts. Specifically, they allege that during routine head lice checks, Native

American students were subjected to a different inspection procedure that involved haircuts. The plaintiffs' allegation that only Native American students had hair removed during head lice checks allows the reasonable inference that all other students were subject to purely visual inspections. Additionally, the plaintiffs identify four specific instances where three different Native American children allegedly had their hair cut during this head lice procedure in the course of one week.

Although the factual allegations are not highly developed and the Court is not sure that the plaintiffs can prove this claim as the proceedings ensue, that is not the standard by which the pleadings are reviewed. The Court finds that, drawing all reasonable inferences for the plaintiffs, the allegations are sufficient to put the defendants on notice of the plaintiffs' Title VI claim and the grounds on which it rests—that because of their race, Native American students at the elementary school were treated differently than non-Native American students during routine head lice checks by being subjected to a hair removal procedure as opposed to purely visual inspections. At the pleadings stage, that is enough to reasonably infer intentional discrimination in the District's application of its head lice inspection procedures, and as such, the Court will deny the District's motion to dismiss the plaintiffs' Title VI claim.

3. BATTERY

The plaintiffs do not dispute that the Court lacks subject matter jurisdiction over their state law battery claim against Logterman. *See* filing 21 at 34. As such, the Court will dismiss this claim.

IV. CONCLUSION

In sum, the Court will deny the defendants' motion to dismiss the plaintiffs' § 1983 claim as the plaintiffs have properly stated a violation of the

children's Free Exercise rights, and the individual defendants are not entitled to qualified immunity based on the allegations made at this stage in the proceedings. However, the Court will grant the defendants' motion to dismiss the plaintiffs' § 1983 claim to the extent that it is based on a violation of Johnson and Leroy's Fourteenth Amendment rights, as no violation has been sufficiently alleged. The Court will deny the District's motion to dismiss the Title VI claim, as the plaintiffs have met the pleading requirements. Finally, the Court will grant the defendants' motion to dismiss the state law battery claim against Logterman where both parties agree that this Court lacks subject matter jurisdiction. Accordingly,

IT IS ORDERED:

1. The defendants' motion to dismiss (filing 17) is granted in part, and in part denied.

2. The plaintiffs' § 1983 claim with respect to alleged violations of the Fourteenth Amendment is dismissed.

3. The plaintiffs' state law battery claim against Logterman is dismissed.

Dated this 10th day of November, 2021.

BY THE COURT:

John M. Gerrard
United States District Judge