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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

NATHALIE GALLARDO,  
  
                                Plaintiff,  
  
                v.  
  
HANFORD JOINT UNION SCHOOL  
DISTRICT, a California Public School  
District, CHERYL HUNT, MARK  
DUTRA, and ANDREW MAZA,  
  
                                Defendants.

**1:12-cv-01612 GSA**  
  
**ORDER REGARDING DEFENDANTS’  
MOTION TO DISMISS**  
  
**(Doc. 52)**

**INTRODUCTION**

This is a 42 U.S.C. § 1983 action brought by Nathalie Gallardo (“Plaintiff”), a former student at Hanford High School against various school officials and the Hanford Joint Union School District (“school district”), which operates the high school. The defendants had previously brought a motion to dismiss the First Amended Complaint, which was granted with leave to amend. Plaintiff then filed a Second Amended Complaint and a Third Amended Complaint (“the complaint”) with the permission of the Court. Pending before the Court is Defendants’ motion to dismiss the Third Amended Complaint. (Doc. 52). The matter is fully briefed and was taken under submission on the papers pursuant to Local Rule 230(g). (Doc. 35).

1 The Court will proceed directly to the merits of the pending motion as the factual background in  
2 the case is delineated in the Court’s prior order and need not be rehashed here.

3 **PLAINTIFF’S THIRD AMENDED COMPLAINT**

4 **(1) Retaliation Claim Against Cheryl Hunt and Mark Dutra**

5 Plaintiff’s complaint sets forth one cause of action pursuant to 42 U.S.C. § 1983 against  
6 Mark Dutra and Cheryl Hunt (collectively “Defendants”), who were, respectively, the vice  
7 principal and principal of Hanford High School during the time period that is relevant to  
8 Plaintiff’s claim. The complaint does not clearly delineate the precise contours of the § 1983  
9 claims, but, based on the allegations set forth in support of thereof, it appears that Plaintiff is  
10 alleging that the Defendants retaliated against her for exercising her First Amendment and Due  
11 Process rights.  
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14 (a) The Complaint’s Factual Allegations

15 Plaintiff alleges that on September 20, 2010, she was found to be in possession of a  
16 “small, folding blade knife” at school. Doc. 1, ¶ 12. The knife was turned over to Dutra and  
17 Hunt, who turned it over to the Hanford Police Department. Doc. 1, ¶ 14. “Hunt also made an  
18 order suspending [Plaintiff] from school forthwith due to her possession of the knife and made a  
19 further order recommending her expulsion as a student at Hanford High School. Doc. 1, ¶ 15.  
20 Plaintiff “then exercised her right to due process” and demanded “an evidentiary hearing” in  
21 accordance with state law and the school district’s bylaws. Doc. 1, ¶ 16. Dutra testified in favor  
22 of expulsion at the evidentiary hearing, and showed “deep resentment at having to appear at the  
23 hearing and testify and have his authority challenged by the hearing officers.” Doc. 1, ¶ 17. The  
24 hearing panel overruled Plaintiff’s suspension and reinstated her as a student at Hanford High  
25 School. Doc. 1, ¶ 17. Dutra “displayed anger” at the decision of the hearing panel. Doc. 1, ¶ 17.  
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27 The complaint alleges that thereafter, upon her return to Hanford High School, Plaintiff  
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1 was not “permitted to participate as fully in her education experience ... as were other students.”  
2 Doc. 1, ¶ 18. She was “denied participation in student government, as well as in some curricular  
3 and extracurricular music programs.” Doc. 1, ¶ 18. Her grades dropped and teachers and  
4 administrators, including Hunt and Dutra, did not secure for her “the individualized attention she  
5 felt she needed to catch up after her several weeks of unjustified suspension.” Doc. 1, ¶ 18. After  
6 the intervention of legal counsel on Plaintiff’s behalf, the school district held a meeting, with  
7 Hunt and Dutra present, and directed that Plaintiff immediately receive “remedial education  
8 benefits.” Doc. 1, ¶ 18. “Hunt and Dutra were angry that [Plaintiff] had again gone over their  
9 heads in her petition” to the school district for “redress of her grievances.” Doc. 1, ¶ 18.  
10 Thereafter, Plaintiff noted “incidents of disparate treatment by Hunt and Dutra.” Doc. 1, ¶ 19.  
11 For example, Dutra ordered her “to collect refuse littering the Hanford High School grounds  
12 which she had no part in causing.” Doc. 1, ¶ 20. Dutra would also question Plaintiff in public in  
13 a manner that incorrectly suggested she “was commonly engaged in censurable conduct in and  
14 around the Hanford High School.” Doc. 1, ¶ 19. Dutra’s conduct was known to Hunt. Doc. 1, ¶  
15 19.

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18 Finally, regarding Plaintiff’s injuries from the “unlawful retaliation and reprisals by  
19 defendants Hunt and Dutra,” the complaint alleges that she was “precluded from opportunities to  
20 participate in performance based financing for higher education which resulted in higher  
21 advanced education costs to herself and her family.” Doc. 1, ¶ 21. The complaint alleges that  
22 Plaintiff’s economic damages are “estimated to be in excess of one million dollars ... or  
23 according to proof.” Doc. 1, ¶ 22.

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25 (b) Applicable Legal Standards

26 “The Government is prohibited from retaliating for the lawful exercise of constitutional  
27 rights.” *Louisiana Pac. Corp. v. Beazer Materials & Servs., Inc.*, 842 F. Supp. 1243, 1256 (E.D.  
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1 Cal. 1994); *see also White v. Napoleon*, 897 F.2d 103, 111–12 (3d Cir. 1990) (“[r]etaliatio

2 the exercise of constitutionally protected rights is itself a violation of rights secured by the

3 Constitution”). To state a claim under § 1983, including a claim for retaliation based on the

4 exercise of constitutional rights, Plaintiff must prove: (1) “the violation of a right secured by the

5 Constitution or laws of the United States;” and (2) “that the alleged deprivation [of the right in

6 question] was committed by a person acting under color of law.” *West v. Atkins*, 487 U.S. 42, 48

7 (1988).

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9 Here Plaintiff asserts that Hunt and Dutra retaliated against her for asserting her Due

10 Process and First Amendment rights. Retaliation claims generally encompass three elements: 1)

11 plaintiff engaged in a protected activity; 2) defendant’s retaliatory action was designed to

12 interfere with that right or privilege; and 3) there was a causal connection between the protected

13 activity and the retaliatory action. *See, e.g., Everett H. v. Dry Creek Joint Elementary Sch. Dist.*,

14 2014 WL 1123802 (E.D. Cal. Mar. 20, 2014) (No. 2:13-CV-00889-MCE-DAD), citing *Barker v.*

15 *Riverside County Office of Educ.*, 584 F.3d 821, 825 (2009); *Eichenlaub v. Twp. of Ind.*, 385 F.3d

16 274, 282 (3d Cir. 2004) (“In general, constitutional retaliation claims are analyzed under a three-

17 part test. Plaintiff must prove (1) that he engaged in constitutionally-protected activity; (2) that

18 the government responded with retaliation; and (3) that the protected activity caused the

19 retaliation.”).

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22 Furthermore, “[d]eliberate retaliation by state actors against an individual's exercise of the

23 right to petition is actionable under 42 U.S.C. section 1983.” *Jefferson v. Tuteur*, 261 F. App'x

24 10, 11 (9th Cir. 2007), citing *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir.

25 1989). To allege a First Amendment retaliation claim under § 1983 a plaintiff must show: “(1) he

26 engaged in constitutionally protected activity; (2) as a result, he was subjected to adverse action

27 by the defendant that would chill a person of ordinary firmness from continuing to engage in the

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1 protected activity; and (3) there was a substantial causal relationship between the constitutionally  
2 protected activity and the adverse action.” *Pinard v. Clatskanie School Dist.* 6J, 467 F.3d 755,  
3 770 (9th Cir. 2006); *see also Ford v. City of Yakima*, 706 F.3d 1188, 1193 (9th Cir. 2013) (stating  
4 that a plaintiff must show that the defendant’s desire to chill the exercise of First Amendment  
5 rights was a “but-for cause” of his actions); *Lacey v. Maricopa County*, 693 F.3d 896, 916-917  
6 (9<sup>th</sup> Cir. 2012) (en banc) (although a plaintiff need not show his “speech was actually inhibited or  
7 suppressed,” he “must allege facts ultimately enabling him to prove the elements of retaliatory  
8 animus as the cause of injury, with causation being understood to be but-for causation) (internal  
9 quotation marks omitted); *Hartman v. Moore*, 547 U.S. 250, 260 (2006) (“It may be dishonorable  
10 to act with an unconstitutional motive and perhaps in some instances be unlawful, but action  
11 colored by some degree of bad motive does not amount to a constitutional tort if that action would  
12 have been taken anyway”); *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 901 (9th Cir. 2008).  
13 The precise nature of the retaliation is not critical to the inquiry in First Amendment retaliation  
14 cases. The goal is to prevent, or redress, actions by officials that “chill the exercise of protected”  
15 First Amendment rights. *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th  
16 Cir. 1999). “If the plaintiff establishes the elements of a retaliation claim, the government can  
17 escape liability by showing that it would have taken the same action even in the absence of the  
18 protected conduct.” *See, e.g., Lacey v. Maricopa County*, 649 F.3d 1118, 1132 (9th Cir. 2011)  
19 (internal quotations omitted).  
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23 (c) Analysis

24 In the instant motion, Hunt and Dutra move to dismiss the complaint on the basis that that  
25 the complaint is “uncertain as to whether [Plaintiff] is claiming retaliation or a denial of her First  
26 Amendment right to petition the government for redress for the deprivation of life, liberty and/or  
27 property without due process.” Doc. 52 at 1. Hunt and Dutra further allege that the allegations in  
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1 the complaint are stated “in a conclusory fashion and without sufficient factual detail to support”  
2 a cognizable cause of action. Doc. 52 at 2. In her opposition, Plaintiff clarifies that the complaint  
3 seeks to allege a retaliation claim, specifically that Hunt and Dutra retaliated against her for  
4 exercising her Due Process and First Amendment rights, and that the claim meets the pleading  
5 standard set forth in Fed. R. Civ. P. 8(a). Doc. 55 at 2.

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7 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint  
8 if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to  
9 dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its  
10 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard  
11 requires the plaintiff to allege facts that add up to “more than a sheer possibility that a defendant  
12 has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although courts do not  
13 require “heightened fact pleading of specifics,” *Twombly*, 550 U.S. at 544, a plaintiff must  
14 provide “more than labels and conclusions, and a formulaic recitation of the elements of a cause  
15 of action will not do.” *Id.* at 555. The plaintiff must allege facts sufficient to “raise a right to  
16 relief above the speculative level.” *Id.*

17  
18 In deciding whether the plaintiff has stated a claim, the Court must assume that the  
19 complaint’s well-pleaded allegations are true and must draw all reasonable inferences in his or  
20 her favor. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir.1987). However, the court is  
21 not required to accept as true “allegations that are merely conclusory, unwarranted deductions of  
22 fact, or unreasonable inferences.” *St. Clare v. Gilead Scis., Inc.*, 536 F.3d 1049, 1055 (9th  
23 Cir.2008). Moreover, “the tenet that a court must accept as true all of the allegations contained in  
24 a complaint is inapplicable to legal conclusions.” *Iqbal*, 556 U.S. at 678.

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26 Here Plaintiff successfully petitioned the school district to overturn her suspension and  
27 potential expulsion from Hanford High School. Plaintiff also successfully petitioned the school  
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1 district to provide her with remedial instruction, to help her make up the lessons she missed  
2 during her suspension. Thus the only harm alleged in the complaint is that Plaintiff's grades  
3 dropped upon her return to school; "she was ordered by Dutra to collect refuse littering the  
4 Hanford High School grounds which she had no part in causing;" "she was subjected to close  
5 questioning and public scrutiny by defendant Dutra for incidents in which she obviously had no  
6 part;" and she was denied participation in "student government, music programs, and other  
7 similar programs, while other similarly, or lesser qualified students who had not demanded a due  
8 process hearing or petitioned for redress of grievances by opposing Hunt's and Dutra's actions  
9 were allowed to participate in those programs." Doc. 1, ¶¶ 18, 20. Based on the complaint's  
10 generalized allegations, there could be any number of reasons why Plaintiff's grades dropped;  
11 why she was not selected for student government and music programs; and why she was asked to  
12 participate in school clean-ups and subjected to school disciplinary measures. Given the lack of  
13 specificity in the factual allegations, Plaintiff's claim of retaliatory animus on the part of Hunt  
14 and Dutra does not rise above the level of her own speculation. The allegations in the complaint  
15 do not plausibly suggest that Plaintiff was treated differently than other students because of her  
16 exercise of her constitutional rights. Plaintiff has thus failed to allege a cognizable claim that  
17 Hunt and Dutra retaliated against her for exercising her constitutional rights.

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21 More specifically, in relation to the elements of a retaliation claim, it is clear that in  
22 seeking an evidentiary hearing to overturn her suspension and potential expulsion from Hanford  
23 High School, and in petitioning the school district to provide remedial instruction following her  
24 suspension, Plaintiff was engaging in constitutionally-protected conduct. However, Plaintiff has  
25 not alleged sufficient facts to satisfy, for purposes of stating a cognizable claim under the  
26 applicable pleading standard, the other elements of a retaliation claim. First, Plaintiff has alleged  
27 minimal harm in the form of retaliatory actions. Next, Plaintiff has failed to allege facts that, if  
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1 taken as true, would show that a person of ordinary firmness would be deterred from engaging in  
2 the constitutionally-protected conduct at issue here, i.e., exercising the right to petition the school  
3 district for redress of grievances. *See, e.g., Lacey v. Maricopa County*, 649 F.3d 1118, 1132 (9th  
4 Cir. 2011) (to allege a First Amendment retaliation claim, a plaintiff must show that a defendant,  
5 by his actions, deterred or chilled a plaintiff's exercise of protected speech, and that such  
6 deterrence was a substantial or motivating factor in the defendant's conduct). Finally, Plaintiff  
7 has failed to allege facts that, if taken as true, would show that Plaintiff's exercise of her  
8 constitutional rights was the "but for" cause of adverse actions by Hunt and Dutra. In sum, the  
9 complaint's highly general and conclusory allegations, taken together, do not state a plausible  
10 entitlement to relief. The complaint is therefore dismissed in its entirety.

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12 As the instant complaint is Plaintiff's Third Amended Complaint, Plaintiff has already  
13 had four opportunities to state a cognizable claim. Accordingly, the Court declines to grant  
14 further leave to amend.  
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### 16 CONCLUSION

17 For the foregoing reasons, Plaintiff's Third Amended Complaint is dismissed in its  
18 entirety, without leave to amend.  
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20 IT IS SO ORDERED.  
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22 Dated: February 13, 2015

/s/ Gary S. Austin  
23 UNITED STATES MAGISTRATE JUDGE  
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