

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 21<sup>st</sup> day of July, two thousand nine.

PRESENT:

JOSEPH M. McLAUGHLIN,  
ROSEMARY S. POOLER,  
RICHARD C. WESLEY,  
*Circuit Judges.*

---

Justin Holmes, Richard Partington III,  
*Plaintiffs-Appellants,*

v.

08-1475-cv

Steven G. Poskanzer, Jonathan Raskin,  
L. David Rooney, and Paul Zuckerman,  
*Defendants-Appellees.*

---

FOR APPELLANTS: Justin Holmes, *pro se*, Binghamton, N.Y.;  
Richard Partington III, *pro se*,  
Southampton, N.Y.

FOR APPELLEES: Zainab A. Chaudhry, Assistant Solicitor General, (Andrea Oser, Deputy Solicitor General and Barbara D. Underwood, Solicitor General, on the brief), for Andrew M. Cuomo, Attorney General of the State of New York, Albany, NY.

Appeal from a judgment of the United States District Court for the Northern District of New York (Kahn, J.).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED**.

Appellants Justin Holmes and Richard Partington, III, proceeding *pro se*, appeal the district court's judgment dismissing their complaint brought pursuant to 42 U.S.C. § 1983. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

"We review *de novo* a district court's dismissal of a complaint pursuant to Rule 12(b)(6), construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002) (quotation marks omitted). The complaint includes any statements or documents incorporated in it by reference, and even "where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint." *Id.* at 152-53 (quotation marks omitted). We also

review *de novo* a district court's decision adjudicating a motion to dismiss based on qualified immunity, and "the plaintiff is entitled to all reasonable inferences from the facts alleged, not only those that support his claim, but also those that defeat the immunity defense.'" See *Benzman v. Whitman*, 523 F.3d 119, 125 (2d Cir. 2008) (quoting *McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004)). "We are free to affirm an appealed decision on any ground which finds support in the record, regardless of the ground upon which the trial court relied." *Reid v. Senkowski*, 961 F.2d 374, 378 (2d Cir. 1992) (quotation marks omitted).

### **Due Process Claims**

As a preliminary matter, the Plaintiffs do not challenge the district court's finding that the Defendants are entitled to qualified immunity on their due process claims concerning the right to have their counsel present and to cross-examine witnesses, and, as such, they have waived those claims. See *LoSacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995) (claims not raised on appeal are deemed waived).

A fundamental requirement of due process in the school disciplinary context is that a hearing be held before an impartial decision maker. See *Winnick v. Manning*, 460 F.2d 545, 548 (2d Cir. 1972). Here, the Plaintiffs have not alleged any facts to support actual bias, conflict of interest, or prior involvement by any of the Defendants who participated in the

disciplinary hearing process, and thus, their bald assertion that Appellees Paul Zuckerman and Jonathan Raskin were not impartial is insufficient to state a claim. See *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1949 (2009) (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))).

To the extent the Plaintiffs assert that the disciplinary committee deviated from the proper regulations, their conclusory allegations fail to support a plausible inference that the proceedings were unfair. *Winnick*, 460 F.2d at 550 (holding that university’s deviations from procedural guidelines “did not rise to constitutional proportions,” particularly where they were minor deviations and did not affect the fundamental fairness of the hearing). Accordingly, the district court properly dismissed the Plaintiffs’ due process claims.

#### **First Amendment Claims**

To state a claim for First Amendment retaliation under § 1983, a plaintiff must allege: “(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action.” *Gill v.*

*Pidlypchak*, 389 F.3d 379, 380 (2d Cir. 2004) (quotation marks omitted). Regardless of any retaliatory motive, the plaintiff cannot prevail if a defendant can show he or she would have taken the same action even in the absence of the allegedly improper reason. See *Lowrance v. Achtyl*, 20 F.3d 529, 534-35 (2d Cir. 1994).

Here, the district court properly dismissed the Plaintiffs' First Amendment claims. The Plaintiffs did not allege that any of the named defendants personally interfered with the student elections, claiming that only Corinna Caracci and the director of athletics, non-parties, intervened and thus, there was no personal involvement of any of the defendants to interfere with the elections. See *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) (state officials may only be held liable if a plaintiff can show that the defendant was personally involved in the purported unlawful conduct or alleged constitutional deprivation).

With respect to the claim that the disciplinary charges were brought in retaliation for protected speech, the Plaintiffs allege only that Caracci filed the disciplinary charges. Moreover, taking judicial notice of the criminal proceedings against the Plaintiffs, Holmes was convicted of harassment for the conduct at issue, and, although Partington was found not guilty, the court specifically found that his conduct would "no doubt subject him to disciplinary action by the school." Thus,

the Plaintiffs cannot show that retaliation was the but-for cause of the discharge. See *Lowrance*, 20 F.3d at 534-35.

To the extent the Plaintiffs argue that they should have been allowed to amend their complaint, this argument is unavailing. The Plaintiffs were represented by counsel below and never moved to amend their complaint, and, as such, cannot raise the argument for the first time on appeal. See *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005) (“It is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.” (quotation marks omitted)).

For the foregoing reasons, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:  
Catherine O’Hagan Wolfe, Clerk

By: \_\_\_\_\_