

**No. 23-1389**

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*In the*  
**UNITED STATES COURT OF APPEALS**  
*for the*  
**FIRST CIRCUIT**

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SHAWN MCBREAIRTY

*Plaintiff-Appellant,*

v.

HEATH MILLER, IN HIS PERSONAL AND  
OFFICIAL CAPACITIES; SCHOOL BOARD OF RSU22

*Defendants-Appellees.*

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*On Appeal from the United States District Court  
for the District of Maine  
No. 1:23-cv-00143  
The Honorable Nancy Torresen*

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**APPELLANT'S APPENDIX**

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MARC J. RANDAZZA  
JAY M. WOLMAN  
ROBERT J. MORRIS II  
RANDAZZA LEGAL GROUP, PLLC  
30 Western Avenue  
Gloucester, MA 01930  
Tel: 888-887-1776  
ecf@randazza.com

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE

SHAWN MCBREAIRTY,

Plaintiff,

v.

HEATH MILLER, in his personal and official capacities; SCHOOL BOARD OF RSU22,

Defendants.

Case No. \_\_\_\_\_

**VERIFIED COMPLAINT 42 U.S.C. §  
1983 COMPLAINT FOR  
DECLARATORY, INJUNCTIVE  
RELIEF, AND DAMAGES  
  
JURY TRIAL DEMAND**

This is a Civil Action brought by Plaintiff Shawn McBreairty against Defendants Heath Miller and School Board of RSU22. Mr. McBreairty brings a claim under 42 U.S.C. § 1983 for Defendant’s violation of Mr. McBreairty’s First Amendment rights, and alleges as follows:

**THE PARTIES**

1. Plaintiff Shawn McBreairty is an educational advocate and journalist who resides in Hampden, Maine.
2. Defendant Heath Miller, Chair of RSU22 School Board is a resident of Newburgh, Maine.
3. Defendant School Board of Regional School Unit 22 (“RSU22”) is a school committee organized pursuant to 20-A M.R.S. § 1001 that exercises control and management of RSU22 public schools.

**JURISDICTION AND VENUE**

4. This Court has subject matter jurisdiction over this civil action per 28 U.S.C. § 1331 as this is a civil action arising under 42 U.S.C. § 1983 and the First Amendment to the U.S. Constitution. Personal jurisdiction and venue should be obvious.

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**FACTUAL BACKGROUND**

**RSU22 Public Participation**

5. If this case sounds familiar to the Court, it should. McBreairty previously filed suit and prevailed in *McBreairty v. Sch. Bd. of RSU22*, No. 1:22-cv-00206-NT, 2022 U.S. Dist. LEXIS 128353 (D. Me. July 20, 2022). However, undeterred by this result, the Defendants have simply done it again. This time, enforcing a rule that prohibits speaking ill of government employees, but which permits speaking well of government employees.

6. All meetings of the RSU22 School Board are open to the public. All actions of the School Board are to be taken openly and the deliberations leading to School Board action likewise must be conducted openly.

7. The public is invited to attend all School Board meetings and are given time to voice opinions or problems unless those problems involve teachers. Praising teachers is strongly encouraged by the School Board. But raising concerns about teachers is not tolerated.

8. BEDH Public Participation Policy Rule 2 provides as follows:

Confidential personnel information will not be shared in a public session. **No complaints or allegations will be allowed at Board meetings concerning any person employed by the school system or against particular students.** Personnel matters or complaints concerning student or staff issues will not be considered in a public meeting but will be referred through established policies and procedures. **Exhibit A**. (emphasis added)

9. Mr. McBreairty is not permitted to even mention a teacher’s name, unless it is to praise that employee. Praise is allowed, but criticism is not.

**RSU22 School Board Meeting – October 19, 2022**

10. On October 19, 2022, Dolly Sullivan, a Program Director for Educate Maine, made public comment at the RSU22 School Board meeting. See **Exhibit B**. Ms. Sullivan is the Program

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Director for the Maine Teacher of the Year program. During Ms. Sullivan’s public comment, she provided an assessment of Kelsey Stoyanova’s service as the 2022 Maine Teacher of the Year, including referring to her as “thoughtful,” “intentional,” “brave,” and “brilliant.”

11. After Ms. Sullivan completed her comments, a round of applause breaks out, and Defendant Miller can be heard saying “Thank you Ms. Sullivan for all you and your organization have done for us.”

12. Ms. Sullivan was permitted to praise Ms. Stoyanova.

**RSU22 School Board Meeting – February 15, 2023**

13. On February 15, 2023, Mr. McBreairty made public comment at the RSU22 School Board meeting. *See* **Exhibit C**. During his public comment, Mr. McBreairty played a prerecorded statement where he twice mentioned Stoyanova.

14. The first time Mr. McBreairty mentioned Ms. Stoyanova, it was in reference to an article where the Superintendent is quoted as being proud of all that Ms. Stoyanova had accomplished as the 2022 Maine Teacher of the Year. Defendant Miller immediately warned Mr. McBreairty that “we are not going to mention names.”

15. The second time Mr. McBreairty mentioned Ms. Stoyanova, he criticized her.

16. Defendant Miller immediately ordered Mr. McBreairty to stop his public comment and sit down. The School Board cut the video feed, and the Hampden Police Department was contacted to remove Mr. McBreairty from the school premises.

17. When the police arrived, Defendant Miller told officers that Mr. McBreairty had violated BEDH Public Participation Policy Rule 2 and ordered that Mr. McBreairty leave the RSU22 school premises. The police report states in relevant part the following:

Heath then spoke up and said that he had violated the policy and Shawn was warned. Shawn said the policy is repugnant to the Constitution. Heath said Shawn

mentioned employee names. [sic] and was warned but Shawn continued to do it. Mentioning employee names is against policy.

...

Heath advised before the public portion he reads the policy and the list of bullet points. Heath read one that says in substance no confidential personal information wont be shared about persons employed at the school. Complaints and allegations will be aloud [sic] at board meetings about concerning any person employed by the school or students. Heath said Shawn played a recording of himself which is perfectly fine and he let him do it until he mentioned a teachers name and an allegation towards that teacher, Heath then told him to sit down and Shawn then mentioned another staff members name in a negative manner. He then told Shawn he could not continue.

**Exhibit D** at 3-4.

**RSU22 School Board Meeting – March 15, 2023**

18. On March 15, 2023, Mr. McBreairty returned to RSU22, not expecting that the Defendants would violate his rights again. However, his expectations were not met.

19. McBreairty engaged in public comment. See **Exhibit E**. During his public comment, Mr. McBreairty mentioned RSU22 staff members.

20. Mr. McBreairty mentioned Jennifer Norwood, a Hampden Academy High School teacher. Mr. McBreairty criticized her practices. Immediately after Mr. McBreairty mentioned Ms. Norwood’s name, Defendant Miller warned Mr. McBreairty stating, “We are not going to speak about school employees. This is your one warning.”

21. As Mr. McBreairty continued speaking, he criticized practices engaged in by Mrs. Campbell. Immediately after Mr. McBreairty mentioned Mrs. Campbell’s name, Defendant Miller ordered Mr. McBreairty to stop speaking and sit down. The School Board cut the video feed, and the police were contacted to remove Mr. McBreairty from the school premises.

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**CLAIMS FOR RELIEF**

**Count I**

**Violation of the First Amendment to the United States Constitution: Retaliation  
(42 U.S.C. 1983 – First Amendment)**

22. Plaintiff realleges each allegation in the preceding paragraphs.

23. Plaintiff alleges that Defendants’ conduct of shutting down Mr. McBreairty’s speech and contacting the police to remove him from RSU22 school premises due to his constitutionally protected petitioning activity is unconstitutional and violates his First Amendment rights to freedom of speech and expression, and freedom of petition.

24. Defendants retaliated against Mr. McBreairty for exercising his First Amendment rights to freedom of speech and expression, and freedom of petition.

25. It is clearly established that there is a First Amendment right to petition to the government, and that clearly established right includes criticism of government employees.

26. Defendants’ restriction on Plaintiff’s speech is content-based and viewpoint discriminatory and is in violation of the Free Speech Clause of the First Amendment and the Right to Petition the Government Clause of the First Amendment.

27. Plaintiff has been injured, by the Defendants’ unconstitutional actions and is entitled to damages as a result of Defendants actions.

**Count II**

**Violation of the First Amendment to the United States Constitution  
Declaratory Judgment & Injunctive Relief  
(42 U.S.C. 1983 – First Amendment)**

28. Plaintiff realleges each allegation in the preceding paragraphs.

29. As set forth above, Rule 2 states the following:

Confidential personnel information will not be shared in a public session. **No complaints or allegations will be allowed at Board**

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**meetings concerning any person employed by the school system or against particular students.** Personnel matters or complaints concerning student or staff issues will not be considered in a public meeting but will be referred through established policies and procedures.

30. Rule 2 is unconstitutionally vague and void on its face. “Complaints” and “allegations” appears to be any comments Defendant Miller views in a disapproving manner.

31. Rule 2 is a facially unconstitutional viewpoint-based restriction that prohibits any comments about RSU22 employees or students that the Chair deems is negative, while positive speech is permitted.

32. Rule 2 was unconstitutionally applied to Mr. McBreairty. Other members of the public are permitted to address their opinions about teachers while Mr. McBreairty’s speech is silenced, and he is ordered to leave RSU22 premises.

33. Plaintiff is entitled to a declaration that the rule is void and an injunction prohibiting its enforcement.

**Count III**

**Violation of the Article I Section 4 and Section 15 of the Maine Constitution  
(5 M.R.S. § 4682 Free Speech and Right to Petition)**

34. Plaintiff hereby repeats and realleges each and every allegation in the preceding paragraphs as if set forth fully herein.

35. Plaintiff alleges that Defendants’ conduct of shutting down Mr. McBreairty’s speech and contacting the police to remove him from RSU22 school premises due to his constitutionally protected petitioning activity is unconstitutional and violates his rights under Article I, Section 4 and 15 of the Maine Constitution.

36. Plaintiff has been injured, or reasonably fears imminent injury, by these constitutional violations, and Plaintiff is entitled to relief.

**Count IV**

**Violation of the Article I Section 4 and Section 15 of the Maine Constitution  
Declaratory and Injunctive Relief  
(5 M.R.S. § 4682 Free Speech and Right to Petition)**

- 37. Plaintiff realleges each allegation in the preceding paragraphs.
- 38. As set forth above, Rule 2 states the following:

Confidential personnel information will not be shared in a public session. No complaints or allegations will be allowed at Board meetings concerning any person employed by the school system or against particular students. Personnel matters or complaints concerning student or staff issues will not be considered in a public meeting but will be referred through established policies and procedures.

39. Rule 2 is unconstitutionally vague and void on its face. “Complaints” and “allegations” appears to be any comments that Defendant Miller views in a disapprovingly manner.

40. Rule 2 is a facially unconstitutional viewpoint-based restriction that prohibits any comments about RSU22 employees or students that the Chair deems is negative, while positive speech is permitted.

41. Rule 2 was unconstitutionally applied to Mr. McBreairty. Other members of the public are permitted to address their opinions about teachers while Mr. McBreairty’s speech is silenced, and he is ordered to leave RSU22 premises.

42. Plaintiff is entitled to a declaration that the rule is void and an injunction prohibiting its enforcement.

**REQUESTS FOR RELIEF**

WHEREFORE, Plaintiff Shawn McBreairty asks this Court to issue and or award:

- A. A declaration that BEDH Public Participation Policy Rule 2 is unconstitutional under the First Amendment and Article I, Sections 4, 6-A, & 15 of the Maine Constitution;

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B. A preliminary and permanent injunction enjoining each Defendant from interfering with Plaintiff’s right to lawfully engage in constitutionally protected expression and activity within Hampden, Maine;

C. Damages in an amount to be determined at trial;

D. An award of attorneys’ fees and expenses under 42 U.S.C. § 1988 and 5 M.R.S. § 4683;

E. Any further relief the Court deems appropriate.

**DEMAND FOR JURY TRIAL**

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands a trial by Jury on all causes of action.

Dated: March 24, 2023.

Respectfully Submitted,

/s/ Brett D. Baber  
Brett D. Baber, Bar No. 3143  
Lanham Blackwell & Baber, PA  
133 Broadway  
Bangor, ME 04401  
Tel: (207) 942-2898  
Email: bbaber@lanhamblackwell.com

Marc J. Randazza (*pro hac vice forthcoming*)  
*Lead Counsel*  
Robert J. Morris II (*pro hac vice forthcoming*)  
RANDAZZA LEGAL GROUP, PLLC  
30 Western Avenue  
Gloucester, MA 01930  
Tel: (888) 887-1776  
Email: ecf@randazza.com

*Attorneys for Plaintiff,*  
*Shawn McBreairty*

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**VERIFICATION OF COMPLAINT**

I, Shawn McBreairty, am the Plaintiff in the above-captioned matter. I have reviewed the foregoing allegations in this Verified Complaint, and I hereby declare under penalty of perjury that the foregoing allegations are true and correct to the best of my knowledge and understanding.

Dated: 3/24/23

By: 

Shawn McBreairty

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# **Exhibit A**

## BEDH Public Participation Policy Rule 2

**BEDH**

### **Public Participation in Board Meetings**

All meetings of the Board shall be open to the public. All actions of the Board shall be taken openly and the deliberations leading to Board action shall likewise be conducted openly. The public is invited to attend Board meetings and will be given limited time to voice opinions or problems.

The Board recognizes its responsibility to conduct the business of the district in an orderly and efficient manner and will therefore require reasonable controls to regulate public presentations to the Board. The primary purpose of the meeting is for the Board to conduct its business as charged by the law. Spontaneous discussion, as well as disorder and disruption, prevent the Board from doing its work and will not be permitted. A person wishing to be heard by the Board shall first be recognized by the Chair. He/she shall then identify him/herself and proceed with his/her comments as briefly as the subject permits.

The Chair is responsible for the orderly conduct of the meeting and shall rule on such matters as the time to be allowed for public discussion, the appropriateness of the subject being presented and the suitability of the time for such a presentation. A speaker in violation of these rules may be required to leave in order to permit the orderly consideration of the matters for which the meeting was called. Persons who disrupt the meeting may be asked to leave, and the Chair may request law enforcement assistance as necessary to restore order.

Speakers are asked to observe the following:

1. In the case of a large audience, speakers may be asked to sign up before the meeting so they may be called on most expediently. Speakers may be asked to keep their comments to three minutes.
2. Confidential personnel information will not be shared in a public session. No complaints or allegations will be allowed at Board meetings concerning any person employed by the school system or against particular students. Personnel matters or complaints concerning student or staff issues will not be considered in a public meeting but will be referred through established policies and procedures.
3. All speakers are asked to identify themselves. Gossip, defamatory comments, or abusive or vulgar language will not be permitted.
4. Speakers must address all comments and questions to the Chair.
5. Comments will be heard and considered. Requests for information or concerns that require further research may be referred to the Superintendent to be addressed at a later time. Generally, the Board does not discuss or act on an item not on the agenda.

**AA011**

6. Speakers are asked not to be repetitious of comments already made to the Board, in the interest of most efficient use of time.
7. The Chair has the authority to stop any presentation that violates these guidelines or the privacy rights of others.
8. Persons wishing to address the Board may be permitted to do so only during the designated time for public comment.

At the discretion of the Chair, a speaker may be recognized for a second time on a particular item. All speakers must observe rules of common etiquette. The Chair may interrupt or terminate an individual's statement when it is too lengthy, personally directed, abusive, obscene, or irrelevant. The Board as a whole will have the final decision in determining the appropriateness of all such rulings.

Copies of the Board of Directors Agenda shall be published in advance of each meeting in accordance with Board policy. Copies will be posted and/or available prior to regular meetings on the district website and at the Superintendent's Office.

Legal Reference: 1 MRSA § 401 et seq.  
20 MRSA §1001(20)

Cross Reference: Policy BEC/KDB, Executive Session  
Policy KE, Public Concerns and Complaints

Adopted: October 2, 1974

Updated: October 4, 1989; December 21, 2016; March 25, 2020

# **Exhibit B**

Video Exhibit  
Recording of Meeting  
October 19, 2022

**To be filed conventionally with the  
Clerk's Office.**



# **Exhibit C**

Video Exhibit  
Recording of Meeting  
February 15, 2022

**To be filed conventionally with the  
Clerk's Office.**

# Exhibit D

Police Report  
February 15, 2023



# Hampden Police Department

## Officer Report for Incident 23H-00471

**Nature:** Wanted Out  
**Location:** HAML A

**Address:** 89 Western Ave; Hampden Academy  
Hampden ME 04444

**Offense Codes:** WOUT

**Received By:** Bazinet, C

**How Received:** T

**Agency:** HAML

**Responding Officers:** Devine, S, Mushrall David

**Responsible Officer:** Devine, S

**Disposition:** INA 03/03/23

**When Reported:** 19:16:03 02/15/23

**Occurred Between:** 19:16:03 02/15/23 and 19:16:03 02/15/23

**Assigned To:**

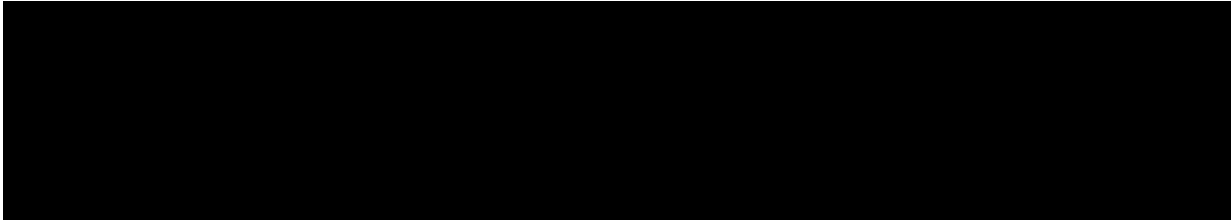
**Detail:**

**Date Assigned:** \*\*/\*\*/\*\*

**Status:**

**Status Date:** \*\*/\*\*/\*\*

**Due Date:** \*\*/\*\*/\*\*



### Offense Codes

**Reported:** WOUT Person Wanted Out

**Observed:** WOUT Person Wanted Out

**Additional Offense:** WOUT Person Wanted Out

### Circumstances

**Responding Officers:**

**Unit :**

Devine, S

306

Mushrall David

308

**Responsible Officer:** Devine, S

**Agency:** HAML

**Received By:** Bazinet, C

**Last Radio Log:** 19:42:06 02/15/23 CMPLT

**How Received:** T Telephone

**Clearance:** PND Report Pending

**When Reported:** 19:16:03 02/15/23

**Disposition:** INA **Date:** 03/03/23

**Judicial Status:**

**Occurred between:** 19:16:03 02/15/23

**Misc Entry:**

**and:** 19:16:03 02/15/23


**Modus Operandi:**

**Description :**

**Method :**

### Involvements

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<b>Date</b>	<b>Type</b>	<b>Description</b>	<b>Relationship</b>
02/15/23	Name	McBreairty, Shawn P	involved
02/15/23	Name	Miller, Heath C	involved
02/15/23	Name	Raymond, Nicholas	involved
			
02/15/23	Cad Call	19:16:03 02/15/23 Wanted Out	Initiating Call

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**Narrative**

at 1919 hours PRCC contacted me to report Hampden Academy would like Shawn Mcbreairty removed. Shawn was asked to stop during public participation, is playing recordings and refusing to leave.

At 1920 hours Officer David Mushrall and I arrived at Hampden Academy. We entered the building and met Nick Raymond who is the district Superintendent. Nick advised there is a school board meeting going on and Shawn is refusing to leave, he is playing a recording and accessing the TV. Nick said they gave him is opportunity to speak, he was violating the policy so they stopped him. Nick said Shawn was refusing to stop, he was asked to sit down several times and Shawn told him he had the First Amendment right. When Shawn refused to stop they asked Shawn to leave and Shawn said he was staying there. The meeting then went into recess.

Nick advised Shawn was playing a recording of himself talking. Nick said he did this probably three times and then he took over the screen and put a video display up.

I was aware that Shawn had been given a trespass notice for the school so I asked Nick what the status of that was. Nick advised that Federal court ruled it was a violation of his First Amendment rights. Nick said Shawn can participate but he is violating the policy and like anyone else he was asked to stop. Nick told me that Heath Miller who is the chair asked Shawn to stop.

I spoke with Nick and told him that I would speak with Shawn about following the rules and tell him he can stay if he does follow the rules. Nick said that would be fine but also wanted me to speak with Shawn about streaming on the TV. I asked Nick if they could block the streaming and he said they cant, its open and they have another presentation. Nick then said they can turn it off and when the need it they can turn it back on but Shawn probably could over ride it.

Officer Mushrall and I then went into the library to speak with Shawn and Heath. I introduced myself to Shawn and asked if we could talk and motioned to leave the room and he said he wanted to talk there. I asked Shawn what was going on and Shawn said Heath Miller was willfully violating his constitutional rights to free speech to address grievances. Shawn said Heath already lost Federal lawsuit to him about this. Shawn said Heath cut him off about half way through on the live feed that goes out to the community. Shawn said he deserves his three minutes of public comment and then will leave the building.

Heath then spoke up and said that he had violated the policy and Shawn was warned. Shawn said the policy is repugnant to the Constitution. Heath said Shawn mentioned employee names and was warned but Shawn continued to do it. Mentioning employee names is against policy. Shawn said the policy is repugnant tot he Constitution, we (Police) signed an oath to protect the Constitution so his policy doesn't mean anything. He continued to say the Federal Lawsuit ruled that the only thing Heath can control is place, time and manner. Shawn said he can say what ever he wants about whomever he wants as long as it doesn't incite violence because that wont be covered under the Constitution.

I then went over to speak with Heath. I told Heath that Nick had told me that if Shawn follows the rules he could stay, heath said that they had warned Shawn and he is completely disrupted the meeting to the point they stopped and would have to continue it at another time. Heath advised before the public portion he reads the policy and the list of bullet points. Heath read one that says in substance no confidential personal information wont be shared about persons employed at

the school. Complaints and allegations will be aloud at board meetings about concerning any person employed by the school or students. Heath said Shawn played a recording of himself which is perfectly fine and he let him do it until he mentioned a teachers name and an allegation towards that teacher, Heath then told him to sit down and Shawn then mentioned another staff members name in a negative manner. He then told Shawn he could not continue.

I then went back to Shawn and told him that naming staff is against police and Shawn said its repugnant to the constitution. He advised Heath was voted in by the people of Newburgh and signed an oath.

Officer Mushrall said what would be your next step if he violated his rights and Shawn said sue him.

Shawn wanted us to have Heath say on the record that Heath is willfully violating his first Amendment right and Officer Mushrall advised he wasn't going to tell him to phrase anything a certain way. Shawn then said he wanted his time back and Officer Mushrall advised they aren't giving him the rest of his time.

I then talked to Nick to clarify if he wants Shawn to stay or leave the meeting. Nick advised that if Heath says he needs to leave then he needs to leave.

I then told Shawn that Nick does want him to leave. Shawn asked if Nick is the superintendent and I said yes. Shawn asked on what charge and I said that Heath wants him to go because he is not following the rules of the meeting. Shawn asked if he said no what will happen, he said lets push it. I told Shawn we don't want to have to make him leave and he said are you sure, I responded with I'm positive. Shawn said I (Me) am in a rock and a hard place because I have an oath to the constitution and I know ill lose in court if I put hands on him. I then said lets not do that. Shawn said he wants the Chair to restart the meeting and if he feels he cant continue the meeting because he doesn't want to follow the constitution then he needs to end the meeting and everyone can go on there merry way. Shawn said he should be able to stay for other public comments and then maybe he will decide to leave. I advised Nick Raymond is telling me that they want him to go.

Shawn said that he (Heath) asked him to leave but did we ask him to leave. I said yes we are asking him to leave. He then said he is refusing him but he wont refuse us. I then asked Shawn if he would leave and he said yes.

We then walked out with Shawn.

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Responsible LEO:

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Approved by:

Officer Report for Incident 23H-00471

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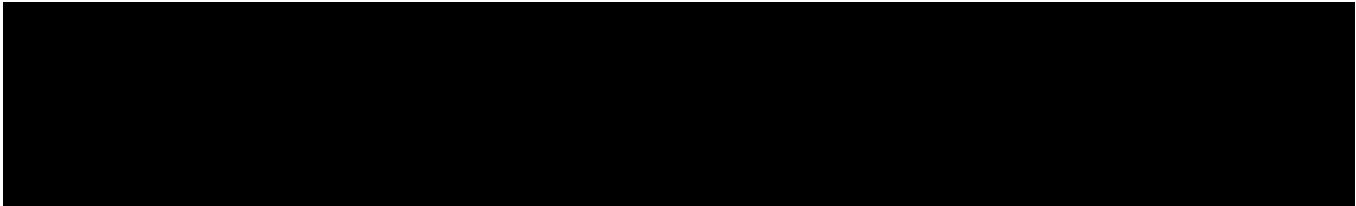
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Date

03/09/23

**AA020**

**Name Involvements:**



involved : 40852

Last: McBreairty  
DOB: [REDACTED]  
Race: W Sex: M

First: Shawn  
Dr Lic: 1010183  
Phone: (207)408-7855  
cell

Mid: P  
Address: 443 Main Rd N  
City: Hampden, ME 04444

involved : 108551

Last: Miller  
DOB: [REDACTED]  
Race: W Sex: M

First: Heath  
Dr Lic: [REDACTED]  
Phone: [REDACTED]

Mid: [REDACTED]  
Address: [REDACTED]  
City: [REDACTED]

involved : 545202

Last: Raymond  
DOB: [REDACTED]  
Race: W Sex: M

First: Nicholas  
Dr Lic: [REDACTED]  
Phone: [REDACTED]

Mid: [REDACTED]  
Address: [REDACTED]  
City: [REDACTED]



# **Exhibit E**

Video Exhibit  
Recording of Meeting  
March 15, 2023

**To be filed conventionally with the  
Clerk's Office.**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE

SHAWN MCBREAIRTY,

Plaintiff,

v.

HEATH MILLER, in his personal and official capacities; SCHOOL BOARD OF RSU22,

Defendants.

Case No. \_\_\_\_\_

**EMERGENCY MOTION FOR A  
TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION**

Plaintiff Shawn McBreairty moves for a temporary restraining order and preliminary injunction to enjoin Defendants from prohibiting Mr. McBreairty from public comment based on viewpoint discrimination and from enforcing BEDH Public Participation Policy Rule 2. McBreairty respectfully requests the entry of an injunction prior to the next RSU22 meeting on April 26, 2023. He has been removed from two prior meetings, under threat of arrest, for criticizing RSU22 employees – and he intends to do so again at the next meeting. McBreairty’s First Amendment rights will not be protected without injunctive relief. McBreairty and the public interest will be irreparably harmed if this relief does not issue prior to April 26. This motion is based on all pleadings and papers on file herein and the attached Memorandum of Points and Authorities, and any further argument and evidence as may be presented at a hearing.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**1.0 INTRODUCTION**

Defendants permit praise of their employees at school board meetings, but they do not allow criticism of the same government employees. And, in fact, they do not even allow McBreairty (and only McBreairty) to so much as mention the names of RSU22 employees. As such, the School Board and its chair, Miller, tolerates certain viewpoints and prohibits others. McBreairty previously prevailed in a suit against this same School Board for its unconstitutional actions. *McBreairty v. Sch. Bd. of RSU22*, 2022 U.S. Dist. LEXIS 128353 (D. Me. July 20, 2022) (hereinafter, *McBreairty v. RSU22*). However, undeterred by this result, Defendants violated the First Amendment again. This time, they did so by enforcing a viewpoint-based rule that prohibits speaking ill of government employees, but which permits speaking well of government employees.

The public must be free to debate the relative merits of government employees, including those of the public schools. The Connecticut Supreme Court addressed this issue with great clarity:

Robust and wide open debate concerning the conduct of the teachers in the schools of this state is a matter of great public importance . . . [T]eachers’ positions, if abused, potentially might cause serious psychological or physical injury to school aged children. Unquestionably, members of society are profoundly interested in the qualifications and performance of the teachers who are responsible for educating and caring for the children in their classrooms. Further, teachers exercise almost unlimited responsibility for the daily implementation of the governmental interest in educating young people. In the classroom, teachers are not mere functionaries. Rather, they conceive and apply both policy and procedure.

*Kelley v. Bonney*, 606 A.2d 693, 710 (Conn. 1992). There is no reason a Maine court should view this any differently. After all, the Connecticut Supreme Court was upholding a universal American concept – The First Amendment.

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## 2.0 FACTS

### 2.1 RSU22 School Board Meeting and Public Participation Policy Rule 2

Plaintiff Shawn McBreairty is an advocate who regularly attends Defendant RSU22 School Board meetings that are overseen by Defendant RSU22 School Board Chair Heath Miller.

BEDH Public Participation Policy Rule 2 provides as follows:

Confidential personnel information will not be shared in a public session. **No complaints or allegations will be allowed at Board meetings concerning any person employed by the school system** or against particular students. Personnel matters or **complaints concerning student or staff issues** will not be considered in a public meeting but will be referred through established policies and procedures. (Compl. at **Exhibit A**) (emphasis added)

McBreairty specifically challenges the bolded portions of the rule.<sup>1</sup>

McBreairty was victim of this rule. While addressing the School Board, McBreairty criticized RSU22 employees. Defendants then unconstitutionally enforced Rule 2 to silence McBreairty’s criticisms.

### 2.2 RSU22 School Board meeting – October 19, 2022

Defendants unconstitutionally allow government employees to be praised by name, but not criticized. As but one example, on October 19, 2022, Dolly Sullivan, a Program Director for Educate Maine, made public comment at the RSU22 School Board meeting. *See* Compl. at **Exhibit C**. Ms. Sullivan is the Program Director for the Maine Teacher of the Year program. During Ms. Sullivan’s public comment, she provided an assessment of Kelsey Stoyanova’s service as the 2022 Maine Teacher of the Year, including referring to her as “thoughtful,” “intentional,” “brave,” and “brilliant.” Ms. Sullivan permitted to praise Ms. Stoyanova with no issue. After Ms. Sullivan

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<sup>1</sup> McBreairty does not intend to advocate about particular students at this time. Doing so may implicate other interests that are not necessary to address at this stage. However, it would seem equally unconstitutional to prohibit criticizing a student in certain contexts. For example, if a student held a student government leadership position and drew criticism or was charged with committing a heinous crime. Nevertheless, McBreairty has never discussed particular students.

completed her comments, a round of applause broke out, and Defendant Miller can be heard saying “Thank you Ms. Sullivan for all you and your organization have done for us.”

**2.3 RSU22 School Board meeting – February 15, 2023**

In contrast to Ms. Sullivan, who faced no reprobation for mentioning Stoyanova by name, McBreairty was penalized for mentioning Stoyanova. On February 15, 2023, McBreairty made public comment at the RSU22 meeting. *See* Compl. at **Exhibit D**. McBreairty played a prerecorded statement where he criticized Stoyanova. Unlike the praise Ms. Sullivan received for lauding Stoyanova, Defendant Miller objected to McBreairty critically discussing Ms. Stoyanova’s performance. When McBreairty criticized her, Defendant Miller ordered McBreairty to stop his public comment and sit down. The School Board cut the video feed, stopped the meeting, and called the Hampden Police Department to remove McBreairty under threat of arrest if he did not comply. Accordingly, McBreairty was not even permitted to remain as a spectator at the otherwise public meeting.

Defendant Miller told officers that McBreairty violated BEDH Public Participation Policy Rule 2 (“Rule 2”) and ordered that McBreairty leave the premises. The police report states:

Heath [Miller] then spoke up and said that he had violated the policy and Shawn was warned. Shawn said the policy is repugnant to the Constitution. Heath said Shawn mentioned employee names. [sic] and was warned but Shawn continued to do it. Mentioning employee names is against policy.

...

Heath advised before the public portion he reads the policy and the list of bullet points. Heath read one that says in substance no confidential personal information wont be shared about persons employed at the school. Complaints and allegations will be aloud [sic] at board meetings about concerning any person employed by the school or students. Heath said Shawn played a recording of himself which is perfectly fine and he let him do it until he mentioned a teachers name and an allegation towards that teacher, Heath then told him to sit down and Shawn then mentioned another staff members name in a negative manner. He then told Shawn he could not continue.

Compl. at **Exhibit E** at 3-4. If Rule 2 did not exist, Defendants could not have removed Plaintiff.

## 2.4 RSU22 School Board meeting – March 15, 2023

Rather than immediately filing suit, which could have, McBreairty exercised restraint. He returned to RSU22 for the following meeting on March 15. McBreairty hoped that the incident on February 15 would not repeat, as Defendants had a month in which to reconsider their unconstitutional actions. McBreairty reminded them of the prior case before this very court. Defendants were undeterred.

McBreairty made public comment at the RSU22 School Board meeting. *See* Compl. at **Exhibit F**. During his public comment, McBreairty criticized RSU22 employees. Defendant Miller again prevented McBreairty from finishing his public comment and ordered him to leave the premises. Immediately after McBreairty uttered the name of an employee, Defendant Miller ordered McBreairty to stop speaking and sit down. Once again, the School Board cut the video feed, stopped the meeting, and called the police to remove McBreairty from the premises.

## 3.0 LEGAL STANDARD

FRCP 65 provides for temporary restraining orders and preliminary injunctions upon notice. *See* Fed. R. Civ. P. 65(a) and (b). A temporary restraining order or preliminary injunction must (1) state the reasons why it issued; (2) state its specific terms; and (3) describe in reasonable detail the act or acts restrained or required. Fed. R. Civ. P. 65(d). Injunctive relief should be issued if: (1) the plaintiff is likely to succeed on the merits; (2) the plaintiff is likely to suffer irreparable harm if the injunction did not issue; (3) the balance of equities tips in plaintiff's favor; and (4) the injunction is in the public interest. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008).

## 4.0 LEGAL ARGUMENT

### 4.1 Plaintiff Has Standing

In the First Amendment context, two types of injuries provide standing without the challenger having undergone criminal prosecution. When “the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute, and there exists a credible threat of prosecution.” *Mangual v. Rotger-Sabat*, 317 F.3d 45, 56-57 (1st Cir. 2003). When a plaintiff “is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences he also demonstrates constitutional standing. *Id.* at 57; (collecting cases). Twice, Defendants prevented Mr. McBreairty from completing his public comment before the School Board, and had him removed by law enforcement under threat of arrest because he expressed a disfavored viewpoint. Facing a credible threat of arrest the next time McBreairty exercises his First Amendment right to criticize a public employee, McBreairty has standing.

### 4.2 Plaintiff is Likely to Prevail on the Merits of His Claims

This Court previously found for McBreairty, and in repeat circumstances, it should do so again. As previously found, “Mr. McBreairty’s expression of his school-related concerns at the podium during the public comment period of School Board meetings constitutes speech that is protected under the First Amendment.” *McBreairty v. RSU22* at \*14. The RSU22 meetings are a limited public forum. *Id.* at \*20. As previously found:

“[T]he School Board shoulders much of the burden when it comes to the merits of the Plaintiff’s First Amendment claim. See *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000) (“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.”); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (In order for the State . . . to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.)

*McBreairty v. RSU22* at \*13. Defendants cannot engage in viewpoint discrimination at all, nor can they engage in content based discrimination unless doing so is reasonable under the forum analysis.

Defendants violated *McBreairty*’s constitutional rights, specifically engaging in viewpoint discrimination by preventing Mr. *McBreairty* from engaging in public comment before a public body and by using Rule 2, which is unconstitutional facially and as-applied. The burden is now upon the government to provide a constitutionally permissible reason for doing so. It cannot.

**4.2.1 Free Speech Claim**

Plaintiff is likely to prevail under his First Amendment claim. As in *McBreairty v. RSU22*:

Maine law dictates: ‘A school board shall provide the opportunity for the public to comment on school and education matters at a school board meeting. Nothing in this subsection restricts the school board from establishing reasonable standards for the public comment period, including time limits and conduct standards.’ 20-A M.R.S. § 1001(20) (emphasis added). And in the Policy, the School Board “recognizes its responsibility to conduct the business of the district,” states that the “primary purpose of the meeting is for the Board to conduct its business as charged by the law,” allows the public limited time “to voice opinions or problems,” and gives the Chair discretion to limit “irrelevant” speech. *Id. at \*19*.

Rule 2 is facially invalid, and the way it has been applied is at odds with the contours of the limited public forum, created by Maine law. As this Court already found, in a prior challenge to RSU22’s actions, “it is hard to shake the sense that the School Board is restricting the speech because the Board disagrees with both Mr. *McBreairty*’s opinions and the unpleasantness that accompanies them.” *Id. at \*26*. This is still the case. At two meetings, as soon as Mr. *McBreairty* criticized (or even mentioned) an employee, Miller interrupted Mr. *McBreairty* and prevented him from completing his comments. (Compl. at ¶¶ 12-20) No reasonable mind could believe that *McBreairty*’s calm criticism was “unpleasant” at the two meetings.

As discussed above, on February 15, 2023, Mr. *McBreairty* spoke before the School Board. He criticized Stoyanova. (Compl. at ¶ 14; Compl. at **Exhibit C**). Defendant Miller ordered Mr.



McBreairty to stop his public comment and to sit down. (Compl. at ¶ 15) The School Board cut the video feed, and brought in the Hampden Police to remove Mr. McBreairty from the premises, under threat of arrest, for engaging in constitutionally-protected speech. (Compl. at ¶ 15) Defendant Miller told the police officers that Mr. McBreairty violated Rule 2. The police report states:

Heath read one that says in substance no confidential personal information wont be shared about persons employed at the school. **Complaints and allegations will be aloud [sic] at board meetings about concerning any person employed by the school or students. Heath said Shawn played a recording of himself which is perfectly fine and he let him do it until he mentioned a teachers name and an allegation towards that teacher, Heath then told him to sit down and Shawn then mentioned another staff members name in a negative manner. He then told Shawn he could not continue.**

Compl. at **Exhibit E** at 3-4 (emphasis added)

Given that Defendants had already been subject to an injunction by this very Court, McBreairty hoped that this was just a temporary loss of reason. McBreairty went to the next meeting, on March 15, 2023. At that meeting, Mr. McBreairty again engaged in public comment. (Compl. at ¶¶ 17-20) Mr. McBreairty mentioned Jennifer Norwood, a Hampden Academy High School teacher and criticized her practices. (*Id.* at ¶ 19) Immediately after Mr. McBreairty mentioned Norwood’s name, Defendant Miller warned Mr. McBreairty stating, “We are not going to speak about school employees. This is your one warning.” (*Id.*) McBreairty had not even yet criticized Norwood. As Mr. McBreairty continued speaking, he began criticizing another teacher, Mrs. Campbell. Immediately after Mr. McBreairty mentioned Campbell’s name, Defendant Miller again ordered Mr. McBreairty to stop speaking and sit down for violating Rule 2. (*Id.* at ¶ 20). Again, the School Board cut the video feed, and called the Hampden Police to remove Mr. McBreairty from the meeting. (*Id.*)

Yet, Defendants allow positive comments about teachers. On October 19, 2022, Dolly Sullivan, a Program Director for Educate Maine, engaged in public comment before the School Board. (*Id.* at ¶ 10) Ms. Sullivan used her time for public comment to provide an assessment of Kelsey Stoyanova’s service as the 2022 Maine Teacher of the Year, including referring to her as “thoughtful,” intentional,” “brave,” and “brilliant.” (*Id.*) After Ms. Sullivan completed her comments, a round of applause broke out, and Defendant Miller said, “Thank you Ms. Sullivan for all you and your organization have done for us.” (*Id.* at ¶ 11)

Permitting praise, but not criticism, is unconstitutional viewpoint discrimination. “[I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, [the Supreme Court has] observed a distinction between, on the one hand, content discrimination, which may be permissible *if it preserves the purposes of that limited forum*, and, on the other hand, viewpoint discrimination, *which is presumed impermissible when directed against speech otherwise within the forum’s limitations.*” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995) (emphasis added). “When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is . . . blatant.” *Id.* at 829. “The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Id.*

Defendants’ actions are viewpoint discrimination. “[D]isfavoring ideas that offend discriminates based on viewpoint, in violation of the First Amendment.” *Iancu v. Brunetti*, 139 S. Ct. 2294, 2301 (2019) (internal quotation marks omitted). “A viewpoint need not be political; any form of support or opposition to an idea could be considered a viewpoint.” *Marshall v. Amuso*, 571 F. Supp. 3d 412, 421 (E.D. Pa. 2021) (quoting *Mata v. Tam*, 137 S. Ct. 1744, 1766 (2017))

(Kennedy, J., concurring in part) (“The First Amendment’s viewpoint neutrality principle protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses.”)). Defendants prohibited McBreairty from criticizing RSU22 employees. But, Ms. Sullivan was, not only permitted to talk about employees by name, but she was applauded for issuing praise. McBreairty was stopped by Defendants from speaking for even *mentioning the name of an employee*, even prior to uttering any criticism. This is unconstitutional viewpoint discrimination.

#### 4.2.2 Rule 2 is Unconstitutional, Both Facially and As-Applied

Defendants’ unconstitutional actions were founded on the unconstitutional Rule 2, and Plaintiff is faced with that rule at all future meetings. “Public speech at school board meetings is in fact protected by the First Amendment.” *Marshall*, 571 F. Supp. 3d at 422 (citation omitted). “[P]ublic bodies may confine their meetings to specified subject matter . . . .” *Madison Joint Sch. Dist. v. Wis. Emp’t Relations Comm’n*, 429 U.S. 167, 175 n.8 (1976). But, such confinement must be reasonable, viewpoint neutral, and clear. Rule 2 is not.

In *Marshall*, the court found unconstitutional viewpoint discrimination in an as-applied challenge to a school board’s policy that permitted “positive and complementary personally-directed comments supportive of Board and school employees” but prohibited “negative, challenging, or critical personally-directed comments.” 571 F. Supp. 3d at 422. Here, as in *Marshall*, Rule 2 expressly prohibits “complaints and allegations . . . concerning any person employed by the school system[.]” Compl. at **Exhibit A**. On its face, Rule 2 bans a viewpoint. Rule 2 permits praising employees while prohibiting complaints. Rule 2 is facially unconstitutional.

Rule 2 is an unconstitutional prior restraint. “The term ‘prior restraint’ is used to describe administrative and judicial orders forbidding certain communications when issued in advance of

the time that such communications are to occur.” *Alexander v. United States*, 509 U.S. 544, 550 (1993) (internal quotation marks and citation omitted; emphasis in original). Importantly:

The danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum’s use. Our distaste for censorship -- reflecting the natural distaste of a free people -- is deep-written in our law.

*Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). Systems that give public officials the power to deny use of a forum in advance of actual expression are unconstitutional prior restraints. *Id. See generally Near v. Minnesota*, 283 U.S. 697, 703, 706, 713-23 (1931). Here, Rule 2 unconstitutionally restrains Plaintiff’s speech before he even attempts to make it.

Additionally, Rule 2 is unconstitutional as-applied. The moment Mr. McBreairty uttered an employee’s name, Miller immediately interrupted him. In *McBreairty v. RSU22*, the Court lacked sufficient evidence to observe how the School Board applied Rule 2 concerning “complaints or allegations.” *Id.* \*23 n.14. Now, there is clear evidence to show that Defendants apply Rule 2 in a viewpoint discriminatory manner. After Ms. Sullivan finished praising Ms. Stoyanova, a round of applause breaks out, and Defendant Miller is heard saying “Thank you Ms. Sullivan for all you and your organization have done for us.” (Compl. at ¶ 11) But, when Mr. McBreairty even mentions the name of an employee, before criticizing them, Defendant Miller states “we are not going to mention names.” (Compl. at ¶ 14) As Mr. McBreairty attempted to criticize Ms. Stoyanova, Defendant Miller ordered Mr. McBreairty to stop his public comment altogether and used law enforcement to remove him. (Compl. at ¶¶ 15-17) A month later, Defendant Miller again prevented Mr. McBreairty from naming and criticizing teachers and again, had him removed by police. (Compl. at ¶¶ 18-21).

Even if Rule 2 were somehow facially constitutional and merely a content-based restriction (which would itself be suspect), Defendants apply Rule 2 in an inconsistent and vague manner.

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Defendants use it to restrict McBreairty (and McBreairty only) from even mentioning the name of an employee, even before he criticizes them. *Compare Huminski v. Corsones*, 396 F.3d 53, 92-93 (2d Cir. 2004) (finding First Amendment violation where plaintiff was singled-out for adverse suppression of expression, even in a nonpublic forum). To the extent that Defendants may claim that Rule 2 can be interpreted a viewpoint-neutral way, it would still be unconstitutional.

While restricting the mere mention of an employee's name *could be* viewpoint-neutral, it would still be an unconstitutional content-based restriction.<sup>2</sup> In a limited public forum, the government may impose some content-based restrictions, but may not do so without limitation. It may only do so "if it preserves the purposes of that limited forum" *Rosenberger*, 515 U.S. at 829-30. It can hardly be said that a government body can be "preserving the purposes of that limited public forum" when that forum exists to discuss RSU22 business, but RSU22 uses the rule to prohibit even *mentioning* the names of RSU22 employees. To whatever extent RSU22 might claim that Rule 2 could be interpreted or amended to ban mentioning RSU22 employees, in praise or in criticism, this would be unreasonable and counter to the purposes for which the forum exists. Discussions of government actions and policies necessarily implicates the public employees and officials behind them.

As this Court found in McBreairty's prior case, "the primary purpose of the meeting is for the Board to conduct its business as charged by the law, [and it] allows the public limited time 'to voice opinions or problems.'" *McBreairty v. RSU22* at \*19. Maine Law requires RSU22 to provide the opportunity to comment on "school and education matters," though "irrelevant" speech can be excluded. There is nothing irrelevant about *talking about* the body's employees, and the stated

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<sup>2</sup> Further, since it only seems to apply to McBreairty, and it seems to only be used to stop criticism, the mask of viewpoint neutrality would fall off the moment it is subject to scrutiny.

purpose of the public forum is to give the public the opportunity to discuss “opinions or problems.” *Id.* at 19. There is neither authority nor justification to prohibit McBreairty from talking about employees of the government body he is before, and certainly not to limit him from criticizing them. This is the core purpose of the forum created by Maine law and by RSU22 policies. “The law and the Policy show that the School Board opened up a limited public forum for the purpose of inviting public comment on school-related matters.” *Id.* at \*20.

Rule 2 is facially unconstitutional, and to the extent it can be found not to be, Defendants applied Rule 2 against Mr. McBreairty in an unconstitutional manner.

#### **4.3 Plaintiff Has Been Irreparably Harmed; the Harm Must be Enjoined**

The “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). When a plaintiff seeks injunctive relief for “an alleged violation of First Amendment rights, a plaintiff’s irreparable harm is inseparably linked to the likelihood of success on the merits of plaintiff’s First Amendment claim.” *WV Assn’n of Club Owners and Fraternal Svcs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009). Thus, if the plaintiff demonstrates a likelihood of success on the merits of its First Amendment claim, they necessarily also establish irreparable harm. *Fortuño*, 699 F.3d at 15.

Twice, the Defendants deprived Mr. McBreairty of his First Amendment rights by shutting him down prior to the expiration of his allotted 3-minutes of public comment and calling the police to remove him from the school grounds. (Compl. at ¶¶ 17, 21) Defendants’ decision to prevent Mr. McBreairty from completing his public comment two months in a row is a pattern that will continue without this Court’s intervention. While Defendants have not banned McBreairty from attending meetings, as in the prior case, they have enacted a *de facto* ban and a prior restraint on his speech. Their intent is to only allow praise. When they are criticized, Defendants use the police force to remove McBreairty.

#### 4.4 The Balance of Equities Tips in Plaintiff's Favor

When the government restricts protected speech, the balance of hardships weighs heavily in a plaintiff's favor. *See Firecross Ministries v. Municipality of Ponce*, 204 F. Supp. 2d 244, 251 (D.P.R. 2002) (“insofar as hardship goes, the balance weighs heavily against Defendants, since they have effectively silenced Plaintiffs’ constitutionally protected speech.”) Here, the balance of equities tips in McBreairy’s favor. Failing to grant the requested injunction will continue to deprive McBreairy of his constitutional rights pursuant to the First Amendment of the Constitution and Article I Sections 4 and 15 of the Maine Constitution. Defendants will suffer no harm if McBreairy is granted the requested injunctive relief. Rather, an injunction will merely restore the rights guaranteed by the U.S. and Maine Constitutions. A temporary restraining order, to be converted into a preliminary injunction, must issue.

#### 4.5 Injunctive Relief is in the Public Interest

“Protecting rights to free speech is *ipso facto* in the interest of the general public.” *McBreairy v. RSU22* at \*31-32. Moreover, the unconstitutional regulation being enforced by Defendants in this case has the potential to harm nonparties to the case because it will limit or infringe upon their rights as well. *See Wolfe Fin. Inc. v. Rodgers*, 2018 U.S. Dist. LEXIS 64335, at \*49 (M.D. N.C. April 17, 2018) (*citing McCarthy v. Fuller*, 810 F.3d 456, 461 (7th Cir. 2015)). Other members of the public are chilled from speaking their minds as well. They see McBreairy shut down and hustled out of the meeting by armed police for merely mentioning government employees, much less criticizing them. Which citizen of ordinary firmness would risk speaking critically at a government meeting if such criticism means ejection by armed guards?

Further, even members of the public who are too shy to speak have a right to hear McBreairy’s criticisms. Even the government is harmed if it cannot hear critiques of how its

employees are performing. How can a government operate effectively if it never hears criticism? The government will create the illusion that it is operating with a unanimous mandate, and perhaps even fool itself into continuing negative policies, because nobody would dare to criticize them. Enjoining that self-inflicted harm is in the public interest. It is a poor example of representative democracy if the government is shielded from even knowing that citizens may have criticisms of employees. There has been no disruption, except when the Defendants have disrupted their own meetings instead of simply letting McBreairty express his disapproval. The public interest favors the issuance of the injunction, just as it did in *McBreairty v. RSU22*.

#### 4.6 At Most, a Minimal Bond Should Be Required

A bond should be required if the enjoined party will suffer harm from the issuance of the injunction. *See Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 285 (4th Cir. 2002). In *McBreairty v. Sch. Bd. of RSU22*, no bond was required and no harm came to the Defendants. An injunction will repair the *status quo* and allow the First Amendment to flourish. McBreairty requests that the injunction issue with no bond required.

#### 5.0 CONCLUSION

“Expression of . . . school-related concerns at the podium during the public comment period of School Board meetings constitutes speech that is protected under the First Amendment.” *McBreairty v. RSU22* at \*5. After the issuance of an injunction in his prior case, McBreairty returned to engage in his civic-minded activism. He spoke without even being accused of being disruptive. He was peaceful and well-mannered. Defendants have not even been willing to allow McBreairty “to voice opinions or problems,” (the purpose of the very forum) unless those opinions were of the government approved viewpoint – to praise, but not criticize. To the extent the policy was used to even limit the mere mention of employees, this is again at odds with Maine law as



recognized in *McBreairty v. RSU22* at \*20. The Court should enter a preliminary injunction against the Defendants from enforcing Public Participation Policy Rule 2 as it is unconstitutional facially, with respect to its limitations on viewpoint, and as-applied in both that manner, and to the extent it has been used as a justification for banning even mentioning RSU22 employees.

**REQUEST FOR ORAL ARGUMENT**

Plaintiff believes that oral argument may assist the court. This matter involved significant Constitutional issues that oral argument will help to address. However, if oral argument cannot be scheduled with enough time to rule prior to the April 26, 2023 RSU22 meeting, then resolution without oral argument will be necessary.

Dated: March 24, 2023

Respectfully Submitted,

/s/ Brett D. Baber  
Brett D. Baber, Bar No. 3143  
Lanham Blackwell & Baber, PA  
133 Broadway  
Bangor, ME 04401  
Tel: (207) 942-2898  
Email: bbaber@lanhamblackwell.com

Marc J. Randazza (*pro hac vice forthcoming*)  
*Lead Counsel*  
Robert J. Morris II (*pro hac vice forthcoming*)  
RANDAZZA LEGAL GROUP, PLLC  
30 Western Avenue  
Gloucester, MA 01930  
Tel: (888) 887-1776  
Email: ecf@randazza.com

*Attorneys for Plaintiff,  
Shawn McBreairty*

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE

SHAWN MCBREAIRTY	)	
	)	
	)	
Plaintiff	)	
	)	
v.	)	Case No. 1:23-cv-00143-NT
	)	
HEATH MILLER AND SCHOOL	)	
BOARD OF RSU 22	)	
	)	
Defendants	)	

**MEMORANDUM OF LAW IN OPPOSITION TO EMERGENCY MOTION FOR A  
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION OF  
DEFENDANTS SCHOOL BOARD OF REGIONAL SCHOOL UNIT 22 AND HEATH  
MILLER**

**INTRODUCTION**

At the March 15, 2023 meeting of the School Board of Regional School Unit 22 (the “School Board” or “Board”), Plaintiff Shawn McBreairty told the Board “I can speak about anyone employed by RSU 22, and I can say anything I want about them, and I will.” Because the School Board Chair, Heath Miller, enforced the School Board’s public participation policy and refused to allow Plaintiff to make allegations against individual employees at its public meeting, Plaintiff now comes to this Court asking that it order the School Board to do just that – allow him to say whatever he wants about school employees at a publicly televised meeting of the Board. Contrary to Plaintiff’s claims, Plaintiff’s new allegations do not represent “repeat circumstances” of the issues preliminarily decided by this Court in his prior lawsuit against RSU 22. *See McBreairty v. School Board of RSU 22*, No. 1:22-cv-00206, 2022 WL 2835458, at \*9 n.14 (D.

Me. July 20, 2022) (noting that the Court was *not* deciding this very issue). And more importantly, there is nothing in First Amendment jurisprudence that guaranties individuals the right to harass, disparage and defame school employees at a public meeting of a school board. School board meetings are not meetings of the public; they are meetings that are open to the public and include a public comment period for comment on specifically school or education matters. *See, e.g., id.* at \*7 (holding that school board meetings are limited public forums); *see also* 20-A M.R.S. § 1001(20) (expressly allowing school boards to establish “reasonable standards for the public comment period” at school board meetings). The School Board policy challenged by Plaintiff here establishes such reasonable standards and Plaintiff’s claims under 42 U.S.C. § 1983 and 5 M.R.S. § 4682 will fail because he has not alleged the denial of his First Amendment rights. Plaintiff’s motion for a temporary restraining order should be denied.

### **FACTUAL BACKGROUND**

#### **A. RSU 22**

Regional School Unit 22 (“RSU 22”) educates approximately 2,270 students in the communities of Hampden, Newburgh, Winterport, and Frankfurt, Maine. Miller Decl. ¶ 2. Defendant Heath Miller has served as a member of the School Board since he was elected to the Board in 2013, and he was voted to his current position of Board Chair in April 2020. Miller Decl. ¶ 1.

RSU 22 permits public participation at its regularly scheduled Board meetings pursuant to Maine law, which provides:

School board meeting public comment period. A school Board shall provide the opportunity for the public to comment on school and education matters at a school board meeting. Nothing in this subchapter restricts the school board from establishing reasonable standards for the public comment period, including time limits and conduct standards. For the purposes of this subsection, “school board meeting” means a full meeting of the school board and does not include meetings of subcommittees.

20-A M.R.S. § 1001(20).

### **B. The Public Participation Policy**

RSU 22 Board Policy BEDH “Public Participation in Board Meetings” (“Policy”) provides eight rules of conduct that are “designed to promote public participation at our meetings and ensure that the public commentary takes place in an orderly fashion, complies with applicable law, and respects the privacy rights of our employees.” Miller Decl. ¶ 7; Miller Decl. Ex. A. Plaintiff challenges only Rule 2 of the Policy:

Confidential personnel information will not be shared in a public session. No complaints or allegations will be allowed at Board meetings concerning any person employed by the school system or against particular students. Personnel matters or complaints concerning student or staff issues will not be considered in a public meeting but will be referred through established policies and procedures.

Miller Decl. Ex. A; *see* Pl. Br. at 1; Complaint (ECF No. 1).

### **C. February 15, 2023 School Board Meeting**

Plaintiff provided remarks at the February 15, 2023 Board meeting by playing pre-recorded audio into the microphone that is provided to speakers during the public comment period. *See* Video Recording of Meeting February 15, 2022, Complaint Exhibit C (ECF No. 1-3). Plaintiff’s pre-recorded remarks started by stating, “We won a federal First Amendment lawsuit against you, Mr. Chair, galvanizing my right to say whatever I want about whomever I want in whatever medium I want.” (ECF No. 1-3 at :14.) Plaintiff went on to communicate a wide range of views about and on behalf of anonymous, unnamed students and teachers before turning to the topic of “sexual grooming,” (ECF No. 1-3 at 1:55). Plaintiff then stated, “In an article recently I believe the Superintendent was quoted as saying that RSU 22 is proud of all [named employee] accomplished in her 2022 groomer, I mean, teacher of the year.” (ECF No. 1-3 at 2:12-2:21). Mr. Miller stated to Plaintiff after the teacher was named, “Sir, we’re not going to mention names. Your recording mentioned names. If it does that again, I’ll ask you to sit down.” (ECF No. 1-3 at

2:20-2:24). Plaintiff's recording then went on to state, "the fact is that [named employee] should be locked up and not allowed within 500 feet of the school because she participated with [second named employee] in giving . . . ." (ECF No. 1-3 at 2:22-2:27). Mr. Miller then stated, "I'm going to ask you to sit down." (ECF No. 1-3 at 2:27). Plaintiff's speech was never interrupted up to this point because his audio recording continued to play during this entire exchange.

#### **D. March 15, 2023 School Board Meeting**

Plaintiff also provided remarks during the public comment period of the March 15 Board meeting. *See* Video Recording of Meeting March 15, 2023, Complaint Exhibit E (ECF No. 1-5). He began by stating, "As a reminder, this 28-page federal law suit, which you lost, the only thing you can control is place, this library filled with kitty porn; time, three minutes, which you did not give me last time; and manner, as it has to be school-related. That ruling was from a federal judge." (ECF No. 1-5 at :24-:41.) Plaintiff then stated, "As long as I do not incite violence or use real obscenities, you can't restrict my free speech. I can speak about anyone employed by RSU 22, and I can say anything I want about them, and I will." (ECF No. 1-5 at :54-1:04.)

In the third minute of his remarks, Plaintiff stated, "Recently, Hampden Academy students alerted me to a high school Spanish teacher, [named employee], who has an LGBTQ cult war flag on the classroom wall." (ECF No. 1-5 at 2:00-2:09). Mr. Miller interrupted and warned, "Mr. McBreairty, we are not going to speak about employees, this is your one warning." (ECF No. 1-5 at 2:09-2:11). As he was being warned, Plaintiff called that employee an indiscernible or otherwise unknowable name. (ECF No. 1-5 at 2:11-2:12.) Plaintiff went on to remark that "Parents may not know there is a gay-sexuality trans-alliance, a nationally sponsored group of groomers in this very high school. It is a tax-payer paid after-school cult pushing sex and enabling mental illness in our youth. Soccer, band, chorus, or talk sex with [named former employee] after school?" (ECF No. 1-5 at 2:15-2:32). Mr. Miller then stated "I gave you your one warning, I am

going to ask you to step down.” (ECF No. 1-5 at 2:33-2:36.) Plaintiff nonetheless continued to speak for at least fifteen seconds. The Board meeting was then adjourned and Plaintiff refused to leave. Ultimately, two police officers arrived and Plaintiff falsely told them that this court had ruled that the only restrictions the Board could place on his speech are restrictions on time, place, and manner. Contrary to Plaintiff’s contention, there was no threat of arrest made. Miller Decl. Ex. G.

## **ARGUMENT**

### **I. THE STANDARD FOR INJUNCTIVE RELIEF**

This Court considers four factors when considering a request for a temporary restraining order and a preliminary injunction:

(1) the likelihood of success on the merits; (2) the potential for irreparable harm [to the movant] if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest.

*Calvary Chapel of Bangor v. Mills*, 459 F.Supp.3d 273, 282 (D. Me. 2020). Although the School Board bears some of the burden as to Plaintiff’s First Amendment claim, Plaintiff, as the movant, nonetheless bears the burden of “establishing that a temporary restraining order should issue.” *McBreairty*, 2022 WL 2835458, at \*5. Indeed, “[i]njunctive relief is an extraordinary and drastic remedy that is never awarded as of right.” *Calvary Chapel*, 459 F.Supp.3d at 282 (alterations and quotations omitted); *see also Munaf v. Geren*, 553 U.S. 674, 689 (2008) (“A preliminary injunction is an extraordinary and drastic remedy.” (internal quotations omitted)). “[I]t is well established general law with respect to equitable injunctive relief that the Court is to bear constantly in mind that an injunction is an equitable remedy which should not be lightly indulged in, but used sparingly and only in a clear and plain case.” *Saco Defense Sys. Div. Maremont Corp. v. Weinberger*, 606 F.Supp. 446, 450 (D. Me. 1985).

If Plaintiff “cannot demonstrate that he is likely to succeed on his quest, the remaining factors become matters of idle curiosity.” *New Comm. Wireless Serv., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002). Here, Plaintiff cannot show a substantial likelihood of success on the merits of his First Amendment contentions and he is accordingly not entitled to relief. Further, even if Plaintiff did have such a substantial likelihood—which he does not—he is still not entitled to the “drastic” relief sought because none of the remaining factors tip in Plaintiff’s favor. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1944-45 (2018) (“As a matter of equitable discretion, a preliminary injunction does not follow as a matter of course from a plaintiff’s showing of a likelihood of success on the merits.”). Plaintiff’s motion for a preliminary injunction or temporary restraining order therefore must be denied.

## **II. PLAINTIFF CANNOT SUCCEED ON THE MERITS OF HIS FEDERAL OR STATE CONSTITUTIONAL CLAIMS**

In Counts 1 and 3 of the Complaint are “as applied claims,” alleging that the Defendants deprived Plaintiff of his right to free speech and to petition based on the School Board’s decisions that he should not be permitted to provide further comment during the time remaining in his three-minute comment period.<sup>1</sup> Counts 2 and 4 of the Complaint allege facial challenges to the School Board’s Public Participation Policy, claiming that it is unconstitutional viewpoint discrimination and vague. Plaintiff has not shown a substantial likelihood of success on the merits of any of these claims; in fact, the videos put forth by Plaintiff show that the School Board permitted Plaintiff to speak about a wide range of issues and criticisms pursuant to its public participation policy.

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<sup>1</sup> To the extent Plaintiff also alleges in Count 1 that he was “retaliated against” for exercising his First Amendment right, he proffers no factual or legal basis for any First Amendment retaliation claim and the Defendants can discern none. Indeed, Plaintiff simultaneously asserts in his Complaint that a non-retaliatory ground—the Public Participation Policy—was the reason for the School Board interrupting his comments. *See Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (explaining that “non-retaliatory grounds” must “in fact” be insufficient to provoke the adverse consequences in order for a Plaintiff to seek relief based on a First Amendment retaliation claim); *see also D.B. ex rel. Elizabeth B v. Esposito*, 675 F.3d 26, 43 (1st Cir. 2012) (explaining that a defendant is not liable for retaliation when “it would have reached the same decision even in the absence of the protected conduct” (alterations omitted)).

## A. Plaintiff's Facial Challenges Will Fail on the Merits

### i. The Public Participation Policy in Place at the February and March Board Meetings is Viewpoint Neutral and Reasonable

Plaintiff's statement at the outset of his March 15 remarks that the only "thing" that can be controlled is "time, place, and manner" is inaccurate as a matter of law. "[P]rotected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985). The nature of the business conducted by school boards make school board meetings one such place and time where not all speech is equally permissible, and indeed School Board meetings are limited public forums. *See, e.g.,* *McBreairty*, 2022 WL 2835458, at \*7. When the State establishes a limited public forum, "the State is not required to and does not allow persons to engage in every type of speech." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995) (explaining that, in a limited public forum, content discrimination is permissible if it "preserves the purposes of that limited forum"); *see also Shurtleff v. City of Boston*, 337 F.Supp.3d 66, 75 n.3 (D. Mass. 2018) (citing *Rosenberger* to explain that a prior restraint on content discrimination is permissible if it preserves the purposes of the limited forum).

Because the public comment period at School Board meetings provides only a limited public forum confined to the discussion of school and education matters, the School Board may restrict expression so long as such restrictions are viewpoint neutral and are "reasonable in light of the purpose served by the forum." *Good News Club*, 533 U.S. at 106-07. "The essence of a viewpoint discrimination claim is that the government has preferred the message of one speaker



over another.” *Mar v. Frey*, 458 F. Supp. 3d 16, 31 (D. Me. 2020) (quoting *McGuire v. Reilly*, 386 F.3d 45, 62 (1st Cir. 2004)). Thus, in order to avoid unconstitutional viewpoint discrimination, “[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger*, 515 U.S. at 829. Viewpoint discrimination does not occur, however, when “the government incidentally prevents certain viewpoints from being heard in the course of suppressing certain general topics of speech.” *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 81 (1st Cir. 2004).

In his motion, Plaintiff challenges only a portion of the Policy, which he refers to as Rule 2, which prohibits complaints or allegations only if made against specifically named employees of RSU 22. This prohibition permissibly restricts speech given that the School Board (i) is statutorily obligated to protect school employees from harassment and keep personnel information confidential, *see* 20-A M.R.S. §§ 6101, 1001(22); (ii) could be exposed to liability as an employer or otherwise for allowing defamatory comments at its meeting, which is open to the public and live-streamed on the internet, *see, e.g., Pan Am Sys., Inc. v. Atl. Ne. Rails and Ports, Inc.*, 804 F.3d 59, 64 (1st Cir. 2015) (explaining that, under Maine law, “one who repeats a defamatory statement may be as liable as the original defamer”); *see also Loe v. Town of Thomaston*, 600 A.2d 1090, 1092 (Me. 1991) (discussing Maine common law regarding an action for disclosure of private facts);<sup>2</sup> and (iii) has a responsibility “to conduct the business of the district in an orderly and efficient manner, *see* Miller Decl. Ex. A; *see also* 20-A M.R.S. § 1001(20) (authorizing school boards to establish “conduct standards” that govern the public comment period at a school board meeting).

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<sup>2</sup> The separate provision in the Policy prohibiting “defamatory comments”—which Plaintiff does not here challenge—is insufficient by itself to protect the School Board from such liability given that the Board has no way of knowing in real time whether a comment is defamatory.

This proscription on an entire class of speech—personnel complaints—in a limited public forum for a publically televised school board meeting is unequivocally permissible under the First Amendment. *See Prestopnik v. Whelan*, 83 F. App’x 363, 365 (2d Cir. 2003) (upholding a school board policy that excluded speech about personnel decisions because the “First Amendment generally permits the government to exclude a topic from discussion in such a limited public forum”); *Pollack v. Wilson*, No. 22-8017, 2022 WL 17958787, at \*2, \*8 (10th Cir. 2022) (affirming the denial of a request for a preliminary injunction against a school board policy that restricted speech on all “personnel matters”).

Contrary to Plaintiff’s contention, the challenged portion of the Policy is not discriminatory on the basis of viewpoint. *See McBairty*, 2022 WL 2835458, at \*8 (“Viewpoint discrimination is treated differently from content discrimination in a limited public forum”). It restricts allegations of wrongdoing, personal attacks, and criticisms of, on, or against specifically named educators without regard to the content of that allegation or the speaker’s perspective which might animate such an allegation. For example, under the current Policy, a speaker offering remarks during the public comment period at Board meetings cannot criticize the fact that a specifically named teacher is teaching LGBTQ topics in the classroom and a speaker likewise cannot criticize that a specifically named teacher is *not* teaching LGBTQ topics. In this regard, the Policy does not restrict one side of any particular debate; instead, it restricts any kind of complaint or allegation levied against a specifically named employee. The policy is therefore viewpoint neutral because neither the identity, ideology, nor motivation of the speaker is considered as part of the Policy’s restriction on speech.<sup>3</sup> These complaints could, of course, be communicated to the Board pursuant to board Policy KE.

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<sup>3</sup> The videos before the Court illustrate this. For example, the clip of the Board’s September 21, 2022 meeting depicts both Plaintiff and another speaker, Katherine Collins, speaking without interruption about their views concerning the

The strong weight of authority supports this position of the School Board. *See Davison v. Rose*, 19 F.4th 626, 635-36 (4th Cir. 2021) (affirming summary judgment that a school board’s public participation policy, which did not permit comments “that are harassing or amount to a personal attack against any identifiable individual,” was viewpoint neutral), *cert. denied*, 143 S. Ct. 106 (2022); *Fairchild v. Liberty Ind. Sch. Dist.*, 597 F.3d 747, 753, 755-60 (5th Cir. 2010) (deeming a school board policy viewpoint neutral when the policy did not permit discussion of individualized complaints because, among other reasons, it “dovetailed” with the school board’s policy of not permitting personnel matters); *Moms for Liberty – Brevard Cnty. v. Brevard Pub. Sch.*, 582 F.Supp.3d 1214, 1217-19 (M.D. Fl. 2022) (denying request for a temporary restraining order against a school board’s policy, which restricted “personally directed” and “abusive” speech, because it was viewpoint neutral), *aff’d* No.22-10297, 2022 WL 17091924 (11th Cir. 2022) (finding the district court’s denial “well-reasoned”).

By contrast, Plaintiff cites only one case, *Marshall v. Amuso*, 571 F.Supp.3d 412 (E.D. Pa. 2021), in support of his assertion of viewpoint discrimination.<sup>4</sup> Yet *Marshall*, which did not decide a facial challenge based on viewpoint discrimination, is entirely different from the circumstances and record now before this Court on Plaintiff’s motion for a preliminary injunction and temporary restraining order. The policy at issue in *Marshall* gave the board chair the right to interrupt or terminate comments deemed “too lengthy, personal directed, abusive, obscene, or irrelevant.” *Id.* at 418. That policy was deemed not to be viewpoint neutral *as applied* given that the presiding officers were only interrupting select comments, deeming them irrelevant, and the evidence

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effects of allegedly oversexualized material in schools. *See Miller Decl. Ex. F.* Similarly, at both the February and March 2023 meetings, Plaintiff was allowed to express his *views* without interruption. It was only when he said the names of individual employees that he was asked to stop.

<sup>4</sup> To the extent it is considered support for Plaintiff’s argument, the Connecticut Supreme Court case cited by Plaintiff in the introduction to his argument addresses a defamation claim brought by a teacher against a school board, among others, and it is therefore completely inapposite to Plaintiff’s request for a preliminary injunction.

showed that comments were being interrupted on the basis of the *idea* that those comments expressed and not simply because they were personally directed. *See id.* at 418-19, 422-23. Here, the Policy only restricts complaints and allegations as to specifically named employees; it does not restrict such complaints based on any ideas that motivate such complaints, nor has Plaintiff proffered any evidence that his ideas were the basis for his speech being interrupted at either the February or March board meeting.

Furthermore, the RSU 22 School Board provides speakers with alternative channels for such complaints, with the language of the Policy specifically referring such individualized allegations and criticisms through the Board's established policies and procedures. *See Christian Legal Soc. Chapter v. Martinez*, 561 U.S. 661, 690 (2010) (explaining that the availability of other avenues to express restricted speech "lessen the burden" of viewpoint neutral barriers and make a limited forum's policy "more creditworthy"); *Fairchild*, 597 F.3d at 760 (explaining that the School Board left "ample opportunity to be heard" when it channeled any issues that arose in public comment into its grievance processes); *see also* Miller Decl. Exhibits A, E.

The challenged section of the Policy thus satisfies a limited forum analysis because, in addition to being viewpoint neutral, it is also reasonable in light of the purpose and interests served by School Board meetings. The purpose of the public comment period at school board meetings is to provide opportunity for comment on "school and education matters." 20-A M.R.S. § 1001(20). Such matters are broad and wide-ranging in light of the myriad issues that touch on education, and RSU 22 does not shy away from the criticisms that can and often do accompany the breadth of educational issues—indeed, the Policy broadly permits public comments on the voicing of "opinions or problems." At the same time, a school board's "most basic obligation is to maintain order in the schools and to create a stable environment for the education of its students." *Solmitz v. Maine Sch. Admin. Dist. No. 59*, 495 A.2d 812, 817 (Me. 1985). Part and

parcel to that obligation is the Maine Legislature’s directive that school boards must “ensure the safety of employees,” which includes the school board’s statutory duty to “address the negative effects of bullying of school employees” by any “individuals associated with the public school.” 20-A M.R.S. § 1001(22). The Policy’s restrictions on speech, including the particular challenged restriction here, also work to further the Board’s interest in encouraging citizen participation, which is not mutually exclusive from the Board’s additional interests in conducting meetings in an efficient and orderly manner.

In light of these interests and purposes, the challenged restriction is reasonable. *See Davidson*, 19 F. 4th at 635-36 (deeming the school board’s policy restricting personal comments regarding identifiable individuals to be reasonable in light of the forum’s purpose of conducting “good business” in an orderly, effective, efficient, and dignified manner); *Fairchild*, 597 F.3d at 760 (holding that the school board restriction on complaints involving the naming of employees was reasonable because “[t]he Board has a legitimate interest, if not state-law duty, to protect student and teacher privacy and to avoid naming or shaming as potential frustration of its conduct of business”); *see also Solmitz*, 495 A.2d at 816-17 (holding that the cancellation of a school program at which a homosexual individual was scheduled to speak was reasonable when the School Board’s decision was motivated by concerns for the safety, order, and security of students rather than the suppression of ideas).

Underscoring the reasonableness of the challenged restriction in light of these purposes is the fact that the Policy only prohibits complaints about personnel when such complaints are associated with a specifically named employee. *See Fairchild*, 597 F.3d at 756, 760 (explaining that the policy still allows complaints, “just not if the complaint involves naming of people”) (alterations omitted)). Speakers, including Plaintiff, remain free to—and do—offer criticism on a variety of matters.

ii. The Public Participation Policy is Not Unconstitutionally Vague

In Count 2, Plaintiff claims in cursory fashion that the Policy’s restriction on “complaints and allegations” is unconstitutionally vague. This Court need not and should not address this argument because Plaintiff has waived it for failure to develop any argument on this issue, nor does Plaintiff proffer any evidence regarding the Board’s arbitrary application of the Policy. *See, e.g., Water Keeper Alliance v. U.S. Dept. of Defense*, 152 F.Supp.2d 155, 158 n.5 (D. P.R. 2001) (declining to address an argument in plaintiff’s motion for a preliminary injunction because “[a]rguments that are merely adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived” (internal quotations omitted)).

In any case, Plaintiff’s assertion of vagueness will fail on the merits because it ignores the remaining portion of that sentence in the policy, which modifies “complaints and allegations.” In fact, a common thread throughout all of Plaintiff’s constitutional claims is his attempt to have this Court view certain words in Rule 2 of the Policy in isolation. But to do so goes against the rules of construction. *See, e.g., Food and Drug Admin. v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (“The meaning . . . of certain words or phrases may only become evident when placed in context.”); *Ardente v. Standard Fire Ins. Co.*, 744 F.3d 815, 817 (1st Cir. 2014) (“a policy is not to be described as ambiguous because a word is viewed in isolation or a phrase is taken out of context.”) (citing *McGowan v. Conn. Gen. Life. Ins. Co.*, 289 A.2d 428, 429 (R.I. 1972)).

“The void-for-vagueness doctrine . . . is concerned with circumstances in which a law is so vague that it does not provide fair notice of what conduct it prohibits and creates a risk of arbitrary enforcement.” *Doe v. Hopkinton Pub. Sch.*, 19 F.4<sup>th</sup> 493, 509 (1st Cir. 2021). Yet vagueness lies only if the Policy is such that persons of “average intelligence would have no choice but to guess at its meaning.” *Nt’l Org. for Marriage v. McKee*, 649 F.3d 34, 62 (1st Cir. 2011). Indeed, the

government is permitted “considerable discretion,” *see Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989), and “perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity,” *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1891 (citing *Ward*, 491 U.S. at 794).

Here, the Policy is not unconstitutionally vague because it does not broadly restrict “complaints and allegations” but rather “complaints or allegations . . . at Board meetings concerning any person employed by the school system.” Miller Decl. Ex. A (emphasis supplied). First, the Policy—which was read allowed in advance of the February and March 2023 Board meetings—provides adequate notice to a “person of ordinary intelligence” that speakers are not permitted to make allegations of wrongdoing or make complaints when they are directed at a specifically named school employee. Second, the specificity of the Policy leaves no room for the Board to restrict speech based on its agreement or disagreement with the particular complaint or allegation; so long as the complaint or allegation is made against a specifically named employee, the speech is impermissible and should be made instead through the Board’s alternative procedures.<sup>5</sup> *See Moms for Liberty – Brevard Cnty. v. Brevard Pub. Sch.*, 582 F.Supp.3d 1214, 1221 (M.D. Fl. 2022) (finding that a policy which permitted the school board chair to restrict statements that are “too lengthy, personally directed, abusive, obscene, or irrelevant” provided a “precise list” of expectations for the speakers as well as “fixed standards” and “concrete reasons” for which the Chair could interrupt speakers), *aff’d* No.22-10297, 2022 WL 17091924 (11th Cir. 2022).<sup>6</sup>

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<sup>5</sup> Board Policy KE, which is referenced by the Public Participation Policy and permits the public to bring “complaints or concerns” regarding an employee of RSU 22, confirms the Board’s interpretation and application of the Public Participation Policy’s restriction against public comments that raise “complaints or allegations” against specifically named RSU 22 employees. *See* Miller Decl. Ex. E.

<sup>6</sup> Although the court in *Marshall* found the policy at issue in that case to be unconstitutionally vague, it did so on the basis of restrictions in that policy which Plaintiff does not similarly challenge here, and the facial challenge in *Marshall*

Furthermore, Plaintiff does not and cannot argue in either a facial or as-applied challenge that he lacked notice of the Policy’s parameters for speech: the Policy, which unequivocally prohibits the discussion of personnel matters, was read out loud before the February and March meetings; Mr. Miller gave Plaintiff a warning, before asking him to sit down, in each instance that Plaintiff mentioned a specific employee’s name; and, upon mentioning individual employee’s names again, Plaintiff made remarks associated with those individuals that, as discussed below, must be interpreted by RSU 22 as personnel matters.

**B. Plaintiff’s Comments Offered at the February 15, 2023 and March 15, 2023 School Board Meetings Were Not Interrupted Based on Plaintiff’s Viewpoint**

The video recordings of Plaintiff’s remarks at the February 15 and March 15 Board meetings bear out the fact that the Policy in place at the time of those meetings was not applied unconstitutionally as to Plaintiff. Indeed, in both instances Plaintiff mentioned specific employees of RSU 22 and made personnel complaints as to those specific individuals. On February 15, Plaintiff stated, in the context of discussing “sexual grooming,” that a specifically named teacher was a “groomer” and should be “locked up and not allowed 500 feet from a school.” On March 15, Plaintiff mentioned a specific name in the context of suggesting that such an individual was involved in an “after-school cult pushing sex and enabling mental illness.” RSU 22 must interpret these remarks as personnel complaints—and, thus, personnel matters—and, pursuant to the Board’s Policy, such complaints should instead be reported to the Board through the Board’s other procedures for doing so.

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is therefore inapposite. Further, at least one court has disagreed with *Marshall*, see *Moms for Liberty – Brevard Cnty. v. Brevard Pub. Sch.*, 582 F.Supp.3d 1214, 1221 (M.D. Fl. 2022), and circuit courts have expressed no concern for any ambiguity in restrictions such as the one challenged by Plaintiff here, see *Pollack v. Wilson*, No. 22-8017, 2022 WL 17958787, at \*2, \*8 (10th Cir. 2022); *Fairchild v. Liberty Ind. Sch. Dist.*, 597 F.3d 747, 761 (5th Cir. 2010) (noting that plaintiff, who challenged a school board policy that did not permit discussion of individual personnel matters and complaints, “wisely [did] not push the vagueness” argument because it lacked merit).



In each instance, Plaintiff was given a warning upon mentioning specific names—and indeed Mr. Miller’s declaration acknowledges that there were conversations happening at this time regarding the Board’s desire to adopt a new policy that will restrict any mention of employees’ names, regardless of whether those names are associated with a complaint or allegation. However, Plaintiff was asked to stop speaking after making personnel complaints and allegations associated with those individuals. Plaintiff’s remarks evolved quickly from the naming of an employee to a substantive allegation being associated with that name. This is particularly true in the case of the February 15 remarks given the speed of the pre-recorded comments. The Board looks forward to the fact that the new policy, which will restrict any naming of individual employees, will account for the fact that complaints and allegations can be attributed to an individual either before or after naming them.

Although Plaintiff contends that one other individual was permitted in October—four months prior to the February meeting—to offer remarks regarding a teacher’s role as Maine Teacher of the Year, the allowance of those remarks does not imply an unconstitutional application of the Policy. It offers no evidence that the School Board has discriminated on the basis of the view or identity of the speaker; rather, it represents an application of the Policy, which only prevents personnel complaints, allegations and personal attacks on specifically named individuals. Further, Mr. Miller acknowledges that it was not until the winter that he began to interrupt speakers as soon as they mention an employee’s name, Miller Decl. ¶ 20, and, notwithstanding that change in the Board’s application of the Policy, Mr. Miller still provided only a warning to Plaintiff each initial time that Plaintiff mentioned an individual name in both February and March.

Mr. Miller’s decision to interrupt Plaintiff’s speech must also be viewed in light of the context of Plaintiff’s pronouncement at the outset of his remarks in both February and March that he could say whatever he wanted and that he intended to speak about RSU 22 employees. *See*

(ECF No. 1-3 at :14 (“We won a federal First Amendment lawsuit against you, Mr. Chair, galvanizing my right to say whatever I want about whomever I want in whatever medium I want.”)); (ECF No. 1-5 at :54-1:04 (“As long as I do not incite violence or use real obscenities, you can’t restrict my free speech. I can speak about anyone employed by RSU 22, and I can say anything I want about them, and I will.”)).

The recordings of Plaintiff’s remarks demonstrate that the Board unequivocally did not interrupt Plaintiff’s speech on the basis of viewpoint; indeed, the Board listened to Plaintiff’s recording and verbal remarks, which expressed a wide range of viewpoints, for over two minutes and fifteen seconds in each instance, before only interrupting him to warn him upon the mentioning of specific names and ultimately stopping his speech after personnel complaints were attributed to those names. Because Plaintiff’s speech was not disrupted on the basis of viewpoint, he has not shown—nor can the videos show—a substantial likelihood of success on the merits.

### **C. Plaintiff’s Facial Challenges Will Be Moot Regardless**

Although the Board maintains—and case law from other Circuits supports—that its current Policy is viewpoint neutral, the Board nonetheless has been planning and still plans to amend the Policy to make crystal clear that the restriction on comments relating to “personnel matters” prohibits any public comments related to named RSU 22 employees. Miller Decl. ¶ 19. In order to avoid the possibility that a complaint or allegation will be made against a specifically named employee, Mr. Miller will be interrupting speakers as soon as they mention an employee’s name during the public comment period. Miller Decl. ¶ 20. This practice and policy is unequivocally constitutional. *See Pollack v. Wilson*, No. 22-8017, 2022 WL 17958787, at \*2, \*8 (10th Cir. 2022) (affirming the denial of a request for a preliminary injunction against a school board policy that restricted speech on all “personnel matters”); *Davison*, 19 F.4th at 635-36.

The Board’s amended Policy, which it expects to be finally adopted in May 2023, will moot Plaintiff’s argument that the Policy discriminates based on viewpoint because it allows complements to be shared about specifically named individual employees. Given that the purpose of injunctive relief is to prevent future violations, Plaintiff simply cannot satisfy his burden to show that injunctive relief is necessary.

### **III. PLAINTIFF HAS NOT DEMONSTRATED AN ‘UNEQUIVOCAL’ RIGHT TO RELIEF BASED ON THE REMAINING FACTORS**

#### **A. Plaintiff Has Not Established that He Will be Irreparably Harmed if a Restraining Order is Not Issued**

This Court has explained that “a showing of irreparable harm must be ‘grounded on something more than conjecture, surmise, or a party’s unsubstantiated fears of what the future may have in store.’” *Maine Educ. Ass’n Benefits Tr. v. Cioppa*, 842 F. Supp. 2d 386, 387–88 (D. Me.), *aff’d*, 695 F.3d 145 (1st Cir. 2012) (quoting *Charlesbank Equity Fund II v. Blinds to Go*, 370 F.3d 151, 162 (1st Cir.2004)). “Thus, a preliminary injunction will not be issued simply to prevent the possibility of some remote future injury. A presently existing actual threat must be shown.” *Grounds for Granting or Denying a Preliminary Injunction—Irreparable Harm*, 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.).

Plaintiff contends in his motion that injunctive relief is necessary here because he intends to criticize public employees at the next school board meeting. Pl. Br. at 1. Assuming such criticism is directed at individual employees, those comments are not permitted under the School Board’s current public participation policy; nor will such comments be permitted under the Board’s policy that will restrict all comments with regard to specific named employees. Finally, there are alternative means through which McBreairty can voice complaints about personnel.

## **B. The Balance of Harms and Public Interest Weigh Against Injunctive Relief**

Plaintiff has not and cannot show a level of hardship that will outweigh the hardship that the Board will incur if the purposes and interests underlying its Policy are frustrated by a preliminary injunction as requested by Plaintiff. The hardship to the School Board is much greater here: if Plaintiff – and others – are allowed to say *whatever they want* about school employees by name, members of the public would be permitted to accuse teachers of being “groomers” and “pedophiles,” as Plaintiff has suggested he will do, or they may criticize teaching methods and personalities of teachers to the general public. By so doing, the School Board will be left powerless to protect its employees from harassment and provide its employees with a safe working environment. The School Board could also face liability or allegations thereof if it permits defamation. Importantly, the Board has no way of knowing in real time – as comments are made during the public comment period – whether comments are defamatory.

Hardship to the Plaintiff if he is not able to criticize RSU 22 employees at the April Board meeting is conversely not significant. Plaintiff is free to express his *ideas* without naming specific individuals, as he has been permitted to do repeatedly, and, to the extent he has complaints about individual employees, he is free to submit those complaints to the Board through its separate policy and procedure for such complaints and criticisms.

The effect that a preliminary injunction would have on the public interest also greatly weighs in favor of the School Board. Maine Law specifically authorizes school boards to establish reasonable standards for the public comment period at school board meetings. 20-A M.R.S. § 1001(20). It also requires school boards to protect school employees from harassment. *Id.* § 1001(22). The School Board has a significant interest in conducting orderly and efficient meetings, which helps support public participation and attention to the important issues discussed and heard by the Board at such meetings. Frustration of these statutory duties and interests by

virtue of a preliminary injunction that allows carte blanche criticism and personal attacks on individually named RSU 22 employees will have a significant effect on the public interest. Not only will RSU 22 be exposed to liability, but its inability to protect its employees from potentially defamatory or harassing comments will threaten the ability to maintain a safe working and learning environment in public schools. *See Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.”).

RSU 22 has deep respect for the importance of public comment on education—and indeed the videos of its board meetings bear out that fact—but the public harm at stake here cannot be overstated. Accordingly, neither the balance of harms nor the public interest support Plaintiff’s request for a preliminary injunction. Because Plaintiff has failed to show a substantial likelihood of success on the merits and because all other remaining factors swing the pendulum towards a denial of Plaintiff’s request for relief, this Court must deny Plaintiff’s request for a preliminary injunction and temporary restraining order.

Dated: April 3, 2023

/s/ Melissa A. Hewey  
Melissa A. Hewey  
Susan M. Weidner  
Attorneys for Defendants  
**DRUMMOND WOODSUM**  
84 Marginal Way, Suite 600  
Portland, Maine 04101-2480  
(207) 772-1941  
[mhewey@dwmlaw.com](mailto:mhewey@dwmlaw.com)

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE**

SHAWN MCBREAIRTY	)	
	)	
	)	
Plaintiff	)	
	)	
v.	)	<b>Case No. 1:23-cv-00143-NT</b>
	)	
HEATH MILLER AND SCHOOL BOARD OF RSU 22	)	
	)	
	)	
Defendants	)	

**DECLARATION OF HEATH MILLER**

Pursuant to 28 U.S.C. § 1746, I, Heath Miller, declare as follows:

1. I am the Chair of the School Board of Regional School Unit 22 (“RSU 22”), a position I have held since April 2020. I also served as a member of the Board from the time of my election in 2013 until I was voted Chair.

2. RSU 22 is a Maine school administrative unit that provides a free public education to students in the communities of Hampden, Newburgh, Winterport and Frankfort, Maine. We operate four elementary schools, two middle schools and one high school, which together educate approximately 2,270 students. We employ approximately 375 administrators, teachers and staff.

3. In my role as Chair of the Board, I am responsible for, among other things, running the Board’s monthly meetings.

4. Our Board meetings are open to the public to attend, and we also livestream the meeting on our webpage.

5. RSU 22 permits public participation at its regularly scheduled Board meetings in compliance with Maine law, which was amended in 2019 to provide as follows:

School board meeting public comment period. A school Board shall provide the opportunity for the public to comment on school and education matters at a school board meeting. Nothing in this subchapter restricts the school board from establishing reasonable standards for the public comment period, including time limits and conduct standards. For the purposes of this subsection, “school board meeting” means a full meeting of the school board and does not include meetings of subcommittees.

20-A M.R.S. § 1001(20).

6. RSU 22 Board Policy BEDH “Public Participation in Board Meetings” was first adopted in October 1974 (when the District was known as Maine School Administrative District 22), and it has been revised three times. Most recently, in response to the amendment requiring public participation at board meetings, our Board adopted the policy recommended by Maine School Management Association (“MSMA”), a copy of which is attached hereto as Exhibit A.

7. The policy includes 8 rules of conduct designed to promote public participation at our meetings and ensure that the public commentary takes place in an orderly fashion, complies with applicable law, and respects the privacy rights of our employees.

8. I generally read or summarize these rules prior to the public participation segment of each Board meeting.

9. The Policy limits each speaker’s comments to 3 minutes.

10. The Policy prohibits “gossip, defamatory comments, or abusive or vulgar language.”

11. It also prohibits discussion of complaints or allegations against specifically named school personnel.

12. This prohibition is viewpoint neutral – in other words, we prohibit anyone from discussing any complaint about our employees at our meetings, regardless of the nature of the complaint.

13. We do this in part because we have an obligation imposed both by statute and Board Policy GBGB, a copy of which is attached hereto as Exhibit B, to protect our employees from harassment.

14. We believe that allegations made about specific employees at publicly televised board meetings can constitute harassment under Policy GBGB and the state law. This is a position that our teacher’s union has taken as well. *See* Exhibit C, attached hereto.

15. We are also mindful of the statutory obligation, set out in 20-A M.R.S. § 6101, to keep personnel information pertaining to school employees confidential.

16. And finally, we seek to shield the District from liability for defamation by prohibiting members of the public from publishing defamatory content at our public meetings.

17. Our current policy states that “personnel matters” as well as “complaints concerning student or staff members” will not be permitted during public comment. During my tenure as Board Chair, positive comments about specific staff members have been infrequent and it did not occur to me that these comments would be included in the prohibition of “personnel matters” until sometime in the winter of 2023 when one of the RSU 22 Board members who is on our policy committee went to a presentation concerning various board policies. She came back to me with the recommendation that the District change its policy BEDH such that the prohibition on discussion of personnel matters relates not only to negative discussion but also positive discussion.

18. We reached out to the Maine School Management Association and learned that a new policy would be distributed for all districts to consider very soon. On March 15, 2023, we



obtained a copy of the newly drafted Policy BEDH, a copy of which is attached as Exhibit D. This policy makes the blanket prohibition against speaking about personnel matters – regardless of whether the comments are complaints about personnel.

19. We plan to put adoption of this policy on the Board’s April 26, 2023 agenda for a first reading and have every expectation that it will be finally adopted in May 2023 (Board policy requires two readings of a policy before adoption).

20. In the meantime, ever since the Board member mentioned this issue to me this past winter, I have been warning and interrupting speakers as soon as they mention an employee’s name during public comment period and I intend to continue doing so until the new policy is adopted.

21. Although RSU 22 does not permit discussion of complaints or allegations about specific employees during the public comment period of its Board meetings, it does provide anyone who has such a complaint or allegation with a process to have that complaint heard. That process is set forth in Board Policy KE, a copy of which is attached hereto as Exhibit E.

22. The Plaintiff, Shawn McBreairty, has attended and spoken at public comment in many of the meetings of the RSU 22 Board that have been held during the past 6 months. In those instances where he has not attempted to make disparaging comments about our employees, I have permitted him to speak for the full three minutes allotted to members of the public for speaking.

23. I have similarly permitted other citizens to express beliefs similar to those often articulated by Mr. McBreairty as long as they do not mention the names of individual employees.

24. As an example, attached hereto as Exhibit F is a video clip from the Board’s September 21, 2022 meeting, the official video of which is available on the RSU 22 School Board’s website. The clip begins with me reiterating our public comment rules. After that, a woman from the public spoke about her concern about sexually explicit material in schools. This woman

expressed her opinion without naming any RSU 22 staff and was not interrupted during the three minutes allotted to her.

25. Next, the video shows that Mr. McBreairty also spoke at the September 21, 2022 meeting. He was critical of both me and the Superintendent and was permitted to express those opinions. He also expressed forceful disapproval of books read at RSU 22 regarding gender dysphoria and even mentioned the name of one teacher but did not directly accuse that teacher of wrongdoing. I therefore made the judgment that he was in compliance with our policy (notwithstanding that I strongly disagree with his viewpoint) and permitted him to complete his presentation.

26. During his February 15, 2023 presentation, attached to the Complaint as Exhibit C, Mr. McBreairty mentioned a teacher employed by RSU 22, by name, referring to that teacher as “groomer, I mean, teacher of the year” in the context of the remarks he was providing about sexual grooming, which he made by playing pre-recorded comments into the microphone that we provide to speakers. I warned Mr. McBreairty not to name names, and as Mr. McBreairty’s recording quickly went on to state that the named teacher should be “locked up,” I asked Mr. McBreairty to sit down.

27. During his March 15, 2023 presentation, attached to the Plaintiff’s motion as Exhibit E, Mr. McBreairty started by saying that he was going to name names. Accordingly, when he mentioned by name a teacher employed by RSU 22, I warned him about not mentioning individual names. As he went on to suggest that a named former employee was part of what Mr. McBreairty referred to as an “after-school cult” that “push[es] sex and enable[es] mental illness,” I asked Mr. McBreairty to stop speaking.

28. When Mr. McBreairty refused, the Board took a recess. During the recess, public broadcast of the Board room was turned off. However, the video feed was left on. A copy of the video showing Mr. McBreairty's conduct while he was asked to leave by responding officers is attached hereto as Exhibit G.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: April 3, 2023

/s/ Heath Miller  
Heath Miller

**BEDH**

### **Public Participation in Board Meetings**

All meetings of the Board shall be open to the public. All actions of the Board shall be taken openly and the deliberations leading to Board action shall likewise be conducted openly. The public is invited to attend Board meetings and will be given limited time to voice opinions or problems.

The Board recognizes its responsibility to conduct the business of the district in an orderly and efficient manner and will therefore require reasonable controls to regulate public presentations to the Board. The primary purpose of the meeting is for the Board to conduct its business as charged by the law. Spontaneous discussion, as well as disorder and disruption, prevent the Board from doing its work and will not be permitted. A person wishing to be heard by the Board shall first be recognized by the Chair. He/she shall then identify him/herself and proceed with his/her comments as briefly as the subject permits.

The Chair is responsible for the orderly conduct of the meeting and shall rule on such matters as the time to be allowed for public discussion, the appropriateness of the subject being presented and the suitability of the time for such a presentation. A speaker in violation of these rules may be required to leave in order to permit the orderly consideration of the matters for which the meeting was called. Persons who disrupt the meeting may be asked to leave, and the Chair may request law enforcement assistance as necessary to restore order.

Speakers are asked to observe the following:

1. In the case of a large audience, speakers may be asked to sign up before the meeting so they may be called on most expediently. Speakers may be asked to keep their comments to three minutes.
2. Confidential personnel information will not be shared in a public session. No complaints or allegations will be allowed at Board meetings concerning any person employed by the school system or against particular students. Personnel matters or complaints concerning student or staff issues will not be considered in a public meeting but will be referred through established policies and procedures.
3. All speakers are asked to identify themselves. Gossip, defamatory comments, or abusive or vulgar language will not be permitted.
4. Speakers must address all comments and questions to the Chair.
5. Comments will be heard and considered. Requests for information or concerns that require further research may be referred to the Superintendent to be addressed at a later time. Generally, the Board does not discuss or act on an item not on the agenda.

**AA065**

6. Speakers are asked not to be repetitious of comments already made to the Board, in the interest of most efficient use of time.
7. The Chair has the authority to stop any presentation that violates these guidelines or the privacy rights of others.
8. Persons wishing to address the Board may be permitted to do so only during the designated time for public comment.

At the discretion of the Chair, a speaker may be recognized for a second time on a particular item. All speakers must observe rules of common etiquette. The Chair may interrupt or terminate an individual's statement when it is too lengthy, personally directed, abusive, obscene, or irrelevant. The Board as a whole will have the final decision in determining the appropriateness of all such rulings.

Copies of the Board of Directors Agenda shall be published in advance of each meeting in accordance with Board policy. Copies will be posted and/or available prior to regular meetings on the district website and at the Superintendent's Office.

Legal Reference: 1 MRSA § 401 et seq.  
20 MRSA §1001(20)

Cross Reference: Policy BEC/KDB, Executive Session  
Policy KE, Public Concerns and Complaints

Adopted: October 2, 1974

Updated: October 4, 1989; December 21, 2016; March 25, 2020

**GBGB**

## **WORKPLACE BULLYING**

The RSU 22 Board of Directors is committed to providing a respectful, safe, and inclusive workplace for employees, one that is free from bullying conduct. All employees and students in the school unit, as well as parents, community members, and others involved with the schools are prohibited from engaging in workplace bullying as defined in this policy.

### **DEFINITION**

For the purposes of this policy, “workplace bullying” means intentional behavior that a reasonable person would expect to interfere with an employee’s work performance or ability to work. Generally, workplace bullying will involve repeated conduct. However, a single incident of egregious conduct could constitute workplace bullying.

Examples of workplace bullying include, but may not be limited to:

- Humiliating, mocking, name-calling, insulting, maligning, or spreading rumors about an employee;
- Shunning or isolating an employee or encouraging others to do so;
- Screaming or swearing at an employee, slamming doors or tables, aggressively invading an employee’s personal space; placing an employee in reasonable fear or physical harm; or other types of aggressive or intimidating behavior;
- Targeted practical jokes;
- Damaging or stealing an employee’s property;
- Sabotaging an employee’s work or purposely misleading an employee about work duties (e.g., giving incorrect deadlines or intentionally destroying an employee’s work);
- Harassing and/or retaliating against an employee for reporting workplace bullying;
- Cyberbullying, which is defined in Maine law as bullying occurring through the use of technology or any electronic communication, including but not limited to, a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted by the use of any electronic device, including, but not limited to, a computer, telephone, cellular telephone, text messaging device, or personal digital assistant.

### **EXCLUSIONS**

Workplace bullying does not include the following:

- When supervisors set reasonable performance goals or provide verbal or written counseling, direction, feedback, or discipline to employees in the workplace when the intent is to address unsatisfactory work performance or violations of law or school policy;

**AA067**

- When supervisors make personnel decisions designed to meet the operational or financial needs of the school unit or the needs of students. Examples include, but are not limited to changing shifts, reassigning work responsibilities, taking steps to reduce overtime costs, transferring or reassigning employees to another building or position.
- Discrimination or harassment based on protected characteristics (race, color, sex, sexual orientation, gender identity, religion, ancestry or national origin, age, familial status, disability, or genetic information). Such conduct is prohibited under separate policies and complaints shall be addressed under ACAB-R – Employee Discrimination/Harassment and Title IX Sexual Harassment Complaint Procedure.
- Disrespectful conduct by students directed at school employees that can be addressed through enforcement of classroom rules, school rules, and applicable Board policies.

## REPORTS AND INVESTIGATIONS

Employees who believe they have been bullied in the workplace, and other persons who believe they have witnessed an incident of an employee being bullied in the workplace, are expected to report the issue to the building administrator.

If the report is about the building administrator, the report should be made to the Assistant Superintendent.

The building administrator shall promptly notify the superintendent of all workplace bullying reports.

Any workplace bullying report about the Superintendent should be made to the Board Chair.

All reports of workplace bullying shall be investigated promptly and documented in writing. The person who was the subject of the alleged workplace bullying and the person alleged to have engaged in workplace bullying will be notified of the outcome of the investigation, consistent with confidentiality and privacy laws.

## DISCIPLINARY ACTIONS

Any employee who is found to have engaged in workplace bullying will be subject to disciplinary action up to and including termination of employment.

Students who are found to have engaged in bullying of an employee will be subject to disciplinary action in accordance with applicable student discipline procedures.

Parents and others who are found to have engaged in bullying of an employee will be dealt with in a manner appropriate to the particular circumstances.

## APPEALS

If dissatisfied with the resolution of the matter, the subject of the alleged workplace bullying or the person alleged to have engaged in workplace bullying may file a written appeal within five (5) business days with the superintendent stating the reason for the appeal. The superintendent will review the matter and issue a written decision within ten (10) business days. The Superintendent's decision shall be final.

If the matter involves employees covered by a collective bargaining agreement, any disagreement with the results of the investigation may be resolved through the agreement's dispute resolution process.

## RETALIATION PROHIBITED

Retaliation for reporting workplace bullying is prohibited. Employees and students found to have engaged in retaliation shall be subject to disciplinary action.

## SUPERINTENDENT'S RESPONSIBILITY

The Superintendent shall be responsible for implementing this policy and for the development of any necessary procedures to enforce it.

Legal References: 20-A MRSA §1001(21); 6544(2)(C)

Cross References: AC – Nondiscrimination, Equal Opportunity and Affirmative Action  
ACAB – Harassment/Sexual Harassment of School Employees  
ACAB-R – Discrimination/Harassment and title IX /Sexual Harassment of School Employees

Adopted: 11.17.21



Regional School Unit 22

Hampden • Frankfort • Newburgh • Winterport

24 Main Road North  
Hampden, Maine 04444

Phone: 207.862.3255  
Fax: 207.862.2789



Nicholas Raymond, Superintendent

Christine Boone, Assistant Superintendent

October 25, 2022

Cedena McAvoy c/o Reeds Brook Middle School  
Beth Kilgore c/o Hampden Academy  
RE: Response to Step 3 Grievance

Cedena and Beth:

I am writing to respond to the Step 3 grievance I received from you on October 17, 2022. Per our conversation on October 19, we are going to disregard the one submitted October 11, due to the incorrect law cited. Your grievance alleges that the RSU 22 School District violated Maine Education and School Statutes Title 20-A §1001(22) Workplace bullying as well as its own RSU 22 Policy BEDH Public Participating in Board Meetings.

The grievance alleges that RSU 22 “failed to enforce the policy designed to protect employees from harassment by a member of the community on September 21, 2022.” As you have written in your letter, the State of Maine Statute indicates, “A school board shall adopt and implement a policy to address the negative effects of bullying of school employees by administrators, school employees, parents, students or any other individuals associated with the public school and to ensure the safety of employees and an inclusive environment for all employees and students in the public school.”

You also allege that RSU 22 “violated school board policy BEDH: ‘The chair is responsible for the orderly conduct of the meeting...#2 ‘No complaint or allegations will be allowed at Board meetings concerning any person employed by the school system...’ and #3 ‘Gossip, defamatory comments, or abusive or vulgar language will not be permitted.’”

With respect to the State of Maine Statute - This community member who spoke was not an administrator, school employee, parent of a student, student. However, for the purpose of this law, we will classify the citizen as an individual associated with our school district. I can agree that this individual spoke ill of an employee in RSU 22.

With respect to RSU 22 policy - The community member indicated that Mrs. Stoyanova “pushed *All Boys Aren’t Blue* on some minors” and made reference to her book list. Here I can agree that the RSU 22 Board of Directors could have acted differently.

*Committed to the optimal learning of all students*

Critical Thinking • Perseverance • Collaboration • Effective Communication • Problem Solving **AA070**

Hampden • Frankfort • Newburgh • Winterport

24 Main Road North  
Hampden, Maine 04444

Phone: 207.862.3255  
Fax: 207.862.2789



Nicholas Raymond, Superintendent

Christine Boone, Assistant Superintendent

**Resolution**

As witnessed in our last Board meeting on October 19, we read all of the parts of policy BEDH pertaining to public speakers. We agree to continue this approach for each meeting. As further evidence that we take our responsibility to our staff seriously, four members of the Board of Directors and myself have also sought additional legal guidance and training on this matter to help us better understand when a speaker should be stopped and what those steps might look like when necessary.

Sincerely,

Nicholas Raymond  
Superintendent of Schools

RECEIVED

OCT 17 2022

SUPT. OFFICE



**Education Association 22 (EA22)**

Serving the RSU 22 school district

Cedena McAvoy and Beth Kilgore, *Co-Presidents and acting Professional Rights and Responsibilities Chairs*

**Grievance Form**

**Names of People To Whom This Grievance is Addressed:**

Nicholas Raymond, Superintendent of RSU22 and Heath Miller, School Board Chairperson

**Date:** Submitted October 17, 2022

**Name of Aggrieved Person:**

EA22 is filing this grievance on behalf of EA22.

**Statement of Grievance:**

The RSU 22 School District violated State Statute **Sec. 1. 20-A MRSA §1001, sub-§22:**

**22. Workplace bullying.** A school board shall adopt and **implement** a policy to address the negative effects of bullying of school employees by administrators, school employees, parents, students or any other individuals associated with the public school and to ensure the safety of employees and an inclusive environment for all employees and students in the public school.

When it failed to enforce the policy designed to protect employees from harassment by a member of the community on September 21, 2022.

In addition, it violated school board policy BEDH: "The chair is responsible for the orderly conduct of the meeting.... #2 "No complaint or allegations will be allowed at Board meetings concerning any person employed by the school system..." and #3 "Gossip, defamatory comments, or abusive or vulgar language will not be permitted."

**Grievance Remedy Sought:**

The remedy sought is that policy BEDH be read in full prior to any public comments at school board (or other such) meetings and that Chairman Heath shuts down comments when staff are specifically mentioned in a defamatory manner.

Signed: Cedena McAvoy, EA22 Co-President and acting Professional Rights and Responsibilities Chair

\*MSMA SAMPLE POLICY\*

NEPN/NSBA Code: BEDH

**[NOTE: School Boards are required by current law to provide an opportunity for public comment, limited to school and education matters, at full meetings of the Board (20-A MRSA § 1001(20). Boards may impose reasonable time, place and manner restrictions on expressive activity during the public comment period to ensure that the Board’s business meeting is not disrupted and to ensure compliance with confidentiality and privacy laws.**

**Boards should check other related policies (such as those pertaining to agenda preparation, Board meetings, agenda format, etc.) to ensure that there are no inconsistencies with revisions to this policy, and update those policies and all cross references as necessary.]**

### **PUBLIC PARTICIPATION AT SCHOOL BOARD MEETINGS**

The primary purpose of School Board meetings is to conduct the business of the Board related to Board policies, programs, and operations. The Board encourages residents to attend Board meetings so that they may become acquainted with the operations and programs of the schools.

The Board also recognizes the value of public comments on school and educational matters. To permit fair and orderly expression of public comments at Board business meetings while still allowing the Board to conduct its business efficiently, the Board has established the procedure below for regular business meetings.

At special, emergency, or workshop meetings, public comments will be limited to the topic(s) of the particular meeting.

**[NOTE: The public comment law simply refers to “full meetings of the board,” without making a distinction between the various kinds of meetings that are typically held. MSMA/DWM believe that it is acceptable to limit public comment at special, emergency, and workshop meetings to the topic(s) for which the meeting is held. Boards may delete the above sentence if they wish to allow general comments. The law makes it clear that public comment is not required at subcommittee meetings.]**

In addition to speaking during the designated public comment portion of the agenda at Board meetings, members of the public are welcome to submit written comments on school and educational matters to the Board and Superintendent, or to submit requests to have items placed on a Board agenda, in accordance with applicable Board policies.

**[NOTE: The law does not specify where the public comment period should be placed on the agenda or how much public comment should be allowed. For efficiency, it may make sense to place the public comment early in the agenda.**

NEPN/NSBA Code: BEDH

1. The Board will include a public comment period, not to exceed 30 minutes [**Or: \_\_\_\_ minutes**] on the agenda of its regular business meetings. Comments by individuals are limited to a maximum of three (3) minutes [**OR: \_\_\_\_ minutes**] at a meeting. Individuals may not relinquish a portion of their allotted time to another speaker. The time limits in this paragraph may be modified at a particular meeting at the discretion of the Board.

**[NOTE: Boards have the option of prioritizing comments from residents of the school unit. There are two options below that Boards may wish to consider. MSMA/DW suggest having a sign-in form for individuals to speak, which includes the individual's name and town/city of residence. Boards may also choose not to have a sign-in form, or only to use one in circumstances where there are many individuals wishing to speak at a regular meeting.]**

2.[**OPTION 1**] Individuals who wish to speak during the public comment period are required to fill out the sign-in form available at each Board meeting, prior to the beginning of the public comment period, and to review a copy of this policy. Each individual will be required to state their name and town/city of residence before beginning their remarks.

[**OPTION 2**] The Board will hear public comments from residents of the school unit first. If there is time remaining in the public comment period once all residents have had the opportunity to speak, the Board will permit comments from non-residents. Individuals who wish to speak are required to fill out the sign-in form available at each Board meeting, prior to the beginning of the public comment period, and review a copy of this policy Each individual will be required to state their name and town/city of residence before beginning their remarks.

3.The Board Chair is responsible for ensuring the orderly conduct of Board meetings and for ensuring compliance with this policy, including the following rules of order:

- a. Speakers will be recognized by the Board Chair, and comments should be addressed to the Board Chair. Requests for information or concerns that require further research may be referred to the superintendent for further action, if necessary;
- b. Speakers are expected to follow rules of common etiquette and decorum, including refraining from using vulgar and/or obscene language, yelling, threatening others using words or by other actions, making defamatory comments, or otherwise engaging in any activity that disrupts orderly meeting progress. Examples of disruptive conduct include, but are not limited to, exceeding the allotted time limits, talking over or interrupting others, offering repetitive comments, and offering comment on matters unrelated to the school unit's programs, policies, or operations.

Page 2 of 3

NEPN/NSBA Code: BEDH

- c. Discussion of personnel matters is not permitted during the public comment period due to the privacy, confidentiality and due process rights of school unit employees. For purposes of this policy, “discussion of a personnel matter” means any discussion of job performance or conduct of a school unit employee, including complaints about them.
- d. Discussion of matters involving individual students are also not permitted during the public comment period due to the privacy, confidentiality, and due process rights of the school unit’s students.
- e. Any concerns about personnel matters and/or student matters should be directed to the Superintendent or another appropriate administrator outside of Board meetings so that they can be addressed through an alternative channel and in a manner consistent with privacy, confidentiality, and due process rights of the individuals involved.
- f. The Board Chair will stop any public comment that is contrary to these rules.
- g. Individuals who disrupt a Board meeting may be asked to leave in order to allow the Board to conduct its business in an orderly manner. The Boar Chair may request the assistance of law enforcement if necessary to address disruptions or safety concerns.

Legal Reference: 20-A MRSA § 1001(20)  
 20-A MRSA § 6101  
 1 MRSA § 405

Cross Reference: BE – School Board Meetings  
 BEDB – Agenda  
 BEDB-R – Agenda Format  
 BEC – Executive Sessions  
 KE – Public Concerns and Complaints

**PLEASE NOTE** MSMA sample policies and other resource materials do not necessarily reflect official Association policy. They are not intended for verbatim replication. Sample policies should be used as a starting point for a board’s policy development on specific topics. Rarely does one board’s policy serve exactly to address the concerns and needs of all other school units. MSMA recommends a careful analysis of the need and purpose of any policy and a thorough consideration of the application and suitability to the individual school system.  
 MSMA sample policies and other resource materials may not be considered as legal advice and are not intended as a substitute for the advice of a board’s own legal counsel.

## PUBLIC CONCERNS AND COMPLAINTS

Understanding that members of the community shall have the right to petition the Board of Directors for redress of concerns or complaints, the Board establishes the following process:

### **I. Complaints**

Parents, students or other citizens with complaints or concerns regarding any aspect of RSU #22 or an employee thereof shall be expected to seek a resolution at the lowest possible level. The only exceptions are complaints that concern School Board actions, operations or policy. Such complaints should be addressed to the Board Chair.

All complaints must adhere to the following protocol. If the person initiating the complaint refuses to meet with the relevant staff in a problem solving session the complaint will be dismissed. At each level the person initiating the complaint can expect an objective assessment of their complaint from the individual responsible for hearing the complaint. If the complaint cannot be resolved at the lowest applicable level, the person initiating the complaint may appeal the decision to the next level, as illustrated:

1. Staff
2. Principal
3. Superintendent of Schools
4. Board of Directors

If the complaint cannot be resolved at any lower level, it may be appealed to the Superintendent, in writing. If the complaint remains unresolved at the Superintendent's level, the person making the complaint may forward it in writing, including policy citation, to the Chair of the Board of Directors. A district appeal form will be made available. Upon receipt the Chair will request the Superintendent to forward all relevant information related to the complaint. The Chair and Vice Chair will determine whether the complaint will be considered by the full Board. Any disagreement between the Chair and Vice Chair will be referred to the Board.

### **II. Retribution Prohibited**

Students, parents and educators should not expect nor participate in retribution because a question is raised or a complaint pursued. The Superintendent of Schools should be notified immediately and directly by a student, parent or employee of RSU #22 who believes retribution has taken place as a result of a complaint under this policy and the Superintendent shall take appropriate action.

Cross Reference: Policy BEDB, Agendas  
Policy BCA, Board Member Code of Ethics

SOURCE: Maine Regional School Unit No. 22, Hampden, Maine  
DATE: 9/4/74;  
Updated: February 14, 2001; September 11, 2019; April 29, 2020

**EXHIBIT F**

**Board Meeting Video Clip from September 21, 2022**

**(To be filed with the Clerk's Office)**



**EXHIBIT G**

**Board Meeting Video Clip from March 15, 2023**

**(To be filed with the Clerk's Office)**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE

SHAWN MCBREAIRTY,

Plaintiff,

v.

HEATH MILLER, in his personal and official  
capacities; SCHOOL BOARD OF RSU22,

Defendants.

Case No. 1:23-cv-00143-NT

**PLAINTIFF’S REPLY IN SUPPORT  
OF MOTION FOR A TEMPORARY  
RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**

**RANDAZZA** | LEGAL GROUP

## 1.0 INTRODUCTION

Rule 2 discriminates viewpoint—you can praise but not criticize.<sup>1</sup> Defendants attempt to handwave this violation by claiming that the rule is in fact, a rare species of viewpoint neutrality, because it prohibits criticizing a teacher displaying a flag while equally prohibiting criticizing the teacher for not displaying a flag.<sup>2</sup> Contrary to Defendants’ arguments (Opp. at 9), identity, ideology, and motivation are foundational to Rule 2 and Defendants’ application of it. When you can praise a teacher, but not criticize, over the same issue, that is viewpoint discrimination.

Defendants try to claim that they can restrict criticism, because “criticism” is a “personnel matter.” “Personnel matters” does not extend to “any criticism at all.” Imagine if a teacher made a racist speech in class. Would that be the same as discussing the status of a Step 2 union grievance arising after the teacher’s suspension? No. Defendant Miller perjured himself when he declared that he enforces Rule 2 by preventing all speakers from mentioning employee names (Miller Decl., Doc. No. 9-1 at ¶ 20). He only limited McBreaity’s use of a name when he also made “an allegation towards that teacher[.]” Doc. No. 1-4 at 4. Rule 2 is unconstitutional facially and as applied. At the next meeting, McBreaity should be free to discuss this perjury, but doing so would violate Rule 2 – at least as Defendants interpret it.

## 2.0 MCBREAIRTY HAS A MERITORIOUS CLAIM

### 2.1 Rule 2 is Unconstitutional, Both Facially and As-Applied

Defendants bear the burden of justifying content and viewpoint based restrictions. These restrictions “pose a high risk that the sovereign is, in reality, seeking to stifle unwelcome ideas rather than to achieve legitimate regulatory objectives.” *McGuire v. Reilly*, 260 F.3d 36, 42 (1st Cir. 2001). “When government targets not subject matter, but particular views taken by speakers

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<sup>1</sup> McBreaity was threatened with arrest for violating that policy. Defendants claim “there was no threat of arrest made[.]” (Doc. No. 9 (hereinafter “Opp.”) at 5). Video shows McBreaity saying to the police, “if you ask me to leave, I will leave under protest to avoid being arrested” to which the officer responds “absolutely,” agreeing with him. (Doc. No. 9-8 at 16:10 – 16:17). Calling the police to suppress First Amendment rights under threat of arrest violates the constitution. *See Hansen v. Westerville City Sch. Dist., Bd. of Educ.*, 43 F.3d 1472, 1994 U.S. App. LEXIS 31576, \*28-29 (6th Cir. 1994) *cert. denied* (Jun. 26, 1995).

<sup>2</sup> This rationale is reminiscent of a now-overturned decision about gay marriage, where a court held that it was not discriminatory to prohibit gay marriage, because a gay man could marry a woman just like a straight man could. *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1004 (D. Nev. 2012).

on a subject, the violation of the First Amendment is ... blatant.” *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 829-30 (1995). That is what is happening, here.

Defendants admit to viewpoint discrimination. In explaining why Defendants allowed praise for an employee in October while prohibiting Mr. McBreairty from criticizing that same employee later,<sup>3</sup> Defendants claim they were following Rule 2. (Opp. at 16). Defendants now admit that they enforced Rule 2 differently during the February and March meetings than during the October meeting. (Opp. at 7-8). However, Rule 2’s language never changed.

Defendants argue “personnel complaints” is a class of prohibited speech. (Opp. at 9). They argue that statutes regarding workplace bullying and employee records abrogate the First Amendment.<sup>4</sup> (Opp. at 8); *see* 20-A M.R.S. §§ 6101, 1001(22). This is incorrect. Moreover, Maine Law *requires* that the public can speak freely about “school and education matters” subject to “reasonable standards.” 20-A.M.R.S. § 1001(20). Critiquing school employees, including by name, is a “school and education matter.” There is nothing *reasonable* about prohibiting criticism of school employees in a forum created for “school and education matters.” If there is criticism about a dangerous building condition, could the Defendants avoid criticism about it by decreeing “building operation matters” are outside the rules? Can they just eliminate budget matters from the forum if they receive flak for wasteful spending? Can they just narrow the forum to exclude any potential for criticism? Neither the First Amendment nor 20-A.M.R.S. § 1001(20) abide that.

It *might* be permissible to restrict discussion of actual pending disciplinary actions or decisions to deny employment. However, there is no justification for restricting critiques about an employee’s actions separate from the narrowly tailored and specific “personnel matter” aspect. An opinion by a member of the public about a government employee is not *per se* a personnel matter,

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<sup>3</sup> During the October 19 School Board meeting, a representative for Educate Maine praised a government employee while addressing the School Board, and she was given a heartfelt thank you from Defendant Miller, along with a thundering applause from the School Board. *See* Doc. No. 1-2. During the February 15 School Board meeting, Mr. McBreairty was prohibited from raising his concerns about the very same government employee, and Defendant Miller called the police to remove Mr. McBreairty from school grounds. *See* Doc. No. 1-3.

<sup>4</sup> If the Court agrees with Defendants, then these state statutes themselves are constitutionally impermissible. But, Plaintiff does not believe the Court will agree and, thus, the constitutionality of those statutes is not addressed. Plaintiff reserves the right to challenge these statutes’ constitutionality if necessary, and will amend his complaint accordingly.

and it is *not* the sort of personnel information that must remain confidential. Defendants appear to argue that criticizing employees is “bullying” and causes “disorder.” However, the assertion that a workplace bullying policy may permit viewpoint discrimination is unsupportable. Imagine a teacher running for governor on the platform of “End School Bands”—a parent speaking at a meeting, critical of the candidate and platform by name would not be speaking to a personnel matter, yet Rule 2 would restrict them, but not the candidate’s supporter.

Defendants rely on *Prestopnik v. Whelan* and *Pollak v. Wilson* but, both cases are inapposite.<sup>5</sup> In *Prestopnik*, the Second Circuit noted that the school board had a policy that “explicitly excludes speech about specific personnel decisions, which presumably would include the decision to deny the appellant tenure[.]” *Prestopnik*, 83 F. App’x at 365. The plaintiff failed to produce evidence to support her claim that the policy was not viewpoint neutral or unreasonable. In contrast, Rule 2 permits discussion of personnel matters, so long as they are not negative, in contrast to *Prestopnik*, the rule is not viewpoint neutral. *Compare Baca v. Moreno Valley Unified Sch. Dist.*, 936 F. Supp. 719, 730 (C.D. Cal. 1996) (“It is difficult to imagine a more [viewpoint-discriminatory] prohibition on speech than this policy, which allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees’ conduct or performance).”)

In *Pollak*, the restriction on discussing *personnel matters* was viewpoint neutral “because it forbids discussion of *all* personnel matters, regardless of the speakers’ perspective.” *Pollak v. Wilson*, 2022 U.S. App. LEXIS 35636, at \*20 (10th Cir. Dec. 27, 2022) (emphasis added). The *Pollak* policy said “Personnel matters are not appropriate topics to be discussed at regular board meetings.” In contrast, RSU22 Rule 2 is *not* facially viewpoint neutral,<sup>6</sup> it prohibits “complaints and allegations.” Doc. No. 1-1. Additionally, the *Pollak* policy was only deemed reasonable because the 10<sup>th</sup> Circuit determined the “personnel-matter restriction protects *personal and*

<sup>5</sup> Both are unpublished decisions.

<sup>6</sup> In *Pollak*, the plaintiff argued that the Chair also applied the policy in a non-neutral manner, but he only made a facial challenge. 2022 U.S. App. LEXIS 35636, \*18-20. McBreairty, however, challenges the rule both facially and as-applied.

*performance evaluation information[.]*” 2022 U.S. App. LEXIS 35636, \*23 (emphasis added). Those terms are not so broad that they can be replaced with the word “criticism.”

Criticizing what a teacher is doing or teaching is not “personal or performance evaluation information”—it is a matter of policy and curriculum, rendering Rule 2 overbroad. Moreover, even protecting “personal and performance evaluation information” is not reasonable—the 10<sup>th</sup> Circuit was wrong. While a discussion of someone’s need for leave might justify a narrow restriction, a teacher having a sexual relationship with a student is “personal” information the public should be able to discuss. If a teacher uses corporal punishment, parents should be able to discuss that teacher’s improper conduct; prohibiting such is unreasonable and this Court is not bound to blindly follow a poor decision. Finally, the 10<sup>th</sup> Circuit decision did not implicate a state law, like 20-A.M.R.S. § 1001(20), that requires the public have input. The *Pollak* Court did not suggest that there was a Wyoming law requiring public comment. *Pollak* is distinguishable and inapposite.

To the extent the Defendants argue that Rule 2, as they now say they apply it or are considering amending it, prohibits the utterance of a government employee’s name, that approach is unconstitutional as-applied (and violates 20-A.M.R.S. § 1001(20)). Stating a name is not a “personnel matter.” Even if Defendants were to adopt the MSMA’s model policy, they cannot prohibit McBreairty from uttering a name. *See* Doc. No. 9-5. This would be an unconstitutional content-based restriction. A content-based restriction on speech will pass constitutional muster only if it employs the least restrictive means to further a compelling interest. *See Frisby v. Schultz*, 487 U.S. 474, 483 (1988). A ban on uttering a name does not satisfy any interest in prohibiting bullying (and, mere criticism of a teacher by name is not “bullying,” either). They can restrict discussion to the contours of the public forum, but they cannot play favorites by slicing off any discussion of topics where they draw criticism. This “new policy” will not cure the problem – voluntary cessation doctrine or not.

### **2.1.1 Rule 2 is Unconstitutionally Vague**

Vagueness lies if the Policy is such that persons of “average intelligence would have no choice but to guess at its meaning.” *Nt’l Org. for Marriage v. McKee*, 649 F.3d 34, 62 (1st Cir.

2011). Even to use one of Defendants’ arguments: if you praise every teacher in a school for doing X, except one, which Defendants would allow, you are necessarily critiquing the one teacher who did not do so. A reasonable person cannot know what speech is permitted and what is not.

It seems that the contours of Rule 2 are based on Miller’s whims. By Miller’s own admissions, Rule 2 is vague and we must guess at its meaning. *See* Miller Decl., Doc. No. 9-1 at ¶ 17. Miller has served on the School Board since 2013. *Id.* at ¶ 1. Yet, it took him ten years to figure out that positive comments “would be included in the prohibition of ‘personnel matters.’” *Id.* at ¶ 17. If the rule fails to provide the School Board Chair reasonable notice as to its meaning, it must be vague for the average citizen.

### 2.1.2 Plaintiff was Censored Based on His Viewpoint

McBreairty’s comments were not personnel complaints. (Contrast Opp. at 15) At the February meeting, McBreairty discussed sexual grooming by a government employee and stated that a government employee should be “locked up and not allowed 500 feet from a school.” Doc. No. 1-3.<sup>7</sup> Yet, at the October meeting, Ms. Sullivan praised Ms. Stoyanova, drawing a round of applause, and Miller thanked her. (Compl. at ¶ 11) Miller relied on the speaker’s viewpoint and identity to thank Sullivan while calling the police to remove McBreairty on threat of arrest.

### 2.1.3 Plaintiff’s Claims Cannot Be Mooted by Wishcasting

Defendants argue that Rule 2 “may be” amended in order to evade injunctive relief. (Opp. at 17-18) A rule change that Defendants may be thinking about, as a result of being sued, does not supersede the current Rule 2. There is no legal doctrine of anticipatory mootness. This “amendment” is a proposed policy sent out by the MSMA, representing what *they* want the policy to be. Defendants didn’t even write it. It has no more effect than if the First Amendment Lawyers Association sent the Defendants *their* proposed policy. It has all the legal weight of a brochure left under a windshield wiper in a parking lot.

Nevertheless, even if Defendants adopted the new policy today, the relief requested is not moot. *Compare Worthley v. Sch. Comm. Of Gloucester*, 2023 U.S. Dist. LEXIS 11508, \*11-12

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<sup>7</sup> Criminal allegations are not personnel matters. If they are, this further shows Rule 2 is unconstitutionally vague.

(D. Mass. Jan. 24, 2023) (granting preliminary injunction against no trespass order, despite that order having been superseded, under the voluntary cessation doctrine). When a defendant asserts mootness, “it bears the heavy burden of persuading the court that there is no longer a live controversy.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC) Inc.*, 528 U.S. 167, 189 (2000). While Defendants claim they are *thinking about* revising their policy, after having been sued for the existing policy, they have not taken any official actions. Rule 2 will remain in place on April 26, and Miller intends to continue enforcing Rule 2 unconstitutionally. Miller Decl., Doc. No. 9-1 at ¶¶ 19-20. Meanwhile, McBreairty intends to exercise his rights under the First Amendment and under Maine law.

Even if it were adopted today, voluntary cessation excepts the matter from being moot. The exception “can apply when a ‘defendant voluntar[ily] ceases the challenged practice’ in order to moot the plaintiff’s case and there exists ‘a reasonable expectation that the challenged conduct will be repeated following dismissal of the case.’” *Town of Portsmouth, R.I. v. Lewis*, 813 F.3d 54, 59 (1st Cir. 2016) (alteration in original) (*quoting Am. Civ. Liberties Union of Massachusetts v. U.S. Conf. of Catholic Bishops*, 705 F.3d 44, 56 (1st Cir. 2013)). There is no dispute that any change (if it happens) is because of McBreairty’s challenge to the rule. As to the second consideration, the amendment would restrict McBreairty, and there “exists a reasonable expectation that the challenged conduct will be repeated.” *See Knox v. Employees Intern. Union, Local 1000*, 567 U.S. 298, 307-08 (2012). After all, while *McBreairty v. School Bd. of RSU22*, No. 1:22-cv-00206-NT, 2022 U.S. Dist. LEXIS 128353 (D. Me. July 20, 2022) did not explicitly enjoin Rule 2, the fact that this very Defendant could not refrain from infringing on McBreairty’s First Amendment rights (even after being served with the prior injunction) makes it clear that the Defendants are not interested in any non-court-ordered restraint.

Mentioning the name of someone you criticize is not a “personnel matter.” (Defendants take the position that they will continue to enforce this prohibition. *See* Miller Decl., Doc. No. 9-1 at ¶¶ 19-20.) The proposal also prohibits “defamatory comments,” even if truthful, while permitting laudatory comments, maintaining viewpoint discrimination. And, it singles out



“complaints” against government employees for a prohibition, but not praises. And, it is vague where it prohibits “any discussion of job performance or conduct of a school unit employee” then nearly anything anyone might say would fall into this category. Discussion of curriculum is discussion of an employee’s performance. Discussion of test scores is a discussion of performance. Even criticizing Miller for his unconstitutional conduct is a discussion of his performance. The proposed policy is full of impermissible content and viewpoint based restrictions, all written so that the government can use the policy to avoid criticism. It is likely (in fact *certain*) that McBreairty will remain targeted by Miller. The voluntary cessation rule applies in full. Therefore, an unadopted change in policy that the Defendants “might be thinking about” has no effect on the relief requested.

#### **2.1.4 Remaining Injunctive factors**

McBreairty is irreparably harmed by Rule 2, there is no harm to Defendants, and public interest favors an injunction. Twice, the Defendants deprived McBreairty of his rights by shutting him down and calling the police to remove him from school grounds. (Compl. at ¶¶ 17, 21) There is no prejudice or harm to Defendants. Criticism does not make a workplace unsafe; if it did, millions of unhappy workers could file OSHA complaints when their boss is mean. Nor is there evidence of School Board liability for allowing McBreairty to speak, no matter what he says. Nothing suggests that the School Board adopts the positions of the speakers. If McBreairty did (for the first time ever) say something actionable, then the aggrieved person would have a claim against him. Defendants do not get to shut down debate for “liability reasons.”

### **3.0 CONCLUSION**

The Court should strike down Rule 2 as facially unconstitutional and find that it was unconstitutionally applied, enjoining its enforcement, and should leave no room for the Defendants to simply categorically ban speech to avoid allowing criticism.

Dated: April 6, 2023.

Respectfully Submitted,

/s/ Marc J. Randazza  
Brett D. Baber, Bar No. 3143  
Lanham Blackwell & Baber, PA  
133 Broadway  
Bangor, ME 04401  
Tel: (207) 942-2898  
Email: bbaber@lanhamblackwell.com

Marc J. Randazza (*pro hac vice*)  
*Lead Counsel*  
Robert J. Morris II (*pro hac vice*)  
RANDAZZA LEGAL GROUP, PLLC  
30 Western Avenue  
Gloucester, MA 01930  
Tel: (888) 887-1776  
Email: ecf@randazza.com

*Attorneys for Plaintiff,  
Shawn McBreairty*

RANDAZZA | LEGAL GROUP

Case No. 1:23-cv-00143-NT

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 6<sup>th</sup> day of April, 2023, a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the court’s electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court’s CM/ECF System.

/s/ Marc J. Randazza  
Marc J. Randazza

**RANDAZZA** | LEGAL GROUP

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

CASE NAME: Shawn McBreairty v. Heath Miller, et al

DOCKET NO: 1:23-cv-143-NT

PROCEEDING TYPE: Hearing re ECF No. 3 Emergency Motion for Preliminary Injunction, Emergency Motion for TRO

**Exhibit List**

Pl Exh No.	Dft Exh No.	Court Exh No.	Description	Date Mentioned	Date Offered	Obj	Date Admitted
1			Agenda for RSU 22 school board meeting on 4/26/23	4/25/23	4/25/23		4/25/23

**Superintendent of Schools**  
**24 Main Road North**  
**Hampden, Maine 04444**  
Telephone (207) 862-3255  
Fax (207) 862-2789

TO: Board of Directors  
FROM: Nicholas Raymond, Superintendent of Schools  
DATE: Wednesday, April 26, 2023  
SUBJECT: Board of Directors Meeting - 7:00 p.m.  
Hampden Academy Library  
Public Participation In-Person

**AGENDA**

- I. Call to Order
- II. Attendance/Roll Call
- III. Pledge of Allegiance
- IV. Approval of Minutes of Regular Meeting of March 15, 2023.
- V. Adjustment to Agenda
- VI. Persons Desiring to Address the Board - Sign in required per policy BEDH-Public Participation in Board Meetings.
  - A. Public Comment
- VII. Board Chair
- VIII. Personnel
  - A. Resignations
  - B. Nominations - Transfers
- IX. Superintendent of Schools
  - A. Reading of the Essential Behaviors and Outcomes Proclamation
  - B. Superintendent Report
  - C. Assistant Superintendent Update

- D. Monthly Financial Report
- E. Student Board Representative Report

X. Questions of Board Members

XI. Committee Reports

- A. Finance Committee (Exhibit)
- B. Budget Committee (Exhibit)
- C. Athletic Committee (Exhibit)
- D. Building Committee (Exhibit)
- E. Negotiations Committee
- F. Education Committee (Exhibit)
- G. Policy Committee (Exhibit)
- H. United Technologies Center Board
- I. Behavioral Review Committee
- J. Dropout Prevention Committee
- K. SPRPCE Board
- L. Community Relations Committee (Exhibit)
- M. Equity in Education Committee
- N. Strategic Planning Ad-Hoc Committee

XII. Policy Consideration (all with exhibit)

- A. Discuss and act on the first reading Policy ECB - Pest Management in School Facilities and on School Grounds
- B. Discuss and act on the first reading Policy JRA – Student Education Records and Information
- C. Discuss and act on the second reading Policy GBO – Family Care Leave
- D. Discuss and act on the second reading Policy JL - School Wellness

XIII. Old Business

- A. Discuss and act on the 2023-24 School Calendar.

XIV. New Business

- A. Discuss and Act on Administrative Contracts for school year 2023-2024
- B. Discuss and Act on the new K-5 reading program.
- C. Election of Chair and Vice Chair

XV. Communication and Correspondence

- A. Set Meeting Dates

XVI. Executive Session

- A. Executive Session to discuss and act on labor contract discussions with EA22 support staff, pursuant to 1 M.R.S.A § 405(6)(D).
  
- B. Executive Session pursuant to 1 M.R.S.A § 405(6)(E).

XVII. Other Business

- A. To see what action, if any, the Board wishes to take on business required by items that are part of this agenda.

XVIII. Adjourn

**Education enables all students to learn the skills, acquire the knowledge, and develop the attitudes necessary for them to reach their potential as citizens who can meet the challenges of a changing global society. We believe that:**

- **all citizens in our communities share the responsibility to educate our children and themselves,**
- **our schools are community support systems and should welcome and encourage all members of our communities to participate, and**
- **our schools will have a supportive and empowering atmosphere for all students and community members.**

**Please notify the Office of the Superintendent of Schools at 862-3255 at least 48 hours prior to the meeting if you require any assistance in order to fully participate in this meeting. The meeting is filmed and will be available for public viewing **on the district website.****

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

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SHAWN MCBREAIRTY,

CIVIL ACTION

Plaintiff

Docket No: 1:23-cv-00143-NT

-versus-

HEATH MILLER, in his personal  
and official capacities, and  
SCHOOL BOARD OF RSU 22,

Defendant

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Transcript of Proceedings

Pursuant to notice, the above-entitled matter came on for **Motion Hearing and Oral Argument** held before **THE HONORABLE NANCY TORRESEN**, United States District Court Judge, in the United States District Court, Edward T. Gignoux Courthouse, 156 Federal Street, Portland, Maine, on the 25th day of April, 2023 at 2:37 p.m., as follows:

Appearances:

For the Plaintiff: Marc Randazza, Esquire  
Robert Joseph Morris, II, Esquire

For the Defendants: Melissa A. Hewey, Esquire  
Susan M. Weidner, Esquire

Tammy L. Martell, RMR, CRR  
Official Court Reporter

(Prepared from manual stenography and  
computer-aided transcription)

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(Open Court.)

THE COURT: Good afternoon.

MS. HEWEY: Good afternoon, Your Honor.

MR. RANDAZZA: Good afternoon, Your Honor.

THE COURT: All right. This is Shawn McBreairty versus Heath Miller and the RSU 22 School Board. The docket number is 1:23-cv-143-NT. I'm going to have counsel enter your appearances.

MR. RANDAZZA: Marc Randazza for Mr. McBreairty. To my left is my associate Robert Morris, who I will note was admitted to the Maine bar yesterday, but.

THE COURT: Congratulations. The finest bar in the country.

MR. MORRIS: Thank you, Your Honor.

THE COURT: Yep. All right. And I see Mr. McBreairty at the back table and good afternoon, Mr. McBreairty, and who is the female?

MR. RANDAZZA: That is Cassie Curran, she is my paralegal, Your Honor.

THE COURT: All right. Thank you for joining us.

And for the defendants.

MS. HEWEY: Melissa Hewey and Susan Weidner.

THE COURT: All right. Good afternoon to both of you as well.

MS. HEWEY: Thank you.

1 MS. WEIDNER: Afternoon.

2 THE COURT: All right. So, I have read -- I have read  
3 this book. So I have read the pleadings and the exhibits, I  
4 have viewed the videotapes, and have read a good number of the  
5 cases as well. So I'm not exactly sure what you want to do  
6 today. I don't know if either party has any additional  
7 evidence to present, but let me ask that question first.

8 Mr. Randazza, for the plaintiff?

9 MR. RANDAZZA: Judge, the only thing we have is the  
10 agenda for tomorrow's meeting.

11 THE COURT: Okay. Any objection to that being  
12 admitted as an exhibit?

13 MS. HEWEY: I haven't seen it.

14 THE COURT: Oh. But it's probably your client's  
15 agenda, right?

16 MS. HEWEY: If it's my client's agenda, I'm not going  
17 to object.

18 THE COURT: I had a feeling.

19 MR. RANDAZZA: Your Honor, may I approach?

20 THE COURT: Yes.

21 MS. HEWEY: Did you get this off the website?

22 MR. RANDAZZA: Yes, only about a half an hour ago.

23 MS. HEWEY: If you can tell me you got it off the  
24 website, I'm not going to object.

25 THE COURT: You're an officer of the court, Mr.

1 Randazza, did you get this off the RSU 22 website?

2 MR. RANDAZZA: Yes, Your Honor.

3 THE COURT: And it --

4 MR. RANDAZZA: Mr. McBreairty did, but I also viewed  
5 it on the -- on the laptop myself. It is a true and correct  
6 copy, and I represent -- make that representation.

7 THE COURT: All right. Then I would -- any objection?

8 MS. HEWEY: No.

9 THE COURT: All right. That -- Plaintiff's 1 is  
10 admitted. I'm going to have it marked as Plaintiff's 1, all  
11 right?

12 MR. RANDAZZA: Yes, Your Honor, thank you.

13 THE COURT: All right. So that's the only evidence  
14 that you would have to offer and you're just here to argue the  
15 case or how do you want to do it?

16 MR. RANDAZZA: Yes, Your Honor, that's all.

17 THE COURT: All right.

18 And, Ms. Hewey, do you have any evidence to offer?

19 MS. HEWEY: I do not.

20 THE COURT: All right. So we'll consider the  
21 evidentiary portion closed and let's talk about oral -- it's  
22 essentially oral argument then.

23 MR. RANDAZZA: Yes.

24 THE COURT: So I have it set for an hour, we got a  
25 little late start, but my anticipated way this would run would

1 be just to give each side an equal amount of time and then give  
2 you some amount of time for any kind of rebuttal to the other  
3 side. Does that sound like it would be good for you?

4 MR. RANDAZZA: Yes, Your Honor.

5 THE COURT: Any objection, Ms. Hewey?

6 MS. HEWEY: No, Your Honor.

7 THE COURT: Okay. So, maybe 15 minutes to start on  
8 each side, and then you can have 10 minutes in rebuttal, and  
9 then if I have any questions after that I'll ask them.

10 MR. RANDAZZA: Sound great, Your Honor.

11 THE COURT: All right. And I may jump in a little bit  
12 if I -- if something hits me because there -- and there is only  
13 really one area that I want to go into any detail with you on,  
14 so go ahead, Mr. Randazza.

15 MR. RANDAZZA: Thank you, Your Honor. Your Honor, I  
16 think we should begin by understanding, and I'm sure Your Honor  
17 does, but for the record, the burdens here. Our burden is to  
18 show that the government's actions implicate the First  
19 Amendment which then shifts the burden to them to justify them.

20 Here I think there is no argument this is a limited public  
21 forum, but that limitation is created both by custom, practice,  
22 the rule, and by Maine law, which Your Honor is very well  
23 familiar with due to McBreairty 1, McBreairty versus RSU 22.

24 Now, they can have content-based restrictions if those  
25 content-based restrictions preserves the purposes of the

1 limited forum, as stated in Rosenberger. It must be  
2 reasonable, in light of the purpose served by the forum, and  
3 the purpose of the forum is established by 20 MRS 1001  
4 subparagraph 20 and again recognized by this Court in the prior  
5 case.

6 Now, viewpoint-based restrictions, however, are a  
7 different standard. They must meet strict scrutiny.

8 Our first argument is that Rule 2 is unconstitutional on  
9 its face. A complaint is a viewpoint. A viewpoint need not be  
10 political. Any forum, or support, or opposition to an idea is  
11 a viewpoint. If you can praise the government employee under  
12 the policy, you must be able to criticize them.

13 Now, the state statutes here which my friend refers to  
14 regard workplace bullying, employee records. These do not  
15 supersede the First Amendment and they are not applicable to a  
16 member of the public. Maine law requires that the public can  
17 speak freely about school education matters subject to  
18 reasonable standards. That's 20-A MRS 1120.

19 I believe critiquing government employees in this public  
20 forum is a school and education matter. The complaints are not  
21 personnel matters, criticism of a government employee is  
22 different than a discussion of Civil Service personnel  
23 practices. If complaints are personnel matters, then so are  
24 praise. Saying this teacher is great could lead to retention  
25 or promotion, just as this teacher is horrible could lead to

1 discipline.

2 Now, my friend does cite the Fairchild case to say, well,  
3 personnel matters can be excluded. However, the Fairchild case  
4 defines those: appointment, employment, evaluation,  
5 reassignment, duties, discipline. These are traditional  
6 personnel matters. It doesn't mean that any complaint or any  
7 discussion of somebody is therefore, per se, a personnel  
8 matter.

9 You will note from the pleadings that Ms. Stoyanova, for  
10 example, was allowed to be praised. In fact, the speaker who  
11 praised her was praised for praising her. Mr. McBreairty --  
12 and this is the application of Rule 2, unconstitutional as  
13 well, was thwarted three times from discussing complaints about  
14 government employees in this public forum created for that  
15 purpose.

16 We also have argued that the rule is vague. Now, if we  
17 look at the rule itself, I think it's very clear and  
18 unconstitutional; however, their argument is that Mr. Miller  
19 has come around, after 10 years on the board, to come to a new  
20 interpretation of it. If it's his job every day to look at  
21 this, and it took him 10 years to come to a new definition of  
22 it, if it isn't unconstitutional on its face, it certainly is  
23 unconstitutional as applied.

24 Now, my friend has put forth a number of arguments that I  
25 think are rebuttable. They have argued that incidental

1 censorship is okay, however, when viewpoint discrimination  
2 doesn't occur if they incidentally prevent certain viewpoints  
3 from being heard in the course of suppressing certain general  
4 topics of speech, but this is not incidental. Limitation of  
5 criticism is the point, either of the rule or of how they've  
6 applied it.

7 They've also argued that they could be exposed to  
8 liability if Mr. McBreairty or someone else says something  
9 defamatory. That's simply not true. We have -- one problem  
10 there is that it's petitioning activity, thus privileged, it's  
11 protected by the Maine Anti-SLAPP law.

12 They've also argued that when it goes over the live stream  
13 this could create liability; however, that ignores 47 U.S.C.  
14 Section 230 which prohibits any such liability at all. When  
15 they say, we can restrict talking about personnel matters,  
16 well, we're not complaining about that. Complaining about  
17 somebody is not a personnel matter. This refers -- refers to  
18 employment matters.

19 THE COURT: Can I ask you about that a little bit?  
20 Complaining about someone, a named teacher, is not a personnel  
21 matter is your position?

22 MR. RANDAZZA: Yes, I would say that there are two --  
23 there may be a Venn diagram where they somewhat overlap;  
24 however, those enumerated areas is -- that I talked about that  
25 were talked about in Fairchild --

1 THE COURT: Mm-hmm.

2 MR. RANDAZZA: -- those would be how you would  
3 commonly consider a personnel matter. If somebody were to  
4 criticize, for example, my performance here today, that  
5 wouldn't be a personnel matter at my firm. If I were to  
6 criticize Mr. Robert -- Mr. Morris's attire today, I would both  
7 have bad taste but also not a personnel matter.

8 We were talking about things in the Maine statutes which  
9 talk about confidential personnel matters, so, for example, a  
10 retention or a bonus or something like that. But I don't even  
11 see how you could refrain -- you could restrain the public from  
12 talking about that, that's the public's information.

13 If Mr. --

14 THE COURT: So -- so when the public talks about it,  
15 it's not a personnel matter -- matter; is that what your  
16 position is?

17 MR. RANDAZZA: The way I see this rule, the proper way  
18 to interpret it is that the board can not and will not respond  
19 if it's a personnel matter. If somebody were to stand up and  
20 say, you know, they should be disciplined for putting in false  
21 records of overtime. The board's proper response to that is,  
22 that's a personnel matter and we're not going to respond to it.  
23 However --

24 THE COURT: So the speaker should be able to say  
25 whatever and it's just that the board doesn't respond --



1 shouldn't respond to it, that's how you interpret that?

2 MR. RANDAZZA: I believe that's -- that's the superior  
3 interpretation, Your Honor. I think it's not an unreasonable  
4 interpretation also to tell the speaker if they wished to have  
5 a specific policy, which they don't, that says you cannot  
6 discuss confidential personnel matters.

7 I don't know how they're confidential once the public has  
8 them, but I could see if you somehow had them leaked to you or  
9 you had stolen them or something like that. But really I -- I  
10 just don't see how you can tell the public that they can't  
11 criticize somebody with this because it's a personnel matter  
12 but then expand the definition of personnel matter to any  
13 criticism at all.

14 You know, let's not forget that this would -- such a rule  
15 I think would be candy in the hands of any government agency  
16 that didn't want to be criticized. You know, imagine, I don't  
17 know, say the Derek Chauvin, if something so horrible as that  
18 happened in Portland, to say, well, criticizing a police  
19 officer who kills somebody, that's a personnel matter, you  
20 can't talk about that here. You can't talk about that in our  
21 public forum created for the purpose of discussing concerns  
22 about this government agency.

23 Now, my friend has also said that there are alternate  
24 avenues through which he can do this, but that's just not so.  
25 If you have a public meeting where somebody is able to voice

1 their concerns to the board, they're not just creating a way to  
2 communicate with the government. If you had that, Maine law --  
3 let's say that Maine law didn't require these public meetings,  
4 perhaps you could argue that we don't have to have public  
5 meetings at all. But the Cyr case, Cyr versus Addison, which  
6 Your Honor is familiar with from the last case, and which while  
7 it's a District of Vermont case it definitely fights outside of  
8 its weight class given how much it is cited, which states even  
9 participating by phone substantially diminished the plaintiff's  
10 ability to communicate not just with the board but with  
11 community members.

12 When you're speaking at a public meeting, you're not just  
13 speaking to the board. Saying you can mail in your complaints  
14 about this government agency I don't think is truly an  
15 alternate avenue of communication. It may be a separate avenue  
16 of communication, but how is one to communicate with one's  
17 peers, with one's fellow citizens who are all there for the  
18 gathered purpose protected both by the First Amendment and by  
19 Maine law?

20 The fact is the government doesn't like to get criticized.  
21 Nobody really does. But they have unlimited resources, they  
22 can just tax the citizens to cover their expenses. The  
23 government has a monopoly on finance. All this --

24 THE COURT: Well, I don't think the school district  
25 considers itself to have unlimited resources, that's for sure.

1 MR. RANDAZZA: Well, it may not consider it, but they  
2 can certainly tax the citizens to take care of anything they  
3 want. That's why the citizens have but one avenue, the First  
4 Amendment, that's it. They have nothing else.

5 So, whether it's police departments who try to enforce  
6 rules against criticizing them, similar rules that I have  
7 challenged in other places, to school boards doing the same,  
8 it's never acceptable. This district has to tolerate dissent.

9 You know, today Mr. McBreairty has his complaints about  
10 the school board. Frankly, I'll be honest, I don't agree with  
11 them; but I'm not here defending his position. The First  
12 Amendment is a neutral principle. And whatever kind of  
13 restriction that they think they might want today, I don't  
14 think they'll be very happy if it's actually employed and then  
15 one day the political winds change, as they always do. So,  
16 they need to tolerate dissent.

17 New York Times versus Sullivan, despite it being  
18 embattled, I don't agree with that either, but it is -- it is  
19 our bellwether. It says that the government must tolerate  
20 sometimes caustic and even vehement attacks on it because that  
21 is the theory of our Constitution.

22 If you have any other questions for me, Your Honor, I  
23 would be delighted to answer them.

24 THE COURT: I may, but I'm going to see what happens  
25 on the other side and then I'll probably question in rebuttal

1 or after it's over, all right.

2 MR. RANDAZZA: Thank you very much, Your Honor.

3 THE COURT: Thank you. Ms. Hewey.

4 MS. HEWEY: Thank you.

5 THE COURT: Your brother came in less than 15 minutes,  
6 so.

7 MS. HEWEY: Oh, I was going to say my brother was  
8 here?

9 THE COURT: Your brother in the bar.

10 MS. HEWEY: Okay, good, because we wouldn't want my  
11 brother here.

12 THE COURT: I don't know your brother, so I don't  
13 know.

14 MS. HEWEY: The only reason he would be in a federal  
15 court would not be a good one.

16 THE COURT: Oh, oh, oh.

17 MS. HEWEY: I'm just kidding.

18 THE COURT: Maybe I do know your brother.

19 MS. HEWEY: Just kidding. Okay. Good afternoon, Your  
20 Honor. At the March 15, 2023, school board meeting Shawn  
21 McBreairty said, as long as I do not incite violence or use  
22 real obscenities you can't restrict my free speech. I can  
23 speak about anyone employed by RSU 22 and I can say anything I  
24 want about them, and I will. And he is here today asking that  
25 you use the extraordinary injunctive power of the Court to

1 order that RSU 22 allow him to say anything he wants about its  
2 employees in a public meeting that's live streamed.

3 I would contend that that is not at all what the First  
4 Amendment is designed to protect. The First Amendment is  
5 designed to protect the free flow of ideas, not harassment and  
6 trashing of regular school teachers.

7 So I think we all agree, it seems, that this is a limited  
8 public forum, and we all agree that a governmental entity such  
9 as RSU 22 can make content-based restrictions that are  
10 reasonable in a limited public forum.

11 Here the content-based restriction is restricting  
12 personnel matters or complaints concerning students or staff  
13 issues. The -- so the question becomes, is that a reasonable  
14 restriction, and the answer I think is pretty clear that it  
15 has -- it is and it has to be.

16 And we've talked about that in our brief I won't go over  
17 it except to say that these are ordinary, hardworking teachers  
18 who don't deserve to be -- to have their privacy and their --  
19 sort of their -- their entire public -- professional life  
20 broadcast and criticized on -- on public TV.

21 It is true that Mr. McBreairty has the right to dispute  
22 what RSU 22 is doing. It is true that Mr. McBreairty has the  
23 right to make complaints, to point out his views, and all of  
24 that he is permitted to do. The only thing he is not permitted  
25 to do is use the names of people who work at RSU 22.

1           And I would point out that the plaintiff has not given you  
2 case law to support the -- the -- some of the arguments he is  
3 making. For one thing, I don't understand the definition that  
4 he has given the Court of personnel matters. I think the -- to  
5 the extent that the Court is looking for any guidance in Maine  
6 law, 20-A Section 6101 which defines what personnel matters are  
7 confidential. And I agree that's mostly for the employer, not  
8 for the public, but that could give some guidance as to how we  
9 would define personnel matters. And basically what the statute  
10 says, and I'll use my language rather than the -- the exact  
11 language of the statute, is things that discuss how somebody's  
12 performing at work as well as a whole bunch of other things.

13           So, what we're talking about here is somebody who wants to  
14 get up and talk about the performance of specific people and to  
15 say -- to criticize that. That is something that he can do  
16 that he has a right to do under the district's complaint  
17 policy. The only thing the district is saying is that -- that  
18 complaints no matter what their content -- so this is viewpoint  
19 neutral, you know, no matter what their content they cannot be  
20 aired at a -- at a board meeting. And the cases we cite in our  
21 brief, the Fairfield case, Moms For Liberty, and a bunch of  
22 other cases, all come down exactly the way -- the way we're  
23 asking the Court to come down here today.

24           THE COURT: Can I just jump in on you there?

25           MS. HEWEY: Yes.

1 THE COURT: So on the idea about complaints, I found  
2 the cases that were cited by the plaintiff, Iancu versus  
3 Brunetti and -- I think it was Tam although --

4 MS. HEWEY: Bacha.

5 THE COURT: Matal versus Tam. These are Supreme Court  
6 cases involving trademark registration, and there the Court --  
7 the Supreme Court, if I'm saying those cases -- pronouncing  
8 them right, I don't know, but the Supreme Court sort of focused  
9 in on complaining or disparagement is a viewpoint.

10 Is there any way of distinguishing those cases?

11 Have you read those cases and are they concerning to you?

12 MS. HEWEY: They're not concerning to me because I  
13 don't think this is a trademark case. What we're talking about  
14 here is complaining about people, not about ideas, and what --  
15 what the -- what the district has said in this limited public  
16 forum is, yes, you can express your ideas, yes, you can express  
17 your opinions no matter what they are, it's people that you  
18 can't be talking about. That I think is completely different  
19 than what's been discussed in -- in the cases that you have  
20 just mentioned.

21 Whereas in the cases that we talk about the courts are  
22 acknowledging that there are real reasonable reasons for a  
23 government to make the restrictions like RSU 22 has made here.

24 THE COURT: All right, thank you. Keep going.

25 MS. HEWEY: I -- I -- I think that's really all I have

1 to say unless there are additional questions. I think this is  
2 an important -- there is an important distinction that has to  
3 be made here, and for -- particularly for I think for school  
4 boards but for all governmental entities between that talking  
5 about specific individuals which has to be protected --

6 THE COURT: Mm-hmm.

7 MS. HEWEY: -- it just has to be --

8 THE COURT: Mm-hmm.

9 MS. HEWEY: -- and talking about ideas which  
10 absolutely he should be able to express for the -- the three  
11 minutes that anybody else can be, and we -- and we completely  
12 acknowledge that.

13 THE COURT: All right. Thank you, Ms. Hewey.

14 Mr. Randazza.

15 MR. RANDAZZA: Thank you.

16 THE COURT: Let me just ask you to address that topic,  
17 because Ms. Hewey distinguishes those trademark infringement  
18 cases -- or not infringement, I guess it's just a trademark  
19 registration case.

20 MR. RANDAZZA: Yes, Your Honor.

21 THE COURT: By saying that those are -- that's come --  
22 focused on ideas and not people, and do you have any rebuttal  
23 to that?

24 MR. RANDAZZA: Yes, Your Honor. In Tam it was about  
25 people. In fact, it was very much about people. It was about



1 entire groups of people. In Tam the -- the -- the party was a  
2 band of Asian American musicians and the trademark office said  
3 it was offensive to refer to them by the slur The Slants.  
4 Mr. Tam, who I happen to know personally, wonderful young man,  
5 said, well, I don't want to find that offensive anymore, I  
6 think I should be able to reclaim that as my term of pride. So  
7 neither of those cases were limited on their facts to  
8 trademarks, those cases very much said that giving offense is a  
9 viewpoint, so --

10 THE COURT: But that doesn't -- I mean that's -- I --  
11 I -- that's a really good comeback, but I feel like the  
12 trademark what was The Slants apparently?

13 MR. RANDAZZA: Yes, it was.

14 THE COURT: And it wasn't, you know, like singling out  
15 a person.

16 MR. RANDAZZA: I guess we could talk about whether --  
17 the relative merits of whether talking about somebody -- I mean  
18 by this virtue we could say that the -- the legislature could  
19 say you can't criticize Governor Mills. I mean there is no --

20 THE COURT: Well --

21 MR. RANDAZZA: -- logical room between this and that.

22 THE COURT: Yeah, but then we're getting into the  
23 question of what -- you know, what rules under the First  
24 Amendment apply. And we're in a limited public forum clearly,  
25 so everybody agrees on that, but I guess the question I'd have

1 there is, I mean certainly you can criticize government  
2 officials in a public park, you can -- but the question is in  
3 the limited public forum context what would that be?

4 MR. RANDAZZA: Well, if let's say the legislature had  
5 come and talk about your government day and you want to stand  
6 up and talk about the Boston Red Sox, I would hope the gavel  
7 would come down and they would say you're outside of the  
8 contours, this is a content-based restriction, we're talking  
9 about the government.

10 Now, could they then -- remember state law says they have  
11 to have this forum. This isn't just a forum created out of the  
12 goodness of their hearts. There are places where you don't  
13 need to have an open government forum. Massachusetts doesn't  
14 require it. So some of those communities have responded to  
15 cases like this by simply saying no more government forum. But  
16 state law says you have to have it. So if state law says you  
17 have to have it, I don't think it's reasonable to say you can't  
18 talk about public officials. So Iancu versus Brunetti and --  
19 the Brunetti case and the Tam case I think both support the  
20 notion that even giving offense is a viewpoint.

21 Now, that's not what this case is about. You know, if  
22 they had said you can't say anything offensive, if that's their  
23 new policy one day, we might be back here, we might not, but  
24 that's not anything that's complained about. And I think we  
25 have to make sure that we focus on what the policy is and what

1 we're actually challenging. We're not challenging the whole  
2 thing.

3 THE COURT: Yeah, tell me exactly what you are  
4 challenging then. It's just the --

5 MR. RANDAZZA: Only --

6 THE COURT: -- personnel matters, right?

7 MR. RANDAZZA: Only what we have bolded on page two of  
8 our complaint, Your Honor, which is --

9 THE COURT: Mm-hmm.

10 MR. RANDAZZA: Now, the part that says confidential  
11 personnel information will not be shared in a public session.

12 THE COURT: Hang on a minute, I've got to get there.

13 MR. RANDAZZA: Sure.

14 THE COURT: Okay, yep. That's not what you're talking  
15 about.

16 MR. RANDAZZA: That first sentence, like I said before  
17 I think that the way to interpret that is it limits the board,  
18 not the speaker --

19 THE COURT: Mm-hmm.

20 MR. RANDAZZA: -- however, we're not challenging that.  
21 If Mr. McBreairty had raised some confidential personnel  
22 information and they had said we're sorry but you can't share  
23 that here, I'm not promising you we wouldn't be here but we're  
24 not here about that.

25 No complaints or allegations will be allowed at meetings

1 concerning any particular -- any person employed by the school  
2 system. I -- I don't think I have ever seen a policy so  
3 clearly unconstitutional on its face because you can cross out  
4 complaints and put in praise and we have record evidence of  
5 praise being allowed. If the government can say you can have  
6 praise but not complaints, I -- I don't think we live in the  
7 republic we think we live in. And I --

8 THE COURT: You're getting me a little confused now  
9 because in your first part of your argument you were talking  
10 about personnel matters but now you're focusing me on just this  
11 language no complaints or allegations.

12 MR. RANDAZZA: Right. That's all we're trying to get  
13 rid of.

14 THE COURT: Why were we focussing on personnel matters  
15 then?

16 MR. RANDAZZA: Well, I was rebutting my -- my sister's  
17 arguments that -- even that I would say, even that I think is  
18 problematic. But you just focus on this one sentence here,  
19 only what we've bolded, that's all we're asking you to strike  
20 out of this policy.

21 So if they want to then say -- it seems that what they've  
22 argued is that complaints are also personnel matters. But if  
23 that's the case, then why are these in two separate sentences?  
24 That just doesn't make any sense. If it said personnel --  
25 confidential personnel information.

1 THE COURT: And then it goes on, and personnel matters  
2 or complaints in that third. So I agree it's not -- it's not a  
3 total model of clarity.

4 Let me ask you this question, you've heard about the new  
5 rule that may be coming your way, does that have the same  
6 infirmity?

7 MR. RANDAZZA: Well, first off, may be coming -- I  
8 think it's extremely hypothetical because that's why we put the  
9 agenda in. If you look at the agenda, it's not on the agenda  
10 for tomorrow. In fact, what's funny, personnel matters are on  
11 the agenda for tomorrow.

12 If we -- here. If we look at Item 8 on the agenda  
13 tomorrow, personnel matters are on the agenda. They're  
14 violating their own policy by that. But then I look at the  
15 entire rest of the agenda, make sure I didn't miss it, I had my  
16 associate look through it and my paralegal look through it to  
17 see can you find anything about noticing this claimed new  
18 policy.

19 I mean I can mail them a policy that I think they'd like  
20 and it would have the same legal effect, but it certainly isn't  
21 going to be considered tomorrow. And as they've said, it takes  
22 two readings, so at best that's going to be put on the agenda  
23 in June. And if it is, we will be back to challenge it.  
24 Because I don't think that you can, consistent with Maine law  
25 and the First Amendment, simply say you can't criticize a

1 person, you can only criticize an idea. That flies in the face  
2 of Sullivan. That flies in the face of Matal versus Tam. It  
3 flies in the face of every single case under the First  
4 Amendment sun.

5 THE COURT: But Sullivan and Matal versus Tam are  
6 different contexts, and as you know the First Amendment is  
7 context specific.

8 MR. RANDAZZA: Agreed, Your Honor.

9 THE COURT: And so what the New York Times can do  
10 versus what a school board can do are just two different  
11 things. And, in fact, Mr. McBreairty's comments that he can  
12 say anything about anybody at any time, et cetera, that's not  
13 what the law is in the limited public forum that he is using  
14 his speech in.

15 MR. RANDAZZA: I agree. I do not agree with Mr.  
16 McBreairty's statement that he can say anything he wants. I  
17 think it has to be within the contours of that forum which is  
18 to discuss school matters.

19 Now, if he wants to come up there and question a teacher's  
20 personal life, I don't think he can do that. I think they can  
21 stop him from doing that. If he wants to talk about their  
22 credit worthiness, which is something mentioned under Maine law  
23 as confidential personnel matters, I don't think he can do  
24 that. I'm sorry, I disagree with him. But I think if you're  
25 going to criticize -- if you're going to have a public forum

1 which is created by state law, you cannot limit that public  
2 forum to something less than state law.

3 And that's an important thing when you think about these  
4 cases that my sister believes support her. When you look at  
5 Davison versus Rose, this is very much distinguishable because  
6 this one -- the plaintiff had to yield the floor one time when  
7 he tried to talk about an individual board member. If you stop  
8 reading there, it supports them. But he was not addressing the  
9 designated topic of the hearing.

10 In another video presented the plaintiff was allowed to  
11 speak uninterrupted, despite mentioning an individual board  
12 member, when his comments focused on the topic of the meeting.  
13 When it was within the confines of the public forum it was  
14 allowed.

15 Now, Maine law 20-A MRS 1120 says that you have to allow  
16 public comment on school and education matters. Imagine if,  
17 you know, there were -- there was asbestos in the building and  
18 somebody was complaining about that and they just said we're  
19 going to limit that now, that's not part of public forum,  
20 building matters.

21 I mean the government can't have plenary power even if we  
22 accept that this new policy that's not on the agenda, that  
23 isn't going to be on the agenda for at least two months, if  
24 it's enacted at all, which I think would be struck down because  
25 you cannot do it in the context of this state law that creates

1 the forum.

2 If you look at Fairchild the school board defined  
3 personnel matters, and again personnel matters aren't what we  
4 care about. Confidential personnel matters limit that.

5 Moms For Liberty versus Brevard, that had a restriction  
6 against personally directed and abusive speech. Now, that's  
7 where I think Matal versus Tam would really come into play.  
8 And I think they got it wrong, but let's accept that they got  
9 it right. Rule 2 specifically bans complaints and allegations.  
10 Well, the rule in Moms For Liberty did not limit the personally  
11 directed attacks against any classes of person. The as-applied  
12 challenge in that case failed because there were hundreds of  
13 instances where speakers were allowed to speak uninterrupted  
14 and only four where they were stopped. I think that would be a  
15 de minimis violation, and that's how the Court looked at it.  
16 Here we only have this rule enforced against one person. Only  
17 one person, only one viewpoint.

18 If we look at --

19 THE COURT: And with regard to that the -- the -- it  
20 seems to me that Mr. McBreairty, at least in the meetings that  
21 he is complaining about in February and March, was the only one  
22 to name names.

23 MR. RANDAZZA: In those meetings, yes, but in meetings  
24 prior to him prevailing in the prior case everybody was allowed  
25 to talk about that. And I haven't looked -- and I will admit



1 we haven't looked through every single school board meeting,  
2 but what I will say is we only have him, they haven't even  
3 shown anybody else.

4 You would think to show a justification if they looked at  
5 Moms For Liberty if there were 100 to four -- if the score was  
6 100 to four, I would feel a little bit foolish here trying to  
7 distinguish Moms For Liberty. Here it's a shut out, it's just  
8 him and just this viewpoint. If he were up there praising  
9 employees, we probably wouldn't be here. In fact, we know we  
10 wouldn't be here because it's never been enforced that way. No  
11 one has ever been shown to be shut down because they praised  
12 somebody.

13 THE COURT: But you've shown us one time when the -- a  
14 named teacher was praised from the October meeting I believe it  
15 was.

16 MR. RANDAZZA: Yes, and I believe it would be their  
17 burden to show us that it happened -- you know, that -- that  
18 the score was different, but it's not. And, again, while we  
19 looked through as many as we could in the time we had, never  
20 were we able to find anybody who was ever shut down for the  
21 challenge speech -- you know, the challenge regulation of  
22 criticism.

23 If I may, just the other two cases that they rely on where  
24 they say that these are so clearly helping them. Prestopnik  
25 versus Wheelan from the Second Circuit. In this one the

1 plaintiff failed to produce evidence to say that the policy  
2 wasn't viewpoint neutral or unreasonable, and then Pollack  
3 versus Wilson the Tenth Circuit determined that the personnel  
4 matter restriction protects personal and performance evaluation  
5 information. Again a narrow category of personnel information.

6 We're just saying look at, no complaints or allegations  
7 will be allowed concerning any person employed by the school  
8 system or against particular students. And frankly we don't  
9 even challenge the student one at this point because I don't  
10 believe we have standing to do so. He has never criticized a  
11 student and doesn't plan to. So it's just government employees  
12 that have to stand -- it's part of the -- part of the burden of  
13 working for the government is you have to stand being  
14 criticized by the people who pay your taxes to support you.  
15 There is just no other way that we can have a self-governing  
16 republic.

17 THE COURT: All right, thank you.

18 MR. RANDAZZA: Thank you, Your Honor.

19 THE COURT: Ms. Hewey, last words.

20 MS. HEWEY: Just a couple of things. Just to -- to  
21 speak to the last point, if people have complaints about  
22 teachers, there is, as I said before, a process they can  
23 follow. So we're not saying we're not going to listen to  
24 complaint about teachers, we're just saying there is a way to  
25 do it and there isn't.

1           The next thing I want to just address very briefly is this  
2 notion that teachers and other people that Mr. McBreairty  
3 proposes to talk about are public officials. And I think that  
4 that's not a correct statement of Maine law. True versus  
5 Ladner I think makes it pretty clear that whereas you might be  
6 able to talk about a superintendent or something like that as a  
7 public official, teachers -- I think it was a math teacher in  
8 True versus Ladner, but I -- I think it holds true for any sort  
9 of staff position are not public officials. So that's a  
10 different law and I think the Court has -- has pointed that  
11 out.

12           The next thing in terms of this -- that Mr. McBreairty is  
13 the only person who has been shut down, and all I can say is  
14 the board chair reads the rules at the beginning of the meeting  
15 and the -- from what we've been able to see, Mr. McBreairty is  
16 the only person who has violated those rules which is the  
17 reason he is the only person who has been shut down, and there  
18 was only one time that we were able to find -- find and that  
19 they found where this -- this person was praised.

20           The last thing I want to do is just end with the Court's  
21 language in the Fairchild case: The board has a legitimate  
22 interest if not a state law duty to protect student and teacher  
23 privacy and to avoid naming or shaming as potential frustration  
24 of its conduct of business. That's what this case is about.

25 Thank you.

1           THE COURT: Thank you, Ms. Hewey. All right. I  
2 realize there is a meeting tomorrow. I've got an opinion in  
3 progress and I'm going to try my level best to get it out  
4 before tomorrow's meeting.

5           MS. HEWEY: Thank you, Your Honor.

6           MR. RANDAZZA: Your Honor, thank you so much for  
7 seeing us.

8           THE COURT: Court's in recess.

9                                 (Time Noted: 3:16 p.m.)

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**C E R T I F I C A T I O N**

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I, Tammy L. Martell, Registered Merit Reporter, Certified  
Realtime Reporter, and Official Court Reporter for the United  
States District Court, District of Maine, certify that the  
foregoing is a correct transcript from the record of  
proceedings in the above-entitled matter.

18

Dated: May 3, 2023

19

/s/ Tammy L. Martell

20

Official Court Reporter

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22

23

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25

**U.S. District Court  
District of Maine (Bangor)  
CIVIL DOCKET FOR CASE #: 1:23-cv-00143-NT**

MCBREAIRTY v. MILLER et al  
Assigned to: JUDGE NANCY TORRESEN  
Referred to: MAGISTRATE JUDGE JOHN C. NIVISON  
Case in other court: First Circuit Court of Appeals, 23-01389  
Cause: 42:1983 Civil Rights Act

Date Filed: 03/24/2023  
Jury Demand: Plaintiff  
Nature of Suit: 440 Civil Rights: Other  
Jurisdiction: Federal Question

**Plaintiff**

**SHAWN MCBREAIRTY**

represented by **BRETT D. BABER**  
LANHAM, BLACKWELL & BABER, P.A.  
133 BROADWAY  
BANGOR, ME 04401  
207-942-2898  
Fax: 207-941-8818  
Email: bbaber@lanhamblackwell.com  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**MARC RANDAZZA**  
RANDAZZA LEGAL GROUP PLLC  
30 WESTERN AVENUE  
GLOUCESTER, MA 01930  
702-420-2001  
Email: ecf@randazza.com  
**LEAD ATTORNEY**  
**PRO HAC VICE**  
**ATTORNEY TO BE NOTICED**

**ROBERT JOSEPH MORRIS , II**  
RANDAZZA LEGAL GROUP PLLC  
30 WESTERN AVENUE  
GLOUCESTER, MA 01930  
978-801-1776  
Email: rjm@randazza.com  
**LEAD ATTORNEY**  
**PRO HAC VICE**  
**ATTORNEY TO BE NOTICED**

V.

**Defendant**

**HEATH MILLER**  
*in his personal and official capacities*

represented by **MELISSA A. HEWEY**  
DRUMMOND WOODSUM &  
MACMAHON  
84 MARGINAL WAY  
SUITE 600

PORTLAND, ME 04101  
 207-772-1941  
 Email: mhewey@dwmlaw.com  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**SUSAN M. WEIDNER**  
 DRUMMOND WOODSUM  
 84 MARGINAL WAY  
 SUITE 600  
 PORTLAND, ME 04101-2480  
 207-772-1941  
 Fax: 207-772-3627  
 Email: sweidner@dwmlaw.com  
**ATTORNEY TO BE NOTICED**

**Defendant**

**SCHOOL BOARD OF RSU22**

represented by **MELISSA A. HEWEY**  
 (See above for address)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**SUSAN M. WEIDNER**  
 (See above for address)  
**ATTORNEY TO BE NOTICED**

Date Filed	#	Docket Text
03/24/2023	<a href="#">1</a>	COMPLAINT with Jury Demand against HEATH MILLER, SCHOOL BOARD OF RSU22 filed by SHAWN MCBREAIRTY. <b>PAYMENT OF FILING FEE DUE WITHIN 48 HOURS. IF FILING FEE IS BEING PAID WITH A CREDIT CARD COUNSEL ARE INSTRUCTED TO LOGIN TO CMECF AND DOCKET Case Opening Filing Fee Paid FOUND IN THE Complaints and Other Initiating Documents CATEGORY. CHECK PAYMENTS DUE WITHIN 48 HOURS.</b> (Service of Process Deadline 6/22/2023) Fee due by 3/27/2023. (Attachments: # <a href="#">1</a> Exhibit A: BEDH Public Participation Policy Rule 2, # <a href="#">2</a> Exhibit B: Video Exhibit Recording of Meeting October 19, 2022, # <a href="#">3</a> Exhibit C: Video Exhibit Recording of Meeting February 15, 2022, # <a href="#">4</a> Exhibit D: Police Report February 15, 2023, # <a href="#">5</a> Exhibit E: Video Exhibit Recording of Meeting March 15, 2023)(lcb) (Entered: 03/24/2023)
03/24/2023	<a href="#">2</a>	CIVIL COVER SHEET. (lcb) (Entered: 03/24/2023)
03/24/2023	<a href="#">3</a>	Emergency MOTION for Preliminary Injunction <i>for Plaintiff</i> , Emergency MOTION for Temporary Restraining Order by SHAWN MCBREAIRTY Responses due by 4/14/2023. (BABER, BRETT) (Entered: 03/24/2023)
03/27/2023	<a href="#">4</a>	NOTICE of Appearance by MELISSA A. HEWEY on behalf of HEATH MILLER, SCHOOL BOARD OF RSU22 (HEWEY, MELISSA) (Entered: 03/27/2023)
03/27/2023	<a href="#">5</a>	CERTIFICATE OF SERVICE by SHAWN MCBREAIRTY re <a href="#">3</a> Emergency MOTION for Preliminary Injunction <i>for Plaintiff</i> Emergency MOTION for Temporary Restraining Order , <a href="#">2</a> Civil Cover Sheet, <a href="#">1</a> Complaint,,, <i>for Plaintiff</i> (BABER, BRETT) (Entered: 03/27/2023)
03/27/2023	<a href="#">6</a>	CERTIFICATION for Admission Pro Hac Vice of Robert J. Morris II filed by BRETT D. BABER on behalf of SHAWN MCBREAIRTY (Total admission fee \$ 100 receipt number AMEDC-2778170.) <b>The District of Maine is a CM/ECF NextGen Court. If PHV counsel</b>

**AA123**

		has not previously been granted electronic filing rights with the District of Maine, PHV counsel will now need to submit a PRO HAC VICE request in this District via PACER at <a href="http://www.pacer.uscourts.gov">www.pacer.uscourts.gov</a> (BABER, BRETT) (Entered: 03/27/2023)
03/27/2023	<a href="#">7</a>	CERTIFICATION for Admission Pro Hac Vice of Marc J. Randazza filed by BRETT D. BABER on behalf of SHAWN MCBREAIRTY (Total admission fee \$ 100 receipt number AMEDC-2778175.) The District of Maine is a CM/ECF NextGen Court. If PHV counsel has not previously been granted electronic filing rights with the District of Maine, PHV counsel will now need to submit a PRO HAC VICE request in this District via PACER at <a href="http://www.pacer.uscourts.gov">www.pacer.uscourts.gov</a> (Attachments: # <a href="#">1</a> Exhibit Declaration of Marc J. Randozza) (BABER, BRETT) (Entered: 03/27/2023)
03/27/2023	<a href="#">8</a>	NOTICE of Appearance by SUSAN M. WEIDNER on behalf of HEATH MILLER, SCHOOL BOARD OF RSU22 (WEIDNER, SUSAN) (Entered: 03/27/2023)
03/27/2023		Reset Deadlines as to <a href="#">3</a> Emergency MOTION for Preliminary Injunction for Plaintiff Emergency MOTION for Temporary Restraining Order per Judge Torresen: Responses due by 4/3/2023. (slg) (Entered: 03/27/2023)
03/28/2023		Reset Deadlines: Filing Fee due by 3/30/2023. (slg) (Entered: 03/28/2023)
03/28/2023		Filing Fee Received from SHAWN MCBREAIRTY: Amount Paid: \$402.00. Receipt Number: 355. Method of Payment: Check. Purpose of Payment: Filing Fee. Date Paid: 3/28/2023. (jgd) (Entered: 03/28/2023)
04/03/2023	<a href="#">9</a>	RESPONSE in Opposition re <a href="#">3</a> Emergency MOTION for Preliminary Injunction for Plaintiff Emergency MOTION for Temporary Restraining Order filed by HEATH MILLER, SCHOOL BOARD OF RSU22. Reply due by 4/17/2023. (Attachments: # <a href="#">1</a> Declaration of Heath Miller, # <a href="#">2</a> Exhibit A- BEDH Public Participation Policy, # <a href="#">3</a> Exhibit B- GBGB Workplace Bullying Policy, # <a href="#">4</a> Exhibit C- Teacher's Union Position, # <a href="#">5</a> Exhibit D- Newly Drafted BEDH Policy, # <a href="#">6</a> Exhibit E- KE Public Concerns & Complaints Policy, # <a href="#">7</a> Exhibit F- September 21, 2022 Board Meeting Video, # <a href="#">8</a> Exhibit G- March 15, 2022 Board Meeting Video)(HEWEY, MELISSA) (Entered: 04/03/2023)
04/03/2023		Reset Deadlines as to <a href="#">3</a> Emergency MOTION for Preliminary Injunction for Plaintiff Emergency MOTION for Temporary Restraining Order per Judge Torresen: Reply due by 4/6/2023. (slg) (Entered: 04/03/2023)
04/06/2023	<a href="#">10</a>	REPLY to Response to Motion re <a href="#">3</a> Emergency MOTION for Preliminary Injunction for Plaintiff Emergency MOTION for Temporary Restraining Order filed by SHAWN MCBREAIRTY. (RANDAZZA, MARC) (Entered: 04/06/2023)
04/11/2023	11	NOTICE of Hearing on Motion <a href="#">3</a> Emergency MOTION for Preliminary Injunction for Plaintiff Emergency MOTION for Temporary Restraining Order. Counsel should review Amended General Order 2021-6 regarding Masks, Courthouse Entrance Protocols, Social Distancing and Testing. Motion Hearing set for 4/25/2023 02:30 PM in Portland Courtroom 2 before JUDGE NANCY TORRESEN. (slg) (Entered: 04/11/2023)
04/13/2023	<a href="#">12</a>	MOTION to Dismiss for Failure to State a Claim by HEATH MILLER, SCHOOL BOARD OF RSU22 Responses due by 5/4/2023. (HEWEY, MELISSA) (Entered: 04/13/2023)
04/14/2023	<a href="#">13</a>	Unopposed MOTION Excuse Local Counsel for Plaintiff by SHAWN MCBREAIRTY Responses due by 5/5/2023. (BABER, BRETT) (Entered: 04/14/2023)
04/14/2023	14	ORDER granting in part <a href="#">13</a> Unopposed Motion to Excuse Local Counsel for Plaintiff. Attorney Baber is excused from attending the April 25, 2023 hearing on the Plaintiff's motion for a temporary restraining order and preliminary injunction. He is not, however, excused from attending all future pre-trial proceedings. If local counsel wishes to be excused from attending a particular hearing, he shall file a motion to that effect; the Court

		will decide whether to excuse local counsel on a proceeding-by-proceeding basis. By JUDGE NANCY TORRESEN. (RGK) (Entered: 04/14/2023)
04/25/2023	15	Minute Entry for proceedings held before JUDGE NANCY TORRESEN: Hearing re <a href="#">3</a> Emergency MOTION for Preliminary Injunction <i>for Plaintiff</i> Emergency MOTION for Temporary Restraining Order filed by SHAWN MCBREAIRTY. (Court Reporter: Tammy Martell) (slg) (Entered: 04/25/2023)
04/25/2023	<a href="#">16</a>	Court Exhibit List from Hearing re ECF No. 3 held on 4/25/23 (Exhibits listed on the Court Exhibit List are not remotely electronically available). (slg) (Entered: 04/26/2023)
04/26/2023	<a href="#">17</a>	ORDER denying <a href="#">3</a> PLAINTIFF'S EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION. By JUDGE NANCY TORRESEN. (slg) (Entered: 04/26/2023)
04/27/2023	<a href="#">18</a>	NOTICE OF APPEAL as to <a href="#">17</a> Order on Motion for Preliminary Injunction, Order on Motion for TRO by SHAWN MCBREAIRTY . ( Filing fee \$ 505 receipt number AMEDC-2791865.)  <b>NOTICE TO FILER:</b> A transcript Report/Order form <b>MUST</b> be completed and submitted to the First Circuit Court of Appeals. The form can be found under the Forms & Fees section on their website at <a href="https://www.ca1.uscourts.gov">https://www.ca1.uscourts.gov</a> .  <b>NOTICE TO COUNSEL:</b> Counsel should register for a First Circuit CM/ECF Appellate Filer Account at <a href="https://pacer.psc.uscourts.gov">https://pacer.psc.uscourts.gov</a> . Counsel should also review the First Circuit requirements for electronic filing by visiting the CM/ECF Information section at <a href="https://www.ca1.uscourts.gov/cmecf">https://www.ca1.uscourts.gov/cmecf</a> (RANDAZZA, MARC) (Entered: 04/27/2023)
04/27/2023		COPIES of Notice of Appeal Sent to Counsel Re: <a href="#">18</a> Notice of Appeal filed by SHAWN MCBREAIRTY. (slg) (Entered: 04/27/2023)
04/27/2023	<a href="#">19</a>	APPEAL COVER SHEET Re: <a href="#">18</a> Notice of Appeal (slg) (Entered: 04/27/2023)
04/27/2023	<a href="#">20</a>	CLERK'S CERTIFICATE Re: <a href="#">18</a> Notice of Appeal. Documents sent to the U.S. Court of Appeals. (slg) (Entered: 04/27/2023)
04/27/2023		Abbreviated Appeal Record Transmitted Electronically to U.S. Court of Appeals re <a href="#">18</a> Notice of Appeal (slg) (Entered: 04/27/2023)
04/27/2023	<a href="#">21</a>	MOTION Injunction Pending Appeal - <i>Expedited Relief Sought</i> by SHAWN MCBREAIRTY Responses due by 5/18/2023. (RANDAZZA, MARC) (Entered: 04/27/2023)
04/28/2023	22	USCA Case Number 23-1389 for <a href="#">18</a> Notice of Appeal filed by SHAWN MCBREAIRTY. (mnd) (Entered: 04/28/2023)
05/01/2023	23	ORDER denying <a href="#">21</a> Motion for Injunction Pending Appeal - Expedited Relief Sought. Plaintiff's Motion for an Injunction Pending Appeal, sought on an expedited basis, is denied for the reasons given in my Order denying Plaintiff's emergency motion for a temporary restraining order and preliminary injunction (ECF No. 17). By JUDGE NANCY TORRESEN. (RGK) (Entered: 05/01/2023)
05/03/2023	<a href="#">24</a>	Emergency MOTION to Extend Time Respond to Defendants' Motion to Dismiss - <i>Assented to</i> - by SHAWN MCBREAIRTY Responses due by 5/24/2023. (MORRIS, ROBERT) (Entered: 05/03/2023)
05/04/2023	25	ORDER granting in part <a href="#">24</a> Motion to Extend Time to File Response to Motion to Dismiss. The Court stays the deadline for Plaintiff to file a response to the motion to dismiss. If the appeal in this matter and the appeal in the related matter referenced in Plaintiff's motion



		remain pending as of July 15, 2023, Plaintiff shall file a report regarding the status of the appeals. If the appeals are resolved prior to July 15, the Court will establish a new deadline for the response to the motion to dismiss. By MAGISTRATE JUDGE JOHN C. NIVISON. (NIVISON, JOHN) (Entered: 05/04/2023)
05/04/2023	<a href="#">26</a>	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings Motion Hearing and Oral Argument held on April 25, 2023 before Judge Nancy Torresen. Court of Appeals Docket Number 23-1389. Court Reporter/Transcriber: Tammy Martell, Telephone Number: 207.272.5566. <b>NOTICE RE REDACTION OF TRANSCRIPTS: The parties have seven (7) calendar days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. The policy is located on our website at <a href="http://www.med.uscourts.gov">www.med.uscourts.gov</a>.</b> Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Release of Transcript Restriction set for 8/2/2023. (MARTELL, TAMMY) (Entered: 05/04/2023)
05/04/2023		Reset Deadlines per Order #25, if appeals remain pending Status Report due by 7/17/2023. (slg) (Entered: 05/04/2023)
05/10/2023	<a href="#">27</a>	CLERK'S FIRST SUPPLEMENTAL CERTIFICATE Re: <a href="#">18</a> Notice of Appeal, Documents Sent to U.S. Court of Appeals (Complaint Exhibits B, C & E [on disc] and Exhibits F & G of ECF #9 [on memory stick]). (jwr) (Entered: 05/10/2023)
05/10/2023		Supplemental Record on Appeal transmitted to US Court of Appeals via UPS re <a href="#">18</a> Notice of Appeal (jwr) (Entered: 05/10/2023)
07/17/2023	<a href="#">28</a>	STATUS REPORT by SHAWN MCBREAIRTY. (MORRIS, ROBERT) (Entered: 07/17/2023)
07/18/2023	29	ORDER: Upon review of the recent status report (ECF No. 28), the Court stays the deadline for Plaintiff to file a response to the pending motion to dismiss until further order of the Court. The Court anticipates that it will reestablish the deadline following resolution of the pending appeal. By MAGISTRATE JUDGE JOHN C. NIVISON. (MFS) (Entered: 07/18/2023)
07/18/2023	<a href="#">30</a>	CLERK'S SECOND SUPPLEMENTAL CERTIFICATE Re: <a href="#">18</a> Notice of Appeal. Documents Sent to U.S. Court of Appeals (clp) (Entered: 07/18/2023)
07/18/2023		Supplemental Record on Appeal transmitted to US Court of Appeals re <a href="#">18</a> Notice of Appeal(clp) (Entered: 07/18/2023)

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<b>Description:</b>	Docket Report	<b>Search Criteria:</b>	1:23-cv-00143-NT
<b>Billable Pages:</b>	5	<b>Cost:</b>	0.50