

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**

RAN**D****A****Z****Z****A** | LEGAL GROUP

1.0 INTRODUCTION

Rule 2 discriminates viewpoint—you can praise but not criticize.¹ 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.² 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

¹ 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).

² 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,³ 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.⁴ (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,

³ 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.

⁴ 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.⁵ 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,⁶ it prohibits “complaints and allegations.” Doc. No. 1-1. Additionally, the *Pollak* policy was only deemed reasonable because the 10th Circuit determined the “personnel-matter restriction protects *personal and*

⁵ Both are unpublished decisions.

⁶ 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. McBreaity, 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 10th 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 10th 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. 1-3.⁷ 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

⁷ 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,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 6th 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

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