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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

HARRY POLLAK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 22-CV-49-ABJ**
	)	
SUSAN WILSON, et al.	)	
	)	
Defendants.	)	

Brief in Support of Defendants' Motion for Summary Judgment

Defendants Sue Wilson et al. (referred to collectively herein as SCSD2) have moved the Court pursuant to Fed.R.Civ.P. 56 for summary judgment on the claims brought by Plaintiff Harry Pollak ("Pollak"). In support of this motion, SCSD2 shows the Court as follows.

Statement of the Case

A. Nature of the Case

This case concerns Sheridan County School District No. 2's policy concerning participation during the public comment portion of its school board meetings. SCSD2 Policy BEDH (Participation at Board Meetings) provides, in part, as follows:

> Personnel matters are not appropriate topics to be discussed at regular board meetings. Decorum requires that such matters be entertained in executive session as arranged by the Board. Speakers will not be permitted to participate in gossip, make defamatory remarks, use abusive or vulgar language.

Policy BEDH in its present form has been in place since 2006. It was derived from the recommended policy provided by the Wyoming School Board Association to SCSD2.

Pollak attended the SCSD2 school board meeting held on February 7, 2022 and signed up to speak during the public comment portion of the meeting. In his initial statement, Pollak indicated that he was going to speak about allegations that SCSD2 Superintendent Stults had violated the constitutional rights of parents. The Board Chair stopped Pollak and advised him that Board policy did not allow discussions about personnel to take place during public comment. Pollak immediately began to challenge the Board's authority. The Board Chair advised Pollak that he could address personnel issues directly to the Board during the executive session portion of the meeting or he could continue speaking during public comment about other matters (other than personnel). Pollak did not take these opportunities, but instead continued to defy the Board Chair and refused to leave the podium. The Board ultimately had to recess the meeting and call law enforcement to remove Pollak from the podium so that it could continue with its business.

Pollak brought suit against the board members of SCSD2 in their official and individual capacities claiming that the school district violated his First Amendment right to free speech when it did not allow him to discuss personnel issues during the public comment portion of the school board meeting. Pollak filed a motion for a preliminary injunction requesting that the Court find Policy BEDH to be unconstitutional and order the restriction against discussing personnel and the restriction against use of inappropriate and abusive language removed from Policy BEDH. The Court denied the motion for a preliminary injunction. (ECF No. 17).

Pollak appealed the denial of his motion for a preliminary injunction to the Tenth Circuit Court of Appeals. The Tenth Circuit affirmed, holding that SCSD2 Policy BEDH was viewpoint neutral and reasonable. *Pollak v. Wilson*, 2022 WL 17958787 (10th Cir. 2022). The Tenth Circuit

also held that Pollak had waived any "as-applied" claims and went on to state that even if not waived, such claims would likely fail based on the undisputed facts. *Pollak v. Wilson*, 2022 WL 17958787 at 9-11. The Tenth Circuit determined that Pollak did not have standing to challenge the restriction against use of inappropriate and abusive language. *Id.* at 11-12. Despite the Tenth Circuit's decision, Pollak has continued to pursue his claims against the school district.

B. Statement of Facts

SCSD2 submits the following statement of material facts as to which no genuine issue exists pursuant to U.S.D.C.L.R. 7.1(b)(2)(D).

1. Sheridan County School District No. 2 ("SCSD2") is a unified school district in the State of Wyoming covering the City of Sheridan and surrounding areas. SCSD2 is governed by a Board of Trustees consisting of the nine (9) elected school board members who are named as defendants in this matter. Scott Stults is employed as the Superintendent of the school district. (Exhibit A, Stults Affidavit, ¶ 4).

2. The facts surrounding the February 7, 2022 school board meeting at issue in this case are intertwined with the facts concerning Pollak's continued opposition to the face covering requirement utilized by the school district during the Covid-19 pandemic. In March of 2020, Wyoming school districts were closed for the remainder of the 2019-2020 school year by the executive health order issued by Wyoming Governor Mark Gordon and the Wyoming State Health Officer to help slow the community spread of Covid-19. Schools were not allowed to resume until the beginning of the 2020-2021 school year and only then pursuant to a "Smart Start" Covid-19 Plan approved by the Wyoming Department of Education. SCSD2's plan for the 2020-2021 school year required face covering requirements and other components (home screening, adherence to state and local guidelines for staff and/or students testing positive, and contact tracing). (Exhibit

A, Stults Affidavit, ¶¶ 5-7). The face covering requirement remained in place until April of 2021 when it was lifted for a little over a month at the end of the school year. *Id.* Pollak and his family moved to Sheridan in 2021. Pollak's son was enrolled in SCSD2 during the 2021-2022 school year but has since been withdrawn and is now homeschooled.

3. In August of 2021, prior to the beginning of the 2021-2022 school year, the community spread of Covid-19 began to increase substantially in the Sheridan community. Dr. Ian Hunter, M.D., Sheridan County, Wyoming's Health Officer, recommended that SCSD2 require all persons to wear face coverings (masks) while in school buildings. (Exhibit A, Stults Affidavit, ¶ 8). On August 30, 2021, after receiving this recommendation from Dr. Hunter, the Board implemented a Covid-19 Plan that required face coverings (masks) to be worn in all school district facilities by staff, students, and visitors except in certain situations. (Exhibit A, Stults Affidavit, ¶ 9, Exhibit B).

4. After making the decision to require face coverings, the school district began to receive a tremendous amount of input from persons in support of or in disagreement with the decision to require masks. (Exhibit A, Stults Affidavit, ¶ 10). On multiple occasions persons protesting the face covering requirement picketed the administration building with signs and other materials speaking out against the mask requirement. *Id.* During the September 13, 2021 school board meeting, the Board was presented with a petition signed by various members of the community requesting that the board members resign their position because they had implemented the face covering requirement. (Exhibit A, Stults Affidavit, ¶ 12). Harry Pollak and his wife Shelley Pollak also signed this petition. (Exhibit U, Deposition of Pollak, pp. 36, 39; Exhibit H).

5. Even though the mask issue was very controversial, SCSD2 continued to allow public comment during its regularly scheduled school board meetings. During the 2021-2022

school year, many members of the community attended school board meetings and spoke out both in favor of and against the mask requirement during public comment. Many opposed to the mask requirement were critical of the Board and its decisions during the pandemic. (Exhibit A, Stults Affidavit, ¶ 11; Exhibits C, D, E, F, G).[1] During these meetings, the Board did not prevent speakers from expressing their opinion during public comment with respect to whether the school district should implement a mask requirement during the Covid-19 pandemic. Likewise, the Board did not stop or interrupt anyone from criticizing the decisions made by the Board during the pandemic. (Exhibit A, Stults Affidavit, ¶ 11).

6. Pollak contacted the school district on multiple occasions during the 2021-2022 school year both by e-mail and during school board meetings to express his opposition to the face covering requirement. The following e-mails were sent by the Pollaks to board members:

a. E-mail dated September 13, 2021 urging board members to "end the mask mandate immediately." (Exhibit A, Stults Affidavit, ¶ 13; Exhibit I).

b. E-mail dated September 21, 2021 to board members stating in part: "We demand that you end the mask mandate immediately. We are actively involved with other parents in the district to call for the immediate resignation of the officers of Sheridan County School District #2 Board of Trustees. We have also signed the petition to recall the same." (Exhibit A, Stults Affidavit, ¶ 14; Exhibit J).

c. E-mail dated October 19, 2021, stating in part: "We call on Mr. Stults and the school board members to resign immediately. We demand that the mask mandate end

[1] Exhibits C, D, E, F, and G contain the portions of the official minutes of the described school board meetings that reflect the speakers and subject matters discussed during public comment.

immediately and that the decision for children to wear a mask be left up to parents to make. Our son and the children in this district should not have to suffer one more second." (Exhibit A, Stults Affidavit, ¶ 15; Exhibit K).

d. E-mail dated October 20, 2021 to board members, school district administrators, local legislators, and others stating that the mask requirement was illegal. (Exhibit A, Stults Affidavit, ¶ 16; Exhibit L).

7. On October 22, 2021, Pollak personally met with Superintendent Stults to express his opposition to the face covering requirement. (Exhibit A, Stults Affidavit, ¶ 17).

8. The controversy over the face covering requirement heightened during the November 1, 2021 school board meeting during which a large crowd of persons opposing the mask requirement came to the board meeting room and refused to wear a mask. (Exhibit A, Stults Affidavit, ¶¶ 18-19). The Superintendent eventually had to call the Sheridan Police Department to assist in restoring order to the situation. (Exhibit A, Stults Affidavit, ¶ 20). These events forced the Board to move its meeting to another room in the building and broadcast the meeting via Zoom. (Exhibit A, Stults Affidavit, ¶ 21).

9. Eventually the level of community spread in the Sheridan community began to decline. On November 12, 2021, Dr. Hunter (Sheridan County Health Officer) recommended removing the face covering requirement because the number of Covid patients in Sheridan County had significantly decreased. (Exhibit A, Stults Affidavit, ¶ 23). The Board held a special meeting on November 16, 2021 and ended the mask requirement. Since that time, SCSD2 has not required face coverings in its schools. *Id.*

10. Although the face covering requirement ended on November 16, 2021, Pollak continued to contact the school district about the mask issue. On January 6, 2022 and January 10,

2022, the Pollaks sent e-mails to the Board regarding the mask requirement. (Exhibit A, Stults Affidavit, ¶ 24; Exhibit M, Exhibit N).

11. Pollak attended the school board meeting held on January 10, 2022. During the public comment portion of the meeting, Pollak spoke out in opposition to the face covering requirement that had previously been in place in the school district. Pollak was critical of the Board's decision to require face coverings. Pollak read from the e-mail dated January 10, 2022 (Exhibit N), which contained criticisms regarding the mask requirement and again called for the resignation of Board members and Superintendent Stults. The Board did not interrupt or stop Pollak from speaking. (Exhibit U, Deposition of Pollak, pp. 74-82). Other members of the community, including Mr. Pollak's wife, Shelley Pollak, spoke during the public comment portion of the January 10, 2023 meeting in opposition to the mask requirement and to express their criticism of Board actions during the pandemic. (Exhibit A, Stults Affidavit, ¶ 25; Exhibit G).

12. Pollak also attended the school board meeting held on February 7, 2022 and signed up to speak during public comment. (Exhibit A, Stults Affidavit, ¶ 27). When it came his turn to speak, Pollak came to the podium to use the microphone as was customary and stated that he was addressing the Board and Superintendent Stults. Shortly after Pollak started his comments he stated: "We aim to set the record straight for the board meeting on January 10th of this year regarding Superintendent Stults rebutting parents' declaration that the Board and Superintendent have violated our rights under Article 1 Section 38(a) of the Wyoming Constitution and that Article 1 Section 38(c) gave them the authority to do so." (Exhibit O; Exhibit A, Stults Affidavit, ¶ 27;

Exhibit U, Deposition of Pollak, pp. 90-92).[2] Chair Wilson advised Pollak that personnel matters were not a topic allowed during public comment. This led to an extended exchange during which Pollak challenged the restriction against discussing personnel during public comment.

13. During this interaction, the Board Chair advised Pollak that if he wanted to discuss personnel, he could address the Board in private (executive session). The Board Chair also advised Pollak that he could continue with his public comment if he did not discuss personnel, but that he would have to leave if he persisted in making comments about personnel. This was explained to Pollak multiple times during the interaction. (Exhibit A, Stults Affidavit, ¶ 29). Pollak did not accept the opportunity to address the Board during executive session or the opportunity to speak on a topic that did not involve personnel. Instead, Pollak refused to comply with the directions from the Board Chair and refused to leave the podium. *Id.*

14. Because Pollak refused to leave the podium or otherwise comply with the direction from Chair Wilson, the Board was unable to continue with the public comment portion of the meeting or with the other regularly scheduled business. The Board recessed the meeting so that it could re-establish order to the meeting. (Exhibit A, Stults Affidavit, ¶ 32). After the meeting was recessed, Pollak still refused to leave the podium. He stated that he would not leave and that he would still be there when the meeting reconvened. (Exhibit A, Stults Affidavit, ¶ 33; Exhibit U,

[2] The video depiction of Pollak's comments and interaction with the Board Chair is contained in two parts marked as Exhibit O (Part 1) consisting of 2 minutes and 39 seconds and Exhibit P (Part 2) consisting of 3 minutes and 08 seconds. The school district did not record the February 7, 2022 school board meeting. Exhibit O and Exhibit P are video recordings provided by Pollak during discovery.

Deposition of Pollak, pp. 102-106). Pollak did not leave the podium until he was removed from the building by law enforcement. *Id.*

15. On March 25, 2022, Superintendent Stults sent a letter to Pollak advising him that if he still had information that he wanted to present to the Board he could address the Board during the public comment portion of the next regularly scheduled school board meeting to be held on April 11, 2022 or during the executive session portion of the meeting if the information he desired to share pertained to personnel. (Exhibit A, Stults Affidavit, ¶ 34; Exhibit Q). Pollak did not respond or address the Board during the April meeting.

16. During this litigation, Pollak provided a declaration containing the contents of the public comments he intended to make during the February 7, 2022 school board meeting. (Exhibit V, pp. 8-9). These comments contain additional statements concerning the conduct of Superintendent Stults and indicate that Pollak would have called for the resignation of the board members and Superintendent Stults if his demands were not met.

LEGAL ARGUMENT

I. Standard of Review.

Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a); *Foster v. Mountain Coal Company, LLC*, 830 F.3d 1178, 1186 (10th Cir. 2016). A fact is material only if it might affect the outcome of the suit under the governing law. *Id.* A dispute over a material fact is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Bennett v. Windstream Commc'ns, Inc.*, 792 F.3d 1261, 1265–66 (10th Cir. 2015).

II. SCSD2's enforcement of the restriction against discussing personnel during public comment as set forth in Policy BEDH did not violate Pollak's right of free speech.

Policy BEDH's restriction on the discussion of personnel during the public comment period of school board meetings is an appropriate viewpoint neutral and reasonable restriction under limited public forum analysis. *Pollak v. Wilson*, 2022 WL 17958787 at *7-9. Having failed in his claim that Policy BEDH is unconstitutional on its face, Pollak now asserts an as-applied claim that the enforcement of this policy against him during the February 7, 2022 school board meeting violated his right of free speech under the First and Fourteenth Amendments. However, Pollak's as-applied claim presents essentially the same arguments he has already made in this case, which arguments were squarely rejected by the Tenth Circuit.

"A facial challenge considers the restriction's application to all conceivable parties, while an as-applied challenge tests the application of that restriction to the facts of a plaintiff's concrete case." *iMatter Utah v. Njord*, 774 F.3d 1258, 1264 (10th Cir. 2014). The same substantive standard applies to both facial and as-applied challenges. *Harmon v. City of Norman, Oklahoma*, 61 F.4th 779, 789 (10th Cir. 2023). The distinction lies in the breadth of the remedy employed by the court. *See Edwards v. District of Columbia*, 755 F.3d 996, 1001 (D.C. Cir. 2014). To prevail on an as-applied First Amendment challenge, the plaintiff must show that the policy is unconstitutional as applied to his/her particular speech. *Id.*

The Tenth Circuit provided the following substantive analysis with respect to the legal standards applicable under limited forum analysis:

> The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. I. But "[n]othing 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." *Minn. Voters All. v. Mansky*, ____U.S.___, 138 S. Ct. 1876, 1885, 201 L.Ed.2d 201 (2018) (quotations omitted). "To determine when and to what extent

> the Government may properly limit expressive activity on its property, the Supreme Court has adopted a range of constitutional protections that varies depending on the nature of the government property, or forum." *Verlo v. Martinez*, 820 F.3d 1113, 1129 (10th Cir. 2016). The Supreme Court has "sorted government property into [the following] categories": traditional public forums, designated public forums, limited public forums, and nonpublic forums. *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 679 n.11, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010); see also *Verlo*, 820 F.3d at 1129, 1129 n.6.
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> Traditional public forums include public streets and parks "that by long tradition have been open to public assembly and debate." *Verlo*, 820 F.3d at 1129. In traditional public forums, "any restriction based on the content of speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest." *Martinez*, 561 U.S. at 679 n.11, 130 S.Ct. 2971 (quotations and alterations omitted). Content-neutral restrictions "must be narrowly tailored to advance a significant government interest." *Verlo*, 820 F.3d at 1131.
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> The government may create a designated public forum by opening "government property that has not traditionally been regarded as a public forum" for use as a public forum. *Martinez*, 561 U.S. at 679 n.11, 130 S.Ct. 2971 (quotations omitted). "[S]peech restrictions in such a forum are subject to the same strict scrutiny as restrictions in a traditional public forum." *Id*.
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> The government also may create a forum "that is limited to use by certain groups or dedicated solely to the discussion of certain subjects," known as a limited public forum. *Pleasant Grove v. City of Summum*, 555 U.S. 460, 470, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009). In a limited public forum, the government may impose restrictions so long as they are "reasonable in light of the purpose served by the forum" and viewpoint neutral. *Martinez*, 561 U.S. at 679 n.11, 685, 130 S.Ct. 2971; see *Shero v. City of Grove*, 510 F.3d 1196, 1202 (10th Cir. 2007). A restriction is viewpoint-based if it "denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). This standard, which is less demanding on the government than the traditional public forum standard, also applies to a nonpublic forum. See *Verlo*, 820 F.3d at 1129.

Pollak v. Wilson, 2022 WL 17958787 at *1-2.

Policy BEDH states that: "Board meetings are conducted for the purpose of carrying out the official business of the school district. The meetings are not public forum meetings, but are meetings held in the public." (Exhibit S). Accordingly, the public comment portion of the school board meetings is considered a limited public forum.

The Board's enforcement of Policy BEDH to restrict Pollak from discussing personnel issues pertaining to Superintendent Stults during the February 7, 2022 school board meeting was reasonable under limited forum analysis. The school district has a significant interest in keeping personnel matters from being discussed during public comment. This restriction protects school district employees from having personal and/or confidential information about their employment discussed in public. (Exhibit A, Stults Affidavit, ¶ 38). It also prevents issues pertaining to the evaluation of the performance of school district employees from being addressed in public and allows such disputes and other issues pertaining to employment to be addressed under other established school district policies such as the Board's grievance policy. *Id.*

Pollak began his comments by making an allegation that Superintendent Stults had violated parents' rights under the Wyoming Constitution. (Exhibit O). This type of allegation with respect to the conduct of a school district employee certainly involves a "personnel matter." It was reasonable for the Board to prevent this allegation about Superintendent Stults from being discussed in public. *See Pollak v. Wilson*, 2022 WL 17958787 at *8; *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 760 (5th Cir. 2010) (upholding policy prohibiting public comment on personnel matter as reasonable to protect student and teacher privacy and avoid public shaming); *Cipolla-Dennis v. Cnty. of Tompkins*, No. 21-712, 2022 WL 1237960, at *2 n. 2 (2d Cir. 2022) (prohibiting discussion of personnel matters reasonably related to interest in limiting matters addressed during public comment period) (unpublished).

The Board's refusal to allow Pollak to continue making allegations against Superintendent Stults was also viewpoint neutral. The policy prohibits the discussion of a subject (personnel matters) but does not draw a distinction based on viewpoint. It simply removes personnel matters as a topic of discussion. Further, Policy BEDH leaves open ample alternative channels for

communication of the information. It was reasonable for the Board to expect Pollak to express his concerns about Superintendent Stults using the other avenues allowed by policy.

On the night in question, Pollak was given the opportunity to address his concerns about Superintendent Stults with the Board during its executive session as allowed by Policy BEDH. (Exhibit S). He chose not to do so. He was given multiple opportunities that night to speak on another matter (other than personnel), but he chose not to do so. Pollak also had the opportunity to utilize the Board's grievance policy, which contains the procedures under which the school district will review a "written allegation by a student, the student's parent, or a District employee of a violation of their civil rights or a violation of Board policy." (Exhibit R, Policy AII/JII). *See Pollak v. Wilson*, 2022 WL 17958787 at *7 (noting the Supreme Court has instructed that viewpoint-neutral restrictions are "more creditworthy" if there are other avenues available for speech); *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 690, 130 S.Ct. 2971 (2010); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 817, 105 S.Ct. 3439 (1985).

Pollak contends that the Board Chair stopped him from speaking because of his viewpoint (i.e., his opposition to the mask requirement and/or other actions taken by the Board during the pandemic). There is no evidence supporting this allegation. To the contrary, the record shows that Pollak was allowed to present his viewpoint about masks and criticism of the Board on multiple other occasions. Pollak spoke during the January 10, 2022 school board meeting without interruption in opposition to the mask requirement during which he was very critical of the Board's actions during the pandemic. (Exhibit A, Stults Affidavit, ¶ 25; Exhibit G). Pollak sent multiple e-mails to the Board expressing his concerns (Exhibits I, J, K, L, M, N). Superintendent Stults

also met personally with Pollak to discuss his concerns regarding the mask requirement. (Exhibit A, Stults Affidavit, ¶ 17).

The record is also clear that the Board allowed others to express their viewpoints concerning the mask requirement. Many members of the community addressed the Board regarding this issue during the 2021-2022 school year. During these meetings, the Board did not prevent anyone from expressing their opinion or criticizing the Board during public comment provided they complied with Policy BEDH. (Exhibit A, Stults Affidavit, ¶ 11; Exhibits C, D, E, F, G). It is clear that in practice, Policy BEDH is not utilized by the Board to suppress unpopular views, but rather as a means to allow the Board to orderly and efficiently conduct the business of the school district.

Pollak attempted to argue his as-applied claims in the appeal to the Tenth Circuit. The Tenth Circuit ultimately held that Pollak had waived these claims and went on to state that even if it overlooked the waiver, Pollak's as-applied or pretext arguments would likely fail based on the record. *Pollak v. Wilson*, 2022 WL 17958787 at *10-11.[3] The court noted Pollak's previous demands that the Superintendent resign and stated that this context was important. The court also noted "the Board repeatedly indicated Mr. Pollak could speak on a non-personal matter." *Id.* at *11.

As noted by the Tenth Circuit, context matters. The events of the February 7, 2022 school board meeting reflect Pollak's motives. Pollak was given multiple opportunities to talk about other

[3] The Tenth Circuit did clarify that because it was only reviewing the denial of the motion for a preliminary injunction, it was not dismissing Pollak's claims or expressing a view on whether Pollak could pursue viewpoint or pretext arguments on remand.

matters (not pertaining to personnel). If he had wanted to speak on matters that did not pertain to personnel, he could have simply done so and there would have been no issue. Instead, Pollak seized on what he perceived to be an opportunity to engage the Board Chair in an argument about the legality of the Board policy. These facts, which are undisputed, do not support Pollak's as-applied claim that his constitutional right to free speech was violated. Rather, it is clear that the Board gave Pollak more than sufficient opportunity to express his views had he wanted to do so within the confines of Policy BEDH.

III. SCSD2's enforcement of the restriction against discussing personnel during public comment did not violate Pollak's right to petition.

Pollak also asserts a claim that SCSD2 violated his First Amendment right to petition when it enforced the personnel restriction in Policy BEDH. In this context, courts have generally applied same constitutional analysis to both free speech and right to petition claims. *See Moms for Liberty – Brevard County, FL v. Brevard Public Schools*, ___ F.Supp.3d __, 2023 WL 2454754, *2, n. 1 (M.D. Fla. 2023) (applying same analysis to parent's claims that school board restrictions on public comment violated free speech and petition rights); *United States*, 470 U.S. 598, 610 n.11, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985) ("Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis."); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911–915, 102 S.Ct. 3409, 3425–3427 (1982). *See also*, *Schalk v. Gallemore*, 906 F.2d 491, 498 (10th Cir. 1990) ("Schalk's right to petition is inseparable from her right to speak. As such, we see no reason to subject this claim to a different sort of analysis.").

Under the same analysis discussed above with respect to the free speech claim, SCSD2 is entitled to summary judgment with respect to Pollak's claims concerning his right to petition. The restrictions against discussing personnel matters in Policy BEDH are reasonable. These restrictions

allow the Board to prevent an employee's personal information or issues pertaining to the employee's performance from being discussed in public. In his initial statement during the public comment, Pollak referenced allegations that Stults had violated parents' constitutional rights. It was certainly reasonable for the Board to not allow such allegations about one of its employees to continue during public comment.

Similarly, SCSD2's application of Policy BEDH in this instance was viewpoint neutral. Pollak was not stopped because he was speaking in opposition to the mask requirement or because he was critical of the school district. On the contrary, it is undisputed that Pollak and others had been allowed to express their opinions and criticisms regarding the mask in multiple school board meetings.

To support right to petition claim, Pollak tries to stretch Policy BEDH and interpret the personnel restriction as prohibiting speakers "who simply discuss or refer to public officials in their comments about school policy." (First Amended Complaint, ¶ 55, ECF No. 43). This argument is untenable. Policy BEDH does not prohibit discussion about public officials. Further, Pollak was not stopped because he was talking about a public official. Superintendent Stults is an employee of the school district. He is not an elected or appointed public official. Pollak was free to oppose or criticize the school district's public officials (i.e., elected board members), which he had done previously on many occasions.

IV. SCSD2 is entitled to summary judgment on Pollak's claims concerning Policy BEDH's restriction on the use of inappropriate and abusive language.

Policy BEDH provides that "Speakers will not be permitted to participate in gossip, make defamatory remarks, [or] use abusive or vulgar language." (Exhibit S). Pollak challenges this restriction on its face, as-applied, as being overbroad, and as being vague. (First Amended Complaint, Counts 3, 4, 5 and 6, ECF No. 42). Pollak lacks standing to assert these claims.

The Tenth Circuit determined that Pollak did not have standing to challenge the restriction against inappropriate and abusive language in Policy BEDH, holding as follows:

> Mr. Pollak also challenges the Policy's restriction against "abusive" language. Aplt. Br. at 33-34. **He lacks standing to challenge this provision**. To establish Article III standing, Mr. Pollak must show he "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016) (quotations omitted).
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> **Mr. Pollak has not established an injury in fact.** To satisfy this requirement, "a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id*. at 339, 136 S.Ct. 1540 (quotations omitted). Mr. Pollak did not allege any injury that he suffered due to this restriction. **The Board did not invoke it when it asked Mr. Pollak to leave, and Mr. Pollak did not use abusive language at the meeting or suggest he was going to use it.** Although we explained in *Initiative & Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006), that "a chilling effect on the exercise of a plaintiff's First Amendment rights may amount to a judicially cognizable injury in fact," Mr. Pollak has not satisfied *Walker's* relaxed First Amendment standing requirements. *Id*. at 1088-89. Mr. Pollak did not allege that he engaged or hopes to engage in abusive speech or that he does not intend to engage in abusive speech because of a credible threat of enforcement. *See Peck v. McCann*, 43 F.4th 1116, 1129-30 (10th Cir. 2022) (discussing *Walker*, 450 F.3d at 1129-30). He therefore lacks standing.

Pollak v. Wilson, WL 17958787 at *9-11 (emphasis added). This holding from the Tenth Circuit is dispositive of Pollak's claims concerning the restriction against the use of inappropriate and abusive language.

Although Pollak has now added overbreadth and vagueness claims with respect to the restriction, he still does not have standing. His amended complaint does not contain any allegations indicating that he desired to use inappropriate or abusive language or that the Board restricted him from using such language. Further, Pollak acknowledged in his deposition that he

did not desire to use gossip, defamatory, abusive or vulgar language during the public comment portion of a school board meeting. (Exhibit U, Deposition of Pollak, pp. 124-125).[4]

V. The individual capacity defendants are entitled to qualified immunity.

Current board members Arin Waddell, Shellie Szmyd, Wayne Schatz, Shane Rader, Ann Perkins, Ed Fessler, Mary Beth Evers, and Dana Wyatt are named as defendants in both their individual and official capacities.[5] Former board members Susan Wilson and Shellie Szmyd are named as defendants in their individual capacity. Michael Lansing and Shelta Rambur, who were elected to the Board after the meeting at issue, are named in just their official capacity.

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[4] Even if Pollak had standing, there is no merit to his claims. A restriction is overbroad if it "reaches a substantial amount of constitutionally protected conduct." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 494, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). Here, the restriction does not affect a substantial amount of constitutionally protected conduct because inappropriate and abusive language is permissibly restricted in a limited public forum. A restriction is unconstitutionally vague if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits or it authorizes arbitrary and discriminatory enforcement." *Doctor Johns, Inc. v. City of Roy*, 465 F.3d 1150, 1158 (10th Cir. 2006). Policy BEDH specifically lists the standards it expects of speakers and can certainly be understood by persons of ordinary intelligence.

[5] Pollak's claims against the SCSD2 board members in their official capacities are in essence claims against the school district. *See Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 3105 (1985).

It is well established that public servants are entitled to qualified immunity to "shield them from undue interference with their duties to the public and from potentially disabling threats of liability." *Lewis v. Tripp*, 604 F.3d 1221, 1224-25 (10th Cir. 2010) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 806, 102 S.Ct. 2727 (1982)). Qualified immunity is "an immunity from suit rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806 (1985). It represents "the norm" for public officials and serves to insulate from suit "all but the plainly incompetent or those who knowingly violate the law." *Lewis v. Tripp*, 604 F.3d at 1225 (citing *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092 (1986)). A plaintiff may overcome a public official's qualified immunity only by showing (1) that the official violated the plaintiff's constitutional rights, and (2) that the rights in question were clearly established at the time of their alleged violation. *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S.Ct. 808, 815-16 (2009).

A constitutional right is clearly established when a Tenth Circuit precedent is on point, making the constitutional violation apparent. *Apodaca v. Raemisch*, 864 F.3d 1071, 1076 (10th Cir. 2017). The precedent must involve "materially similar conduct" or apply "with obvious clarity" such that the constitutional violation is "beyond debate." *Id.* (citing *Estate of Reat v. Rodriguez*, 824 F.3d 960, 964-65 (10th Cir. 2016) (citations omitted).

The board members named in their individual are entitled to qualified immunity. Pollak cannot establish either prong. As discussed above, the board members did not violate Pollak's constitutional rights when it refused to allow him to discuss personnel matters pertaining to Superintendent Stults. Likewise, Pollak cannot show that the board member violated clearly established precedent. The Tenth Circuit held that Policy BEDH was reasonable and viewpoint neutral in *Pollak v. Wilson*, 2022 WL 17958787 (10th Cir. 2022). After this decision, it should

have been clear to Pollak that there was no basis for his claims against any of the board members in their individual capacities.

Conclusion

Defendants respectfully pray for summary judgment against the Plaintiff pursuant to Fed. R. Civ. P. 56(a).

Dated this 26th day of September, 2023.

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Certificate of Service

I, Kendal R. Hoopes, hereby certify that on September 26th, 2023, I served a true and correct copy of the above and foregoing through the Case Management/Electronic Case Filing (CM/ECF) system for the United States Federal Court for the District of Wyoming.

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