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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.	)	

SCSD2's Response in Opposition to Pollak's Motion for Summary Judgment

Defendants Sue Wilson et al. (referred to collectively herein as "SCSD2") hereby respond in opposition to Plaintiff's Motion for Summary Judgment.

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. Plaintiff Harry Pollak ("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 began speaking about an allegation 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. This led to an extended exchange where Pollak refused to follow the Board Chair's directions and refused to leave the podium until law enforcement was called.

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 the use of abusive language removed from Policy BEDH. This 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 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. *Id.* at 9-11. The Tenth Circuit also determined that Pollak did not have standing to challenge the restriction against use of abusive language. *Id.* at 11-12. Despite the Tenth Circuit's decision, Pollak has continued to pursue his claims against the school district. Both parties have filed a motion for summary judgment.

Response to Pollak's Statement of Facts

Pursuant to U.S.D.L.R. 7.1(b)(2)(D), SCSD2 provides the following statement concerning Pollak's Statement of Undisputed Material Facts. The parties do not dispute the facts of this case. However, Pollak's recitation of certain facts contains misstatements, partial recitations of the facts, and in some cases argument, as addressed below. These inaccuracies do not present genuine issues of material fact for purposes of the motion for summary judgment.

<u>Pollak Statement of Fact No. 2</u>. Pollak's description of these facts suggests that the Board receives reports or other information about SCSD2 employees, including the superintendent,

during the public comment portion of board meetings. This is incorrect. Reports and other information about SCSD2 employees are provided to the Board during the executive session portion of board meetings. (See ECF No. 66, Exhibit 3, p. 12; Exhibit 4, p. 11; Exhibit 5, p. 12; Ex. 6, p. 13; Exhibit 8, pp. 10-11; Exhibit 9, p. 18; Exhibit 10, pp. 15-16; Exhibit 11, p. 11). These board minutes show that the Board went into executive session to discuss personnel matters and then came back into open session to take action on the Personnel Action Reports.

Pollak Statement of Fact No. 3. Pollak's description of these facts suggests that the referenced statements were made during the public comment portion of board meetings. This is incorrect. SCSD2 board meetings often have various agenda items during its board meetings in which school district personnel may be mentioned. However, these specific agenda items are not open to the public for comment, are not covered by Policy BEDH, and are not at issue in this case. The statements referenced in Pollak's Exhibit 3 were made during various specific agenda items addressed during the referenced board meetings that were not open for public comment and were not covered by Policy BEDH. Reports and other information about the performance or evaluation of school district employees were provided to the Board during the executive session portion of the meetings referenced by Pollak. (See ECF No. 66, Exhibit 3, p. 12; Exhibit 4, p. 11; Exhibit 5, p. 12; Ex. 6, p. 13; Exhibit 8, p. 10-11; Exhibit 9, p. 18; Exhibit 10, pp. 15-16; Exhibit 11, p. 11).

Pollak Statement of Fact Nos. 5, 6, 7, 8, 12. These statements of fact refer to various provisions in Policy BEDH. SCSD2 does not dispute the facts stated to the extent Pollak accurately cites Policy BEDH, but otherwise takes the position that Policy BEDH speaks for itself. (ECF No. 64, Exhibit S).

Pollak Statement of Fact No. 9. Pollak's statement misstates and/or incorrectly summarizes deposition testimony. Wilson testified that the term personnel matter refers to:

"Matters that have to do anything that concerns these people [employees]." (Exhibit AA, Wilson Deposition, at 32:13-14). Rader testified that the term personnel matter refers to "[matters] pertaining to the employment of a district staff member." (Exhibit AB, Rader Deposition, at p. 29:13-15). Stults testified "Certainly during audience comments, it is not appropriate for the audience to speak about personnel" and "I would hold to the fact that personnel matters cannot be discussed during public comment." (Exhibit AC, Stults Deposition, at 32:2-4, 33:6-8).

Pollak Statement of Fact No. 10. Pollak's statement misstates and/or incorrectly summarizes deposition testimony. In reference to her occasionally telling the audience that positive comments were welcome, Wilson stated: "I was not changing the policy. I was trying to make people feel like they were welcome." (Exhibit AA, Wilson Deposition, at 37:19-20).

Pollak Statement of Fact No. 11. Pollak's statement misstates and/or incorrectly summarizes Wilson's deposition testimony. Further, Pollak's statement suggests that SCSD2 has not stopped other speakers from discussing personnel during public comment, which is not true. Wilson testified that there have been other instances when the restriction against discussing personnel matters during public comment was enforced against someone speaking about school district employees. (Exhibit AA, Wilson Deposition, at 45:16-24). Stults also testified that there have been other occasions where an individual has been stopped by the Board Chair and advised that he/she could not speak during public comment about personnel matters. (Exhibit AC, Stults Deposition, at 89:25 – 92:25).

Pollak Statement of Fact No. 15. SCSD2 disputes the last sentence of Pollak's Statement of Fact No. 15. Individuals did have the chance to discuss the issues Stults publicly addressed during the January 10, 2022 board meeting. Pollak and other members of the community spoke

during the public comment portion of this meeting. (ECF No. 64, Exhibit U, Pollak Deposition, pp. 74-82; ECF No. 64, Exhibit A, Stults Affidavit, ¶ 25; ECF No. 64, Exhibit G).

Pollak Statement of Facts No. 17-19. Pollak's summary of his comments during the February 7, 2022 board meeting is not complete and does not correctly summarize the statements made by him and others. The video recordings depicting this incident speak for themselves. (ECF No. 64, Exhibit O, Exhibit P).

Pollak Statement of Fact No. 21. Pollak's statement misstates and/or incorrectly summarizes deposition testimony. Wilson testified that she stopped Pollak "because he was violating the personnel matter rule." (Exhibit AA, Wilson Deposition, at 43:25-44:12).

Pollak Statement of Facts No. 22-23. Pollak's statements are asserted as statements of fact, but they are more accurately characterized as Pollak's personal opinion and/or personal views with respect to the matters addressed.

Statement of Additional Facts

SCSD2 hereby incorporates by reference the Statement of Facts (numbered 1-16) and the exhibits submitted to the court in its *Brief in Support of Defendants' Motion for Summary Judgment.* (ECF No. 64, pp. 3-9, Exhibits A-V). Pursuant to U.D.C.L.R. 7.1(c)(3), SCSD2 is not again attaching exhibits that have already been filed with the court. SCSD2 will refer to such exhibits by reference to its Brief in Support of Defendants' Motion for Summary Judgment and the respective exhibit letter (ECF No. 64). Attached to this pleading are Exhibits AA, AB, and AC, which contain additional excerpts from the depositions that are referenced herein.

LEGAL ARGUMENT[1]

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 Policy BEDH as applied to Pollak during the February 7, 2022 board meeting did not violate Pollak's First Amendment rights.

The material facts of this case are undisputed. Policy BEDH prohibits persons from speaking about personnel matters during the public comment portion of board meetings. (ECF No. 64, Exhibit S). During the public comment portion of the board meeting at issue, Pollak began his comments by alleging that Superintendent Stults "violated our rights" under the Constitution. (ECF No. 64, Exhibit O). This statement pertaining to the conduct and/or performance of a school district employee, clearly involved a personnel matter, which is not denied by Pollak. Pollak was stopped, advised that he could not discuss personnel matters, and then given the opportunity to talk about other matters during his public comment or address the board in private during executive

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[1] SCSD2 incorporates by reference Defendants' Motion for Summary Judgment (ECF No. 63) and Defendants' Brief in Support of Motion for Summary Judgment (ECF No. 64) and requests that the court deny Pollak's motion for summary judgment for the same reasons it grants SCSD2's motion for summary judgment.

session. Pollak declined these options. Instead, he refused to comply with the Board Chair's directions and refused to leave the podium until he was removed by law enforcement.

The personnel matters restriction in Policy BEDH (a) protects school district employees from having personal and/or confidential information about their employment discussed in public, (b) prevents issues pertaining to the evaluation of the performance of school district employees from being addressed in public, and (c) 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. (ECF No. 64, Exhibit A, Affidavit of Stults, ¶ 38). The Tenth Circuit has determined that Policy BEDH's restriction on the discussion of personnel matters during the public comment period of board meetings is an appropriate viewpoint neutral and reasonable restriction under limited public forum analysis. *Pollak v. Wilson*, 2022 WL 17958787 at *7-9.

A. Policy BEDH does not ban speakers from commenting on matters discussed at SCSD2 public meetings.

In his attempt to sidestep the facts of this case and avoid the prior decisions of this Court and the Tenth Circuit, Pollak goes to great lengths to try and rephrase the issue. Pollak argues that Policy BEDH is unreasonable and discriminates based on viewpoint "when applied to speakers who mention public officials while discussing school policy outside the context of private or confidential employment matters." (ECF No. 66, p. 9). He claims that "[i]ndividuals listening to the superintendent's report about district policy are *forbidden* from commenting about it." (ECF No. 66, p. 10) (emphasis in original). This argument significantly misstates the facts and restriction set forth in Policy BEDH.

Policy BEDH does not prohibit speakers from discussing school policy during public comment. Neither was Pollak stopped from speaking because he mentioned a public official while discussing school policy. Rather, he was stopped because he stood up in public comment and

began his comments with an allegation that the actions of a school district employee (Superintendent Stults) had violated his Constitutional rights, which was clearly a personnel matter that should have been discussed with the Board during executive session or presented through the school district's grievance procedures.

Throughout his memorandum it is difficult to discern if/when Pollak is making a facial challenge or an as-applied challenge to Policy BEDH. Further, Pollak's argument confuses the analysis employed by the courts in addressing facial and as-applied challenges to a governmental policy. "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." *Colo. Right To Life Comm. v. Coffman*, 498 F.3d 1137, 1146 (10th Cir. 2007). *See also iMatter Utah v. Njord*, 774 F.3d 1258, 1264 (10th Cir. 2014).

While Pollak's claim pertaining to speakers who mention public officials while discussing school policy may be "as applied" in the sense that it does not challenge Policy BEDH in all its applications, it is actually "facial" as it is not limited to his particular case. *See United States v. Supreme Ct. of New Mexico*, 839 F.3d 888, 913-915 (10th Cir. 2016) (discussing analysis utilized to determine whether to apply standards for a facial claim or standards for an as-applied claim). To the extent Pollak is still making a facial challenge, the issue has already been decided by *Pollak v. Wilson*, 2022 WL 17958787. To the extent Pollak is making an as-applied claim it must be with respect to the facts of this case. Thus, analysis of any as-applied claim in this situation would examine whether Pollak's actual speech (i.e., alleging that the Superintendent had violated his Constitutional rights) was prohibited by Policy BEDH.

Instead of addressing the facts concerning his particular speech, Pollak bases his argument on the faulty premise that the restriction against discussing personnel matters "bans speakers from

commenting on matters discussed at SCSD2 public meetings." (ECF No. 66, pp. 10-14). This is just simply not true. Neither Pollak nor other members of the public were prohibited from commenting on matters discussed at SCSD2 public meetings. On the night in question, Pollak was given multiple opportunities to talk on something other than personnel. (ECF No. 64, Exhibit A, Stults Affidavit, ¶ 29; ECF No. 64, Exhibit O and Exhibit P). He just declined to do so.

It is also undisputed that Pollak was allowed to present his viewpoint about masks and criticism of Board decisions 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. (ECF No. 64, Exhibit A, Stults Affidavit, ¶ 25; ECF No. 64, Exhibit G). Mr. and Mrs. Pollak both signed a petition demanding that the Board members resign their positions. (ECF No. 64, Exhibit U, Pollak Deposition, pp. 36, 39; ECF No. 64, Exhibit H). The Pollaks sent multiple e-mails to the Board expressing his concerns. (ECF No. 64, Exhibits I, J, K, L, M, N). Superintendent Stults also met personally with Pollak to discuss his concerns regarding the Board's decision to require the wearing of masks on school property during the pandemic. (ECF No. 64, Exhibit A, Stults Affidavit, ¶ 17).

The record is also clear that the Board allowed others to express their viewpoints with respect to issues concerning the school district, including the pandemic and the mask requirement. Many members of the community addressed the Board regarding these issues 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. (ECF No. 64, Exhibit A, Stults Affidavit, ¶ 11; ECF No. 64, Exhibits C, D, E, F, G).

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 confuses the difference between public participation during the public comment portion of board meetings and other agenda items that may be addressed by the Board such as recognitions or administrative staff reports. (ECF No. 66, p. 13). Policy BEDH governs audience comments during the public comment portion of board meetings. Other agenda items such as recognitions or administrative staff reports in which school district employees may be mentioned are not open to the public for comment, are not covered by Policy BEDH, and are not at issue in this case. The isolated examples noted by Pollak with respect to recognition of staff accomplishments, expressions of thanks, etc. (see ECF No. 66, p. 13) that are mentioned during other scheduled agenda items are markedly different than a specific allegation during public comment that a school district employee has violated the law.

The Board's enforcement of the restriction against discussion of personnel matters was not unconstitutional as applied to Pollak's particular speech. The purpose of the restriction is to protect school district employees from having personal and/or confidential information about their employment discussed in public. (ECF No. 64, 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 school district policies such as the Board's grievance policy. *Id.* This restriction has been determined to be reasonable. *See Pollak v. Wilson*, 2022 WL 17958787 at *8. Similar restrictions have been upheld by other courts. *See 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).

Pollak's statement about Stults undermines the very purpose of the personnel restriction in Policy BEDH. It was reasonable for SCSD2 to prohibit an allegation about the conduct of one of its employees during public comment, especially an accusation that could pertain to the evaluation of the performance of that employee or which should be addressed under the grievance procedures. Pollak was given the opportunity to address his concerns that the Superintendent had violated his Constitutional rights during the Board's executive session. He was also given the opportunity to continue with his public comments provided he didn't discuss personnel matters. He declined both of these options. Pollak cannot now claim that he did not have the opportunity to comment on "matters discussed at SCSD2's public meetings."

B. Policy BEDH was not enforced against Pollak in an arbitrary manner.

Pollak contends that Policy BEDH is unreasonable because the policy does not specifically define "personnel matters" and because the Board Chair is given authority to enforce the policy. This is essentially a facial challenge to the policy that has already been decided by the Tenth Circuit in favor of SCSD2 in *Pollak v. Wilson*, 2022 WL 17958787.

Pollak contends that the failure of Policy BEDH to define "personnel matters" invites arbitrary enforcement. To support his argument, Pollak refers to abstract hypotheticals and discusses whether a "thank you" or "merely mentioning" the Superintendent would constitute a personnel matter. (ECF No. 66, p. 14). However, this argument fails to recognize that the actual issue before the court is whether Pollak's statement that Superintendent Stults had violated the Constitution violated the restriction against discussing personnel matters. The Board Chair clearly

believed it did. Interestingly, Pollak does not contend otherwise. Instead, he repeatedly tries to reframe the issue to avoid the obvious conclusion that he was speaking about a personnel matter.

It is undisputed that SCSD2 has utilized Policy BEDH on other occasions to stop persons from speaking about school district employees during the public comment portion of a board meeting. (Exhibit AA, Wilson Deposition, at 45:16-24; Exhibit AC, Stults Deposition, at 89:25 – 92:25). Pollak has obviously combed through the public board minutes looking for other examples that he thinks will support his claims. It is telling that he cannot point to one specific instance in which a speaker was allowed to make allegations that a specific school district employee's actions violated the law during public comment. There is no basis to Pollak's claim that Policy BEDH was applied to him arbitrarily.

C. The Board Chair's application of Policy BEDH to Pollak was viewpoint neutral.

The Board's refusal to allow Pollak to make allegations against Superintendent Stults during public comment did not discriminate based on viewpoint. Policy BEDH 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 including the opportunity to address the Board during executive session or the opportunity to utilize the grievance procedure.

Pollak argues that Policy BEDH discriminates on the basis of viewpoint because it would allow an individual to voice an opinion during public comment that a school is underperforming because of the curriculum, budget concerns or class size, but not an opinion that an employee is failing in the performance of his/her duties. (ECF No. 66, p. 17). However, this example does not mean that SCSD2 discriminates on the basis of viewpoint. Rather, this example is just a recognition that SCSD2 has imposed content-based restrictions on topics that may be discussed

during public comment. Topics involving curriculum, budget concerns or class size are allowed during public comment regardless of the persons' viewpoint. Discussions concerning personnel matters are not allowed regardless of the persons' viewpoint.

Simply removing personnel matters as a topic of discussion is not viewpoint discrimination. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439 (1985) (a governmental entity may impose content-based restrictions in limited public forums, such as those reserving the forum for certain groups or for the discussion of certain topics so long as the restrictions are reasonable in light of the purpose served by the forum and are viewpoint neutral); *Summum v. City of Ogden*, 297 F.3d 995, 1003 (10th Cir. 2002) (a governmental entity may limit speech in a nonpublic forum to reserve the forum for the specific official uses to which that forum is lawfully dedicated).

Pollak's reliance on the holding in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) to support his argument that Policy BEDH discriminates based on viewpoint is misplaced. In *Lamb*, the Court held that a school district could not discriminate on the basis of viewpoint by permitting school property to be used for the presentation of views about family issues and child rearing except those dealing with the subject matter from a religious standpoint. *Id.* at 394-95. Central to the Court's decision was the fact that the school allowed nonreligious entities to present views about family issues but refused to allow religious entities the same access. *Id.* at 393. This critical distinction distinguishes the holding in *Lamb* from the present case. As noted by the Tenth Circuit, Policy BEDH "is viewpoint neutral because it forbids discussion of all personnel matters, regardless of the speakers' perspective." *Pollak v. Wilson*, 2022 WL 17958787, at *8.

D. SCSD2 did not unconstitutionally apply Policy BEDH against Pollak.

Pollak contends that Policy BEDH was enforced against him in a discriminatory manner because Chair Wilson refused to allow him to make allegations about Superintendent Stults but then made comments that "compliments and congratulations" were welcome. This argument has already been addressed by the Tenth Circuit which held: "The Chair had no authority to modify Board policies on her own, so her comment did not reflect state Board policy. . . . Mr. Pollak fails to identify any authority showing that the Chair could unilaterally modify Board policy." *Pollak v. Wilson*, 2022 WL 17958787, at *7. This holding is consistent with Wyo. Stat. Ann. § 21-3-110(a)(i) and SCSD2 Policy BGA, which require action by the full Board to establish policy. (ECF No. 64, Exhibit R, Policy BGA).

Pollak's argument in this regard suggests that the Board prevented his comments but allowed other speakers to discuss personnel matters during the public comment period of its board meeting. This is not accurate. Both Chair Wilson and Superintendent Stults testified that there have been other instances when the personnel rule in Policy BEDH has been enforced against someone speaking about personnel matter during public comment. (Exhibit AA, Wilson Deposition, at 45:16-24; Exhibit AC, Stults Deposition, at 89:25 – 92:25).

Pollak points to two instances that he claims supports his argument that Policy BEDH has been applied by SCSD2 improperly. (ECF No. 66, p. 19). In the first example, a speaker during public comment in a board meeting held in August of 2021 "thanked the board and the Superintendent for the decisions they made last year to keep teachers and students safe." (ECF No. 66, Exhibit 3, p. 4). In the second example that occurred over a year later, a speaker during public comment in a board meeting held in October of 2022 "thanked [an employee] for his help in addressing the questions she had prior to the meeting." (ECF No. 66, Exhibit 9, p. 17).

Pollak cannot seriously contend that a speaker saying "thank you" during public comment constitutes discussion of a personnel matter. Allowing incidental comments involving common courtesy does not mean that the Board has opened the door to discussion of personnel matters during public comment. Neither of these examples is comparable to Pollak's statement during public comment that the Superintendent had violated his Constitutional rights.

Finally, Pollak's argument continues to ignore the obvious. Context matters. The Tenth Circuit determined as follows:

> Even if we overlook Mr. Pollak's waiver, his pretext argument would likely fail based on the record and therefore not support a preliminary injunction. The dissent says that "Mr. Pollak was shut down for merely stating the school superintendent's name." Dissent at 1. But context here matters. Mr. Pollak and his wife together sent emails to the Superintendent and the Board in advance of the meeting calling for their immediate resignations and demanding an end to the COVID 19 mask mandate, Suppl. App. at 51-64. And in his declaration, Mr. Pollak indicated he would have called for the Board members' resignation at the meeting if they refused to implement certain policies. See App. at 37-38 ¶ 42. This explains the Chair's invocation of the personnel-matter restriction and shows that doing so was bona fide, reasonable, and not pretextual.

Pollak v. Wilson, 2022 WL 17958787, at *10.

III. Pollak does not have standing to challenge the abusive language restriction in Policy BEDH.

Pollak asserts that the restriction in Policy BEDH prohibiting speakers from using abusive language violates the First Amendment (Claim 3), is vague (Claim 4), and is overbroad (Claim 5). The Tenth Circuit determined that Pollak did not have standing to challenge the abusive language restriction 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).

> **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).

Pollak's 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 does not desire to use gossip, defamatory, abusive or vulgar language during the public comment portion of a school board meeting. (ECF No. 64, Exhibit U, Pollak Deposition, pp. 124-125). Thus, he cannot show standing by alleging "an intention to engage in a course of conduct arguably affected with a constitutional interest" or by alleging "a credible threat of future prosecution" plus an "ongoing injury resulting from the statute's chilling effect on his desire to exercise his First Amendment rights." See *Peck v. McCann*, 43 F.4th 1116, 1129 (10th Cir. 2022).

Even if Pollak had standing, there is no merit to his claims. Although it is not required by law to do so, the Board holds a public comment period during its meetings. The purpose for the restriction against the use of abusive language in Policy BEDH is to ensure that board meetings can be conducted in an orderly, efficient and dignified manner. (ECF No. 64, Exhibit A, Affidavit of Stults, ¶ 39). The abusive language restriction helps to prevent angry outbursts and

confrontations, disorderly conduct, and other conduct that is detrimental to the purpose of the meeting. *Id.*

Courts in other jurisdictions have upheld such restrictions. *See e.g.*, W*ard v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746 (1989) (holding the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."); *Steinburg v. Chesterfield County Planning Commission*, 527 F.3d 377, 387 (4th Cir. 2008) (holding content-neutral policy against personal attacks employed in a limited public forum to serve the legitimate public interest of maintaining decorum and order did not violate First Amendment rights); *Scroggins v. City of Topeka*, 2 F.Supp.2d 1362, 1371 (D. Kan. 1998) (upholding policy that required speakers to confine comments to a relevant topic and to avoid personal attacks, noting that the restriction furthers a significant governmental interest and that residents had several other channels of communication with council and mayor).[2]

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[2] To support his argument, Pollak cites to *Matal v. Tam*, 137 S.Ct. 1744 (2017) (declaring the Lanham Act's ban on registering marks that disparage any person to be unconstitutional) *and Iancu v. Brunetti*, 139 S.Ct. 2294 (2019) (holding that Lanham Act's bar on the registration of "immoral" or "scandalous" trademarks discriminates on the basis of viewpoint and, thus, violates the First Amendment). Both of these cases, however, dealt with legislation pertaining to the federal registration of trademarks. Neither case considered the reasonableness of a restriction against offensive language in order to maintain the order and structure of a school board meeting.

Pollak's argument that the abusive language restriction is unconstitutionally vague is without merit. 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. Chair Rader testified that the policy was intended to cover the common definitions of gossip, defamatory remarks, abusive and vulgar language. Exhibit AB, Rader Deposition, at 51:14-17; 54:13-17; 56:8-12; 59:8-13.

Similarly, the abusive language restriction is not overbroad. A restriction is impermissibly 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. *See* W*ard v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746 (1989); *Steinburg v. Chesterfield County Planning Commission*, 527 F.3d 377, 387 (4th Cir. 2008); *Scroggins v. City of Topeka*, 2 F.Supp.2d 1362, 1371 (D. Kan. 1998).

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

Pollak's Right to Petition claims are analyzed in the same manner as his Free Speech 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."); *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."). Accordingly, Pollak's Right to Petition claims fail for the same reasons that his Free Speech claims fail.

V. Pollak is not entitled to damages or injunctive relief.

For the reasons stated above, Pollak cannot succeed on any of his claims. Thus, he is not entitled to damages. Permanent injunctive relief is only available if a party can prove: (1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest. *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007). Since Pollak cannot show actual success on the merits of any of his claims, there is no basis for a permanent injunction.

Conclusion

SCSD2 respectfully requests that the court deny Pollak's motion for summary judgment.

Dated this 13th day of October, 2023.

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Certificate of Service

I, Kendal R. Hoopes, hereby certify that on October 13, 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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