UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

PATRTICIA MCBREAIRTY, as personal representative of the Estate of Shawn McBrearty, Plaintiff, v. BREWER SCHOOL DEPARTMENT, et al., Defendants.	)	CASE NO. 1:24-cv-00053-LEW

REPLY MEMORNADUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS BREWER SCHOOL DEPARTMENT, GREGG PALMER AND BRENT SLOWIKOWSKI

Defendants Brewer School Department, Gregg Palmer and Brent Slowikowski (collectively "Brewer") submit this reply memorandum to address new matter raised in Plaintiff's opposition to their motion for summary judgment.

I. The Alleged Constitutional Violation

The legal issues regarding whether the content in the post here at issue is or is not constitutionally protected has been exhaustively briefed in the context of Plaintiff's several motions for injunctive relief and in Brewer's main brief in support of its motion for summary judgment and consistent with the dictates of Local Rule 7(c), will not be repeated here. It does, however, bear noting that Plaintiff has failed to generate a question of fact as to whether McBreairty's statements about HD were defamatory and the pictures of students in the bathroom at Brewer High School were an invasion of privacy. *See* Plaintiff's Opposing Statement of Material Fact ("OSMF") ¶ 4, ECF Doc. 105, PageID #: 978, (denial of fact that the statement is false not supported by record citation and thus deemed admitted pursuant to Local Rule 56 (f)); OSMF ¶ , ECF Doc. 105, PageID #: 978 (qualification of fact that parents were upset by

violation of children's privacy rights not supported by record citation and therefore deemed admitted pursuant to Local Rule 56 (f))). Accordingly, unless this Court were to hold that even speech that is defamatory or an invasion of privacy is protected under the First Amendment, which as discussed in Brewer's initial memorandum, it should not, Brewer is entitled to summary judgment on all of the Plaintiff's claims.

II. Municipal Liability

Plaintiff begins her discussion of municipal liability by acknowledging that she must show the existence of the deprivation of a constitutional right through an official policy or custom of the governmental entity, Plaintiff's Opposition at 14, ECF Doc. 104, PageID # 969. She then veers from this correct statement of the law to an argument based on principles of *respondeat superior.* She thus argues that she has met the *Monell* standard because "Hewey's demands were expressly on behalf of Brewer (and others)." *Id.* It is, however, black letter law that "a municipality cannot be held liable under [42 U.S.C.] § 1983 on a *respondeat superior* theory . . . Instead, it is when execution of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983." *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978); *see also Fabiano v. Hopkins*, 352 F.3d 447, 452 (1st Cir. 2003)("Absent evidence of an unconstitutional municipal policy, a single incident of misconduct cannot provide the basis for municipal liability under § 1983. Such a result would be the equivalent of imposing respondeat superior liability upon the municipality.")(citation omitted); *Kelley v. LaForce*, 288 F.3d 1, 9 (1st Cir. 2002)("Rather, liability can be imposed on a local government only where that government's policy or custom is responsible for causing the constitutional violation or injury."). "[I]t is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality." *Board of Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397,404 (1997). Furthermore, where, as here, the alleged policy is unwritten, the

plaintiff may prevail only by showing that the alleged policy is an "official" one, in other words that it is "so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Abdisamad v. City of Lewiston*, 960 F.3d 56, 60 (1st Cir. 2020) (explaining that unwritten policies will only give rise to municipal liability where they are "permanent and well settled"); *see also Welch v. Ciampa*, 542 F.3d 927, 942 (1st Cir. 2008) ("[L]iability may not be imposed on a municipality for a single instance of misconduct by an official lacking final policymaking authority.").

In opposing Brewer's motion for summary judgment, Plaintiff has failed to point to one single fact that could support the existence of such a policy. To the contrary, Plaintiff's complaint and the summary judgment record include allegations of only a single instance of the type of allegedly unconstitutional conduct that she asserts supports her claim.[1] This is not sufficient to establish municipal liability under *Monell.*

Plaintiff next contends that her claim should survive because the alleged threat was directed by the Superintendent who, she asserts, is a person with final policy making authority. Plaintiff is correct that "[a] plaintiff can establish the existence of an official policy by showing that the alleged constitutional injury was caused . . . by a person with final policymaking authority." *Welch*, 542 F.3d at 941. Generally, however, "[t]he fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not,

[1] In her opposition to the School Defendant's motion for summary judgment, Plaintiff did not argue that the facts regarding the student petition are evidence of the required pattern and any such argument is now waived. *See McBreairty v. Miller, No. 1:23-cv-00143, 2023 WL 3096787, at *9 n.16 (D. Me. April 26, 2023) (*"[A]rguments developed for the first time in a reply brief are waived." *Mabee v. Eckrote*, No. 1:19-CV-00432, 2023 WL 3997067, at *1 n.1 (D. Me. June 14, 2023) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.*") (quoting United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)).Regardless, the School Department's treatment of a student petition cannot support an argument that Brewer has an official policy with respect to third party speech. As this Court noted in denying the plaintiffs' motion for a temporary restraining order in *Wells v. Brewer School Department*, Case 1:24-cv-00062-LEW, the standard for regulating speech with respect to students is vastly different from the standard here at issue.

without more, give rise to municipal liability based on an exercise of that discretion." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481-82 (1986). The determination of whether a particular official is a final policymaker is a question of state law. *St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988).

This Court has already correctly held that as a matter of state law, neither Slowikowski nor Palmer had final authority to bring a lawsuit which is the very threat that Plaintiff complains of here and in her opposition, Plaintiff concedes as much. She argues instead that Brewer is not entitled to summary judgment on two bases. First, she states that Brewer did not argue that Palmer was not a final decisionmaker in its an initial memorandum, a contention that is false. S*ee* Brewer's Memorandum, ECF Doc. 92, PageID #: 819 ("to the extent there is any question as to whether Superintendent Palmer could be considered a final decisionmaker in this context, the answer is no").

Second, she contends that because the Superintendent is empowered to *enforce* Board policy, that makes him a final policy maker. That, however, is not the law. In *Jett v. Dallas Independent School Dist.*, 491 U.S. 701 (1989), the United States Supreme Court held that a jury instruction to the effect that a school district is liable under Section 1983 for the actions of a school administrator who had been delegated authority by the board to transfer employees was "manifest error." *Id.* at 736. The Court explained that "the trial judge must identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue. *Id.* at 737. State law is clear that the authority of a Superintendent is limited to enforcing policy, whereas policy is solely in the hands of the school board. *See* 20-A M.R.S. §§ 1001, 1055. The School Department is thus entitled to summery judgment.

III. Qualified Immunity

In purporting to discuss qualified immunity, Plaintiff once again spews forth law relating to the First Amendment and almost entirely ignores Brewer's argument. Qualified immunity, as this Court is well-aware, "put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix v. Luna*, 577 U.S. 7, 12, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015),, *quoting Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986); *see also Stanton v. Sims*, 571 U.S. 3, 6 (2013) (""Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.' ").

Here, Plaintiff proffers no fact that indicates Slowikowski was involved at all, and the only fact in the record about Palmer is that when faced with disruption in the school, he decided to try to get McBreairty to take down the post. SMF ¶ 6.

Nor is this case analogous to the Tenth Circuit's recent decision in *Tachias v. Sanders*, No. 22-2139, 2025 WL 747688, at *8 (10th Cir. Mar. 10, 2025) a case holding that a school superintendent was not entitled to qualified immunity for making a threat of a frivolous lawsuit for the express purpose of chilling the plaintiff's First Amendment Speech under the law of that Circuit. In the first place, the facts of that case were very different from the facts of this case. In contrast to the relatively benign statement that "we will be forced to take further action against you" made here, in that case, the superintendent trademarked the name of the school in order to try to shut down a Facebook page that was critical of the school and when the website. She then followed up with cease and desist letters that threatened the plaintiffs with a suit for damages.

The *Tachias* court began its analysis by stating:

> we must not "abstract [our past] holdings to the situation here" too much. *Est. of Smart v. City of Wichita*, 951 F.3d 1161, 1174 (10th Cir. 2020). Doing so may "define[ ] the qualified immunity inquiry at [too high a] level of generality." *Mullenix v. Luna*, 577 U.S. 7, 16, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015) (per curiam). Although there need not

> be a "case directly on point," *id.* at 12, 136 S.Ct. 305, "the clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 580 U.S. 73, 79, 137 S.Ct. 548, 196 L.Ed.2d 463 (2017) (per curiam) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). In short, "[t]he salient question is whether the state of the law at the time of an incident provided fair warning to the defendants that their alleged conduct was unconstitutional." *Tolan v. Cotton*, 572 U.S. 650, 656, 134 S.Ct. 1861, 188 L.Ed.2d 895 (2014) (cleaned up).

Id. at *5. It went on to hold that the infringement action was frivolous because the Lanham Act did not apply to the trademark the school obtained. Id at * 7. Finally, it relied on Tenth Circuit case law to determine that the law was clearly established.

In this case, by contrast, Plaintiff does not establish that Brewer threatened a *frivolous* lawsuit, if it threatened a lawsuit at all.[2] Further, she has identified no First Circuit case to support a contention that the state of the law would have provided fair warning to Palmer that trying to protect the school's students and employee would violate McBreairty's rights. Palmer and Slowikowski are thus entitled to immunity.

IV. Maine Civil Rights Act.

Plaintiff is correct that the Maine Civil Rights Act has been amended to include the possibility of recovery for emotional distress under very narrow circumstances. That amendment, however, is not relevant to this case. In her memorandum, Plaintiff quotes a portion of the amendment (the addition of the language "engaging in any conduct that would cause a reasonable person to suffer emotional distress," (ECF Doc. 104, PageID #: 972), but leaves out the language of the remainder of the amendment. The section of the Maine Civil Rights Act quoted by Plaintiff provides in full:

§4684-A. Civil rights

[2] Plaintiff suggests that the Brewer was going to bring a lawsuit similar to that brought against McBreairty by the Hermon School Department in *Hermon School Department v. McBreairty*, CV-2022-00056 (Penobsoct Couunty Superior Court). Even if Plaintiff had proffered any facts to support that suggestion – which she has not – she has not established that that lawsuit was frivolous. To the contrary, she concedes in her Opposing Statement of Facts, that the Superior Court had denied McBreairty's anti-SLAPP motion. OSMF ¶ 28.

> For purposes of this chapter and Title 17, section 2931, a person has the right to engage in lawful activities without being subject to physical force or violence, damage or destruction of property, trespass on property, the threat of physical force or violence, damage or destruction of property or trespass on property or any conduct that would cause a reasonable person to suffer emotional distress or to fear death or bodily injury to that person or a close relation motivated by reason of race, color, religion, sex, ancestry, national origin, physical or mental disability, sexual orientation or gender identity. For purposes of this section, "close relation" and "emotional distress" have the same meanings as in Title 17-A, section 210-A, subsection 2, paragraph B and paragraph D, respectively.

17-A M.R.S.§ 210-A(2) in turn, defines "emotional distress" as "mental or emotional suffering **of the person being stalked** as evidenced by anxiety, fear, torment or apprehension that may or may not result in a physical manifestation of emotional distress or a mental health diagnosis." (Emphasis supplied).

In this case, Plaintiff's Maine Civil Rights Act claim fails not only because there is no record evidence to support a claim that the alleged threat was motivated by McBreairty's "race, color, religion, sex, ancestry, national origin, physical or mental disability, sexual orientation or gender identity," but also because there is no record that McBreairty was stalked. Thus, the type of emotional suffering required under the amendment is missing here and Brewer is entitled to summary judgment on that claim.

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