No. 24-1337

In the

UNITED STATES COURT OF APPEALS

for the

FIRST CIRCUIT

SHAWN MCBREAIRTY

Plaintiff-Appellant,

v.

BREWER SCHOOL DEPARTMENT, GREGG PALMER, BRENT SLOWIKOWSKI, AND MICHELLE MACDONALD

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maine
No. 1:24-cv-00053-LEW
The Honorable Lance E. Walker

REPLY IN SUPPORT OF EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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Plaintiff-Appellant Shawn McBreairty ("McBreairty") respectfully submits his Reply in support of his Emergency Motion for an Injunction Pending Appeal, per Fed.R.App.P. 8(a), and asks the Court to grant injunctive relief pending resolution of this appeal.

1.0 Introduction

No matter how much Appellees Brewer School Department, Gregg Palmer, and Brent Slowikowski ("Appellees") try to complicate this matter, hoping to win by delay, they fail. The case is simple. A journalist published an article with a photo. The government threatened to take action against him if he did not censor his article, and they now want to get away with it.

Appellees argue that Appellant overreacted in interpreting their demands and say that he is "free" publish what he wants, but that is not the case.[1] Freedom to publish means freedom from government reprisal. However, Appellees *still refuse to* say they will not take "action" against McBreairty, complaining that injunctive relief would "prevent the Brewer School Department from taking even modest action [against Appellant] to protect its students and staff from privacy violations and bullying and hazing." Opposition, 14. Appellees do not get to have it both

[1] If Appellees' intended to simply implore McBreairty to voluntarily remove the article rather than coerce him with threats, they could have sent him a letter requesting that he do so, disclaiming any demand. Appellees instead chose to make substantial threats of legal repercussions and must accept the consequence of being told they cannot do that anymore, nor can they follow through on those threats.

ways—they cannot argue that Appellant has not suffered irreparable harm because they did not really threaten him while simultaneously arguing that an injunction will prevent them from making good on their threats. Moreover, Appellees' briefs before this Court and below have not asserted what *valid* course of action against McBreairty could be warranted. McBreairty asks this Court to see Appellees' threats for what they are—the government using coercive action to intimidate Appellant into censoring his speech—and issue injunctive relief.

2.0 Argument

2.1 McBreairty Faces Irreparable Harm

When the government threatens a journalist, that is harm in itself. When the government then says, "our threat was not specific, so there is no harm," that requires sanctions, not the reward of further delay to effect the government's censorship. McBreairty faces retaliation by Appellees for his protected speech. Appellees lodged legally baseless allegations against him based upon his reporting, and they explicitly threatened to take further action if he did not censor his writing. McBreairty's only options were to either take his article down or face expensive and time-consuming litigation—again—or even prosecution or criminal investigation. Appellees suggest that Appellant should have just kept his article up in the face of their threats and simply faced the consequences. This does not accurately reflect the state of First Amendment law or pre-enforcement jurisprudence.

This Court, and the United States Supreme Court, have repeatedly recognized that "[i]t is well established that the loss of first amendment freedoms constitutes irreparable injury." *Maceira v. Pagan*, 649 F.2d 8, 18 (1st Cir. 1981), citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Appellees point to *Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010) to attempt to refute this well-established principle, but *Respect Maine* is inapposite. In *Respect Maine*, this Court heard an appeal from denial of a preliminary injunction relating to a suit seeking to hold a state election statute unconstitutional. *Id*. at 14. In declining to reverse denial, this Court found that the issues were complicated, that there were facts in dispute, and that the plaintiffs had not shown that "there [were] any actions remaining under the challenged…provisions to enjoin before [the upcoming election]." *Id*. at 15-16.

In contrast, McBreairty is suffering immediate and ongoing harm because he is unable to publish his article and photo without succumbing to government editorial input, while simultaneously suffering the chilling effect of Appellees' threats against his freedom. Such a burden on McBreairty's speech is both real and irreparable—no amount of monetary damages can restore McBreairty's free speech rights, particularly where that speech relates to an ongoing public debate that has a shelf-life; news and public opinion changes like the weather, and if McBreairty can only re-publish his article once this action has received a final judgment on the merits (potentially years from now), the Article may be irrelevant. This must be Appellees'

plan, as they argue for even more "full briefing" (Opposition, 15), as if the issues have not already been fully briefed.

2.2 McBreairty is Likely to Succeed

Appellees attempt to wave away McBreairty's rights by focusing on a novel theory of a government right to petition.[2] This theory, erroneously endorsed by the District Court, would augur the end of injunctions in §1983 actions. If that were a legitimate option, any government entity which wanted to prosecute someone for having the wrong opinion could simply state that it has a First Amendment right to petition the courts, and the citizen's only way to invoke the First Amendment would be defensively. Such a theory is creative, but implementing it would require that §1983 be re-written.

Appellees point to nothing establishing a "right to petition the courts" belonging to governments or municipalities because they have none. The cases Appellees cite about restraining the right to petition the courts are inapposite—none of them involve the government as a putative litigant because government entities

[2] Appellee Michelle MacDonald filed a separate Opposition. Injunctive relief is only sought against her in her official capacity, not in her personal capacity. An official-capacity suit is "in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Here, the entity is Brewer School Department, represented by Attorney Hewey, and MacDonald acknowledges that Hewey's client was the Brewer School Department. MacDonald otherwise incorporates Appellees' arguments by reference. Thus, no further discussion is necessary as to MacDonald's Opposition.

do not have First Amendment rights. "In short, extending First Amendment protections to governments flips the Constitution on its head. Rights belong to people, whereas governments have powers. Instead of protecting individual liberty at government's expense, a First Amendment cause of action for government would protect government's powers at the expense of individual liberty." *New Mexico v. McAleenan*, 450 F. Supp. 3d 1130, 1210 (D.N.M. 2020); *accord Student Gov't Ass'n v. Bd. of Trustees*, 868 F.2d 473, 481 & 482 n.10 (1st Cir. 1989) ("a state entity[] itself has no First Amendment rights[.]"); *see also Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the government.") No further factual development, as Appellees want, is needed to enjoin a non-existent "right."

Appellees' attempt to distance themselves from the actions of their counsel in the *Hermon* matter is disingenuous. Appellees argue here that Hermon did not actually seek to apply its policies against McBreairty and point to a later-filed appellate brief from that case in which Hermon attempted to distance itself from that frivolous position. The Complaint in that case tells a different story. The Hermon School Department, represented by attorney Melissa Hewey and the DrummondWoodsum law firm, sought declaratory and injunctive relief against

McBreairty based on his reporting. ECF No. 23-2, at **Exhibit 1**. Hermon sought the following relief:

> WHEREFORE, Plaintiff Herman [sic] School Department requests that this Court enter the following relief against Defendant Shawn McBreairty:
>
> 1. Declare that **McBreairty has engaged in bullying, harassing, and hazing behavior** toward Mallory Cook **that is in violation of** state law and **Herman** [sic] **School Department Board policies GBGB and ACAD**;
>
> 2. Enter a preliminary and permanent injunction prohibiting McBreairty from publishing further statements concerning Mallory Cook that are false and defamatory, or that place Ms. Cook in a false light, **or otherwise constitute bullying or harassment under** state law and **Herman** [sic] **School Department Board policy**; …

Id. at 9 (emphasis added). Appellees attempt to paint Hermon's later argument as controlling what relief was sought notwithstanding the complaint, but as Appellees' counsel knows, positions taken by parties outside of pleadings do not override the complaint. *See McBreairty v. Miller*, 93 F.4th 513, 521 (1st Cir. 2024).

Appellees attempt to separate themselves from their messenger, while using the same messenger. Appellees' choice of agent is relevant to McBreairty's subjective and objective assessment of the threats conveyed. Having endured years of frivolous litigation initiated by another school department employing this same attorney and same firm as their agent under nearly identical circumstances, they threatened to use the same exact weapon against him. McBreairty understood quite clearly what Attorney Hewey meant when she said that if he did not comply,

Appellees "will be forced to take further action against [him]." In this way, the messenger is part of the message. Hiring Whitey Bulger to deliver a message to one's neighbor is functionally different than hiring Fred Rogers. A reasonable person in McBreairty's shoes knows that such a threat from Attorney Hewey is a credible one, no matter who she represents, even if the threat is legally baseless. The choice of messenger was deliberate and is highly relevant.

Further, Appellees do not attempt to disavow filing the same type of frivolous "Hermon theory" lawsuit. Instead, the uncontroverted record evidence shows that Appellees did indeed plan to file suit against McBreairty. *See* ECF 23-3, attached as **Exhibit 2**, at ¶¶4-11 (describing conversation with Attorney Hewey indicating Appellees' intention to sue Appellant).

Appellees have never provided justification as to how such a lawsuit would have merit. Moreover, Appellees' opposition shows that their demands were legally baseless. In her first demand, Attorney Hewey outlined of three specific instances where McBreairty's article supposedly violated the law. Opposition, 4-5 (publishing Hewey's emails verbatim). After McBreairty knuckled under, but published the demand on social media, Hewey *then* demanded that her email be removed from his post. Hewey made this demand because "[her] email **quoted verbatim** the inappropriate content so by posting the email on X, [Appellant] ha[s] **effectively re-posted the inappropriate content**." *Id.* She specifically clarified that the relevant

"inappropriate content" was the following information recited in her email: "the information regarding the BHS student from second picture and the information regarding the staff member's child on the third page," and demanded that he redact that information. *Id.*

In other words, Appellees claimed that McBreairty's purported liability stemmed from publishing ***the exact same information*** that Appellees themselves published here. Appellee neither sought to seal that information, nor did they choose to redact or summarize the information.[3] If Appellees believed that simply publishing that information publicly was illegal, then they themselves voluntarily committed the same infraction here. Accordingly, Appellees concede their demands were bluster, and their claims that Appellant's publication violated teachers' or students' privacy hold no water. Their intent was to intimidate a critical journalist, and they succeeded. That journalist has a right to an injunction so that he may publish without further governmental intimidation.

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[3] The only difference between the text of Hewey's email and the text produced in Appellees' Opposition was that H.D.'s initials were used in lieu of H.D.'s legal name, following the convention to not use the names of minors in litigation. However, Heweys' second email does not identify the publication of H.D.'s name as the issue with Appellant's post; instead, it identifies the issue as publishing "information regarding the BHS student." The Opposition publishes that same information and even references H.D.'s unique nickname.

2.3 The Remaining Factors Tip in McBreairty's Favor

Appellees' claim that McBreairty failed to address balancing of harm, but that subject was perhaps the most-discussed portion of his Motion. There are two harms to here: (1) the harm associated with chilling Appellant's speech, and (2) the purported harm associated with restraining Appellees from pursuing baseless, retaliatory actions against Appellant based upon protected speech.

As discussed above, Appellees do not have any First Amendment right to petition the courts in their official capacities and they provide no authority to support their novel theory that governments have such a right. Moreover, Appellees offer no valid basis for asserting *any claim* by them against McBreairty based on his speech. Thus, the harm Appellees allege they would suffer is that their non-existent right to petition the courts for relief based upon meritless claims would be infringed; there is no harm to them; the balance favors McBreairty.

Further, an injunction supports the public interest. Appellees argue that because Appellant may have publicly discussed the underlying subject matter of the article after his removal of the post, he was not chilled. Appellees purposefully miss the point. Their demands related to Appellant's publication of a specific article containing specific information. Appellees successfully bullied Appellant into removing his article, and he has not subsequently re-published it. Speech they did not yet threaten is not yet at issue.

Finally, no further briefing is needed. The parties collectively submitted nearly 150 pages of briefing. That Appellees, at this late juncture, throw in a new argument grounded in the Anti-Injunction Act, without any elaboration, based upon a citation to an inapposite Ninth Circuit case from 1997, shows that they are more interested in dragging this case out as long as possible than seriously engaging with the issues. Regardless, the issue has a straightforward answer provided by the Supreme Court itself: the Anti-Injunction Act does not prohibit injunctions sought in §1983 cases. *Mitchum v. Foster*, 407 U.S. 225, 242-43 (1972). Full stop.

2.4 Appellant's Request for Injunctive Relief is Sufficient

Appellees argue in passing that the relief Appellant seeks is not sufficiently specific. However, it is clear from the Complaint what relief McBreairty sought:

> WHEREFORE, Plaintiff Shawn McBreairty asks this Court to issue and or award:
>
> A. A preliminary and permanent injunction enjoining Defendants from interfering with Plaintiff's right to lawfully engage in constitutionally protected expression including, but not limited to, publication of the Article and the demand letter; …

Verified Complaint, ECF No. 1, at 15. Appellant's briefing also makes it clear:

> The Court should enter a preliminary injunction against the Defendants from taking action against him on account of publishing the Article and the letter as these actions are unconstitutional. Further, the Court should enjoin the Defendants from taking any action to try to apply school policies to McBreairty.

Motion, ECF No. 4, at 20.

In his Motion, Appellant also points out that the relief he requested was not limited to enjoining Appellees from filing a civil lawsuit because Appellees' threats implied criminal prosecution[4] or other administrative remedies. Motion at 18. Yet, Appellees claim that they do not understand what relief is sought. It could not be more clearly spelled out. But, here we are.

Appellees cannot issue vague threats and then complain that the injunctive relief sought for shelter from those threats is too broad. The relief sought is clear and can be easily enforced. Appellant asks that this Court enjoin Appellees from taking any adverse action against Appellant related to his publication of the article at issue in the case, along with the photograph published therein, including but not limited to filing a lawsuit, attempting to bring administrative charges, or seeking the institution of criminal charges or a criminal investigation against Appellant.

3.0 Conclusion

In light of the foregoing, Appellant asks that this Court issue the requested injunctive relief pending the conclusion of this appeal.

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[4] While Appellees argue that they cannot institute criminal proceedings, they can and should be enjoined from seeking the institution of a criminal investigation or criminal proceedings against Appellant based upon the conduct alleged in Appellant's Complaint.

Date: April 23, 2024.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that:

This reply complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this motion contains 2,598 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Counsel for the parties met and conferred on April 15, 2024 telephonically; Appellees all oppose the requested relief.

Date: April 23, 2024.

RANDAZZA LEGAL GROUP, PLLC

/s/ Marc J. Randazza
MARC J. RANDAZZA

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: April 23, 2024.

RANDAZZA LEGAL GROUP, PLLC

/s/ Marc J. Randazza
MARC J. RANDAZZA

Exhibit 1

Complaint

Hermon School Dept. v. McBreairty

ECF 23-2

<u>Exhibit 2</u>

Complaint

Hermon School Dept. v. McBreairty

May 3, 2022

STATE OF MAINE
PENOBSCOT, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-2022-

HERMON SCHOOL DEPARTMENT Plaintiff v. SHAWN MCBREAIRTY, Defendant	))))))))))	**COMPLAINT** **INJUNCTIVE RELIEF REQUESTED**

Plaintiff Hermon School Department, for its complaint against Defendant Shawn McBreairty, states as follows:

INTRODUCTION

1. This is an action brought by the Hermon School Department seeking a declaration that Defendant Shawn McBreairty has engaged in bullying and harassing behavior toward Hermon School Department employee Mallory Cook, that such conduct violates Hermon School Department Board policy and state law, and that McBreairty should be enjoined from further conduct of this nature for the protection of the School Department as well as Ms. Cook and others like her.

THE PARTIES

2. Plaintiff Hermon School Department is a Maine municipal school district organized under the laws of the State of Maine, with a principal place of business in Hermon, Penobscot County, Maine.

3. Defendant Shawn McBreairty is an individual who resides in Hampden, Penobscot County, Maine.

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FACTS

A. Bullying of School Employees Generally

4. Public schools in Maine are responsible for providing a free appropriate public education to all students of school age in the state.

5. Schools depend on their ability to attract and keep talented and proficient educators in order to be able to provide their students with a quality education.

6. Attrition among teaching professionals has become a crisis in Maine and around the country as more and more teachers resign due to on-the-job stress.

7. One growing source of on-the-job stress for teachers has been bullying and harassing behavior by members of the public.

8. Teachers are subject to adverse bullying behavior both on line and in person.

9. One way that the Maine Legislature has sought to address this growing problem is through the enactment of 20-A M.R.S.A. § 1000(22), a law that requires public school administrative districts to adopt and implement policies protecting their employees from bullying and harassment.

10. As a school administrative unit within the State of Maine, the Hermon School Department has the obligation to protect its employees from bullying and harassment.

11. 20-A M.R.S.A. § 1001 (22) requires public school boards to adopt and implement a policy to "address the negative effects of bullying of school employees . . . and to ensure the safety of employees and an inclusive environment for all employees and students in the public school."

12. 20-A M.R.S.A. § 1001 (22) further requires that public schools adopt policies prohibiting bullying and harassment of school employees and mandates that they implement and enforce the policies so adopted.

13. In compliance with its obligations under 20-A M.R.S.A. § 1001(22), the Hermon School Department has adopted Board Policy GBGB, a copy of which is attached hereto as Exhibit 1.

14. That policy provides that "[a]ll employees and students in the school unit, as well as parents, community members, and others involved with the schools are prohibited from engaging in workplace bullying."

15. The definition of bullying contained in Hermon Board Policy GBGB includes "humiliating, mocking, name-calling, insulting, maligning, or spreading rumors about an employee."

16. The definition of bullying contained in Hermon Board Policy GBGB also includes cyberbullying which is defined as "bullying occurring through the use of technology or any electronic communication."

17. The Herman School Department has also adopted Board Policy ACAD, a copy of which is attached hereto as Exhibit 2.

18. Board Policy ACAD prohibits injurious hazing of school employees and students.

19. Board Policy ACAD defines injurious hazing as "any action or situation, including harassing behavior, that recklessly or intentionally endangers the mental or physical health of any school personnel or a student enrolled in a public school."

20. If the Hermon School Department is unable to comply with its obligations to protect its employees from bullying, harassment and hazing, it will suffer cognizable damages in that it will be in violation of state law and its own policy; employees who are the victims of bullying, harassment and/or hazing may have contractual rights as against the School Department, the violation of which could lead to the imposition of monetary and nonmonetary consequences against the School Department; and it will lose employees who are unwilling to

work in an environment where they are subject to bullying, harassment, and/or hazing, thereby degrading the quality of education it is able to provide to its students.

B. Bullying of School Employee by Shawn McBreaity

21. McBreairty describes himself on Twitter as "Father, Husband, Dog-Dad, Patriot, Lion, Warrior, Activist, Anti-CRT OG and approves of toxic masculinity."

22. McBreairty publishes a podcast called the Maine Source of Truth Podcast in which he broadcasts his views opposing rights for transgender individuals, racial equality and other issues involving the fair and equitable treatment of all people regardless of race, ethnicity, gender, or any other difference.

23. McBreairty regularly makes statements on his podcast, on various social media platforms, in emails, and in personal presentations, that attack school employees in various school administrative units around the state, including Hermon.

24. McBreairty regularly makes false and defamatory statements about teachers around the state by accusing them, among other things, of "grooming children" and being "sexual predators."

25. These statements intentionally or recklessly endanger the mental or physical health of the individuals that are the subject of the statements.

26. As a result of McBreairty's baseless attacks on school employees, several have either threatened to resign from employment or have submitted their resignations.

27. Mallory Cook is an English teacher at the Hermon High School.

28. Ms. Cook is also an advisor of the Gender and Sexuality Alliance ("GSA").

29. Although McBreairty does not have a child in Ms. Cook's classroom, and indeed does not have a child enrolled in any school within the Hermon School Department, he has made

it a personal mission to mock, intimidate and attempt to hold Ms. Cook out for public ridicule and scorn simply because he does not agree with her.

30. On or about April 1, 2022, McBreairty sent the Superintendent of the Hermon School Department a letter in which he requested public records relating to a non-Hermon School Department training Ms. Cook provided to various Bangor area schools.

31. In the same letter McBreairty made the following charges concerning Ms. Cook:

- She "appears to be grooming children";
- "Microaggressions" is simply a nicer sounding term of teaching young children racism;
- "Reflection on their own privilege" is another way for teachers to push the racial divide of whites being oppressors and black student being oppressed;
- There are 2 genders, not the 63 Hermon HS library displayed recently;
- What Mallory Cook is appearing to be doing, on the heels of her participation in last year's anti-Trump, leftist progressive video, in which Cook broke many Hermon school policies, is to attempt to co-parent the children of Hermon High School, while not concentrating on the very basics of education.

32. The statements McBreairty has made about Ms. Cook are both false and defamatory and constitute bullying and harassment of Ms. Cook.

33. The statements McBreairty has made about Ms. Cook intentionally or recklessly endangered her mental or physical health.

34. On February 16, 2022, McBreairty appeared on a radio broadcast called Legacy 1160 and made numerous false statements about Ms. Cook, including that she wanted to distribute a book of pronouns to her classes and that she conduced pronoun surveys in her classes.

35. McBreairty's false statements on the radio showcased Ms. Cook to be fearful and not to feel safe in the Herman High School Building.

36. As a result of McBreairty's statements on the radio broadcast, the School relocated Ms. Cook's classroom and Ms. Cook was obliged to seek an alternative meeting place for the GSA club meetings in order to ensure the safety of club members.

37. As a result of McBreairty's statement on the radio broadcast, Ms. Cook filed a formal complaint under Board Policy GBGB.

38. On or about March 18, 2022 on his podcast McBreairty stated that Ms. Cook is a "sexual predator" because of her work with LGBTQIA+ students.

39. On or about March 10, 2022, McBreairty posted on Twitter that Ms. Cook "has a 'secret' Twitter account, who is also the head of the hyper-sexualization movement."

40. This statement is false and defamatory.

41. This statement casts Ms. Cook in a false light.

42. This statement constitutes bullying and harassment of Ms. Cook.

43. This statement intentionally or recklessly endangered the physical or mental health of Ms. Cook.

44. In early April, 2022, McBreairty sent emails to several people accusing Ms. Cook of "grooming children" and stating that she "is running a shadow organization by pushing hyper-sexualization of minors in the Gay Sexuality Alliance (GSA) club s faculty sponsor."

45. On April 12, 2022, McBreairty published the following definition of "grooming" on Facebook: "the deliberate act of bringing a child into a sexual, political, or racial ideology, practice, cult, or lifestyle without the knowledge or consent of his or her parents for the aim of isolating them from their family so the external party can abuse and manipulate them."

46. On or about May 2, 2022, McBreairty posted a message on Twitter accusing Ms. Cook and two other employees of the Hermon School Department of being "groomers."

47. McBreairty's accusations were false and defamatory.

48. McBreairty's accusations constitute bullying and harassment of Ms. Cook.

49. McBreairty's actions concerning Ms. Cook as detailed above have made Ms. Cook feel unsafe.

50. McBreairty's actions concerning Ms. Cook as detailed above have cast Ms. Cook in a false light.

51. McBreairty's statements concerning Ms. Cook as detailed above recklessly or intentionally endanger her mental or physical health causing her to miss work and require counselling.

52. McBreairty's actions as detailed above meet the definition of hazing under state law and Hermon School Department Board policy ACAD.

53. McBreairty has engaged in a course of conduct that would cause a reasonable person to suffer serious inconvenience or emotional distress.

54. As a result of McBreairty's course of conduct, Ms. Cook has suffered emotional distress.

55. McBreairty's course of conduct constitutes stalking under Maine law.

COUNT I

(Declaratory Judgment)

56. The Herman School Department repeats and realleges each of the allegations set forth in paragraphs 1 through 47 of this Complaint as if fully set forth herein.

57. The Hermon School Department has suffered, and will continue to suffer particularized injury as a result of McBreairty's actions detailed above.

58. Such particularized injury includes, but is not limited to, the inability of the Hermon School Department to protect Ms. Cook and its other employees from bullying and harassment by McBreairty as required by state law, Board policy and contract, and the risk of losing Ms. Cook and other teachers because of the stress caused by severe and outrageous bullying behavior by McBreairty.

59. Because McBreairty is not associated with the Hermon School Department in any way, without intervention by this Court, the Hermon School Department has no way to enforce its anti-bullying policy against him and to provide Ms. Cook and its other employees with the protection they deserve and are entitled to under 20-A M.R.S.A. 1001(21) .

60. The Hermon School Department therefore brings this action requesting that the Court declare that McBreairty's statements about Ms. Cook are in violation of her rights and enter a preliminary and permanent injunction prohibiting Mr. McBreairty from making false statements concerning Ms. Cook or any of its other teachers

61. The Hermon School Department is entitled to this declaration pursuant to 14 M.R.S.A. § 5951, *et seq.*

62. The Hermon School Department is without an adequate remedy at law to prevent McBreairty from bullying its employee Ms. Cook and thereby meet the obligations imposed upon it by state law.

63. The Herman School Department and its employee Ms. Cook will be irreparably injured if McBreairty is not prevented from further bullying of its employee

64. By contrast, McBreairty will suffer no damage if he is not permitted to bully, defame, harass and invade Ms. Cook's privacy.

65. It is in the best interests of the public that Mr. McBreairty be prevented from bullying, defaming, harassing and invading Ms. Cook's privacy.

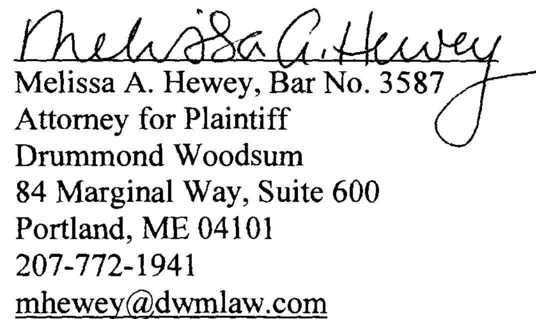
WHEREFORE, Plaintiff Herman School Department requests that this Court enter the following relief against Defendant Shawn McBreairty:

1. Declare that McBreairty has engaged in bullying, harassing, and hazing behavior toward Mallory Cook that is in violation of state law and Herman School Department Board policies GBGB and ACAD;

2, Enter a preliminary and permanent injunction prohibiting McBreairty from publishing further statements concerning Mallory Cook that are false and defamatory, or that place Ms. Cook in a false light, or otherwise constitute bullying or harassment under state law and Herman School Department Board policy; and

3. Award Plaintiff its costs and such other further relief as may be just and equitable.

Dated: May 3, 2022



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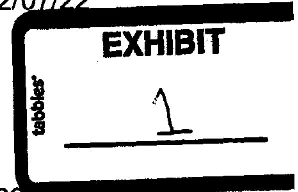


Hermon School Department

WORKPLACE BULLYING

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

DEFINITION

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

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

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

EXCLUSIONS

Workplace bullying does not include the following:

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

- When supervisors make personnel decisions designed to meet the operational or financial needs of the school unit or the needs of students. Examples include, but are not limited to changing shifts, reassigning work responsibilities, taking steps to reduce overtime costs, transferring or reassigning employees to another building or position.

- Discrimination or harassment based on protected characteristics (race, color, sex, sexual orientation, gender identity, religion, ancestry or national origin, age, familial status, disability, or genetic information). Such conduct is prohibited under separate policies and complaints shall be addressed under ACAB-R – Employee Discrimination/Harassment and Title IX Sexual Harassment Complaint Procedure.

- Disrespectful conduct by students directed at school employees that can be addressed through enforcement of classroom rules, school rules, and applicable Committee policies.

REPORTS AND INVESTIGATIONS

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

If the report is about the building administrator, the report should be made to the Affirmative Action Officer.

The building administrator [Or other identified administrator] shall promptly notify the superintendent of all workplace bullying reports.

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

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

DISCIPLINARY ACTION

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

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

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

APPEALS

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

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

RETALIATION PROHIBITED

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

SUPERINTENDENT'S RESPONSIBILITY

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

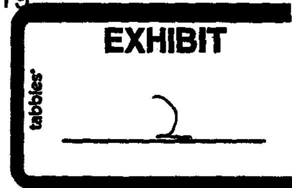
Legal References: 20-A MRSA §1001(21); 6544(2)(C)

Cross References: AC – Nondiscrimination, Equal Opportunity and Affirmative Action

ACAB – Harassment/Sexual Harassment of School Employees

ACAB-R – Discrimination/Harassment and title IX /Sexual Harassment of School Employees

Code: ACAD
Adopted: 02/10/03
Amended: 11/04/19



Hermon School Department

Hazing

The Hermon School Committee is committed to providing a safe learning environment for all students, coaches/advisors and supporters, and is unequivocally opposed to hazing activities of any kind.

Maine law defines injurious hazing as "any action or situation, including harassing behavior, that recklessly or intentionally endangers the mental or physical health of any school personnel or a student enrolled in a public school".

Injurious hazing also includes any activity expected of a student as a condition of joining or maintaining membership in a group that humiliates, degrades, abuses or endangers a student, regardless of the student's willingness to participate in the activity.

Injurious hazing activities of any type, either on or off school property, by any student, staff member, group or organization affiliated with the Hermon School Department are inconsistent with the educational process and shall be prohibited at all times.

"Harassing behavior" includes acts of intimidation and any other conduct that recklessly or intentionally endangers the mental or physical health of a student or staff member.

"Acts of intimidation" include extortion, menacing, direct or indirect threats of violence, incidents of violence, bullying, statements or taunting of a malicious nature and/or derogatory nature that recklessly or intentionally endanger the mental or physical health of another person, and property damage or theft.

No administrator, faculty member, or other employee of the School Department shall encourage, permit, condone, or tolerate injurious hazing activities. No student or groups of students, including leaders of students' organizations, shall plan, encourage, or engage in injurious hazing activities.

Students who violate this policy may be subject to disciplinary action which may include suspension, expulsion, or other appropriate measures. Administrators, professional staff, and all other employees who violate this policy may be subject to disciplinary action, up to and including dismissal.

In the case of an organization affiliated with this School Department that authorizes hazing, penalties may include rescission of permission for that organization to operate on school property or to receive any other benefit of affiliation with the School Department.

Persons not associated with this School Department who fail to abide by this policy may be subject to ejection from school property and/or other measures as may be available under the law.

These penalties shall be in addition to any civil or criminal penalties to which the violator or organization may be subject.

Incidents of suspected hazing should be reported to building administration or the Hermon Affirmative Action Officer.

The superintendent/designee shall be responsible for administering this policy. In the event that an individual or organization disagrees with an action -- or lack of action -- on the part of the superintendent/designee as he/she carries out the provisions of this policy, that individual or organization may appeal to the Hermon School Committee. The ruling of the School Committee with respect to the provisions of this policy shall be final.

This right to appeal does not apply to student suspensions of ten days or less or to matters submitted to grievance procedures under applicable collective bargaining agreements.

A copy of this policy shall be included in all school, parent and employee handbooks or otherwise distributed to all school employees and students.

Legal Reference: 20-A MRSA § 6553

Cross Reference: ACAA - Harassment and Sexual Harassment of Students
ACAA-R Student Discrimination and Harassment Complaint Procedure
ACAB - Harassment and Sexual Harassment of Employees
JICIA - Weapons, Violence and School Safety
JICK - Bullying

Exhibit 2

Declaration of Marc J. Randazza
ECF 23-3

Exhibit 3

Declaration of Marc J. Randazza

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

SHAWN MCBREAIRTY,

Plaintiff,

v.

BREWER SCHOOL DEPARTMENT, GREGG PALMER, in his personal and official capacities, BRENT SLOWIKOWSKI, in his personal and official capacities, MICHELLE MACDONALD, in her personal and official capacities,

Defendants.

Case No. 1:24-cv-00053-LEW

DECLARATION OF MARC J. RANDAZZA

I, Marc J. Randazza, hereby declare:

1. I am over 18 years of age and have never been convicted of a crime involving fraud or dishonesty. I have knowledge of the facts set forth herein, and if called as a witness, could and would testify thereto.

2. I am Managing Partner of Randazza Legal Group, PLLC, Counsel for Plaintiff in the above-captioned matter.

3. I submit this declaration in support of Plaintiff's Reply in Support of Plaintiff's Motion for a Temporary Restraining Order and for a Preliminary Injunction (the "Reply").

4. At approximately 2:30 p.m. on February 22, 2024, I called Attorney Hewey to discuss the filing of this case, service of process, and consent to admission of counsel for *pro hac vice* admission.

5. Attorney Hewey stated that of course she would consent, after she filed Brewer' case.

6. At that point, it became apparent that we were not talking about the same thing –

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that Attorney Hewey was talking about a not-yet-filed case, and I was talking about a just-filed case.

7. I told her that we had already filed the above-captioned matter.

8. Attorney Hewey asked on what basis we filed against Defendants.

9. I told her that we filed under § 1983.

10. Attorney Hewey's response was "oh, even better!"

11. Even more to the point, and the direct, imminent, and concrete nature of the threats, this call with Attorney Hewey confirmed to me that the threat was real. It is a credible threat of civil and/or criminal prosecution.

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

Dated: March 5, 2024.

By: /s/ Marc J. Randazza
Marc J. Randazza

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