STATE OF MAINE
PENOBSCOT, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-2022-00056

HERMON SCHOOL DEPARTMENT

Plaintiff,

v.

SHAWN MCBREAIRTY,

Defendant.

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S ANTI-SLAPP SPECIAL MOTION TO DISMISS

1. Introduction

Hermon School Department (HSD) refers to this case as a "novel situation." (Opp. at 11.) Mr. McBreairty agrees that it is. It is *novel* for a government agency to sue a citizen to stop him from engaging in First Amendment protected activity. It is *novel* for a government agency to ask that one of its internal policies be turned into a tool of censorship and fashioned into an injunction against speech. It is *novel* for a public official to use her public agency as a proxy for a lawsuit. It is *novel* for the government to seek a prior restraint while swearing that it is not seeking a prior restraint. Yes… *novel* shall be euphemism we shall all use when describing this case.

The Complaint reads like a defamation claim by Mallory Cook – a public school teacher, who serves as a delegate for the Maine Education Association,[1] provides trainings for the Maine Education Association,[2] a former candidate for the Maine Education Association Board of

[1] 2021-2022 Maine Education Association Representative Assembly Delegate/Alternate Vacancy List, https://maineea.org/wp-content/uploads/2022/04/Attachment-I-2021-2022-RA-Delegates-updated.pdf, (accessed Aug. 12, 2022).

[2] *Beyond the Classroom – Leaders for Just Schools Equity Training*, MEA, https://maineea.org/news/beyond-the-classroom-leaders-for-just-schools-equity-training/, (accessed Aug. 12, 2022).

Directors,[3] and a frequent flyer on political panels.[4] In other words, a public figure.[5] Perhaps because she is a public figure, aware of the standard for a defamation claim for public figures, she chose not to put herself at risk by filing a SLAPP suit personally. She chose to have the taxpayers do it for her. In doing so, she put the taxpayers on the hook for the Anti-SLAPP fees.

That is certainly *novel.* The public must be free to debate the relative merits of public school teacher contributions (especially teachers who are also involved heavily in statewide policy decisions). The Connecticut Supreme Court addressed this issue with great clarity:

> *Robust and wide open debate concerning the conduct of the teachers in the schools of this state is a matter of great public importance . . . [T]eachers' positions, if abused, potentially might cause serious psychological or physical injury to school aged children. Unquestionably, members of society are profoundly interested in the qualifications and performance of the teachers who are responsible for educating and caring for the children in their classrooms. Further, teachers exercise almost unlimited responsibility for the daily implementation of the governmental interest in educating young people. In the classroom, teachers are not mere functionaries. Rather, they conceive and apply both policy and procedure.*

Kelley v. Bonney, 606 A.2d 693, 710 (Conn. 1992). There is no reason a Maine court should view this any differently. After all, the Connecticut Supreme Court was upholding a universal American concept – The First Amendment – not espousing some *novel* quirk of Connecticut Law.

2. McBreairty's Conduct Was Petitioning Activity

HSD reverses the two stages of the Anti-SLAPP analysis. The first prong is simple – was the complained-of conduct "petitioning activity?" It was. HSD seems to ask that the Court *first* condemn McBreairty's speech, and therefore find that it could not be petitioning activity, because it is speech it did not like. The only correct way to analyze it is to ask if McBreairty's speech was

[3] 2019 MEA Elections, MEA, https://maineea.org/wp-content/uploads/2019/02/MEA-Candidates-2019-1.pdf, (accessed Aug. 12, 2022).

[4] E. Popp, *Sanders, local leaders call on Mainers to mobilize for crucial election, Maine Beacon*, https://mainebeacon.com/sanders-local-leaders-call-on-mainers-to-mobilize-for-crucial-election/ (accessed Aug. 12, 2022).

[5] In Maine, a public school teacher is not *per se* a public official. Cook has taken on leadership roles at the MEA and waded into the public sphere to promote her political views, https://www.youtube.com/watch?v=MatxcJNOUi4, (accessed Aug. 12, 2022). As such, she has certainly entered the public arena for the purposes of evaluating her as a public figure.

any of these: 1) a written or oral statement made before or submitted to the government; or 2) a written or oral statement made in connection with an issue under consideration by any governmental body; or 3) reasonably likely to encourage consideration of or review of an issue by the government; or 4) any statement reasonably likely to enlist public participation; or 5) any other statement falling within the right to petition. 14 M.R.S. § 556.

We do not evaluate how we feel about his statements. We only look at whether they fit the broad spectrum of speech the statute was intended to protect. In *Gaudette v. Davis*, 2017 ME 86, ¶¶ 2, 23, 160 A.3d 1190, the defendant alleged a police officer was investigated for sexually abusing minors and the Attorney General's Office covered it up. The police officer likely felt that these statements were horrible. Nevertheless, they fit prong one because they were on a matter of public concern and were reasonably likely to encourage review and enlist public participation.

In *Schelling v. Lindell*, 2008 ME 59, ¶¶ 3, 13, 942 A.2d 1226, the defendant accused the plaintiff of abuse of power, in a letter to a newspaper. HSD argues that this case only met prong one because *a legislator* wrote the letter to the editor. (Opp. at 5.) There is no support for the proposition that a *citizen* receives a lesser degree of civil liberties' protection than a legislator. It is repugnant to everything the Constitution stands for to argue that public officials should have *greater* access to a law intended to protect First Amendment rights than mere citizens. *See also Maietta Constr., Inc. v. Wainwright*, 2004 ME 53, ¶ 7, 847 A.2d 1169 (letters sent to the city council and mayor, and statements made to newspapers about the issue were covered).

HSD incorrectly argues that *Hearts with Haiti, Inc v. Kendrick*, 2019 ME 26, 202 A.3d 118 and *Pollack v. Fournier*, 2020 ME 93, 237 A.3d 149 support a narrow interpretation of petitioning activity. (Opp. at 4-5.) In *Hearts with Haiti,* the Law Court held the defendant's conduct was not petitioning because it was aimed at a private organization's donors – not at trying to change public policies. 2019 ME 26, ¶¶ 12-13, 202 A.3d 118. There, the defendant's statements were meant to place pressure on third parties to end their support for a private organization. *Id.* at ¶ 13. Here, McBreairty's conduct is aimed at the government activity related to issues within HSD.

McBreairty's petitioning activity was made to influence, inform, and reach governmental bodies directly and indirectly and enlist public participation in his cause. (Mot. at 6-7.)

In *Pollack*, the Law Court held sending a notice of claim was not *petitioning* when the defendant did not actually file a claim. 2020 ME 93, ¶¶ 14-19, 237 A.3d 149. The Law Court said that 14 M.R.S. § 556 covers statements "*reasonably likely to* ***encourage*** *consideration or review of an issue*" and the courts could not be encouraged to review an issue without a subsequent filing of a complaint. *Id.* at ¶ 18 (emphasis added). The Law Court defined "encourage" to mean "[to] help or stimulate (an activity, state, or view) to develop." *Id.* Here, McBreairty's advocacy is aimed at government actors and the public to stimulate consideration and review of governmental activity related to issues within HSD and to enlist public participation on the issue.

HSD makes several admissions that McBreairty's actions were petitioning activity. Mallory Cook admits that "[McBreairty's] comments were broadcast widely to the general public, and concerned [Cook's] performance as a teacher." (Cook Decl. at ¶ 19.) Ms. Cook also admits that McBreairty hosts a podcast "where he shares his thoughts with likeminded listeners." (Cook Decl. at ¶ 28.) Superintendent Grant acknowledges that McBreairty is a "frequent attendant at Hermon School Committee meetings" and that McBreairty often addresses "topics related to LGBTQ+ issues." (Grant Decl. at 11.) HSD admits that filing a public records request is "petitioning activity." (Opp. at 9.) Meanwhile, they seek to enjoin him from doing this.

HSD admits that a public records request is petitioning activity, but argues that it "does not transform those bullying statements into petitioning activity." (Opp. at 9.) That is not how this works. Petitioning activity is petitioning activity. Ms. Cook taking offense does not "transform" this petitioning activity into something else. HSD does not cite any case law for its assertion that petitioning activity can be bifurcated into good and bad petitioning activity. HSD asserts that McBreairty's public records request becomes invalid petitioning activity because the public

records request was allegedly defamatory, in violation of the "criminal prohibitions on stalking,"[6] and in violation of "school policy." (Opp. at 9.)

3. McBreairty's Petitioning Activities were either true facts or protected opinions

There is no such thing as a "false" opinion. *Gertz v. Welch*, 418 U.S. 323, 339 (1974). Context is key. We consider whether the audience is expecting precise objective meanings of terms used or rather hyperbole or evaluative opinions. We consider whether the nature and tenor of the language suggests objective facts or an evaluative opinion or whether the statement is subject to objective verification. *See Wynn v. New Haven Bd. of Educ*., 2022 U.S. Dist. LEXIS 65403, *9, 2022 WL 1063732 (D. Conn. 2022) (citations omitted); *McManus v. Richey*, 2016 Tex. App. LEXIS 7957 (Tex. App. 2016) (ordering dismissal under Texas Anti-SLAPP act because statements were rhetorical hyperbole and evaluative opinion).

Insults with no precise meaning cannot be proven true or false. *See McCabe v. Rattiner,* 814 F.2d 839, 842 (1st Cir. 1987) (loose terms such as "scam" have different meanings to different people, and are thus opinions, incapable of being proven true or false). *See also Carrington.v. Carolina Day Sch., Inc.,* 837 S.E.2d 383, 383 (N.C. Ct. App. 2020) ("scumbag" was an opinion about a school coach); *Cheng v. Neumann*, 2022 U.S. Dist. LEXIS 19835, *27, 2022 WL 326785 (D. Me. 2022) (statements on a matter of public concern must be provable as false). We consider the context and "assess how a reasonable listener or reader would understand them, rather than

[6] There is no support for a claim that McBreairty violated 17-A M.R.S. § 210-A, or even a mention of it until this opposition. (Opp. at 8-9.) HSD cites *Child v. Ballou*, 2016 ME 142, ¶ 15, 148 A.3d 291 for the proposition that "[t]he use of speech as part of conduct designed to threaten or harm other individuals will not find protection in either the Maine or the federal constitution." (Opp. at 7.) In *Child*, the Law Court discusses "true threats" and criminal harassment in the context of a divorced couple and an abuse protection order. *Id.* at ¶¶ 2-6. The Law Court held that neither "true threats" or criminal harassment are protected. *Id.* at ¶ 17. Nowhere in the record are there even *allegations*, much less *evidence* that McBreairty made "true threats" against anyone, nor are there allegations or evidence of criminal harassment in violation of 17-A M.R.S. § 506-a(1). Accusing McBreairty of criminal stalking, (Opp. at 8), and alluding to McBreairty making "true threats" or committing criminal harassment, (*id.* at 7), are very serious accusations, which should have been reported to the police if there was a shred of credibility to them. And if HSD's logic in the opposition holds, McBreairty should be free to sue whoever wrote them for defamation, without fear of the Anti-SLAPP law. Should this court decide that the Anti-SLAPP law is, indeed, that impotent, and the Law Court upholds that decision, he promises to do so. However, this is mere rhetoric, as the Anti-SLAPP law is *not* as impotent as HSD shortsightedly wishes this court to think it is.

construing the words as negatively as possible." *Cain v. Sambides*, 2020 U.S. Dist. LEXIS 203446, *6, 2020 WL 6391451 (D. Me. 2020). *See also Pan Am Sys., Inc. v. Atl. Ne. Rails & Ports, Inc.*, 804 F.3d 59, 64 (1st Cir. 2015); Picard v. Brennan, 307 A.2d 833, 835 (Me. 1973).

In *Bakal v. Weare,* 583 A.2d 1028 (Me. 1990) accusations of criminal activity were non-actionable opinion. There was a claim of "years of threats" *Id.* at 1030 – a clear accusation of criminality. The Law Court recognized that much stronger epithets were protected. *See Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin,* 418 U.S. 264, 283-84 (1974) ("traitor"); *Greenbelt Pub. Ass'n, Inc. v. Bresler,* 398 U.S. 6, 14 (1970) ("blackmail"); *McCabe,* 814 F.2d at 842-43 ("scam"); *Lukashok v. Concerned Residents of North Salem,* 554 N.Y.S.2d 39, 40 (A.D.2d 1990) ("terrorism"). There are no cases examining the term "grooming," but in this case, it is clear that it is rhetorical hyperbole and an evaluative opinion based on shared facts.

HSD appears to concede that the majority of McBreairty's statements were evaluative opinions. (Opp. at 10.) HSD contends that "Mr. McBreairty alleged that Ms. Cook was engaged in specific acts, (Compl. at ¶¶ 38-39, 41, 44), and went so far as to post a definition of the terms he used, **to ensure there was no doubt about what he meant.** (Compl. at ¶ 45)." (Opp. at 10.) Despite the complaint providing McBreairty's definition, Ms. Cook has a different definition of "grooming" -- "an accusation that [Ms. Cook] was behaving in a sexually explicit or similarly inappropriate manner with students." (Cook Decl. at ¶ 34.) Ms. Cook's self-serving definition of "grooming" is different than the one McBreairty used and that HSD provided in their Complaint.[7] The Plaintiff and Cook prove the First Amendment point here – that if a word has different definitions to different people, it lacks the precision required to prove it true or false.[8]

[7] April 12, 2022, Shawn McBreairty Facebook post: "[t]he de 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." (Compl. at ¶ 45; Mot. at 4.)

[8] Even if we accept Ms. Cook's self-serving definition, what is "inappropriate" is clearly a matter of opinion. One person's opinion of "inappropriate" is another person's "utter necessity."

Saying that "Ms. Cook is a 'sexual predator'" (Compl. at ¶ 38), is an evaluative opinion that cannot be proven false. McBreairty outlines the facts available to him and his definition of "predatory." He holds the opinion that a teacher who seems to over-emphasize sexual issues when speaking to children is "predatory." It is clear that his statements represent his own interpretation of facts and leaves the audience free to draw its own conclusions. *Partington v. Bugliosi*, 56 F.3d 1147, 1156-57 (9th Cir. 1995) ("when an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment.") When McBreairty stated that Ms. Cook has a "secret" twitter account, he made that statement alongside a screenshot of her *private* twitter account, making it clear that "secret" was his interpretation of the facts and sharing those very facts. (*See* Compl. ¶ 39; Mot. at 4.) Would this Court rule that an account that is private and hidden is not "secret?" Or that the difference between private and secret warrants an injunction?

Lastly, HSD asserts that McBreairty made provably false statements through email when he was "accusing Ms. Cook of 'grooming children' and stating that she is 'running a shadow organization by pushing hypersexualization of minors in the Gay Sexuality Alliance (GSA) club as faculty sponsor.'" Again, Cook applies her own definition to the term "grooming." (*See* Cook Decl. at ¶ 40.) Then, she denies "pushing hypersexualization or anything else in [her] role as GSA advisor." *Id*. Hypersexualization[9] is an evaluative opinion based on Ms. Cook's actions. One person might find it "hypersexualized" and another person, with different values, might find it "titillating" while another might find it "modest." A reasonable person could think that a teacher discussing sex with children is inappropriate and could call it "hypersexualization."

McBreairty's petitioning activity is composed of his opinions and to the extent that McBreairty's statements were not opinions, they were supported by a factual basis that allowed

[9] Merriam-webster dictionary defines "hypersexual" as "exhibiting unusual or excessive concern with or indulgence in sexual activity." https://www.merriam-webster.com/dictionary/hypersexual. (accessed August 12, 2022.) What is "unusual" or "excessive" is a matter of opinion.

others free to draw their own conclusions. HSD has not met its burden to show "why the allegations were devoid of any reasonable factual support." *Thurlow v. Nelson*, 2021 ME 58, ¶ 27, 263 A.3d 494.

4. No "actual injury" to Hermon School Department

Even if there were a reasonable claim, the Maine Anti-SLAPP law requires the plaintiff to show "actual injury." This means "a reasonably certain monetary valuation of the injury suffered by the plaintiff." *Weinstein v. Old Orchard Beach Fam. Dentistry*, 2022 ME 16, ¶ 7, 271 A.3d 758. "Emotional injury alone does not constitute actual injury for anti-SLAPP purposes, however, unless it is so severe that no reasonable person could be expected to endure it." *Id.* at ¶ 11.

HSD claims that it had to find a substitute while Ms. Cook was absent from work. *Id.* This "substitute teacher" issue is not raised in the complaint, but rather for the first time in the opposition. No objective evidence is provided proving that this is why she was absent - other than self-serving statements by someone seeking court intervention so that she may be free from criticism. In the complaint, HSD claims that other teachers have resigned or threatened to do so. However, none of this is mentioned in the opposition. Presumably, HSD has abandoned this theory, now favoring the theory that McBreairty criticized Ms. Cook, and then she had to miss work because she was so upset about being criticized for having such a focus on talking about sex with children. We have no therapists' notes, no proof at all. All we have is Cook claiming that she missed class because she was upset that a parent criticized this extracurricular conduct. Even if we believe that Cook was so distraught at being criticized that she missed work, was this something "that no reasonable person could be expected to endure?" Remember, the plaintiff is not Cook – but HSD. We all have to take criticism at work, even Ms. Cook. But, this is next-level -- HSD should not be expected to endure criticism of one of its teachers?

5. The relief sought is triply flawed and could never be granted

5.1 There is no legal authority to turn a policy into an injunction

There is neither statutory nor case law supporting a public agency enforcing an internal policy against a citizen who is not subject to that policy. HSD admits this. (Opp. at 23.) If HSD

wants its policies to become law, it can petition the legislature to adopt them – but it can not create a judicial bill of attainder, asking that a Court turn the policy into law, but a law that only restrains a single critic. This would violate separation of powers by transforming the judiciary into the legislature. *See State v. St. Regis Paper Co.*, 432 A.2d 383, 385 (Me. 1981).

If we are to cross the Rubicon of a Court turning "policy" into an injunction, this is dangerous territory. How convenient would it be for a mayor to enforce an insubordination policy against a challenger for office? If a court were prepared to enforce a school policy against a non-student and non-employee, what are the limits? HSD wants a court order that would put him in contempt if McBreairty violates it – meanwhile, HSD has specific procedures to follow when there are allegations of bullying.[10] HSD does not seek to afford McBreairty even these insufficient due process rights – it just wants the vague prohibition – not the whole policy. But, the remedies under the policy are suspension or expulsion from school[11] – not jail. If we are to subject McBreairty to HSD policies, why not all of them? HSD policy **requires** reporting if someone *suspects* sexual abuse.[12] McBreairty suspected that Ms. Cook was acting in a sexually inappropriate manner with children and he reported it. But, if HSD's relief is granted, such reporting would be in contempt of court. HSD policy authorizes the use of physical force to quiet a disturbance.[13] Why not an order that a teacher can physically restrain McBreairty if he reports them for sexual abuse? *Novel*, indeed.

5.2 The policy is unconstitutionally vague outside the school environment

Even if the policy could be exported, it would be unconstitutional. The policy prohibits "bullying." While this might be enforceable as school policy, a law with the same text would be void for vagueness. We know that students and teachers "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch.*

[10] Attached as **Exhibit A** (Exhibits A-D could have been cited to their online locations, but they are provided as printouts of the relevant documents for the convenience of the Court).
[11] Attached as **Exhibit B**.
[12] Attached as **Exhibit C**.
[13] Attached as **Exhibit D**.

Dist., 393 U.S. 503, 506 (1969). But, they enjoy a lesser degree of protection once through that gate. Content-based speech restrictions *outside* the schoolhouse must pass strict scrutiny. Inside, school boards have broad (but not plenary) authority to regulate speech. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986). "Courts generally defer to school administrators' decisions regarding student speech so long as their judgment is reasonable." *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist*., 969 F.3d 12, 30 (1st Cir. 2020). This "reasonableness" will receive great deference with respect to speech the school may consider bullying or harassing. *Id.* at 29 n.18.

HSD fails to understand where that deference ends. Such broad authority *inside* the classroom may be permissible. However, no school has the authority to enact a policy against something so vague as "bullying" and then give it the force of law with a court order that extends it to a citizen who is neither a teacher nor a student. While students do not shed their rights at the school house gate, teachers and administrators shed their authority at that gate. No Court could take a vague policy, which might pass muster as school or employee policy and apply it as law.

5.3 The First Amendment will not abide the proposed relief

"The Supreme Court has roundly rejected prior restraint as 'the most serious and least tolerable infringement on [a person's] First Amendment rights.'" *Santilli v. Van Erp*, 2018 U.S. Dist. LEXIS 79916, *17 (M.D. Fla. 2018) (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) and citing to its collection of cases). *See also Kinney v. Barnes*, 443 S.W.3d 87 at n.7 (Tex. 2014) ("For your information, the Supreme Court has roundly rejected prior restraint." quoting Sobchak, W, THE BIG LEBOWSKI). Prior restraints bear a "heavy presumption against [their] constitutional validity." *New York Times Co. v. U.S.,* 403 U.S. 713, 714 (1971). "Our law thinks it better to let the defamed plaintiff take his damages for what they are worth than to intrust a single judge (or even a jury) with the power to put a sharp check on the spread of possible truth." *Krebiozen Research Foundation v. Beacon Press, Inc*., 334 Mass. 86, 95 134 N.E.2d 1 (1956). Seeking to overcome the First Amendment, HSD seeks a *novel* interpretation of the term "prior restraint," which seeks to redefine "prior restraint" as a *rare species of liberty*, rather than a common example of censorship. HSD takes offense that we have called its request a prior restraint.

(Opp. at 2.) HSD denies wanting one and then claims that it "only" asks this to court enjoin 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 Hermon School Department Board policy*." What does HSD think a prior restraint is? The Supreme Court says it is a "judicial order[ ] forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993). What is HSD's definition?

Whatever interest HSD might have in shutting down criticism, it does not overcome the heavy burden required for a prior restraint. "This is precisely the type of circumstance in which the law forbids courts from halting speech before it occurs." *Saad v. Am. Diabetes Ass'n,* 2015 U.S. Dist. LEXIS 21150, *4, 43 Media L. Rep. 1786. *See also Near v. Minnesota,* 283 U.S. 697, 716 (1931) (unconstitutional to enjoin publication of a defamatory news article); *Krebiozen Research Foundation v. Beacon Press, Inc.,* 334 Mass. 86, 134 N.E.2d 1 (rejecting injunction to prevent publication of statements harmful to medical researchers' reputations); *In re Providence Journal Co.*, 820 F.2d 1342, 1345 (1st Cir. 1986) (prior restraints are so intolerable, that it was not contempt to defy a court order imposing one). The danger inherent in such a remedy is clear. HSD (and Ms. Cook) believe that disagreeing with them is "false and defamatory." (Opp. at 2.) Whether something is defamatory or rises to the level of "false light" is only something that can be determined after a trial, not simply by a court – before the statements are even uttered.

However, let us appreciate where the parties agree – HSD gets something right, when it gets to page 7, footnote 1, where it acknowledges that the right to petition and the right to free speech are "related and generally subject to the same constitutional analysis." *Wayte v. United States,* 470 U.S. 598, 612 n.11 (1985); (Opp. At 7). And that constitutional analysis would never support a prior restraint in this context. *See Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (avoiding criticism does not overcome the presumption against prior restraints).

6. Conclusion

In *Snyder v. Phelps*, 562 U.S. 443 (2011) a father burying his son, who died in service to our country, was told by the Supreme Court that the First Amendment requires him to tolerate protesters at the funeral holding signs that said "Thank God for Dead Soldiers" (and even worse). In this case, HSD seeks to enjoin Mr. McBreairty from merely criticizing a teacher who seems fixated on discussing sexual issues with children. Do HSD and Ms. Cook *really* believe that their desire to pander to children *without being so much as criticized* is more of a worthy cause than Mr. Snyder's desire to bury his son in peace? This Court should disaffect them of that belief. McBreairty's conduct was protected under the First Amendment's right to petition. HSD has no reasonable claim, and even if it did, it has no articulable damages. The Court should grant the motion and award McBreairty his attorneys' fees.

Dated: August 23, 2022.

Respectfully Submitted,

/s/ Brett D. Baber
Brett D. Baber, Bar No. 3143
Lanham Blackwell & Baber, PA
133 Broadway
Bangor, ME 04401
(207) 942-2898
bbaber@lanhamblackwell.com

/s/ Marc J. Randazza
Marc J. Randazza
(*Pro Hac Vice)*
Randazza Legal Group, PLLC
30 Western Avenue
Gloucester, MA 01930
(702) 420-2001
ecf@randazza.com

STATE OF MAINE
PENOBSCOT, ss.

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HERMON SCHOOL DEPARTMENT

Plaintiff

v.

SHAWN MCBREAIRTY,

Defendant

DECLARATION OF CASSIDY S. CURRAN

I, Cassidy S. Curran, 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 a Paralegal with Randazza Legal Group, PLLC ("RLG"), counsel for Defendant, Shawn McBreairty.

3. I provide this declaration in support of Defendant's Reply Memorandum in Support of Defendant's Anti-SLAPP Motion ("Reply").

4. On August 22, 2022 at 11:35 a.m. Eastern Time, while at the Gloucester office of RLG and while using the Google Chrome browser on a MacBook Air laptop, I visited the URL < https://core-docs.s3.amazonaws.com/documents/asset/uploaded_file/441500/JICK-R_Bullying_Administrative_Procedure.pdf >. Immediately after viewing these pages, I created a PDF printout using the Google Chrome browser print to PDF function. A true and correct copy of the link is attached to the Reply as **Exhibit A**.

5. On August 22, 2022 at 11:36 a.m. Eastern Time, while at the Gloucester office of RLG and while using the Google Chrome browser on a MacBook Air laptop, I visited the URL < https://core-docs.s3.amazonaws.com/documents/asset/uploaded_file/441498/JICK-

E3_Bullying_Documentation_of_Disciplinary_and_Remedial_Actions_Taken.pdf >. Immediately after viewing these pages, I created a PDF printout using the Google Chrome browser print to PDF function. A true and correct copy of the link is attached to the Reply as **Exhibit B**.

6. On August 22, 2022 at 11:36 a.m. Eastern Time, while at the Gloucester office of RLG and while using the Google Chrome browser on a MacBook Air laptop, I visited the URL < https://core-docs.s3.amazonaws.com/documents/asset/uploaded_file/441536/JLFA_Child_Sexual_Abuse_Prevention_And_Response.pdf >. Immediately after viewing these pages, I created a PDF printout using the Google Chrome browser print to PDF function. A true and correct copy of the link is attached to the Reply as **Exhibit C**.

7. On August 22, 2022 at 11:37 a.m. Eastern Time, while at the Gloucester office of RLG and while using the Google Chrome browser on a MacBook Air laptop, I visited the URL < https://core-docs.s3.amazonaws.com/documents/asset/uploaded_file/441485/JG_Discipline_and_Punishment.pdf >. Immediately after viewing these pages, I created a PDF printout using the Google Chrome browser print to PDF function. A true and correct copy of the link is attached to the Reply as **Exhibit D**.

I swear under penalty of perjury under the laws of the Commonwealth of Massachusetts that the foregoing statements are true and correct to the best of my knowledge.

Executed on August 22, 2022.

Cassidy Curran

Cassidy S. Curran

Exhibit A

Hermon School Department
Bullying – Administrative Procedure

Found at <https://core-docs.s3.amazonaws.com/documents/asset/uploaded_file/441500/JICK-R_Bullying_Administrative_Procedure.pdf>

Code: JICK-R
Adopted: 2/11/13

Hermon School Department

Bullying – Administrative Procedure

This procedure is intended as guidance for school administrators in carrying out their responsibilities when bullying is alleged to have occurred. It provides important definitions as well as steps for reporting, investigating and responding to allegations of bullying.

Bullying behavior alleged to be based on race, color, ancestry, national origin, sex, sexual orientation, religion or disability should be addressed under the procedures set forth in the Student Harassment and Sexual Harassment procedure, ACAA-R, rather than under this procedure.

Definitions

The following terms are defined in Maine law (20-A MRSA § 6554):

Bullying

"Bullying" includes, but is not limited to a written, oral or electronic expression or a physical act or gesture or any combination thereof directed at a student or students that:

A. Has, or a reasonable person would expect it to have, the effect of:

   1. Physically harming a student or damaging a student's property; or

   2. Placing a student in reasonable fear of physical harm or damage to his/her property;

B. Interferes with the rights of a student by:

   1. Creating an intimidating or hostile educational environment for the student; or

   2. Interfering with the student's academic performance or ability to participate in or benefit from the services, activities or privileges provided by the school; or

C. Is based on:

   a. A student's actual or perceived characteristics identified in 5 MRSA § 4602 or 4684-A (including race; color; ancestry; national origin; sex; sexual orientation; gender identity or expression; religion; physical or mental disability) or other distinguishing personal characteristics (such as socioeconomic status; age; physical appearance; weight; or family status); or

b. A student's association with a person with one or more of these actual or perceived characteristics or any other distinguishing characteristics; and that has the effect described in subparagraph A. or B. above.

Cyberbullying

"Cyberbullying" means bullying 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.

For the purpose of this policy, bullying does not mean mere teasing, put-downs, "talking trash," trading of insults, or similar interactions among friends, nor does it include expression of ideas or beliefs so long as such expression is not lewd, profane or does not interfere with students' opportunity to learn, the instructional program or the operations of the schools. This does not preclude teachers or school administrators from setting and enforcing rules for civility, courtesy and/or responsible behavior in the classroom and the school environment.

The determination whether particular conduct constitutes bullying requires reasonable consideration of the circumstances, which include the frequency of the behavior at issue, the location in which the behavior occurs, the ages and maturity of the students involved, the activity or context in which the conduct occurs, and the nature and severity of the conduct.

Retaliation

"Retaliation means" an act or gesture against a student for asserting or alleging an act of bullying. "Retaliation" also includes reporting that is not made in good faith on an act of bullying (i.e., the making of false allegations or reports of bullying).

School Grounds

"School grounds" means a school building; property on which a school building or facility is located; and property that is owned, leased or used by a school for a school-sponsored activity, function, program, instruction or training. "School grounds" also includes school-related transportation vehicles.

Alternative Discipline

"Alternative discipline" means disciplinary action other than suspension or expulsion from school that is designed to correct and address the root causes of a student's specific misbehavior while retaining the student in class or school, or restorative school practices to repair the harm done to relationships and persons from the student's misbehavior.

Bullying Reports

Students and Parents/Guardians

Students who believe they have been bullied, or who have witnessed or learned about an act of bullying, should report this behavior to the building principal.

Parents/guardians may report bullying on behalf of their children or when they have witnessed or are aware of the occurrence of bullying.

Reports of bullying may be made anonymously, but no disciplinary action shall be taken against a student solely on the basis of an anonymous report.

Any student who has been determined to have made a false report of bullying will be subject to disciplinary consequences.

School Employees

For the purposes of this procedure, "school employees" includes coaches, advisors for co-curricular or extracurricular activities and volunteers.

All school employees are expected to intervene when they see acts of bullying in progress and are required to report incidents of bullying they have witnessed or become aware of to the building principal as soon as practicable.

School employees who fail to report bullying or who have made a false report of bullying will be subject to disciplinary consequences up to and including termination, in accordance with any applicable collective bargaining agreement.

Others

Contractors, service providers, visitors or community members who have witnessed or become aware of bullying are encouraged to report such incidents to the building principal.

Form of Reports

Complaints or reports of bullying may be made orally or in writing, but all reports will be recorded in writing by school personnel authorized to receive complaints or reports, using the school unit's reporting form (JICK-E1).

School employees are required to make reports of bullying to the principal in writing. Although students, parents and others, as identified above, may make bullying reports anonymously, all persons reporting incidents of bullying are encouraged to identify themselves.

Bullying reports may be made anonymously, but in no instance will action be taken against any person or organization affiliated with the schools solely on the basis of an anonymous report.

The building principal will forward a copy of the report to the Superintendent by the end of the next school day.

Interim Measures

The building principal may take such interim measures as he/she deems appropriate to ensure the safety of the targeted student and prevent further bullying and will inform the parents of the targeted student of measures taken.

Investigation

The principal will ensure that all reports of bullying and retaliation are investigated promptly and that documentation of the investigation, including the substance of the complaint or report and the outcome of the investigation is prepared and forwarded to the Superintendent within a reasonable period of time.(Form JICK-E2)

Response to Bullying by Students

If bullying has been substantiated, the building principal or designee as appropriate under the circumstances will determine the appropriate disciplinary consequences, which may include detention, suspension or expulsion; alternative discipline; remediation; and/or other intervention. (Form JICK-E3)

Alternative discipline includes but is not limited to:

A. Meeting with the student and the student's parents;

B. Reflective activities, such as requiring the student to write an essay about the student's misbehavior;

C. Mediation when there is mutual conflict between peers, rather than one-way negative behavior, and when both parties freely choose to meet;

D. Counseling;

E. Anger management;

F. Health counseling or intervention;

G. Mental health counseling;

H. Participation in skills building and resolution activities, such as social-emotional cognitive skills building, resolution circles and restorative conferencing;

I. Community service; and

J. In-school detention or suspension, which may take place during lunchtime, after school or on weekends.

If the bullying behavior appears to be a criminal violation, the building principal will notify local law enforcement authorities.

If bullying has been substantiated, the building principal will provide written notification to:

A. The parents/guardians of the targeted student, including the measures being taken to ensure the student's safety; and to

B. The parents/guardians of the student found to have engaged in bullying, including the process for appeal.

All communications to parents must respect the confidentiality of student and employee information as provided by federal and Maine law and regulations.

Appeals

Any appeal of the building principal's decisions in regard to consequences for bullying must be submitted, in writing, within 14 calendar days of the parental notification. The Superintendent will review the investigation report and actions taken and decide whether to sustain or deny the appeal. The Superintendent's decision shall be final.

Cross Reference: ACAA-R – Student Harassment and Sexual Harassment Procedure
JICK – Bullying
JRA-R – Student Education Records and Student Information

Exhibit B

Hermon School Department Documentation of Disciplinary and Remedial Actions Taken

Found at <https://core-docs.s3.amazonaws.com/documents/asset/uploaded_file/441498/JICK-E3_Bullying_Documentation_of_Disciplinary_and_Remedial_Actions_Taken.pdf>

Code: JICK-E3
Adopted: 2/11/13

Hermon School Department

Documentation of Disciplinary and Remedial Actions Taken

____Notification of law enforcement authorities, if warranted (if any question, principal should consult with superintendent first)

Date: _____ Reported to: _____

____In school suspension

____Out of school suspension

____Recommendation for expulsion

____Alternative discipline/restorative justice (describe): _____
_____
_____
_____

[OPTIONAL: FORM MAY INCLUDE AS A CHECKLIST THE LIST OF ALTERNATIVE DISCIPLINE TECHNIQUES IDENTIFIED IN 20-A MRSA § 6552(2)(A) IN ADDITION TO, OR AS AN ALTERNATIVE TO, LINES PROVIDED FOR DESCRIPTION OF TECHNIQUES TO BE EMPLOYED. EITHER WAY, WE SUGGEST LEAVING SPACE AVAILABLE FOR "OTHER" METHODS.]

____Other intervention: _____

____Support for targeted student: _____

____Counseling/referral to services (targeted student), if suitable

____Counseling/referral to services (bully), if suitable

____If bully is school employee or administrator, recommendation for action to be taken by Superintendent (any action must be consistent with collective bargaining agreement or individual contract).

____If bullying by other person (e.g., volunteer, visitor, contractor), action taken:_____
_____

____If bullying by school-affiliated organization, action taken: _____
_____

WRITTEN NOTIFICATION TO PARENTS/GUARDIANS OF TARGETED STUDENT, INCLUDING MEASURES BEING TAKEN TO ENSURE STUDENT'S SAFETY:

Date: _____ By: _____ (Attach copy of notification here)

WRITTEN NOTIFICATION TO PARENTS/GUARDIANS OF STUDENT FOUND TO HAVE ENGAGED IN BULLYING BEHAVIOR, INCLUDING PROCESS FOR APPEAL:

Date: _____ By: _____ (Attach copy of notification here)

[IMPORTANT: ALL NOTIFICATIONS MUST RESPECT CONFIDENTIALITY OF STUDENT AND EMPLOYEE INFORMATION AS PROVIDED BY FEDERAL AND MAINE LAW AND REGULATIONS.]

Signature of building principal:_____ Date: _____

Copy sent to Superintendent on [_____]
Date

DOCUMENTATION OF APPEALS OF PRINCIPAL'S DECISION

Date appeal submitted: _____

All appeals to the superintendent must be submitted, in writing, within 14 [OR: ___] calendar days of the building principal's decision, to the central office.

ACTIONS TAKEN BY SUPERINTENDENT

____Recommendation to School Committee for student expulsion

____Action taken against employee: (If confidential employment action, in personnel file)

____Recommendation to School Committee for suspension/revocation of sanctioning/ approval of school-affiliated organization

____Action on appeal of principal's decision: _____
_____

____Other:_____
_____
_____

Exhibit C

Hermon School Department
Child Sexual Abuse Prevention and Response

Found at <https://core-docs.s3.amazonaws.com/documents/asset/uploaded_file/441536/JLFA_Child_Sexual_Abuse_Prevention_And_Response.pdf>

Code: JLFA
Adopted: 10/01/18

Hermon School Department

CHILD SEXUAL ABUSE PREVENTION AND RESPONSE

The Board recognizes that Maine law requires every school unit with a Pre-K through 5th grade program to adopt a policy for child sexual abuse prevention education and response. The Hermon School Committee adopts this policy in the interest of promoting the well-being of students and providing a supportive learning environment as well as compliance with the law.

For the purpose of this policy, "child sexual abuse" means any sexual engagement either through "hand on" or "hands off" activities between an adult and a child. Sexual engagement between children can also be sexual abuse when there is a significant age difference between the children involved or if the children are very different in development, size, or other power differential.

I. REPORTING CHILD SEXUAL ABUSE

A. Any employee of the school unit who has reason to suspect that a child has been sexually abused is to immediately notify the building principal or designated agent.

1. In addition to notifying the building principal/designated agent, the employee may also make a report directly to the Department of Health and Human Services (DHHS).

2. School volunteers who have reason to suspect that a child has been sexually abused may report their suspicions to the building principal or designated agent or directly to DHHS.

3. Neither the employee or volunteer nor the building principal/designated agent should attempt to further question or interview the child nor otherwise undertake an investigation.

B. If the reporting employee or volunteer does not receive written confirmation from the building principal/designated agent or Superintendent within 24 hours of his/her report that a report has been made to DHHS, the employee or volunteer shall make an immediate report directly to DHHS. In such cases, the employee or volunteer shall then complete a copy of the school unit's Suspected Child Abuse and Neglect Reporting Form (JLF-E).

C. If the reporting employee or volunteer does receive written confirmation from the building principal/designated agent or Superintendent within 24 hours of his/her report (i.e., a copy of the Suspected Child Abuse and Neglect Reporting Form (JLF-E)), he/she shall sign the form as acknowledgement that the report was made and return it to the building principal/administrator or Superintendent.

D. The administrator reporting and confirmation duties shall be the same as provided in Section III of the Hermon School Committee's policy JLF, Reporting Child Abuse and Neglect.

II. CHILD SEXUAL ABUSE AWARENESS AND PREVENTION EDUCATION FOR SCHOOL PERSONNEL

All school personnel shall be required to complete a minimum of one hour of training in child sexual abuse awareness and prevention, with training to be updated at least once every four years thereafter. New employees must complete training within six months of hire.

Training must be "evidence-informed" (i.e., based on research and best practices) and delivered by a qualified instructor (i.e. a person with appropriate knowledge, skills, and experience or training in child sexual abuse awareness and prevention). The trainer may be an employee or volunteer with an agency/organization specializing in sexual assault and/or child sexual abuse or an employee of the school unit (e.g., school social worker, guidance counselor, school nurse, health educator) who has received appropriate training from such an agency/organization.

The goals of the training for school personnel are:

- Increased awareness of developmentally appropriate and inappropriate sexual behaviors in children;
- Increased ability to recognize indicators of child sexual abuse;
- Enhanced ability to respond effectively when a student or student's friend or peer discloses sexual activity or the staff member suspects child sexual abuse has occurred; and
- Awareness of local resources available to students, parents, schools, and community members, and how these resources may be accessed.

Training should also address confidentiality/disclosure concerns (beyond the mandated reporting).

III. CHILD SEXUAL ABUSE PREVENTION EDUCATION IN THE PRE-K THROUGH 5TH GRADE CURRICULUM

The school unit will provide child sexual abuse prevention programming to its Pre-K through grade 5 students. Such instruction will be aligned with the health education standards of Maine's system of Learning Results for this grade span, and incorporated into the written school health education curriculum.

Programming of appropriate scope and sequence will be delivered by qualified instructors, who may be from a local or regional agency/organization with experience and expertise in sexual assault and child sexual abuse of by a school unit employee deemed competent by the Superintendent/designee to deliver such instruction. If the instructor is a school unit employee, the Hermon School Committee anticipates that this will be a person with the knowledge, skills, sensitivity and "comfort level" necessary to deliver the curriculum in the classroom setting, i.e., school nurse, school social worker, guidance counselor, or teacher with experience in health education. Any instructor who is a school employee is expected to take full advantage of the evidence-informed educational resources available on websites hosted by the DOE and/or MECASA. Any instructor who is a school employee should be familiar with the local community-based agencies/organizations that provide assistance or services to children and families that are experiencing or have experienced sexual assault or child sexual abuse.

It is the intent that the curriculum, as delivered in the classroom, will:

- Include age-appropriate education regarding physical and personal boundaries; including biologically accurate body terminology;
- Help children identify unsafe or uncomfortable situations including a range of feelings, touches, or violations of physical boundaries;
- Help children identify safe adults with whom they can talk about unsafe or uncomfortable situations; and

Legal Reference: 20-A MRSA §§ 254(18), 4502(5-C)
22 MRSA §4011-A
20-A MRSA §§ 5051-A(1)(C); 5051-A(2)(C)
20 USC § 1232g, Family Educational Rights and Privacy Act

Cross Reference: JLF – Reporting Suspected Child Abuse and Neglect
JLF-E – Suspected Child Abuse/Neglect Report Form

Exhibit D

Hermon School Department
Discipline and Punishment

Found at <https://core-docs.s3.amazonaws.com/documents/asset/uploaded_file/441485/JG_Discipline_and_Punishment.pdf>

Policy: JG
Adopted: 08/29/67
Amended: 05/10/76
Amended: 11/20/01

Hermon School Department

Discipline and Punishment

It is the duty of each teacher to maintain discipline while having jurisdiction of students in such a manner as to allow sufficient quiet during the times for study; to provide an atmosphere conducive to discussion and recitation; and to provide courtesy and safety at all times.

Punishment is most effective when it is administered for the purpose of teaching and correcting. Penalties for misconduct should be known to pupils, be reasonable without being harsh, and be administered on an individual basis.

Physical force may be used by teachers and administrators to quiet a disturbance, remove a student who is creating disturbance or otherwise restore order. Once the breach of discipline has occurred, corporal punishment shall not be used as a follow-up disciplinary action.