UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

MAMA BEARS OF FORSYTH COUNTY, et al., *Plaintiffs*, v. WESLEY MCCALL, et al., *Defendants*.	Case No. 22-cv-00142-RWS

PLAINTIFFS'
PRE-HEARING MEMORANDUM

In addition to evidence and argument referenced in Plaintiffs' moving papers and reply brief, Plaintiffs offer the following additional information and argument in support of their motion for preliminary injunction.

I. ALISON HAIR AND CINDY MARTIN WERE CENSORED FOR READING PORTIONS OF BOOKS FOUND IN FORSYTH COUNTY SCHOOL LIBRARIES.

Defendants censored and then banned Alison Hair for the alleged transgression of attempting to draw attention to herself and her beliefs,

as though her viewpoints cannot be included in a public discussion of the schools' operations. ECF No. 2-5 at 2 ("It was clear that your intent was… to draw attention to yourself and your beliefs."). But that is what most speakers attempt to do—get people to pay attention to them and draw attention to their ideas. Indeed, appealing to both reason and emotion has been a central purpose of rhetoric since ancient times. *See, e.g.,* Cicero, *De Oratore* (55 B.C.). One must have the audience's attention to persuade it. It seems rather that Defendants were bothered by the speech for the very viewpoints Hair expressed, as well as her effectiveness at conveying those viewpoints. Moreover, the May 11, 2022 letter focused on the content of Ms. Hair's remarks by invoking the civility clause and implied an inappropriate concern with audience reaction. ECF No. 2-5 at 2 ("We feel that your remarks were not civil.").

If called to the stand, Alison Hair would testify that Exhibit D contains excerpts from the book "Extremely Loud and Incredibly Close," which she, and another Mama Bears member, attempted to read from at

the February board meeting. *See* ECF No. 2-2 at 4-5.[1] In addition, she would testify that Exhibit H contains excerpts from the book "Georgia Peaches and Other Forbidden Fruit," which she attempted to read from at the March board meeting. *See* ECF No. 2-2 at 8.

Similarly, if called to the stand, Cindy Martin would testify that Exhibit G contains the uncensored version of the speech she attempted to give at the February board meeting, including an excerpt from the book "Call Me By Your Name." *See* ECF No. 2-3 at 6.

These passages may contain words that are crass or make listeners uncomfortable—including cock, buttocks, anus, vagina, fuck, breasts, breastbone, nipple, penis, dick, cunt, ass, petting—but they are the actual words appearing in books available in Forsyth County Schools' ("FCS") libraries. They are also anatomical descriptions (and verbs) appearing in those books. ECF 2-7; Exs. G, H. And the Mama Bears want to avail themselves of the actual words to make a point about the books.

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[1] Both Ms. Hair and Ms. Martin will be available to formally authenticate these documents at the hearing, but Plaintiffs do not expect there to be a dispute as to their admissibility.

Ironically, Defendants have to some extent proven the Mamas' point by censoring their speech and banning one of their members.

Defendants claim that reading from such works was "profane," "rude," "uncivil" or "disrespectful," but it is not the role of state actors to dull or soften the rhetoric of government critics. Over fifty years ago, in *Cohen v. California*, 403 U.S. 15, 25, 91 S. Ct. 1780, 1788 (1971), the Supreme Court recognized the risks of allowing government officials to declare certain words off-limits for public debate. "How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." *Id.* If a conscription dissenter can wear a jacket bearing the words "Fuck the Draft" in a county courthouse in 1971, then mothers who want to criticize school books they deem inappropriate ought to be free to read the actual texts to the elected officials who are responsible for administering their schools in 2022. That is particularly true where they seek to do so to prove their point with primary-source evidence, and not merely engage in gratuitous rhetoric or emphasis.

II. DEFENDANTS' PROPOSED REVISED POLICY AND RULES OF CONDUCT BETRAY AN INTENT TO KEEP CENSORING SPEECH THAT THE BOARD FINDS EMBARRASSING.

Defendants have proposed to revise their public-comment policy by substituting new subjective terms and moving some restrictions from the policy into subordinate "Rules of Conduct and Public Participation Procedures." *See* ECF Nos. 24-1, 24-2, 24-3; *see also* Exhibit I (Recommended Revision and Rules of Conduct).[2] Defendants are playing a shell game to avoid judicial review of their activities by switching around terminology and attempting to place provisions of the policy into rules and procedures. These tactics are in and of themselves indicative of a future intent to censor speech and dampen criticism of the Board.

The revised rules require speakers to comport themselves in a "respectful manner." ECF No. 24-3 at 2 (Rule 2). They maintain the prohibition on personally directing comments to individual board members. *Id.* (Rule 6). Speakers are also still required to "keep their remarks civil," but the language of the civility clause uses different terminology, including restricting "obscene, profane, physically

[2] Exhibit I was printed from the FCS website. Plaintiffs do not believe either its authenticity or admissibility will be contested.

threatening, or abusive remarks"[3] and adding a restriction on "[l]oud and boisterous" comments or audience conduct. *Id.* (Rule 9). The new rules carry over the prohibition on "profane" comments and also the threat of an outright prohibition on speaking. *Id.* at 2-3.

These terms are all highly subjective and lend themselves to broad interpretation by the meeting chair. Indeed, the emphasis on a "respectful manner" sounds similar to Wes McCall's repeated past admonishment to speakers to "be respectful." But respect is a two-way street. It is understandable that parents who are censored, interrupted, and spoken to in a paternalistic manner might address officials in a pointed manner. Indeed, this country was founded by people who were disrespectful toward authority. The First Amendment does not require Americans to speak to government officials in a respectful manner, and officials who cannot handle criticism, however caustic or unwarranted, should relinquish their posts. In a democracy, unpleasant criticism comes with the territory.

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[3] Plaintiffs do not challenge the prohibition on "physically threatening" comments, to the extent the prohibition is limited to true threats and not threatening ideas.

Obscenity is not defined by the new rules and it cannot, in any event, be reasonably construed to apply to reading from a school book to make a political or philosophical point about whether the book is appropriate to have available in schools. *See McBreairty v. Sch. Bd. of RSU22,* No. 1:22-cv-00206-NT, 2022 U.S. Dist. LEXIS 128353, at *14-15 (D. Me. July 20, 2022). Under *Miller v. California,* 413 U.S. 15, 24 (1973), the following factors are used to determine whether content is obscene: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. If Defendants now claim that the uncensored speeches were "obscene," or would be under the revised rules, then they are also admitting that the works in question are obscene when being present in FCS libraries. The definition of obscenity may shift somewhat in accordance with community standards, but it does not shift between the school library and school-board meeting within that same community. Here the Mama Bears propose to read excerpts to make a political or philosophical point. By definition, that is not obscene.

It is also hard to determine what Defendants mean by the term "abusive" because it invites the chair to consider the subjective feelings of the listeners or other board members and the standard is otherwise insufficiently defined. Some 50 years ago, the Supreme Court invalidated a Georgia statute that had criminalized "opprobrious words or abusive language" because it was unconstitutionally broad and vague. *Gooding v. Wilson*, 405 U.S. 518, 518-20 (1972) (citing *Cohen* and noting that vulgar and offensive speech is protected by the First and Fourteenth Amendments). Other courts have similarly invalidated prohibitions on abusive or offensive speech in the context of public comments at school-board meetings. *Ison v. Madison Loc. Sch. Dist. Bd. of Educ.,* 3 F.4th 887, 894 (6th Cir. 2021) (striking down prohibitions on "abusive," "personally directed," and "antagonist" comments); *Marshall v. Amuso*, 571 F. Supp. 3d 412, 422, 424 (E.D. Pa. 2021) (striking down prohibition on "abusive" and "offensive" comments among other terms). The Court should do likewise here.

The prohibition on "loud and boisterous" comments or audience reactions is also subjective and invites the chair to censor speech whenever it is just a little too effective. To be sure, some audience members expressed their agreement with Alison Hair or their

disagreement with Wes McCall by clapping or laughing at his profession of concern for young people, but those events were temporally short and did not prevent the meeting from continuing or prevent other speakers from having their say. What disrupted the meeting was Wes McCall repeatedly interrupting speakers and trying to censor them and on several occasions clearing the room because he did not like what he was hearing.

The risk of the "loud and boisterous" rule being abused by officials is even more pronounced because they have not provided any criteria for evaluating whether someone is too loud or boisterous. *Compare,* ECF No. 24-3 at 2 (Rule 9) *with DA Mortg., Inc. v. City of Miami Beach,* 486 F.3d 1254, 1272 (11th Cir. 2007) (noise ordinance contained rebuttable presumption that it was violated when a sound reproduction device was clearly audible 100' away during the hours of 11:00 PM and 7:00 AM); *Coal. of Immokalee Workers, Inc. v. Town of Palm Beach, Fla.,* No. 16-cv-80284-MIDDLEBROOKS, 2016 U.S. Dist. LEXIS 190826, at *22-27 (S.D. Fla. Mar. 11, 2016) (application of decibel ordinances to speech would interfere with ability for anyone to hear or notice that speech).

Moreover, Defendants' proposed ban on "loud and boisterous" audience reactions is also undefined. A review of the video records of both

the February and March 2022 board meetings shows that enthusiastic clapping and occasional expressive hollering by the audience was not an uncommon occurrence and did not disrupt the proceedings. School boards should not be able to prevent audience members from clapping if they agree with a speaker, so long as doing so does not delay the progression of the meeting or prevent the actual orderly administration of the meeting.

To be sure, Defendants, and other school boards across this country, are well within their rights to prevent speakers from going over their time, skipping ahead in line, interrupting other speakers, or making true threats of physical harm. But the right to free expression is at risk if officials can use highly subjective terms, on the fly, to censor speakers who say things that make officials uncomfortable. Protecting criticism of government officials that they may find unpleasant is among the First Amendment's core purposes.

This Court should enjoin the application of the civility provisions of both the existing public comment policy and the proposed policy and

rules.[4] At a bare minimum, this Court should enjoin both the existing policy and the revised rules from being used to restrict any Mama Bear from reading from a book available in any FCS library, during public comments.

III. DEFENDANTS HAVE OFFERED NO DEFENSE OF THEIR INDEFINITE BANNING OF ALISON HAIR.

Alison Hair remains banned from attending FCS school board meetings (ECF No. 2-5 at 2), which prevents her from petitioning her elected school board officials for changes or otherwise commenting on FCS-related topics. Moreover, this ban is indefinite, and contingent on Ms. Hair submitting to Wes McCall's subjective and self-serving interpretation of the FCS speaking rules. *Id.*

Defendants have offered no defense of their indefinite ban and this Court should interpret that as a concession that it should be lifted. Even were this Court to agree that Ms. Hair's speech exceeded the content restrictions allowable in a school-board forum, banning her indefinitely

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[4] Plaintiffs will be exercising their right to amend their Complaint under Rule 15(a)(1)(b), as of right, to challenge the revise policy and rules. The First Amended Complaint will be filed before the upcoming preliminary injunction hearing.

is disproportionate and lacks narrow tailoring. "Singling out one individual, banning h[er] (perhaps disfavored) speech, and essentially preventing h[er] from engaging in a form of civil discourse that is available to everyone else in [the school district]—is unreasonable." *McBreairty*, 2022 U.S. Dist. LEXIS 128353, at *28; *see also Garnier v. O'Connor-Ratcliff,* 41 F.4th 1158, 1181-82 (9th Cir. 2022) (school board trustees' social media blocking of repetitive commenter was not narrowly tailored and burdened more speech than necessary); *Cyr v. Addison Rutland Supervisory Union,* 60 F. Supp. 3d 536, 549 (D. Vt. 2014) ("[A] categorical ban on expressive speech singling out an individual does not even satisfy the lower threshold of reasonableness review").

As a result, this Court should enjoin the enforcement of this ban.

Dated: September 15, 2022

Respectfully submitted,

s/Endel Kolde
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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and spacing requirements of LR 5.1(C) because this brief has been prepared in double spaced typeface using Microsoft Word in 13-point in Century School Book.

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