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Of Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

GLENDA SCHERER, Plaintiff, v. GLADSTONE SCHOOL DISTRICT, BOB STEWART, in his official capacity as Superintendent of Gladstone School District, TRACY OBERG GRANT, in her official capacity as Board Chair, Defendants.	Case No. 3:24-cv-00344-YY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT *ORAL ARGUMENT REQUESTED*

LR 7-1

Pursuant to Local Rule 7-1(a), defendants certify that the parties conferred but were unable to resolve their disputes.

MOTION

Pursuant to Federal Rule of Civil Procedure 56, defendants move this Court for its order granting summary judgment in their favor and against plaintiff's First Amended Complaint ("Complaint") in its entirety. The ground for this motion is that there is no genuine dispute as to

any material fact and that the defendants are entitled to judgment as a matter of law. Defendants' motion is supported by the argument and authorities below and the Declarations of Karen M. Vickers and Beth F. Plass and attached exhibits.

INTRODUCTION

Plaintiff Glenda Scherer brings First Amendment claims against defendants Gladstone School District, former Superintendent Bob Stewart, and former School Board Chair Tracey Grant. Scherer's claims arise out of her desire to publicly accuse a District staff member, who removed her child's hands from the neck of another student, of "child abuse" during the public comment portion of the District's board meetings. Summary judgment should be granted in favor of defendants on all claims for relief.

STANDARDS

A court must grant summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). The existence of a factual dispute between the parties is insufficient to defeat a motion for summary judgment. "Likewise, mere allegation and speculation do not create a factual dispute for purposes of summary judgment." *Nelson v. Pima Community College,* 83 F.3d 1075, 1081-82 (9th Cir. 1996). To defeat a motion for summary judgment, there must be a genuine issue of fact which means that the disputed evidence would be sufficient to support a reasonable jury verdict for the plaintiff. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 245-52 (1986).

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FACTUAL BACKGROUND

The plaintiff is Glenda Scherer. Scherer is a resident of Gladstone, Oregon, residing within the Gladstone School District ("District"). Scherer has two children. *See* Complaint ¶ 13 Both attended District schools at various times, but neither has been enrolled since mid-September 2022. *See* Vickers decl. Ex. 1 (Plt Depo 15:23-16:3). Defendant Gladstone School District ("District") is a public school district in Clackamas County, Oregon. *See* Complaint ¶ 7. Defendant Bob Stewart is the former Superintendent of the District. Jeremiah Patterson is the current Superintendent. Complaint ¶ 8; Vickers decl. Ex. 2 (Stewart Depo 7:19-21). The District is governed by a five-member elected volunteer school board ("Board). Defendant Tracey Grant is the former Board chair. Complaint ¶ 12.

I. COVID-ERA BOARD MEETINGS

During COVID-19, while the District was trying to navigate the logistical challenges of holding remote school board meetings, the District asked individuals who wanted to participate in public comment to submit their comments in writing. Vickers decl. Ex. 2 (Stewart Depo 41:3-11); Ex. 3 (Patterson Depo 28:16-23). The Board Chair then read the comments aloud during the public comment section of the meeting. This applied to all comments, not just Scherer's comments. Vickers decl. Ex. 1 (Plt Depo 43:17-44:6). Commenters are no longer required to submit their comments in advance. Vickers decl. Ex. 1 (Plt Depo 88:19-89:2); Ex. 7 p. 1.

II. SOCIAL MEDIA

The following incidents involving social media are relevant to the allegations in the Complaint.

COVID Facebook Group: In approximately September 2020, the District opened a

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Facebook group for parents. It was facilitated by the District's Communications Coordinator at that time, Leslie Robinette. *See* Vickers decl. Ex. 2 (Stewart Depo 12:18-22; 14:5-6). The group was shut down in October 2020 and not reopened. *See* Vickers decl. Ex. 1 (Plt Depo 39:10-18; 39:24-40:25). The Superintendent was not involved in the Facebook group. Ex. 2 (Stewart Depo 16:9-13).

Twitter: On Wednesday, November 25, 2020, Scherer emailed Patterson, Stewart, and Robinette stating that she was blocked from the School's Twitter account. Vickers decl. 2, pgs 15-16 (Stewart Depo Ex 1). The matter was promptly resolved, and Scherer's account was unblocked. *See* also Vickers decl. Ex. 2, pgs 15-16 (Stewart Depo Ex. 1); Ex. 1 (Plt Depo 41:1-23).

Tagging: Scherer maintains at least three Facebook accounts – Glenda Conant-Scherer, Unheard Parents, and Kids First Oregon. Vickers decl. Ex. 1 (Plt Depo 19:10-14). Scherer often "tags" the District when posting on her Facebook accounts. *See* Plass decl. at Ex. 1. Her posts appear: (a) on her Facebook pages as hyperlinks, and (b) on the "Mentions" section of the District's Facebook page, called Gladstone Schools. Vickers decl. Ex. 1 (Plt 96:12-16); Plass decl. ¶ Ex. 1. Scherer is not blocked from seeing what the Gladstone Schools Facebook page posts. Vickers decl. Ex. 1 (Plt Depo 43:13-16).

III. STUDENT ISSUE AND RELATED TEMPORARY PROPERTY DIRECTIVE

One of Scherer's children was enrolled at a District school during the 2022/2023 school-year. One day in class, Scherer's child put their hands around the neck of another child during story time while students were gathered on the carpet. A staff member intervened to stop the incident, lifted Scherer's child off of the ground and removed the child from the area of the

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classroom near other students, and calmed the child down. *See* Vickers decl. Ex. 2 (Stewart Depo 19:21-20:3); Ex. 9 (Police Report). Scherer did not observe the incident. Vickers decl. Ex. 1 (Plt Depo 59:8-10; 61:1-13).

Scherer has accused the staff member (Staff Member 1) who removed her child's hands from the neck of another student of "child abuse." Scherer's claims about Staff Member 1 have been investigated and found untrue by the District, the Gladstone Police Department, the Department of Human Services and Office of Training Investigations, and the Teacher Standards and Practices Commission. Vickers decl. Ex. 8 (Staff Member 1 Declaration).

On December 17, 2022, Scherer came to the District office to review documents related to the situation with her child. As the meeting concluded, she took original documents with her despite then-Assistant Superintendent Jeremiah Patterson's repeated instruction that she not do so. Vickers decl. Ex. 3 (Patterson Depo 85:17-86:11; 87:6-91:24). This incident followed a series of occasions where Scherer engaged in threatening behavior, yelling, and swearing at staff. Vickers decl. Ex. 3 (Patterson Depo 91:5-24). As a result of these interactions, then-Superintendent Bob Stewart wrote Scherer a letter requiring that she obtain permission before coming onto District property. Ex. 2 (Stewart Depo 29:5-30:15 & Depo Ex. 7).

The District is governed by an elected, volunteer, five-member school board. *See* ORS 332.011. Oregon law does not require that school districts hold open meetings for public comment. ORS 192.630 (requiring only that the public be permitted to attend any meeting except as otherwise provided). The Board has, however, allowed public comment at many meetings. Oregon law requires that personnel complaints or charges be held in executive (closed) session, unless the individual requests an open hearing. ORS 192.660(2)(b).

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The District's public comment policy is Policy BDDH. Vickers decl. Ex. 4, pgs 8-9 (Grant Depo Ex. 6). Policy BDDH states in relevant part :

> A person speaking during the designated portion of the agenda for public comment *may* offer objective criticism of district operations and programs. The Board will not hear comments regarding any individual district staff member. The Board chair will direct the visitor to the procedures in Board policy KL – Public Complaints for consideration of a legitimate complaint involving a staff member. A commendation involving a staff member should be sent to the superintendent, who will forward it to the Board.

Id. (emphasis added). That is, commenters "may" but are not required or mandated to submit objective criticism of district operations. *See id.* Further, the policy prohibits positive *and* negative comments about individual staff during public comment period and provides other avenues for members of the public to address personnel concerns and commendations. *Id.* Scherer has used the complaint procedures liberally. *See,* e.g., Vickers decl. Ex. 5 (GSD 194, 155-56, 161).

Scherer frequently signs up to speak during public comment. During her public comment time, she has been stopped or redirected by the Board chair when she attempts to discuss the situation involving her child and Staff Member 1 and when she attempts to discuss other personnel information. *See* Complaint ¶ 32, 33.

In December 2023, Scherer and Staff Member 1 apparently had an interaction at a Fred Meyer store. Scherer filed a petition for a restraining order in Clackamas County Circuit Court. A temporary order was granted without notice or hearing to Staff Member 1. Vickers decl. Ex. 6 (Docket). Staff Member 1 retained counsel prior to the permanent hearing date. Scherer then voluntarily dismissed the petition. *See id*. Soon after the incident, Scherer signed up to speak during the public comment period of the school board meeting. Complaint ¶ 33.

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When she started to discuss this incident, then-Board Chair Grant attempted to redirect her, without success. Grant then recessed the meeting. Vickers decl. Ex. 1 (Plt Depo 85:11-23). During the recess, Scherer appeared to be livestreaming from her phone in the Board room. Then-Superintendent Stewart thereafter updated his prior letter of directive, providing that Scherer was not to come to Board meetings in person unless she received permission. Vickers decl. Ex. 2 (Stewart Depo 30:21-33:9 and Depo Ex. 8). The letter stated that she was permitted to participate in the meetings remotely. *Id.* The directive was withdrawn, before this lawsuit was filed. Vickers decl. Ex. 7 (Sterling Email Excerpt); Ex 1 (Plt Depo 89:16-18); Ex. 2 (Stewart Depo 33 :15-22).

On March 13, 2024, Scherer wanted to speak at the school board meeting during public comment to discuss personnel information regarding named staff members. Prior to the meeting, Scherer had made a public records request to the Teacher Standards and Practices Commission ("TSPC"). TSPC incorrectly provided Scherer with confidential information of District employees, including their transcripts, records with their home addresses, and phone numbers.[1] Vickers decl. Ex. 4 (Grant Depo 83:19-85:9). Grant attempted to redirect Scherer during the meeting. When Scherer pivoted to discussing hiring practices, without discussing a specific educator, she was permitted to continue her comment. Vickers decl. Ex. 4 (Grant Depo 90:5-18).

Scherer would like to use her time in public comment to publicly accuse Staff Member 1, who removed her child's hands from the neck of another child, of "child abuse." Scherer would like to make these and other criticisms of named school officials regardless of their truth or

[1] TSPC is a defendant in a lawsuit for having disclosed this information. *Dunkin, et al. v. State of Oregon,* Clackamas County Case No. 25CV04813.

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falsity. Vickers decl. Ex. 1 (Plt 56:11-18). At the same time, Scherer would like to use student privacy laws, presumably the Family Educational Rights and Privacy Act, to shield the District or Staff Member from responding with their perspective on the incident or criticizing her in any manner. *See* Vickers decl. Ex. 1 (Plt Depo 82:1-25).

ARGUMENT

I. Defendants Stewart and Grant are entitled to summary judgment because the claims against them are official capacity claims and the District is also a defendant.

The Complaint makes all claims against the District, Bob Stewart – in his official capacity only, and Tracey Grant – in her official capacity only. Suits against government officials in their official capacities are subject to the same requirements established in *Monell v. Dep't of Soc. Svs.,* 436 U.S. 658 (1978) as claims against local governments. *See Kentucky v. Graham,* 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.").

Official-capacity suits are simply a different way of pleading an action against a municipal entity. *Id.* Where, as here, "individuals are being sued in their official capacity as municipal officials *and* the municipal entity itself is also being sued, then the claims against the individuals are duplicative and should be dismissed." *Vance v. Cty. of Santa Clara,* 928 F. Supp. 993, 996 (N.D. Cal. 1996) (emphasis original). Because the District is a defendant, the claims against defendants Stewart and Grant should be dismissed.

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II. Scherer's claims are time-barred to the extent that the actions she complaints of occurred prior to February 26, 2022.

Scherer's claims are filed under 42 U.S.C section 1983. Section 1983 does not come with its own statute of limitations. When a federal civil rights statute does not include its own statute of limitations, federal courts borrow the forum state's limitations period for personal-injury torts. Thus, Oregon's two-year, general tort statute of limitation found at ORS 12.110(1) applies to Scherer's claims. *Addisu v. Fred Meyer, Inc.,* 198 F.3d 1130, 1140 (9th Cir. 2000).

Here, Scherer filed her complaint in this matter on February 26, 2024. Dkt. 1. Therefore, she cannot base any of her claims on alleged actions which occurred more than two years prior to that date, including for example, claims related to the District's Facebook group for parents or allegations that she was blocked from the District's Twitter account. Summary judgment should be granted accordingly.

IV. Scherer lacks standing to challenge the portions of the policies which have not been applied to her. (First, Second, Fourth and Fifth Claims for Relief)

Scherer attempts to challenge portions of policies which have not been applied to her. She lacks standing to do so.

To establish constitutionally minimum standing, a plaintiff must show: (1) "injury in fact" – that she suffered or is in immediate danger of suffering an injury that is "concrete and particularized" and not conjectural or hypothetical; (2) "a causal connection between the injury and the conduct," and that (3) it is "likely" rather than "merely speculative that the injury will be addressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61

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(1991); *Lopez v. Candaele,* 630 F.3d 775, 785 (9th Cir. 2010). "Abstract injury is not enough." *City of Los Angeles v. Lyons,* 461 U.S. 95, 101 (1983). The standing requirement applies to both as-applied and facial challenges. *See Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 891-892 (9th Cir. 2007).

"Mere 'allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm,'" and a plaintiff's bare claims of "self-censorship alone" do not suffice. *Lopez,* 630 F.3d at 787, 792 (quoting *Laird v. Tatum,* 408 U.S. 1, 13-14 (1972)). Courts recognize that "[c]onstitutional challenges based on the First Amendment present unique standing considerations," and therefore "plaintiffs may establish an injury in fact without first suffering a direct injury from the challenged restriction." *Lopez*, 630 F.3d 775, 785 (citation omitted). However, plaintiffs bringing "pre-enforcement" actions must still demonstrate "a realistic danger of sustaining a direct injury as a result of the [policy's] operation or enforcement." *Id*. at 785 (citation omitted).

Here, Scherer seeks to challenge the portion of BDDH-AR which states, "All members of the public attending School Board meetings must treat each other and the Board with respect." *See* Complaint ¶ 24. She also challenges Policy BDDH and BDDH-AR provisions which state that commenters "[m]ay offer objective criticism…" Complaint ¶ 23. However, Scherer does not allege and there is no evidence that the District has ever enforced the "respect" or "objective criticism" provisions to prevent her from speaking at a Board meeting. *See* Vickers decl. Ex. 4 (Grant Depo 57:19-22) (regarding respect provision). Accordingly, Scherer lacks standing to bring claims challenging the "respect" and "objective criticism" provisions.

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III. Defendants are entitled to summary judgment over Scherer's claim that she was banned from Board meetings. The temporary ban on in person attendance without prior permission was a reasonable restriction which was withdrawn before this suit was filed. (Sixth Claim for Relief)

In the sixth claim, Scherer alleges defendants violated her First Amendment rights when they "banned" her from attending Board meetings in person. Complaint ¶¶ 85-91. Scherer's claim fails because (1) the directive was withdrawn before any meetings occurred; and (2) even if it had not been withdrawn, Scherer was permitted to attend in person with prior permission or remotely.

A. The January 23, 2024 letter was withdrawn.

Scherer does not allege she has been excluded from attending Board meetings. On January 23, 2024, Stewart updated his December 16, 2022 property directive to include board meetings and workshops, which he stated plaintiff could not attend without prior approval from the Superintendent's Office. Vickers decl. Ex. 2 pgs 18-19 (Stewart Depo Ex. 8). The letter noted that the meetings were available for participation online. *Id.* The directive was rescinded days later and before this lawsuit was filed. Vickers decl. Ex. 7 (Sterling Email). Scherer does not allege that she ever sought permission or was in fact excluded from any meetings. Scherer's sixth claim for relief is moot.

B. Scherer was permitted to attend meetings in person with prior permission or via remote means.

Notwithstanding that the letter was withdrawn and the claim is moot, Scherer was permitted to attend Board meetings in person if she received permission first. She was also permitted to participate via remote means and nothing would have prohibited her from making comment. This withdrawn restriction was reasonable in light of Scherer's history of disruption –

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it allowed for the Superintendent to make sure that the District was sufficiently prepared to handle any disruption that Scherer might cause, should she want to attend meetings in person, and allowed her to participate fully online.

IV. Scherer's claim alleging that the District is violating her rights by restricting her from tagging its own Facebook page fails because Scherer is tagging the District in her posts. (Seventh Claim for Relief)

In the seventh claim, Scherer alleges that the District created a designated public forum via its Facebook page. She further alleges that the District violated her First Amendment and petition rights by restricting her ability to tag the District's account. Complaint ¶¶ 92-96. There is no specificity to this claim; Scherer does not identify the posts at issue except to vaguely assert in deposition that it relates to a post about TSPC.

Scherer maintains at least three Facebook accounts: Glenda Conant-Scherer, Unheard Parents, and Kids First Oregon. Scherer posts on those accounts, "tagging" the District's account, Gladstone Schools.

When a user clicks on the District's Gladstone Schools page, which is also publicly accessible, they are directed to the District's "Posts." A user can navigate to the District's Gladstone Schools page's "Mentions" by selecting "More" followed by "Mentions." The "Mentions" section contains posts by non-users who have "tagged" the District's Gladstone Schools page when posting on their own pages.

Contrary to allegations in the Complaint asserting that Scherer was blocked until February 2024, Complaint ¶ 21, Scherer's posts – from the Facebook pages she uses – dating back to well-prior to the filing of this lawsuit can be found on the "Mentions" page. This includes posts mentioning TSPC issues on October 13, 2023. Plass dec. Ex. 1 pg. 6. Summary

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judgment should be granted on the District's seventh claim for relief.

V. The Board's enforcement of its policies against discussion of personnel matters was not unconstitutional as applied to Scherer's speech. The policy is also facially constitutional. (First, Second, Fourth and Fifth Claims for Relief)

The Complaint alleges that the District's public comment policies are unconstitutional as-applied and facially. The challenges are contained in the first, second, fourth, and fifth claims for relief. As-applied, Scherer, challenges the redirection of her speech during two public comment periods, once in relation to the situation involving her child and an interaction with Staff Member 1 and the second time when she attempted to discuss specific personnel hiring records. Complaint ¶¶ 41 & 42. Scherer makes facial challenges to the prohibition on discussion of specific personnel, the claimed requirement of "objective" criticism, and the requirement that individuals treat each other with "respect."

"An as-applied challenge contends that [a] law is unconstitutional as applied to [a] litigant's particular speech activity, even though the law may be capable of valid application to others." *Foti v. City of Menlo Park,* 146 F.3d 629, 635 (9th Cir. 1998). A facial challenge seeks to strike down a law in its entirety and must therefore meet a more rigorous standard. *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024). In the First Amendment context, this standard requires a plaintiff to show that "a substantial number of [the policy's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* (alteration in original) (quoting *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021)).

A. The District's public comment policy is reasonable and viewpoint neutral.

Government entities, like the District, have the right to limit expressive activity on their

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property. The nature of the restrictions depends on the particular "forum." Government property is sorted into four categories: traditional public forums, designated public forums, limited public forums, and nonpublic forums. *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings College of the L. v. Martinez,* 561 U.S. 661, 679 n. 11 (2010).

Courts analyze public comment portions of school board meetings under the standards for limited public forums. *McBreairty v. Sch. Bd. of RSU 22,* 616 F.Supp.3d 79, 92 (D. Me. 2022) ("[M]ost courts that have considered the issue have found that [school board meetings] fall in the limited public forum category"); *Barna v. Bd. of Sch. Directors of Panther Valley Sch. Dist.,* 877 F.3d 136, 142 (3d Cir. 2017) (labeling school board meeting "a limited public forum"); *Green v. Nocciero,* 676 F.3d 748, 753 (8th Cir. 2012) ("For First Amendment purposes, the School Board meeting was what has variously been called a nonpublic or a limited public forum."). In limited public forums, the government may restrict speech, as long as the restriction is reasonable and viewpoint neutral. *Pleasant Grove City, Utah v. Summum,* 555 U.S. 460, 470 (2009).

Specifically, in a limited public forum, the government may establish "time, place, or manner" restrictions as long as the restrictions are "reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). The government may also impose content-based restrictions, such as those reserving the forum for certain groups or for the discussion of certain topics so long as the restrictions "are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Id.*

1. The restriction is reasonable.

As many courts have found, restrictions on discussion of personnel during the public

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comment period of school board meetings are reasonable and constitutional. *See, e.g., Slinkard v. Indep. Sch. Dist. No. 1 of Tulsa Cnty.,* 2025 WL 957554, *9 (N.D. Oklahoma Mar. 31, 2025) (rejecting facial challenge to public comment restrictions on personnel matters); *McBreairty,* 2024 WL 2187436 at **6-11. *Pollack v. Wilson*, 2022 WL 17958787, **7-8 (10th Cir. 2022) (upholding restriction on personnel discussions during public comment); *Cipolla-Dennis v. Cnty. of Tompkins*, 2022 WL 1237960, at *2 n. 2 (2d Cir. 2022) (same); *Davison v. Rose,*19 F.4th 626 (4th Cir. 2021) (upholding policy prohibiting personal attacks at board meetings); *Monroe v. Houston Indep. Sch. Dist.,* No. H-19-1991, 2019 WL 13252407, at *5 (S.D. Tex. July 19, 2019) *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 760 (5th Cir. 2010) (approving policy barring personnel discussions to protect student and teacher privacy); *Prestopnik v. Whelan,* 83 F. App'x 363, 365 (2d Cir. 2003). A school district has significant and legitimate interest in preventing the public disclosure of confidential personnel information during open comment periods.

That is particularly the case, where, as here, state law – which governs the forum – mandates that such discussion occur in executive (closed) session unless an employee requests otherwise:

> The governing body of a public body may hold an executive session: … (b) To consider the dismissal or disciplining of, or *to hear complaints or charges brought against*, a public employee, staff member or individual agent who does not request an open hearing.

See ORS 192.660(2)(b) (emphasis added). The requirement is further necessary where, as here and nearly every situation involving complaints and commendations about school personnel, the restricted comments intersect with student issues, which are confidential under federal student

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privacy laws. 34 C.F.R. § 99.30. The restriction is reasonable.

2. The restriction is viewpoint neutral.

The personnel restriction is viewpoint neutral. The challenged provision restricts comment on a subject matter – individual staff - regardless of the speaker's opinion or perspective. It does not favor or suppress any viewpoint. The availability of alternative channels of communication, mentioned in Policy BDHH, further demonstrates that the policy is reasonable. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 53-54 (1983). Individuals are permitted to raise concerns about staff through official District procedures or private means. Scherer has used these procedures repeatedly.

Because the challenged personnel restrictions are reasonable and viewpoint neutral, the restriction is not facially unconstitutional. Scherer's as-applied challenges to the two instances where she was redirected during the public comment period fail, because as she alleges, she was prohibited from making personnel complaints.

B. The remaining challenges to the policies should be dismissed.

As described above in section IV, Scherer does not have standing to challenge the "respect" and "objective criticism" provisions of the policies. But even if she did, the Court should find that the "objective criticism" provisions in Policy BDDH and BDDH-AR are constitutional. Those provisions provide that commenters "may provide objective criticism." The plain and ordinary meaning of "may" in English usage is permissive, rather than "shall" or must" which impose obligations. *Lopez v. Davis,* 531 U.S. 230, 231 (2001). Thus, the "objective criticism" provisions impose no restrictions on Scherer's speech. Finally, Scherer's as-applied challenges to the "respect" and "objective criticism" provisions fail because Scherer

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does not allege that the District has ever enforced those policies to prevent her speech.

The Board's enforcement of its policies and the policies themselves do not violate the First Amendment.

C. Scherer's First Amendment free speech and First Amendment petition claims are analyzed the same way.

The first and second claims for relief are First Amendment free speech claims. The fourth and fifth claims are First Amendment right to petition claims. In the context in which Scherer's claims arise, Courts apply the same constitutional analysis to the free speech and right to petition claims. *Wayte v. United States,* 470 U.S. 598, 610 n. 11 (1985) ("Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis.") Thus, Scherer's right to petition claims fail for the same reason that her free speech claims fail.

VI. The District is no longer requiring commenters to submit their comments in advance. (Third Claim for Relief)

During COVID-19, as the Board was first learning to accommodate remote meetings, individuals who wanted to submit public comments were asked to do so in writing. That practice continued for a time but is no longer in place and was stopped before this lawsuit was filed. Scherer's claim alleging that the pre-submission requirement violates the constitution is moot. Additionally, there are no timely allegations that Scherer was prohibited from speaking because she either deviated from or failed to submit her comments in advance.

Summary judgment should be granted to defendants on the third claim for relief.

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CONCLUSION

For the reasons given above, the District requests that the Court grant its motion for summary judgment against all claims in plaintiff Glenda Scherer's complaint.

DATED: June 25, 2025.

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