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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2018-01115

COREY SPAULDING & another[1]

vs.

TOWN OF NATICK SCHOOL COMMITTEE & others[2]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT AS TO COUNT I

Plaintiffs Corey Spaulding ("Spaulding") and Karin Sutter ("Sutter") (collectively, "plaintiffs") commenced this action against the Town of Natick School Committee ("School Committee"), Lisa Tabenkin ("Tabenkin"), the School Committee chair, and Anna Nolin ("Nolin"), the interim superintendent of the Natick Public Schools (collectively, "defendants"), alleging constitutional and statutory violations arising out of three meetings before the School Committee. This case is before the court on the plaintiffs' and defendants' cross motions for summary judgment on Count I of the plaintiffs' amended complaint. For the following reasons, the plaintiffs' motion is **ALLOWED** and the defendants' motion is **DENIED**.

BACKGROUND

The summary judgment record reveals the following undisputed facts.[3]

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[1] Karin Sutter

[2] Lisa Tabenkin, individually and in her official capacity as Chair of the Natick School Committee; Anna Nolin, individually and in her official capacity as Interim Superintendent of the Natick Public Schools

[3] The plaintiffs submitted the Affidavit of Benjamin J. Wish, and they rely on the attachments thereto in their statement of material facts. In their own statement of additional facts, the defendants reference the "(First) Aff. of Anna Nolin," the "Second Aff. of Anna Nolin," the "Aff. of Timothy Luff," the "Aff. of Lisa Tabenkin," and lettered, yet unidentified, exhibits (i.e., Additional Facts Nos. 11-15, 17). In the context of summary judgment motions, Rule 9A(b)(5)(vi) of the Superior Court Rules requires that "[a]ll exhibits referred to in a motion, a cross-motion, or opposition thereto shall be filed as a joint appendix, which shall include an index of the exhibits. The initial moving party, with the cooperation of each opposing party, shall be responsible for assembling the joint

Pursuant to the document titled "Public Participation at School Committee Meetings" ("Participation Policy"), "[a]ll regular and special meetings of the School Committee shall be open to the public." Benjamin J. Wish ("Wish") Affidavit, Exhibit B. "The School Committee desires citizens of the District to attend its meetings so that they may become better acquainted with the operations and the programs of . . . [Natick] public schools. . . . [and so that the School Committee can] hear the wishes and ideas of the public." Id.

> "In order that all citizens who wish to be heard before the [School] Committee have a chance and to ensure the ability of the [School] Committee to conduct the District's business in an orderly manner, the following rules and procedures are adopted:
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> 1. At the start of each regularly scheduled school committee meeting, individuals or group representatives will be invited to address the [School] Committee. The Chairperson shall determine the length of the public participation segment [i.e., 'Public Speak'].
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> 2. Speakers will be allowed three (3) minutes to present their material. The presiding Chairperson may permit extension of this time limit.
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> 3. Individuals may address topics within the scope of responsibility of the School Committee.
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> 4. Improper conduct and remarks will not be allowed. Defamatory or abusive remarks are always out of order. If a speaker persists in

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appendix and the index." The parties' submissions do not comply with this rule, but, as the summary judgment record is reasonably small, the court will accept it. See Superior Court Rule 9A(b)(6) ("The court need not consider any motion or opposition that fails to comply with the requirements of this rule.").

The court also notes that the defendants' citations to its own record are unclear. In addition to the unidentified lettered exhibits noted above (which the court presumes refer to the exhibits attached to Benjamin J. Wish's affidavit), the "(First) Aff. of Anna Nolin" is not included with the summary judgment papers. A search through the case file revealed the Affidavit of Anna Nolin, dated April 30, 2018, as Exhibit A to the Defendants' Opposition to the Plaintiffs' Motion for a Preliminary Injunction (paper #9). The court presumes that this April 2018 affidavit is the "(First) Aff. of Anna Nolin." Additionally, in the defendants' response to the plaintiffs' Statement of Fact No. 3, the defendants write, in pertinent part, "A true and accurate copy of the policies can be found on the [Massachusetts Association of School Committees] website and is attached as Exhibit A. Ex. A; Affidavit . . . of Lisa Tabenkin." There is no "Exhibit A" attached to the Statement of Material Facts, and the only affidavit from Tabenkin that the court can locate in the record is paper #24 ("Revised Affidavit of Lisa Tabenkin") which does not mention the Massachusetts Association of School Committees. Given the actual issues before the court, and the availability of the Massachusetts Association of School Committees' policies on the Internet, see note 4, infra, these deficiencies are ultimately of no consequence. See note 24, infra.

improper conduct or remarks, the Chairperson may terminate that individual's privilege of address.

5. All remarks will be addressed through the Chairperson of the meeting.

6. Speakers may offer such objective criticisms of the school operations and programs as concern them, but in public session the [School] Committee will not hear personal complaints of school personnel nor against any member of the school community. Under most circumstances, administrative channels are the proper means for disposition of legitimate complaints involving staff members.

7. Written comments longer than three (3) minutes may be presented to the [School] Committee before or after the meeting for the [School] Committee members' review and consideration at an appropriate time."

Id.[4] Also pursuant to the Participation Policy,

> "No person shall address a meeting of a public body without permission of the chair, and all persons shall, at the request of the chair, be silent. No person shall disrupt the proceedings of a meeting . . . . If, after clear warning from the chair, a person continues to disrupt the proceedings, the chair may order the person to withdraw from the meeting and if the person does not withdraw, the chair may authorize a constable or other officer to remove the person from the meeting."

Id. (formatting omitted), quoting G.L. c. 30A, § 20(g).[5]

The School Committee's meeting agendas provide for "Public Speak" during the first fifteen minutes of the School Committee's meetings. Wish Affidavit, Exhibits A, C, F, H. During "Public Speak," "any individual may voice an opinion or concern on any school-related

[4] The Participation Policy is nearly identical to the policy with the code BEDH and titled "Public Comment at School Committee Meetings," set forth in the Massachusetts Association of School Committees' reference manual. http://z2policy.ctspublish.com/masc/Z2Browser2.html?showset=masterset (last visited October 9, 2018). Other Massachusetts towns and cities use a variation of this policy as well. See http://z2policy.ctspublish.com/masc/Z2Browser2.html?showset=mascall (last visited October 9, 2018) (setting forth online policy manuals for various Massachusetts towns and cities).

[5] More accurately, the Participation Policy purports to quote G.L. c. 30A, § 20(f). Section 20(f) of G.L. c. 30A is now section 20(g). See St. 2014, c. 485 (amending G.L. c. 30A, § 20).

issue that is not on the agenda. During [P]ublic [S]peak there will not be an opportunity for debate of issues raised." Id.

I. **January 8, 2018, School Committee Meeting**

The following is a summary of the School Committee meeting held on January 8, 2018 ("January 8th meeting"), and assistant superintendent Timothy Luff's 911 call, both of which are contained on the DVD attached to the Wish Affidavit.[6]

At the beginning of the January 8th meeting, Tabenkin, as the chair, asked if anyone was present for Public Speak. An attendee off camera identified three people, including the speaker herself, who wanted to speak. Tabenkin reminded them that Public Speak is "only for fifteen minutes, so we have to give everyone equal amount of time."

Spaulding identified herself at the podium and said, "I am the mother of a child that was mercilessly bullied into suicide here in Natick."

The superintendent at the time, Dr. Peter Sanchioni ("Sanchioni") and Tabenkin interrupted Spaulding. Sanchioni said, "Stop it right now. Stop it right now. That is unfettered lies" and Tabenkin said, "We can't. We can't."

Spaulding said, "Excuse me, it's not unfettered."

Sanchioni replied, "No, it is. We're ending this right now. . . . the police will be called. . . . Nope, nope."

Spaulding attempted to continue to speak about her daughter. Then Sanchioni said, "You have[7] the opportunity to meet with the chair and the superintendent -"

Spaulding broke in with "No, I did not, actually -"

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[6] The court conducted its own transcription of each of the three meetings at issue, as quoted below.

[7] The parties transcribe this word in the past tense, that Spaulding *had* an opportunity to meet with Sanchioni and Tabenkin. Sanchioni clearly uses the word "have" at approximately 1:35 of the DVD of the recording.

Sanchioni replied, "No, we're offering that right now, but you're not doing this on [sic] public and you're going to disparage the Natick Public Schools."

While Sanchioni was speaking, Spaulding said, "You know what, then, you're going to have to call the police. You're going to have to call the police. I am invoking my civil right in speaking."

Tabenkin suspended the meeting, and the School Committee members left the room.

Thereafter, Luff called the Natick police, informing the dispatcher that an "irate parent" was at the January 8th meeting and requesting assistance from the police in removing her.[8]

II. **January 2018 No Trespass Order**

Sanchioni, as then-superintendent, sent Spaulding a letter dated January 9, 2018, in reference to the January 8th meeting. Plaintiffs' First Amended Verified Complaint, Exhibit E. In that letter, Sanchioni wrote,

> "During the public speak portion of the meeting, you confronted the School Committee and made several statements which were inaccurate and seemed intended to disrupt the School Committee meeting relative to your daughter and her emotional status. You were asked to discontinue your behavior as it was disrupting the meeting and not an appropriate topic for a public meeting. In fact, I offered to meet with you to discuss your concerns which involved your daughter. Instead, you continued to discuss these sensitive matters in front of your daughter, which resulted in the School Committee having to suspend its meeting due to your continued disruption of the meeting and due to the potential emotional harm that such statements could cause to a minor child. You continued to refuse to leave the meeting until such time as you could play a song on a computer for the School Committee. The police were called and had to escort you out of the building.
>
> "I am writing to offer you an opportunity to meet with me and provide your explanation of your conduct at the January 8th . . . meeting and why I should not issue a no trespass order."

Id.

[8] It is undisputed that the Natick police arrived and escorted Spaulding from the building.

In a follow-up letter to Spaulding dated January 16, 2018, Sanchioni wrote,

> "Since you declined to schedule a meeting with me to discuss your inappropriate and disruptive behavior, I am herby [sic] issuing this letter of no trespass. Consequently, upon receipt of this letter, you are hereby forbidden from entering upon the premises of the central administrative offices at 13 East Central Street in Natick. Failure to comply will result in legal action, including, but not limited to police notification and arrest.
>
> . . . .
>
> "This letter in no way limits your right to advocate for your daughter for an educational placement should you decide to . . . return to [Natick] public schools. . . .
>
> "To reiterate, please be advised that this letter constitutes official notification of the Natick Public Schools that you are not allowed to enter the premises of the Natick Public Schools' central administrative offices . . . . Should you choose to ignore or violate the terms of this no trespassing order, the Natick Police Department with [sic] be immediately notified and a criminal complaint or arrest may be made. There are no exceptions to this directive unless you obtain the advance written approval from me."

Plaintiffs' First Amended Verified Complaint, Exhibit F.[9]

In a letter dated April 30, 2018, Nolin revoked Spaulding's no trespass order.

Attachment to (First) Affidavit of Anna Nolin.

III. **February 5, 2018, School Committee Meeting**

The following is a summary of the School Committee meeting held on February 5, 2018 ("February 5th meeting") contained on the DVD attached to the Wish Affidavit.

Tabenkin opened the meeting and informed the attendees that an individual had permission to film the meeting.[10] Tabenkin began the Public Speak segment of the February 5th meeting by stating,

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[9] The Plaintiffs' Statement of Fact No. 29 erroneously states, "A true and correct copy of the 'Notice of no trespass order' is attached here as Exhibit F."

[10] According to the defendants, the individual filming the February 5th meeting was Sutter's friend, Ronald Alexander.

> "Before we go to Public Speak, I just want to remind everyone that Public Speak is . . . not to exceed . . . a period of fifteen minutes, as well as Public Speak is not a place for individuals to speak about personnel, school-related personnel, or individual students, and also . . . if it is on the agenda, please wait if you care to speak about something that's on the agenda, please wait [un]til we get to that topic."

During the Public Speak portion of the School Committee meeting held on February 5, 2018 ("February 5th meeting"), three people spoke before Sutter. Tabenkin stopped the first speaker because his topic related to an item on the agenda. The second and third speakers were parents of Natick High School students from a particular neighborhood. They wanted to make the School Committee aware of their efforts to make the high school bus routes safer for their children and to ask for the School Committee's support.

Sutter then approached the microphone and stated, "This is really hard for me." She introduced herself and said that she "was a Natick resident for eighteen years" and that she knew "many" of the School Committee members. For "the future and well-being of [her] boys and family," they moved out of Natick as a result of the "retaliation and retribution [they] received at the hands of the Natick Public Schools."

Tabenkin cut Sutter off, stating, "I have made it very clear . . . at the beginning that Public Speak is not for personnel issues or talking about individual students."

Sutter replied, "Okay. . . . I have more to say."

Tabenkin responded, "I'm going to tell you . . . if this is the . . . theme, and you're going to continue on this, . . . it is not going to be allowed. So if you're talking about personnel, if you're talking about individual students, this is not the forum for that. We have other means."

Sutter read a Winston Churchill quote about courage, then observed that she herself was "being very brave" in attending the School Committee meeting to "voice [her] concern about the hostile, unsupportive climate of fear that exists in the Natick Public Schools."

Tabenkin interrupted Sutter, telling her, "I am ending this right now." When Sutter stated that she did not understand, Tabenkin replied, "You do understand. You are talking about personnel issues. You are talking about . . . there is no time . . . You cannot speak defamatory about the Natick . . . in Public Speak."

Sutter stated that she would "refrain from that."

In response to an off-camera "why not?" from a male questioner, Tabenkin stated, "Because this is Open Meeting Laws." The off-camera male voice stated that "Open Meeting Law says nothing like that," to which Tabenkin responded, "You are out of order. . . . I am allowing you to film this without any disruptions. If you continue to disrupt, I will ask you to turn off the camera. This is a meeting, and if you don't . . . I will suspend the meeting. Okay? The choice is yours. So I'd ask for no more disruptions." To Sutter, Tabenkin said, "If you'd like to continue, . . . I've given you as much leeway as I'm going to give you. So I'm telling you, any defamatory –"

Sutter interjected, "It's really hard not to be able to come up to this podium and speak the truth as a parent, okay? I'll get to what I witnessed a month ago at this meeting."

Tabenkin interrupted again, announcing, "I am now suspending the meeting. We are not discussing that . . . . I have made it quite clear we are not talking about personnel issues or students, and that was –"

Sutter broke in, stating, "It was the way a public speaker was treated."

Tabenkin said, "I am suspending the meeting. You have a choice and I am making this clear, to leave while the meeting is suspended. If you continue with this, you will be escorted out of here, and I am suspending the meeting." Tabenkin struck her gavel, and the School Committee members left the room. When the February 5th meeting resumed, Tabenkin read

G.L. c. 30A, § 20(g), and Paragraph 4 of the Participation Policy to the attendees, prefacing it by stating, "Let me just make some things clear about our policies around Public Speak."

A couple of minutes of Public Speak remained, and Tabenkin asked if anyone else wanted to speak. Ron Alexander ("Alexander") came to the podium and informed the School Committee that the executive session they had convened earlier in the evening violated the Open Meeting Law by not following the proper procedure. Tabenkin broke in, stating that she had just read the policies, but Alexander proceeded to speak over her. Tabenkin hit her gavel, suspending the meeting again and the School Committee members walked out.

When the meeting resumed, another Public Speak speaker discussed the bus safety issue and asked about next steps. Tabenkin said that she and Nolin would set up a meeting to discuss the issue with the concerned parents.

Tabenkin then officially ended Public Speak.

IV. **March 12, 2018, School Committee Meeting**

The following is a summary of the School Committee meeting held on March 12, 2018 ("March 12th meeting") contained on the DVD attached to the Wish Affidavit.

Tabenkin introduced the Public Speak segment of the March 12th meeting by stating that Public Speak is "a period not exceeding fifteen minutes during which time any individual may voice an opinion or concern on any school related issue that is not on the agenda. During Public Speak there will not be an opportunity for debate of issues raised." Tabenkin then read out loud G.L. c. 30A, § 20(g), and Paragraph 4 of the Participation Policy.

Sutter introduced herself at the podium. In response to a question from the School Committee, Sutter stated that she had been a resident of Natick for eighteen years but that she was no longer a resident. Sutter thanked them for the privilege to speak and read a quote from

Benjamin Franklin about justice. Sutter then said, "Tonight I'm here to express my concern about the hostile and unsupportive climate of fear that still exists in Natick Public Schools. Almost four years ago, our family made the difficult decision to move to another town. This was necessary because of the retaliation and retribution we received –"

Tabenkin interrupted, stating, "I'm going to let you continue. But we are not going to discuss any individual. . . . I just want to be clear . . . . We're not talking about individuals and we're not going to hear defamatory statements as part of our policy. But please continue . . . with those guidelines."

Sutter replied,

> "I'm not trying to be difficult, I'm really not. It's just really hard to watch things that happened to you happen to other people. . . . I'm very saddened to . . . see this continue in this town. I'm concerned about . . . a few things I've seen over the past few weeks that the committee approved inaccurate . . . meeting minutes from 1-8 and 2-5. Fortunately, both my boys are doing fantastically after leaving this environment, and it has shed a light to me as a parent about the way things can be done and to watch them continue to be done differently is . . . upsetting. I'm also concerned, with all due respect Tim, about your special ed. presentation a few weeks ago. There were some things in there that did not ring true for me at all based on my own experience and the experience of others."

Sutter went on to express concern and skepticism about certain data concerning special education, and suggested that the School Committee hold public discussions to discover "what is going on" with respect to special education and hire someone from outside the district to conduct a survey.[11]

V. **March 2018 Email**

In a March 2018 email to the "Natick Schools Community," the Natick Public Schools and School Committee wrote,

[11] Alexander also spoke at the March 12th meeting in a way that Tabenkin characterized as disruptive and caused her to suspend the meeting. Once the meeting was suspended, the recording continued without audio. The DVD shows two Natick police officers arriving at the suspended meeting and speaking to someone off camera.

"Recent School Committee meetings have had various visitors who have both attended, spoken at, and taped our meetings; subsequently posting videos with editorialized content and titles. We would like to take the opportunity to provide the community with deeper understanding and information about how we conduct [S]chool [C]ommittee meetings and why events have transpired as they have.

"The [P]ublic [S]peak portion of a [S]chool [C]ommittee meeting is generally an opportunity for members of the community-at-large to address us with their feedback, concerns, and questions regarding the activities of the school department. Unfortunately, recent [P]ublic [S]peak situations represent long-standing issues that have been attempted to be resolved in many ways to date.

"It is worth clarifying the following: [P]ublic [S]peak is not the same as making a formal complaint for resolution in the system.

"The [S]chool [C]ommittee policies that guide community members as they seek to address issues are the following:

- KE-General Complaints
- KEB/KEB-R Personnel Complaints/Criticism

"In both cases, they ask that the issues be brought to the authority closest to the situation and move up the chain of authority (teacher to supervisor, supervisor to principal, principal to superintendent, superintendent to school committee). However, a formal complaint that has not been successfully resolved at lower levels can be brought to a body like [S]chool [C]ommittee through a formal written complaint (this is the formal policy) and as a procedure, we always invite personal meetings to resolve issues. However, if complaints have been resolved through other means such as litigation, the [S]chool [C]ommittee cannot discuss them, nor do they have the authority to take action on these complaints.

"A recent visitor to [P]ublic [S]peak was disruptive to the meeting, which meant that school district business could not be attended to as efficiently as expected, and because 'defamatory statements,' (damaging to reputations/slanderous/libel) were used, this violates our [P]ublic [S]peak policy. Speaking using vulgar language and ideas in front of our high school students (or in front of anyone) is not appropriate.

"Avoiding defamation, abusive remarks, or personal statements about children and personnel does not preclude a person expressing their general opinions (opining) about broad general issues, i.e., 'something has to be examined in the way special education students are identified,' or 'administration is not listening to our concerns about unsafe busing.'

"We always warmly welcome [P]ublic [S]peak, but we are also responsible for ensuring the critical business of the school district is conducted appropriately.

The importance of reiterating the [P]ublic [S]peak rules of conduct during the meeting was to remind our visitors that there are specific rules that we (as a committee) are bound by and to implore them to respect those rules as well.

"We are only able to stop disruptive or abusive speech/speech about specific students and personnel after warning a person that they are doing so. When a speaker uses defamatory and/or abusive remarks, speaks about specific personnel or students, becomes disruptive as defined by the chair (which may include yelling, defamatory remarks, abusive language and actions, engaging the [S]chool [C]ommittee, refusing to relinquish the floor, and filibustering) we have to reiterate the policy as a first step to resolving the communication issue and restore the decorum of the meeting.

"[P]ublic [S]peak is not designed to be a two-way conversation (this is also true of the other boards, like the Board of Selectmen). When broad concerns are raised, the central office administration determines the best person within the organization to address and investigate the concern and we follow up with the public speaker. That is why we take names and information at [P]ublic [S]peak and include them in our minutes.

"As of late, many topics raised during our meetings tend to be sensitive in nature, concerning personnel, complaints about specific personnel, or about specific students and thus cannot be responded to in a public forum. We can certainly understand that parents and members of the public want to use [P]ublic [S]peak as an opportunity to gain a wider audience for their message. However, our first duty is to protect student and staff privacy – and we take this charge seriously. As it relates to some of our recent visitors to [P]ublic [S]peak, unfortunately, this may have come across as uncaring to viewers. However, it is evident that we are dedicated to supporting and protecting our students and their families and meeting our legal obligations.

"We do want to assure you that all parties who have come to [P]ublic [S]peak recently, had been advised they could not speak on specific or sensitive issues in the public meeting and have been invited to speak with individual administrators and/or [S]chool [C]ommittee members on multiple occasions. Additional constraints do indeed come into play in some of these situations, as may be evident in watching the videos or visiting the meetings. These are complex issues and we work to allow for free speech – but even free speech is guided by policy and decorum in the realm of open public meetings. We work regularly with our on-staff public relations and communications director and our attorneys in these matters so we can strike this balance."

Wish Affidavit, Exhibit J (underlining in original) ("March 16th email").

DISCUSSION

I. Standard of Review

Summary judgment is granted where there are no genuine issues of material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Cassesso v. Commissioner of Corr., 390 Mass. 419, 422 (1983); Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles the moving party to judgment as a matter of law. Flesner v. Technical Commc'ns Corp., 410 Mass. 805, 808-809 (1991); Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989); see Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). The court considers the evidence presented in the light most favorable to the nonmoving party. Mass. R. Civ. P. 56(c); Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991); Parent v. Stone & Webster Eng'g Corp., 408 Mass. 108, 113 (1990); Flynn v. Boston, 59 Mass. App. Ct. 490, 491 (2003). The nonmoving party, however, cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment. LaLonde v. Eissner, 405 Mass. 207, 209 (1989). "[B]are assertions and conclusions . . . are not enough to withstand a well-pleaded motion for summary judgment." Polaroid Corp. v. Rollins Envtl. Servs., Inc., 416 Mass. 684, 696 (1993).

II. Count I

In Count I of their First Amended Verified Complaint, the plaintiffs seek the following declarations:

> "i. Defendants may not regulate protected speech during any time period designated for speech by the public based on the content of the message of the speaker, the view point of the speaker, or their desire to avoid criticism, ensure proper decorum, or avoid personal or derogatory or even defamatory statements unless such regulation is the least restrictive means necessary to achieve a compelling government interest;

"ii. Defendants may not regulate speech during any time period designated for speech by the public other than in compliance with a valid, constitutional written policy, including definite, objective standards for regulation of speech, adopted by the School Committee in accordance with all relevant laws and regulations;

"iii. Paragraph 4 of the [Participation Policy] is unconstitutional and violates Article 16 of the Massachusetts Declaration of Rights;

"iv. Paragraph 6 of the [Participation Policy] is unconstitutional and violates Article 16 of the Massachusetts Declaration of Rights.

"v. The bases for regulating speech set out in the March 16, 2018 4:40 PM email from the Natick Public School[s], School Committee and Central Office are unconstitutional and violate Article 16 of the Massachusetts Declaration of Rights; and

"vi. The 'No Trespass Order' issued against Ms. Spaulding violates Article 16 of the Massachusetts Declaration of Rights and is void and unenforceable."

The plaintiffs seek partial summary judgment on Count I, subparagraphs iii, iv, and v, arguing that Paragraphs 4 and 6 of the Participation Policy and the March 16th email are unconstitutional on their face and as applied to the plaintiffs. The defendants oppose that motion and seek partial summary judgment as to those same sections of Count I, contending that the provisions are constitutionally valid.

II. **The March 16th Email**

As an initial matter, the defendants dispute the characterization of the March 16th email as a revision of the Participation Policy. The defendants are correct. A close reading of the March 16th email demonstrates that it is what it purports to be: an "opportunity to provide the community with deeper understanding and information about how" the School Committee conducts its meetings, "why events [i.e., handling of 'recent visitors'] transpired as they have[,]" and a "clarif[ication]" of the Participation Policy. Given that the March 16th email does not

revise the Participation Policy, the court will not treat it separately but rather together with Paragraphs 4 and 6 of the Participation Policy.

III. **Forum Classification**

As the plaintiffs point out, "the analysis under art. 16 [of the Declaration of Rights] is generally the same as under the First Amendment . . . ." Mendoza v. Licensing Bd. of Fall River, 444 Mass. 188, 201 (2005). That notwithstanding, the Supreme Judicial Court has, on occasion, "[left] open the possibility that . . . art. 16 will call for a different result." Id. In fact, in Walker v. Georgetown Hous. Auth., 424 Mass. 671 (1997), the Court held that it "need not decide whether [it] would find the [United States] Supreme Court's public, nonpublic, and limited public forum classifications instructive in resolving free speech rights under [the Massachusetts] Declaration of Rights[,]" id. at 675, given that "[t]here is concern about these classifications" and "it might be considerably more helpful if the [United States Supreme] Court were to focus more directly and explicitly on the degree to which the regulation at issue impinges on the first amendment interest in the free flow of information.'" Id. at 675 n.9, quoting L.H. Tribe, American Constitutional Law, § 12-24, at 993 (2d ed. 1988). In the absence of any precedent from the Supreme Judicial Court concerning the application of art. 16 to facts analogous to this case, however, this court declines to deviate from First Amendment jurisprudence and considers the forum at issue here. See, e.g., Commonwealth v. Lucas, 472 Mass. 387, 398 n.11 (2015) (holding that, although it "decide[ed] this case under art. 16, [the court] [drew] on First Amendment jurisprudence insofar as it is instructive . . . .").

"To address the exercise of First Amendment speech rights on government property, the United States Supreme Court has developed the public forum doctrine. '[T]he extent to which the Government may limit access [to those seeking to exercise protected speech in a particular

forum on government property] depends on whether the forum is public or nonpublic.'" Roman v. Trustees of Tufts Coll., 461 Mass. 707, 713 (2012) (alterations in original) (citation omitted). "Where the forum is public, the extent to which the government may permissibly limit speech depends on the nature of the property and the extent to which the public has been given access to the forum." Id. at 714. "Under First Amendment jurisprudence, there are three categories of public forums: [1] traditional public forums, such as public streets and parks; [2] designated public forums, which the government has opened for use by the public as a place to assemble or debate; and [3] limited public forums, which are 'limited to use by certain groups or dedicated solely to the discussion of certain subjects.'" Id. With respect to the first two categories, "the government may impose reasonable time, place, and manner restrictions on the exercise of free speech rights, but any such restriction must be narrowly tailored to serve a compelling government interest." Id. With respect to the third category, "'a less restrictive level of scrutiny [is applied than in a traditional public forum]'; restrictions on speech need only be reasonable and neutral as to content and viewpoint." Id. at 715 (alteration in original) (citation omitted).

The defendants argue that the Public Speak portion of the School Committee meetings[12] constitutes a limited public forum and that, under the less restrictive level of scrutiny, the Participation Policy is constitutional. The plaintiffs counter that regardless of the level of scrutiny that applies, the challenged portions of the Participation Policy are unconstitutional.

Public Speak is a segment of the School Committee meetings "which the [School Committee] has opened for use by the public as a place to assemble" and discuss School

[12] "[I]n defining the forum [courts] have focused on the *access* sought by the speaker. When speakers seek general access to public property, the forum encompasses that property. . . . In cases in which limited access is sought, . . . [courts] have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property." Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 801 (1985) (emphasis added). Where the plaintiffs "seek access to a particular means of communication[,]" i.e., Public Speak, then Public Speak is the forum. See id.

Committee-related topics. See Roman, 461 Mass. at 714. The court therefore concludes that Public Speak is a designated public forum.[13, 14] See id.; see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) ("[W]hen the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest."); see, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 n.7, 45-46 (1983) (applying strict scrutiny to "second category" of public forums "created for a limited purpose such as use by certain groups . . . (student groups), or for the discussion of certain subjects . . . . (school board business)" (citations omitted)).

[13] Other states have found designated public forums in analogous situations. See, e.g., Besler v. Board of Educ. of W. Windsor-Plainsboro Reg'l Sch. Dist., 2008 WL 3890499 at *17 (N.J. Super. Ct. App. Div. 2008) ("A school board meeting is considered a [designated] public forum . . . ."), aff'd in relevant part by 993 A.2d 905 (N.J. 2010); Paridon v. Trumbull Cnty. Children Servs. Bd., 988 N.E.2d 904, 908 (Ohio Ct. App. 2013) ("A meeting of government officials, when opened to the public, is a [designated] public forum for discussion of subjects relating to the duties of those officials."); State v. Cephus, 161 Ohio App. 3d 385, 392 (Ohio Ct. App. 2005) (holding that meeting of city commission is designated public forum); Dayton v. Esrati, 125 Ohio App. 3d 60, 73 (Ohio Ct. App. 1997) ("A meeting of elected government officials, when opened to the public, is a [designated] public forum for discussion of subjects related to the duties of those officials."). Some courts, including those in the above-cited cases, refer to the intermediary category of forum – designated public forum – as a limited public forum. See White v. Norwalk, 900 F.2d 1421, 1425 (9th Cir. 1990) (holding that city council meetings "where the public is afforded the opportunity to address the [c]ouncil, ... have been regarded as public forums, albeit *limited* ones" and that city council did not violate First Amendment "when it restricts public speakers to the subject at hand" because "public forum may be created by government *designating* 'place or channel of communication . . . for the discussion of certain subjects'" (emphasis added) (ellipses in original) (quoting Cornelius, 473 U.S. at 802 (discussing designated public forums))); Draego v. Charlottesville, 2016 WL 6834025 at *12 (W.D. Va. 2016) ("'There are three different types of forums in First Amendment cases, traditional public forums, nonpublic forums, and *limited (or designated) public forums*.'" (emphasis added) (citation omitted)). The United States Supreme Court, the First Circuit, the Federal District Court of Massachusetts, and the Supreme Judicial Court use the phrase "limited public forum" interchangeably with "nonpublic forum." See, e.g., American Freedom Def. Initiative v. King Cnty., Wash., 136 S. Ct. 1022, 1022 (2016) (noting that limited public forum is "also called a nonpublic forum"); Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 76 n.4 (1st Cir. 2004) ("equating limited public forum with non-public forum"); Lu v. Hulme, 133 F. Supp. 3d 312, 324-325 (D. Mass. 2015) (discussing "[t]he limited or nonpublic forum"); Roman, 461 Mass. at 714 (listing three categories of public forums as "traditional public forums, . . . designated public forums, . . . and limited public forums").

[14] Arguably, the Open Meeting Law itself creates a designated public forum, providing that "[n]o person shall address a meeting of a public body without permission of the chair, and all persons shall, at the request of the chair, be silent." G.L. c. 30A, § 20(g).

IV. **Facial Challenge**

The plaintiffs challenge the following provisions of the Participation Policy as unconstitutional:

> 4. Improper conduct and remarks will not be allowed. Defamatory or abusive remarks are always out of order. If a speaker persists in improper conduct or remarks, the Chairperson may terminate that individual's privilege of address.
>
> 6. Speakers may offer such objective criticisms of the school operations and programs as concern them, but in public session the [School] Committee will not hear personal complaints of school personnel nor against any member of the school community. Under most circumstances, administrative channels are the proper means for disposition of legitimate complaints involving staff members.

In a designated public forum, "the government may impose reasonable time, place, and manner restrictions on the exercise of free speech rights, but any such restriction must be narrowly tailored to serve a compelling government interest." Roman, 461 Mass. at 714. In other words, "[r]easonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." Perry Educ. Ass'n, 460 U.S. at 46. The defendants contend that these provisions are narrowly tailored to further their compelling interest in protecting student and staff privacy, promoting a learning environment that fosters success, maintaining a positive workplace for its employees, prohibiting bullying, and conducting the School Committee's business in an orderly and efficient fashion.

"As a general matter," this court agrees. See Lucas, 472 Mass. at 398. "The Legislature has enacted a complex of statutes that identify, assign, and mandate various responsibilities related to public education." McDuffy v. Secretary of Executive Office of Educ., 415 Mass. 545, 548 (1993). "The requirement to maintain public schools is assigned to the towns and cities of the Commonwealth . . . ." Id. "'General charge' of the public schools in each town, city, or regional school district is assigned to a locally elected school committee in each community. . . .

The Legislature has identified and mandated the specific duties and powers of the school committees." Id. at 549, citing G.L. c. 71, § 37. "It follows that the [School Committee] has the right to exercise control over access to" its own meetings in order to accomplish its statutory duties. See Cornelius, 473 U.S. at 805-806.

The defendants, however, do "'not have carte blanche'" to restrict speech at those meetings. See Lucas, 472 Mass. at 398 (citation omitted).

A. Content-Based Prohibitions

Paragraph 6 of the Participation Policy contains content-based prohibitions on speech, prohibiting personal complaints by school personnel and against members of the school community.[15] "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." Reed v. Gilbert, 135 S. Ct. 2218, 2227 (2015). "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." Id. "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." Id. "It is difficult to imagine a more content-based prohibition on speech than [a] policy, which allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter . . . ." Baca v. Moreno Valley Unified School Dist., 936 F. Supp. 719, 730 (C.D. Cal. 1996).[16]

[15] The court treats these prohibitions together because any attendee who raises "personal complaints" during Public Speak can only raise personal complaints that concern "topics within the scope of responsibility of the School Committee." Participation Policy, Rule 3.

[16] Even if the court did not characterize Public Speak as a designated public forum, strict scrutiny analysis would apply because "content-based restrictions on speech . . . can stand only if they survive strict scrutiny . . . ." Reed, 135 S. Ct. at 2231.

Public Speak is expressly limited to "topics within the scope of responsibility of the School Committee." Participation Policy, Rule 3. The plaintiffs do not dispute this provision, which is relevant to the propriety of the challenged provisions. See Roman, 461 Mass. at 714 (holding that "extent to which the government may permissibly limit speech depends on the nature of the property and the extent to which the public has been given access to the forum"). As an initial matter, then, the court must define the scope of the School Committee's responsibilities.

"The school committee in each city and town and each regional school district [1] shall have the power to select and to terminate the superintendent,[17] [2] shall review and approve budgets for public education in the district, and [3] shall establish educational goals and policies for the schools in the district consistent with the requirements of law and statewide goals and standards established by the board of education." G.L. c. 71, § 37. Only "[a] principal may dismiss or demote any teacher or other person assigned full-time to the school, subject to the review and approval of the superintendent; and . . . the superintendent may dismiss any employee of the school district." G.L. c. 71, § 42, par. 1; see G.L. c. 71, § 42, pars. 2-7 (providing procedures for dismissing, laying off, and displacing teachers); G.L. c. 71, § 42, par. 7 (providing that, when seniority of school personnel is at issue in the context of determining "qualified teacher" status for purposes of lay-offs and displacements, "[t]he school committee and the collective bargaining representative may negotiate for seniority or length of service only as a tie-breaker in personnel actions under this paragraph among teachers whose qualifications are no

[17] The Open Meeting Law does permit the School Committee "to meet in executive session . . . [t]o discuss the reputation, character, physical condition or mental health, rather than professional competence, of [the superintendent], or to discuss the discipline or dismissal of, or complaints or charges brought against . . . [the superintendent]." G.L. c. 30A, § 21(a)(1); see District Attorney for the N. Dist. v. School Comm. of Wayland, 455 Mass. 561, 568 (2009). Public Speak, however, is an opportunity for the *public* to speak to the School Committee; the School Committee merely listens, and does not respond. These statutory restrictions on the School Committee therefore do not apply to Public Speak.

different using the qualifications collectively bargained for in accordance with this paragraph"). Additionally, the statutory and regulatory framework regarding bullying in schools places the responsibility to address bullying on the principals rather than school committees. See generally G.L. c. 71, § 37O; 603 Code Mass. Regs. §§ 49.00.

Therefore, to the extent the attendees, including school personnel, voice "personal complaints" during Public Speak, those complaints must fall within the above-delineated scope. For example, an attendee cannot voice a "personal complaint" about a particular teacher as issues relating to the competence of teachers is not within the scope of the School Committee's responsibility, and an attendee also cannot voice a "personal complaint" about a student or group of students as behavior issues are also outside the School Committee's scope of responsibility. An attendee can, however, voice a personal complaint about the superintendent, and an attendee can voice a personal complaint about "school operations and programs" to the extent that the School Committee is responsible for those school operations and programs.[18] The blanket prohibition against "personal complaints" is therefore not narrowly tailored to serve the defendants' interest in conducting the School Committee's business; rather, the prohibition is only constitutional to the extent that it prohibits speech outside the scope of the School Committee's responsibilities. See Cornelius, 473 U.S. at 805-806.

[18] The March 16th email further explains that, to involve the School Committee, community members must file a formal complaint as set forth in KE-General Complaints and KEB/KEB-R Personnel Complaints/Criticisms. The parties have not supplied these policies to the court. Consistent with the March 16th email's explanation, the Massachusetts Association of School Committees' reference policies with those titles establish that the School Committee only hears the complaint if it has not been resolved by the teacher, school building administrator, or superintendent. See http://z2policy.ctspublish.com/masc/Z2Browser2.html?showset=masterset (MASC's KE-Public Complaints) (last visited October 9, 2018); http://z2policy.ctspublish.com/masc/Z2Browser2.html?showset=mascall (providing links to online policy manuals for various Massachusetts cities and towns, some of which include KEB-R policies) (last visited October 9, 2018). The constitutionality of this complaint process is not before this court.

Further, in raising these personal complaints, the School Committee cannot prohibit the speaker from identifying the party involved.[19] Any interest the School Committee has in protecting the privacy of members of the school community, including school personnel, must "give way" to the constitutional right the public has under art. 16 that "[t]he right of free speech shall not be abridged." Mass. Const., Part II, c. 1, § 1, art. 16; see, e.g., Baca, 936 F. Supp. at 732 (rejecting school district's "interest in protecting its employees' right to privacy" because that right "must give way to the more fundamental constitutional right of freedom of expression under both" United States and state constitutions).

Finally, Paragraph 6 permits speakers to make "objective criticisms of the school operations and programs as concern them . . . ."[20] Compare Black's Dictionary 1101 (7th ed. 1999) (defining "objective" as "[o]f or relating to, or based on externally verifiably phenomena, as opposed to an individual's perceptions, feelings, or intentions" and "[w]ithout bias or prejudice; disinterested"), with Black's Law Dictionary 1438 (7th ed. 1999) (defining "subjective" as "[b]ased on an individual's perceptions, feelings, or intentions, as opposed to externally verifiable phenomena" and "[p]ersonal; individual"). While requiring that criticisms be "based on externally verifiable phenomena" is not improper, prohibiting subjective comments – to the extent the issues "concern" the speaker – is improper. See Baca, 936 F. Supp. at 730.

B. Defamatory Remarks

Paragraph 4 of the Participation Policy prohibits defamatory remarks. "'A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'"

[19] As the defendants point out, the Participation Policy does not prevent a speaker from identifying his or her own child. The plaintiffs do not argue that a speaker should be permitted to identify children other than his or her own.

[20] The phrase itself is arguably contradictory. Indeed, in defining "objective" Black's Law Dictionary 1101 (7th ed. 1999), uses the following example: "because her son was involved, she felt she could not be objective[.]"

HipSaver, Inc. v. Kiel, 464 Mass. 517, 530 n.13 (2013) (citations omitted). "'The test whether a [communication] is defamatory is whether, in the circumstances, the writing [or speech] discredits the plaintiff in the minds of any considerable and respectable segment in the community.'" Id. (citations and internal quotations omitted). "In the defamation context, a [party] who is shown to be a public official or public figure must prove 'actual malice' in order to recover for defamation." Id. at 531 n.14; see id. at 530 ("'Actual malice' is proved by showing that a [speaker or writer] published a defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." (internal footnote omitted)).

Until speech is adjudicated defamatory, however, it is entitled to constitutional protection. See Commonwealth v. Barnes, 461 Mass. 644, 651 (2012) ("'The term "prior restraint" is used to describe administrative . . . orders forbidding certain communications when issued in advance of the time that such communications are to occur.'" (citations and internal quotations omitted)); cf. Auburn Police Union v. Carpenter, 8 F.3d 886, 903 (1st Cir. 1993) (holding that judicial injunction that prohibits speech "does not constitute an unlawful prior restraint" if it is "granted only after a final adjudication on the merits that the speech is unprotected"). The freedom of speech provisions in the First Amendment and art. 16 represent "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions – and to do so on pain of libel judgments virtually unlimited in amount – leads to a comparable 'self-censorship.'" Id. at 279.

The Participation Policy's prohibition of defamatory remarks is therefore constitutional to the extent that it only prohibits remarks that have been adjudicated defamatory.[21]

C. Improper and Abusive Remarks

Paragraph 4 proscribes improper[22] and abusive remarks. The plaintiffs argue that these terms are unconstitutional because they are not defined and, consequently, provide the defendants with unbridled discretion.

The plaintiffs are correct that the Participation Policy does not define the terms "improper" and "abusive." A consideration of First Amendment jurisprudence supplies the parameters of these terms. First, "obscene material is unprotected by the First Amendment." Miller v. California, 413 U.S. 15, 23 (1973); see id. at 25 (describing guidelines for determining obscene material). Similarly, "'fighting words'" are excluded "from the scope of the First Amendment." R.A.V. v. St. Paul, 505 U.S. 377, 386 (1992); Commonwealth v. Robicheau, 421 Mass. 176, 182-183 (1995) (holding that that First Amendment does not protect "fighting words" or, more broadly, speech or "conduct that threatens another"); see Virginia v. Black, 538 U.S. 343, 359 (2003) (defining "fighting words" as "'those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction'" (citation omitted)). Conversely, "the use of epithets or otherwise profane language alone is not a basis for regulating speech as fighting words." Nolan v. Krajcik, 384 F. Supp. 2d 447, 459 (D. Mass. 2005).

[21] The plaintiffs do not argue – and in fact, cannot argue – that speakers are entitled to make statements during Public Speak that they know to be false. Cf. Sklar v. Beth Israel Deaconess Med. Ctr., 59 Mass. App. Ct. 550, 558 (2003) (holding speech loses protection "if the defendant (1) knew the information was false, (2) had no reason to believe it to be true, or (3) recklessly published the information unnecessarily, unreasonably, or excessively").

[22] Paragraph 4 also proscribes improper conduct. The plaintiffs do not challenge this restriction.

The Participation Policy is constitutional to the extent that it prohibits speakers from using threats, "fighting words," or obscenities during Public Speak.[23] The broad language in Paragraph 4 must therefore be narrowly tailored in this way in order to serve the defendants' interest in conducting the School Committee's business in an orderly fashion. See Cornelius, 473 U.S. at 805-806.

V. **As-Applied Challenge**

The plaintiffs also seek summary judgment on Count I on the basis that Paragraphs 4 and 6 are unconstitutional as the defendants applied those provisions to the plaintiffs at the January 8th, February 5th, and March 12th meetings. As noted above, principals, not school committees, address bullying in schools; principals, with their superintendents' approval, dismiss and demote teachers; and superintendents dismiss all other school district employees. School committees are responsible for their school district's budget, for hiring and firing superintendents, and for developing educational goals and policies for the schools. Based on the scope of the School Committee's responsibilities, the defendants applied the Participation Policy too broadly to the plaintiffs.[24]

A. January 8th Meeting

At the January 8th meeting, Sanchioni and Tabenkin interrupted Spaulding after she identified herself during Public Speak as "the mother of a child that was mercilessly bullied into

[23] In the March 16th email, the defendants attempted to explain this broad language with the statement that "[s]peaking using vulgar language and ideas in front of our high school students (or in front of anyone) is not appropriate." "Vulgar" is synonymous with "obscene." See, e.g., Webster's College Dictionary 1495 (1991) (defining "vulgar" as "indecent; obscene; lewd"); The American Heritage Dictionary 1356 (2d ed. 1982) (defining "vulgar" as "[o]bscene or indecent; lewd").

[24] The defendants contend that the plaintiffs have a history with the School Committee that predates the meetings at issue in this case. See (First) Affidavit of Anna Nolin, pars. 2-6; Revised Second Affidavit of Anna Nolin (paper #23), pars. 12, 14. This issue is not material to this analysis, especially where there is no allegation that the plaintiffs utilized and exhausted the complaint process. See note 18, supra.

suicide here in Natick." They told Spaulding to stop speaking because her speech was "disparag[ing] the Natick Public Schools."[25]

The defendants cut off Spaulding before she could explain her position. For example, if the bullying to which Spaulding referred was at the hands of other students or teachers, Public Speak was not the forum for that topic; if, however, she believed that the superintendent, school operations, and/or school policies had somehow left her child feeling "bullied," then Public Speak was the appropriate forum. The defendants therefore applied the Participation Policy too broadly to Spaulding, prohibiting her from speaking by concluding that she was disparaging the Natick Public Schools. Spaulding's single sentence was an insufficient basis on which to reach that conclusion.[26]

B. February 5th Meeting

At the February 5th meeting, Tabenkin stopped Sutter from speaking during Public Speak after Sutter stated that, for "the future and well-being of [her] boys and family," they moved out of Natick as a result of the "retaliation and retribution [they] received at the hands of the Natick Public Schools." After Tabenkin instructed Sutter that Public Speak was not the forum to discuss personnel and individual students, Sutter continued that she was present to "voice [her] concern about the hostile, unsupportive climate of fear that exists in the Natick Public Schools." Tabenkin stopped Sutter again, telling her that she "cannot speak defamatory about the Natick . . . in Public Speak."

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[25] Sanchioni and Tabenkin also stated that Spaulding's speech was "unfettered lies." The "lies" likely referred to the fact that Spaulding's child had not committed suicide. The use of the plural, however, suggests that Sanchioni and Tabenkin also meant that Spaulding's claim that the Natick Public Schools "bullied" her child was also a "lie."

[26] To "disparage" is "[t]o dishonor (someone or something)" or "[t]o unjustly discredit or detract from the reputation of (another's property, product, or business)." Black's Law Dictionary 438 (7th ed. 1999). Even if Sanchioni meant that Spaulding was defaming the schools when he used the word disparaging, the topic must still be within the scope of the School Committee's responsibilities.

Here, too, the defendants stopped Sutter before she could explain the retaliation and retribution she believed her family had suffered. Public Speak was the proper forum for Sutter to discuss the superintendent's "retaliation and retribution" against her and her family, but she could not discuss any "retaliation and retribution" at the hands of other school staff or students. Further, if the "hostile, unsupportive climate of fear" at the Natick Public Schools was a result of the superintendent and/or school policies, Public Speak was the proper forum; otherwise, it was not.[27]

Sutter also tried to discuss "what [she] witnessed a month ago at this meeting" with respect to "the way a public speaker was treated." Tabenkin would not permit Sutter to discuss this topic either, and proceeded to suspend the meeting. The Participation Policy does not preclude speakers from using Public Speak to discuss Public Speak. Sutter was therefore wrongly silenced on this basis as well.

C. March 12th Meeting

At the March 12th meeting, Sutter spoke again about her family's decision to move out of Natick "because of the retaliation and retribution [they] received" and she stated that she wanted "to express [her] concern about the hostile and unsupportive climate of fear that still exists in Natick Public Schools." Tabenkin interrupted Sutter, informing her that Sutter could not discuss individuals or make defamatory statements but that she could continue "with those guidelines." The defendants then did not stop Sutter from speaking about the special education program in the Natick Public Schools.

[27] Regardless, Sutter's comments do not constitute defamation not only because there has been no such adjudication, but also because there likely could not be such an adjudication solely on the basis of Sutter's statements at the February 5th meeting. See HipSaver, Inc., 464 Mass. at 530 n.13, 531 n.14; note 23, supra.

Sutter did continue to speak, but, as with the previous meetings, Tabenkin placed too great a restriction on Sutter. The Participation Policy did not preclude Sutter from discussing the superintendent or any operations or policies within the School Committee's control.

VI. **Declarations**

"'As the action is one for declaratory relief, the [Superior] Court judge [is] required to make a declaration of the rights of the parties.'" Vergato v. Commercial Union Ins. Co., 50 Mass. App. Ct. 824, 829 (1996) (first alteration in original), quoting Dupont v. Dracut, 41 Mass. App. Ct. 293, 297 (1996); see Boston v. Massachusetts Bay Transp. Auth., 373 Mass. 819, 829 (1977) ("[W]hen an action for declaratory relief is properly brought, even if relief is denied on the merits, there must be a declaration of the rights of the parties."). Based on the foregoing the court makes the following declarations:

1. Paragraph 4 of the Participation Policy violates article 16 of the Declaration of Rights by failing to define the terms "improper" and "abusive" as referring to obscenities (or vulgarities), threats, and fighting words (or remarks likely to provoke a violent reaction); and by failing expressly to limit "defamatory" remarks as remarks that have been adjudicated defamatory.

2. Paragraph 6 of the Participation Policy violates article 16 of the Declaration of Rights by limiting criticisms to those that are "objective"; the remainder of Paragraph 6 is constitutional as explained above, i.e., the School Committee may only limit criticisms, complaints, and comments, "personal" and otherwise, during Public Speak to matters within the School Committee's scope of responsibility.

3. The March 16, 2018 4:40 PM email from the Natick Public Schools, School Committee and Central Office does not violate article 16 of the Declaration of Rights in and of itself, but only to the extent it is consistent with Paragraphs 4 and 6 of the Participation Policy.

4. The defendants violated the plaintiffs' rights to free speech under art. 16 of the Declaration of Rights by silencing the plaintiffs at the School Committee meetings on January 8, 2018, February 5, 2018, and March 12, 2018.

ORDER

The plaintiffs' motion for partial summary judgment on Count I is **ALLOWED**, and the defendants' cross motion for summary judgment on Count I, subparagraphs iii, iv, and v, is **DENIED**. Further, the court **DECLARES**:

1. Paragraph 4 of the Participation Policy violates article 16 of the Declaration of Rights by failing to define the terms "improper" and "abusive" as referring to obscenities (or vulgarities), threats, and fighting words (or remarks likely to provoke a violent reaction); and by failing expressly to limit "defamatory" remarks as remarks that have been adjudicated defamatory.

2. Paragraph 6 of the Participation Policy violates article 16 of the Declaration of Rights by limiting criticisms to those that are "objective"; the remainder of Paragraph 6 is constitutional as explained above, i.e., the School Committee may only limit criticisms, complaints, and comments, "personal" and otherwise, during Public Speak to matters within the School Committee's scope of responsibility.

3. The March 16, 2018 4:40 PM email from the Natick Public Schools, School Committee and Central Office does not violate article 16 of the Declaration of Rights in and of itself, but only to the extent it is consistent with Paragraphs 4 and 6 of the Participation Policy.

4. The defendants violated the plaintiffs' rights to free speech under art. 16 of the Declaration of Rights by silencing the plaintiffs at the School Committee meetings on January 8, 2018, February 5, 2018, and March 12, 2018.

SO ORDERED.

Date: November 21, 2018

Maynard M. Kirpalani
Justice of the Superior Court

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2018-01115

COREY SPAULDING & another[1]

vs.

TOWN OF NATICK SCHOOL COMMITTEE & others[2]

MEMORANDUM OF DECISION AND ORDER ON OFFICIAL CAPACITY DEFENDANTS' MOTION TO DISMISS AND INDIVIDUAL DEFENDANTS' SPECIAL MOTION TO DISMISS

Plaintiffs Corey Spaulding ("Spaulding") and Karin Sutter ("Sutter") (collectively, "plaintiffs") commenced this action challenging the "Public Speak" procedures of defendant Town of Natick School Committee ("School Committee") and alleging that the School Committee and defendants Lisa Tabenkin ("Tabenkin"), the School Committee chair, and Anna Nolin ("Nolin"), the interim superintendent of the Natick Public Schools, violated G.L. c. 12, §§ 11H, 11*I*, by regulating the plaintiffs' speech at School Committee meetings. This case is before the court on Tabenkin and Nolin's motion to dismiss in their official capacities ("official defendants"), and Tabenkin and Nolin's special motion to dismiss under G.L. c. 231, § 59H, in their individual capacities ("individual defendants"). For the following reasons, their motions are **DENIED**.

[1] Karin Sutter

[2] Lisa Tabenkin, individually and in her official capacity as Chair of the Natick School Committee; Anna Nolin, individually and in her official capacity as Interim Superintendent of the Natick Public Schools

DISCUSSION

I. Official Defendants' Motion to Dismiss[3]

The official defendants move to dismiss Count II of the plaintiffs' amended complaint under Mass. R. Civ. P. 12(b)(6), arguing that they cannot be held liable under the Massachusetts Civil Rights Act ("MCRA"), G.L. c. 12, §§ 11H, 11*I*, in their official capacities.[4] This argument fails.

"It is well established that the MCRA incorporates the standard of immunity for public officials developed under 42 U.S.C. § 1983 . . . ." Williams v. O'Brien, 78 Mass. App. Ct. 169, 173 (2010). "'[A] state official in his or her official capacity, *when sued for injunctive relief*, would be a person under [42 U.S.C. §] 1983 because "official-capacity actions for prospective relief are not treated as actions against the State."'" O'Malley v. Sheriff of Worcester Cnty., 415 Mass. 132, 141 n.13 (1993) (first alteration in original) (emphasis added), quoting Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989), in turn quoting Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985).

In Count II, the plaintiffs seek only injunctive relief. They may therefore assert this action against the official defendants. See O'Malley, 415 Mass. at 141 n.13; Doe v. Sex Offender Registry Bd., 94 Mass. App. Ct. 52, 64 (2018) (holding that defendants were "properly sued in their official capacities for declaratory or injunctive relief under State law"). The official defendants' motion to dismiss Count II is accordingly **DENIED**.

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[3] The official defendants also moved to dismiss for failure to join a necessary party, i.e., the attorney general, under Mass. R. Civ. P. 19(a) and G.L. c. 231, § 8. The official defendants now acknowledge that, in fact, the plaintiffs did file a notice with the attorney general's office, and that the attorney general's office informed the plaintiffs that it did not plan to intervene in this action. Although the official defendants continue to contend that the plaintiffs' challenge to the School Committee's procedures is an implicit constitutional challenge to the Open Meeting Law, they concede that the portion of their motion seeking dismissal under Mass. R. Civ. P. 19(a) and G.L. c. 231, § 8, is now moot. See Official Defendants' Reply, at 2, 3.

[4] The plaintiffs contend that they have not brought Count II against the School Committee.

II. **Individual Defendants' Special Motion to Dismiss**

In their separate motion to dismiss, the individual defendants challenge Count II[5] under G.L. c. 231, § 59H, as well as on the basis that qualified immunity shields them from liability. These arguments fail.[6]

A. G.L. c. 231, § 59H

In response to the plaintiffs' original complaint, the official defendants filed a motion to dismiss Count II in May 2018 ("May 2018 motion"), arguing that the MCRA does not apply to municipal defendants. Shortly thereafter, the plaintiffs filed an amended complaint adding the individual defendants and seeking to hold them liable under Count II. The individual defendants now contend that the filing of the May 2018 motion constitutes petitioning activity and that the amended Count II must be dismissed under G.L. c. 231, § 59H.

1. *Standard*

Section 59H of G.L. c. 231, the so-called "anti-SLAPP statute," permits a party to file a "special motion to dismiss" "[i]n any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth . . . ." The purpose of this statute is "to counteract 'SLAPP' suits, defined broadly as 'lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the

[5] The individual defendants also moved to dismiss Count I on the basis that they lack any power or ability in their individual capacities to provide the relief the plaintiffs seek in that count. The plaintiffs, however, have not brought Count I against the individual defendants. See Plaintiffs' Opposition to Individual Defendants' Motion, at 3; Individual Defendants' Reply, at 1.

[6] The individual defendants also argue that the court should dismiss Count II because the plaintiffs have not alleged facts plausibly suggesting that the individual defendants acted outside the scope of their employment. The significance of this alleged omission is unclear where the individual defendants make this argument in a single paragraph without citing to any case law in support of their position. This argument therefore fails as well.

redress of grievances.'" Blanchard v. Steward Carney Hosp., Inc., 477 Mass. 141, 147 (2017), quoting Duracraft v. Holmes Prods. Corp., 427 Mass. 156, 167-168 (1998).

"To prevail on such a motion," the individual defendants, as the special movants, "'must make a threshold showing through pleadings and affidavits that the claims against it are "based on" the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities.'" Id. (citations and internal quotations omitted). "At this stage of the inquiry, 'the motive behind the petitioning activity is irrelevant,' and '[t]he focus solely is on the conduct complained of.'" Reichenbach v. Haydock, 92 Mass. App. Ct. 567, 572 (2017), quoting Office One, Inc. v. Lopez, 437 Mass 113, 122 (2002). The statute defines "'a party's exercise of its right of petition'" as:

> "[1] any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; [2] any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; [3] any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; [4] any statement reasonably likely to enlist public participation in an effort to effect such consideration; or [5] any other statement falling within constitutional protection of the right to petition government."

G.L. c. 231, § 59H.

If the individual defendants make this threshold showing, "the burden shifts to the plaintiff[s] . . . to establish 'by a preponderance of the evidence that the [individual defendants] lacked any reasonable factual support of any arguable basis in law for [their] petitioning activity,' . . . and that the [individual] defendants' sham petitioning activity caused the plaintiff[s] . . . 'actual injury.'" Blanchard, 477 Mass. at 148 (alteration and citations omitted). Alternatively, the plaintiffs can satisfy their "second-stage burden and defeat the special motion to dismiss by demonstrating . . . that each challenged claim does not give rise to a 'SLAPP' suit. .

. . by demonstrating that each such claim was not primarily brought to chill the special movant's legitimate petitioning activities." Id. at 160. "To make this showing, the [plaintiffs] must establish, such that the motion judge may conclude with fair assurance, that its primary motivating goal in bringing its claim, viewed in its entirety, was 'not to interfere with and burden defendants' . . . petition rights, but to seek damages for the personal harm to [the plaintiffs] from [the] defendants' alleged . . . [legally transgressive] acts.'" Id. (ellipses and final two alterations in original) (alteration and citation omitted). "In applying this standard, the motion judge, in the exercise of sound discretion, is to assess the totality of the circumstances pertinent to the [plaintiffs'] asserted primary purpose in bringing [their] claim. . . . A necessary but not sufficient factor in this analysis will be whether the [plaintiffs'] claim at issue . . . 'offers some reasonable possibility' of a decision in the [plaintiffs'] favor." Id. at 160-161 (citations omitted).

2. *Analysis*

The individual defendants cannot meet their threshold burden. First, "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served and prior to entry of an order of dismissal . . . ." Mass. R. Civ. P. 15(a); see Reporter's Notes to Mass. R. Civ. P. 15 (1973) ("[A] motion is not considered a pleading within the meaning of Rule 15 . . . ."). The individual defendants therefore cannot demonstrate that that the plaintiffs based the amended complaint solely on the May 2018 motion because the plaintiffs were entitled, as a matter of law, to amend their complaint.[7] See Blanchard, 477 Mass. at 159 ("A nonmoving party's claim is not subject to dismissal as one 'based on' a special movant's petitioning activity if, when the burden shifts to it, the nonmoving party can establish that its suit was not 'brought primarily to chill' the special movant's legitimate exercise of its right to petition."); Marabello v.

[7] As the plaintiffs point out, under the individual defendants' application of G.L. c. 231, § 59H, a plaintiff would be subject to a special motion to dismiss whenever it amends its complaint in response to the opposing party's motion to dismiss the original complaint based on legal or factual deficiencies.

Boston Bark Corp., 463 Mass. 394, 399 (2012) ("[A] party cannot exercise its right of petition without making a 'statement' designed 'to influence, inform, or at the very least, reach governmental bodies' . . . . And a claim cannot be 'based on' a party's exercise of its right to petition unless the claim is based on such a 'statement.'" (citations omitted)).

Second, the May 2018 motion was not an exercise of the individual defendants' *own* right of petition; rather, the *official* defendants brought the May 2018 motion. "As such they were not exercising their own constitutional right of petition, as they must in order to claim protection under the statute." Cardno ChemRisk, LLC v. Foytlin, 476 Mass. 479, 486 (2017); see, e.g., id. (collecting cases where, with respect to petitioning activities at issue, special movants "were not speaking for themselves, but in a different capacity").

Even if the individual defendants did meet their threshold burden, the plaintiffs satisfy the second prong. The amended complaint, viewed in its entirety, was not intended to interfere with, or chill, the individual defendants' rights to petition.[8] They have not advanced "meritless claims targeting legitimate petitioning activity . . . ." Blanchard, 477 Mass. at 157. Through their amended complaint – which is verified – the plaintiffs intend to remedy the alleged violations of their constitutional right to free speech. See id. ("The Legislature did not intend the expedited remedy it provided, the special motion to dismiss, to be used . . . as a cudgel to forestall and chill the legitimate claims – also petitioning activity – of those who may truly be aggrieved by the sometimes collateral damage wrought by another's valid petitioning activity."); see also id. (noting that in considering whether nonmovant satisfied second prong, court may consider "course and manner of proceedings, the pleadings filed and affidavits 'stating the facts upon which the liability . . . is based'").

[8] Indeed, in addition to opposing the plaintiffs' motion for summary judgment, the defendants have filed a cross motion for summary judgment.

The individual defendants' special motion to dismiss under G.L. c. 231, § 59H, is consequently **DENIED**.

B. Qualified Immunity

The individual defendants also seek dismissal of Count II on the basis that qualified immunity protects them from liability under the MCRA. This argument fails.

Qualified immunity is "not available . . . where injunctive relief is sought instead of or in addition to damages." Pearson v. Callahan, 555 U.S. 223, 242 (2009). As the plaintiffs here seek injunctive relief and not monetary damages, the individual defendants are not entitled to the defense of qualified immunity. See Longval v. Commissioner of Corr., 404 Mass. 325, 332 (1989) ("[A] determination that the defendants had the benefit of a qualified immunity would not bar a court from declaring that [the plaintiff's] rights under . . . [the MCRA] had been violated or from granting injunctive relief. It would only preclude the recovery of damages against the defendants.").

Even if the individual defendants were entitled to this defense, however, they cannot satisfy the requirements. See Cristo v. Evangelidis, 90 Mass. App. Ct. 585, 590 (2016) ("'Qualified immunity is an affirmative defense, and thus the burden of proof is on defendants[].' (citation omitted)). "The standard for qualified immunity is well settled. '[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" LaChance v. Commissioner of Corr., 463 Mass. 767, 777 (2012) (alteration in original) (citations omitted); cf. Barnett v. Lynn, 433 Mass. 662, 663-664 (2001) (explaining "discretionary function" in context of G.L. c. 258, § 10(b)); Harry Stoller & Co. v. Lowell, 412 Mass. 139, 141 (1992) (same).

Qualified immunity claims may be evaluated under a three-part test: (1) whether, taken in the light most favorable to the allegedly injured party, the facts show the actor's conduct violated a constitutional right; (2) if so, whether the constitutional right was clearly established at the time of the violation; and (3) whether a reasonable person would understand that the challenged conduct violated that clearly established right. Nelson v. Salem State Coll., 446 Mass. 525, 531 (2006).

First, in their amended complaint, the plaintiffs have alleged facts that plausibly suggest that the individual defendants violated the plaintiffs' right to free speech under article 16 of the Declaration of Rights by suppressing the plaintiffs' speech at the School Committee meetings. See Swanset Dev. Corp. v. Taunton, 423 Mass. 390, 395 (1996) ("To establish a claim under the [MCRA], the plaintiffs must prove that (1) their exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth, (2) have been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by 'threats, intimidation or coercion.'"); First Amended Verified Complaint, pars. 38-50, 52-56, 58-59, 81-92 (non-exhaustive example of facts plausibly suggesting violation of G.L. c. 12, § 11H).

As to the second and third requirements, "[a] right is only clearly established if, at the time of the alleged violation, 'the contours of the right allegedly violated [were] sufficiently definite so that a reasonable official would appreciate that the conduct in question was unlawful.'" Id. (alteration in original) (citation omitted). The court must therefore determine "whether 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" Id. at 777-778 (citations omitted). "The standard is entirely objective[,]" Longval v. Commissioner of Corr., 448 Mass. 412, 418 (2007), and "'qualified immunity sweeps

so broadly that all but the plainly incompetent or those who knowingly violate the law are protected from civil rights suits for money damages.'" Id. at 419 (citations omitted).

With respect to the second and third requirements, an unpublished federal case is instructive. In Gelinas v. Boisselle, the court considered whether a reasonable person in the position of the defendant, the chair of the school committee, would have known that ejecting the plaintiff from the school committee meeting "was a violation of clearly established First Amendment rights." 2011 WL 5041497 at *8 (D. Mass. 2011); see Mendoza v. Licensing Bd. of Fall River, 444 Mass. 188, 201 (2005) ("[T]he analysis under art. 16 [of the Declaration of Rights] is generally the same as under the First Amendment . . . ."). The court was "not aware of any [law] . . . indicat[ing] that the law prohibiting viewpoint discrimination was not clearly established at the time of [the school c]ommittee meeting . . . ." Gelinas, 2011 WL 5041497 at *8. In fact, in a Fourth Circuit case, "a concurrence . . . acknowledged that it was clearly established that an individual in a school committee meeting could *not* silence a speaker solely on the basis of his or her viewpoint" and that "a reasonably competent official" would understand that the only reasonable basis for such silencing would be the fear of disruption. Id. (emphasis in original), citing Collinson v. Gott, 895 F.2d 994, 1000 (4th Cir. 1990).

As the plaintiffs have plausibly suggested that the individual defendants sought not "to ensure the orderly conduct of the [School Committee] meeting" but rather to suppress the plaintiffs' viewpoint, see id., the individual defendants have not demonstrated that they would be entitled to qualified immunity if that defense were available to them. See LaChance, 463 Mass. at 777. Contra Doe, 94 Mass. App. Ct. at 59 (holding that individual defendants, who were state employees, did not "have immunity from the [42 U.S.C.] § 1983 damages claim against them"

because "[t]here was no clearly established [constitutional] . . . right applicable to the plaintiffs' circumstances at the time").

ORDER

For the foregoing reasons, Lisa Tabenkin and Anna Nolin's motion to dismiss and special motion to dismiss are **DENIED**.

SO ORDERED.

Date: November 21, 2018

Maynard M. Kirpalani