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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 18-1115

COREY SPAULDING & another

vs.

TOWN OF NATICK SCHOOL COMMITTEE & others

MEMORANDUM OF DECISION AND ORDER ON THE PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The plaintiffs, Corey Spaulding ("Spaulding") and Karin Sutter ("Sutter"), are the parents of children who formerly attended the Natick Public Schools. They commenced this civil rights action against the Natick School Committee ("Committee"), its chair, Lisa Tabenkin ("Tabenkin"), and Anna Nolin, the interim Superintendent of the Natick Public Schools ("Nolin") (collectively, "defendants"), alleging that the defendants unconstitutionally restricted their speech during the "public speak" portion of certain Committee meetings. The matter is presently before the court on the plaintiffs' motion for a preliminary injunction. A non-evidentiary hearing was held on May 2, 2018. For the following reasons, the plaintiffs' motion is ALLOWED, in part.

BACKGROUND

The following facts are taken from the record before the court, which includes the verified complaint, a video of the Committee meetings in question, and other documentary evidence. Further facts are reserved for later discussion.

I. The Public Speak Policy.

The Committee has a written policy entitled "Public Participation at School Committee Meetings" ("the policy"). Noting that the Committee "would like the opportunity to hear the wishes and ideas of the public . . . in an orderly manner" the policy provides, in relevant part:

> 1. At the start of each regularly scheduled School Committee meeting, individuals or groups representatives will be invited to address the Committee. The Chairperson shall determine the length of the public participation segment.
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> 2. Speakers will be allowed three (3) minutes to present their material. . . .
>
> 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 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 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.

The policy also cites G. L. c. 30A, § 20(g) of the Open Meeting Law, which provides:

> 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 of a public body. 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.

The public participation portion of the Committee's meetings is known as "public speak."

II. The Meetings at Issue.

The events at issue occurred during the public speak portions of the Committee meetings on January 8, 2018, February 5, 2018, and March 12, 2018. The agendas for each of those meetings define public speak as fifteen minutes "during which time any individual may voice an opinion or concern on any school-related issue that is not on the agenda."

A. The January 8, 2018 Meeting.

Spaulding spoke during the January 8, 2018, public speak. She began, "I am the mother of a child who was mercilessly bullied into suicide here in Natick." Midsentence, the former Superintendent of the Natick Public Schools, Peter Sanchioni ("Sanchioni"), interrupted, saying "that is unfettered lies." The two went back and forth a few times, with Sanchioni continuing to interrupt, stating that Spaulding was disparaging the public schools and needed to stop while Spaulding attempted to speak. After Spaulding stated that "you are going to have to call the police, I am invoking my civil rights in speaking," Taberkin suspended the meeting and the Committee exited the room.

During the exchange, Spaulding remained composed behind the podium and spoke in an assertive tone, raising her voice slightly, but did not yell. After the Committee had left, another school official called the police to report an "irate" parent that needed to be removed. Police arrived and escorted Spaulding out of the room. On January 16, 2018, Spaulding received a "no trespass order" prohibiting her from entering the area where Committee meetings are held. The January 8, 2018, meeting minutes state that Spaulding's comments were "out of order and not within the responsibility of the School Committee."

B. The February 5, 2018, Meeting.

At the February 5, 2018 Committee meeting, Tabenkin opened the public speak period by noting that "public speak is not a place for individuals to speak about personnel, school-related personnel, or individual students." One parent then addressed her safety concerns about the high school bus route. The Committee did not interrupt or otherwise seek to regulate her speech. Thereafter, Tabenkin recognized Sutter. After an opening sentence, Sutter stated: "Unfortunately for the future and well-being of my boys and family we needed to move out due to the retaliation and retribution we received at the hands of the Natick Public Schools." Tabenkin promptly interrupted, saying that if Sutter continued to speak about "personnel issues . . . it is not going to be allowed." Shortly after Sutter resumed, Tabenkin again interrupted, stating "I am ending this right now." After Sutter said she did not understand, Tabenkin continued, "you cannot speak defamatory about the Natick . . . this is Open Meeting Laws. . .you are out of order." Sutter then resumed, addressing what she "witnessed a month ago at this meeting." Tabenkin immediately suspended the meeting, informing Sutter that she had a choice to either leave during the suspension, or "if she continued with this," she would be escorted out of the meeting. After the meeting resumed, another speaker attempted to address what he considered to be the Committee's Open Meeting Law violations. After a short, but heated, discussion, Tabenkin again suspended the meeting.

C. The March 12, 2018, Meeting.

At the March 12, 2018 meeting, Tabenkin opened public speak by reading the portions of the policy quoted, supra. Sutter then went to the podium and began to speak. After stating that she wanted to address "the hostile and unsupportive climate of fear that still exists in Natick Public Schools" and "the retaliation and retribution we received," Tabenkin interrupted, informing her that

"we're not talking about individuals and we're not going to hear defamatory statements as part of our policy, but please continue along - with those guidelines." Sutter continued, generally addressing her concerns about special education in the Natick Public Schools.

III. Revised Policy.

On March 16, 2018, the Committee emailed the "Natick School Community" a clarification of the policy ("revised policy"). It states that "'defamatory statements,' (damaging to reputations/slanderous/libel)" violate the policy, and that "[s]peaking using vulgar language and ideas in front of our high school students (or in front of anyone) is not appropriate." The revised policy further provides that a speaker may be stopped if his or her comments become "disruptive as defined by the chair." Finally, it emphasizes that sensitive issues about personnel or other individuals should be addressed through formal complaints or private meetings with Committee members or other administrative staff.

IV. The Present Case.

On April 18, 2018, the plaintiffs filed their complaint. It seeks a declaratory judgment that the policy, revised policy, and no trespass order are unconstitutional under Article 16 of the Massachusetts Declaration of Rights (Count 1), and alleges violations of the Massachusetts Civil Rights Act, G. L. c. 12, §§ 11H & 11I (Count 2). On the same day, the plaintiffs filed an emergency motion for a preliminary injunction that would prohibit the defendants from enforcing: (1) the portions of the policy and revised policy that regulate the viewpoint or content of an individual's speech, and (2) the no trespass order.

On May 1, 2018, the defendants filed an opposition with attached exhibits, including an affidavit from Nolin averring that she had revoked the no trespass order. The requested relief

concerning that order is accordingly moot. At the hearing, the plaintiffs submitted emails from community members to the Committee expressing their concern about its regulation of speech during public speak.

DISCUSSION

To obtain preliminary injunctive relief, "the applicant must show a likelihood of success on the merits of the underlying claim; actual or threatened irreparable harm in the absence of injunction; and a lesser degree of irreparable harm to the opposing party from the imposition of an injunction." Wilson v. Commissioner of Transitional Assistance, 441 Mass. 846, 860 (2004). Because the plaintiffs seek to enjoin governmental action, the court must also consider whether the requested injunctive relief will promote or at least not adversely affect the public interest. GTE Prods. Corp. v. Stewart, 414 Mass. 721, 723 (1993). The court addresses the factors in turn.

I. Success on the Merits.

The plaintiffs seek injunctive relief solely under Article 16 of the Massachusetts Declaration of Rights. The free speech rights afforded under Article 16 are at least as co-extensive as those under the First Amendment to the United States Constitution, and the analysis in many circumstances is the same. See Roman v. Trustees of Tufts Coll., 461 Mass. 707, 713 (2012); Opinion of the Justices, 387 Mass. 1201, 1202 (1982). Where the Supreme Judicial Court looked to Federal jurisprudence in analyzing a free speech claim in Roman, the court here does the same. Id. at 713.

The framework for analyzing free speech claims where the speech or conduct occurs on government property, as here, is known as the public forum doctrine. Id. Roman summarized its three categories as follows:

> [They are] traditional public forums, such as public streets and parks; designated public forums, which the government has opened for use by the public as a place to assemble or debate; and limited public forums, which are "limited to use by certain groups or dedicated solely to the discussion of certain subjects." Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009). In traditional or designated public forums, 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. at 469. In a limited public forum, however, regulations need only be "reasonable and viewpoint neutral." Id. at 470.

Roman, 461 Mass. at 714.

If the government enacts a content-based restriction on speech that is within the purposes or subject matter of a limited forum, however, it is likewise subject to strict scrutiny; i.e., the government must prove that it furthers a compelling interest and is narrowly tailored to achieve that interest. Reed v. Town of Gilbert, Arizona, 135 S. Ct. 2218, 2231 (2015); Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829-831 (1995); Draego v. Charlottesville, 2016 WL 6834025, at *14 (W.D. Va. 2016). To determine if a regulation is content-neutral, the court begins by looking at the face of the regulation, considering whether it applies "because of the topic discussed or the idea or message expressed (citation omitted)." Reed, 135 S.Ct. at 2227. Only once it has made that determination can the court then turn to any justifications the government offers explaining why the regulation is unrelated to content. Id. at 2227-2228; Draego, 2016 WL 6834025, at *16.

Turning to the policies here, both original and revised, they are on their face content-based. The policy seeks to regulate "improper conduct and remarks," as well as "defamatory" and "abusive" remarks. It also prohibits speech concerning "personal complaints [about] school personnel [and]

against any member of the school community." The revised policy adds a definition to the term defamatory, i.e. "damaging to reputations / slanderous / libel," and further prohibits "[s]peaking using vulgar language and ideas in front of our high school students (or in front of anyone)." Finally, the revised policy allows the chair to define the speech he or she considers to be disruptive. None of these regulations can be applied unless the topic discussed, or the ideas or message expressed are examined. Reed, 135 S. Ct. at 2227. Moreover, all of these regulations apply to speech that is otherwise school-related, thus within the purposes of the forum. For that reason, even under a limited forum analysis, the regulations are subject to strict scrutiny.

Looking at the relevant Federal case law, given the restrictions here and the Committee's pattern of enforcement, the defendants' chance of success at overcoming a strict scrutiny analysis is low. The regulation of speech in a similar forum was the subject of a recent Federal case in Virginia, Draego v. Charlottesville, *supra*. In that case, which concerned the prohibition of "group defamation" during an open comment period of a city council meeting, a speaker was removed after he referred to Muslims as "monstrous maniacs." Id. at *2-3, 5. The court allowed the plaintiff's motion for a preliminary injunction on the ground that, regardless of forum classification, the content-based restriction could not pass strict scrutiny. Id. at *16.

In reaching its decision, the court relied on many well-settled First Amendment principles, the touchstone of which is to invite "uninhibited, robust, and wide-open debate" on public issues. Id., at *10, quoting Sullivan v. New York Times, 376 U.S. 254, 270 (1964). In particular, the court noted that "offensiveness" is not an acceptable basis for restricting speech, and that viewpoint and content discrimination are deeply suspect. Id. at *11; see Rosenberger, 515 U.S. at 828 ("It is axiomatic that the government may not regulate speech based on its substantive content or the

message it conveys"); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 579 (1995) (governmental entity "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government"). Likewise, "[t]he prohibition against unbridled discretion" also "'is a constant in forum analysis,' although the inquiry is not a static, acontextual one." Draego, 2016 WL 6834025, at *20, quoting Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five, 470 F.3d 1062, 1068 (4th Cir. 2006).

In applying these principles to the group defamation restriction, the court held that it was not justified in order to prevent disruption to meetings, granted unbridled discretion to the mayor in that case to make ad hoc, subjective content-based prohibitions, and was unconstitutionally vague and overbroad. Id. at *20-22. In short, the restriction was impermissibly and unjustifiably content-based. Id. at *16.

The same logic applies here. Public speak, by its own definition, is an open forum, outside of the meeting's agenda, to allow members of the public to "voice an opinion or concern on any school-related issue." The restrictions in the policy and revised policy both on their face and as applied are aimed to prohibit certain speech that is critical of the Natick Public Schools – they are quintessentially viewpoint based. Whether language or conduct is to be deemed improper, disruptive, or vulgar is not subject to objective criteria or analysis – but, rather, as in Draego, is at the discretion of the chair, who, as is apparent from the videos the court has observed, freely exercises her authority on an ad hoc basis, as she sees fit. As concerns the policy's prohibition of defamation, the law in Massachusetts makes clear that even false statements are protected from prior, government restraint. See Nyer v. Munoz-Mendoza, 385 Mass. 184, 188 (1982).

The defendants respond that G. L. c. 30A, § 20(g), of the Open Meeting Law, gives the chair of the Committee the authority to prohibit disruptions to meetings and request that any person be silent, which is exactly the authority she exercised during the meetings at issue here. The Open Meeting Law, G. L. c. 30A, § 20, was enacted in 2009, and the relevant subsection here, § 20(g), has not been the subject of case law as yet. Although § 20(g) certainly provides a chairperson with authority over municipal meetings, to the extent that it is in conflict with First Amendment or Article 16 principles, those would take priority, and the statute would have to be read in a way that is compatible with the rights that they provide. See e.g., Commonwealth v. A Juvenile, 368 Mass. 580, 597-598 (1975) (construing disorderly person statute so as to be compatible with First Amendment protections).

Moreover, as the forum doctrine makes clear, the rights of a speaker largely depend on the place, context, subject matter, and purpose of the particular meeting or forum. See Roman, 461 Mass. at 713-714. In other words, during the portion of the meeting devoted to agenda items, which has a very limited scope, a chair would have more authority to prevent a speaker from straying off topic, or otherwise disturbing the order and efficiency of the meeting. During the portion of the meeting that is an open comment session, however, that authority is far more limited, as discussed, supra. See Draego, 2016 WL 6834025, at *14. Accordingly, unlike the defendants suggest, the plaintiffs' speech here, which was school-related and delivered in a calm manner, was not actionable as disruptive under § 20(g).

The defendants next argue that Committee meetings are a limited public forum, not a designated public forum, which allows for the regulations in the policies. Even in a limited public forum, however, content-based regulations that govern speech otherwise within the scope of the

forum, like those here, are allowed only if they survive a strict scrutiny analysis. Draego, 2016 WL 6834025, at *14-16 & n.15. Although the defendants certainly have an arguably compelling interest in protecting student and staff privacy, and conducting orderly and efficient meetings, as they argue, those goals could be accomplished with significantly more narrow restrictions than the ones currently in place.

As a case in point, the prohibition against "improper" speech is not further defined, providing no notice about the types of speech it seeks to target. Such a vague restriction clearly lacks the narrow tailoring required to address the Committee's concerns. The prohibition of "personal complaints" about students and staff, while much closer to the mark, also could also be more narrowly drawn. Finally, the defendants' argument that the plaintiffs have already been heard by the Committee in other, private settings, is irrelevant to the analysis here.

In sum, viewing the challenged restrictions facially, and as applied, they are likely to be deemed unconstitutional.

II. Remaining Preliminary Injunction Factors.

In order to obtain injunctive relief, the plaintiffs also must demonstrate irreparable harm, balanced against any harm to the opposing party, and that the relief requested will promote, or not adversely affect the public interest. Wilson, 441 Mass. at 860; GTE Prods. Corp., 414 Mass. at 723.

As for harm, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." T & D Video, Inc. v. City of Revere, 423 Mass. 577, 582 (1996), quoting Elrod v. Burns, 427 U.S. 347, 373 (1976). The government, on the other hand, is unharmed by the issuance of a preliminary injunction that prevents it from enforcing policies,

which, on this record, are likely to be found unconstitutional as written. Finally, upholding constitutional rights serves a strong public interest.

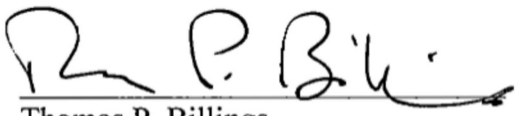
For all of these reasons, the plaintiffs' motion for a preliminary injunction is ALLOWED.

ORDER

For the foregoing reasons, the plaintiffs' motion for preliminary injunction is ALLOWED, with the exception of the no-trespass order, which, because it has already been revoked, is MOOT.

Accordingly, it is hereby ORDERED that the defendants refrain from enforcing paragraphs 4 and 6 of the Public Participation at School Committee Meetings policy, as well as the revised policy set forth in the March 16, 2018, email.

Because the court is aware of the sensitive nature of the subject matter discussed at Committee meetings, and the need for a threshold level of regulation to protect student and staff privacy, for the purposes of temporary injunctive relief only, it is further ORDERED that individual staff and students may not be named or otherwise identified during public speak.



Thomas P. Billings
Justice of the Superior Court

Dated: June 5, 2018