UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STEFANIE BOONE,

Plaintiff,

v.

LOWELL AREA SCHOOLS, et al,

Defendants.
_____/

Case No.: 1-24-cv-00582

Honorable Paul L. Maloney

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BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(6)

****ORAL ARGUMENT REQUESTED****

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Exhibit 1 - Publication 0167.3 – Public Participation at Board Meetings

I. INTRODUCTION

Plaintiff believes that she had a completely unfettered fundamental right to participate in her children's public education and, as such, she should be permitted unlimited access to Lowell Area Schools employees to harass, slander, and interfere with the everyday operation of the school district. Plaintiff's subjective beliefs regarding her fundamental rights is fatally flawed and legally unsubstantiated. After engaging in a years-long pattern of harassing, doxxing, and defaming employees of Lowell Area Schools, Plaintiff was instructed to contact building-level administrators or the superintendent, rather than individual staff members (e.g., teachers). Plaintiff claims this constitutes a ban on her speech and is a prior restraint. Plaintiff has failed to state a claim.

Federal courts have consistently found that the right of parents to control the education of their children is not without limits. *See*, *e.g.*, *Runyon v. McCrary*, 427 U.S. 160, 177; 96 S.Ct. 2586 (1976) (reasoning that there is no parental right to education children in private, segregated schools); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005) (concluding that a school dress code does not interfere with parent's fundamental right to direct the education of their child)

> The critical point is this: While parents may have a fundamental right to decide whether to send their child to a public school, they do not have a fundamental right generally to direct how a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally "committed to the control of state and local authorities."

Blau, 401 F.3d at 395-396 (internal citations omitted). Plaintiff does not have a right under the First Amendment to speak to or with the employees of Lowell Area Schools on her terms.

Plaintiff files suit against Lowell Area Schools, Superintendent Nate Fowler, Lowell Area Schools Curriculum Director Dan VanderMeulen, Lowell High School Principal Steve Gough, Lowell High School Assistant Principal Jacob Strotheide, Lowell Middle School Principal Abby Wiseman, Lowell Middle School Assistant Principal Ron Acheson, and Media Specialist Christine Beachler. Plaintiff asserts the following causes of action:

- Count I – Banned Speech
- Count II – Prior Restraints
- Count III – Due Process Void-for-Vagueness
- Count IV – Title IX
- Count V – Negligent Breach of Fiduciary Duty
- Count VI – Reckless Breach of Fiduciary Duty
- Count VII – Intentional Breach of Fiduciary Duty

Plaintiff's Complaint fails to state any claim for relief and should be dismissed in its entirety.

II. RELEVANT FACTUAL ALLEGATIONS

Plaintiff is a regular attendee (and commenter) at Lowell Area Schools' board meetings and operates a Facebook page, "Lowell Kids 1st" where she "provides insight to community members". (ECF No. 1, PageID.6, Plaintiff's Complaint ¶11). At the heart of Plaintiff's rambling Complaint is her overarching claim that Lowell Area Schools and its "administrators and teachers (including the Defendants)": (1) promote diversity, equity, and inclusion; (2) promote social emotional learning[1]; (3) "groom" children through social justice "issues", "gender ideologies",

[1] According to the Michigan Department of Education, "[o]ne of MDE's primary goals as outlined in the state's strategic education plan is to support the healthy [sic], safety and wellness of all students. The MDE feels Social and Emotional Learning (SEL) is a critical way to achieve this goal." *Social Emotional Learning (SEL)*, MICHIGAN DEPARTMENT OF EDUCATION, https://www.michigan.gov/mde/services/health-safety/social-emotional-learning-sel (last visited August 22, 2024). SEL "is the process of developing students' and adults' social and emotional competencies--the knowledge, skills, attitudes, and behaviors that individuals need to make successful choices." (*Id.*).

and "liberal political ideology", and permit access to "books and lifestyles that are not age appropriate." (*Id.* at PageID.7, ¶13).

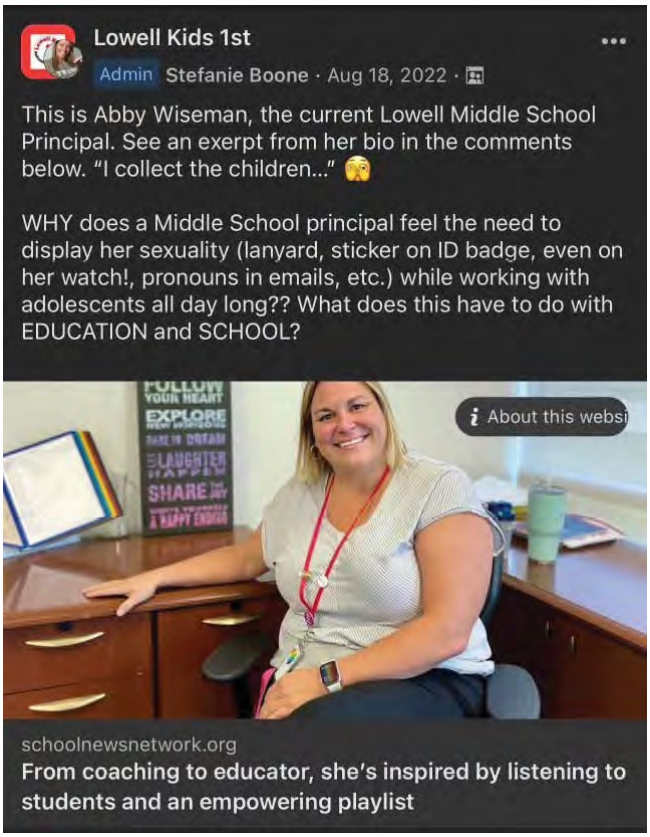
A significant portion of the allegations in Plaintiff's Complaint are wholly irrelevant to her claims. According to Plaintiff:

> Plaintiff has been critical of certain political statements and positions of Defendants regarding their blatant promotion of DEI, SEL, social justice issues, alternate sex and gender ideologies, and other liberal political ideology, and through manipulative behavior such as giving children access to sexually explicit books and lifestyles that are not age appropriate, including promoting "drag performances" and "pride events" in the community.

(*Id.* at PageID.17, ¶56). Plaintiff's complaints regarding the type of books allegedly made available at Lowell Area Schools reach back to 2021. (*Id.* at ¶57). Thereafter, Plaintiff began posting on social media regarding her thoughts on diversity, equity and inclusion initiatives and whether certain books should be permitted at Lowell Area Schools. (*Id.* at PageID.19, ¶62, 65).

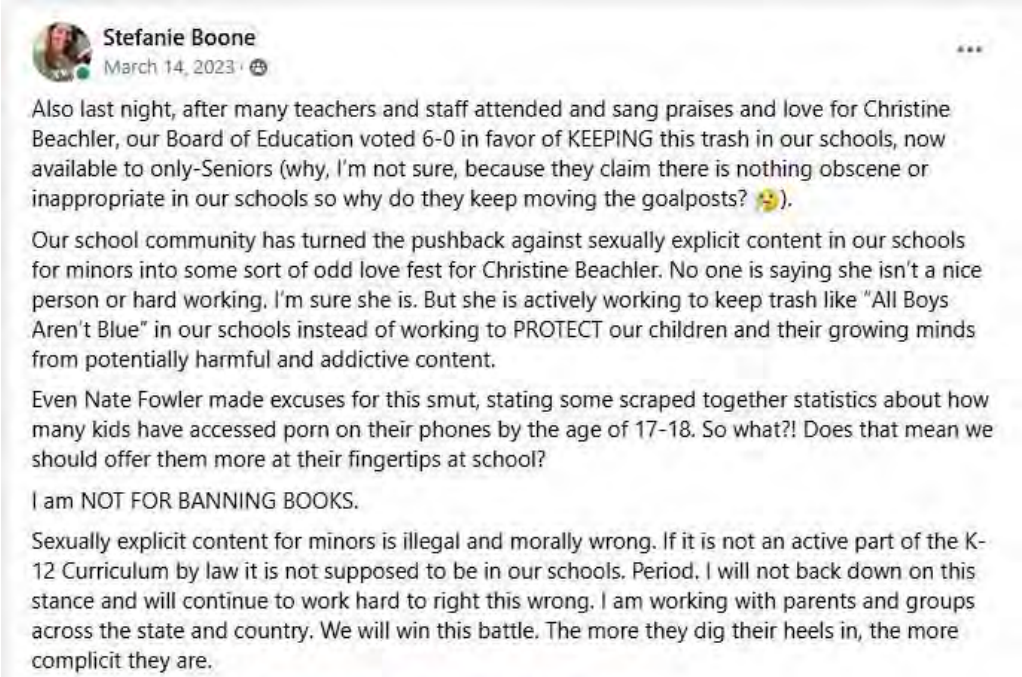
However, Plaintiff's Facebook postings – as she appears to admit – became harassing and targeted individual employees of Lowell Area Schools, often naming them and publicizing their photographs.

On August 18, 2022, Plaintiff posted the following to her Facebook group, Lowell Kids 1st:



(ECF No. 1-3, PageID.110).

On September 22, 2022, Plaintiff posted on her social media: "Lowell Middle School Principal, Abby Wiseman, flexing sexuality in her office at school again. Do you want this pushed on your children?? Who pays for this anyway?! The taxpayers?" (ECF No. 1, PageID.21, ¶ 75). On March 14, 2023, Plaintiff posted on her personal Facebook page:



Stefanie Boone
March 14, 2023

Also last night, after many teachers and staff attended and sang praises and love for Christine Beachler, our Board of Education voted 6-0 in favor of KEEPING this trash in our schools, now available to only-Seniors (why, I'm not sure, because they claim there is nothing obscene or inappropriate in our schools so why do they keep moving the goalposts? 🤔).

Our school community has turned the pushback against sexually explicit content in our schools for minors into some sort of odd love fest for Christine Beachler. No one is saying she isn't a nice person or hard working. I'm sure she is. But she is actively working to keep trash like "All Boys Aren't Blue" in our schools instead of working to PROTECT our children and their growing minds from potentially harmful and addictive content.

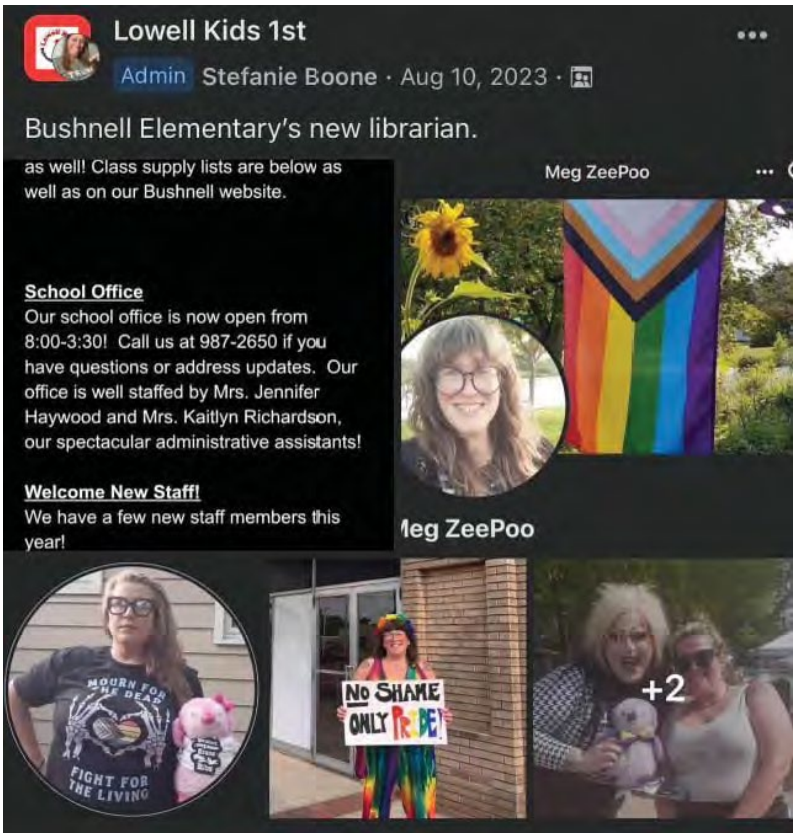
Even Nate Fowler made excuses for this smut, stating some scraped together statistics about how many kids have accessed porn on their phones by the age of 17-18. So what?! Does that mean we should offer them more at their fingertips at school?

I am NOT FOR BANNING BOOKS.

Sexually explicit content for minors is illegal and morally wrong. If it is not an active part of the K-12 Curriculum by law it is not supposed to be in our schools. Period. I will not back down on this stance and will continue to work hard to right this wrong. I am working with parents and groups across the state and country. We will win this battle. The more they dig their heels in, the more complicit they are.

(ECF No. 1-5, PageID.133).

The Lowell Area Schools employees who were the targets of Plaintiff's Facebook postings continued to evolve over time. On August 10, 2022, Plaintiff posted the following to the "Lowell Kids 1st" page, apparently putting together a collage of photographs from the personal Facebook page of a Lowell Area Schools employee, a new librarian at Bushnell Elementary School:



(*Id.* at PageID.135).

In January, 2024, the target of Plaintiff's online posting changed to Lowell High School teacher Sarah Ellis, who received an invitation to participate in the Fulbright Scholar Program in 2024. (ECF No. 1, PageID.24, ¶ 88-91). On January 2, 2024, a local online publication, "Lowell's First Look" ran an article regarding Ms. Ellis prestigious award". Michelle Smith, *LHS Teacher Receives Fulbright Scholar Award: Destination Uruguay 2024*, LOWELL'S FIRST LOOK (January 2, 2024), https://lowellsfirstlook.com/lhs-teacher-receives-fulbright-scholar-award-destination-uruguay-2024/.

In response to the article regarding Ms. Ellis' success and prestigious award, "Plaintiff published a comment on social media that stated, 'This is the same teacher who is was [sic] hailed for creating a shrine to a disgusting pornographic, incestual, sexually explicit book (All Boys

Aren't Blue) in honor of her 'hero' media specialist who faces 'constant attacks' for simply trying to provide 'literacy' (porn) for all." (ECF No. 1, PageID.24, ¶ 90).

The media specialist Plaintiff references is Christine Beachler, who Plaintiff – as she alludes to in her Complaint – subjected to a barrage of abuse regarding her work at Lowell Area Schools. Plaintiff alleges her defamatory statements regarding Ms. Ellis were "true" because Ms. Ellis created a painting in honor of Ms. Beachler which was featured at a local art show. Plaintiff's Complaint is nearly silent regarding her attacks against Ms. Beachler; however, Plaintiff elected to attach as an exhibit an article from the Michigan Education Association that describes the history of attacks against Ms. Beachler:

> When MEA member Sarah Ellis learned she had several months to create five works of art on a theme of "inspiration," she chose to honor her school district's media specialist – Christine Beachler – who has faced ongoing harassment while staunchly defending students' access to books over three years.
>
> * * *
>
> Ellis said she wanted to recognize the admirable courage and accomplishments of the Lowell district's only certified librarian – who serves as treasurer of her local union in addition to other roles – but also to acknowledge her friend and colleague's humanity in the face of personal attacks.
>
> * * *
>
> "Sarah is just very thoughtful and inspiring, and when I saw her artwork it made me realize if I didn't have support from wonderful people like her, I don't know how I could have kept going," Beachler said.
>
> The past few years have been increasingly difficult as a small group of people have used bullying and harassment to try to remove books they find objectionable from school libraries, she said. Beachler has faced a barrage of terrible name-calling at board meetings and online.
>
> Beachler's work was featured last year in part three of our five-part series, Freedom to Read, on rising book bans in Michigan and across the country.
>
> She has been verbally accosted at the grocery store and even at a family picnic in the park in her small town east of Grand Rapids. A certified media specialist

> for 23 years, Beachler just completed her 35th year in education and needed to take time off from work due to stress this year.
>
> "It's something I never thought I would have to endure being a school librarian," she said. "Most days I know I'm doing the right thing and doing my job to the best of my ability, and I have great support from my administration and from our staff and our community. But there are some days where I just fall apart and cry."
>
> This year for the first time in the district's history, two books were formally challenged. Beachler followed her profession's best practices, longstanding board policy, and the law in determining the outcome for *All Boys Aren't Blue* and *the sun and her flowers*.
>
> Two separate committees of seven people, including a parent, student, teachers and administrators, read and discussed the books before voting 6-1 and 7-0 to keep them on the shelves. Both decisions were reviewed by the school board and upheld in votes of 7-0 and 6-1.
>
> In one case, the complainant went on to file a police report against the school board claiming district officials were distributing pornography. The same people continue to speak against books and use derogatory insults and personal smears against Beachler and other school officials at meetings and on social media.

(ECF No. 1-6, PageID.164-168).

On January 19, 2024, Lowell High School Principal Stephen Gough wrote to Plaintiff:

> It has been brought to my attention by concerned members of the community that you continue to post inappropriately to social media about members of our staff related to their professional practice as employees of the District. You have stated on more than one occasion that you want to work with and help the District, yet you continue in this inappropriate and unproductive behavior even after we have asked repeatedly that you stop. The most recent post that I am aware of can be construed as threatening in nature and significantly elevates my concern. As a result, **I am compelled to request that you immediately cease and desist from any reference to any Lowell Area Schools employee on social media and/or other public communication platforms.** Failure to comply with this request will be perceived as a deliberate and inappropriate act against the involved staff and the District further demonstrating your lack of willingness to work with the District in any constructive manner and may result in further action including but not limited to all available legal remedies.
>
> While individuals may have differing opinions regarding all manner of issues, it is a basic and minimal expectation that all members of our school community, including parents, express their differences and concerns in an appropriate,

> respectful and professional manner. Making derogatory, disrespectful, disparaging and/or threatening comments on social media platforms is not only unconstructive but also damaging to the well-being of our dedicated staff members and the school community in general. As principal of Lowell High School, I have an obligation to do all that I can to ensure a safe and appropriate environment for all students and staff. As a result, **I am directing that you have no contact with our staff without prior permission from the involved building principal or the superintendent.** Failure to comply with this directive may result in further restrictive action including but not limited to an order of no trespass prohibiting your presence at all school functions.
>
> We remain committed to working constructively and in good faith with all members of our community to resolve issues and challenges. To that end, I encourage you to reach out to the appropriate administrators when you have questions or concerns. We are also committed to ensuring that all members of our school community are treated with decency, dignity and respect which is why I believe the actions outlined in this letter are, unfortunately, necessary at this time.

(ECF No. 1-7, PageID.178). Plaintiff asserts Mr. Gough's letter was in response to her post attacking Ms. Ellis. (ECF No. 1, PageID.25, ¶ 92). Plaintiff appears to allege that she is not permitted to speak at every Board meeting based on Mr. Gough's January 19, 2024 correspondence. (*Id.* at PageID.26, ¶ 95). However, Mr. Gough's letter unambiguously states that Plaintiff is to have no contact with Lowell Area School's *staff* without first going to the involved building principal or superintendent. The letter does not make any reference to making public comment at school board meetings.[2]

Indeed, Plaintiff could not allege that she has been stopped from making public comment at Lowell Area Schools Board Meetings. Plaintiff made public comment at the Board meetings on:

- February 12, 2024

[2] Lowell Area Schools has a Board Policy #0167.3 which guides "Public Participation at Board Meetings". (Exhibit 1). Before providing public comment, attendees "must register their intention to participate in the public participation portion of the meeting upon their arrival at the meeting." It is unclear whether this board policy forms the basis for Plaintiff's claim that she is not permitted to speak unless she has "special permission".

- March 11, 2024
- April 8, 2024
- June 10, 2024
- July 8, 2024

The only regularly scheduled Board meeting in the last eight months where Plaintiff has not made public comment was May 13, 2024.[3] However, as Plaintiff affirmatively alleges, she made public comment at a Board of Education work session meeting on May 20, 2024. (ECF No. 1, PageID.28, ¶ 104).

Plaintiff alleges that at the April 8, 2024 Board of Education meeting, Mr. Gough made *public* comment and Plaintiff does not allege he was speaking in any sort of official capacity:

> Steve Gough, I am not a resident of the district. I am a parent and my son is a senior at the high school where I am also the principal. In my nearly 30 years as an educator I've never offered public comment at a board meeting. I am speaking here tonight because I was directly referenced by another parent in her public comment last month. The information offered in that comment was inaccurate and misleading so I thought it would be appropriate for me to provide some context and clarity for the Board and the community. The parent stated in her March comment that the district is trying to silence her because she disagrees with us. She offered a letter that I sent to her in January as evidence of this effort. This claim is demonstrably false. She is allowed to speak at every board meeting while we all listen respectfully without interrupting even though much of what she says is misleading at best. She is allowed to comment on our social media sites even though much of her comments are demonstrably false and arguably disrespectful. And she has offered no evidence that we have made any attempt to silence her. If you read the letter that she presented as evidence it requests that she stop directly referencing staff in her social media because of her repeated posts that staff perceives as derogatory, disparaging, and disrespectful. The only directive in that letter is that she have no contact with staff prior to permission from the involved principal or superintendent so that we can protect our staff from any further inappropriate behavior. She claims that we are violating her First Amendment right by asking that she treat others with decency, dignity, and respect in her public discourse. There is no First Amendment right to bullying, harassment, or misinformation. Further, with every right comes responsibility. This is a core democratic principal [sic] I used to teach eight [sic] graders when I was a middle school history teacher. We each have the responsibility to respect

[3] The Lowell Area Schools' Board of Education records their board meetings and posts them on YouTube. https://www.youtube.com/@LASBoE-ns3lu. Plaintiff's public comment at every one of the meetings is publicly available online.

> the rights of others while exercising our own individual rights. The parent claimed in her March comments that she has been respectful as she can be while disagreeing with us. There is again no evidence to support this claim. Over the past several years it has become a regular occurrence for this parent to attack staff members in her public discourse through social media and public comment and the parent's efforts publicly demean and diminish the district that she chooses to send her children to. The staff members that she has targeted feel disrespected and much of the behavior that I can see on social media appears disrespectful to me. A good deal of the behavior is public so you can read it and decide for yourself if you believe that it is respectful and appropriate. It certainly does not seem like a constructive way to resolve concerns. It is more than okay to disagree with the district or even individual staff members. It is not okay to manipulate the truth and it is not okay to defame, bully, harass, or otherwise mistreat members of the community because they will not bend to your political views. We are simply asking this parent to treat our staff with decency, dignity, and respect. These are good educators who work hard every day for the good of other people's children and they deserve to be treated with respect. Thank you.

(ECF No. 1, PageID.25-26, ¶ 94). Plaintiff asserts Mr. Gough's public comment was "directed to the School Board without objection". (*Id.* at PageID.26, ¶ 95).

After Mr. Gough's January 19, 2024 letter, which Plaintiff claims silenced her (despite all evidence to the contrary, specifically that she continues to present public comment at Board of Education meetings) Plaintiff sent an email to one of her children's teachers on April 11, 2024. (*Id.* at PageID.28, ¶ 105). Plaintiff claims this email was sent due to a "concern she had with the curriculum in [the teacher's] classroom." (*Id.*). Plaintiff asserts the teacher refused to respond to the email and instead forwarded it to Mr. Gough who responded on April 16, 2024. (*Id.*).

> Good afternoon Mrs. Boone,
>
> Mr. Larsen notified me that you emailed him directly regarding the AP Literature and Composition course. Please note that you were notified in January that you should not have direct contact with staff without prior permission from the involved principal.
>
> Your inquiry was in regard to *The Handmaid's Tale* and the reasoning behind its selection as part of the AP Literature and Composition course at Lowell High School.
>
> AP English Literature and Composition is a non-required college level course intended for the most mature learners at Lowell High School. The literature used in the course is selected based on its literary merit in support of the course goals which are described in the course syllabus provided to all students who select the course in May the year before the course begins. This allows for students and parents to review the course expectations before making a final decision about their schedule for the upcoming year. The current course syllabi, which was distributed to students in May of last year, lists the major works to be studied in the course including *The Handmaid's Tale*.
>
> Please let me know if you have additional questions.
>
> Respectfully,
>
> Principal Gough

(ECF No. 1-7, PageID.180).

At some point on or before April 19, 2024, Plaintiff sent another email to the subject English teacher regarding the selection of *The Handmaid's Tale* for an AP Literature and Composition course. Mr. Gough responded on April 19, 2024. (ECF No. 1-7, PageID.182). Mr. Gough responded to each of Plaintiff's questions that were originally sent to the subject English teacher. (*Id.* at PageID.183).

Plaintiff claims that on May 30, 2024, she was "denied the right" to have a meeting with one of her children's teachers. On May 30, 2024, Plaintiff wrote to Abby Wiseman, the Principal at Lowell Middle School: "I would like to request a meeting with you, Ms. Guile, Dylan, and me (possibly my husband as well) to discuss this concern further please." (ECF No. 1-7, PageID.185). Ms. Wiseman responded and invites a meeting with Plaintiff and either herself (the Principal) or Mr. Acheson (the Assistant Principal):

> I will not be scheduling a meeting with the teacher to discuss perceptions. It is the teacher's perception he said it multiple times and it is Dylan's that it was only said once. I am not going to question the teacher's perception any more than I

> question Dylan's. It is agreed upon that he used profanity and the differing perceptions would not change the actions moving forward. Dylan and Mrs. Guile have already had a discussion and have moved forward. Discipline was assigned by Mr. Acheson accordingly. If you would like to talk with Mr. Acheson or me, we are more than happy to do that.

(*Id.*).[4]

Finally, Plaintiff alleges that Lowell Area Schools blocked her from commenting on Lowell Area Schools social media pages for violating the Lowell Area Schools Code of Conduct for using defamatory language toward Lowell Area Schools staff. (ECF No. 1, PageID.29, ¶ 110; ECF No. 1-7, PageID.197). However, this occurred in August, 2021, and Plaintiff's ability to post to Lowell Area School's social media accounts was restored in February, 2023. (ECF No. 1-7, PageID.197). While Plaintiff alleges she was blocked from Lowell Area School's social media accounts, it does not appear that any of her legal claims relate to this. (*See* ECF No. 1, PageID.31-34, "Defendant Gough's statement does not define 'bullying, harassment, or misinformation.'").

LAW AND ARGUMENT

III. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 8, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678; 129 S. Ct. 1937 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Its allegations "must do more than create speculation or suspicion of a legally cognizable cause of action; they must show *entitlement* to relief." *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (emphasis in original) (citing *Twombly*,

[4] Plaintiff presented public comment regarding this issue during the June 10, 2024 Board of Education meeting. https://www.youtube.com/watch?v=TiAwGVIQuWo&t=4304s. As notes during her public comment, Plaintiff's son used profanity in class and was disciplined with a detention.

550 U.S. at 555–56) "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint will be dismissed where it "fail[s] to state a claim upon which relief can be granted."

In deciding a 12(b)(6) motion to dismiss, the Court must construe the complaint in the light most favorable to the plaintiff, accepting all well-pleaded factual allegations as true. *Id.* However, "[t]he court is not required to accept non-specific factual allegations and inferences or unwarranted legal conclusions." *Frazier v. Michigan*, 41 Fed. Appx. 762, 764 (6th Cir. 2002). When presented with a Rule 12(b)(6) motion, a Court may consider "the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008).

IV. PLAINTIFF'S COMPLAINT FAILS TO STATE A VIABLE *MONELL* CLAIM FOR LIABILITY AGAINST LOWELL AREA SCHOOLS.

Plaintiff's Complaint draws no distinctions between the claims asserted against the individual Defendants and Lowell Area Schools. Ostensibly, Plaintiff seeks to establish liability against Lowell Area Schools for her alleged First and Fourteenth Amendment claims. Nevertheless, Plaintiff must plead facts that would impute liability on the municipality – Lowell Area Schools. Plaintiff has failed to do so.

A municipality cannot be held liable under Section 1983 solely on a respondeat superior theory. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978). Rather, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those

whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

To establish a claim for municipal liability under *Monell*, Plaintiff must: (1) identify the policy or custom; (2) connect the policy to the governmental entity; and (3) show causation. *Alkire v. Irving*, 330 F.3d 802, 815 (6th Cir. 2003) (internal citations omitted). Proving this requires a plaintiff to "point to a municipal 'policy or custom' and show that it was the 'moving force' behind the constitutional violation." *Crabbs v. Scott*, 800 Fed. Appx. 332, 336 (6th Cir. 2020) (quoting *Monell*, 436 U.S. at 694. There are four ways Plaintiff can plead an illegal policy or custom: "(1) the municipality's legislative enactments or official policies; (2) actions taken by officials with final decision-making authority; (3) a policy of inadequate training or supervision; or (4) a custom of tolerance or acquiescence of federal violations." *Winkler v. Madison Cnty.*, 893 F.3d 877, 901 (6th Cir. 2018).

Finally, [t]here can be no liability under *Monell* without an underlying constitutional violation." *Robertson v. Lucas*, 753 F.3d 606, 622 (6th Cir. 2014) (citing *Scott v. Clay Cnty., Tenn.*, 205 F.3d 867, 879 (6th Cir. 2000).[5]

Plaintiff has not adequately pled an illegal policy or custom of Lowell Area Schools under any of these theories.

A. Plaintiff Has Not Alleged An Official Unconstitutional Policy.

Plaintiff has not stated a *Monell* claim based on an unconstitutional "policy" because she has failed to "show that there were 'formal rules or understandings – *often but not always committed to writing* – that [were] intended to, and [did], establish fixed plans of actions to be

[5] There is no underlying constitutional violation in this case. However, for the sake of economy, Defendants will address the merits of the underlying constitutional claims *supra* when discussing the allegations against the individual Defendants.

followed under similar circumstances consistently and over time." *Jackson v. City of Cleveland*, 925 F.3d 793, 829 (6th Cir. 2019) (emphasis in original). An official policy includes "a policy statement, ordinance, regulation, or decision officially adopted and promulgated . . . ." *Johnson v. Hardin Cnty.*, 908 F.2d 1280, 1285 (6th Cir. 1990) (quoting *Monell*, 436 U.S. at 690).

Other than conclusory allegations and threadbare recitals, Plaintiff's Complaint is devoid of factual allegations that *Lowell Area Schools* has any official policy – let alone a custom or policy of suppressing protected activity under the First Amendment or other civil rights that was promulgated or officially adopted by Lowell Area Schools. Rather, Plaintiff's allegations relate to Mr. Gough's letter and statement to the Board of Education. This is insufficient to state a claim of an official policy under *Monell*.

District courts in the Sixth Circuit have dismissed claims on the basis that a plaintiff has failed to allege an official policy. *See, e.g.*, *Sistrunk v. City of Hillview*, 545 F. Supp. 3d 493 (W.D. Ky. 2021) (dismissing *Monell* official-policy claim based on failure to plead an official policy); *Hutchison v. Metro. Gov't of Nashville*, 685 F. Supp. 2d 747, 751 (M.D. Tenn. 2010) (dismissing claim that allege specific unconstitutional policy or practice "without additional factual assertions of any kind").

B. Plaintiff Has Not Alleged Any Actions By Officials With Final Decision-Making Authority.

Plaintiff has not alleged that any of the alleged actions in her Complaint were undertaken by an official of Lowell Area Schools with final decision-making authority. A "municipality is liable for an official's unconstitutional action only when the official is the one who has the 'final authority to establish municipal policy with respect to the action ordered.'" *Feliciano v. City of Cleveland*, 988 F.2d 649, 655 (6th Cir. 1993) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986)). While policymaking authority can be delegated in certain situations (and

Plaintiff has not alleged that Lowell Area Schools did indeed delegate any authority), merely being given the "authority to exercise discretion while performing particular functions does not [on its own] make a municipal employee a final policymaker." *Feliciano*, 988 F.2d at 655. A policymaker is only the final authority it his "'decisions are final and unreviewable and are not constrained by the official policies of superior officials.'" *Adair v. Charter Cty. Of Wayne*, 452 F.3d 482, 493 (6th Cir. 2006) (internal quotation omitted).

There is no basis for liability against Lowell Area Schools under a theory that any of the alleged actions were undertaken by an individual with final decision-making authority.

C. Plaintiff Has Failed To Allege A Policy Of Inadequate Training.

The Sixth Circuit has described what a plaintiff must establish to show a failure to train:

> "In order to show that a municipality is liable for a failure to train its employees, a plaintiff 'must establish that: (1) the City's training program was inadequate for the tasks that officers must perform; (2) the inadequacy was the result of the City's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury.'"

Jackson v. City of Cleveland, 925 F.3d 793, 834 (6th Cir. 2019) (quoting *Ciminillo v. Streicher*, 434 F.3d 461, 469 (6th Cir. 2006)).

Plaintiff's Complaint makes no allegations regarding Lowell Area Schools' training, let alone that the training program was inadequate for the tasks its employees would perform, that that inadequacy was the result of Lowell Area Schools' deliberate indifference, or that this alleged lack of training was closely related to or actually caused Plaintiff's alleged injury.

To show the first element of a failure-to-train claim, the allegations in the complaint must focus on the "adequacy of the training program in relation to the tasks the particular officers must perform." *City of Canton v. Harris*, 489 U.S. 378, 390 (1989). Plaintiff's Complaint contains no

factual allegations regarding the adequacy of Lowell Area Schools' training in relationship to the tasks its employees would face.

Second, Plaintiff's Complaint is completely devoid of allegations of deliberate indifference. Showing deliberate indifference imposes "a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his actions." *Bd. of Cty. Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 410 (1997). In other words, the Complaint must indicate a "risk of a constitutional violation arising as a result of" the inadequate training that is "plainly obvious." *Gregory v. City of Louisville*, 444 F.3d 725, 752 (6th Cir. 2006). To make that showing, Plaintiff must allege either "prior instances of unconstitutional conduct demonstrating that the City had notice that the training was deficient and likely to cause injury but ignored it," or "evidence of a single violation of federal rights, accompanied by a showing that the City had failed to train its employees to handle recurring situations presenting an obvious potential for such a violation." *Campbell v. City of Springboro*, 700 F.3d 779, 794 (6th Cir. 2012).

Plaintiff has not even attempted to plead deliberate indifference through alleging prior instances of unconstitutional conduct, demonstrating that Lowell Area Schools has notice that training was deficient or that that Lowell Area Schools failed to train its employees to handle recurring situations presenting an obvious potential for a constitutional violation.

Finally, Plaintiff failed to allege that any shortcomings in training were "closely related to or actually caused the [plaintiff's] injury." *See Jackson*, 925 F.3d at 834. Even if Plaintiff had attempted to make a conclusory allegation on this issue, which she has not, "conclusory allegations are insufficient to state an arguable claim that an unconstitutional governmental policy caused Anthony's illegal arrest". *Anthony v. Roberson*, 26 Fed. Appx. 419, 422 (6th Cir. 2001).

D. Plaintiff Has Failed To Properly Allege A Custom Of Tolerating Constitutional Violations.

In order to plead a violation based on a policy of tolerating federal rights violations requires Plaintiff to show:

> (1) the existence of a clear and persistent pattern of [illegal activity];
> (2) notice or constructive notice on the part of the [defendant];
> (3) the [defendant's] tacit approval of the unconstitutional conduct, such that their deliberate indifference in their failure to act can be said to amount to an official policy of inaction; and
> (4) that the [defendant's] custom was the "moving force" or direct causal link in the constitutional deprivation.

Thomas v. City of Chattanooga, 398 F.3d 426, 429 (6th Cir. 2005) (internal citation omitted). "A municipal 'custom' may be established by proof of the knowledge of policymaking officials and their acquiescence in the established practice." *Miller v. Calhoun County*, 408 F.3d 803, 814 (6th Cir. 2005) (quoting *Memphis, Tenn. Area Local, Am. Postal Workers Union v. City of Memphis*, 361 F.3d 898, 902 (6th Cir. 2004)). A "custom" exists only if it carries "the force of law", in other words a pattern that is "so permanent and well settled as to constitute a custom or usage with the force of law." *Vereecke v. Huron Valley Sch. Dist.*, 609 F.3d 392, 403 (6th Cir. 2010). The "pattern" requirement involves repetition of similar events. *See Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013) ("a custom . . . claim requires a showing that there was a pattern of . . . similar claims"). The Sixth Circuit has noted that "[t]wo incidents of unconstitutional searches over the course of five months does not demonstrate behavior 'so permanent and well settled as to constitute a custom or usage with the force of law.'" *Beard v. Whitmore Lake Sch. Dist.*, 244 Fed. Appx. 607, 613 n.3 (6th Cir. 2007) (quoting *Monell*, 436 U.S. at 691).

Plaintiff has not alleged any pattern of constitutional violations, notice of the pattern of constitutional violations by Lowell Area Schools, and Lowell Area Schools' tacit approval of the unconstitutional conduct such that its deliberate indifference in its failure to train could be said to

amount to an official policy of action. In other words, Plaintiff has not even attempted to plead a custom of violations theory.

Plaintiff's Complaint is devoid of allegations that state a municipal liability claim against Lowell Area Schools under *Monell*. As such, Plaintiff's claims against Lowell Area Schools should be dismissed for failure to state a claim.

V. PLAINTIFF'S CONSTITUTIONAL CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS FAIL AS A MATTER OF LAW.

Plaintiff's Complaint fails to state a claim against any of the individual Defendants. First, Plaintiff has failed to allege personal involvement of any individual Defendant with the exception of Mr. Gough. Second, Plaintiff's § 1983 claims fail as a matter of law because there is no underlying constitutional violation. Finally, Plaintiff cannot state a claim against the individual Defendants because they are all entitled to qualified immunity.

To state a cognizable claim against an individual under § 1983, "a plaintiff must set forth facts that, when construed favorably, establish (1) the deprivation of a right secured by the Constitution or laws of the United States (2) caused by a person acting under color of state law." *Sigley v. City of Parma Heights*, 437 F.3d 527, 533 (6th Cir. 2006). Plaintiff cannot hold the individual defendants liable under § 1983 merely on a basis of *respondeat superior*. *See Winkler v. Madison Cty.*, 893 F.3d 877, 898 (6th Cir. 2018) (citing *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984)). Rather, individuals sued in their personal capacity under § 1983 are liable only for their own unconstitutional behavior. *See Murphy v. Grenier*, 406 Fed. Appx. 972, 974 (6th Cir. 2011) ("Personal involvement is necessary to establish section 1983 liability."); *see also Iqbal*, 556 U.S. at 676 ("Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."); *Heyerman v. Cty. of Calhoun*, 680 F.3d 642, 647 (6th Cir. 2012)

("Persons sued in their individual capacities under § 1983 can be held liable based only on their own unconstitutional behavior.").

A. Plaintiff's Complaint is Devoid of Factual Allegations Regarding the Individual Involvement of Mr. Fowler, Mr. VanderMeulen, Mr. Strotheide, Ms. Wiseman, Mr. Acheson, and Ms. Beachler.

Again, to prove liability against an individual defendant sued in their capacity under Section 1983, Plaintiff must prove personal involvement in order to establish liability. *See Murphy,* 406 Fed. Appx. at 974. Plaintiff's allegations regarding any personal involvement of any individual Defendants other than Mr. Gough are mere threadbare recitals that are supported by no more than conclusory statements which are insufficient to state a claim. *(See Iqbal,* 445 U.S. at 678).

Plaintiff makes the following allegations against each of the individual Defendants. Plaintiff's allegations appear to be a copy and paste, making the same conclusory and threadbare recitals, without providing any factual information regarding the individual's alleged involvements of the administrators. For each of the individual Defendants, Plaintiff alleges as follows:

- Each individual defendant implemented a policy in which the school district promotes and grooms children through DEI, SEL, social justice issues, alternate sex and gender ideologies, and other liberal political ideology, and through manipulative behavior that is not age appropriate;
- Each individual defendant has implemented a policy in which Plaintiff is not permitted to make any social media posts that reference any Lowell Area Schools' employee; and
- Each individual defendant has implemented a policy in which Plaintiff is not permitted to have any contact with any staff without prior permission from the involved building principal or the superintendent

Plaintiff also makes the same threadbare, conclusory allegation for each individual Defendant that each, upon Plaintiff's information and belief, did so with the consent, knowledge or ratification of the School Board. However, Plaintiff offers no factual support for this. Plaintiff's Complaint is plainly insufficient to satisfy the requirements of Fed. R. Civ. P. 8(a)(2), and is therefore subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(6). The factual allegations in

Plaintiff's Complaint need to be sufficient to give notice to Defendants as to what claims are alleged. However, "a legal conclusion couched as a factual allegation" need not be accepted as true on a motion to dismiss, nor are mere recitations of the elements of the cause of action sufficient. *Hensley Mfg. v. Propride, Inc.,* 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Twombly,* 550 U.S. at 555). The pleadings standard required in Rule 8 does not require detailed factual allegations, but it demands more than an unadorned, "the defendants unlawfully harmed me accusation". *Iqbal,* 556 U.S. at 678. A complaint is insufficient if it tenders naked assertions devoid of further factual enhancement. *Twombly,* 550 U.S. at 555-557 (internal citations omitted).

B. Plaintiff Has Not Alleged An Underlying Constitutional Violation.

As a threshold matter, the Court must first determine whether the protections of the First Amendment even apply to this case. In *Country Mill Farms, LLC v. City of East Lansing*, 280 F.Supp.3d 1029, 1042-1043 (W.D. Mich. 2017), this Court has previously explained the "three-step inquiry" under which "free-speech claims should be analyzed":

> First, a court must consider whether the speech should be afforded constitutional protection. *Id.* Second, the court must examine the nature of the forum where the speech was made. *Id.* And third, the court must assess the whether the government's action in shutting off the speech was legitimate, in light of the applicable standard of review. *Id.* For the first step in the inquiry, if the court concludes that the government has not regulated speech, or that the speech is not entitled to protection, the inquiry ends.

1. Plaintiff does not have a First Amendment right to limitless communication with Lowell Area Schools staff.

Here, the First Amendment is not implicated. "The right to communicate is not limitless." *Lovern v. Edwards*, 190 F.3d 648, 656 (4th Cir. 1999). Rather, "School officials have the authority to control students and school personnel on school property, and also have the authority and responsibility for assuring that parents and third parties conduct themselves appropriately on school property." *Lovern*, 190 F.3d at 655. Moreover, the First Amendment does not guarantee

Plaintiff an audience with public official; there is no "constitutional right to force the government to listen to [plaintiff's] views." *See Minnesota St. Bd. For Community Colleges v. Knight*, 465 U.S. 271, 283-284; 104 S.Ct. 1058 (1984).

In *Gaines-Hanna v. Farmington Pub. Sch. Dist.*, No. 04-74910, 2007 WL 1201567, at *2 (E.D. Mich., April 20, 2007), the Eastern District of Michigan was confronted with facts and legal theories comparable to this when the plaintiff filed suit alleging, among other things, violations of the First Amendment based, in part, on an alleged order that all communications would need to be with administrations rather than individual teachers. "In general, Plaintiff alleges that the Teacher Defendants violated her right to direct the upbringing of her children and her right to free speech by refusing to meet or communicate with her on her terms." *Id.* Plaintiff alleged, in part, that, "[a]ll Defendants were ordered not to deal with Plaintiff, send any and all contact or communication to the principal in every single school." (*Id.*) (emphasis from original removed). Additionally, Plaintiff took issue with a letter sent to her by the district's attorney, which provided in part:

> The language, customs and behaviors you have exhibited in your correspondence and dealings with district personnel will no longer be accepted. By the same token, certain responses of school staff will be curtailed as the district can no longer devote the amount of time requested by you for issues which are unreasonable, inappropriate and frequently based on your perceptions which are not shared by anyone else.
>
> * * *
>
> Essentially, your conduct interferes with school district staff's ability to perform their jobs . . . .
>
> Accordingly, you are placed on notice to abide by all school rules and building policies and conduct yourself in a civil and polite manner. You will no longer be receiving the special attention and additional services that you have received in the past. Your demands or requests for special conferences, phone calls and meetings with staff member will not necessarily be accommodated. Displays of anger, slanderous statements, raised voices, accusations, rude behavior, finger pointing or intimidating conduct will no longer be tolerated by district staff . . .

Id. at *3.

The Court first rejected Plaintiff's substantive due process and First Amendment claims against the teacher defendants, reasoning:

> Assuming that Plaintiff's allegations regarding the Teacher Defendants are true, they do not constitute a violation of Plaintiff's parental rights arising from substantive due process. Nor do such allegations constitute a First Amendment violation. *See Lovern*, 190 F.3d at 656 ("The right to communicate is not limitless."). The constitution does not require that teachers communicate with parents on terms imposed by the parents. Therefore, the court will grant the Teacher Defendants' motion for summary judgment with respect to Counts I and II of Plaintiff's complaint (due process and free speech claims).

Id. at *4.

Next, the Court concluded Plaintiff did not state a First Amendment claim against the district administrators involved:

> Plaintiff generally alleges that most of the Administrative Defendants "denied all contact and any writing" with her and "conspired to stop Plaintiff from her speech." See Pl.'s Br. at 20-23. Plaintiff also suggests that she suffered retaliation for engaging in activity protected by the First Amendment, although she does not specify how the Administrative Defendants allegedly retaliated against her.
>
> The First Amendment does not guarantee Plaintiff an audience with public officials such as the Administrative Defendants. *See Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 283-84, 104 S.Ct. 1058, 79 L.Ed.2d 299 (1984) (holding the appellees had "no constitutional right to force the government to listen to their views"). Accordingly, even assuming Plaintiff's allegations are true, the Administrative Defendants did not violate Plaintiff's rights by denying "all contact and any writing" with her.

Id. at *6.

Similar to the Plaintiff in *Gaines-Hanna*, the correspondence from Mr. Gough directed Plaintiff to communicate with building-level administration or the superintendent. Importantly, this is not a "ban" on Plaintiff speaking or sharing her views. To the contrary, Plaintiff continues to share her views at Board of Education meetings and was welcomed to communicate directly

with building-level administrators or the superintendent. As in *Gaines-Hanna* Plaintiff asserts this request to communicate with certain staff members violates her First Amendment rights. But the ability to communicate is not limitless. Plaintiff has not identified any constitutional right to speak with a certain employee of Lowell Area Schools.

Ultimately, the First Amendment is not implicated by the request that Plaintiff not communicate directly with staff, but rather first communicate with Lowell Area Schools' administrators.

2. Even if the First Amendment was implicated, Plaintiff's Complaint fails to state a claim for "banned" speech or prior restraints.

Plaintiff asserts two distinct First Amendment claims: banned speech and prior restraints. To be clear, Plaintiff's speech has not been banned. While Plaintiff claims that Mr. Gough has implemented a "policy and silenced" her by allegedly instituting a "ban" on "bullying, harassment, or misinformation," the allegations in Plaintiff's Complaint do not support such a position. Rather, Plaintiff's allegations regarding a "ban" on "bullying, harassment, or misinformation" comes from Mr. Gough's public comments at the April, 2024 Board meeting. (ECF No. 1, PageID.33, ¶ 131). According to Plaintiff's Complaint, Mr. Gough said, in part:

> If you read the letter that she presented as evidence it requests that she stop directly referencing staff in her social media because of her repeated posts that staff perceives as derogatory, disparaging, and disrespectful. The only directive in that letter is that she have no contact with staff prior to permission from the involved principal or superintendent so that we can protect our staff from any further inappropriate behavior. She claims that we are violating her First Amendment right by asking that she treat others with decency, dignity, and respect in her public discourse. There is no First Amendment right to bullying, harassment, or misinformation.

(ECF No. 1, PageID.25-26, ¶ 94). Nothing in Mr. Gough's statement could under any circumstances be interpreted as a "ban" on anything.

Rather, as Mr. Gough alluded to in his public comment, the letter sent to Plaintiff requested that she cease from any reference to Lowell Area Schools employees on social media, and if she failed to do so, her actions "may result in further action including but not limited to all available legal remedies." (ECF No. 1-7, PageID.178). Plaintiff's speech is not "banned" by Mr. Gough requesting that Plaintiff refrain from making disparaging comments about school employees online. Moreover, Mr. Gough's request that Plaintiff not have contact with District staff without first involving a building principal or the superintendent is not a "ban" on speech. As quite literally written into the document, Plaintiff is invited to contact building or district-level administration. Additionally, as Plaintiff admits throughout her Complaint, as is borne out through the public record of Lowell Area Schools, Plaintiff continues to present public comment at Board of Education meetings.

Next, Plaintiff's allegations do not implicate the doctrine of prior restraints. The Sixth Circuit has held that "[t]he term 'prior restraint' describes administrative and judicial orders that block expressive activity before it can occur." *Polaris Amphitheater Concerts, Inc. v. City of Westerville*, 267 F.3d 503, 506 (6th Cir. 2001) (citing *Alexander v. United States*, 509 U.S. 544, 550, 113 S.Ct. 2766 (1993)). "Under a system of prior restraint, the lawfulness of speech turns on the advance approval of government officials." *Id.*; *see McGlone v. Bell*, 681 F.3d 718, 733 (6th Cir. 2012) ("Because an unaffiliated speaker's exercise of a First Amendment right depends on the prior approval of a public official, the policy imposes a prior restraint."); *Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty.*, 274 F.3d 377, 400 (6th Cir. 2001) ("A 'prior restraint' exists when the exercise of a First Amendment right depends on the prior approval of public officials."). Typically, a prior restraint refers to a licensing or administrative scheme that

places "unbridled discretion in the hands of a government official or agency." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988).

However, before something will be considered a prior restraint, the government action must be based on the content of the speech. The distinction between a prior restraint and a time, place, and manner restriction can be fine:

> By 'prior restraint' Blackstone and modern courts alike mean censorship – an effort by administrative methods to prevent the dissemination of ideas or opinions thought dangerous or offensive. The censor's concern is with the content of speech, and the ordinary judicial safeguards are lacking. 'Prior restraints' that do not have this character are reviewed under the much more permissive standard applicable to restrictions merely on the time, place, or manner of expression.

Blue Canary Corp. v. City of Milwaukee, 251 F.3d 1121, 1123 (7th Cir. 2001).

Plaintiff's allegations and the documentary evidence submitted with her Complaint do not support the existence of a prior restraint. Again, Plaintiff is permitted to communicate with Lowell Area Schools through its administrators and superintendent, and, in addition, she continues to make public comment at Board of Education meetings. Moreover, before even considering whether any action could be considered a prior restraint, the government action must be based on the content of the speech. Requesting that Plaintiff communicate with building-level administration or the superintendent and not contacting the staff places no restriction on the content of Plaintiff's speech. It is entirely content neutral.

3. Plaintiff fails to state a claim for due process void for vagueness.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108; 92 S.Ct. 2294 (1972). The void-for-vagueness doctrine is concerned with "two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may

act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminating way." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253; 132 S.Ct. 2307 (2012). When free speech is implicated, the Constitution demands "rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Id.* at 253-254. However, "[t]he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498; 102 S.Ct. 1186 (1982). Civil laws are held to a less strict vagueness standard than criminal laws "because the consequences of imprecision are qualitatively less severe." *Id.* at 498-499.

Plaintiff's vagueness claim is exceptionally vague regarding the alleged "enactment" she is challenging. Plaintiff's allegations are nothing more than threadbare, conclusory allegations regarding a prohibition on "bullying, harassment, or misinformation". As discussed *supra*, the only reference to "bullying, harassment, or misinformation" comes from Mr. Gough's public comments at the April, 2024 Board meeting where it's alleged Mr. Gough said, in part:

> If you read the letter that she presented as evidence it requests that she stop directly referencing staff in her social media because of her repeated posts that staff perceives as derogatory, disparaging, and disrespectful. The only directive in that letter is that she have no contact with staff prior to permission from the involved principal or superintendent so that we can protect our staff from any further inappropriate behavior. She claims that we are violating her First Amendment right by asking that she treat others with decency, dignity, and respect in her public discourse. <u>There is no First Amendment right to bullying, harassment, or misinformation.</u>

(ECF No. 1, PageID.33, ¶ 131).

Plaintiff then appears to parlay this one sentence into an allegation of a prohibition on "bullying, harassment, or misinformation" with no factual development whatsoever. However,

Plaintiff offers no factual support for this claim. Plaintiff's Complaint is plainly insufficient to satisfy the requirements of Fed. R. Civ. P. 8(a)(2), and is therefore subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(6). As with her First Amendment claims, the factual allegations in Plaintiff's Complaint regarding the void-for-vagueness claim fail to give sufficient notice to the Defendants as to what claims are alleged.

The remainder of Plaintiff's allegations regarding the void-for-vagueness claim are similarly vague and infirm. Instead, the remainder of her allegations claim, without any factual development, that:

- "The absence of any clear or meaningful standards for 'bullying, harassment, or misinformation' results in a serious risk that these prohibitions will be enforced in an arbitrary or discriminatory manner, or will be used to target speech based on the viewpoint the speaker expresses." (ECF No. 1, PageID.42, ¶ 176).
- She claims, without any further factual development that this unknown "policy has been enforced in an arbitrary or discriminatory manner and has been used to target speech based on the viewpoint Plaintiff has expressed." (*Id.* at ¶ 177).
- Plaintiff then finally claims, without any factual development, that "due to the inherent vagueness of the prohibitions . . . members of the community (including parents, students, administrators, or teachers) will choose not to speak about certain topics . . . ." (*Id.* at ¶ 178).

It is well established that "a legal conclusion couched as a factual allegation" need not be accepted as true on a motion to dismiss, nor are mere recitations of the elements of the cause of action sufficient. *Hensley Mfg. v. Propride, Inc.,* 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555). The pleadings standard required in Rule 8 does not require detailed factual allegations, but it demands more than an unadorned, "the-defendants-unlawfully-harmed-me accusation". *Iqbal*, 556 U.S. at 678. A complaint is insufficient if it tenders naked assertions devoid of further factual enhancement. *Twombly*, 550 U.S. at 555-557 (internal citations omitted).

Plaintiff's Complaint fails to state a claim for due process void-for-vagueness.

C. The Individual Defendants Are Entitled To Qualified Immunity.

Under the doctrine of qualified immunity, "government 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." *Harlow v. Fitzgerald*, 457 U.S. 800, 818; 102 S.Ct. 2727 (1982). Courts undertake a two-step inquiry in considering a qualified-immunity claim: (1) whether a constitutional right was violated on the facts alleged, and (2) whether the right was "clearly established" at the time of the violation. *Wright v. City of Euclid*, 962 F.3d 852, 864 (6th Cir. 2020).

As discussed at length above, there is no underlying constitutional violation. Plaintiff was not engaged in speech protected by the First Amendment and, even if there was speech involved, Plaintiff has failed to state a claim for banned speech or prior restraints.

Even if the first hurdle is cleared, a parent's alleged right to communicate with school employees at Lowell Area Schools on the parent's terms was not clearly established. To the contrary, "[t]he right to communicate is not limitless." *Lovern*, 190 F.3d at 656. Rather, "School officials have the authority to control students and school personnel on school property, and also have the authority and responsibility for assuring that parents and third parties conduct themselves appropriately on school property." *Lovern,* 190 F.3d at 655. Moreover, the Supreme Court has reasoned there is no "constitutional right to force the government to listen to [plaintiff's] views." *See Knight*, 465 U.S. at 283-284. While unpublished, the Eastern District of Michigan in *Gaines-Hanna* examined nearly identical factual circumstances and found "the First Amendment does not guarantee Plaintiff an audience with public officials such as the Administrative Defendants." *Gaines-Hanna*, 2007 WL at *6.

Finally, even Plaintiff in her Complaint concedes, "this case is a case of first impression in Michigan jurisprudence." (ECF No. 1, PageID.27, ¶ 96). Plaintiff's admission militates in favor of a finding that the right to communicate with school officials on the parent's terms was not clearly established at the time of the actions alleged in the Complaint.

VI. PLAINTIFF FAILS TO STATE A TITLE IX CLAIM BECAUSE SHE WAS NOT DISCRIMINATED AGAINST ON THE BASIS OF HER SEX.

Title IX provides that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

Plaintiff's allegations do not demonstrate any sex-based discrimination that would trigger the protections of Title IX. Instead, Plaintiff relies on a series of conclusory allegations daisy-chained together to try and fashion sex-based discrimination out of thin air where none exists. Plaintiff alleges that she has been "subjected to harassment because the policy is based on DEI, SEL, social justice issues, and alternate sex and gender ideologies through sexually explicit books and lifestyles, which creates a harassing hostile environment specifically on the basis of the sex of the persons involved." (ECF No. 1, PageID.44) (emphasis added). She then alleges: "[t]he policy of allowing pornography or sexually explicit material to minors based on DEI, SEL, social justice issues, and alternate sex and gender ideologies through sexually explicit books and lifestyles, and then silencing parents who speak against it is harassment based on sex." (*Id.*). Plaintiff's allegations eventually make clear that the discrimination is not sex-based, but rather stems back to her First Amendment claims: "[t]he harassment is ongoing, preventing Plaintiff from speaking to her children's educators who are promoting the very thing she objects to." (*Id.* at PageID.45).

As with Plaintiff's other claims, Plaintiff's Title IX claim relies on conclusory allegations that simply tenders naked assertions devoid of any factual enhancement. *Twombly*, 550 U.S. at

555-557. It is well established that "a legal conclusion couched as a factual allegation" need not be accepted as true on a motion to dismiss, nor are mere recitations of the elements of the cause of action sufficient. *Hensley Mfg.*, 579 F.3d at 609.

Plaintiff does not allege any discrimination against her based on *her* sex, but some unknown hostile environment on the basis of the sex of the individuals in the books and lifestyles to which she apparently objects. Plaintiff has failed to allege that Lowell Area Schools favored one sex over another. "That shortcoming dooms any claim for relief under the traditional understanding of Title IX." *Chisholm v. St. Marys City Sch. Dist. Bd. of Educ.*, 947 F.3d 342, 351 (6th Cir. 2020). This is not sex-based discrimination at all, let alone sex-based discrimination against Plaintiff. In reality, Plaintiff repackages her First Amendment claims as sex-based discrimination under Title IX.

Plaintiff's Complaint does not state a claim under Title IX.

VII. PLAINTIFF'S COMPLAINT FAILS TO STATE A VIABLE CLAIM FOR BREACH OF FIDUCIARY DUTY.

Under Michigan law, to establish a claim for breach of fiduciary duty a plaintiff must prove "(1) the existence of a fiduciary duty; (2) a breach of that duty; and (3) proximately causing damages." *Delphi Auto. PLC v. Absmeier*, 167 F. Supp. 3d 868, 884 (E.D. Mich. 2016). "A breach of fiduciary duty claim requires that the plaintiff reasonably reposed faith, confidence, and trust in the fiduciary." *Moross Ltd. P'ship*, 466 F.3d 508, 516 (6th Cir. 2006). Further, a fiduciary duty arises in the following contexts:

> (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.

Mike Vaughn Custom Sports, Inc. v. Piku, 15 F.Supp.3d 735, 753 (E.D. Mich. 2014).

For a fiduciary duty to exist, a fiduciary relationship must also exist. *Grand Traverse Band of Ottawa & Chippewa Indians v. Blue Cross & Blue Shield of Michigan*, 391 F. Supp. 3d 706, 716 (E.D. Mich. 2019). There are certain relationships that automatically yield a fiduciary obligation: "trustees to beneficiaries, guardians to wards, attorneys to clients, and doctors to patients." *Ford Motor Co. v. Ghreiwati Auto*, 945 F. Supp. 2d 851, 865 (E.D. Mich. 2013) citing *Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P. C*, 107 Mich.App. 509, 515; 309 N.W.2d 645, 648 (1981). "[F]iduciary relationships can arise in several different situations .... [and a] fiduciary relationship ... exists when one person or entity has a duty to act for another on matters falling within the scope of the relationship." *Midwest Healthplan v. Nat'l Med. Health Card. Sys*., 413 F.Supp. 823, 833 (E.D. Mich. 2005).

Michigan courts have "been reluctant to extend the cause of action for breach of fiduciary duty beyond the traditional context." *Id.* (citing *Teadt v. Lutheran Church Missouri Synod,* 237 Mich.App. 567; 603 N.W.2d 816, 823 (1999)). *See also Jarbo v. BAC Home Loan Servicing*, 10–12632, 2010 WL 5173825, at *15 (E.D. Mich. Dec. 15, 2010) (granting motions to dismiss the breach of fiduciary duty claims because Michigan courts have not recognized a duty in the bank/lender relationship) (citation omitted).

A. Plaintiff Has Not Established A Fiduciary Relationship Existed.

Recently, the Sixth Circuit affirmed an Ohio District Court's ruling that a plaintiff failed to plead a fiduciary relationship between her and defendants wherein the plaintiff alleged a school district compliance officer and business manager owed a fiduciary duty to conduct an investigation in a fair and unbiased manner and was bound by the state's ethics rules. The defendants argued the law does not recognize a fiduciary duty created by ethics rules and that the plaintiff failed to

allege any fiduciary duty owed. *Ingram v. Regano*, No. 1:19CV2926, 2021 WL 1214746, at *10 (N.D. Ohio Mar. 31, 2021), aff'd, No. 23-3222, 2023 WL 6634262 (6th Cir. Oct. 12, 2023). The plaintiff alleged that the failure to act as a neutral investigator creates a fiduciary obligation. *Id*.

Ultimately the District Court ruled that plaintiff's breach of fiduciary duty claim suffers from a fatal flaw in that the plaintiff could not show the school administrators owed the plaintiff any fiduciary duty to conduct an investigation for her benefit. *Id.* at *4. Comparable to Michigan law, in Ohio, a fiduciary relationship arises when "special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *Ingram*, 2023 WL 6634262, at *4 (6th Cir. Oct. 12, 2023). The Sixth Circuit affirmed the District Court's ruling to dismiss the plaintiff's fiduciary duty claim holding that the defendants did not agree to act primarily for the plaintiff's benefit. *Id*.

Here, Plaintiff alleges Defendants owed a common law and other fiduciary duties to Plaintiff through their position as state actors and that Defendants negligently, recklessly, and intentionally breached that duty when Defendants allegedly violated her constitutional right to freedom of speech. However, Plaintiff's claim is supported by nothing beyond this allegation. Plaintiff presents no proof to support whether Defendants agreed to act primarily for the benefit of Plaintiff or whether Plaintiff was governed by Defendants or dependent on Defendants to make decisions. Plaintiff pleads no facts from which it can be concluded that Defendants assumed a fiduciary duty in the course of a school official/parent relationship. A school official/parent relationship has not been recognized as a circumstance under Michigan law that would impose fiduciary duties.

Plaintiff cannot manufacture a fiduciary relationship or a fiduciary duty without proof in support. In *Garber-Cislo v. State Farm Auto. Ins. Co*., No. 10-13301, 2011 WL 13217323, at *3

(E.D. Mich. Dec. 16, 2011), the plaintiff argued that the defendant "voluntarily assumed" a fiduciary duty via its "Commitment to Policyholders". The District Court held that the claim for breach of fiduciary duty was futile because the plaintiff did not establish that any fiduciary duty existed under the circumstances presented. *Id*.

A fiduciary duty cannot be breached if it does not exist. No special relationship was created between Plaintiff and Defendants. Moreover, Defendants' roles as employees of Lowell Area Schools did not require them to act "primarily for the benefit" of Plaintiff. Plaintiff's mere allegation that a fiduciary relationship exists does not meet the definition of the conduct that would give rise to a fiduciary duty.

Even assuming that a fiduciary relationship can arise out of a school official/parent relationship, Plaintiff has done nothing more than allege a breach of fiduciary duty. Such bare-boned recitals are not enough to survive a Rule 12(b)(6) motion. To survive a 12(b)(6) motion and to prevail on a breach of a fiduciary duty claim, a plaintiff must show that the "position of influence has been acquired and abused," or the "confidence has been reposed and betrayed." *Clausen as Trustees of Clausen Tr. v. Burns & Wilcox, Ltd*., No. 20-11193, 2023 WL 3606646, at *6 (E.D. Mich. May 23, 2023) (citing *Vicencio v. Ramirez*, 536 N.W.2d 280, 284 (Mich. Ct. App. 1995)).

Plaintiff has failed to properly allege the existence of a fiduciary relationship. As such, Plaintiff has failed to state a claim for breach of fiduciary duty under any of her theories.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated, Defendants Lowell Area Schools, Nate Fowler, Dan VanderMeulen, Steve Gough, Jacob Strotheide, Abby Wiseman, Ron Acheson, and Christine Beachler, respectfully request that this Honorable Court grant their motion pursuant to Fed. R. Civ. P. 12(b)(6) and dismiss Plaintiff's Complaint against them in its entirety with prejudice.

Respectfully Submitted,

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Dated: August 26, 2024

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