APPENDIX A (4th)

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 20-1683

BRIAN DAVISON,

Plaintiff - Appellant,

v.

DEBORAH ROSE; TRACY STEPHENS; ERIC HORNBERGER; JILL TURGEON; BRENDA SHERIDAN; JEFFREY MORSE; WILLIAM FOX; KEVIN KUESTERS; JOY MALONEY; ERIC DEKENIPP; SUZANNE G. DEVLIN; LOUDOUN COUNTY SCHOOL BOARD,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony John Trenga, Senior District Judge. (1:16-cv-00540-AJT-MSN)

Argued: September 23, 2021; Decided: December 3, 2021

Before GREGORY, Chief Judge, and KING and FLOYD, Circuit Judges.

Affirmed by published opinion. Judge Floyd wrote the opinion, in which Chief Judge Gregory and Judge King joined.

Michael Allen Bragg, BRAGG LAW, Abingdon, Virginia, for Appellant. Julia Bougie Judkins, BANCROFT, MCGAVIN, HORVATH & JUDKINS P.C., Fairfax, Virginia, for Appellees.

FLOYD, Circuit Judge:

Plaintiff Brian C. Davison, the parent of children attending Seldens Elementary School (Seldens) in Loudoun County, Virginia, at times relevant to this litigation, claims that between 2015 and 2016, Defendants engaged in conduct restricting his First and Fourteenth Amendment rights in violation of 42 U.S.C. § 1983.

On May 13, 2016, Davison filed this federal action. He sued the Loudoun County School Board (LCSB), various members of the LCSB, and current and former employees of the Loudoun County Public

School System (LCPS), in both their official and individual capacities, for injunctive relief and monetary damages. Defendants Morse, Sheridan, Rose, Hornberger, Fox, Turgeon, Keusters, and Maloney at material times served on the LCSB. Defendant Stephens was the principal of Seldens between July 2011 and June 2016 and is now the principal of Aldie Elementary School, also in LCPS. Defendant Devlin served as the supervisor of security for LCPS between 2014 and 2019.

The district court granted Defendants' Motion to Dismiss the claims against the LCSB based on res judicata. On May 1, 2020, the district court denied all of Davison's remaining claims, except for one claim for injunctive relief against Defendant Morse concerning Davison's access to Morse's social media pages (Count 1(a)). The parties voluntarily dismissed that claim after Morse unblocked Davison on social media. Davison now appeals the district court's decisions on several claims against several Defendants. We affrm the district court's decisions on all counts.

I.

A.

This case arises in large part from no-trespass letters Defendants issued to Davison in 2015 that prohibited his presence on school property and attendance at any school- sponsored activities unless

authorized. However, the antagonism between the parties began in 2014, when Davison sued the Virginia Department of Education (VDOE) in state court to obtain Student Growth Percentiles (SGPs) for Loudoun schools. The LCSB moved to intervene in Davison' s lawsuit to prevent him from obtaining SGPs, but VDOE released all Virginia SGPs in February 2015.

Based on this SGP information and other grievances he had with the LCSB and LCPS, Davison began to publicly criticize LCPS policies in January 2015, including allegations that LCPS violated federal law, misled the public regarding budget information, and flouted Virginia' s Conflict of Interest Act. Davison frequently chastised LCSB members in many forums and during public comment periods at LCSB meetings. He routinely emailed individual LCSB members and made multiple social media posts about his complaints. Davison also commented on LCSB members' Facebook and other social media platforms. LCSB members eventually voiced personal safety concerns about Davison, prompting a law enforcement officer to attend all meetings after January 20, 2015. At the time of the district court's summary judgment opinion, Davison was banned from accessing board member Morse's Twitter account. Morse has since removed the ban.

In September 2015, Davison appeared at a back-to-school night and a PTA meeting at Seldens where,

according to witnesses, his behavior, conduct, tone, and demeanor prompted multiple complaints. On September 30, 2015, Principal Stephens served Davison with a no-trespass letter,[1] which was later amended and supplemented with no- trespass letters issued on behalf of the LCSB on October 8 and October 14, 2015. The no- trespass ban prevented Davison, for the remainder of that school year, from (1) attending any public events inside Seldens that were open to the public, including PTA meetings; (2) using any outdoor public facilities, such as the track or playgrounds; and (3) dropping off or picking up his children at the school without first getting permission from Stephens. Still, Davison could attend LCSB meetings and participate in the public comment periods. The letter informed Davison that he could appeal.

The September 30 and October 8 no-trespass letters cited multiple reasons for their issuance including: (1) Davison's behavior at the back-to-school night where he interrupted both of his children's teachers to raise non-germane questions; and (2) Davison's behavior at the September 22, 2015, PTA meeting, where Davison, with an aggressive tone, accused Stephens of violating the law and students' privacy and, allegedly said to Stephens, "Try me. Try me. You'll end up in

[1] Before issuance, the Director of School Administration reviews no-trespass letters based on content and rationale to determine whether there is a grave or significant disruption to the learning environment, school operations, or tranquility of the school.

Federal Court." JA 3789. In October 2015, Davison involved his children in his efforts. His children, at his direction, distributed flyers on school property during their class time, presenting Stephens's picture and Davison's criticisms of school policies and alleged violations of federal law. This and other behavior concerned school officials about the children's welfare.

The October 14 no-trespass letter restated the restrictions and highlighted Davison' s behavior, claiming he violated the conditions of the September 29 letter and that he wrote in the emails that he considered Stephens' prior restrictions "null and void." Additionally, Stephens wrote:

> [Y]ou have stated publicly that you are a Navy veteran, publicly made allusions to American Sniper, used the term "SHOTGUN" in reference to a public meeting, referred to "BE PREPARED" regarding a public meeting, referred to a public school as a "target rich environment," used a quote that referred to a "hand grenade," made references to public officials' children, and made a reference to public officials meeting their creator [, which] have all contributed to intense fear among staff, caused disruption and time off tasks, causing great alarm and concern for the safety of Seldens Landing Elementary School. Your tone has been both aggressive and intimidating. Staff has [re]viewed your demeanor and are very concerned about your behaviors.

JA 817. The October 14 letter also provided Davison the opportunity to appeal. It further made accommodations for Davison as a parent, including quarterly telephone conferences with Stephens regarding Davison's children's progress in school.

Also in October 2015, Stephens, who was a mandatory reporter of child abuse under Virginia law, began receiving reports about Davison' s children from their teachers, two other teachers, and community members, who raised concerns about the children's well- being. For example, Kathy Gims, a teacher at Seldens, declared that she saw Davison's son handing out flyers as class was starting and the boy told her that Davison told him that he had to hand out flyers. Gims told the boy to go to class and she reported the incident to Stephens. Another teacher, Lori Haskins, reported to Stephens several instances where Davison's daughter was crying or visibly upset. The husband of one of Davison's children's teachers wrote to the school district that, based on Davison's behavior towards his wife, he was very concerned that Davison was mentally unstable and needed intervention: "[i]n my mind, Brian Davison is unstable, irrational, and is creating an unacceptable level of fear, concern, and anxiety at a school of 80o+ students.,, JA 2,262. Stephens then conferred with her supervisors and counsel about her responsibilities according to the Child Protective Services (CPS) guidelines for mandatory reporters. On October 27, 2015, Stephens

contacted CPS with concerns regarding Davison and his children. CPS investigated the matter and dismissed all allegations.

Davison appealed the no-trespass letters to Stephens, who denied the appeal. Davison then filed an administrative appeal, which was also denied. On December 1,2015, Davison provided additional information to the LCSB in an appeal of the ban. That same day, the LCSB denied the appeal.

On December 22, 2015, Davison filed a Petition for Review of the no-trespass letters in the Circuit Court of Loudoun County, Virginia. See *Brian C. Davison, Petitioner v. Loudoun Cnty. Sch. Bd.*, CL00098468-00 (Va. Cir. Ct. 2015). In the Petition, Davison claimed that the no-trespass letter violated his First and Fourteenth Amendment rights. Davison later filed a Motion for Injunctive Relief, requesting that the state court enjoin the LCSB from enforcing the no-trespass letters.

After the federal lawsuit was filed, the LCSB updated its facility use policy (Policy 6310) in November 2018. Policy 6310, which is still in effect, banned any recipient of a no-trespass letter from a LCPS official from using any outdoor facilities at any time, regardless of the specifics within their individual no-trespass letter.

B.

Davison filed this federal suit on May 13, 2016. At the time, Davison' s state court petition was still pending, so the district court stayed the federal case pending resolution of the state court petition. On August 5, 2016, the state court dismissed Davison's petition with prejudice. The district court accordingly lifted its stay on September 9, 2016, to allow Defendants to litigate their previously filed motions to dismiss. On July 28, 2017, the court dismissed Davison's Amended Complaint, holding that res judicata or qualified immunity barred each of the claims.

Davison appealed the district court's dismissal. On March 19, 2018, the Fourth Circuit remanded, concluding that the district court's order was not "final"for purposes of appellate jurisdiction because the court did not consider Davison's claims for injunctive relief. On April 19, 2019, the district court granted Defendants' renewed Motions to Dismiss Davison's claims for injunctive relief as to Defendants Rose, Stephens, Hornberger, Turgeon, Sheridan, Morse, Maloney, and Devlin and dismissed the action as moot as to Defendants Fox, Keusters, DeKenipp, and the LCSB.

On April 30, 2019, Davison filed a Motion for Reconsideration of the district court's July 28, 2017, and April 19, 2019 Orders. On July 31, 2019, the district court granted the Motion for Reconsideration and reinstated Davison's claims for injunctive relief

against certain individual Defendants under Counts 1, 2, 4, 5, 6, and 7 and also Davison's claims for monetary relief against certain individual Defendants under Counts 4, 5, 7, and 8. However, the district court reafiirmed dismissal of all claims against the LCSB and the individual Defendants in their official capacities. On December 19, 2019, the district court entered the parties' joint stipulation of voluntary dismissal of all claims against Defendant DeKenipp and Counts 1, 3, 4, 5, 6, and 7 against Defendants Maloney, Turgeon, Keusters, and Fox.

On May 1, 2020, the district court ultimately denied Davison' s Motion for Partial Summary Judgment and Defendants' Motion for Summary Judgment as to Davison's claim for injunctive relief against Defendant Morse in Count 1(a) (concerning access to his social media pages), but otherwise granted Defendants' Motion on all remaining claims. The parties voluntarily dismissed the claim for injunctive relief in Count 1(a) against Morse after he unblocked Davison on social media. Davison appeals this order, as well as the July 28, 2017, April 19, 2019, and July 31, 2019 orders.

A summary of the claims Davison appeals is as follows:

• Count 1: Davison appeals the district court's (1) dismissal of his First Amendment claim against the LCSB in its official capacity for injunctive relief

and monetary damages because he was blocked on various social media pages and (2) denial of his First Amendment claim for monetary damages against Rose and Hornberger in their individual capacities because they allegedly censored Davison at LCSB meetings on summary judgment.

• Count 2: Davison appeals the district court's (1) dismissal of his First Amendment retaliation claim against the LCSB in its official capacity for injunctive and damages and (2) denial of his First Amendment retaliation claim for monetary damages against Rose, Hornberger, Stephens, Devlin, Morse, Fox, Turgeon, Kuesters, and Maloney in their individual capacities on summary judgment.

• Counts 4 and 5: Davison appeals the district court's decisions regarding his First Amendment free speech and assembly claims against the no-trespass ban, including (1) dismissal of his claims for injunctive relief and monetary damages against the LCSB in its official capacity and (2) denial of his claims for injunctive relief against Morse and Sheridan in their individual capacities and for monetary damages against Rose, Hornberger, Stephens, Morse, and Sheridan in their individual capacities on summary judgment.

• Count 6: Davison appeals the district court's (1) dismissal of his Fourteenth Amendment procedural due process claim for injunctive relief and

monetary relief against LSCB and (2) denial of his claims for injunctive relief against Stephens, Morse, and Sheridan on summary judgment.

II.

This Court reviews an appeal of summary judgment de novo, "applying the same legal standards as the district court and viewing all facts and reasonable inferences therefrom in the light most favorable to the moving party." *Carter v. Fleming*, 879 F.3d 132, 139 (4th Cir. 2018) (quoting *T-Mobile Ne. LLC v. City Council of Newport News*, 674 F.3d 380, 384-85 (4th Cir. 2012). Likewise, we review de novo grants of qualified immunity, *Cox v. Quinn*, 828 F.3d 227, 235 (4th Cir. 2016), and Rule 12(b)(6) dismissals of claims, *King v. Rubenstein*, 825 F.3d 206, 214 (4th Cir. 2016). Reviewing motions to dismiss, we "accept as true all well-pleaded allegations and view the complaint in the light most favorable to the plaintiff." *Philips v. Pitt Cnty. Mem 'I Hosp.*, 572 F.3d 176, 179-80 (4th Cir. 2009).

III.

The district court dismissed all claims against the LCSB and the individual defendants in their official capacities in Counts 1 through 7 because it found res judicata precluded those claims. Davison appeals that decision for all claims against the LCSB

in Counts 1, 2, and 4-6.[2] We affirm the district court.

Under Virginia law, a valid res judicata defense requires: (1) a final judgment issued on the merits of a prior suit; (2) identity of parties-or those in privity with the parties- between the prior and present suits; and (3) that the prior proceeding arose out of the same conduct, transaction, or occurrence. See *Lee v. Spoden*, 776 S.E.2d 798, 804-06 (Va. 2015). Under Virginia law, as a general rule, a dismissal of a claim "with prejudice" constitutes "an adjudication on the merits, and final disposition, barring the right to bring or maintain an action on the same claim or cause." *Reed v. Liverman*, 458 S.E.2d 446, 447 (Va. 1995) (citing *Black's Law Dictionary* 469 (6th ed. 1990)). Furthermore, a dismissal with prejudice generally "is as conclusive of the rights of the parties as if the suit had been prosecuted to a final disposition adverse to the plaintiff." Id. However, the words "with prejudice" must "be considered in light of the circumstances in which they are used." Id. (quoting *Va. Concrete Co. v. Bd. of Supervisors*, 197 Va. 821, 825 (Va. 1956)).

Nothing about the circumstances of this case suggests that the state court's dismissal was anything other than a resolution constituting a final

[2] Davison stated he appeals the July 31,2019, order but the chart he provided in his brief, Op. Br. at 12, only shows that he appeals just the LCSB official-capacity claims, not the claims against individual defendants in their official capacity.

adjudication on the merits. In the state court proceedings, Davison admitted there was no 'justiciable controversy" remaining for the court to decide once the no-trespass letter expired and he was allowed back on LCPS grounds. He had "no reason to believe LCSB [would] issue another ban in bad faith." JA 772. Davison contended in his motion for reconsideration that the state court granted a motion for nonsuit. However, the state court did not grant Davison' s motion for nonsuit. Infact, the court told Davison that it did not have the authority to enter a nonsuit and that the only option was "outright dismissal or withdrawing your appeal." JA 772 n.6. Davison then agreed to a dismissal with prejudice. JA 772; see also JA 772 n.6. Under Virginia law, this constituted a final judgment on the merits. See Reed, 458 S.E.2d at 447. Because Davison brings the same claims against the same party-LCSB-res judicata bars these claims. Davison then tried to bring the same claims against the LCSB in federal court.

Davison nonetheless contends that his claims should not be precluded because he properly invoked an *England* reservation in his nonsuit motion. See *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411 (1964). In England, the Supreme Court held that a litigant sent to state court to address an antecedent state law issue after a federal court Pullman abstention can "reserve" its right to return to federal court at the conclusion of the state court proceedings.

See id. at 415; see also *Geiger v. Foley Hoag LLP Ret. Plan*, 521 F.3d 60, 67 (1st Cir. 2008). Thus, an *England* reservation only applies after a federal court abstains under *Pullman*. *San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 339 (2005); see also *Geiger*, 521 F.3d at 67 & n. 10 ("[Under *Pullman* abstention,] [t]he right to reserve claims only arises where a federal court abstains from deciding a federal issue to address an antecedent state law issue." (emphasis added)). This case does not involve a Pullman abstention. Davison did not go to state court because a federal court sent him there to decide an antecedent state law issue. Instead, Davison went to state court in the first instance, on his own volition, and voluntarily dismissed his Petition with prejudice. While there might be some language in Davison's state court motion to nonsuit where he attempted to reserve his claims, see JA 698 ("[c]onstitutional claims are appropriately adjudicated in federal courts"), Davison never mentioned his pending action in the hearing on his motion, and he never informed the state court that he was dismissing his petition to pursue his federal action. Davison subsequently agreed to dismiss his state petition, which included federal claims, with prejudice, despite being given the opportunity to withdraw his petition. See JA 772; see also JA 772 n.6. He cannot now make an *England* reservation argument.

We thus affirm the district court's dismissal of

the claims against the LSCB under settled res judicata principles.

IV.

The only remaining claims in Count One are for monetary damages against Rose and Hornberger in their individual capacities for alleged censorship of Davison's speech at the LCSB's meetings.[3]

First Amendment claims like these proceed in three steps. First, the Court determines whether the "speech [was] protected by the First Amendment. . . ." *Cornelius v. NAACP Legal Def & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). Next, the Court "must identify the nature of the forum" in which the speaker spoke. Id. Finally, the Court must ask "whether the justifications for exclusion from the relevant forum satisfy the requisite standard." Id.

All parties agree that the school board meetings were limited public fora. See *Steinburg*, 527 F.3d at 385. "The standards that we apply to determine whether a State has unconstitutionally excluded a private speaker from use of a public forum depend on the nature of the forum." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001). Government entities may create a limited public forum in a

[3] At the summary judgment stage, this claim was also against Morse, but according to Davison's chart of his appeals, see Op. Br. at 12, he is not appealing the claim against Morse.

specified location for a limited use, so long as they do not impose those limits in a manner that discriminates based on the speaker's viewpoint. *Steinburg v. Chesterfield Cnty. Plan. Comm'n*, 527 F.3d 377, 384- 85 (4th Cir. 2008). Thus, "when the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified 'in reserving its forum for certain groups or for the discussion of certain topics.'" *Good News Club*, 533 U.S. at 106 (cleaned up) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). Even in a limited public forum, however, the government "'must not discriminate against speech on the basis of viewpoint,' and any restriction 'must be reasonable in light of the purpose served by the forum.'" *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067-68 (4th Cir. 2006) (quoting *Good News Club*, 533 U.S. at 106-07).

Since the school board meetings are limited public fora, the LCSB is "justified in limiting its meeting to discussion of specified agenda items and in imposing reasonable restrictions . . . to further the forum's purpose of conducting public business." *Steinburg*, 527 F.3d at 385. The LCSB has a policy, § 2-29, that regulates the public's participation at school board meetings. That policy, in relevant part, limits the content of public comments to matters related to

the public schools and does not allow comments "that are harassing or amount to a personal attack against any identifiable individual," including school board members. JA 31. The policy states that it limits public comment in this way in order "to maximize citizen participation and to allow the Board to transact public business in an orderly, effective, efficient and dignified manner." JA 31. Personal attacks are thus prohibited because they have the "potential for causing unnecessary delay or disruption." JA 31.

We uphold this policy. In Steinburg, we upheld a similar policy against personal attacks in a limited public forum "as necessary to further the forum's purpose of conducting good business." 527 F.3d at 387. LCSB's policy, like the one in Steinburg, is a constitutional policy for a limited public forum because it is viewpoint neutral, and the restriction is reasonable in light of the purpose of the LCSB. The policy prohibits all personal attacks, regardless of viewpoint, because they cause "unnecessary delay or disruption to a meeting." JA 31. The policy is reasonable in light of the purpose served by the forum. Like in *Steinburg*, the LCSB is justified in imposing these restrictions as they are reasonable "to further the forum's purpose of good business." 527 F.3d at 385.

Davison asserts the policy was not used in a viewpoint-neutral way towards his speech. In his brief on appeal, Davison identifies five instances "in which his on-topic, critical comments of LCSB member

actions were materially interrupted by Rose or Hornberger," which he asserts constitutes viewpoint discrimination. Op. Br. at 41. In all five videos, Davison is interrupted and warned for talking about particular board members, discussing their children, and providing comments that were not about the topic of the meeting. Davison was warned about violating §2-29 and was only asked to yield the floor once, when he tried to talk about individual board members in a public hearing about the elementary zoning process and never seemed to address the designated topic of the hearing. Indeed, in one of the five videos, Davison was allowed to speak uninterrupted, despite mentioning individual board members, when his comments focused on the topic of the board meeting.

Davison also provides comparison videos of other members of the public providing public comments where they are not interrupted, which he asserts shows he suffered viewpoint discrimination. While it is true that some of the speakers were very animated and several used explicit words, none of the speakers made comments about individual board members. All of their comments were about school-related topics pertaining to "diverse culture books" and the explicit words were from book quotations.

The restrictions are also reasonable in regard to Davison's speech. In the videos Davison identified to support his argument, the LCSB members are not going beyond the bounds of the policy to interrupt his

speech. Per the policy, the LCSB members warn Davison that his personal attacks are out of order, but he is allowed to continue speaking.

For the same reasons, Davison has alternative means of communication to express his ideas about the LCSB members. Davison has submitted evidence showing he has spoken at the LCSB many times. As the Court stated in Steinburg, "denying a speaker at the podium in a Commission hearing the right to launch personal attacks does not interfere with what that speaker could say without employing such attacks." 527 F.3d at 387 (internal quotations omitted).

Accordingly, Rose's and Homberger's decision to restrict Davison's speech at LCSB meetings did not violate his right of free speech and the district court should be affirmed.

V.

Davison asserts that the Defendants engaged in First Amendment retaliation by issuing the no-trespass letters, engaging in other speech-chilling activities in response to his comments about school board members, and contacting CPS about the welfare of his children.

A plaintiff claiming First Amendment retaliation must demonstrate that: "(1) [he] engaged

in protected First Amendment activity, (2) the defendants took some action that adversely affected [his] First Amendment rights, and (3) there was a causal relationship between [his] protected activity and the defendants' conduct." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 499 (4th Cir. 2005) (citing *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000). The district court denied all elements of Davison' s retaliation claim. We affirm.

A.

The district court held that Davison "has not as a matter of law made an adequate showing of a causal relationship between his protected speech and Defendants' decision to issue the no-trespass letter." JA 3823. Davison asserts that the court did not properly weigh facts in his favor, pointing to the no-trespass letters which in part cite Davison' s criticisms of LCPS staff. While criticisms of staff are surely protected speech, Davison omits the other stated reasons in the no-trespass bans. In particular, Stephens wrote in the last no-trespass ban letter that Davison had "made allusions to American Sniper," said "SHOTGUN' and "BE PREPARED" in reference to public meetings, called a public school a "target rich environment," and "made a reference to public officials meeting their creator," among other concerning statements. JA 817. Davison has not

sufficiently provided evidence to prove that the no-trespass ban was issued because of his protected speech, as opposed to his threats and antagonistic behavior. See *Wood v. Arnold*, 321 F. Supp. 3d 565, 581 (D. Md. 2018) (finding that "[t]he record indicates that Defendants issued the No Trespass Order based on their perception of the threats of disruption following notification of Mr. Wood's Facebook posts, not in objection to Mr. Wood's protected speech" where the plaintiff posted on social media messages that were perceived as threats), a.ff'd, 915 F.3d 308 (4th Cir. 2019). Thus, the district court correctly determined that Davison did not experience retaliation.

Davison also asserts that the LCSB censorship of his speech at school board meetings was retaliation. As discussed above, Defendants did not unlawfully curtail Davison's speech in the school board meetings. The district court's denial of these grounds of count two was not in error and is affirmed.

B.

Davison's contention that Stephens retaliated against him by contacting CPS on October 27, 2015 is a closer issue.[4] As we have recognized, there is the

[4] We note that Davison brings a First Amendment retaliation claim regarding Stephens' contacting CPS for the first time on appeal. In his complaint, Davison did not discuss the CPS issue as part of his retaliation claim. He raised the CPS issue as part

possibility of serious consequences for parents who were reported due to the mistaken suspicion of child abuse. See *Wolf v. Fauquier Cnty. Bd. of Supervisors*, 555 F.3d 311, 314 (4th Cir. 2009). However, we have also recognized that Virginia has designed its child abuse mandatory reporting system in a way that prioritizes the protection of children over the potential costs of a mistaken report. Id. The district court granted summary judgment for the Defendants on this element of count 2 and we affirm.

It is undisputed that, at the time of the CPS report, Stephens was a mandatory reporter of child abuse under Virginia law. Under Virginia Code § 63.2-1509, teachers, as well as a number of other occupation holders, who "have reason to suspect that a child is an abused or neglected child, shall report the matter immediately to the local department of the county or city wherein the child resides or wherein the abuse or neglect is believed to have occurred or to the Department's toll-free child abuse and neglect hotline." Va. Code Ann. § 63.2-1509 (emphasis added). Mandatory reporters who fail to notify the authorities are subject to fines. *Id.* As this Court has recognized, "[u]nder Virginia law, reporters are protected." *Wolf*, 555 F.3d at 317. A person who reports suspected child abuse pursuant to § 63.2-1509 "shall be immune from

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of his state law defamation claim in Count 8, but does not appeal the district court's denial of his claims on summary judgment.

any civil or criminal liability in connection therewith, unless it is proven that such person acted in bad faith or with malicious intent." Va. Code Ann. § 63.2-1512. Thus, the "statutory framework is designed to encourage those who genuinely suspect a child is at risk to report their suspicions to authorities without fear of civil liability." *Wolf*,555 F.3d at 317. This Court has explained that Virginia' schild protection framework establishes a "strong presumption that immunity applies." Id. at 318. This presumption "cannot be overcome 'unless it isproven that [the reporter] acted in bad faith or with malicious intent." Id. at 318 (quoting Va. Code Ann. § 63.2-1512). "The burden is placed squarely on the person who would overcome the presumption to prove that immunity should not attach." Id.

"In short, the Virginia General Assembly set a high bar for those wishing to strip reporters of suspected child abuse of their statutory immunity," as evidenced by the requirements of "malicious intent" or "bad faith." Id. "So long as the reporter was acting in the interest of protecting a child rather than out of self-interest or with an intent, for example, to settle some score with the child's parent, the plain intent of the legislature was to allow immunity to attach to the reporter." Id. (citing *State Farm Mut. Auto. Ins. Co. v. Floyd*, 235 Va. 136, 144 (Va. 1988)).

Davison fails to overcome the presumption that

Stephens possesses immunity as a mandatory reporter. He offers only conclusory suppositions that "Stephens frivolously referred Davison to CPS," Op. Br. at 34, and "Stephens conspired with senior LCPS officials to refer Davison to CPS for child abuse," Op. Br. at 5, without any supporting facts. Davison provides that Stephens possibly issued the referral to CPS based on a frivolous reason-that Davison sent his child to school in rain boots, which made it so she could not play kickball with her class.

However, Davison's arguments obfuscate other key facts regarding Stephens's actions. Davison ignores that Stephens made the referral after several teachers-none of whom are defendants in this action--came to her with concerns about Davison's children. JA 3,486. Teachers reported the children crying about having to hand out fliers, during class time, that Davison made and instructed them to distribute. Stephens testified in her deposition that she was alerted to a "series of instances . . . where a teacher would see the children acting differently than they would typically." JA 3,486. Further, "there were some situations where [Davison's daughter] would come to school without her lunch, without her homework, dressed not for the weather . . ."and that "we could just see changes in [the children's] demeanor and [see them] withdrawing." JA 3,487. Stephens further testified that she consulted with her supervisor and made the report "because I'm required to make a

report" and "also [because] seeing Mr. Davison's demeanor, [I was] just concerned for his ability to care for the kids, when we could see that his state of mind seemed highly agitated. He seemed angry and aggressive toward people . . ." JA 3,487- 88.

The record reflects that Stephens reached out to school officials about what her responsibilities were for reporting Davison to CPS. See JA 2,930-33. The guidance emails Stephens received include CPS's Guide for Mandated Reporters which states "[m]ental abuse or mental neglect may result from caretaker behavior, which is rejecting, chaotic, bizarre, violent, or hostile." JA 2,930. Stephens thus tried to obtain the necessary advice and information before submitting the complaint and she believed it was her responsibility under the law. Davison argues that this decision was made in retaliation for his speech and that the only evidence Stephens had was the incident in which his daughter wore rainboots, but the CPS referral itself never mentions the rainboots and focuses more broadly on Davison's "increasingly irrational behavior." JA 3,687. It also mentions that his children were "coerced and/or forced . . . to distribute" flyers "including on rainy days," and that Davison "attempted to gain access to the school on at least 3 occasions by sending the children to school without lunch, snack and materials." JA 3,687. Davison has not shown, in light of these facts, that Stephens's referral to CPS was done in bad faith or

with malicious intent.

Davison has failed to overcome the strong presumption that Stephens is entitled immunity as a mandatory reporter. Like in Wolf, "[w]e affirm the judgment for defendants because the Commonwealth of Virginia has made the protection of children the centerpiece of its child abuse reporting systems and its social services apparatus. To impose civil liability in these circumstances would turn that system on its head." 555 F.3d at 314. In *Wolf*, an employee of a licensed counseling center reported suspected child abuse to the Department of Social Services, a report that was later characterized by this Court as a "false positive." Id. at 324. The mother of the children filed suit against the employee and other defendants, claiming violations of various state law torts, as well as claims under 42 U.S.C.

§ 1983. This Court treated the employee, for the sake of argument, as a voluntary reporter, but found that Virginia law protects mandatory and voluntary reporters. We found that the employee was protected from suit as a reporter. Id.

As we have previously stated,

> Hard choices surround the issue of suspected child abuse. Virginia' s reporting statute and its social services apparatus are both based on the assumption that false positives-mistaken reports

> of child abuse followed by DSS investigations-are less harmful than false negatives-serious harm to a child that could have been prevented but was not. . . . There is no conceivable child abuse prevention policy that both gives government the ability to respond to threats in order to prevent harms before they occur yet prevents government from investigating before being certain that a perceived threat is real. Policymakers must choose which of these harms is the greater evil
>
> This case makes concrete the consequences of a false positive . . . But because the Commonwealth of Virginia in designing its child abuse reporting scheme and its social services apparatus decided the costs of an occasional mistaken report were far less than the costs of lasting harm to the lives and safety of young children, the judgment must be affirmed.

Id. at 323-324. As in *Wolf*, this report turned out to be a false positive as subsequent investigation revealed that CPS was not concerned with Davison's interactions with his children. However, Stephens is still entitled to a strong presumption of immunity and Davison has not overcome that presumption. Davison has not provided much beyond legal conclusions to support his argument and he has not shown evidence of bad faith or malice. Thus, we affirm on this element of count two.

VI.

Davison appeals the district court's grant of summary judgment for the Defendants on Counts 4 and 5 claims-that the no-trespass ban violated his First Amendment Free Speech and Assembly rights-for monetary damages and injunctive relief, on both the merits and due to the Defendants' qualified immunity. We affirm the district court.

A.

"Qualified immunity shields government officials performing discretionary functions from personal-capacity liability for civil damages under § 1983, insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 306 (4th Cir. 2006) (internal quotation marks and citation omitted). Government officials are entitled to qualified immunity unless "(1) the allegations underlying the claim, if true, substantiate the violation of a federal statutory or constitutional right; and (2) this violation was of a clearly established' right 'of which a reasonable person would have known." Id. (internal quotation marks and citation omitted).

The district court held that the no-trespass ban did not involve a constitutional violation that was clearly established. On the contrary, Davison's

"concerning behavior extended over an extended period of time and the no-trespass letters were issued under circumstances long recognized as sufficient to impose such a sanction, including multiple levels of review and input of legal counsel." J.A. 3,810. Thus, "[n]o person in Defendants' position would have reasonably thought that he or she was engaged in conduct that violated the law, clearly established or otherwise." J.A. 3,810.

The district court correctly relied on *Lovern v. Edwards*, 190 F.3d 648 (4th Cir. 1999) to support its holding. In *Lovern*, the Fourth Circuit considered the constitutionality of a ban barring Lovern, a non-custodial father, from entering school property. The plaintiff began contacting school officials several times about his son's basketball coach and eventually confronted the coach in person at a school basketball practice for 25 minutes. Id. at 650. The school principal wrote Lovern a letter stating that his children's mother, the custodial parent, had requested notice and an opportunity to attend any school discussions about her children, and thus, any discussions by Lovern must be scheduled in advance. Id. at 651-52. The letter also stated that Lovern was barred from "High School property during school hours without [the principal' s] express consent and authorization except to attend scheduled activities open to the public." Id. at 651 n.3. After receiving the letter, Lovern proceeded for months to contact school

officials, attend county school board meetings, and accuse school officials of various illegalities, corruption, and cover- ups. Id. at 650-51. Lovern was then banned from all county school property and offices because of his "continued pattern of verbal abuse and threatening behavior towards school officials, including staff and School Board members." Id. at 652 n.7. The district court dismissed the case for lack of subject-matter jurisdiction, concluding that the plaintiff had failed to state a substantial federal claim. Id. at 654-55. We affirmed, emphasizing that "[t]he right to communicate is not limitless," particularly where the plaintiff has engaged in a "continuing pattern of verbal abuse and threatening behavior towards school officials." Id. at 656. We thus upheld the ban because the plaintiff's constitutional rights were not "'directly and sharply' implicated by . . . [the] prohibition against him." Id. (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). As we explained, "school officials . . have the authority and responsibility for assuring that parents and third parties conduct themselves appropriately while on school property." 190 F.3d at 655; see also *Cole v. Buchanan Cnty. Sch. Bd.*, 328 F. App'x 204, 210-12 (4th. Cir. 2009) (overturning district court's denial of a school board's qualified immunity for a decision to ban plaintiff from all school grounds based on the "broad discretion" afforded to schools and school boards to "ensure the proper functioning of the educational system.").

Other circuits have relied on *Lovern* to uphold bans on people entering school property. For example, in *Barna v. Bd. of Sch. Directors of Panther Valley Sch. Dist.*, the Third Circuit upheld a school board issuing a permanent ban against a plaintiff attending school board meetings on qualified immunity grounds, writing "the Lovern court's guidance on the scope of the 'right to communicate' on school property could plausibly suggest to a reasonable official that the permanent ban at issue here would pass constitutional muster." 877 F.3d 136, 144 (3d Cir. 2017) (emphasis added). The court reasoned: "Even assuming there is a protected interest in participating in school board meetings despite engaging in a pattern of threatening and disruptive behavior, we cannot fault the individual Board officials for having failed to recognize that right as clearly established, particularly in light of the Lovern decision and the absence of contrary authority from the Supreme Court . . . ." Id.; see also *Johnson v. Perry*, 859 F.3d 156, 175 (2d Cir. 2017) (school officials are entitled to qualified immunity for banning a plaintiff from school property because parents have no "general and unlimited First Amendment right of access to school property"); *Jackson v. McCurry*, 762 F. App'x 919, 929 (11th Cir. 2019) (same).

Lovern establishes the constitutionality of no-trespass bans against parents attempting to enter school grounds. Given the similarities to *Lovern*, a reasonable official could conclude that the no-trespass

ban in this case was constitutional. Thus, Defendants have qualified immunity on the damages claims against them in their individual capacities for counts 4 and 5, and we affirm the district court.

B.

Davison also seeks prospective injunctive relief in order to engage in similar activity criticizing the LCSB. Specifically, Davison asks this Court to invalidate provisions of LCPS Policy 6310 that impose a blanket ban on any individual given a no-trespass letter from visiting any LCPS property, regardless of the basis of or the specific restrictions within the letter. Instead, he asks that the Court direct LCPS to narrowly tailor any future no-trespass ban to all limited public fora, such as during the school's after-hours setting.

"The purpose of an injunction is to prevent future violations," and the party seeking such relief "must satisfy the court that [prospective, injunctive] relief is needed." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). Injunctive relief is simply not "needed" where no-trespass bans are constitutional- an injunction here would not prevent any future constitutional violations.

VII.

Finally, Davison challenges LCPS Policy 6310 under the procedural due process clause of the Fourteenth Amendment and requests injunctive relief against the use of LCPS Policy 6310.

A.

Since the monetary damages claim in this count against the LCSB is denied, Davison only asks for injunctive relief against the use of LCPS Policy 6130 on this count. Davison alleges that Defendants "violated [his] Fourteenth Amendment Rights to procedural due process when they deprived him of constitutionally protected fundamental liberty interests without providing notice or a meaningful opportunity to be heard prior to the deprivation." JA 3,800. Davison asserts that his liberty interests include the right to direct his children's education, the right to enter school property, and the right of free speech on school property without fear of retaliation. JA 3,800. Davison also contends that he was deprived of procedural due process with respect to the suspension of his right to post messages on Defendants' "public figure" Facebook pages.

Procedural due process claimants must show "(1) a cognizable liberty or property interest; (2) the deprivation of that interest by some form of state action; and (3) that the procedures employed were constitutionally inadequate." *Shirvinski v. U.S. Coast Guard*, 673 F.3d 308, 314 (4th Cir. 2012) (citation omitted).

Regarding the no-trespass claim, the district court rightly held that this case fell into a "rare and extraordinary" circumstance when a post-deprivation remedy can satisfy due process. JA 3802. In *Goss v. Lopez*, the Supreme Court held that "[s]tudents whose

presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school" without a pre- deprivation hearing. 419 U.S. 565, 582 (1975). The district court concluded as a matter of law that, even if Davison asserted a cognizable liberty interest, "Davison clearly presented an ongoing threat of disrupting the educational process" and "thus an adequate post-deprivation remedy satisfied any constitutionally required due process." JA 3,802.

We agree with the district court that the post-deprivation remedies provided in this case satisfy due process. As the district court recognized, Davison posed an ongoing threat of disruption to the educational process. Davison also had a number of post-deprivation remedies available to him, including several levels of administrative review, as well as state court review pursuant to Va. Code § 22. 1-87. Davison had opportunities to discuss the no-trespass ban with Defendants, which he did in the administrative appeal, and he retained the ability to come to the school, provided that he had consent from Stephens or her designee. Thus, under the facts of this case, the post-deprivation remedies available satisfied any required due process.

Thus, we affirm the district court's conclusion that Davison was not deprived of procedural due process.

B.

Davison claims he was also denied procedural due process due to social media bans, stating he is entitled to monetary damages and injunctive relief. Davison appears to seek injunctive relief and monetary damages against the LCSB, and injunctive relief against Stephens, Morse, and Sheridan for count 6. See Op. Br. at 12. He does not clarify which defendants are liable for the no-trespass ban and which are for the social media ban. All claims against the LCSB are dismissed due to res judicata. Regarding the individual defendants, the district court only discussed Morse's social media ban. Since Morse has now unblocked Davison on social media, at most, Davison is seeking is prospective injunctive relief. Davison has not briefed why he needs a prospective injunction against Morse in particular. Though he seems to want injunctive relief regarding LCPS's social media policies, LCPS has never been a defendant in this action. Thus, there was no error committed by the district court and we affirm.

VIII.

For the above reasons, the district court's grant of Defendants' Motion to Dismiss and Motion for Summary Judgment and denial of Davison's Partial Motion for Summary Judgment is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

BRIAN C. DAVISON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:16-cv-540 (AJT/IDD)
	)	
	)	
DEBORAH ROSE, *et al.*,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION AND ORDER

In this action, Plaintiff Brian C. Davison ("Plaintiff" or "Davison"), the parent of two children attending public schools in Loudoun County, Virginia, claims that between 2015 and 2016, Defendants engaged in unconstitutional conduct that restricted his First and Fourteenth Amendment rights in violation of 42 U.S.C. § 1983. Davison also alleges that four Defendants defamed him by making false accusations to his family, his employer, law enforcement, Loudoun County's Child Protective

Services, and the general public. Based on these allegations, Davison has sued the Loudon County School Board (the "LCSB"), certain current and former members of the LCSB, and certain current and former employees of Loudoun County Public School System ("LCPS"), in both their official and individual capacities, for injunctive relief and monetary damages. Now pending before the Court are the parties' cross-motions for summary judgment [Docs. 92, 98] (collectively, the "Motions"). For the reasons discussed below, Davison's Motion for Partial Summary Judgment [Doc. 92] is **DENIED**; and Defendants' Motion for Summary Judgment [Doc. 98] is **DENIED** as to Plaintiff's claim for injunctive relief against Defendant Morse in Count 1(a) (concerning access to his social media pages) and is otherwise **GRANTED.**

I. BACKGROUND

A. Factual Background[1]

Plaintiff Brian Davison has been a resident of Loudoun County for over fifteen years and had two children enrolled in the Loudoun County Public School System during all events rom which his claims arise.

Defendants Morse and Sheridan were elected to the LCSB in 2011, were re-elected to the LCSB in

[1] The facts in this Order are undisputed, unless indicated otherwise.

November 2019, and at all material times herein have served on the LCSB. [Doc. 99, Ex. 13 ("Morse Decl.") ¶ 1; Ex. 16 ("Sheridan Decl.") ¶ 1]. Defendants Rose and Hornberger served on the LCSB between January 2012 and December 31, 2019. [Doc. 99, Ex. 15 ("Rose Decl.") ¶ 1; Ex. 7 ("Hornberger Decl.") ¶ 1].

Defendant Stephens served as the principal of Seldens Landing Elementary School ("Seldens" or "Seldens Landing") between July 2011 and June 2016. Since July 2016, Stephens has served as the principal of Aldie Elementary School, another elementary school within the LCPS. During the relevant period, Stephens' direct supervisor was Dr. Michael Martin, director of elementary school instruction for LCPS. [Doc. 99, Ex. 22 ("Stephens Dep. Tr.") at 5, 68].

Defendant Devlin served as the supervisor of security for LCPS between 2014 and 2019. Devlin left her employment with LCPS shortly after John Clark was installed as the Director of Safety and Security in July 2019. [Doc. 99, Ex. 4 ("Devlin Decl.") ¶ 1].

This action arises in large part from "no trespass letters" issued to Davison in the Fall of 2015, which prohibited his physical presence on Seldens property or to attend any school-sponsored activity unless specifically authorized. [Doc. 93, Exs. 2, 3]. When issued, a no trespass letter restricts the recipient, according to its terms, from accessing school property or facilities. Before issued, a no trespass letter is reviewed by Dr. Virginia Patterson ("Patterson"), an employee of the LCSB who, in June 2015, assumed the newly created position of Director of School Administration. [Doc. 99, Ex. 14 ("Patterson

Decl.") ¶ 1]. In that role, Dr. Patterson reviews no trespass letters based on content and rationale to determine whether there is a grave or significant disruption to the learning environment, school operations, or tranquility of the school. *Id.* ¶ 2. Further, Dr. Patterson worked with Dr. Martin in consultation with school principals about problematic situations leading to issuance of no trespass letters and, when appropriate, drafted no trespass letters. *Id.* Since 2015, Dr. Patterson has served as the custodian of all no trespass letters issued by LCPS.

In 2014, Davison sued the Virginia Department of Education ("VDOE") in the Circuit Court for the City of Richmond to obtain student growth data, known as Student Growth Percentiles ("SGP"). After obtaining a ruling directing the release of the SGP data, the LCSB moved to intervene in Davison's lawsuit to prevent Davison from obtaining SGP data for Loudoun schools. VDOE released the SGP data for the entire state of Virginia at the student level in February 2015, without the identifying information for teachers.

Based on this information and other issues he had with the LCSB and LCPS, Davison began to publicly criticize LCPS policies in January 2015, including making allegations that LCPS violated federal law concerning No Child Left Behind waivers; violated laws covering student privacy under the Federal Educational Rights & Privacy Act; misled the public regarding LCPS budget information; and violated Virginia's Conflict of Interest Act. [Doc. 93, Ex. 1, ¶ 7]. To that regard, Davison criticized specific

LCSB members in online chat boards, on social media, via e-mail, and during the public comment period at LCSB meetings. *Id.* In particular, during the first quarter of 2015, Davison was a frequent speaker at LCSB meetings and public hearings. [Doc. 99, Ex. 2 ("Byard Decl.") ¶ 3; Ex. 3 ("Coleman Decl.") ¶ 3. He was also frequently e-mailing individual School Board members, sometimes multiple times a day, and making multiple social media posts about his complaints or preferred policies or practices. In light of these criticisms, LCSB members had personal safety concerns about Davison based on his manner and demeanor, Hornberger Decl. ¶ 19, and for among other reasons, Devlin recommended and arranged for a law enforcement officer to be present at all meetings and hearings after January 20, 2015. Devlin Decl. ¶¶ 3-4

Davison also occasionally commented on LCSB members' Facebook and other social media platforms. Individual LCSB members who had Facebook accounts in 2014 through the end of 2019 created the accounts before being elected to the LCSB and used their own electronic devices to create, maintain and make posts. During the relevant period, these individual members had various terms, conditions and reasons for creating their social media pages. However, following legal advice provided to LCSB members after this Court's decision in *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702 (E.D. Va. July 25, 2017), Defendant Morse, among others, reconfigured his Facebook pages to conform to division counsel's advice. Morse Decl. ¶¶ 2-9. That

said, Davison continues not to have access to Morse's Twitter account. [Doc. 93-1 ("Davison Decl.") ¶ 36].

In September of 2015, Davison's appeared at Back-to-School night and a PTA meeting at Seldens where, as recounted by both school administrators, teachers, and fellow parents, his behavior, conduct, tone, and demeanor prompted multiple complaints and raised concerns. [Doc. 99, Ex. 204, 205-11, 276]. During this time, Davison was also sending e-mails to the principal and school staff which were perceived as harassment. In these e-mails, Davison threatened to sue certain members of Seldens, as well as the LCSB. *See* [Doc. 99, Ex. 17 ("Stephens Decl.") ¶¶ 16-19, 22; Ex. 12 ("Martin Decl.") ¶ 5; Devlin Decl. ¶ 15; Patterson Decl. ¶¶ 3-4 ; Rose Decl. ¶ 2; *see also* [Doc. 99, Exs. 218-222]. In October 2015, Davison involved his two children attending Seldens in his efforts, which concerned school officials as to their welfare. In that regard, his children, at his direction, distributed on school property during school hours flyers that he had prepared, which contained Stephens' picture and Davison's criticisms of school policies and alleged violations of federal law. *See* Martin Decl. ¶ 12; Stephens Decl. ¶ 24; Stephens Depo. Tr. at 95-99.

School officials formally responded to Davidson's conduct on September 30, 2015, when Stephens, the principal at Seldens, served Davison with a no trespass letter, dated September 29, 2015, [Doc 93, Ex. 1][2] which was amended and

[2] The September 29, 20215 no trespass letter was signed by Stephens, but prepared by Drs. Martin and Patterson, with

supplemented with no trespass letters issued on behalf of the LCSB on October 8 and October 14, 2015. *See* [Doc. 93, Exs. 3, 4]. The no trespass letters prohibited Davison's presence on all Seldens property at all times, including nights and weekends.

The no trespass letters cited multiple reasons for issuing the letter including: (1) Davison's behavior at the Back-to-School night during which Davison interrupted both of his children's teachers to raise non-germane questions and (2) Davison's behavior at the September 22, 2015 Volunteer Breakfast and PTA meeting, where Davison, with a purported aggressive and accusatory tone, accused Stephens of violating the law and student's privacy and, "in a loud and hostile voice" said "Try me. Try me. You'll end up in Federal Court." [Doc. 93, Ex. 2 at 1]. In substance, the no trespass ban was based on the view that Davison's behavior was not appropriate for an elementary school setting and in effect, the ban prevented Davison from (1) attending any public events inside Seldens that were open to the public, including PTA meetings; (2) using any outdoor facilities such as the track or playgrounds that were generally open to the public; or

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input from division counsel, Stephen DeVita. The LCSB was not involved in deciding to issue the September 29, 2015 no trespass letter, although multiple members were aware of Davison's behavior at Seldens, see [Doc. 93, Exs. 5 ("Rose Dep. Tr.") at 27-36; 6 ("Hornberger Dep. Tr.") at 42-51], and all then-serving LCSB members received an e-mail from a LCPS employee, dated September 29, 2015, regarding the decision to issue a no trespass letter to Davison, see [Doc. 99, Ex. 213].

(3) dropping off or picking his children up at the school's drop-off lane without first obtaining written permission from Stephens. *Id.* at 2. The letters also advised Davison of his opportunity to appeal the decision. *Id.*

The October 14, 2015 no trespass letters re-stated the restrictions first stated in the September 29, 2015 letter and highlighted Davison's behavior, beginning on or around October 2, 2015, in which Davison violated the conditions of the September 29 letter. For instance, the October 14, 2015 letter noted:

> On October 3, 2015, you [Davison] sent two emails to 38 Seldens Landing Elementary School staff members in complaining at length about a variety of matters wholly unrelated to your children's progress in school, including . . . that our District leaders are among the most hated . . . which frightened staff and caused considerable disruption to the daily functioning of the school.

[Doc. 93, Ex. 4 at 1]. The letter also noted that on October 4, 2015, Davison forwarded an email to 38 Seldens staff members, in which he stated that he considered Stephens' prior restrictions "null and void" and would openly defy the September 29 letter. In this e-mail, which spanned a total of ten printed pages, Davison complained about a variety of matters, oddly using the phrase "Your Honor" throughout, as if he were addressing a court. *Id.* Separately, the letter noted that the school was justified in imposing the ban in light of his use of the term "SHOTGUN" in

reference to a public meeting, his references to "BE PREPARED," and the general aggressive and intimidating behaviors he exhibited at the elementary school. *Id.* at 2.

As stated in the earlier no trespass letters, the October 14 letter provided Davison an opportunity to appeal. It further made accommodations to Davison in light of his status as a parent, noting that "as an accommodation to you as a parent," the school, through Stephens, would schedule quarterly telephone conferences regarding your children's progress in school. *Id.*[3]

Davison appealed these no trespass letter to Stephens, who denied his appeal. He next requested an administrative appeal from all three no trespass letters to Dr. Patterson, which she reviewed and also denied, notifying him of his further right of appeal to the LCSB. Patterson Decl. ¶¶15-17; [Doc. 99 Ex. 327 at 13-14]. Davison then appealed the bans to the LCSB under LCPS Policy 2350, whereby a three member select committee consisting of LCSB members Bill Fox, Kevin Keusters, and Jill Turgeon were tasked with hearing Davison's appeal. Dr. Patterson's office, working with division counsel and the superintendent's office, compiled a redacted Administrative Record for the committee to review, a copy of which was provided to the committee members and to Davison by e-mail on November 17, 2015. The committee review was held on November 23, 2015. Patterson Decl. ¶¶ 19-20; [Doc. 99, Exs. 324-327].

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On December 1, 2015, Davison provided additional information to the entire school board in order to contest the no trespass ban, and on the same date, the LCSB decided not to rescind or revise the no trespass ban. *See* Fox Decl. ¶ 7. Davison reiterated his objection to the ban during public comments at the December 1, 2015, school board meeting. [Doc. 99, Ex. 128].

On December 22, 2015, Davison filed a Petition for Review of the no trespass letters in the Circuit Court of Loudoun County, Virginia ("Loudoun County Circuit Court"). *See Brian C. Davison, Petitioner v. Loudoun County School Board*, Case No. 98468. On March 4, 2016, Davison also filed pursuant to Va. Code § 22.1-87 the Administrative Record of the School Board proceedings, with second addendum to the Record filed on June 3, 2016. [Doc. 99, Ex. 327]. Davison later filed in that state court action a Motion for Injunctive Relief requesting that the Loudoun County Circuit Court enjoin the LCSB from enforcing the no trespass letters. However, Davison never pursued a hearing or any other relief in that state court action but filed a Motion for Nonsuit. By circuit court order dated August 5, 2016, which Davison signed, "SEEN AND Agreed.", the case was dismissed with prejudice with Davison's agreement that no "justiciable controversy" remained for the court to decide; that he "has continued to publicly criticize the policies of LCSB;" no new no trespass ban has been issued against him; that he has "no reason to believe LCSB will issue another ban in bad faith;" and that he "didn't want to waste the time of the Court, or the

school board, or anybody else to be here . . . ." [Docs. 21-5 (Motion for Nonsuit); 21-6 (Aug. 5, 2016 Loudoun County Circuit Court Transcript) at 5].

Both before and after the no trespass letters, Davison regularly commented at LCSB meetings. In fact, between January 2015 and December 2019, Davison did so on at least 68 separate occasions. *See generally* [Doc. 99, Ex. 354B]. With respect to these LCSB meetings, the school board maintains published policies addressing its meeting procedures and communications (including participation by the public), among other things. Coleman Decl. ¶¶1,2, Ex. B.

After this lawsuit was filed, the LCSB updated its facility use policy, also known as "Policy 6310" in November 2018.[4] [Doc. 93, Ex. 11]. As relevant here, Policy 6310, which remains in effect today, banned any recipient of a no trespass letter from an LCPS official from using any outdoor facilities at any time regardless of the specifics within their individual no trespass letter. *Id.*, Section C ¶ 2].

B. Procedural History

i. Initial Motion to Dismiss

On May 13, 2016, Plaintiff filed this action.

[4] Policy 6310 allowed all non-profit groups to reserve use of indoor LCPS facilities for a fee. While the policy did not allow reserved use of outdoor facilities, it provided for the use of outdoor facilities by the general public during daylight hours when school was not in session and the outdoor facilities were not being used by student groups. See [Doc. 93, Ex. 11 (Policy 6310]

[Doc. 1]. At that time, Plaintiff's Loudoun County state court action was still pending. In light of that state court action, the Court, by Order dated July 8, 2016 [Doc. 11], stayed this action pending resolution of the state court action and denied without prejudice Defendants' then-pending Motion to Dismiss [Doc. 22]. On August 5, 2016, the Loudoun County Circuit Court granted Plaintiff's "Motion for Nonsuit" and dismissed Plaintiff's Petition with prejudice. *See* [Doc. 24-17]. By Order dated September 9, 2016 [Doc. 17], the Court lifted the stay for the sole purpose of allowing Defendants to litigate their previously filed motions to dismiss. Davison then filed his Amended Complaint on October 7, 2016 [Doc. 21], and Defendants filed a renewed Motion to Dismiss on October 26, 2016 [Doc. 23]. By Order dated July 28, 2017 [Doc. 37], the Court dismissed the entire Amended Complaint on the grounds that each of Plaintiff's claims were barred by either r*es judicata* or qualified immunity. *See id.* at 11-19.

ii. Appeal and Decision on Remand

Plaintiff timely appealed the Court's dismissal; and on March 19, 2018, the United States Court of Appeals for the Fourth Circuit remanded this action after concluding that the Court's July 28, 2017 Order was not "final" for purposes of appeal because the Court did not specifically consider Plaintiff's claims for injunctive relief. [Docs. 43, 44]. On remand, the Court ordered additional briefing on Plaintiff's requests for injunctive relief [Doc. 45], which the parties submitted [Docs. 47, 48].

While Plaintiff's injunctive relief claims were pending, the Fourth Circuit issued its opinion in *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019), *as amended* (Jan. 9, 2019), which addressed the application of the First Amendment to a state actor's social media websites. In light of *Randall*, this Court ordered additional briefing on Plaintiff's First Amendment claims, which involved, in part, the alleged deletion of his comments and/or the blocking of his postings on certain LCSB member's social media pages and on the "public official" pages maintained by the individual Board members. As ordered, the parties provided their respective positions on that issue. [Docs. 52, 53].

By Order dated April 19, 2019 [Doc. 54], the Court granted Defendants' renewed Motion to Dismiss and dismissed Plaintiff's claims for injunctive relief as to Defendants Deborah Rose, Tracy Stephens, Eric Hornberger, Jill Turgeon, Brenda Sheridan, Jeffrey Morse, Joy Maloney, and Suzanne Devlin and dismissed the action as moot as to Defendants William Fox, Kevin Keusters, Eric DeKenipp, and LCSB.

iii. Motion for Reconsideration and Dismissal of Certain Claims

On April 30, 2019, Plaintiff filed a Motion for Reconsideration [Doc. 58], with respect to its July 28, 2017 [Doc. 37] and April 19, 2019 [Doc. 54] Orders. After a *de novo* review of the record, this Court granted Plaintiff's Motion for Reconsideration on July 31, 2019. [Doc. 71] and upon a review of its prior Orders, the Court reinstated certain of Plaintiff's

claims, namely, Plaintiff's claims for injunctive relief against certain individual Defendants under Counts 1, 2, 4, 5, 6, and 7 and Plaintiff's claims for monetary relief against the certain individual Defendants under Counts 4, 5, 7, and 8. The Court, however, reaffirmed its dismissal of all claims against the LCSB and the individual Defendants in their official capacities.

By Order dated December 19, 2019 [Doc. 81], this Court entered the parties' joint stipulation of voluntary dismissal as to (1) all claims as to Defendant DeKenipp and (2) Counts 1, 3, 4, 5, 6, and 7 as to Defendants Maloney, Turgeon, Keusters, and Fox.

iv. Pending Claims

Remaining for adjudication are the following claims, all of which are asserted against the remaining defendants (Defendants Rose, Hornberger, Morse, Sheridan, Stephens, and Devlin) in their *individual capacities* only:

(1) First Amendment claim for **injunctive relief** against Defendant Morse for allegedly deleting comments and/or barring Plaintiff from his social media pages (Count 1(a));[5]

[5] Defendant Morse contend that this claim is limited to his Facebook page, while Plaintiff contends that this claim also extends to Morse's Twitter page, which Plaintiff asserts he is still banned from visiting. In the Amended Complaint [Doc. 21], Plaintiff does not specifically identify Defendant's Twitter in Count 1. Instead, he broadly references social media generally as the subject of this count. See [Doc. 21 ¶¶ 54-55]. Because Twitter is commonly referred to as a social media platform, the Court has considered Plaintiff's claim based on his claimed lack of access to

(2) First Amendment claim for **monetary damages** against Defendants Rose, Hornberger and Morse for interfering with Plaintiff's right to speak at School Board meetings. (Count 1(b));

(3) First Amendment retaliation claim for **injunctive relief and monetary damages** against Defendants Rose, Hornberger, Turgeon, Morse, Maloney, Fox, Keusters, Stephens, and Devlin based on the issuance of the no trespass letter (Count 2);

(4) First Amendment claim for **injunctive relief and monetary damages** against Defendants Stephens, Hornberger, Rose, Morse, and Devlin based on the issuance of the no trespass letter which prevented Davison from attending PTA meetings at Seldens (Count 4) and from exercising his right to freedom of assembly at Seldens (Count 5);

(5) Fourteenth Amendment procedural due process claim for **injunctive relief** against Defendants Stephens, Hornberger, Rose, Morse, and Devlin based on Defendants' issuance of the no trespass letter and Defendants' barring Plaintiff from their Facebook pages (Count 6);

(7) Fourteenth Amendment equal protection claim for **injunctive relief and monetary damages** against Defendants Stephens, Hornberger, Rose,

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Defendant Morse's Twitter account within the context of Count 1(a). See, e.g., Davison v. Plowman, 247 F. Supp. 3d 767, 775 (E.D. Va. Mar. 28, 2017) ("Plaintiff [Davison] also made use of Twitter, another social media platform, to make his case to the public.").

Morse, and Devlin based on issuance of the no trespass letter (Count 7); and (8) Virginia state law defamation claims for **monetary damages** against Defendants Rose, Stephens, Hornberger, and Devlin (Count 8).

II. LEGAL STANDARD

Summary judgment is appropriate only if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Evans v. Techs. Apps. & Serv. Co.*, 80 F.3d 954, 958 (4th Cir.1996). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

Once a motion for summary judgment is properly made, "the moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party does so, the non-moving party then has the burden of showing that a genuine dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). To defeat a properly supported motion for summary judgment, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 247-48 ("[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the

requirement is that there be no *genuine* issue of *material* fact."). Whether a fact is considered "material" is determined by the substantive law, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248.

Importantly, the nonmoving party is entitled to have his version of all that is disputed accepted, all conflicts resolved in his favor, and to have the benefit of all favorable legal theories invoked by the evidence. *M & M Medical Supplies and Serv. Inc. v. Pleasant Valley Hospital, Inc.,* 981 F.2d 160, 163 (4th Cir. 1992). The party who bears the burden of proof on an issue at trial, however, cannot survive summary judgment without sufficient evidence to sustain his or her burden of proof on that point. *Celotex*, 477 U.S. at 327. Where, as here, the court is faced with cross motions for summary judgment, the court must consider each motion separately on its own merits. *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003).

III. ANALYSIS

Plaintiff has moved for summary judgment as to Counts 4, 5, 6 and 8; Defendants have moved for summary judgment on all counts.

A. Mootness as to certain requests for injunctive relief.

As an initial matter, the Court finds, and Plaintiff does not appear to dispute, *see* [Doc. 106 at

n. 1, n. 4], that certain of Plaintiff's claims for injunctive relief against certain defendants are moot because those defendants no longer hold positions on the LCSB or within the LCPS that would enable them to impose the challenged consequences on Davison. In that regard, Defendants Rose, Hornberger, and Devlin are no longer members of the LCSB and Devlin is no longer employed by LCPS. They are therefore no longer able to issue a no trespass letter or amend or implement any school policies. For these reasons, Plaintiff's claims for injunctive relief against Rose, Hornberger, or Devlin will be dismissed as moot. *See* U.S. Const. art. III, § 2; *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the case's outcome.); *Davison v. Plowman*, 247 F. Supp. 3d 767, 782 (E.D. Va. 2017) (finding that because "[Plowman] is no longer capable of taking such action under the new Social Media Comments Policy, and has no intention of returning to the old policy," Davison's claim for injunctive relief against Plowman is moot).

B. Plaintiff's Motion for Partial Summary Judgment [Doc. 92]

Plaintiff has moved for summary judgment on Counts 4, 5, 6 and 8. With the exception of Count 8, each of these claims concern alleged constitutional violations raised pursuant to § 1983. To state a claim for relief under § 1983, a plaintiff must satisfy two elements. *First*, he must allege that an act or omission deprived him of a right, privilege, or immunity

secured by federal law. *Second*, he must allege that the act or omission was committed by a state actor or a person acting under color of state law. *See* 42 U.S.C. § 1983. The Defendants do not dispute that they were acting under color of state law at the time of their alleged actions. Plaintiff's § 1983 claims therefore reduce to whether Defendants' alleged actions violated a federally-guaranteed right or privilege.

(1) Injunctive Relief Under Counts 4 and 5 against Defendants Stephens, Morse, and Sheridan

Plaintiff's First Amendment claims for injunctive relief in Counts 4 and 5, asserted against Defendants Stephens (the former principal at Seldens) and Morse and Sheridan (the still-serving members of LCSB) are based on his contention that by "voluntarily open[ing] Seldens Landing to all members of the public who wish to attend the PTA meeting or other non-profit civic organizations who reserved space at the school," the school created a limited public forum and then, by issuing the No Trespass Letter in retaliation against Plaintiff for criticizing school management and policies, the Defendants "violated Davison's constitutional right to free speech [and assembly]." [Doc. 21 ¶¶ 116-24, 128, 141]. As relief, Davison requests this Court (1) invalidate those provisions of LCPS Policy 6310 that imposes a blanket ban on any individual given a no trespass letter from visiting any LCPS property, regardless of the basis of or the specific restrictions within the letter, and (2) require any future no

trespass letter issued by LCPS be narrowly tailored with respect to all limited or designated public fora, such during the school's after-hours setting. [Doc. 93 at 15-20]. Because Plaintiff's First Amendment claim is based on the now expired no trespass letters, the Court will first consider whether the requested injunctive relief would be warranted at this point, assuming *arguendo* some First Amendment violation occurred.[6]

"The purpose of an injunction is to prevent future violations," and the party seeking such relief

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[6] For purposes of this Order, the Court finds that Plaintiff has standing to seek injunctive relief. As the Fourth Circuit recently explained, to obtain Article III standing when seeking equitable relief a party must allege an (1) "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," and that (2) "there exists a credible threat of prosecution thereunder." *Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. 2018) (citing *Babbitt v. Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). There is little doubt that Plaintiff continues to be actively engaged in the Loudoun County civic and political community and continues to criticize LCPS officials whether in-person or via social media. *See* Davison Decl. ¶ 32). Further, as articulated in *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019), under the relaxed standing requirements applicable to First Amendment claims, *see Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013), a "credible threat of enforcement" exists as long as plaintiff can demonstrate he "has been subject to past enforcement," which is the case here, "and that [the defendants] [have] not 'disavowed' future enforcement," which also appears to be the case here. 912 F.3d at 667. While there would appear to be some tension between the Court's finding of standing and its conclusion that injunctive relief is unwarranted, whether injunctive relief is appropriate under all the circumstances is committed to the Court's sound discretion and does not automatically follow based on a person's standing to request such relief. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006) ("[T]he decision whether to grant or deny injunctive relief rests within the equitable discretion of the" court).

"must satisfy the court that [prospective, injunctive] relief is needed." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). Based on the undisputed facts and in light of the breadth of the injunctions sought, the absence of any currently operative no trespass letter against Davison, the absence of any demonstrable threat to Davison from any future issuance of a no trespass letter, his on-going abilities to exercise his First Amendment rights, the relative equities between the parties, the public interest, and the adequacy of avenues of review for Davison or any individual aggrieved by a LCPS no trespass letter, the Court concludes that the requested injunctive relief is not warranted and therefore declines to award the injunctive relief requested under Counts 4 and 5 based on any possible past First Amendment violation.[7] Summary judgment in favor of Plaintiff will therefore will be denied and will be entered in favor of these Defendants on Counts 4 and 5's request for injunctive relief.

(2) Injunctive Relief Under Count 6 against Defendants Stephens, Morse and Sheridan

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[7] Although his request for injunctive relief is not framed as such, Plaintiff effectively seeks an injunction requiring that Defendants Morse, Sheridan, and Stephens henceforth to follow the law. But as this Court has previously explained, "injunctions that simply require their subjects to follow the law are generally overbroad." *Plowman*, 247 F. Supp. 3d at 783 (citing *Lineback v. Spurlino Materials, LLC*, 546 F.3d 491, 504 (7th Cir. 2008)); *see also Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 722 (E.D. Va. 2017).

In Count 6, Plaintiff's requests the same injunction against the use of LCPS Policy 6130 as in Counts 4 and 5, based, not on his rights under the First Amendment, but rather his procedural due process rights under the Fourteenth Amendment to notice or pre-deprivation process. In that regard, he contends that these Defendants "violated [his] Fourteenth Amendment Rights to procedural due process when they deprived him of constitutionally protected fundamental liberty interests without providing notice or a meaningful opportunity to be heard prior to the deprivation." [Doc. 21 ¶ 141]. That allegedly infringed upon liberty interest included "[t]he right to direct the education of his children including the ability to 'engage' with his children's teachers regarding their instruction of his children," "[t]he right to enter onto the Selden's Landing property to participate in his daughter's education and engage in peaceable assembly and free speech," "[t]he right of free speech concerning the operation of the Loudon County public school system without fear of retaliation," and "[t]he right of free speech within the limited public forums created by holding Seldens Landing PTA meetings on school grounds," [Doc. 21 ¶ 141]. Separately, Davison contends that he was deprived of procedural due process with respect to the suspension of his right to post messages on LCPS's public Facebook page and the board members "public figure" Facebook pages. [Doc. 21 ¶ 153].

i. No Trespass Ban

The Due Process Clause guarantees that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "The procedural component of due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause." *D.B. v. Cardall*, 826 F.3d 721, 741 (4th Cir. 2016) (internal quotation marks omitted). Thus, to state a procedural due process claim, a plaintiff must show "(1) a cognizable liberty or property interest; (2) the deprivation of that interest by some form of state action; and (3) that the procedures employed were constitutionally inadequate." *Shirvinski v. U.S. Coast Guard*, 673 F.3d 308, 314 (4th Cir. 2012).

Due process is a flexible concept that varies with the particular situation. *Mathews*, 424 U.S. at 334; *see also Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961) ("The nature of the hearing should vary depending upon the circumstances of the particular case."). As such, it, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Rest. Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895 (1961) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162-163 (1951) (Black, J., concurring)). Nonetheless, despite its flexible construction, pre-deprivation due process is typically in order if "the state is in a position to provide for" such process. *Hudson v. Palmer*, 468 U.S. 517, 534 (1984).

There are, however, "rare and extraordinary" circumstances, *Goss v. Lopez*, 419 U.S. 565, 582 (1975), when "post-deprivation remedies made available by the State can satisfy the Due Process Clause," *Parratt v. Taylor*, 451 U.S. 527, 538 (1985), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 330 (1986). One such "rare and extraordinary" circumstance occurs when an individual presents an ongoing threat of disrupting the educational process. *Goss*, 419 U.S. at 582 (where a party "poses a continuing danger to persons or property or an ongoing threat of disrupting the educational process," a school may forgo a pre-suspension hearing and provide only a post-suspension hearing); *see also Bell v. Burson*, 402 U.S. 535, 542 (1971) (recognizing that procedural due process rights encompass a pre-deprivation hearing "except in emergency situations").

Based on these applicable principles and considerations, the Court concludes as a matter of law that even if Davison has asserted a cognizable liberty interest and Defendants' conduct infringed upon that liberty interest, the circumstances justified the issuance of the no trespass letter on September 29, 2015 without notice or a hearing. Davison clearly presented "an ongoing threat of disrupting the educational process." As stated in the explanations provided in the no trespass letters, Davison disrupted PTA meetings, Back-to-School night, and other events, and his general aggressive and hostile stance against school administrators, teachers, and school board members, were reasonably perceived as an

ongoing threat, against which immediate measures were warranted. Consequently, under the facts of this case, an adequate postdeprivation remedy satisfied any constitutionally required due process. *See Dyer v. Atlanta Indep. Sch. Sys. Atlanta Pub. Schs,* 2019 U.S. Dist. LEXIS 211306, at *19, 2019 WL 6606168 (N.D. Ga. Dec. 5, 2019) (denying, on summary judgment, plaintiff's procedural due process claim that he was deprived of a predepriviation hearing with respect to a no trespass letter after finding that plaintiff, inter alia, accused school board officials of committing crimes and tried to "send a message" that school officials were "destructive").

Plaintiff had a number of postdeprivation remedies available to him, including several levels of administrative review in addition to state court review pursuant to Va. Code § 22.1-87. Indeed, Va. Code § 22.1-86 authorizes an individual to file a civil suit, which Plaintiff in fact filed, to seek an injunction or other equitable relief based on the no trespass letters. Moreover, Plaintiff had an opportunity to discuss the terms of the ban with Stephens and the LCSB administrators, which he did on appeal; and Davison retained the ability to come to the school, provided he obtained consent from Stephens or her designee.

Against this background, and after balancing Davison's interests with the government's, with the

school setting having particular significance,[8] the Court concludes that Davison, or any other individual who receives a no trespass letter, has a constitutionally adequate opportunity to contest a no trespass ban and its consequences through postdeprivation process. See, e.g., *McKinney v. Pate*, 20 F.3d 1550, 1564 (11th Cir. 1994) (en banc) (finding that postdeprivation review by a state court of a petitioner's job termination, which was limited to the record produced before the review board, was adequate given the court's powers to, inter alia, remove any deprivation suffered). The Court therefore denies Davison's request for injunctive relief in Count 6 with respect to the no trespass letters.

ii. Facebook Ban

The Court reaches the same conclusion with respect to Davison's procedural due process claim raised with respect Morse's ban of Davison from Morse's Facebook page.[9] For the same reasons discussed by this Court in *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 719-722 (E.D. Va. 2017), Davison is not entitled to any injunction requiring pre-deprivation due process with respect to

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[8] That balance includes Davison's private interest in obtaining access to school property, which did not, as Davison himself admits, totally curtail his ability to engage in speech regarding school matters, and the relatively low risk of erroneous deprivation, which is protected against through adequate administrative and state law procedures, against the government's interest in school safety.

[9] As discussed above, Count 6 is moot as to Defendants Hornberger and Rose, both of whom are no longer LCSB members. *See* Section III.A., *supra*.

this "censorship," which is unrelated to any LCPS no trespass ban. Indeed, assuming *arguendo* that Morse's Facebook page is a public forum, the balancing analysis applicable to procedural due process claims, *see Mathews,* 424 U.S. at 335, does not require any pre-deprivation notice or hearing.

Here, Davison has a First Amendment interest in accessing and commenting on Morse's public forum Facebook page, although that interest, in light of Davison's ability to communicate his messages across a wide array of other means, is "relatively weak." *Id.* at 721-22. Meanwhile, Morse's countervailing interest—namely, public officials' reasonable interest in moderating their social media pages, including for the benefit of the First Amendment rights of other would-be participants—is comparatively stronger. *Cf. Eichenlaub v. Twp. of Indiana,* 385 F.3d 274, 281 (3d Cir. 2004) ("Indeed, for the presiding officer of a public meeting to allow a speaker to try to hijack the proceedings, or to filibuster them, would impinge on the First Amendment rights of other would-be participants."). And finally, Davison has produced no evidence that there would be any "substantial benefit to predeprivation procedures in this context." *Loudoun Cty. Bd. Of Supervisors,* 267 F. Supp. 3d at 721 (noting that a government official's decision to ban an individual from their Facebook page is an individual action "apparent without predeprivation procedures"). Thus, given "(1) the relatively weak First Amendment interest at issue, (2) the uselessness of any predeprivation procedures in this context, and

(3) the degree to which imposing predeprivation procedures here would impinge on the government's legitimate interest," Davison was not entitled to any predeprivation due process. 267 F. Supp. 3d at 721-22.

Thus, left to decide is whether there is a meaningful postdeprivation remedy available to Davison. *See id.* at 722. But Davison has failed to demonstrate how any postdeprivation remedies were either unavailable or not meaningful. For example, he has not argued how raising such claims in state court is constitutionally inadequate.[10] As Plaintiff failed to even allege that available postdeprivation remedies were inadequate, Plaintiff failed to carry his burden and his due process claims fail. *See Leavell v. Illinois Dep't of Nat. Res.*, 600 F.3d 798, 806 (7th Cir. 2010 (denying procedural due process claim on the grounds that plaintiff failed to argue that "state post-deprivation remedies fail to satisfy due process," and noting that state remedies were available, including filing suit in state court, even though plaintiff did not avail herself of them); *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 722, 2017 U.S. Dist. LEXIS 116208, *39, 2017 WL 3158389 (dismissing his procedural due process claim based on lack of access to social media). Summary judgment as to Count 6 will therefore be denied as to Plaintiff and granted in favor of Defendants.

(3) Monetary Damages Under Counts 4 and 5 against Defendants Rose, Hornberger, Morse,

[10] Nor does contend that directly engaging with Morse or the LCSB on this alleged lack of access was either unavailable or inadequate.

Sheridan, Stephens, and Devlin Plaintiff also moves for summary judgment on his claims in Counts 4 and 5 for damages as a result of the no trespass letters, which Davison contends was issued to exclude him from public school events (but not school board meetings)[11] solely because of his opinions and viewpoints, in violation of his freedom of speech, assembly, and association. [Doc. 21 ¶¶ 116-24].[12]

Plaintiff's First Amendment claim requires the Court to determine whether the ban restricted Plaintiff's protected activities, the nature of the forum in which the protected activity was restricted, and whether the justifications for his exclusion from the relevant forum satisfy the requisite standard. *Goulart v. Meadows*, 345 F.3d 239, 246 (4th Cir. 2003) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985)).

The First Amendment is recognized in three types of forums: the traditional public forum, the nonpublic forum, and the designated public forum (also referred to as a limited public forum). *Id.* at 248

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[11] These events included monthly PTA meetings held at Seldens; a Halloween fundraiser (Spooky Bingo) in October 2015; a December 2015 choir recital; and a spring skit assembly. *See* [Doc. 93 at 17].

[12] Because these claims are substantively related, the Court analyzes the claims together. *See Cromer v. Brown*, 88 F.3d 1315, 1331 (4th Cir. 1996) ("The right to associate in order to express one's views is inseparable from the right to speak freely." (internal quotation marks omitted)); *McCabe v. Sharrett*, 12 F.3d 1558, 1563 (11th Cir. 1994) ("The right of expressive association . . . is protected by the First Amendment as a necessary corollary of the rights that the amendment protects by its terms. . . . [A] plaintiff . . . can obtain special protection for an asserted associational right if she can demonstrate . . . that the purpose of the association is to engage in activities independently protected by the First Amendment.").

(citing *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998)). It is generally understood that a public school facility is a limited public forum during after-school hours. *See Goulart*, 345 F.3d at 250 ("To date, the Supreme Court has recognized two types of government property that clearly are limited public fora: public school facilities during after school hours and a student activities fund of a public university."). Here, because the no trespass letters restricted Plaintiff's access to the school sponsored events during non-school hours, the Court treats the no trespass letters as barring Plaintiff from a limited public forum.

The Court's level of review with respect to limitations on First Amendment activities within a designated or limited public forum is based on either an "internal standard," applicable to situations where "the government excludes a speaker who falls within the class to which a designated [limited] public forum is made generally available," or an "external standard," applicable to all other situations. *See Goulart*, 345 F.3d at 250 (citing *Warren v. Fairfax County*, 196 F.3d 186 (4th Cir. 1999) (en banc)). Under the internal standard, a limited public forum is treated as a *traditional* public forum and the exclusion of speech is subject to strict scrutiny. *Id.* In that respect, "once a limited forum has been created, entities of a "similar character to those allowed access may not be excluded," unless the exclusion satisfies strict scrutiny. *Id.* By contrast, under the external standard, a limited public forum is treated as a *nonpublic* forum, such that government control of

speech must only be viewpoint neutral and reasonable in light of the objective purposes served by the forum. *Id.*

In support of his claim for damages, Davison contends that the internal standard applies and that his exclusion from school sponsored events cannot withstand strict scrutiny. The Court disagrees.

The central inquiry on this issue is whether Davison's conduct sufficiently distinguished him constitutionally from other parents to whom the school event is made generally available, such that his treatment is constitutionally justified, or whether he was a parent of "similar character" to other parents against whom no action had been taken. Here, Davison contends that he was singled out solely because of his constitutionally protected speech, *i.e.*, his criticisms of government officials and school administrators. But as discussed above, the ban was imposed on the basis of Davidson's conduct, not his views, and to conclude that he was "similar in character" to other parents against whom no sanctions would ignore Davison's demonstrated persistent behavior, which on multiple occasions caused school teachers and officials to be highly concerned about the safety of the elementary school, a concern the record does not indicate extended to any other parents at Seldens.[13] Considering this dispositive, distinguishing characteristic, the Defendants' decision to issue the no trespass letters is

[13] In fact, many parents also shared their concerns about Plaintiff 's threatening behavior.. *See, e.g.* [Doc. 99, Ex. 143-44].

not subject to strict scrutiny under the limited public forum internal standard. *See Wood v. Arnold*, 321 F. Supp. 3d 565, 583 (D. Md. 2018), *aff'd* 2019 U.S. App. LEXIS 4067 (4th Cir. Feb. 11, 2019) (holding that a parent of a student was not within the class to whom to school meetings were available because he was not of "similar character" to other parents since he "caused school officials to be concerned about safety at the school and therefore applying the external standard). Instead, the no trespass ban is reviewable under the external standard, and as such must be viewpoint neutral and reasonable in light of the specific purpose served by the limited public forum. *Id.*

Here, the record sufficiently establishes as a matter of law that the no trespass ban was both viewpoint neutral and reasonable. *First*, as reflected in the no trespass letters, the ban was not based on Davison's objections to the curriculum, school policy, or administration, but rather the perceived threat, accumulated over weeks of evidence, that Davison posed to the school, school staff, and potentially students, a threat that was reinforced by Davison's behavior after his initial receipt of the no trespass letter. *See, e.g.*, [Doc. 93, Exs. 4 (detailing post September 30, 2015 behavior with the school); 218-222]. *Second*, the ban was limited in duration, spanning the remainder of the school year, and scope, providing an opportunity for Davison to visit the school if he had permission, and to appear before LCSB meetings. In short, the no trespass letters were

fashioned to ensure that Davison did not disrupt either during-school activities or any school-related functions and activities reserved for other parents, while continuing to provide an opportunity for him to engage as a parent. *See also ACLU v. Mote*, 423 F.3d 438, 445 (4th Cir. 2005) (citing *Cornelius*, 473 U.S. at 808) (a school's decision to restrict speech in a limited public forum under the external standard "need only be reasonable; it need not be the most reasonable or the only reasonable limitation") (emphasis in original). For the foregoing reasons, Davison is not entitled to judgment in his favor as to his claim for damages under Counts 4 or 5. Even if the no trespass letters were subject to the internal standard, and cannot withstand strict scrutiny, Defendants are, as they contend, entitled to qualified immunity as to any damages claim. *See* [Doc. 99 at 18, 24-26]. "Qualified immunity shields government officials performing discretionary functions from personal-capacity liability for civil damages under § 1983, insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 306 (4th Cir. 2006) (internal quotation marks omitted). Government officials are entitled to the defense of qualified immunity when sued in their individual capacities unless "(1) the allegations underlying the claim, if true, substantiate the violation of a federal statutory or constitutional right; and (2) this violation was of a 'clearly established' right 'of which a reasonable person would have known.'" *Id.* The

defense, in substance, provides for protection to all but the plainly incompetent or those who knowingly violate the law." *Id.*

Here, Plaintiff's claim does not involve the violation was of a "clearly established" right "of which a reasonable person would have known." For a constitutional or statutory right to be considered "clearly established," thus defeating qualified immunity, that right must be recognized at a sufficiently high level of authority and in a specific enough fashion to put a reasonable official on notice that the conduct at issue is unlawful. *Vincent v. City of Sulphur*, 805 F.3d. 543, 2015 U.S. App. LEXIS 18761, 2015 WL 6688006 (5th Cir. 2015). No such recognition existed at the time the no trespass ban was issued in the Fall of 2015. Plaintiff's concerning behavior extended over an extended period of time and the no trespass letters were issued under circumstances long recognized as sufficient to impose such a sanction, including multiple levels of review and input of legal counsel. No person in Defendants' position would have reasonably thought that he or she was engaged in conduct that violated the law, clearly established or otherwise.

In *Lovern v. Edwards*, 190 F.3d 648, 656 (4th Cir. 1999), the Fourth Circuit explained that "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 while on school property." In so writing, the Fourth Circuit noted that it was unable to conclude that

Lovern's "constitutional rights were 'directly and sharply' implicated by [the school's] prohibition against him." *Id. See also Cole v. Buchannan County Sch. Bd.*, 328 Fed. App'x 204, 210-12 (4th Cir. 2009) (unpublished) (overturning district court's denial of qualified immunity pertaining to a school board's decision to ban plaintiff from all school grounds based on the "broad discretion" afforded to schools and school boards to "ensure the proper functioning of the educational system"). Other circuits have concluded the same. *See, e.g., Johnson v. Perry*, 859 F.3d 156, 175 (2d Cir. 2017) (school officials are entitled to qualified immunity for "bann[ing] [a plaintiff] from [school] property" because "we cannot conclude that a parent has a general and unlimited First Amendment right of access to school property."); *see also Jackson v. McCurry*, 762 Fed. Appx. 919, 929 (11th Cir. 2019) (same); *McCook v. Springer School District*, 44 F. App'x 896, 910-11 (10th Cir. 2002) (same).

Davison contends that none of these defendants are entitled to qualified immunity based principally on the breadth of the ban, relying on *Barna v Bd. Of Sch. Dirs.*, 143 F. Supp. 3d 205, 216-23 (M.D. Pa. 2015) for the proposition that under clearly established law at the time, a broad, sweeping no trespass letters of the sort issued here was constitutionally impermissible. [Doc. 93 at 13]. The Court disagrees. In *Barna*, the plaintiff exhibited disruptive and threatening behavior at several school board meetings and as a consequence, the board *permanently* banned him from attending them; provided, however, that the plaintiff was allowed to submit "reasonable and

responsible" written requests which the board promised to timely answer. *Barna v. Bd. of Sch. Directors of Panther Valley Sch. Dist.*, 877 F.3d 136, 140 (3d Cir. 2017) (*Barna II*). The district court found that, although the ban was content-neutral and justified in light of the plaintiff's disruptive conduct, it was nevertheless unconstitutionally overbroad because it did not leave open ample alternative channels of communication. *Barna v. Bd. of Sch. Directors of the Panther Valley Sch. Dist.*, 143 F. Supp. 3d 205, 216 (M.D. Pa. 2015) (*Barna I*).

But *Barna* is distinguishable from this case. First, as discussed, the LCSB did not restrict Davison's alternative avenues of communication. Although he was banned from visiting LCPS school facilities, Davison still regularly attended and spoke at LCSB meetings and continued his online activities, through social media or e-mail. More relevant is that the *Barna I* court found, and the Third Circuit affirmed, that the defendants were entitled to qualified immunity. *See Barna II*, 877 F.3d at 144-45; *Barna I*, 143 F. Supp. at 226 ("While this Court has identified several out-of-circuit cases which it finds to be persuasive authority for the proposition that a reasonable school board member could not have believed that the permanent ban on future expressive activity by Barna was lawful or that the alternative means of communication accorded him was sufficient, it is not clear that there was established a 'consensus' of cases at the time of the imposition of the ban on Barna sufficient to deny the Defendants qualified immunity.") (citations omitted). The application of

qualified immunity is even more clear here. For the above reasons, as a matter of law, Plaintiff is not entitled to summary judgment on his claim for damages under Count 4 or 5, Defendants are entitled to summary judgment in their favor as to those claims and both claims for damages are dismissed.

(4) Defamation Under Count 8 against Defendant Rose

Davison alleges that Rose defamed him during the public comment period at a June 23, 2015 LCSB meeting when Rose denied that she had filed criminal complaints against him, when in fact she had, and when Rose suggested that Davison was a physical threat to her family. [Doc. 93 at 24]. According to Davison, these statements were false and amounted to *per se* defamation because Rose's comments implied that Davison had committed a crime and/or was unfit for his job, which required a government security clearance. *Id.*; *see also* [Doc. 99, Exs. 116; 354B, entry 13].

Under Virginia law, the elements of common law defamation are the "(1) publication of (2) an actionable statement with (3) the requisite intent." *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir. 1993) (applying Virginia law). Whether a statement is actionable is a threshold question of law for courts to decide. *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 294 (4th Cir. 2008). An alleged defamatory statement is actionable if it contains a provably false factual connotation, rather than a "pure expression[] of opinion." *Tharpe*, 285 Va. at 481-82,

737 S.E.2d at 893. With respect to the substance of that falsity, "the allegedly defamatory words must carry 'the requisite defamatory "sting" to one's reputation." *Dragulescu v. Va. Union Univ.*, 223 F. Supp. 3d 499, 507 (E.D. Va. 2016) (quoting *Schaecher v. Bouffault*, 290 Va. 83, 772 S.E.2d 589 (Va. 2015)). In making that determination, a court must view the allegedly defamatory statements in context, with "all the surrounding facts and circumstances . . . taken into consideration . . . and the whole case. . . looked at in the light of its own particular facts." *See Zayre of Va., Inc. v. Gowdy*, 207 Va. 47, 50, 147 S.E.2d 710 (Va. 1966).

Virginia law recognizes that certain statements as defamatory *per se*. These are (1) statements that "impute to a person the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished," (2) statements that "impute that a person is infected with some contagious disease, where if the charge is true, it would exclude the party from society," (3) statements that "impute to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of duties of such an office or employment," and (4) statements that "prejudice such person in his or her profession or trade." *Hatfill v. New York Times Co.*, 416 F.3d 320, 331 (4th Cir. 2005) (citing *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 82 S.E.2d 588, 591 (Va. 1954)). Because Rose's statements implied Davison was lying, Davison argues that the statements, which

implicate his ability to hold a security clearance, among other things, are defamatory *per se*.

Rose's alleged statements are not actionable. Although Defendant admits in her pleadings that one of the three police complaints filed against Davison was filed by her, *see* [Doc. 99 at 28], Davison does not allege that he was defamed by any statements Rose made in that criminal complaint, *see* [Doc. 21, Exs. 3, 4], only by her statement that she did not file any criminal complaint against him, which Davison claims defamed him because it contradicted his own statement that Rose did file a criminal complaint and thereby casted him as a liar.

Here, there were simply two conflicting statements; and as a matter of law, one cannot reasonably draw the defamatory inference that Davison relies upon—that he is a liar. Indeed, one might have drawn the opposite inference, either that Davison was being truthful and Rose was not truthful or that Rose never filed any such criminal complaint because Davison never engaged in any wrongdoing. As a matter of law, Rose's statement cannot be understood as carrying the "defamatory sting" necessary to sustain a defamation claim.[14]

Second, Rose's comments that she and her family felt threated by Davison is, as a matter of law, an opinion, protected by the First Amendment and

[14] Although Plaintiff's defamation claim appears to be based on the view that Rose's statement constituted defamation *per se*, the Court concludes as a matter of law that Rose's statements are not actionable as defamation *per se* or as defamation under any other standard.

thus beyond the reach of defamation. Virginia federal and state courts have routinely rejected as beyond the reach of defamation law claims alleging unflattering expressions of opinion. *See e.g.*, *Marroquin v. Exxon Mobil Corp.*, 08CV391, 2009 U.S. Dist. LEXIS 44834, 2009 WL 1429455, at *9 (E.D. Va. May 27, 2009) (finding defendant's characterization of plaintiff's conduct as "very bad," "inappropriate," and "improper" were "an opinion of the scope and magnitude of Plaintiff's wrongdoing that cannot be proven false"); *Taylor v. CNA Corp.*, 782 F. Supp. 2d 182, 2010 WL 3430911, at *15 (E.D. Va. 2010) (finding coworkers' statements that plaintiff was "intimidating" and "bullying" not capable of defamation); *Chapin*, 993 F.2d at 1093 (finding that plaintiff and charity he ran could not maintain defamation based on statements, *inter alia*, that charity's president was a "veteran charity entrepreneur," and that the charity was "charging hefty mark-ups," notwithstanding that they implied that charity was making large profit and pocketing it); *Key v. Robertson*, 626 F. Supp. 2d 566, 582 (E.D. Va. 2009) (ruling that press release charging plaintiff with "manipulat[ing]" photo was non-actionable opinion); *American Commc'ns Newtork, Inc. v. Williams*, 264 Va. 336, 568 S.E.2d 683, 686 (Va. 2002) (reversing jury verdict and finding statements company "failed to establish effective operations" and lacked "appropriate infrastructure" were non-actionable opinion); *Jarrett v. Goldman*, 67 Va. Cir. 361, 2005

WL 1323115, at *8, 10 (Va. Cir. Ct. May 31, 2005) (finding, *inter alia*, that statements asserting plaintiff "screwed up" and was "incompetent" were non-actionable opinion). Here, when taken in context, including Davison's own unflattering accusations towards Hornberger and Rose, *see* [Doc. 99, Ex. 116 at 1:09-1:28], no reasonable person would view Rose's statements as anything other than Rose's opinion, however unflattering, not factual accusations.

For the foregoing reasons, the Court denies summary judgment in favor of Davison as to his defamation claim against Rose; and because the relied upon statements are not actionable as a matter of law, judgment will be entered in favor of Defendant Rose on Count 8.

C. Defendants' Motion for Summary Judgment [Doc. 98]

Defendants move for summary judgment as to all of Plaintiff's pending claims. For the reasons discussed above, the Court finds that Defendants are entitled to summary judgment as to Counts 4, 5, and 6, and Defendant Rose as to Count 8 as well. Thus, remaining for the Court's review are Counts 1(a), 1(b), 2, 7, and 8 with respect to Defendants Hornberger, Devlin, and Stephens.

(1) Count 1(a) for injunctive relief against Defendant Morse

In Count 1(a), Plaintiff alleges that Defendant Morse has barred him from accessing his social media

pages and accordingly seeks an injunction ordering that Morse allow him to access his social media pages.

In *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019), *as amended* (Jan. 9, 2019), the Fourth Circuit held that the Chair of the Loudoun County Board of Supervisors acted under color of state law in creating and maintaining a "public official" page in which she communicated with the public regarding Board of Supervisors issues; and that the "interactive component" of the page, which appears nearly identical to the interactive characteristics of the pages maintained by the individual Board members challenged in this matter, was a "public forum" subject to the First Amendment. 912 F.3d at 680, 688. In reaching this conclusion, the Fourth Circuit observed that "the Chair's Facebook Page is in many ways analogous to . . . privately-operated public access channels" in that the Chair "expressly sought to—and did, in fact—create an electronic marketplace of ideas by inviting 'ANY' constituent to post to the Chair Page on 'ANY issues,'" that the Chair "exercised unconstrained control over the aspect of the Chair's Facebook Page giving rise to Plaintiff's claim—banning of other Facebook profiles and Pages" and expressly opened a segment of the page ("its interactive space") for "ANY" user to post on "ANY" issues of public concern. *Id.* at 684–85, 687 (quotation and internal quotation marks omitted). The Court also found that it did not need to decide whether the Chair's Facebook page was a traditional, limited, or designated public forum because the Chair's conduct toward Plaintiff— deleting comments he posted on her

page critical of the Board members' official actions and fitness for office and subsequently banning him from the page in the wake of those comments—constituted viewpoint discrimination, which is "prohibited in all forums." *Id.* (quoting *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 n.2 (4th Cir. 2006)).

Morse contends that he has complied with *Randall*, bringing his social media pages within the holding of that case, thereby making any request for injunctive relief moot. *See* [Docs. 99 at 15-17; 109 at 3]; *see also* Morse Decl. ¶¶ 7, 9. In opposition, Davison does not dispute that Morse made changes to his Facebook page following *Randall*, but instead contends that since *Randall*, Morse continues to bar Davison from visiting Morse's Facebook and Twitter pages. [Doc. 106 at 33-34].[15] Ultimately, the disposition of this claim depends on whether and to what extent Morse has opened up his social media pages as a forum for discussion regarding LCPS events and policies; and in that regard, based on the current record, the Court finds that there remains a genuine issue of material fact concerning whether Defendant Morse's social media pages satisfy the *Randall* criteria for a "public forum" subject to the First Amendment and if so, whether Davison has been improperly

[15] The Court previously held that given that ban on these social media pages is ongoing, Plaintiff has established standing to assert this claim, and the Court finds that the Plaintiff likewise has standing raise these claims. *See* [Doc. 71 at 22].

barred from that forum. Defendant Morse is therefore not entitled to judgment as a matter of law as to Davison's claim in Count 1(a) for injunctive relief; and his motion for summary judgment in that regard is denied.

(2) Count 1(b) for monetary damages against Defendants Rose, Hornberger, and Morse

In Count 1(b), Davison seeks monetary damages arising from Defendants Rose's, Hornberger's, and Morse's alleged "censorship" of his speech when Defendants Rose, Hornberger, and Morse prematurely terminated his comments in public LCSB meetings, even though his comments were *within* the scope of the topics being discussed and he adhered to the applicable conduct rules. [Doc. 21 ¶¶ 55, 56-64.]

As noted above, First Amendment claims proceed in three steps. First, the Court determines whether the "speech [was] protected by the First Amendment . . . ." *Cornelius*, 473 U.S. at 797. Next, the Court next "must identify the nature of the forum" in which the speaker spoke, and finally the Court must then ask "whether the justifications for exclusion from the relevant forum satisfy the requisite standard." *Id.* Defendants do not appear to dispute that Davison's speech is protected nor do they dispute that the school board meetings were limited public fora. Accordingly, the dispositive issue is whether the regulation of Davison's speech before the LCSB was content-neutral, narrowly tailored to serve a significant government interest and "[left] open ample

alternative channels for communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

i. Content Neutrality

"The restriction of speech is content-neutral if it is justified without reference to the content of the regulated speech." *Harris v. City of Valdosta, Ga.*, 616 F. Supp. 2d 1310, 1322 (M.D. Ga. 2009) (internal quotation marks and citation omitted). "In determining whether a restriction is content-neutral, the Court's controlling consideration is the purpose in limiting the Plaintiffs' speech in a public forum." *Id.* (internal quotation marks and citation omitted). "As long as a restriction serves purposes unrelated to the content of the expression, it is content-neutral even if it has an incidental effect upon some speakers or messages but not others." *Id.* (internal quotation marks and citation omitted).

Here, the Court finds as a matter of law that Defendants Rose and Hornberger imposed restrictions on Davison's speech, pursuant to school board policy, and without reference to the speech's substantive content. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 295 (1984). Indeed, the LCSB's policy, which Defendants enforced, endeavored to provide everyone a fair and adequate opportunity to be heard in a public forum, where "public comment .. . [is] limited to matters related to the public schools," LCSB Policy § 2-29 B, and barred "comments that are harassing or amount to a personal attack against any identifiable individual whether

board member, staff or student, have potential for causing unnecessary delay or disruption to a meeting" in order to prevent unnecessary delay or disruption to a meeting. *Id.* In this respect, the school board's policy fits well within the constraints articulated as content neutral by the Fourth Circuit in *Steinberg v. Chesterfield Cty. Planning Comm'n*, 527 F.3d 377, 384-88 (4th Cir. 2008).

The content-neutral nature of the Defendants' actions is reflected in the record, which contains videos of the challenged conduct. *See* [Doc. 99, Ex. 354]. In those instances where Defendants allegedly cut off Davison's speech, they appear to have done so, not out of distaste for the content of Davison's speech, but after Davison expressed himself in a hostile manner that disrupted meeting progress or was off topic. *See Collinson*, 895 F.2d at 1000 (4th Cir. 1990) (Phillips, J., concurring) (noting that a municipal body is justified in limiting its meeting to discussion of specified agenda items and in imposing reasonable restrictions to preserve the civility and decorum necessary to further the forum's purpose of conducting public business"). For instance, on November 15, 2015, the LCSB opened public comment regarding the Madison Trust Rezoning Process. Davison, who was granted two minutes of speaking time, does not discuss that subject matter, but instead makes personal attacks on Rose, Fox, and other members of Board and raised issues regarding a past rezoning dispute and accompanying lawsuit. *See* [Doc. 354B, entry 19]. Similarly, on March 14, 2016, at a LCSB meeting regarding public rezoning, Davison called

Defendant Hornberger a "congenital liar," threatened Hornberger with a federal lawsuit, raised his voice in anger, and impugns Hornberger's spouse for what Davison alleged to be a conflict of interest. *Id*, entry 29. Likewise, on April 12, 2016, at a public meeting, Davison, who was afforded 3 minutes to speak and spoke for 2 minutes and 45 seconds, brings into his comments Rose's children, which caused Hornberger to issue a warning to Davison while permitting him to continue, provided Davison discussed education related policy. *Id.* entry 31. In light of these and other similar occurrences, the Court finds as a matter of law that the relied upon restrictions imposed on Davison's speech were content-neutral. *See Arnold v. Ulatowski,* No. 5:10-cv-1043 (MAD/ATB), 2012 WL 1142897, at *5 (N.D.N.Y. Apr. 4, 2012) (finding that a disruption occurred where the plaintiff admitted he was speaking loudly and angrily); *Barnes v. Zaccari*, No. 1:08-cv-77-CAP, 2008 WL 11339923, at *6 (N.D. Ga. Nov. 19, 2008) (finding that a restriction on free speech in a school was appropriate where "the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school"); *Kirkland v. Luken*, 536 F. Supp. 2d 857, 875-76 (S.D. Ohio 2008) (holding that there was no First Amendment violation where the speaker's microphone was turned off and the speaker was removed from a public hearing for using inappropriate language and shouting). In fact, throughout the relevant period, Davison was able to freely address the LCSB and criticize school-wide

policy decisions and has been permitted to do so when he did not violate the school board's rules.[16]

ii. Narrowly Tailored to Advance a Substantial Government Interest

Even if content-neutral, the restrictions on Davison speech must be narrowly tailored to advance a substantial government interest. In that regard, courts have generally found that there is a strong government interest in preserving decorum at board meetings. See *Kirkland*, 536 F. Supp. 2d at 876 (finding that "[t]he interest in conducting orderly meetings of the City Council was a compelling state interest"); *Scroggins v. Topeka*, 2 F. Supp. 2d 1362, 1373 (D. Kan. 1998) ("[T]he Council's interest in conducting orderly, efficient, and dignified meetings and in preventing the disruption of those meetings is a significant governmental interest."). Indeed, in the school context, this interest is designed to prevent "the sort of uninhibited, unstructured speech that characterizes a public park." *Lowery v. Jefferson Cnty. Bd. of Educ.*, 586 F.3d 427, 432 (6th Cir. 2009).

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[16] To rebut Defendants' argument that the restrictions on his speech were not content neutral, Davison points to other speakers who, in 2019, raised their voices or discussed "sexual content" at LCSB meeting. But while some of those speakers were visibly angry, they did not diverge from the topic under discussion, or try to provoke individual Board members with personal attacks. In contrast, Davison's pointed behavior and off-topic remarks were properly addressed and managed by the Defendants for the purpose of avoiding "disruption of the orderly conduct of the meeting." *Collinson*, 895 F.2d at 1000; *see also Steinberg*, 527 F.3d at 38 ("We conclude that a content-neutral policy against personal attacks is not facially unconstitutional insofar as it is adopted and employed to serve the legitimate public interest in a limited forum of decorum and order.").

Further, for a restriction on speech to be narrowly tailored to achieve a substantial government interest, the restriction "need not be the least restrictive or least intrusive means of" serving the interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). Instead, the government is prohibited from "regulat[ing] expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* at 799.

Here, the record reflects that Defendants Hornberger and Rose imposed reasonable requirements on Davison to ensure the orderly functioning of school board meetings and to preserve decorum. In the instances where Hornberger and Rose interrupted Davison, they did so to ensure Davison remained on topic and made germane statements. And it appears from the record that at no point did they preemptively terminate Davison's opportunity to speak, and significantly, that they always permitted Davison to speak when comment was allowed from the public. Accordingly, this Court finds as a matter of law that the restrictions imposed on Davison at the school board meetings were narrowly tailored to serve LCSB's legitimate interest in maintaining order and decorum during the meetings. *See Dyer*, 2019 U.S. Dist. LEXIS 211306, at *13-14.

iii. Alternative Means of Communication

Finally, a constitutionally valid restriction must provide ample alternative channels of communication. *See Jones v. Heyman*, 888 F.2d 1328, 1334 (11th Cir. 1989). By Davison's own admission,

Davison has routinely and repeatedly expressed his concerns regarding the LCSB across a host of different platforms, from social media pages to pamphlets. Davison Decl. ¶¶ 38-40; *see also* [Doc. 106 at 21 ("[T]he no trespass ban was not successful in restricting Davison's criticism . . ."). As a result, other alternative channels of communication were not only available to Davison during the time he was speaking before the LCSB, but were, in fact, used; thus the Court finds as a matter of law that the relied upon restrictions were imposed in a way that allowed ample alternative channels of communication.

For the above reasons, Defendants Rose's and Hornburger's decision to restrict Davison's speech before LCSB meetings did not violate his right of free speech. The restrictions placed on Davison's speech before the LCSB were reasonable in that they were content neutral, applied equally to all members of the public, and imposed when they interfered with the school board's interest in maintaining decorum and order. Accordingly, Defendants are entitled to judgment as a matter of law as to Plaintiff's claim for monetary damages in Count 1(b).

(3) Count 2 for injunctive relief and monetary damages against all Defendants

In Count 2, Plaintiff seeks both monetary damages and injunctive relief based on his allegation that each of the remaining individual Defendants engaged in "First Amendment retaliation" by issuing the no trespass letter and engaged in other speech-

chilling activities in response to his critical comments made at LCSB meetings and elsewhere. [Doc. 21 ¶ 98].

A plaintiff claiming First Amendment retaliation must demonstrate that "(1) [he] engaged in protected First Amendment activity, (2) the defendants took some action that adversely affected [his] First Amendment rights, and (3) there was a causal relationship between [his] protected activity and the defendants' conduct." *See Constantine v. Rectors and Visitors of George Mason University*, 411 F.3d 474, 499 (4th Cir. 2005); *see also Corales v. Bennett*, 567 F.3d 554 (9th Cir. 2009) (clarifying that the third prong requires that "the protected activity was a substantial or motivating factor in the defendant's conduct.").

Assuming *arguendo* that Davison had engaged in protected speech and the no trespass letter inhibited Davison's continued ability to do so, Davison has not as a matter of law made an adequate showing of a causal relationship between his protected speech and Defendants' decision to issue the no trespass letter. Indeed, the record reflects that Defendants issued the ban based on their perception that Davison had engaged and would continue to engage in threats of disruption, *see supra* 18, not in retaliation against Davison's speech or actions before the school. *See, e.g.*, *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 309 (4th Cir. 2006) (noting that temporal proximity between protected activity and adverse action is not

dispositive of a retaliation claim when the adverse action is otherwise justified).[17]

(4) Count 7 for monetary damages and injunctive relief based the Equal Protection Clause

In Count 7, Plaintiff alleges that individual Defendants "deprived Davison of his constitutional right to equal protection by treating him differently than other (a) residents of Loudoun County, (b) parents of children of Selden's, and (c) other members of the PTA." [Doc. 21 at ¶ 173].

The Equal Protection Clause requires the government to treat similarly situated persons alike. *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). By contrast, treatment of dissimilarly situated persons in a dissimilar manner does not violate the Equal Protection Clause. *See, e.g., Keevan v. Smith*, 100 F.3d 644, 647-48 (8th Cir. 1996). However, the equal protection analysis takes on a different aspect when an alleged equal protection

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[17] Davison attempts to establish a causal connection between the content of his speech and the no trespass ban by claiming the existence of a months-long conspiracy against him as a result of his efforts, beginning in 2012, to obtain academic records, challenge LCPS administration, and report various legal violations. *See* [Doc. 106 at 14-29]. But Davison has produced insufficient evidence of any such conspiracy, particularly given the fulsome record concerning his own behavior that justified the no trespass letters. *See, e.g.,* Stephens Dep. Tr. at 33-37; Devlin Dep. Tr. at 36-38, 42-43 (noting Davison's use of expletives and angry outbursts); [Doc. 99, Ex. 204 (Sep. 22, 2015 email from Davison to Stephens: "It appears that division counsel has not educated Ms. Stephens on civil rights and the rules regarding content neutral access. This is in no way a 'threat.' It is a 'promise' just like I promised to defend the Constitution as an officer in the Navy and appropriately protect material pursuant to my clearance.").

violation is based on a First Amendment claim. In such situations, the court must "fuse the First Amendment into the Equal Protection Clause." *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 442 (4th Cir. 2013) (internal quotation marks and alteration omitted) (quoting *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 384–85 n.4 (1992)). In other words, to the extent that Plaintiff's equal protection claim is grounded on his contention that he was treated differently because he had exercised his First Amendment rights, the two claims coalesce. *See African Trade & Info. Ctr., Inc. v. Abromaitis*, 294 F.3d 355, 363 (2d Cir. 2002) (holding that the plaintiffs' First Amendment and equal protection claims coalesced because the alleged deprivation of equal protection was "punish[ment]" for plaintiffs' exercise of their First Amendment rights).

The essence of Plaintiff's Equal Protection Clause arises from Defendants' treatment of his speech. For that reason, it mergers with the First Amendment claims already discussed and rejected as a matter of law. Accordingly, for the same reasons discussed above, the Defendants are entitled to judgment as a matter of law with respect to Davison's Equal Protection claim in Count 7.[18]

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[18] Alternatively, the Court dismisses Count 7 because Davison has not sufficiently demonstrated that he was treated differently from "others with whom he was similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Kerr v. Marshall Univ. Bd. of Governors*, 2015 U.S. Dist. LEXIS 38206 *58 (S.D. W. Va. 2015) (quoting *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). Importantly, Davison has not put forward any similarly-situated

(5) Count 8 for defamation damages against Defendants Rose, Stephens, Hornberger, and Devlin.

As discussed above, Defendant Rose is entitled to judgment as a matter of law as to Davison's defamation claim against Rose. Remaining for consideration are Plaintiff's defamation claims against Defendants Stephens, Hornberger, and Devlin, who contend that their statements are not actionable defamation and that each Defendant is entitled to either sovereign immunity or a qualified privilege. [Doc. 99 at 26-30].

As discussed with respect to Davison's defamation claim against Rose, under Virginia law, the elements of common law defamation are the "(1) publication of (2) an actionable statement with (3) the requisite intent." *Chapin*, 993 F.2d at 1092. Whether a statement is actionable is a threshold question of law for courts to decide. *CACI*, 536 F.3d at 294. And in this regard, whether an alleged defamatory statement is actionable requires a court to first consider whether the statement contains a provably false factual connotation or is a "pure expression[] of opinion." *Tharpe*, 285 Va. at 481-82, 737 S.E.2d at 893. In doing so, a court's objective is not to

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comparator—*i.e.*, an individual who posed a similar perceived threat but who was treated differently. In this regard, Davison's reference to members of the PTA, public residents who utilize LCPS facilities, and his reference to other members of public who attend student performances are too general and conclusory and those persons cannot serve as a suitable comparator. *See Willoughby v. Virginia*, 2017 U.S. Dist. LEXIS 153417, 2017 WL 4171973, at *5 (E.D. Va. Sept. 20, 2017) (Lauck, J.).

"determine whether the alleged defamatory statement is true or false, but whether it is capable of being proved true or false." *Id.* at 893. As such, the Virginia Supreme Court has held that clear "rhetorical hyperbole" is not defamatory. *Yeagle v. Collegiate Times,* 255 Va. 293, 295, 497 S.E.2d 136, 138 (1998). Thus, for instance, statements that plaintiff's fees were "excessive" or that he was "inexperienced" have been found not to be defamatory, as the "relative nature of such opinions is obvious to anyone who hears them." *Chaves v. Johnson*, 230 Va. 112, 118-19, 335 S.E.2d 97, 101 (Va. 1985); *see also Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (criticizing a real estate developer's legal tactics as "blackmail" did not constitute accusation that he had broken the law, because "even the most careless reader" would perceive "that the word was no more than rhetorical hyperbole, a vigorous epithet"). In other words, "merely offensive or unpleasant statements" are not defamatory; rather, defamatory statements "are those that make the plaintiff appear odious, infamous, or ridiculous." *Chapin,* 993 F.2d at 1092 (citation omitted).

i. Hornberger

With respect to Hornberger, Davison claims that Hornberger falsely told Fox, a former LCSB member, that Davison said to Hornberger that Hornberger was "digging his own grave," which Fox repeated in online chat programs, [Doc. 21 ¶ 202], and that Hornberger made similar defamatory statements about Davison in the administrative record in arguing

that the no trespass letters were justified, *Id.* ¶ 204]. According to Davison, this allegedly false statement by Hornberger, regarding what Davison allegedly told him, constitutes actionable defamation because it suggests Davison made violent threats against Hornberger. *Id.* ¶ 203; *see also* [Doc. 106 at 39-40].

Hornberger's alleged "digging his own grave" statement is not actionable defamation as a matter of law within the context reflected in the record. Context is frequently necessary to determine whether someone has imputed a defamatory meaning. *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 184 (4th Cir. 1998). And in this respect, whether the language used is "loose, figurative, or hyperbolic language," must be analyzed on a case-by-case basis. *Schnare v. Ziessow*, 104 Fed. Appx. 847, 851 (4th Cir. 2004) (citations omitted). In other words, whether Hornberger's statements are actionable depends on whether a reasonable reader would construe them as seriously asserting that Davison intended to threaten Hornberger.

Here, reading the statements in context and assuming the statement was said, and against the common meaning of the phrase "digging his own grave," that phrase as used here was "loose, figurative, or hyperbolic language." It reflects merely an opinion which, when taken in context, referred to Davison's own view that Hornberger was not helping his own position with respect to his reaction to Davison's vocal and public criticisms of the LCSB, not that Davison was threatening to kill Hornberger. Indeed, Davison understood it in that sense. *See* Davison Dep. Tr. at 33, 93-94 (suggesting that if

someone says that another is digging their own grave, he is warning them that they are doing something foolish).

Therefore, defendant Hornberger is entitled to judgment in his favor as a matter of law as to this defamation claim.

ii. Stephens and Devlin

Plaintiff alleges that Devlin and Stephens falsely stated that he had made threats against LCPS officials in the context of justifying the no trespass letters. *See id.* at ¶¶ 205-10. In particular, Davison points to Devlin's statements that Davison "Left meetings yelling profanity," had posted on Leesburg Today, a local newspaper, "What do I have to do to get your attention . . Yell SHOTGUN," and was having exchanges with himself in postings to social media by assuming several different identities, each of which he contends is false . *Id.* ¶ 205. And with respect to Stephens, Davison contends that in each of the three no trespass letters issued, she made knowingly false statements about Davison's supposedly "threatening" comments, which were false, and that Stephens had referred Davison to Child Protective Services in October 2015 based on false statements. *Id.* ¶¶ 209-10.

Davison has admitted in substance that he assumed other identities and persona to send e-mails to school staff, Davison Dep. Tr. at 75-76. Thus, this statement is therefore provably true. Moreover, all of the relied upon statements, which Davison alleges are

defamatory, were made within the context of a qualified privilege.

Under Virginia law, the publication requirement for defamation requires a dissemination of the statement to a third party where that dissemination does not occur in a privileged context. *See Montgomery Ward & Co. v. Nance*, 165 Va. 363, 379, 182 S.E. 264 (1935). In this regard, it is well settled under Virginia law that "communications between persons on a subject in which the persons have an interest or duty are occasions of privilege." *Larimore v. Blaylock*, 259 Va. 568, 572, 528 S.E.2d 119 (Va. 2000); *see also Southeastern Tidewater Opportunity Project, Inc. v. Bade*, 246 Va. 273, 275, 435 S.E.2d 131 (Va. 1993) (holding that a letter was privileged because it "was written in the context of his employment relationship"). Thus, the privilege applies broadly to all statements, provided the parties to the communication have a duty or interest in the subject matter. *See Isle of Wight Cnty. v. Nogiec*, 281 Va. 140, 704 S.E.2d 83, 88 (Va. 2011) (quoting *Story v. Norfolk-Portsmouth Newspapers, Inc.*, 202 Va. 588, 118 S.E.2d 668, 670 (Va. 1961)).

That said, it is also well-settled that "if a plaintiff proves by clear and convincing evidence that the defamatory words were spoken with common-law malice," then the qualified privilege is lost. *Southeastern Tidewater,* 246 Va. at 276; *see also Larimore,* 259 Va. at 572. Common law malice, in turn, is "behavior actuated by motives of personal spite, or ill-will, independent of the occasion on which

the communication was made." *Southeastern Tidewater,* 246 Va. at 276. In other words, to avoid an otherwise justified application of qualified privilege, a plaintiff must show that "the communication was actuated by some sinister or corrupt motive such as hatred, revenge, personal spite, ill will, or desire to injure the plaintiff." *Id.* Thus, the question here is two-fold: *first*, were Devlin's and Stephens' statements made pursuant to some duty conferred upon them and out of a duty of a "moral or social character," *Story*, 118 S.E.2d at 669, and *second*, were their statements knowingly false and made with malicious intent.

The Court first concludes that both Stephens' and Devlin's statements were on a subject in which both have a qualifying interest or duty. Indeed, both Defendants have established that they were attempting to protect the interest of Seldens, and with respect to Stephens, who is a mandatory reporter to Child Protective Services, the Davison children. *See* Va. Code § 63.2-1509 (requiring any teacher or other person employed in a public school who, in their professional or official capacity, suspects that a child is abused or neglected, shall report the matter immediately and conferring immunity to that person from any liability unless such person acted in bad faith or with malicious purpose); *see also Day v. Morgan,* 2011 U.S. Dist. LEXIS 86270, at *35, 2011 WL 3418854 (D.S.C. May 5, 2011) (finding that school interim principal and assistant superintendent allegedly defamatory statements about a plaintiff regarding his alleged threats and false information in a letter advising that he be terminated were within

scope of duty to which qualified privilege applied); *Wolf v. Fauquier County Bd. of Supervisors*, 555 F.3d 311, 317-18 (4th Cir. 2009) ("reporters are protected. . ." and "the Virginia General Assembly set a high bar for those wishing to strip reporters of suspected child abuse of their statutory immunity").

Second, the Court concludes as a matter of law that their statements were not made out of malice. Davison, who bears the burden of proving the existence of malice in this context, *Story*, 202 Va. at 591, has not offered any credible proof that either Defendant made the statements with malicious intent. As discussed throughout this Memorandum Opinion and Order, the statements by Stephens and Devlin were made within the context of their school duties and obligations and arose out concerns about the safety of the school, its teachers and students and are entitled to qualified privilege.

For the above reasons, Defendants are entitled to judgment as a matter of law as to Plaintiff's defamation claims in Count 8.

IV. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Plaintiff's Motion for Summary Judgment [Doc. 92] be, and the same hereby is, DENIED; and it is further

ORDERED that Defendants' Motion for Summary Judgment [Doc. 98] be, and the same hereby is, GRANTED in part and DENIED in part. The motion is granted as to Counts 1(b), 2, 4, 5, 6, 7,

and 8, against all named Defendants and for all forms of relief; and it is denied as to Plaintiff's claim for injunctive relief against Defendant Morse in Count 1(a).

The Clerk is directed to forward a copy of the Order to all counsel of record.

Anthony J. Trenga
United States District Judge

Alexandria, Virginia
May 1, 2020

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

BRIAN C. DAVISON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	1:16cv0540 (AJT/IDD)
	)	
DEBORAH ROSE, *et al.*,	)	
	)	
Defendants.	)	
	)	

ORDER

This matter is before the Court on Defendants Deborah Rose, Tracy Stephens, Eric Hornberger, Jill Turgeon, Brenda Sheridan, Jeffrey Morse, William Fox, Kevin Kuesters, Joy Maloney, Eric DeKenipp, Suzanne Devlin, and Loudoun County School Board's Motion to Dismiss Filed Pursuant to Fed. R. Civ. P. 12(b)(1) and (6) (the "Motion to Dismiss") [Doc. No. 3]. Upon consideration of the Motion, the memoranda in support thereof and in opposition thereto, and for the reasons stated in open court, it is hereby

ORDERED that Defendants' Motion to Dismiss [Doc. No. 3] be, and the same hereby is, DENIED as to the relief sought pursuant to Rule 12(b)(1) under the *Rooker-Feldman* doctrine, and DENIED without prejudice as to the relief sought pursuant to Rule 12(b)(6); and it is further

ORDERED that this matter be, and the same hereby is, STAYED pending the final resolution of the action in Loudoun County Circuit Court, styled Davison v. Loudoun County School Board, Case No. CL-00098468-00 (Va. Cir. Ct. Dec. 22, 2015).

The Clerk is hereby directed to forward copies of this Order to all counsel of record and to remove this case from the active docket.

Anthony J. Trenga
United States District Judge

Alexandria, Virginia
July 8, 2016

APPENDIX D

FILED: January 3, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Case No. 20-1683
1:16-cv-540 (AJT/MSN)

BRIAN DAVISON,
Plaintiff-Appellee

v.

DEBORAH ROSE; TRACY STEPHENS; ERIC HORNBERGER; JILL TURGEON; BRENDA SHERIDAN; JEFFREY MORSE; WILLIAM FOX; KEVIN KUESTERS; JOY MALONEY; ERIC DEKENIPP; SUZANNE G. DEVLIN; LOUDOUN COUNTY SCHOOL BOARD
Defendants-Appellees

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc. The court denies the petition for rehearing and rehearing en banc.

For the Court
/s/ Patricia S. Connor, Clerk