UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

DAVID J. BLOCH, *Plaintiff,* v. HEATHER BOUCHEY, in her official capacity as Interim Secretary of the Vermont Agency of Education, JAY NICHOLS, in his official capacity as Executive Director of the Vermont Principals' Association, WINDSOR CENTRAL SUPERVISORY UNION BOARD, and SHERRY SOUSA, in her official and individual capacities as Superintendent of Windsor Central Supervisory Union, *Defendants.*	Civil Action No. 2:23-cv-209

DEFENDANTS WINDSOR CENTRAL SUPERVISORY UNION BOARD AND WINDSOR CENTRAL SUPERVISORY UNION SUPERINTENDENT SHERRY SOUSA'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND EXPEDITED HEARING

Defendants Windsor Central Supervisory Union Board and Windsor Central Supervisory Union Superintendent Sherry Sousa (collectively, "the Supervisory Union Defendants"),[1] by and through counsel, Lynn, Lynn, Blackman & Manitsky, P.C., oppose Plaintiff's motion for

[1] On July 1, 2023, Windsor Central Supervisory Union became Mountain Views Supervisory Union. The Supervisory Union Defendants assume that Plaintiff, in his Complaint filed July 17, 2023, intended to name the Mountain Views Supervisory Union Board of Directors and Superintendent Sousa in her official capacity as Superintendent of the Mountain Views Supervisory Union.

preliminary injunction and expedited hearing.[2] In support of this request, the Supervisory Union Defendants respectfully submit the following Memorandum of Law, and their concurrently filed Motion to Dismiss.

MEMORANDUM OF LAW

The Supervisory Union Defendants terminated Plaintiff David Bloch as a snowboarding coach due to conduct unbecoming a coach. The Supervisory Union Defendants concluded that his conduct created a hostile environment and constituted harassment based on gender identity. His efforts to reframe the facts as a violation of his First Amendment rights are without merit.

At its heart, the Complaint attacks two policies binding on the Supervisory Union: (1) the Supervisory Union's Policies and Procedures for the Prevention of Harassment, Hazing, and Bullying ("HHB Policy") (Doc. 1-13 at 2-14), which are mandated under Vermont law, and (2) the Vermont Principals' Association ("VPA") Athletics Policy (Doc. 1-14 at 2-39), required for Vermont schools to participate in competition. For reasons set forth in detail in the Supervisory Union Defendants' motion to dismiss, the facial challenge to their HHB Policy on the grounds of content and viewpoint discrimination, prior restraint, and overbreadth should be dismissed because the policy is constitutionally sound.

Similarly, Plaintiff's as-applied retaliation claim falls apart under scrutiny. Because Plaintiff cannot show a clear and substantial likelihood of success on the merits, the Court should deny the motion for preliminary injunction.

Argument

[2] Plaintiff's counsel graciously consented to counsel's request for a one-day extension on the briefing deadline as a professional courtesy due to a death in the family.

"Preliminary injunctive relief is 'an extraordinary remedy that may only be awarded upon a clear showing the plaintiff is entitled to such relief.'" *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 1:11-CV-99-JGM, 2011 WL 2811317, at *2 (D. Vt. July 18, 2011) (quoting from *Winter v. Natural Res. Def. Council*, 129 S.Ct. 365, 376 (2008); *Sussman v. Crawford*, 488 F.3d 136, 139 (2d Cir. 2007) (describing preliminary injunction as "extraordinary and drastic remedy")).

This extraordinary remedy is simply not warranted here.

I. Because Plaintiff seeks to enjoin government action taken in the public interest, he must establish a clear or substantial likelihood of success on the merits.

"'In order to justify the award of a preliminary injunction, the moving party must first demonstrate that it is likely to suffer irreparable harm in the absence of the requested relief.'" *Million Youth March, Inc. v. Safir*, 18 F. Supp. 2d 334, 338-39 (S.D.N.Y. 1998) (quoting from *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996)). "Once the likelihood of irreparable harm has been demonstrated, a movant ordinarily is entitled to relief if it demonstrates 'either (1) 'a likelihood of success on the merits' or (2) 'sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly' in the movant's favor.'" *Id*. at 339 (quoting from *Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir. 1996)). The movant must also establish that that "an injunction is in the public interest." *Entergy*, 2011 WL 2811317, at *2 (citing *Winter*, 129 S.Ct. at 374).

However, where the movant alleges a First Amendment violation and seeks to enjoin government action, the calculus is altered.

With regard to irreparable injury, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Brooklyn Inst. of Arts & Sciences v. City of New York*, 64 F. Supp. 2d 184, 197 (E.D.N.Y. 1999) (citing *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673 (1976) (plurality opinion); *Bery v. City of New York*, 97 F.3d 689,

693 (2d Cir.1996), *cert. denied* 520 U.S. 1251, 117 S.Ct. 2408 (1997)). "Because of this, it is sometimes said that 'when an injunction is sought to protect First Amendment rights, likelihood of success on the merits and irreparable harm merge into a single threshold requirement.'" *Brooklyn Inst. of Arts & Sciences*, 64 F. Supp. at 197 (quoting from *801 Conklin St. Ltd. v. Town of Babylon*, 38 F.Supp.2d 228, 235 (E.D.N.Y.1999).

Here, as Plaintiff alleges that the required policies related to his termination violate his First Amendment rights, the operative question concerns his likelihood of success on the merits.

"Where, however, a movant seeks to enjoin 'government action taken in the public interest pursuant to a statutory or regulatory scheme,' it may succeed only by demonstrating a likelihood of success on the merits in addition to irreparable harm." *Million Youth March,* 18 F. Supp. 2d at 339 (quoting from *Jolly*, 76 F.3d at 473). "Further, if 'the injunction sought will provide the movant with substantially all the relief sought, and that relief cannot be undone even if the defendant prevails at a trial on the merits,' the showing of a likelihood of success must be 'clear' or 'substantial.'" *Id*. (quoting from *Jolly*, 76 F.3d at 473). *See also Jolly*, 76 F.3d at 473 ("The moving party must make a 'clear' or 'substantial' showing of a likelihood of success where . . . the injunction sought will alter, rather than maintain, the status quo") (citation and quotation marks omitted).

Here, the Supervisory Union Defendants must comply with their HHB Policy, as required by Vermont law. They must comply with the VPA Athletics Policy, which cites State agency guidance and Vermont law. (Doc. 1-14 at 5) (citing the Vermont Agency of Education Best Practices for Schools for Transgender and Gender Nonconforming Students and the Vermont Public Accommodations Act, 9 V.S.A. § 4502). These policies, enacted to protect students, are indisputably enacted in the public interest and altering them would significantly change the status

quo. Indeed, granting the injunction would provide Plaintiff with substantially all the relief sought, and that relief cannot be undone even if Defendants prevail at a trial on the merits. Thus, Plaintiff must make a clear or substantial showing of a likelihood of success on the merits to be entitled to the extraordinary and drastic remedy he seeks. As will be established at the preliminary injunction hearing, he cannot make such a showing.

II. Plaintiff cannot establish a clear or substantial likelihood of success on the merits for his facial and as-applied First Amendment claims.

A. Plaintiff spoke as a school employee on a matter of private concern.

To state a First Amendment retaliation claim, a plaintiff must first establish that the speech or conduct at issue was protected. *Shara v. Maine-Endwell Cent. Sch. Dist*., 46 F.4th 77, 82 (2d Cir. 2022). The analysis "must consider 'two separate subquestions': (1) whether the employee 'spoke as a citizen rather than solely as an employee,' and (2) whether he spoke on 'a matter of public concern.'" *Id*. at 82-83 (quoting *Matthews v. City of New York*, 779 F.3d 167, 172 (2d Cir. 2015)). "If either question is answered in the negative, our inquiry may end there. If both questions are answered in the affirmative, we may proceed to consider whether the employer 'had an adequate justification for treating the employee differently from any other member of the general public based on the government's needs as an employer.'" *Id*. at 83 (quoting *Matthews*).

"Turning to the first subquestion, we recognize two relevant inquiries to determine whether a public employee speaks as a citizen. First, courts may consider whether the employee's speech falls outside of his official responsibilities; second, they may ask whether a civilian analogue to the employee's speech exists." *Id.* at 82 (citation and quotation marks omitted).

Plaintiff's retaliation claim fails on both prongs.

1. Plaintiff's comments concerning a student athlete in the competition about to occur were made pursuant to his official responsibilities as the coach and thus were not protected speech.

"[W]e have emphasized that the heart of our analysis is whether the speech at issue is itself ordinarily within the scope of an employee's duties . . . examin[ing] the nature of the plaintiff's job responsibilities, the nature of the speech, and the relationship between the two, along with other contextual factors such as whether the plaintiff's speech was also conveyed to the public." *Shara,* 46 F.4th at 82 (citations and quotation marks omitted). "This objective, practical inquiry should take into account the fact that a public employee's speech can be pursuant to his official job duties even though it is not required by, or included in, [his] job description, or in response to a request by the employer." *Id*. (citation and quotation marks omitted). "As this Court has previously explained, speech may be 'pursuant to' an employee's official duties when it is 'part-and-parcel of' the employee's concerns about his ability to properly execute his duties." *Id*. (quoting *Weintraub v. Bd. of Educ*., 593 F.3d 196, 203 (2d Cir. 2010)).

Here, speaking to team members about the opposing competition just prior to the meet was "part-and-parcel" of Plaintiff's official coaching duties. Plaintiff makes clear the snowboarding team travelled offsite by bus to a ski area and that the speech occurred just prior to the meet in the lodge. Complaint ¶¶ 5-9. The Supervisory Union Defendants expect the testimony at the hearing will establish that Plaintiff's speech fell under his official duties of coaching and supervising student athletes based on his actual comments and the context in which they were delivered.

Thus, this case is distinguishable from *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (coach's quiet, postgame prayer away from the team was outside of his duties). In reaching its conclusion, *Kennedy* explained that the coach "was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach." *Id*. at 2424. "The District did not discipline Mr. Kennedy for engaging in

prayer while presenting locker-room speeches to students. That tradition predated Mr. Kennedy at the school. And he willingly ended it, as the District has acknowledged. He also willingly ended his practice of postgame religious talks with his team." *Id*. at 2429 (citations omitted). *Kennedy* further clarified, "[T]he concerns the District says it heard from parents were occasioned by the locker-room prayers that predated Mr. Kennedy's tenure or his postgame religious talks, all of which he discontinued at the District's request. There is no indication in the record that anyone expressed any coercion concerns to the District about the quiet, postgame prayers that Mr. Kennedy asked to continue and that led to his suspension." *Id*. at 2430.

Unlike *Kennedy*, the Supervisory Union Defendants received specific complaints about Plaintiff's pregame comments about an opposing player just prior to the competition. At that moment, he was acting as a school employee, supervising the student athletes and speaking about the school sporting event about to happen. Because his speech was part part-and-parcel of his coaching duties, it was not protected speech.[3]

[3] *See also Johnson v. Poway Unified Sch. Dist.*:

> We consider next our legal inquiry: whether Johnson's speech owes its existence to his position, or whether he spoke just as any non-employee citizen could have. The answer is clear; he spoke as an employee. *Downs*, 228 F.3d at 1015; *see also Peloza*, 37 F.3d at 522–23. Certainly, Johnson did not act as a citizen when he went to school and taught class, took attendance, supervised students, or regulated their comings-and-goings; he acted as a teacher—a government employee. *Cf. Ceballos*, 547 U.S. at 422, 126 S.Ct. 1951 ("Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings.... When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee."). Similarly, Johnson did not act as an ordinary citizen when "espousing God as opposed to no God" in his classroom. *Peloza*, 37 F.3d at 522–23; Mayer, 474 F.3d at 479–80 ("The Constitution does not entitle teachers to present personal views to captive audiences against the instructions of elected officials."); see Lee, 484 F.3d at 695.
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> As we recognized in *Peloza*, teachers do not cease acting as teachers each time the bell rings or the conversation moves beyond the narrow topic of curricular instruction. *Peloza*, 37 F.3d at 522; *see Downs*, 228 F.3d at 1015. Rather, because of the position of trust and authority they hold and the impressionable young minds with which they interact, teachers necessarily act as teachers for purposes of a *Pickering* inquiry when at school or a school function, in the general presence of students, in a capacity one might reasonably view as official.

658 F.3d 954, 967–68 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1807 (2012) (footnotes omitted).

As Plaintiff cannot establish a clear or substantial likelihood of success on his First Amendment retaliation claim, the Court should deny the motion for preliminary injunction.

2. There is no civilian analogue to coaching student athletes.

"Speech has a relevant civilian analogue if it is made through channels available to citizens generally." *Matthews*, 779 F.3d at 175 (citation and quotation marks omitted). "[A]n indicium that speech by a public employee has a civilian analogue is that the employee's speech was to an independent state agency responsible for entertaining complaints by any citizen in a democratic society regardless of his status as a public employee." *Id*. (citation and quotation marks omitted). Finding a civilian analog, the Court explained, "Matthews chose a path that was available to ordinary citizens who are regularly provided the opportunity to raise issues with the Precinct commanders. . . . We do not consider the relative degree of access to be material; rather what matters is whether the same or a similar channel exists for the ordinary citizen." *Id*. at 176.

With regard to the civilian analogue in the education context, *Leon v. Dep't of Educ*., is instructive. 16 F. Supp. 3d 184 (E.D.N.Y. 2014), *aff'd in part, vacated in part on other grounds sub nom*. *Leon v. New York City Dep't of Educ*., 612 F. App'x 632 (2d Cir. 2015). *Leon* explained that the teacher communicating with parents "exercised her speech through means with no relevant civilian analogue." *Id*. at 201 (citing *Weintraub v. Bd. of Ed. of City Sch. Dist. of City of N.Y.*, 593 F.3d 196, 204 (2d Cir.2010) ("[T]he lack of a citizen analogue is not dispositive ... [but] it does bear on the perspective of the speaker—whether the public employee is speaking as a citizen[.]")). "When speech is made in a form and context that is only available to public employees—and not to members of the public in general, such as submitting a letter to the editor of a newspaper or an elected official—it is indicative that the speech was made in the speaker's capacity as a public employee." *Id*. (citing *Weintraub*). *Leon* concluded:

> Here, Plaintiff communicated with the parents by calling them at their homes and speaking with them at the end-of-the-day student pick up location. Both are circumstances created solely by her position as the children's schoolteacher and by function of her DOE responsibilities. Plaintiff's communiques lack "a relevant analogue to citizen speech" and demonstrate that she was speaking in her role as a public employee.

Id. (quoting *Weintraub*). *See also Clay v. Greendale Sch. Dist*., 602 F. Supp. 3d 1110, 1122 (E.D. Wis. 2022), *appeal dismissed*, No. 22-1998, 2022 WL 17403217 (7th Cir. Nov. 21, 2022) (dismissing teacher's First Amendment retaliation claim where he used his school email to communicate his views on gay marriage to the class as a "captive audience") ("Clay sent his email using his public-school email address to only his public-school students at their public-school email addresses. When composing the email, Clay viewed and presented himself in the role of the students' teacher.").

Similar to *Leon* and *Clay*, there is no civilian analogue for the access a public-school coach has to student athletes during a competition. No similar channel exists for the ordinary citizen. Plaintiff did not write an editorial or speak at a school board meeting about transgender athletes generally; when he spoke specifically to team members about an opposing player just prior to competition, he viewed and presented himself as the coach. His claim that his conversation was unconnected to the setting or his role as coach is without merit. As there is no civilian analogue, his First Amendment retaliation claim fails and the Court should deny the motion.

3. Because the point of Plaintiff's speech concerned a student athlete in the competition about to occur, it was a matter of private, not public concern.

In determining whether certain speech of a coach reflects a matter of public concern, *Dambrot v. Cent. Michigan Univ*., 55 F.3d 1177 (6th Cir. 1995), is instructive. *Dambrot* affirmed dismissal of a First Amendment retaliation claim by a coach who used the "N-word" when speaking with players in the locker room, concluding the comments were private speech. *Id*. at 1185. "'Whether an employee's speech addresses a matter of public concern must be determined

by the content, form, and context of a given statement, as revealed by the whole record.'" *Id*. at 1186 (quoting *Connick v. Myers*, 461 U.S. 138, 147–48, 103 S.Ct. 1684, 1690 (1983)). *Dambrot* explained:

> [T]he proper inquiry as not "what might incidentally be conveyed by the fact that the employee spoke in a certain way, [but] the point of the speech in question." The court must ask to what purpose the employee spoke. Controversial parts of speech advancing only private interests do not necessarily invoke First Amendment protection.

Id. at 1187 (citing *Linhart v. Glatfelter*, 771 F.2d 1004 (7th Cir. 1985)).

Here, the Supervisory Union Defendants expect to elicit testimony at the hearing that Plaintiff's comments were specific to the transgender student on the opposing team they were about to compete against, intending to denigrate the player. The apparent "point" of the comments was to rile up the team for the competition, not to communicate on "any matter of political, social or other concern to the community." *Id*. at 1187. Given the content, form, and context of Plaintiff's comments, he spoke on a matter of private, not public concern.

4. The Supervisory Union Defendants had adequate justification to terminate Plaintiff due to disruption to the school's educational mission and operations.

Even if Plaintiff's comments could be seen as those of a citizen on a matter of public concern, he is not entitled to a preliminary injunction. "A school board may terminate a school [employee] where the [employee]'s exercise of his or her First Amendment rights causes disruption to the school's educational mission and operations." 16B *McQuillin Mun. Corp*. § 46:90 Grounds— Miscellaneous (3d ed.) (citing, *inter alia*, *Melzer v. Board of Education of City School Dist. of City of New York*, 336 F.3d 185 (2d Cir. 2003)). "A government employer may take an adverse employment action against a public employee for speech on matters of public concern if: (1) the employers' prediction of the disruption that such speech will cause is reasonable; (2) the potential for disruption outweighs the value of the speech; and (3) the employer took the adverse

employment action not in retaliation for the employee's speech, but because of the potential for disruption." *Johnson v. Ganim*, 342 F.3d 105, 116 (2d Cir. 2003). *See also Nichols v. Univ. of S. Mississippi*, 669 F. Supp. 2d 684, 699 (S.D. Miss. 2009) (school's strong interest in providing a learning environment that does not tolerate disrespect or contempt based on sexual orientation outweighed speech that disrupted the regular and successful operation of the enterprise, affected morale and discipline, fostered disharmony, impeded the performance of the employee's duties, or detrimentally impacted working relationships that depend on loyalty and confidence).[4]

Here, the evidence at hearing will establish that Plaintiff's comments about the transgender student athlete on the competing team caused a disruption; it was reasonable given his reaction to being confronted with the complaint that he would continue to cause such disruption going forward, contrary to the obligations in the mandated HHB Policy. This disruption outweighs the value of permitting Plaintiff to denigrate a competitor student athlete to his team members at a meet. As is reflected in the termination letter, the Supervisory Union Defendants terminated Plaintiff for creating an objectively offensive environment constituting harassment, not for having a particular viewpoint. (Doc. 1-10 at 3). The suggestion that a hostile environment is not a disruption is meritless. *See Munroe v. Cent. Bucks Sch. Dist*., 805 F.3d 454, 479 (3d Cir. 2015).

Since the Supervisory Union Defendants had adequate justification to terminate, the Court should deny the motion for preliminary injunction.

B. For all the reasons stated in the Motion to Dismiss, Plaintiff fails to make a clear or substantial showing of a likelihood of success on his content and viewpoint discrimination, prior restraint, and overbreadth claims and the motion for preliminary injunction should be denied.

[4] *See also Locurto v. Giuliani,* 447 F.3d 159, 176 (2d Cir. 2006) ("The First Amendment does not require a Government employer to sit idly by while its employees insult those they are hired to serve and protect."); *Spetalieri v. Kavanaugh*, 36 F.Supp.2d 92, 100, 106 (N.D.N.Y. 1998) (finding that, even assuming the plaintiff's off-duty speech in which he spoke "in a denigrating manner about African-Americans" touched on a matter of public concern, the "potential for disruption in the" police department "outweighs the value of [the] plaintiff's speech").

III. Both the balancing of equities and public interest favor denial of the injunction.

As the Supervisory Union Defendants are charged with enforcing Vermont law as set forth in the HHB Policy, the issues of the balancing of equities and the public interest blur together. Both factors weigh against a preliminary injunction.

In *Parents Defending Education v. Olentangy Local School District Board of Education*, the District Court considered the balance of harms and public interest in light of the plaintiff's request to preliminarily enjoin enforcement of a school district's policies prohibiting some categories of discriminatory speech pending resolution of Plaintiff's First and Fourteenth Amendment claims. __ F.Supp.3d __, no. 2:23-cv-01595, 2023 WL 4848509 at *1 (S.D. Ohio July 28, 2023); *see also Nken v. Holder*, 556 U.S. 418, 435 (2009) (holding that the third and fourth preliminary injunction factors—the balance of harms and the public interest—"merge when the Government is the opposing party"). Having found the plaintiff was not likely to succeed on its challenges, the court concluded that this factor favored the school board. First, it noted that "enjoining the Policies in their entirety would lift all restrictions against harassing and discriminatory speech within the School District, without sufficient time to draft a new policy before the start of the school year." *Olentangy*, 2023 WL 4848509 at *19. Were that to occur, the court reasoned, transgender students—a "captive audience" for purposes of First Amendment analysis—would be rendered unable to "escape the harms of being subject to misgendering, to harassment, to systematic and chronic bullying." *Id.*; *see also Hill v. Colorado*, 530 U.S. 703, 716-18 (2000) (noting that "protection afforded to offensive messages" may not "embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it" and recognizing that Court has been solicitous in First Amendment cases of "the interests of unwilling listeners in situations where the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid

exposure"); *Katz v. McAulay*, 438 F.2d 1058, 1061 (2d Cir. 1971) (applying captive audience doctrine in First Amendment case in recognition that "[p]upils are on school premises in response to the statutory requirement that they attend school for the purpose of formal education").

The students whose rights are protected under the policies, the court recognized, are "individuals who, having been told repeatedly by society that they do not belong, that they are inferior, that they are an aberration, simply seek 'to be secure and to be let alone' at school." *Olentangy*, 2023 WL 4848509 at *19 (quoting *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 508 (1969)). In contrast, the plaintiffs did "not suggest that [the policy] imposes physical harms on them . . . or stamps a badge of inferiority upon them." *Id.* (recognizing multiple other ways the plaintiff's concerns could be addressed).

Finally, the court observed that it was important to consider the ways in which "allowing for discriminatory or harassing speech in the name of vindicating First Amendment rights too often causes a new set of First Amendment injuries, by silencing the voices of already-marginalized listeners . . . . Giving full effect to the right to free speech in a pluralistic democratic society requires acknowledging and addressing the ways in which those who are members of 'discrete and insular minorities,' *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), are systematically silenced by discrimination." *Id.* at *20 (citing *Arroyo Gonzales v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) (observing that policies that "expose[] transgender students to a substantial risk of stigma, discrimination, intimidation, and danger . . . hurt[] society as a whole by depriving all from the voices of the transgender community").

Here, the risk of harm is even broader, and the public interest even more compelling, than in *Olentangy*: Plaintiff seeks to enjoin not just the Supervisory Union's Policy, but Defendant Secretary's Model Policy. The Model Policy serves as the "floor" for such required policies across

the state, which may be no less stringent. 16 V.S.A. § 570(b) (requiring every Vermont school board to adopt and enforce a harassment, hazing, and bullying prevention policy at least as stringent as the Secretary's model policy or, upon failing to do so, "be presumed to have adopted" the Secretary's policy). If the preliminary injunction is granted, the harassment, hazing, and bullying policies currently in place in every school district in the state will be invalidated just as the school year begins. While new policies are created, vetted noticed, read, and adopted by school boards, *see* 16 V.S.A § 563(1), school administrators will exist in a vacuum, without tools to respond to conduct currently regulated under those policies or to avoid liability under Vermont's Public Accommodations Act for the status-based denial of equal access worked by unchecked harassing conduct, *see* 16 V.S.A. 570f(b).

Protecting civil rights is "always in the public interest," *see Dodds v. U.S. Dept. of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016), and Vermont students in protected categories will be certain to suffer harm in the form of the denial of equal access resulting from the absence of the policies and procedures as tool to address discrimination. *See, e.g., McKinney as Next Friend of K.P. v. Huntsville Sch. Dist.*, 350 F.Supp. 3d 757, 772 (2018) ("[W]hile the Court must ensure that protected speech is not restricted by a school district's actions, it concludes that enjoining the District's punishment of K.P. . . . would unduly frustrate the District's right—and duty—to ensure a safe academic environment conducive to the education of young Arkansans.").

In contrast, the harm to Plaintiff is overstated. The Supervisory Union Defendants expect to elicit testimony at the hearing that, prior to the February 9, 2023, termination letter, Plaintiff gave notice that he would not return as a snowboarding coach for the 2023-2024 season. Moreover, contrary to his claim and as his contracts reflect, Plaintiff was an at-will employee, with no right of renewal. (Doc. 1-10 at 10-21). Even if he were to return, the Supervisory Union

Defendants would be obligated to enforce their policies to prevent discrimination against students through the creation of a hostile environment. He retains numerous outlets with which to express his views outside his role as coach.

In the First Amendment context, "[t]he public interest in maintaining a free exchange of ideas, though great, has in some cases been found to be overcome by a strong showing of other competing public interests, especially where the First Amendment activities of the public are only limited, rather than entirely eliminated." *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002), *abrogated on other grounds by Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365 (2008)).

Given the competing public interests behind the polices here and the relatively limited impact on Plaintiff's alleged First Amendment activities, the Court should deny the motion.

Conclusion

For the foregoing reasons, the Supervisory Union Defendants respectfully request that the Court deny Plaintiff's motion for preliminary injunction.

Dated at Burlington, Vermont, this 1st day of September, 2023.

WINDSOR CENTRAL SUPERVISORY UNION BOARD & SHERRY SOUSA

By: */s/ Pietro J. Lynn*

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