IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 24-cv-02284-DDD-TPO

KRISTEN FRY,

Plaintiff,
v.

SCHOOL DISTRICT NO. 1,
d/b/a Denver Public Schools,
AUON'TAI ANDERSON,
SCOTT ESSERMAN,
XOCHITL GAYTAN,
MICHELLE QUATTLEBAUM,
HASHIM COATES, and
MIDIAN SHOFNER,

Defendants.

RECOMMENDATION

Timothy P. O'Hara, United States Magistrate Judge.

Before this Court is the Motion to Dismiss [ECF 35] filed by School District No. 1 d/b/a Denver Public Schools along with Auon'tai Anderson, Scott Esserman, Xochitl Gaytan, and Michelle Quattlebaum (collectively, the "District Defendants").[1] Also before this Court are the Motions to Dismiss which Defendants Hashim Coates and Midian Shofner amended and refiled at ECF 97 and 100.[2] All three motions were referred to this Court for Recommendations. ECF 41

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[1] The briefing of the District Defendants' Motion consists of Plaintiff's Response [ECF 66] and the District Defendants' Reply [ECF 77].

[2] This Court gave Mr. Coates and Ms. Shofner leave to amend and refile their Motions to Dismiss. ECF 93. Plaintiff filed a combined Response to the two amended Motions to Dismiss at ECF 108. Defendant Coates filed a Reply to support his Motion. ECF 112. Defendant Shofner

(referring ECF 35); ECF 98 (referring ECF 97); ECF 101 (referring ECF 100). The Court has reviewed the briefing, the record, and the relevant case law, and the Court finds that oral argument will not materially assist in the Motions' adjudication.[3] The Court recommends that Defendants' Motions be **denied**.

BACKGROUND

For purposes of this ruling, this Court accepts as true[4] the factual allegations—as opposed to any legal conclusions, bare assertions, or conclusory allegations—that Plaintiff raises in her First Amended Complaint ("FAC") [ECF 8]. The Court construes the well-pleaded allegations in the light most favorable to her. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) (citing *Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir. 2006); *see also Boulter v. Noble Energy*, 521 F. Supp. 3d 1077, 1082 (D. Colo. 2021) (citing *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995)).

I. The Individual Defendants Work Closely Together to Change School Disciplinary Policy.

School District No. 1 d/b/a Denver Public Schools (the "District" or "DPS") is a duly organized school district in the State of Colorado, but it is not an arm of state government. ECF 8

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did not reply.

[3] Because the Defendants' Motions overlap and raise similar arguments, the Court's below discussion and rationale are meant to address all three Motions together even if not separately referenced.

[4] For the benefit of the pro se parties involved in this litigation, it is important to emphasize that the Court is not making any judgments about the truth of Plaintiff's allegations. Rather, as the law requires at this stage of the litigation, the Court presumes all well-plead facts to be true for purposes of this Motion. This Court emphasizes that Plaintiff has yet to prove her claims, and the Defendants may continue to challenge her claims on their merits.

¶ 8. It is governed by a Board of Education ("BOE") whose members are elected officers. The BOE members serve as the District's highest policy-making officials, and the BOE sets the District's official policies. *Id*. Auon'tai Anderson, Scott Esserman, Xochitl Gaytan, and Michelle Quattlebaum (the "BOE Defendants") were on the BOE during the period relevant to this lawsuit. *Id*. ¶¶ 9-12.

Plaintiff alleges that Mr. Anderson spearheaded, and the other BOE Defendants supported, significant changes to the District's discipline policy. *Id*. ¶ 25. Public safety officers were removed from schools and the previous "behavioral and accountability rules" were replaced with "'restorative justice' principles.'" *Id.* ¶ 25. As an example of the latter change, "potentially violent students, including students facing criminal charges such as robbery and attempted murder" now were allowed to attend school in person, even if against the advice of law enforcement authorities. *Id.* ¶ 25. More than 800 students were evaluated for their potential to engage in violent behavior and/or for a "safety plan." *Id.* ¶ 29. The reason for this disciplinary policy change was "racial inequities in disciplinary enforcement." *Id.* ¶ 25.

Plaintiff also implicates two Defendants, Mr. Hashim Coates and Ms. MiDian Shofner, who were not members of the BOE. According to Plaintiff, Defendants Coates and Shofner supported this change in policy as well. *Id*. ¶ 25.

Plaintiff describes Mr. Coates as a paid political consultant who runs a political consulting firm called HTC Solutions. *Id*. ¶ 14. He and his firm have worked on all of the BOE Defendants' election campaigns, most closely for Defendants Anderson and Esserman whose campaigns he ran. *Id.* ¶ 14. In September 2022, Mr. Anderson reported that "HTC Solutions has been involved in helping to elect all SEVEN of the [then-] current School Board Directors!" *Id.* ¶ 14.

Ms. Shofner runs a political consulting firm known as 8PM Consulting for Humanity. *Id.* ¶ 16. Plaintiff describes Defendant Shofner as "a long-time agent of and joint participant with the BOE defendants." *Id.* Defendant Esserman described her as a "partner" in developing the BOE policy change at issue in this lawsuit. *Id.* ¶ 16. Plaintiff also describes Defendant Shofner as "a vocal and aggressive proponent of the work that she and her co-defendants have done." *Id.* Defendant Shofner (then known as Ms. Holmes) is a former BOE appointee. *Id.* ¶ 16.

Plaintiff describes substantial interrelationship between all of the individual Defendants. In addition to their support of the BOE Defendants, the BOE Defendants in turn have supported Defendants Coates and Shofner. *Id.* ¶ 17. Defendant Esserman supported Defendant Coates' campaign for elective office in 2024. At Defendant Anderson's prompting, the BOE issued an official "proclamation 'celebrat[ing] and honor[ing] Mr. Coates and Ms. Shofner in the lead up to Mr. Coates' political campaign." *Id.* ¶ 17. As a BOE member, Mr. Anderson worked as a paid consultant to support the campaigns of Defendants Esserman and Quattlebaum. *Id.* ¶ 15. On the basis of "information and belief," Plaintiff alleges that Defendants Anderson and Esserman "regularly conferred in private" with Defendants Coates and Shofner to set District policy. *Id.* ¶ 18.

II. The New Disciplinary Policy Causes Problems and Opposition

The policy change began for the 2022-2023 school year. ECF 8 ¶ 24. Plaintiff alleges that the new policy led to lax discipline which in turn distracted students and degraded the learning environment.[5] *Id.* ¶ 27. Then in early 2023, two shootings occurred at East High School. In the

[5] Plaintiff leaves unclear whether these problems were limited to a particular school and whether she observed such problems personally at the school where her children attended.

first incident, students reportedly shot and killed another student. *Id.* ¶ 28. In the second incident, which occurred in March 2023, a student shot and critically injured two school administrators. *Id.*

On March 24, 2023, two days after the second shooting, a reporter interviewed the principal of another District school, McAuliffe International School. ECF 8 ¶ 30. The principal, Kurt Dennis, spoke about a student who was allowed to attend McAuliffe despite a charge for attempted murder of a liquor store clerk. *Id.* Mr. Dennis reported that like the staff who had been shot at East High School, "he and other untrained McAuliffe administrators were required to perform daily "pat downs" of [this particular] student." *Id.* ¶ 31. Mr. Dennis expressed concern "about the possibility of harm to students or staff." *Id.*

Two weeks after Mr. Dennis spoke to the press, the District initiated proceedings to terminate him. ECF 8 ¶ 39. On July 3, 2023, the District Superintendent formally recommended his termination. *Id.* Plaintiff alleges that the District terminated Mr. Dennis in retaliation for speaking to the press and gave a false pretext to support their action. *Id.*

Around the same time when Mr. Dennis went to the press, "parents and other citizens began to engage politically." ECF 8 ¶ 32. They set up the organizations of Parent Safety Advocacy Group ("PSAG"), DPS Resign/Recall ("DPS Resign"), and Facebook McAuliffe Parents Group ("FB Group"). *Id.* ¶ 33. Plaintiff lives in Denver, and she has three children in the District school system. *Id.* ¶ 7. "Plaintiff joined these groups and participated in their activities through the summer of 2023." *Id.* ¶ 33. "Beginning in April 2023, PSAG held multiple press conferences to discuss the East High School tragedies, defendants' links to those tragedies, and urgent changes needed to improve DPS school security." *Id.* ¶ 36. "All of these groups were publicly involved in resisting defendants' failed policies and in advocating on behalf of Mr. Dennis" *Id*.

These groups conducted their advocacy publicly in the media, on the internet, and "face to face with defendants." ECF 8 ¶ 36. Plaintiff "was visibly present at some of those press conferences." *Id*. ¶ 34. She and other parents also "volunteered to help with security at McAuliffe." *Id*. ¶ 35. She also "was actively involved in citizen-led efforts to change school board policy, including by testifying at a public board meeting and participating in online group messaging boards." *Id.* ¶ 7.

III. Defendants Defend Their Policy and Counter the Opposition

Plaintiff alleges that Defendants defended their policy by retaliating against both Mr. Dennis (by terminating him, as discussed above) and the parent-advocacy groups. *Id*. ¶¶ 37, 39.

A. The Town Hall Meetings

Plaintiff alleges that the Defendants "staged" two 'town halls' or 'listening sessions' from mid-July through August 2023." *Id.* ¶ 41. While ostensibly presented "as opportunities for public input" on the policy debate, Plaintiff alleges that in practice the Defendants used them "to bully and browbeat opposition." *Id*.

Defendant Shofner moderated and directed the first town hall on July 15, 2023. Defendants Coates, Esserman, Quattlebaum, and Anderson attended it. Plaintiff also attended it. Plaintiff alleges that "[f]rom the outset, defendants were hostile to parents and others who had questions or concerns about DPS's policies." *Id*. ¶ 42. Plaintiff introduced herself to Mr. Anderson after the meeting for the purpose of establishing a constructive dialogue. *Id*. ¶ 43.

Defendant Shofner also hosted the next town hall meeting on August 1, 2023. That meeting "featured Mr. Coates, Mr. Esserman, Mr. Anderson and Ms. Quattlebaum." *Id*. ¶ 45.[6] Plaintiff

[6] Plaintiff leaves unclear what she means when she says that the meeting "featured" these

attended that meeting as well. Plaintiff alleges that Defendant Coates "denounced" those who opposed the new discipline policy and Mr. Dennis' termination "as bigoted 'white parents.'" *Id*. ¶ 46. Defendant Coates accused those parents (like Plaintiff) who were volunteering in a security-type role at the McAuliffe school, parents like Plaintiff, of "racial profiling and 'targeting black and brown students.'" *Id*. ¶ 47.

Plaintiff attempted to speak with Defendant Coates after the meeting. Rather than reciprocate "in good faith dialogue," Plaintiff alleges that Defendant Coates "shouted at and loudly accused [her] of racism and 'doing that white girl thing' by disagreeing with him." *Id*. ¶ 49. Plaintiff says that this treatment "deeply disturbed" her, and she "left the event in tears." *Id*.

On August 2, 2023, Defendants Coates, Esserman, and Anderson "began an unofficial 'investigation' of "de-escalation rooms" at the McAuliffe school. Plaintiff alleges that such rooms are common in public schools, and they are used by school psychologists and administrators to provide students with emotional or psychological issues a place to de-escalate during crisis moments. *Id*. ¶¶ 51-53. Defendants Anderson and Esserman gave Defendant Coates "key responsibility for the so-called 'investigation,' as well as physical access to DPS facilities." *Id*. ¶ 52. Plaintiff alleges that "each of the individual defendants falsely framed the de-escalation room at McAuliffe in terms of an 'incarceration room' that was used exclusively to lock up 'students of color'" in public statements. *Id*. ¶ 53. The "false 'incarceration room' accusations against Mr. Dennis" also became a subject of subsequent town hall meetings.

Plaintiff alleges that at the town hall meetings that occurred in August 2023, Mr. Coates

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Defendants. *Id.* ¶ 45. The pleading is ambiguous as to whether they simply were in attendance as passive observers, or whether they served in some official or leadership capacity.

"repeatedly smeared parents as 'racist.'" *Id*. ¶ 55.

B. The Final Public Meeting – August 21, 2023

A public comment session took place on August 21, 2023. It was the last public event before the BOE would decide whether to ratify Principal Dennis' termination on August 24th. ECF 8 ¶ 57. Plaintiff's description of this proceeding suggests that BOE members were the ones who presided over it and conducted it. Defendants Shofner and Coates attended as part of the public audience. *Id*. ¶ 60 (noting how they sat next to each other and close to the speaker's podium). As to the proximity between the Defendants, Plaintiff alleges that "Ms Gaytan was mere feet away from [Plaintiff] and Mr. Coates." *Id*. ¶ 87.

A group of middle school students came to participate. Their role was to convey anonymously their teachers' comments. Plaintiff alleges that the teachers wished to proceed anonymously because they feared retaliation. Defendants Anderson and Gaytan did not allow the students to read the teachers' statements. *Id*. ¶ 59.

Plaintiff alleges that Defendants Shofner and Coates used their proximity to the speaker's podium to hinder others' speaking time. *Id.* ¶ 60 She alleges that they "repeatedly interrupted comments by parents, staff, and students (some of whom were ten, eleven and twelve years old) with 'coughing,' laughter, or loud derogatory statements such as 'white supremacist' or 'racist'." *Id*. ¶ 60. Plaintiff alleges that the BOE and District staff knew of the disruptive misconduct as well as her request for intervention. "However, no admonition against disruption was forthcoming from the Board." *Id*. ¶ 62. Likewise, the Board did not respond to inquiries from two other parents who expressed "concern over its failure to prevent Defendants Shofner and Coates from bullying speakers and disrupting the meeting." *Id*. ¶ 64.

Plaintiff says that all of the session's preceding two hours of commentary was critical of the policy and Principal Dennis' termination. *Id.* ¶ 65. It was now Plaintiff's turn to speak. Plaintiff contends that Defendants Coates and Shofner already knew her from the prior town hall meetings, and they knew she had complained about their disruptive behavior earlier at this meeting. *Id.* ¶ 65.

Plaintiff alleges that Defendant Coates interrupted the speaker before her "with loud laughing and vigorous head shaking." The BOE remained silent, thereby encouraging their misconduct. *Id.* ¶ 67. Standing in her place in line, Plaintiff "took a step or two, slightly leaned in the direction of Mr. Coates and Ms. Shofner and said, 'please be respectful of the speakers.'" *Id.* ¶ 67. Defendant Coates immediately "turned around in his seat and shouted for everyone in the room to hear, 'did you just call me N*****?!'", using a racial slur. *Id.* ¶ 68. Plaintiff states that "[t]he accusation was utterly false." *Id.* ¶ 69.

Plaintiff says that the accusation left her "shaken and confused," but she nonetheless gave her planned public comments. "Mr. Coates interrupted her several times with sighs and other noises, forcing her to interrupt her own comments to again ask Mr. Coates to be respectful of the speakers." *Id.* ¶ 73. The public comment session later was adjourned. *Id.* ¶ 74.

C. Additional Public Comments

In the days after the public comment session, Defendant Coates "took to the internet" to publicly accuse Plaintiff of using the racial slur. *Id.* ¶ 75. He also accused Plaintiff of assaulting him. *Id.* Defendant Coates attached Plaintiff's picture to these posts. *Id.*

On August 22, 2023, Defendant Coates emailed the BOE and District leadership accusing Plaintiff of using the racial slur and assaulting him. *Id.* ¶ 85. According to Plaintiff, the District Defendants "knew [Defendant Coates'] allegations were false." *Id.* ¶ 93. Despite knowing the

falsity of the allegations, Plaintiff alleges that the Defendants, in turn, chose to corroborate them. For example, Defendant Gaytan responded to the email, copying all to express her agreement "that these vile, racist epithets should not be uttered or have any part in our meetings" and to denounce the "racist verbal attack by [Plaintiff as] unconscionable." *Id*. ¶ 86. Plaintiff alleges that Defendant Gaytan and the other Defendants should have known that Defendant Coates' accusations were false because she (along with Defendants Anderson, Esserman, and Quattlebaum) sat "at the front of the room" and "a few feet away" from where Plaintiff's interaction with Defendant Coates occurred. *Id.* ¶ 72; *see also* ¶ 93 (the District Defendants sat "only a dozen or so feet away").

On August 23, 2023, Defendants Coates, Shofner, and Anderson appeared together on a video podcast. *Id*. ¶ 76. Defendant Coates repeated the racial epithet and assault accusation. *Id.* ¶ 77. Defendant Shofner stated that she was there and that "Mr. Coates suffered an 'unwarranted touch' by Ms. Fry." *Id.* ¶ 80. Defendant Shofner believed that Plaintiff was motivated by "an effort to ensure that black people . . . do not feel safe." *Id*. ¶ 81. Defendant Anderson stated that "that bad ass adult came up and assaulted Hashim" at that school board meeting. *Id*. ¶ 82. All three Defendants identified Plaintiff specifically. *Id.* ¶¶ 76-84. At some point a friend told Plaintiff that she had heard Plaintiff was "going around calling people" the N-word and warned her that her "reputation is going in that direction." *Id*. ¶ 84.

D. The August 24, 2023 Meeting

BOE held a public vote on August 24, 2023, on the matter of whether to ratify the termination of Principal Dennis. *Id*. ¶ 89. At the start of this meeting, the BOE Defendants each "shared their 'reactions' to the alleged incident." *Id.* ¶ 90. Plaintiff was not identified by name. Rather, the incident was attributed to a "white" person against "a black individual" that took place

at a BOE meeting. Defendant Anderson described the incident as "unspeakable racism at our board meeting." *Id.* Defendant Esserman stated that Plaintiff's conduct was "thoroughly and completely unacceptable." *Id.* Ms. Quattlebaum added that the incident had "cause[d] trauma." *Id*. While Defendants did not use Plaintiff's name specifically, others in attendance perceived the BOE Defendants' statement to be about Plaintiff. *Id.* ¶ 91. This was confirmed by subsequent messages Plaintiff received alerting her "that the BOE defendants were specifically targeting [Plaintiff] in their public comments." *Id*. ¶ 92.

E. Mr. Coates Pursues Criminal Charges

On August 24, 2023, Mr. Coates filed a police report accusing Plaintiff of assaulting him and using the racial slur at the August 21, 2023, BOE meeting. ECF 8 ¶¶ 96-99. As part of his declaration, he stated that he felt "pressure on [his] left shoulder." *Id.* ¶ 97. Mr. Coates specifically identified Defendant Shofner as a witness to the assault, and Defendant Shofner informed a police investigator that she observed "Ms. Fry grab Mr. Coates on the shoulder." *Id.* ¶ 99. Plaintiff alleges that in doing so Defendant Coates filed a "false police report." *Id.* ¶ 96.

On an unknown date, Plaintiff asked the District for video footage of the August 21, 2023, meeting. *Id*. ¶ 101. The District denied the request claiming it as an exempt criminal justice record under the Colorado Open Records Act ("CORA"), the statute pursuant to which Plaintiff made the request. *Id*. ¶ 102.

Plaintiff originally was charged with disturbing the police. *Id*. ¶ 100. Defendant Coates thereafter met with the prosecutor on September 22, 2023, to complain about that charge. *Id*. ¶ 103. Defendant Coates added to his report "a violent history" between Plaintiff and him, which he alleged Plaintiff was escalating. *Id.* ¶ 104. On September 25, 2023, Mr. Coates gave the prosecutor

the contact information for Defendants Esserman, Quattlebaum, and Anderson who had "agreed to corroborate Mr. Coates' false account of the August 21st alleged assault." *Id*. ¶ 105. On September 26, 2023, the prosecutor increased the criminal charge to "Harassment Strike/Shove" with a hate crime sentencing enhancement for "ethnic intimidation." *Id*. ¶ 106.

Defendant Coates applied to the court for a restraining order. In the paperwork, he gave the BOE "meeting location" as his address. The restraining order prevented Plaintiff from attending any BOE public meetings. *Id*. ¶¶ 107-08.

On October 23, 2023, "DPS revoked [Plaintiff's] ability to act as a parent volunteer" at its schools, including the school where her children attend. DPS cited the criminal charge as the reason for the volunteer revocation. *Id*. ¶ 111.

Defendant Coates repeated the accusation of racial slur and assault against Plaintiff at a November 13, 2023 BOE public comment session. *Id*. ¶ 112. On November 22, 2023, on social media, Defendant Anderson stated: "Kristen Fry . . . assulted [sic] Hashim Coates at our August Board meeting and called him a dumb n*gger . . ." *Id.* ¶ 113. At some unspecified point, Defendant Anderson also referred to the DPS Resign group, of which Plaintiff is a member, as "The Klan." *Id*. ¶ 114.

F. The Criminal Charge Is Dropped

On December 1, 2023, the District produced the video recording in response to a subpoena. *Id*. ¶ 115. As Plaintiff recounts it, the video shows that she remained "feet away" from Defendants Coates and Shofner, and that she touched no one. *Id*. ¶ 116. The criminal charge was dropped, and on January 10, 2024, the criminal case was dismissed and the restraining order vacated. *Id*. ¶ 118.

IV. Plaintiff's Claims for Relief

Plaintiff's first claim for relief is for First Amendment retaliation which she brings under 42 U.S.C. § 1983 against all Defendants. ECF 8 at p. 33. Plaintiff alleges that the Defendants formed a conspiracy to retaliate against her. The Defendants acted on the basis of a "collective objective . . . to suppress political disagreement with their educational and safety policy choices." *Id*. ¶ 133. To achieve that goal, the Defendants "agreed, both expressly and implicitly, to mistreat" Plaintiff. *Id*. ¶ 133. This plan began with Defendants Anderson, Esserman, Coates, and Shofner who "regularly conferred in private . . . to set DPS policy, and to develop strategies to suppress dissenting voices, including Ms. Fry's." *Id.* ¶ 18. The aim was to deter Plaintiff and others from engaging in "speech and activities in opposition to defendants' policies." *Id*. ¶ 133. The Defendants also agreed "to mistreat Ms. Fry as an example to her and to others to deter their speech and activities in opposition to defendants' policies." *Id.* Defendants agreed that the mistreatment of Plaintiff "would take multiple forms," including: (1) falsely accusing Plaintiff of using a racial slur and committing "a hate crime assault during a public school board meeting," (2) "broadcasting false claims that Ms. Fry was a 'racist' or 'white supremacist,'" (3) filing knowingly false police reports accusing Ms. Fry or crimes she did not commit; and (4) "agreeing to give and giving false testimony in support of the false criminal prosecution." *Id.* ¶ 134. Plaintiff alleges that Defendants took adverse actions against her. *Id*. ¶ 135.

The Defendants had a "broader objective of suppressing dissent by taking unlawful actions against persons other than Ms. Fry." *Id*. ¶ 138. Plaintiff points to adverse actions taken against others (such as Principal Dennis[7] and other parents) and acts of interference against dissenting

[7] Plaintiff alleges that consistent with a pattern of conduct, Defendant Anderson made a

voices that also occurred as proof of the Defendants' larger objectives. *Id*.

The remaining causes of action are brought under Colorado state law. Plaintiff's Second Claim for Relief is for defamation. She asserts it against Mr. Anderson and Mr. Coates. Plaintiff's Third Claim for Relief is for abuse of process, and her Fourth Claim for Relief is for malicious prosecution. Plaintiff brings the latter two claims against Mr. Coates alone.

LEGAL STANDARDS

I. Fed. R. Civ. P. 12(b)(6)—Failure to State a Claim

The purpose of Fed. R. Civ. P. 12(b)(6) is to test the sufficiency of a plaintiff's complaint. *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 2008). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, **accepted as true**, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (emphasis added) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that a plaintiff pleads facts that allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. *Twombly* requires a two-prong analysis. First, a court must exclude from consideration "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. *Id.* at 679–80. Second, a court should focus on the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id.* at 681. If the allegations state a plausible claim for relief, then that claim survives the motion to dismiss. *Id.* at 680.

Plausibility refers "to the scope of the allegations in a complaint: if they are so general that

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false police report against Mr. Dennis. ECF 8 ¶ 54.

they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *S.E.C. v. Shields*, 744 F.3d 633, 640 (10th Cir. 2014) (quoting *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012)). "The nature and specificity of the allegations required to state a plausible claim will vary based on context." *Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 878 (10th Cir. 2017) (quoting *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011)). While the Rule 12(b)(6) standard does not require a plaintiff to establish a prima facie case in a complaint, the elements of each cause of action may help to determine whether the plaintiff has set forth a plausible claim. *Khalik*, 671 F.3d at 1191.

However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. The complaint must provide "more than labels and conclusions" or merely "a formulaic recitation of the elements of a cause of action," so that "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "An allegation is conclusory if it states an inference without underlying facts or if it lacks any factual enhancement." *Frey v. Town of Jackson, Wy.*, 41 F.4th 1223, 1232-33 (10th Cir. 2022). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. "The degree of specificity needed to establish plausibility and provide fair notice depends on the context and the type of case." *Frey*, 41 F.4th at 1233. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint has made an allegation, "but it has not shown that the pleader is entitled to relief." *Id.* (quotation

marks and citation omitted).

DISCUSSION

I. Section 1983 Liability

The Plaintiff must meet two requirements in order to hold an individual liable under § 1983. First, Plaintiff must establish an actual deprivation of a federally protected right. Second, Plaintiff must show that the Defendants committed that act of retaliation under color of state law. *VDARE Found. v. City of Colorado Springs*, 11 F.4th 1151, 1160 (10th Cir. 2021); *see also*, *Lopez v. Hous. Sols. for the Sw.*, No. 19-cv-00684-MEH, 2021 WL 326942, at *3 (D. Colo. Feb. 1, 2021). In other words, Plaintiff must show that the Defendants were "state actors" (in the sense of a government actor, rather than on behalf of the State of Colorado, specifically). This is because the First Amendment protects Plaintiff's speech from infringement by the government, not by other private citizens. *Buentello v. Boebert*, 545 F.Supp.3d 912, 916 (D. Colo. 2021).

A. Individual § 1983 Liability

1. The District/BOE Entity

There is no doubt that the District/BOE, itself, is a state (i.e., government) actor. Moreover, the District/BOE as a municipal government entity can be found held liable under § 1983 if it as an entity took an action through policy or custom that has a direct causal relationship with unlawful retaliation against Plaintiff. *McCook v. Spriner Sch. Dist.*, 44 F. App'x 896, 910 (10th Cir. 2002) (citing *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978) and related case law). "[I]f an official, who possesses final policymaking authority in a certain area, makes a decision—even if it is specific to a particular situation—that decision constitutes municipal policy for § 1983 purposes." *Marshall v. Dix*, 640 F.Supp.3d 1033, 1068 (D. Colo. 2022) (quoting *Randle v. City of Aurora*, 69

F.3d 441, 447 (10th Cir. 1995)). "A single act of an employee may be imposed on a local governmental entity if the employee possesses final authority to establish policy with respect to the challenged action." *Id.* (quoting *Ireland v. Jefferson Cnty. Sheriff's Dep't*, 193 F.Supp.2d 1201, 1226 (D. Colo. 2002)). "To sufficiently state a *Monell* claim based on the alleged decisions of final policymakers, a plaintiff must allege facts indicating that the policymakers had 'final policy making authority' . . . on the basis of a decision specific to a particular situation." *Id*. (quoting *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1250 (10th Cir. 1999)).

2. Individual State Actors

The individual BOE Defendants are state (i.e., government) actors to the extent they acted while wearing the hat of a BOE official. The District Defendants do not dispute that the BOE Defendants were state actors during BOE meetings. As they phrase it in their Motion to Dismiss: "There can be no reasonable dispute that the [BOE Defendants'] statements, which came from the dais during a public meeting, were delivered as government speech, perceived as being conveyed by the government, and controlled by the government." ECF 35 at p. 7.

However, the BOE Defendants argue that statements made by the Individual BOE Defendants outside of BOE meetings were not state action. ECF 35 at p. 7. But the Individual BOE Defendants can be held liable under § 1983 for their personal involvement in unlawful retaliation against Plaintiff. *McCook*, 44 F. App'x at 910 (citing *Foote v. Spiegel*, 118 F.3d 1416 (10th Cir. 1997)). Personal involvement does not necessarily mean direct involvement; § 1983 liability may be found if the individual state actor defendant "set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the Plaintiff of her constitutional rights." *Calderon v. City & Cnty. of Denver*, No. 18-cv-00756-PAB-MEH, 2023

WL 534396, at *8 (D. Colo. Aug. 21, 2023) (quoting *Snell v Tunnell*, 920 F.2d 673, 700 (10th Cir. 1990). And using at least one of the tests employed by the Tenth Circuit to determine whether the conduct of a private party constitutes state action, the joint action test, the actions of a private actor can be transformed into those of a state actor when "state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Wittner v. Banner Health*, 720 F.3d 770, 777 (10th Cir. 2013) (quoting *Gallagher v. "Neil Young Freedom Concert,"* 49 F.3d 1442, 1453 (10th Cir. 2002)); *see also Anaya v. Crossroads Managed Care Sys., Inc*., 195 F.3d 584, 596 (10th Cir. 1999) ("State action is . . . present if a private party is a 'willful participant in joint action with the State or its agents.'") (quoting *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)).

a. Mr. Anderson

Plaintiff identifies several actions that Mr. Anderson took while wearing the hat of an elected BOE official. Some are conclusory and are not considered by the Court.[8]

Some, though, are not conclusory. For example, Plaintiff alleges that at the Board Meeting on August 24, 2023, Defendant Anderson characterized Plaintiff's actions as "unspeakable racism at our board meeting." *Id.* ¶¶ 90-91. Plaintiff alleges that Defendant Anderson's statements were made after he, and the other Defendants, "knew the allegations were false." *Id.* ¶ 93.

The FAC also concerns other statements made by Defendant Anderson that are not clearly linked to him as a state actor. For example, while speaking with Defendants Coates and Shofner on a podcast, he referred to Plaintiff as "that bad ass adult" and stated that she "came up and assaulted Hashim," referring to the August 21, 2023 Board Meeting. ECF 8 ¶ 82. Plaintiff also

[8] For example, Plaintiff alleges that Mr. Anderson acquiesced to the bullying of Plaintiff and others at BOE meetings and that he and Ms. Gaytan prevented students from reading their teachers' letters. ECF 8 ¶¶ 48, 59, 61. These statements are conclusory.

alleges Defendant Anderson made at least one other statement, not relating to Plaintiff, that implicitly adopted Defendant Coates' labeling of parents at board meetings as "white racists." *Id*. ¶ 56. The day after commenting on Defendant Coates' post, Defendant Anderson next "referred to one of the parents in a public post as a member of the 'klan.'" *Id*. ¶ 56. Defendant Anderson also agreed to "corroborate Mr. Coates' false account of the August 21, 2023 alleged assault." *Id.* ¶ 105. And on November 22, 2023, Plaintiff alleges that Mr. Anderson repeated the assault and racial slur accusation about Plaintiff in social media posts and referred to the DPS Resign group as "The Klan." *Id*. ¶¶ 113-114. Plaintiff pleads that Defendant Anderson was a BOE member until November 2023. *Id*. ¶ 9.

Mr. Anderson denies making these statements as a state actor. ECF 35 at pp. 7-8. Even if Mr. Anderson was acting in a private capacity when he made these statements, however, his involvement in a conspiracy with state actors allows the Court to consider the statements at this stage of the proceedings when the Court considers the well-plead allegations in Plaintiff's favor. ECF 66 at p. 14 (citing *Buentello*, 545 F.Supp.3d at 916-17). And the statements alleged in the FAC made by Defendant Anderson outside of BOE meetings either indirectly or directly relate to his role as a BOE member. *See e.g., Windom v. Harshbarger*, 396 F.Supp.3d 675, 682 (N.D. W.Va. 2019) (noting that the color of state law requirement "is satisfied when the challenged actions are 'linked to events which arose out of [her] official status.") (quoting *Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019)). This Court will consider the aforementioned statements made by Defendant Anderson in determining his involvement in the alleged conspiracy. *See Wittner*, 720 F.3d at 777; *Anaya*, 195 F.3d at 596; *cf*. *Buentello*, 545 F. Supp. 3d at 920-21 (private comments not considered as state action when "Representative Boebert did not act in concert with state

officials (joint-action test).").

b. The Remaining Individual BOE Defendants

Unlike for Defendant Anderson, the actions that Plaintiff attributes to the other Individual BOE Defendants are limited solely to acts done while wearing the hat of a BOE official. Thus, this Court finds a sufficient predicate to consider them potentially liable under § 1983.

3. The Private Defendants (Mr. Coates and Ms. Shofner)

Plaintiff makes no allegation that during the relevant time period that Defendants Coates or Shofner were District employees or BOE officials in the plain understanding of those terms. (Therefore, for purposes of this discussion, this Court refers to them as the "Private Defendants".) That does not fully foreclose the potential of § 1983 liability, however. As noted above, there are situations when it still "may fairly be said [that a private person is] a state actor." *Buentello*, 545 F.Supp.3d at 916-17. There are a variety of tests by which to determine whether an ostensibly private actor is sufficiently close to the state such that the private actor can be deemed to have acted under the color of state law. *See VDARE,* 11 F.4th at 1160-61 (discussing the "nexus test" option); *Janny v. Gamez*, 8 F.4th 883, 919 (10th Cir. 2021) (discussing the four tests of public function, state compulsion, nexus, and joint action). *See generally Archuleta v. City of Roswell*, No. Civ. 10-1224 JB/RHS, 2013 WL 12329138 (D.N.M. May 23, 2013) (providing a detailed discussion of the Tenth Circuit's four tests).

Here, Plaintiff pleads a high degree of entwinement between Defendants Coates and Shofner and the individual BOE Defendants, sufficient enough to consider the actions of these two private actors as part of a potential conspiracy. The degree of entwinement goes beyond campaign support, consultancy, personal affiliation, or shared political agendas. In regards to the greater

scheme of defending their discipline policy and terminating Principal Dennis, Plaintiff pleads how the involvement of Defendants Shofner and Coates crossed the line from concerted political action to carrying out BOE functions.

Despite being an advocate for one side of the debate, the District appointed Defendant Shofner to preside over (that is, to "moderate[]", "direct[]", and "host[]") two town hall meetings whose purpose was to solicit public comment on this issue. ECF 8 at ¶¶ 42, 45. Plaintiff complains that in that capacity, Defendant Shofner either directly created or tacitly permitted an atmosphere hostile to the opposition. The parents who opposed these two BOE acts were treated poorly at the first town hall meeting. *Id*. ¶ 42. At the second town hall meeting, the character of the policy's opponents were impugned, and Defendant Shofner allowed Defendant Coates' bullying of them in racial terms. *Id*. ¶¶ 46-48. In this respect, Plaintiff makes a plausible argument that Defendant Shofner could be regarded as a BOE actor.

Defendant Coates likewise was allowed to act in a way that plausibly could be considered an extension of the District or BOE. This is in respect to being given "key responsibility" to investigate Principal Dennis including physical access to DPS facilities. *Id*. ¶ 52. Defendant Coates' email to the District Defendants following the August 21, 2023, false assault, characterizing Plaintiff's actions as a "sudden unwelcome grip on my shoulder" with "the utterance of a vile racial slur," supports Plaintiff's connection between Defendant Coates and the rest of the District Defendants.

While this Court is not willing to go so far as to find at this early stage that Defendants Coates and Shofner actually assumed the mantle of state actors, following the logic of the joint action test discussed in *Wittner*, *Anaya*, and *Buentello*, *supra*, their conduct can be considered in

the present analysis as part of the alleged conspiracy. *Janny*, 8 F.4th at 925 ("When a constitutional claim is asserted against private parties, to be classified as a state actors under color of law, they must be jointly engaged with the state officials in the conduct allegedly violating the federal right.")

And while the Court concedes that Plaintiff's allegations are somewhat thin at this stage on this point, she has provided all that is required by law and by Fed. R. Civ. P. 8(a). And as aptly noted by District Judge Thomas S. Kleeh in regard to this topic in *Windom*:

> Given the stage of the proceedings, Windom's allegations (which must be taken as true), and the burden [Defendant] faces under Rule 12(b)(6), this Court cannot conclude that dismissal is proper on this question. The Court presumes it will again be presented the opportunity to evaluate whether [Defendant's] conduct may reasonably be treated as that of the State itself. *Rossignol v. Voohar*, 316 F.3d 516, 523 (4th Cir. 2003). Until then, discovery will provide useful insight as to how, if, when, and why [Defendant] used his page and possibly prevented others from doing so. At this stage, the Court finds that by taking Windom's factual allegations and reasonable inferences drawn therefrom as true, Windom has raised his right to relief above a speculative level, and thus, the Motion to Dismiss must be denied.

This Court concludes that Plaintiff has plausibly pleaded that the conduct of all Defendants should be considered in the present analysis.

B. Conspiracy

Plaintiff's primary § 1983 liability argument is that Ms. Shofner and Mr. Coates acted as part of a conspiracy with the BOE Defendants. This is how Plaintiff pleads it in the FAC, and this is the focus of Plaintiff's Response [ECF 108] in opposition to the Private Defendants' Motions to Dismiss.

1. General Rule

a. Shared Liability

If a private actor conspired with a state actor to deprive someone of her constitutional

rights, then the private actor conspirator shares in the § 1983 liability. *Dixon v. City of Lawton*, 898 F.2d 1443, 1449 n.6 (10th Cir. 1990). The conspiracy provides the required color of state law to the private party's action. *Pastore v. Bd. of Cnty. Comm'rs*, 572 F.Supp.3d 1100, 1118 (D.N.M. 2021). Moreover, the existence of a conspiracy potentially expands the range of adverse acts relevant to the retaliatory conduct. As applied here, that would make the District/BOE Defendant conspirators liable under § 1983 for acts that Defendants Coates or Shofner took in furtherance of the alleged retaliation conspiracy. *Pastore*, 572 F.Supp.3d at 1118 (citing *Dixon* for the principle of imputed liability in the conspiracy context). Indeed, a conspiracy may even benefit from enlisting actors with different roles as a means to accomplish the goal. In this way, the presence of a private actor could support the conspiracy. *Janny*, 8 F.4th at 922. However, Plaintiff must plausibly claim the existence of a § 1983 conspiracy before she can benefit from a shared liability theory.

b. Elements of a Section 1983 Conspiracy

An unlawful "conspiracy" consists of (1) two or more persons, (2) who agree or act in concert, (3) for an unlawful purpose or by unlawful means, and (4) commit an overt act toward the completion of the unlawful objective. *Wilson v. City of Lafayette*, Nos. 07-cv-01844, *et seq*., 2008 WL 4197742, at *11 (D. Colo. Sept. 10, 2008).

One key aspect of a conspiracy is an affirmative agreement by two or more people to act in concert with the intention of accomplishing a goal. The agreement may be express or implied. It can be proven with circumstantial evidence. *Merritt v. Hawk*, 153 F.Supp.2d 1216, 1225 (D. Colo. 2001) (giving as an example of circumstance evidence a sequence of events which reasonably could imply a conspiratorial agreement). Or a defendant's assent to join a conspiracy

can be inferred from taking specific acts that furthered the conspiracy's purpose. *Calderon*, 2023 WL 534396 at *13. But to be a conspiracy, the actors must proceed with understanding and agreement that their actions are in support of the conspiratorial goal. *Wilson*, 2008 WL 4197742 at *11. "The participants in the conspiracy must share the general conspiratorial objective," although it is not necessary that they "know all the details of the plan . . . or possess the same motives for desiring the intended conspiratorial result." *Frasier v. Evans*, 992 F.3d 1003, 1025 (10th Cir. 2021) (citing *Snell*, 920 F.2d 673 at 702).

However, there is no conspiracy if a defendant simply acted in parallel with the conspiracy's goal. *Salehpoor v. Shahinpoor*, 358 F.3d 782, 789 (10th Cir. 2004). *See also*, *Frasier*, 992 F.3d at 1025 (noting that plaintiff showed only that the assistance that the defendants provided was within the lawful and regular scope of their duties and far short of what was needed to show an agreement to bring false charges). Likewise, there is no conspiracy if the defendant's action coincidentally furthered another's unlawful goal. *Calderon*, 2023 WL 534396 at *12 (citing *Snell*, 920 F.2d at 702, for the general rule that there must be "a single plan, the essential nature and general scope of which was known to each person who is to be held responsible for its consequences"). Also, an official's mere acquiescence to the private party's action does not constitute the kind of concerted action needed to show a conspiracy. *Janny*, 8 F.4th at 919. Nor does a defendant's later act taken after the conspiracy accomplishes its goal necessarily evince that defendant's willingness to join the conspiracy. *Calderon*, 2023 WL 534396 at *13.

The goal to be accomplished by a conspiracy must be specific and illegal. *Frasier*, 992 F.3d at 1025 (noting that plaintiff showed only defendants' assistance within the lawful and regular scope of their duties and far short of what was needed to show an agreement to bring false charges).

If the alleged goal is so broad or vague that it entirely encompasses lawful conduct, it is insufficient to demonstrate the existence of a conspiracy. *Wilson*, 2008 WL 4197742 at *12.

c. Conspiracy Pleading Standard

Importantly, Plaintiff's allegations of conspiracy must be plausible. A conclusory assertion of a conspiracy will not suffice. *Wilson*, 2008 WL 4197742 at *10. The Court will not simply assume or infer the existence of a conspiracy. *See Lucero v. Safeway, Inc*., No. 20-cv-03792-MEH, 2022 WL 79860 at *7 (D. Colo. Jan. 7, 2022). Rather, Plaintiff must aver specific facts that tend to show agreement and concerted action. Plaintiff must indicate "who conspired, what they conspired about, where they conspired, when they conspired, and how they conspired." *Wilson*, 2008 WL 4197742 at *10. There must be some indicia of an agreement that the defendants consciously conspired and deliberately pursued a common plan or design that resulted in a tortious act. In short, "a plaintiff must offer allegations with some greater degree of detail than is required generally." *Wilson*, 2008 WL 4197742 at *9.

At the same time, case law gives "some leeway to plaintiffs in describing the exact details of the alleged conspiracy" and allowing inferences to be drawn from the circumstances. *Wilson*, 2008 WL 4197742 at *10. Because of the inherent difficulty of directly proving a conspiracy, "the Court must proceed with caution in considering a pre-trial dismissal of a § 1983 conspiracy." *Trevino v. Catron County Sheriff's Dep't*, No. CIV 03-1178 DJS/RLP, 2004 WL 7337998, at *11 (D.N.M. Sept. 14, 2004) (citing *Fisher v. Shamburg*, 624 F.2d 156, 162 (10th Cir. 1980)). The Court may consider the relationships between alleged co-conspirators as evidence of a conspiracy. *See Near v. Crivello*, 673 F.Supp.2d 1265, 1274-75 (D. Kan. 2009) (court considered the existing business relationship, the friendships, as well as the close involvement of the alleged co-

conspirators before determining that plaintiff adequately pleaded the existence of a conspiracy). A conspiracy is not plausible if there is an obvious alternative explanation for the course of conduct. *Llacua v. W. Range Ass'n*, No. 15-cv-01889-REB-CBS, 2016 WL 9735747, at *10 (D. Colo. June 3, 2016).

2. Plaintiff Pleads a Plausible Conspiracy

Applying the above general principles to the FAC, this Court finds that Plaintiff pleads the plausible existence of a § 1983 conspiracy between the BOE Defendants and the Defendants Shofner and Coates.

Plaintiff pleads several hallmarks of a conspiracy. First, the FAC shows a close and well-established relationship between the Individual BOE Defendants (except Defendant Gaytan)[9] and the Private Defendants Shofner and Coates, a group well in excess of two individuals. *See e.g.,* ECF 8 ¶¶ 8-18. Plaintiff describes Defendant Coates as a "paid consultant who has been a long-time agent of and joint actor with the BOE defendants." *Id.* ¶ 14. Defendant Shofner is a former "appointee to the BOE" and "has been a long-time agent of and joint participant with the BOE defendants." *Id*. ¶ 16. Various individuals worked on the campaigns of other Defendants. *Id.* ¶¶ 14-18. Plaintiff also alleges that Defendants "regularly conferred in private" . . . "to develop strategies to suppress dissenting voices, including Ms. Fry's." *Id.* ¶ 18. This information supports the existence of a conspiracy. *See Near*, 673 F.Supp.2d at 1274-75 (using the "existing business relationship" and personal friendships as factors supporting a conspiracy)

As Plaintiff stresses in her Response [ECF 66], their relationship included the pursuit of a

[9] Plaintiff does not mention Defendant Gaytan as having any personal connection with the other Defendants. *See generally* ECF 8 ¶¶ 8-20.

common political agenda. *See* ECF 8 ¶¶ 18, 50, 93; *Frasier*, 992 F.3d at 1024 ("The participants in the conspiracy must share the general conspiratorial objective . . ."). Relevant for purposes of this discussion, Plaintiff pleads that all of the Individual Defendants had developed and advocated for a new disciplinary policy, which included the removal of public safety officers from district schools due to "the racial inequalities in disciplinary enforcement." ECF 8 ¶¶ 24-25. They also advocated for the termination of Principal Dennis as part of that shared agenda.[10] *Id.* ¶ 51. When opposition to their disciplinary policy and Principal Dennis' termination formed, the Defendants acted with the same motivation to defend that agenda, "change the public discourse, and further silence dissent."[11] *Id.* ¶ 50. This type of context has been deemed appropriate for consideration by the Tenth Circuit. *Snell*, 920 F.2d at 702 (citation omitted) (in a § 1983 conspiracy, "proof of an agreement to deprive often will require examination of conduct occurring before the deprivation.")

Furthermore, Plaintiff alleges the following facts which constitute a clear opportunity for the conspiracy:

1) all six individual Defendants were present at the meeting and were sitting close to one another. ECF 8 ¶ 93 ("the BOE defendants were present . . . and only a dozen or so feet away . . .").

2) The District Defendants were sitting so close that they could hear Defendants Coates and Shofner. *Id.* ¶ 61 (four District Defendants "could, of course hear defendants Shofner and Coates' repeated interruptions).

3) Several Defendants knew Plaintiff from prior town halls and knew that she was opposed to the District Defendants' agenda. *Id.* ¶¶ 43, 49, and 66.

4) When Plaintiff moved to address Mr. Coates, she "took a step or two, slightly leaned

[10] Notably, Plaintiff alleges that Defendant Anderson "went so far as to make a false report to the police accusing Mr. Dennis of criminal conduct . . ." ECF 8 ¶ 54.

[11] The Court addresses the specifics of Plaintiff's First Amendment Retaliation claim below.

in the direction of Mr. Coates and Ms. Shofner and said, 'please be respectful of the speakers.'" *Id.* ¶ 67.

5) In turn, Mr. Coates "shouted for everyone in the room to hear": "did you just call me n***er?!" *Id.* ¶ 68.

6) Defendant Coates' allegation that Plaintiff used a racial epithet was "utterly false." *Id.* ¶ 69.

7) Defendant Coates' later assertion that Plaintiff also assaulted him by grabbing him by the shoulder also was "utterly false." *Id.* ¶ 70.

8) Based on their proximity to the altercation, the District Defendants "knew [Mr. Coates'] allegations were false." *Id.* ¶ 93.

These facts, when viewed in a light most favorable to Plaintiff, demonstrate that Defendants were acting in concert and not on parallel, unconnected tracks. With that important context and a clear opportunity, Plaintiff further alleges in her FAC at ECF 8 that each Defendant committed at least one overt act in furtherance of the conspiracy, all occurring within days or weeks after the August 21st meeting:

1) The District: denied Plaintiff's Colorado Open Records Act (CORA) request for the video footage of the incident and withheld video footage (¶¶ 101-02); denied Plaintiff's "ability to act as a parent volunteer at her children's school and other schools." (¶ 111).

2) Defendant Coates: sent an email to "BOE defendants and other DPS leadership" about the altercation with Plaintiff falsely describing the events (¶ 85); appeared on a podcast with Defendants Anderson and Shofner discussing the same (¶¶ 76-78); filed a false police report (¶¶ 97-98);[12] met with the City Attorney's office and continued to falsely accused Plaintiff (¶¶ 104, 109); and intentionally procured a false statement from Mr. Robert Giron (¶ 110).

3) Defendant Shofner: appeared on the same podcast with Defendant Coates and Anderson and echoed his false narrative about the August 21st altercation with Plaintiff (¶81); spoke to a police investigator and falsely described the altercation between Plaintiff and Defendant Coates to support the prosecution of Plaintiff (¶ 99); and intentionally procured a false statement from Mr. Giron (¶ 110).

[12] This was an action that had been employed by Defendant Anderson previously relating to Mr. Dennis. ECF 8 ¶ 54.

4) Defendant Anderson: appeared on the same podcast with Defendants Coates and Shofner and echoed Defendant Coates' false narrative about the August 21st altercation with Plaintiff (¶81); *during a board meeting*, falsely described the incident between Plaintiff and Defendant Coates as "unspeakable racism at out board meeting" (¶ 90); agreed to corroborate Defendant Coates' false account to law enforcement (¶ 105); further commented about Mr. Coates' false accusation (¶¶ 113-14).

5) Defendant Gaytan: after receiving Defendant Coates' email containing the false narrative about the altercation, knowing it to be false (¶ 87), she responded, copying all BOE Defendants and other DPS leadership, that "these vile, racist epithets should not be uttered or have any part in our meetings," and stated that the "racist verbal attack by [Plaintiff was] unconscionable." (¶ 86); *during a board meeting*, falsely commented about "someone that identifies as white using a racial epithet against [a] black individual." (¶ 90).

6) Defendant Esserman: during a board meeting, stated Plaintiff's alleged conduct was "thoroughly and completely unacceptable," (¶ 90); agreed to corroborate Defendant Coates' false account of the assault to the police (¶ 105).

7) Defendant Quattlebaum: during a board meeting, stated that the alleged incident "caused trauma," (¶ 90); agreed to corroborate Defendant Coates' false account of the assault to the police (¶ 105).

This Court finds for present purposes that the act of making a false accusation of a racial slur and a false accusation of a criminal assault could be regarded as unlawful retaliation, especially considering the context and opportunity of the alleged conspiracy. Moreover, this Court also finds it could be actionable if a state actor made those accusations. That was the situation in *Pastore* in which the plaintiff alleged that the law enforcement defendants filed a false police report about him. 572 F.Supp.3d at 1116. And Plaintiff has alleged that while this was occurring, Defendants had "agreed, both expressly and impliedly, to mistreat Ms. Fry as an example to her and to others to deter speech and activities in opposition to defendants' policies." ECF 8 ¶ 133.

Based on the totality of the circumstances, including the context and the opportunity alleged in detail by Plaintiff in the FAC, as well as the timing of the subsequent overt acts by all

Defendants, the majority of which occurred within a few days of the August 21, 2023, incident, this Court finds that Plaintiff has plausibly alleged the existence of a conspiracy involving all Defendants.

In similar cases involving alleged civil conspiracies, motions to dismiss have been denied. In *Calderon*, for example, Chief District Judge Philip A. Brimmer found Plaintiff pleaded a plausible conspiracy claim where the defendants allegedly took overt acts that would accomplish a specific goal—for plaintiff to lose her position as program director through contract re-assignment—in response to the plaintiff's criticisms of the city. 2023 WL 5348396 at *13. The plaintiff in *Trevino* likewise pleaded a plausible conspiracy where local law enforcement aided well-connected private actors in specific, unlawful ways to protect the private actors and to retaliate against the plaintiff for seeking legal redress against the private actors. This culminated in the law enforcement defendants bringing a false criminal charge against the plaintiff. 2004 WL 7337998 at *11. The *Pastore* case provides an additional example of a clear conspiracy storyline that begins with the plaintiff's request to restore lawful water rights; concerted action between law enforcement and private actors to harass the plaintiff; and escalation after the plaintiff sought legal redress. 572 F.Supp.3d at 1117-18. The circumstances described in *Calderon*, *Trevino*, and *Pastore*, *supra*, show clear causal relationships between a plaintiff's protected activities and a group's organized, collective response to stop it, sufficient to imply the existence of a conspiracy. Similarly, in this case, when viewing the facts as true and in a light most favorable to Plaintiff, she pleads that Defendants took a concerted approach to label her as a racist and even go so far as to bring a criminal charge against her to quell her legitimate opposition to a specific District policy and termination decision.

Notably, Defendants cite no persuasive legal authority to the contrary. District Defendants' citation to *Mnyofu v. Bd. of Educ.*, No. 03 C 8717, 2007 WL 1308523 (N.D. Ill. Apr. 27, 2007) is not supportive of their position. Although on the surface the case appears to line up factually, the differences are stark. First, that case was decided on summary judgment, after the parties had the benefit of discovery. *Id*. at *1. Second, the district judge in that case specifically noted that, after plaintiff had the benefit of discovery, the evidence of a conspiracy was still "woefully deficient." *Id.* at *12. Here, by comparison, even at this early stage, Plaintiff's allegations are detailed and presented logically such that, taken as true, they support the claim that all Defendants acted in concert by making false statements against her in the days and weeks after the August 21st board meeting, including the false reporting of allegations to the police. Also, in *Mnyofu*, who had a similar claim dismissed for being time-barred, the alleged motive was speculative. Straining logic, he alleged that the defendants, members of the school board and faculty, were motivated by the idea of plaintiff losing custody of his son. *Id.* at *13. Here, by contrast, Plaintiff alleges a much more plausible motive: that Defendants wanted to quiet dissenting opinions and acted accordingly.

3. Summary

Plaintiff makes a plausible claim of conspiracy, one that involves all Defendants.

III. First Amendment Retaliation

Although the Court has already found the existence of a conspiracy, an examination of the First Amendment rights at issue bears further discussion. Plaintiff alleges that the purpose of the conspiracy was to retaliate against her for her protected speech activity and to dissuade opposition to the disputed policy choice and termination decision. *See e.g.*, ECF 8 ¶ 132. Because a required element of a § 1983 conspiracy claim is that Defendants' actions were for an unlawful purpose,

this Court explains why Plaintiff states a plausible underlying claim of First Amendment retaliation.

A. The Defining Elements

To state a claim of First Amendment retaliation, whether by way of conspiracy or not, Plaintiff must allege (1) she was engaged in constitutionally protected activity, (2) the Defendants caused her to suffer injury that would chill a person of ordinary firmness from continuing to engage in that protected activity, and (3) her protected conduct is what substantially motived the Defendants to take that adverse action against her. *VDARE*, 11 F.4th at 1160.

1. Protected First Amendment Activity

No Defendant disputes, and this Court sees no doubt, that Plaintiff was engaged in a constitutionally protected activity.[13] Plaintiff resides in the District, and her children attend its public schools. She opposed the new disciplinary policy as well as the termination of a principal. She organized with others politically, and along with them, she participated in public opposition to the BOE policy and to persuade it not to follow through on its decision to remove a principal. She conducted this advocacy with the local press and at BOE public functions. A citizen's speech at a public, governmental meeting is protected political speech. *Mesa v. White*, 197 F.3d 1041, 1044 (10th Cir. 1999). Because Plaintiff's retaliation claim occurs in the context of protected speech about matters of public concern, she establishes the first element as a general matter.

Defendant counters, though, that Plaintiff cannot use the Defendants' statements to demonstrate a First Amendment violation because Defendants themselves were entitled to free

[13] Defendant MiDian Shofner-Holmes currently is suing the City of Aurora under the First Amendment to restore the ability to make public comment at city council meetings. *Holmes v. City of Aurora*, 25-cv-01917-GPG-TPO (D. Colo.).

speech. ECF 35 at p. 7 ("Since the Board members themselves were engaging in protected speech, their statements must have been egregious to be plausibly retaliatory.") (citing *VDARE Found.*, 11 F.4th at 1174). They argue that the statements made by Defendants do not reach an impermissible level. *Id.*

A government employee "must accept certain limitations on his or her freedom." *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202 (10th Cir. 2007) (quoting *Garcetti v. Ceballos*, 547 U.S. 410 (2006)). When government employees speak on matters of "public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id.* What constitutes a matter of public concern is defined broadly. It is implicated if the speech "can be fairly considered as relating to any matter of political, social, or other concern to the community" or if the subject is "of legitimate news interest" or "of generate interest and of value and concern to the public." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (internal citations omitted). But public officials may not "wield the powers of their office as weapons against those who question their decisions." *Van Deelen v. Johnson*, 497 F.3d 1151, 1155 (10th Cir. 2007).

Viewing Plaintiff's FAC in a light most favorable to Plaintiff, Defendants' statements were not necessary for the Board to operate efficiently and effectively, and thus not protected government speech. On August 24, 2023, for example, before starting the scheduled public meeting that was "broadcast on the internet," Defendants took an opportunity "to publicly shame and rebuke Mr. Fry for an alleged 'racist' incident that, in fact, never took place." ECF 8 at p. 22. The FAC does not suggest that these statements were part of the meeting's agenda.

This Court does not discount Defendants' First Amendment rights. But due to the fact-

intensive inquiry that this analysis requires, this issue seems to be best addressed at summary judgment.

2. Adverse Action

The First Amendment bars a government official from chilling protected speech. However, the adverse action that a government official takes to punish for or dissuade against protected speech activity must be sufficiently severe and concrete. More than trivial or de minimis harm is needed. *Lopez*, 2021 WL 326942 at *4. Nor does it suffice that the plaintiff subjectively perceived the defendant's action as adverse. Rather, the adverse action must be objectively severe, that is, severe enough to chill a person of ordinary firmness. *McCook*, 44 F. App'x at 904. It is a "vigorous standard". *VDARE,* 11 F.4th at 1172. It is "substantial enough that not all insults in public debate become actionable." *Id*.

Plaintiff alleges that "[f]ollowing defendants' conduct, Ms. Fry has been deterred from attending board meetings and participating in the democratic process around public school policy." ECF 8 ¶ 7. Plaintiff lists eight adverse actions that she suffered as a result of Defendants' conduct. *Id.* ¶ 135. Yet Defendants contend that Plaintiff did not sufficiently allege injury in this case. ECF 35 at pp. 8-9. Citing no legal support, they note that: 1) it was the **court**-ordered restraining order that "prevented her from attending Board meetings," 2) Defendants personally did not forbid her from volunteering at her children's school, 3) the school's CORA denial is insufficiently tied to Defendants, and 4) the denial of a CORA request would not have "chilled a person of reasonable firmness from making future public comments." *Id.*

Plaintiff's argument is persuasive at the Rule 12(b)(6) stage. Plaintiff's laundry list of injuries suffices as "objectively severe . . . to chill a person of ordinary firmness." *McCook*, 44 F.

App'x at 904. When Defendants' failure to disclose the crucial surveillance video is combined with the false statements uttered by Defendants about Plaintiff being a "racist" and committing an assault, culminating in the false prosecution, it is clear that Plaintiff has met her burden on this element.

3. Retaliatory Motive

The third element requires the Plaintiff to show that the Defendant took the adverse action because she engaged in protected speech. For example, adverse action taken because the defendant disliked the plaintiff does not establish this element. *McCook*, 44 F. App'x at 908-09 (citing *Rakovich v. Wade*, 850 F.2d 1180, 1193 (7th Cir. 1988)). Plaintiff must show that the Defendant acted with a culpable, subjective state of mind. *McCook*, 44 F. App'x at 905-07. Plaintiff may establish a retaliatory motive through circumstantial evidence, *Id.* at 905, but the causal relationship must be plausible, *VDARE,* 11 F.4th at 1174. The simple fact that the adverse action happened soon after the protected activity—i.e., temporal proximity—alone does not show causation. *VDARE,* 11 F.4th at 1174. In *McCook*, for example, even if the defendant took an adverse action against plaintiff soon after the plaintiff's protected activity, the defendant took that action in response to an unrelated occurrence: a third party independently discovered the plaintiff's wrongdoing. 44 F. App'x at 907. Thus, "[e]vidence of intervening events tend to undermine any inference of retaliatory motive and weaken the causal link." *VDARE,* 11 F.4th at 1174.

Here, Defendants knew Plaintiff to be a vocal opponent of a hotly debated BOE policy and termination decision. On August 21, 2023, Plaintiff yet again stood up to voice her opposition. *While she was still waiting in line to speak*, Defendant Coates falsely accused her of using a racial slur against him. After speaking, the very next morning, Defendant Coates sent a message to all

the District Defendants to outline the false narrative of a racial slur uttered by Plaintiff as well as an assault. Within days, the false accusations had snowballed and the District Defendants all weighed in to voice their support of the narrative, both publicly and privately. The situation culminated in false criminal charges being sought and obtained. Based on the context and described above, as well as the timing of the subsequent overt acts, Plaintiff has successfully demonstrated a retaliatory motive.

B. The District/BOE Entity

Plaintiff alleges several decisions or acts by the BOE entity itself. One such matter concerns that actions that it took regarding Principal Dennis. While that matter provides background and context to Plaintiff's conspiracy claim, that action was not adverse to her. Moreover, it is subject of a separate lawsuit: Principal Dennis brings his own lawsuit against the District and the BOE members over his termination. *Dennis v. School District No. 1, et al*., 23-cv-02257-JLK (D. Colo.). Other acts do concern Plaintiff directly, and because they relate to Defendants' qualified immunity argument, this Court explains why she pleads plausible retaliatory acts by the District/BOE entity, itself.

One such matter concerns the denial of Plaintiff's CORA request for the video recording of the meeting. The BOE Defendants fault Plaintiff for not identifying who made that decision specifically, ECF 35 at p. 9, but Plaintiff alleges both "DPS denied the request" and that "the BOE defendants denied the CORA request knowing that the video footage would exonerate Ms. Fry and disprove the allegations against her," ECF 8 ¶¶ 101-02. This allegation is not conclusory.

Defendants' own arguments support that the decision was made by the District/BOE entity. Mr. Anderson emphasizes how individual BOE members lack authority to act on BOE's behalf.

ECF 77 at p. 7 (citing Colo. Rev. Stat. § 22-32-103(1) and § 24-6-402(8)). However, someone made the decision. The current record leaves unclear whether that decision was made in a way that invokes *Monell* municipal liability; whether an individual made the decision in a way that the District/BOE entity otherwise is liable for it; or whether an Individual BOE Defendant is liable for it. This issue involves facts beyond the scope of the FAC and beyond this Court's ability to resolve on a Rule 12(b)(6) review.

The District Defendants also deny any legal obligation to cooperate with the CORA request (an argument Plaintiff says is incorrect, ECF 66 at p. 13), and they point out Plaintiff's option to seek judicial review of the denial. ECF 35 at p. 9. Plaintiff alleges that it took the issuance of a subpoena from that criminal case before the video was produced. ECF 8 ¶ 115. Given the circumstances that preceded that criminal charge and the relationship between the accusation and the policy debate, it would be reasonable to infer that an unlawful retaliatory motive lay behind the District/BOE's non-cooperation with the video recording request. It is irrelevant that Plaintiff had no constitutional right to obtain the video recording. *Pastore*, 572 F.Supp.3d at 1115. That is not the basis of Plaintiff's claim. What constitutional right at issue here is her right to be free from First Amendment retaliation. Here, Plaintiff pleads a plausible causal link between this adverse action (denying her exculpatory evidence) and protected activity.

Another decision that also reasonably could be ascribed to the District/BOE entity[14] was

[14] For both the CORA denial and volunteer revocation decisions, this Court finds reasonable that either the District/BOE entity, itself, or the Individual BOE Defendant(s) could be found to be the responsible decision-maker, even if Plaintiff does not specify who that responsible decision-maker(s) were. Moreover, the District Defendants appear to concede this point when they say that "the only District actions [that Plaintiff challenges] are the denial of her CORA request and the restriction on her ability to volunteer in schools." ECF 35 at p. 12.

the revocation of Plaintiff's volunteer privilege. As with the records request, the District Defendants argue that Plaintiff has no constitutional right to access a public school, citing *Vukadinovich v. Bd. of Sch. Tr.*, 978 F.2d 403, 409 (7th Cir. 1992) and *Taylor v. Roswell Indep. Sch. Dist.*, No. 10-cv-606 LFG/ACT, 2011 WL 13282136, at *14 (D.N.M. Nov. 23, 2011). As with the CORA request denial, Plaintiff does not claim that the revocation of her volunteer privilege, itself, violated her constitutional rights, but rather, the District revoked her volunteer privilege *as a way to retaliate against her for her public speech.*

C. Summary

Viewing the Plaintiff's FAC in a light most favorable to her, she plausibly pleads the elements of a First Amendment retaliation claim. Because she pleads an underlying constitutional violation, Plaintiff thereby pleads a § 1983 conspiracy upon which it is based.

IV. Qualified Immunity

The Individual BOE Defendants assert the defense of qualified immunity. Although qualified immunity is an affirmative defense, *Hardy v. Rabie*, --- F.4th ---, 2025 WL 2202718, at *3 (10th Cir. 2025), it is an affirmative defense that creates a presumption in a defendant's favor that a plaintiff must rebut. *Id.* at *3. *See also Janny*, 8 F.4th at 913. Thus, the question before this Court is whether Plaintiff successfully overcomes the District Defendants' qualified immunity defense.

A summary judgment motion "is the more common vehicle for asserting a qualified immunity defense." *Doe v. Jefferson Cnty. Public Schs.*, No. 24-cv-00924-RMR-NRN, 2025 WL 1892444, at *5 (D. Colo. June 17, 2025) (citing *Peterson v. Jensen*, 371 F.3d 1199, 1201 (10th Cir. 2004)). A defendant may assert qualified immunity in a motion to dismiss, but by doing so,

the defendant subjects him- or herself "to a more challenging standard of review." *Peterson*, 371 F.3d at 1201. "To survive a motion to dismiss based on qualified immunity, the burden is on the plaintiff to allege sufficient facts that show—when taken as true—the defendant plausibly violated his constitutional rights, which were clearly established at the time of violation." *Hardy*, 2025 WL 2202718 at *3 (internal citation omitted).

Regarding the first prong, this Court finds that Plaintiff does plead a plausible claim that the Individual BOE Defendants conspired to violate her First Amendment right by retaliating against her for public speech that opposed the Board's agenda.

The second prong asks whether the right at issue was clearly established at the time of the Individual BOE Defendants' alleged misconduct. There are several components to determining whether the right that a defendant allegedly violated was clearly established. First, a right is clearly established if at the time a reasonable government official would have understood that his or her conduct violated the law. *Hardy*, 2025 WL 2202718 at *6. Second, there must be an on-point decision by the U.S. Supreme Court or Tenth Circuit that shows the right to be as the plaintiff claims it or alternatively a weight of authority in the case law of other courts that shows a consensus about the subject right. *Id*. Third, while the precedent must be on point, it need not be fundamentally the same. Precedent need not involve "precisely the same facts," and it "need not be exactly parallel to the conduct" in the case at bar. *Id.* (citing *Truman v. Orem City*, 1 F.4th 1227, 1235 (10th Cir. 2021)). However, it must suffice to place the constitutional question "beyond debate," *Ellis v. Salt Lake City Corp*., --- F.4th ---, 2025 WL 2213327, at *14 (10th Cir. 2025), and "must be 'particularized' to the facts of the case" at bar, *Tachias v. Sanders*, 130 F.4th 836, 844 (10th Cir. 2025). The test therefore is whether either (1) "courts have previously ruled that

materially similar conduct was unconstitutional" or (2) there is "a general constitutional rule already identified in the decisional law [that] applies with obvious clarity to the specific conduct at issue" in the case at bar. *Hardy*, 2025 WL 2202718 at *6 (citing *Buck v. City of Albuquerque*, 549 F.3d 1269, 1290 (10th Cir. 2008)).

This Court notes that both sides make very limited argument regarding qualified immunity. ECF 35 at pp. 11-12; ECF 66 at p. 15. The Individual BOE Defendants' assertion of qualified immunity consists of two paragraphs, with the first brief paragraph simply summarizing the general rule. ECF 35 at pp 12-13. The Defendants' application of the qualified immunity defense to this case is the subject of the second brief paragraph. Defendants' first argument is that Plaintiff "has not made out a First Amendment violation by any named Board member." ECF 35 at p. 12. However, as described above, this Court finds against Defendants on that argument. Defendants' remaining argument concerns the legality of Defendants' speech in this context. *Id.* at pp. 12-13 ("VDARE put Board members on notice that it was appropriate to publicly denounce racism from the dais, while *Buentello* advised Anderson that he could safely exercise his own First Amendment rights when speaking as an individual in the community.").

However, the cases cited by Defendants, *VDARE* and *Buentello*,[15] are distinguishable. Here, the Individual BOE Defendants did more than make a general assertion of the community's values. Rather, according to Plaintiff's FAC, the members of the conspiracy publicly attacked Plaintiff by calling her a racist or implying as much, brought a false criminal charge against her, and denied her access to information that would vindicate herself and they did so as part of a conspiratorial goal to punish Plaintiff for her advocacy and to discourage other opposing voices.

[15] *Buentello* is a case from the District of Colorado, not from the Tenth Circuit.

VDARE informed Defendants that "the crucial question" of whether a government board member violates someone's First Amendment rights is whether "the government is compelling others to espouse or to suppress certain ideals and beliefs." 11 F. 4th at 1175. *VDARE* cited *Phelan v. Laramie Cnty. Cmty. Coll. Bd. of Trs*., 235 F.3d 1243, 1247 (10th Cir. 2000) which, in turn, states that "the government may not restrict, or infringe, an individual's free speech rights," and may not use either direct punishment or indirect discouragement to suppress speech.

The Individual BOE Defendants argue that the right to volunteer at the school is not clearly established. ECF 35 at p. 13. However, Plaintiff's claim stems from how Defendants' "deterred [her] from exercising her First Amendment rights." ECF 8 ¶ 137. The revocation of her volunteering permission was an adverse action that the Defendants took against her to retaliate for her protected speech activities. The same applies to the video recording request. Plaintiff is not claiming that Defendants violated some constitutional right to obtain the video recording. Plaintiff's claim instead is that their refusal to provide it was an adverse action taken in retaliation for her protected speech activities.

By referencing just particular aspects of Plaintiff's claim, Defendants do not expressly assert the defense of qualified immunity with respect to what her claim actually is. For this reason, Defendants' qualified immunity argument is unpersuasive.

Plaintiff nonetheless argues against the application of qualified immunity. Restating the "clearly established" prong in terms of what her claim actually is, she contends that no reasonable public official should be surprised that "engaging in a conspiracy to retaliate against political opponents, including bringing false criminal charges . . . was unconstitutional." ECF 66 at p. 15. Although it is Plaintiff's burden to show that her rights were clearly established, Plaintiff cites no

case law to support her clearly established argument. Nevertheless, this Court need not limit its consideration to only what she argues. *Hardy*, 2025 WL 2202718 at *6-7. "Whether a legal right is clearly established presents a question of law," *id*. at *7, and a court may use its own knowledge of relevant precedents, even case law that Plaintiff does not cite, *id*. at *6.

This Court restates what Plaintiff's claim actually is: Defendants' engagement "in a conspiracy to retaliate against political opponents, including by bringing false criminal charges against [her]." ECF 66 at p. 15. This Court's independent review of the case law shows that if Plaintiff's allegations are true, then not only does she plead a plausible violation of her First Amendment rights, but at this stage of the analysis, she also pleads a plausible violation of a clearly established First Amendment right to be free from adverse action by government officials for speaking about a matter of public concern.

In *Tachias*, the Tenth Circuit found it to be clearly established that a government actor violates a person's First Amendment constitutional right when he or she threatens frivolous litigation in retaliation for that person's protected speech activity. 130 F.4th at 848. *Tachias* concerned adverse actions taken by a school official against parents who were being critical of the school. Applying *Tachias* here, Defendants likewise should have known that making false claims and bringing a false criminal charge against Plaintiff for her protected speech activity would have violated Plaintiff's First Amendment right.

In *Van Deelen*, the Tenth Circuit held "that a reasonable government official should have clearly understood . . . that physical and verbal intimidation intended to deter a citizen from pursuing a private tax complaint violates that citizen's First Amendment right to petition for the redress of grievances." 497 F.3d at 1159. Here, Plaintiff was engaged in an analogous

undertaking—challenging a school board policy—for which she had a right to do without suffering intimidation as a result.

Indeed, the right to be free from government retaliation for engaging in speech protected by the First Amendment is clearly established as a general principle. In *Crawford-El v. Britton*, 523 U.S. 574, 588 n. 10 (1998), the U.S. Supreme Court held that the First Amendment prohibits government officials from subjecting an individual to retaliatory actions as a reprisal for speaking out and protected speech. Simply put, "the First Amendment bars retaliation for protected speech," and that "general rule has long been established." *Id*. at 592.

On the basis of the above case law, this Court finds "the contours" of Plaintiff's right to be free from First Amendment retaliation were sufficiently clear to put a reasonable school board member on notice that adverse actions taken against a member of the public to punish and dissuade that person from voicing opposition to a board policy would violate that person's constitutional rights. *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1186 (10th Cir. 2009) (describing as the "key inquiry" "whether the contours of the right were sufficiently clear that a reasonable official would understand that what he is doing violates that right").

This Court finds that qualified immunity is unavailable to the Individual BOE Defendants at this stage, but this Court makes that finding upon a motion to dismiss based on limited briefing on the issue. This Court does so without prejudice to Defendants' ability to revisit the matter on summary judgment. By that point in the litigation's development, the nature of Plaintiff's claim and its dimensions will be clearer. That will permit both sides to make more focused arguments about both qualified immunity prongs.

This Court also discusses at this juncture Mr. Anderson's invocation of public employee

immunity from Plaintiff's tort claims under the Colorado Governmental Immunity Act, Colo. Rev. Stat. § 24-10-118 ("CGIA"). That immunity does not apply if the public employee's conduct was "willful and wanton." Colo. Rev. Stat. § 24-10-118(1). Whether Plaintiff can prove that Mr. Anderson acted willfully and wantonly has yet to be determined. For now, this Court finds Plaintiff's allegations sufficient to make a plausible indication of such. As Plaintiff summarizes those allegations in her Response, Mr. Anderson:

> engaged in a wide-ranging conspiracy with the other Defendants to intimidate political opponents into silence, secretly enlisted Coates to fabricate an "investigation", filed a false police report against Dennis, participated in public intimidation and bullying of parents, helped invent a "rule" to silence children attempting to speak at a school board meeting, and lied on public broadcasts and in social media that [she] assaulted Coates (which he knew was false, because he was facing [her] when she did not assault Coates).

ECF 66 at pp. 15-16 (emphasis in the original). Thus, Mr. Anderson's claim of CGIA immunity is better left for summary judgment as well.

V. Defamation

To state a claim of defamation under Colorado state law, Plaintiff must plead that Mr. Coates or Mr. Anderson (1) made a defamatory statement, (2) that was materially false, (3) about Plaintiff, (4) published to a third party, (5) uttered with actual malice, and (6) caused Plaintiff actual or special damages. *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1109 (10th Cir. 2017). *See also*, *Sanders v. Emerson*, No. 22-cv-00852-MEH, 2023 WL 90354444, at *9 (D. Colo. Nov. 2, 2023). Some categories of statements may be presumed injurious or defamatory. *Sanders*, 2023 WL 90354444 at *9.

Although Plaintiff asserts a defamation claim against both Mr. Coates and Mr. Anderson, only Mr. Coates argues for its dismissal. Therefore, this Court does not consider whether Plaintiff

pleads a plausible claim against Mr. Anderson.

First, Mr. Coates argues that he made the complained-of statements in the course of a political dispute over a matter of public concern (school policy and school board governance) that are part of the democratic process and thus non-judiciable. Mr. Coates argues that the political question doctrine bars Plaintiff's claims against him. ECF 97 at pp. 12-13. This Court does not find this argument persuasive. If Plaintiff's lawsuit required this Court to decide which side's policy preference the District/BOE should follow, then the political question doctrine might have applicability. *See Schroder v. Bush*, 263 F.3d 1169, 1175 (10th Cir. 2001) (discussing the doctrine). It is true that the alleged defamatory statements were uttered against the background of a charged and intense political debate, but Mr. Coates cites no legal authority that statements made in conjunction with a political debate cannot be unlawfully defamatory as a matter of law. In any event, Mr. Coates' attempt to cast the alleged defamatory statements as political discourse, or as a protected opinion, is unavailing. Mr. Coates cites no legal authority supporting the proposition that using defamation to injure an opponent's personal reputation by falsely accusing them of assault is a legitimate debate tactic or a protected opinion. Nor does Mr. Coates explain how falsely accusing Plaintiff of a hate crime—the falsity of which this Court assumes for present purposes—contributed to the debate about school board policy.

Moreover, this Court finds that Plaintiff does adequately plead the actual malice element, thus rendering Mr. Coates' argument moot. *Brokers*, 861 F.3d at 1109. "Actual malice" is established if the defendant published the statement "with actual knowledge that it was false or with reckless disregard for whether it was true." *Coomer v. Lindell*, No. 22-cv-01129-NYW-SBP, 2024 WL 3989524, at *7 (D. Colo. Aug. 29, 2024). The defamatory statements by Defendant

Coates are about an incident which Defendant Coates would have direct, personal knowledge. Moreover, Mr. Coates made false accusations against her after he contributed to the false accusation against Principal Dennis in the context of the same political debate. Plaintiff alleges that Mr. Coates investigated Principal Dennis and participated in framing the false accusation of using an "incarceration room" against students of color. ECF 8 ¶¶ 51-53. (Plaintiff also alleges that Defendant Anderson filed a false police report against Principal Dennis accusing him of using the de-escalation room in a criminal way. *Id*. ¶ 54.)

Moreover, the alleged defamatory statements are not matters of political opinion.[16] Rather, they concern discrete, verifiable fact questions: (1) did Plaintiff say a racial slur to him? and (2) did Plaintiff assault him? Regarding whether Plaintiff said a racial slur to him, the record presents a direct factual dispute beyond this Court's ability to resolve on a Rule 12(b)(6) review. For example, the fact that the criminal charge was dropped does not resolve whether Plaintiff said the racial slur to Mr. Coates. However, the video recording is evidence relevant to whether Mr. Coates falsely accused Plaintiff of physical assault.

This Court finds that case law that Plaintiff cites in her Response [ECF 108] persuasive to show that she does plead a plausible claim of defamation against Mr. Coates. This Court therefore recommends that Mr. Coates' Amended Motion to Dismiss [ECF 97] be denied. Of course, whether Plaintiff can prove her defamation claim and prevail on its merits remains to be decided.

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[16] Defendant Coates cites to *Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Investor Services, Inc.* for the proposition that his statements were "expressions of opinion." ECF 97 at p. 11 (citing 175 F.3d 848, 852 (10th Cir. 1999)). However, as an example, one of his alleged false statements was that Plaintiff grabbed his shoulder as part of an assault. This statement was ultimately determined to not be true and therefore not an expression of an opinion.

VI. Supplemental Jurisdiction

Plaintiff invokes this Court's supplemental jurisdiction under 28 U.S.C. § 1367 to hear his state law claims. ECF 8 ¶ 24. Because this Court finds that Plaintiff's federal claims should survive Defendants' Motions, the Court need not address this argument.

CONCLUSION

The First Amendment allows both Plaintiff and the Defendants to engage in vigorous debate over matters of public concern (such as school discipline and thus, indirectly, children's education). However, the Defendants may not retaliate against Plaintiff simply for voicing an opposing position. The law strictly defines what constitutes retaliation in violation of a citizen's First Amendment rights as well as what constitutes a conspiracy to violate someone's constitutional rights. Plaintiff adequately pleads the elements required to state retaliation against her because of her political activity as well as a conspiracy by all Defendants to do so.

Accordingly, the Court respectfully recommends[17] that the Motions to Dismiss [ECF 35,

[17] The Parties have **fourteen days from the date of this Recommendation** to file with the Clerk of Court written objections to findings of fact, legal conclusions, or recommendations that this Court proposes here. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *Griego v. Padilla* (In re *Griego*), 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. 2121 East 30th Street*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings of fact, legal conclusions, and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings of fact, legal conclusions, and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (holding that the district court's decision to review magistrate judge's recommendation *de novo* despite lack of an objection does not preclude application of "firm waiver rule"); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Refining Sys., Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (finding that cross-claimant waived right to appeal certain portions of magistrate judge's order by failing to object to those portions); *Ayala v. United States*, 980 F.2d 1342, 1352

97, and 100] be **denied**.

DATED at Denver, Colorado, this 22nd day of August, 2025.

BY THE COURT:

Timothy P. O'Hara
United States Magistrate Judge

(10th Cir. 1992) (finding that plaintiffs waived their right to appeal the magistrate judge's ruling by failing to file objections). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (holding that firm waiver rule does not apply when the interests of justice require review). Finally, all Parties must consult and comply with the District Judge's practice standards for any specific requirements concerning the filing and briefing of objections.