IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
CENTRAL PANEL BUREAU

ERIC HENELY, Appellant, v. GILBERT COMMUNITY SCHOOL DISTRICT, Appellee.	)	DIA Docket No. 24DOE0001 DE Admin Doc. 5175 **PROPOSED DECISION**

Appellant Eric Henely filed an appeal to the State Board of Education, pursuant to Iowa Code section 290.1, of a decision rendered by the Gilbert Community School District Board of Directors. A telephone hearing in the matter was held on October 9, 2023. Appellant Eric Henely was present and presented testimony. Henely submitted Exhibits A, B, F, and H, which were admitted as evidence in the case. The Appellee's objections to Appellant's Exhibits C, D, E, and G were sustained and those exhibits were not admitted. Appellee Gilbert Community School District was represented at hearing by attorney Carrie Weber. Dr. Christine Trujillo, district superintendent, testified for Appellee. Appellee's Exhibit 2 was admitted as evidence.

At hearing, arrangements were made for the parties to submit briefs following the hearing. Appellant was to submit its post-hearing brief no later than October 23, 2023 and any reply brief no later than November 13, 2023. Appellee was to submit its post-hearing brief no later than November 6, 2023. Following Appellant's post-hearing request, his deadline to submit a reply brief was extended to November 28, 2023. The Appellant timely submitted a post-hearing brief and reply brief and the Appellee timely submitted a post-hearing brief.

FINDINGS OF FACT

On June 12, 2023, the board of directors of Appellee Gilbert Community School District approved Policy 804.06: Use of Recording Devices on School Property in the Board Policy Manual. This policy provides:

> The district believes in the importance of providing a safe and enriching environment for teaching and learning. Recording devices of all kinds, including still photography, video, and audio, can be valuable teaching, learning, and safety tools. Recording also has the potential to substantially disrupt the school district environment and may invade the privacy rights of individuals present on school district property or at school district events. This policy is intended to place reasonable restrictions on recording of any kind on school district property or at school district events to maintain the safety and decorum of the school district

environment. This policy is not intended to be construed or enforced in a way that infringes on any individual's First Amendment right or infringes upon employee activity protected by law.

District-Generated Recordings

The District uses digital recording devices on school property, including school transportation vehicles, to help maintain safety and safeguard District property. Recording devices also have several legitimate educational purposes to enrich the curriculum and aid in student learning. Recording may be an important part of student lessons or used to facilitate employee performance review and professional development. Additionally, district-generated recordings of students and staff engaging in the district's educational and extracurricular programs are essential to engage positively with the school community, keep parents and community members informed, and promote the value of public education.

Recordings of students have the potential to be considered education records under the Family Education Rights and Privacy Act (FERPA). Recordings shall be maintained and accessed only in compliance with FERPA. Certain recordings of employees may also be considered personnel records under Iowa law and shall be maintained and accessed only in compliance with those laws.

Non-District Generated Recordings

The use of non-district owned recording devices on school property and at school events will be regulated to maintain the safety and decorum of the school district environment. Students, parents, community members, and visitors will not be permitted to take recordings during school hours on school property unless the recording is authorized in advance by a staff member. This policy does not apply to recording at public events or in public spaces.

Regulations Applicable to all Recordings

In order to balance privacy and safety interests, no recording will be allowed on District property where individuals maintain a reasonable expectation of privacy. These areas include but aren't necessarily limited to: the nurse's office, restrooms, locker rooms, changing areas, lactation spaces, and employee break rooms. No individual is entitled to use a recording device in a way that violates any law, violates the District's anti-harassment, anti-bullying, or anti-discrimination policies, or in a way that creates a substantial disruption in the learning environment.

In determining whether recording is appropriate, District employees should use professional judgment and consider the following factors:

> educational purpose of the recording, privacy of the individuals involved, and the nature of the setting. All questions or concerns regarding recordings on school district property should be directed to the building principal.

(Exh. 2).

Regulation 804.06-R(1) discusses the use of recording devices on district property as a means to monitor and maintain a safe environment for students and employees. Generally, it relates to recording devices capturing surveillance video on school-owned property. The regulation provides that students are prohibited from tampering with recording devices on school property. Students who do so may face discipline in accordance with the district's discipline policy and will be required to reimburse the district for repairs or replacement necessary as a result of the tampering. Employees are also prohibited under the regulation from tampering with recording devices on school property. Employees who violate the regulation will be subject to disciplinary action as outlined in the employee handbook and relevant board policies. (Exh. 2).

The Appellee's board of directors reviews each of its policies every five years. When this policy and associated regulation came up for review, the board utilized policy recommendations from the Iowa Association of School Boards in their drafting. The board of directors placed the final policy on the agenda for the June 12, 2023 meeting and voted on its adoption after it had previously undergone a first, second, and third read by the board. (Trujillo testimony).

Eric Henely is a resident of the Appellee district and has two children who attend school in the district. In his appeal, Henely asserts that the recording policy contains provisions that: 1) violate his and his children's rights to free speech and free press under the First Amendment to the United States Constitution; 2) violate his and his children's rights to equal protection under the Fourteenth Amendment to the United States Constitution; and 3) are unconstitutionally vague and therefore violate the due process clause under the Fourteenth Amendment of the United States Constitution.[1] At hearing, Henely testified that he is concerned that the school district will be able to rely on these policies to favor expression that paints the district in a positive light and suppresses expression that is critical of the district. Henely is also concerned that the policies allow for the expression of some individuals to be favored over others.

CONCLUSIONS OF LAW

Pursuant to Iowa Code section 290.1, an affected pupil or the parent or guardian of an affected minor pupil who is aggrieved by a decision or order of the board of directors of a school corporation may appeal the decision or order to the state board of education.

[1] The Appellant also asserted in his appeal that the school district board of directors violated his right to due process under the Fourteenth Amendment of the United States Constitution by changing the wording of the challenged policy after it was adopted by the board. This claim was withdrawn by the Appellant at hearing.

The rules regarding the procedures for such an appeal are found at 281 Iowa Administrative Code Chapter 6.

An agency's authority to review a school district's decision is only as broad as that vested in it by statute or regulation.[2] "[W]here a statute provides for a review of a school district's discretionary action, the review, by necessary implication, is limited to determining whether the school district abused its discretion."[3] In applying the abuse of discretion standard, the Board must look to whether a reasonable person could have found sufficient evidence to come to the same conclusion as reached by the school district.[4]

First Amendment Challenges

The Appellant previously appealed a similar decision by the Appellee approving updated school building handbook language related to photography, video, and audio recording. That provision provided that students and visitors were not authorized to photograph or audio or video record on school property or in a school building – other than at a public performance, such as a play, game, or concert – without the consent of a teacher, coach, or administrator. A Proposed Decision was issued regarding that appeal on January 27, 2023.[5] The Appellant's appeal was premised on an argument that the handbook language violated the First Amendment. Given the similarity between that appeal issue and the present one, portions of that decision are relevant here:

> The only issue before the State Board of Education in this matter, then, is whether the policy that the school board approved was an abuse of discretion because, as Appellants argue, it violates the First Amendment on its face. The policy that the school board passed prohibits all photography, audio recording, and video recording on school grounds outside of a public performance like a sporting event or concert, unless it is specifically approved by a teacher, coach, or administrator. A primary consideration in First Amendment case law is whether the restriction in question is content-based or content neutral. Laws or policies that distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based. Content neutral regulations are those that implicate, for example, the time, place, or manner of speech.[6] The policy at issue here is content neutral. There is no need to view the content of a recording in order to determine whether it violates the policy; the fact that a recording is made on school property or grounds without authorization is enough to make that determination.[7]

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[2] *Sioux City Community School Dist. v. Iowa Dept. of Educ.*, 659 N.W.2d 563, 568 (Iowa 2003).
[3] *Id.*
[4] *See id.* at 569 (*citing* Iowa Code § 17A.19(10)(f)(1))).
[5] In the appeal that initiated this action, Henely reported that he has pursued an appeal of that decision to district court.
[6] *State v. Musser*, 721 N.W.2d 734, 743 (Iowa 2006) (*citing Turner Broad. Sys., Inc.*, 512 U.S. 622, 642-43 (1994); *Consol. Edison Co. of N.Y., Inc.*, 447 U.S. 530, 536 (1980)).
[7] *See Ness v. City of Bloomington*, 11 F.4th 914, 923-94 (8th Cir. 2021).

Another important consideration with regard to a First Amendment challenge is where the restriction of speech takes place; greater protection is afforded to speech that takes place in a public forum. In that context, government can impose restrictions on speech only so long as the restrictions are justified without reference to content, narrowly tailored to serve a significant governmental interest, and leave open alternative channels for communication of the information.[8]

In contrast to restrictions in traditionally public forums such as streets and parks, restriction of speech on public property which is not by tradition or designation a forum for public communication, such as a school, is governed by a different standard. In a non-public forum, time, place, and manner restrictions are allowable; additional reasonable regulations on speech are permissible as long as the regulation is not an effort to suppress expression merely because public officials oppose the speaker's view.[9] In a non-public forum, restrictions must be reasonable in light of the purpose which the forum at issue serves, but need not be the most reasonable or the only reasonable limitation.[10] Reasonable restrictions adopted in a viewpoint neutral manner in a non-public forum do not violate the First Amendment.[11]

This is precisely the situation here. The school board approved reasonable restrictions on photography, audio recording, and video recording in the school setting that are content neutral. The restrictions are reasonable based on the ubiquity of recording devices in today's world and the potential for disruption if there were no boundaries around such recording in the school setting. The board also considered privacy issues, especially related to student privacy. The board vested the authority to make decisions about recording on a case-by-case basis in teachers, coaches, and administrators, the very individuals who are best situated to determine the level of disruption recording would create in a given situation. Even the Appellants conclude that the challenged policy would withstand scrutiny under a rational basis test.[12]

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[8] *Hoye v. City of Oakland*, 653 F.3d 835, 844 (9th Cir. 2011) (*citing Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 (1984)).
[9] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (citation omitted); *see also Victory Through Jesus Sports Ministry Foundation v. Lee's Summit R-7 Sch. Dist.*, 640 F.3d 329, 334-35 (8th Cir. 2011); *Larsen v. Fort Wayne Police Dept.*, 825 F.Supp.2d 965, 980 (N.D. Ind. 2010).
[10] *Victory Through Jesus Sports Ministry Foundation*, 640 F.3d at 335.
[11] *Id.* at 337.
[12] *See* Appellants' Reply Brief, at p. 2.

> The Appellants' arguments regarding the alleged underinclusiveness and overinclusiveness of the policy at issue are similarly unpersuasive. In a non-public forum, the strict scrutiny standard, which requires that any restriction be narrowly tailored to serve a compelling government interest, does not apply. The only requirements, as noted above, are that the restrictions be reasonable and content neutral. They do not have to be the best or most reasonable limitation.

(Proposed Decision, DIA Docket No. 23DOE0002, Jan. 27, 2023, pp. 4-6).

The Appellant argues here that his previous appeal regarding the district's recording policy was wrongly decided, relying upon a decision by the Seventh Circuit in *N.J. and A.L. v. Sonnabend*.[13] *Sonnabend* was an as applied challenge by two public school students to school administrators' interpretation of a dress code to prohibit the students from wearing T-shirts depicting firearms. The Seventh Circuit, on appeal, found that the district court erroneously declined to apply *Tinker v. Des Moines Independent Community School District*,[14] instead applying a standard articulated by the circuit in *Muller v. Jefferson Lighthouse School*.[15] In *Muller*, the court was presented with a case regarding a public elementary school student's right to hand out fliers inviting students to a Bible study and Christian fellowship meeting at his church. The *Muller* court determined that the appropriate test was whether the restrictions on the student's expression were reasonably related to legitimate pedagogical concerns and concluded that they were. The *Sonnabend* court remanded the case for the district court to apply *Tinker's* substantial disruption standard to the students' as applied challenge.

Sonnabend is distinguishable from the case presented here and does not compel the concusion that the Appellee's policy violates the Appellant's First Amendment rights. Most importantly, *Sonnabend* was an as applied challenge to specific actions that administrators had taken that restricted student speech on campus. The court in *Sonnabend* remanded the case and directed the district court to apply the *Tinker* analysis, which requires examination of whether the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.[16] In contrast, the Appellant here presents a facial challenge to a policy that regulates recording in the school environment generally. Under the policy, recording must be authorized in advance by a staff member who is directed to use their professional judgment and to consider the educational purpose of the recording, the privacy of the individuals involved, and the setting. There is no content or viewpoint restriction contained on the face of the Appellee's policy that brings this case within the ambit of *Tinker*.

The Appellant also focuses on the policy's language allowing district personnel to use digital recording devices on school property to help maintain safety, safeguard district property, enrich the curriculum, aid in student learning, engage positively with the

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[13] 37 F.4th 412 (7th Cir. 2022).
[14] 393 U.S. 503 (1969).
[15] 98 F.3d 1530 (7th Cir. 1996).
[16] *Tinker*, 393 U.S. at 509.

school community, keep parents and community members informed, and promote the value of public education. Henely argues that this language compels students to consent to images or videos of them being used in political speech that is not viewpoint neutral. In support of this argument, Henely has cited to cases involving compelling public school students to salute the flag or recite the pledge of allegiance. Such cases are not analogous to this one. The challenged policy does not compel any student speech on its face; at most, it subjects students to recording by district personnel in the classroom when such recording is useful for safety reasons, enriches the curriculum or aids in student learning, or facilitates communication with parents and community members.

Finally, the Appellant argues that the "unbridled discretion" that this policy vests in educators to permit or deny recording at school by parents or students violates his First Amendment rights. The case the Appellant cites for this proposition, *City of Lakewood v. Plain Dealer Publishing Co.*,[17] involved a local ordinance granting the mayor of Lakewood, Ohio the authority to grant or deny applications for annual newsrack permits on public property. The ordinance provided no guidance or criteria for the decision, but required the mayor to state the reasons for any denial.[18] The United States Supreme Court allowed a facial challenge to the ordinance. In allowing the facial challenge, the Court noted the difference between newspapers and other entities subject to licensing or regulatory structures and the particular importance of newspapers in the landscape of speech and expression.[19] The Court struck down the ordinance based on the fact that it provided no guidance or criteria for the decisionmaking process on its face and did not require the mayor to state reasons for any denial with specificity.[20] Without going into the differences between a municipal licensing scheme related to newspaper sales and general rules regarding recording in a public school setting, the Appellant's comparison of the Lakewood ordinance and the Appellee's recording policy is unpersuasive. The Appellee's policy lays out important reasons for the regulatory action itself, including student safety and privacy and minimizing disruption in the educational environment. In addition, it provides salient guidance to staff members tasked with making the decisions required under the policy. The Appellee places importance on balancing student privacy and the possibility of disruption with the purpose of the recording, a balancing that is wholly consistent with the administration of a school system. This is not the type of "unbridled discretion" the Court was concerned about in *Lakewood*.

In short, this is a facial challenge to a policy that provides for reasonable restrictions adopted in a viewpoint-neutral manner. Reasonable restrictions adopted in a viewpoint neutral manner in a non-public forum do not violate the First Amendment.

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[17] 486 U.S. 750 (1988).
[18] *Id.* at 753. A prior ordinance prohibiting the private placement of any structure on public property, including a newsrack, had already been declared unconstitutional following a challenge.
[19] *Id.* at 760-61.
[20] *Id.* at 769-70.

Equal Protection Challenges

The Appellant's equal protection arguments relate to: 1) the policy establishing different guidelines for recording for district staff versus students, parents, and other community members; and 2) the associated regulation providing for different consequences for students versus staff for tampering with district recording devices on school property.

The equal protection clause in the Fourteenth Amendment, along with the guarantee of equal protection in the Iowa Constitution, is "'essentially a direction that all persons similarly situated should be treated alike.'"[21] Equal protection, however, does not prohibit laws that impose classifications; rather, it demands that laws treat alike all people who are similarly situated with respect to the legitimate purposes of the law.[22] If plaintiffs cannot show as a threshold matter that they are similar situated, courts do not further consider whether the different treatment under a statute is permitted under the equal protection clause.[23]

The purpose of the Appellee's policy, as indicated in the policy itself, is to minimize disruption in the school environment and protect the privacy rights of individuals present on school district property and at school district events. The policy recognizes the legitimate educational purposes of recording devices when used by school staff as part of student lessons, to facilitate employee performance review and professional development, and to engage with the school community. The policy also notes the importance of maintaining and accessing district-generated recordings in compliance with FERPA. Teachers and staff are responsible for complying with FERPA and have front line responsibility for ensuring safety and minimizing disruption in the school environment; students and parents do not have these same obligations. Teachers and staff are not similarly situated to parents and students with regard to the legitimate purposes of this policy. Accordingly, the Appellant's equal protection argument fails.

The same analysis applies to Henely's argument regarding the regulation imposing different consequences to teachers versus students for tampering with district-owned recording devices. Teachers and staff are not similarly situated to students here either. Discipline of employees is governed by an employment contract, whereas discipline of students is guided by the district's discipline policies. There are myriad legitimate reasons to treat students and staff differently under this policy.

Due Process Challenges

Finally, the Appellant argues that the policy approved by the board contains provisions that are "unconstitutionally vague" in violation of his due process rights under the Fourteenth Amendment. The Appellant makes two arguments under the umbrella of vagueness: 1) the fact that this policy states that recording must be approved by a staff member and another board policy states that recording must be approved by the

[21] *Varnum v. Brien*, 763 N.W.2d 862, 878-79 (Iowa 2009) (citations omitted).
[22] *Id.* at 882 (citations omitted).
[23] *Id.*

superintendent renders it unconstitutionally vague; and 2) the discretion of the staff is so broad and unlimited as to be unconstitutionally vague.

As an initial matter, the United States Supreme Court cases from 1926 and 1943 cited by the Appellant in support of this proposition are not analogous to the present policy. With regard to the first argument, the second policy the Appellant references, Policy 902.04, relates to live broadcast or recording, which is a subset of recording not expressly contemplated in Policy 804.06. Policy 902.04 provides that live broadcast or recording of classroom activities will be allowed at the discretion of the superintendent. One could imagine that the majority of parents or students who would make a request to record under Policy 804.6 would not be requesting to live broadcast the recording. A request to broadcast live may implicate separate concerns and it appears that the board has concluded that those concerns are best analyzed by the superintendent. Nothing in this disparity raises any constitutional concerns.

The Appellant raises his concern regarding the discretion allowed to staff under the policy again under the umbrella of due process. The policy outlines the concerns that are being balanced and allows district employees to use their professional judgment in making decisions. It outlines a non-exclusive list of factors to consider: the educational purpose of the recording, privacy of the individuals involved, and the nature of the setting. It is unreasonable to expect the board to craft a policy that would address every situation where a request to record might come up in the school setting. The policy vests discretion in those individuals who are in the best position to evaluate requests and provides criteria for them to consider in making decisions. This grant of discretion does not render the policy unconstitutionally vague in violation of due process.

ORDER

The school board's decision to approve Policy 804.06 and Regulation 804.06-R(1) was not an abuse of its discretion. Accordingly, the Appellant's appeal is dismissed.

cc: Eric Henely and Christine Henely (via first class mail)
308 Hawthorne Circle
Gilbert, IA 50105

Carrie Weber, Attorney for Respondent (AEDMS)

Rebecca Griglione, IDOE (AEDMS)

Appeal Rights

Any adversely affected party may appeal a proposed decision to the state board within 20 days after issuance of the proposed decision.[24] An appeal of a proposed decision is initiated by filing a timely notice of appeal with the office of the director. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service.[25] The requirements for the notice are found at Iowa Admin. Code r. 281-6.17(5). Appeal procedures can be found at Iowa Admin. Code r. 281-6.17(6). The board may affirm, modify, or vacate the decision, or may direct a rehearing before the director or the director's designee.[26]

[24] 281 Iowa Administrative Code (IAC) 6.17(4).
[25] 281 IAC 6.17(5).
[26] 281 IAC 6.17(7).

Case Title: ERIC HENELY VS. GILBERT COMMUNITY SCHOOL DISTRICT

Case Number: 24DOE0001

Type: Proposed Decision

IT IS SO ORDERED.

Laura Lockard, Administrative Law Judge

BEFORE THE IOWA DEPARTMENT OF EDUCATION

ERIC HENELY, Appellant, vs. GILBERT COMMUNITY SCHOOL DISTRICT, Appellee.	Dept. Ed. Docket No. 5175 DIA No. 24DOE0001 NOTICE OF APPEAL

Appellant respectfully submits the following appeal of the proposed decision of Administrative Law Judge Laura Lockard regarding case 5175 to the Iowa State Board of Education:

1. Eric Henely of 308 Hawthorne Circle, Gilbert, Iowa, 50105 is the party initiating this appeal. 281 IAC 6.17(5)(a).

2. The proposed decision to be appealed is the proposed decision of Administrative Law Judge Laura Lockard regarding Department of Education Docket Number 5175 dated December 22, 2023. 281 IAC 6.17(5)(b).

3. The specific findings or conclusions to which exception is taken and any other exceptions to the decision are as follows (281 IAC 6.17(5)(c)):

   a. The administrative law judge abused her discretion by sustaining the school district's objections to Appellant's Exhibits C, D, and G.

   b. The administrative law judge abused her discretion by sustaining the school district's objection to cross examination regarding Superintendent Trujillo's testimony that "The board of directors placed the final policy on the agenda for the June 12, 2023

meeting and voted on its adoption after it had previously undergone a first, second, and third read by the board. (Trujillo Testimony)."

c. The proposed decision makes an error of fact in finding that "The board of directors placed the final policy on the agenda for the June 12, 2023 board meeting and voted on its adoption after it had previously undergone a first, second, and third read by the board. (Trujillo Testimony)."

d. The proposed decision makes an error of law in concluding that the school board has an unreasonable amount of discretion when implementing a policy that regulates Constitutional Rights.

e. The proposed decision makes an error of law in concluding that the policy does not violate the Free Speech and Free Press clauses of the First Amendment to the United States Constitution.

f. The proposed decision makes an error of law in concluding that the policy does not violate my rights and my children's rights to Equal Protection under the Fourteenth Amendment to the United States Constitution.

g. The proposed decision makes an error of law in concluding that the policy does not violate my rights and my children's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution by being unconstitutionally vague.

4. I request in relief that Exhibits C, D, and G be entered into the record and that I be granted an opportunity to testify based on these Exhibits and cross-examine the Appellee's witness regarding these Exhibits. I further request that I be granted the opportunity to cross-examine Superintendent Trujillo regarding her testimony that the school board held three

readings of the policy before passing it and that the finding of fact in the decision that the school board held three readings of the challenged policy be corrected to show that the school board only held two readings of the policy before passing it. I further request that the decision be modified to declare that the policy violates the Free Speech and Free Press clauses of the First Amendment to the United States Constitution and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. Finally, I request that the Appellee be enjoined from enforcing the policy against me and my children (281 IAC 6.17(5)(d), 281 IAC 6.17(7)).

5. The grounds for relief are the First Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, Iowa Code Chapter 290, and 281 IAC 6.17(7).

6. Appellant respectfully requests an opportunity to make oral argument before the State Board of Education regarding this appeal (281 IAC 6.17(6)(d)).

In summary, Appellant respectfully requests the school district's policy presented in this case be declared unconstitutional and that the school district be enjoined from enforcing it against us.

Dated this 27th day of December, 2023.

ERIC HENELY
308 Hawthorne Circle
Gilbert, Iowa 50105
Telephone:515-357-1733

Certificate of Service

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on December 27th, 2023 by U.S. Mail.

Signature _____

Eric Henely

BEFORE THE IOWA STATE BOARD OF EDUCATION

Eric Henely,	)	
	)	
Appellant,	)	Docket 5175
	)	
-vs-	)	
	)	STATUS AND SCHEDULING ORDER
Gilbert Community School District,	)	
	)	
Appellee.	)	

This matter has been brought to my attention for review.

On January 3, 2024, Appellant appealed a proposed decision from the Hon. Laura Lockard, administrative law judge. In his appeal, he objected to evidentiary rulings, to findings of fact, and to conclusions of law. Appellant requests oral argument before the Board.

Having reviewed this filing, I make the following procedural and case processing orders.

I. This matter will be governed by the administrative rules on appeals (Iowa Admin. Code ch. 281—6) that were in effect on the date of the Appellant's filing. Newly revised rules that were published on December 27, 2023, do not become effective until January 31, 2024.

II. This matter will be presented to the State Board of Education at its next regularly scheduled meeting on **March 21, 2024**. This is the next available regular State Board meeting. (The State Board's meeting in February is a specially scheduled meeting devoted exclusively to charter school contracts.)

III. Each party will be allotted seven minutes and thirty seconds (7:30) of oral argument. Additional time is at the sole discretion of the Board's president.

IV. I take official notice, *see* Iowa Code § 17A.14 (2023), of the State Board's decision on a similar challenge heard by the State Board at its March 23, 2023, meeting, as well as a petition for judicial review filed by the appellant in that matter. I take further official notice of the fact that the Appellant has filed a notice of appeal to the Supreme Court of Iowa after the trial court dismissed his petition for judicial review.

V. Because of the nature of this matter, I have determined that the briefing schedule contained in Iowa Administrative Code rule 281—6.17(6) (2023) requires extending and adjusting.

i. Appellant's briefs and exceptions are due to the undersigned on or **before February 15, 2024**, with copies served on the Appellee.
ii. Appellee's briefs and exceptions are due to the undersigned on or before February 29, 2024, with copies served on the Appellant.
iii. Any replies may be filed with the undersigned on or before **March 7, 2024**, with copies served on the opposing party.

VI. Briefs are limited to thirty pages, exclusive of cover pages, tables of content, and tables of authorities. Replies are limited to ten pages, exclusive of cover pages, tables of content, and tables of authorities.

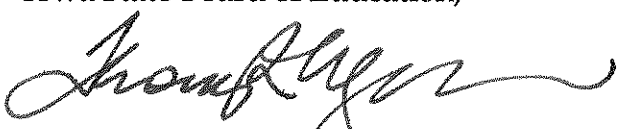
VII. In their briefing, the parties are directed to address the relationship between this appeal and the State Board's March 2023 decision involving the parties as well as subsequent judicial proceedings.

VIII. Given the pendency of the appeal in the Supreme Court of Iowa, the Attorney General may file a statement of interest or information at any time before March 7, 2024, with copies to the parties.

IX. Nothing in this scheduling order shall be construed as a position on the merits of any claim, defense, or argument.

Done on January 26, 2024, in Des Moines.

Iowa State Board of Education,



By: Thomas A. Mayes
General Counsel
Iowa Department of Education

Copies to:

- Appellant, by ordinary mail
- Carrie Weber, counsel for Appellee, by electronic mail
- Tyler Eason, Assistant Attorney General, by electronic mail
- John Robbins, Ph.D., President, Iowa State Board of Education, by electronic mail
- McKenzie Snow, Director, Iowa Department of Education, by electronic mail

BEFORE THE IOWA DEPARTMENT OF EDUCATION

ERIC HENELY, Appellant, vs. GILBERT COMMUNITY SCHOOL DISTRICT, Appellee.	Dept. Ed. Docket No. 5175 APPELLANT'S APPEAL BRIEF

Appellant respectfully submits the following appeal brief regarding State Board Appeal 5175:

1. This appeal concerns Gilbert Community School District's Board Policies 804.06 and 804.06R1 which were passed by the school board on June 12, 2023. I contend that these policies violate my right and my children's rights to Free Speech and Free Press under the First Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment to the United States Constitution. These policies also violate our right to Equal Protection under the Fourteenth Amendment to the United States Constitution. Finally, these policies violate our right to Due Process under the Fourteenth Amendment to the United States Constitution because they are unconstitutionally vague.

2. In conducting the hearing, Administrative Law Judge Laura Lockard abused her discretion by sustaining the school district's objections to Exhibits C, D, and G. At the beginning of the 2023-2024 school year, I filled out the school district's form 506.02-E(1) to instruct the school district to withhold student directory information regarding my children. A copy of this form was contained in Exhibit G. This form defines a student's "Photograph" as directory information. On or about September 26, 2023, the school district posted a photograph

of my son participating in an event during the school day to its Facebook page. This photograph was contained in Exhibit C. Exhibit D contained an assortment of pictures that the school district has posted to its Facebook page. The school district objected to these exhibits, claiming that a violation of FERPA is not relevant to this case. However, Exhibit B, which is at the center of this case, contains numerous cross-references to the district's Board Policies regarding Education Records, which are covered by FERPA. Based on this, the argument that the FERPA forms contained in Exhibit G are not relevant to this case is without merit. Furthermore, after successfully excluding Exhibits C, D, and G, the school district then went on to argue in its brief that parents have the right to opt out of having images and videos of their children shared on the school district's Facebook page. Board Policies 804.06 and 804.06R1, which are under challenge in this case, make no provision for parents to opt out of having photographs and videos of their children shared on the school district's Facebook page. The State Board cannot interpret the policies based on comments in a brief written by the school district's legal counsel. This is consistent with the Southern District of Iowa's finding that "[t]he Court is not at liberty to interpret Senate File 496 according to stray comments by individual legislators. Nor may the court apply its own subjective judgement, divorced from the statutory text, about what the Legislature was probably trying to accomplish. Instead, the analysis must focus squarely on the statutory language. When the text of a statute enables us to resolve the interpretive question, our sole function is to apply the law as we find it, not defer to some conflicting reading the government might advance. And for good reason: it would violate the principles of separation of powers for the Court to pretend the Legislature wrote a different statute than it did." *Penguin Random House et al v. John Robbins et al*, S.D. Iowa, 4:23-cf-00478 (December 29, 2023). Furthermore, the school district's position is that the photographs and videos of students

contained on its Facebook page are not education records. If photographs and videos of students participating in classroom activities are generally not education records, then, absent some other showing from the record, the only regulations on their capture and dissemination are Board Policies 804.06 and 804.06R1. In other words, the school district wants it both ways: it wants photographs and videos taken by students and parents to be restricted because it would violate student (and supposedly teacher) privacy, but it wants to be able to freely disseminate the photographs and videos that its staff captures of students with no repercussions or recourse by parents. Based on this discrepancy, I respectfully request that the State Board order that these Exhibits be entered into the record and that the case be reheard with them in evidence.

3. In regard to Board Policies 804.6 and 804.6R1, the findings of fact in this case state "The board of directors placed the final policy on the agenda for the June 12, 2023 meeting and voted on its adoption after it had previously undergone a first, second, and third read by the board. (Trujillo Testimony)." This finding of fact and the testimony it is based on are false. What actually happened is that the school board held the first reading of the policies on May 8, 2023 (Exhibit A). Then, between the May 8, 2023 meeting and the June 12, 2023 meeting, the school board modified the text of the policies (Exhibit B). During the June 12, 2023 meeting, the board then voted to approve the "second" reading of the policies and waived the third reading (since the text of the policies changed between the two readings, my position is that the June 12, 2023 reading was actually another first reading). Information about these two readings of the policy is publicly available in the meeting agendas on the school board's website at https://simbli.eboardsolutions.com/SB_Meetings/SB_MeetingListing.aspx?S=36031382. After hearing Superintendent Trujillo's testimony that three readings of the policy were held, I intended to disprove that while cross-examining her. However, the school district's legal

counsel objected, claiming that this was not relevant to the appeal, and this objection was sustained. The judge then proceeded to include this in her findings of fact in the proposed decision, which means that she did indeed find that this information is relevant to the case. I respectfully request that the State Board of Education grant me the opportunity to cross-examine Superintendent Trujillo regarding her testimony that the school board held three readings of these policies in order to correct the findings of fact in this case.

4. Regarding my challenge to the policies, I would like to refrain from reasserting all of the arguments made in my previous briefs a with the understanding that the State Board will have access to those briefs.

5. The proposed decision's conclusion that Board Policy 804.06 is viewpoint-neutral is erroneous. The plain text of the policy states that its purpose is to "engage positively with the school community" and "promote the value of public education". These are not viewpoint-neutral purposes. However, I do not challenge the school district's right to "engage positively with the school community" or to "promote the value of public education", I challenge the school district's right to use the Name, Image and Likeness of my children in order to do so without my consent. If the government cannot compel public school students to salute the flag and recite the pledge of allegiance, then it also cannot compel parents to allow the school district to use recordings of their children to "promote the value of public education." See *Board of Education v. Barnette*, 319 U.S. 624 (1943). As stated earlier in this brief, I have asked the school district to refrain from capturing and disseminating images and videos of my children, but the school district continues to do so, including via its Facebook page. As stated in the policy, the purpose of the district's Facebook page (among other communication channels) is to "promote the value of public education." Forcing students to participate in the act of promoting

the value of public education via the use of their Name, Image, and Likeness undermines the students' effectiveness in using their Name, Image, and Likeness to criticize the school district and/or challenge the value of public education. As the Southern District of Iowa recently opined, "[t]his adds a new layer to the constitutional problems [] because it inhibits the ability of students to express beliefs that others might find disagreeable or offensive." *Penguin Random House et al v. John Robbins et al*, S.D. Iowa, 4:23-cf-00478 (December 29, 2023). Policies and laws that are not viewpoint-neutral are unconstitutional in all forums.

6. Even if the school district's intent in posting photographs and videos of students on its Facebook is positive according to the opinions of the majority of citizens, the potential for abuse still exists. It is public knowledge that deepfake images of Taylor Swift were recently circulated on the internet. See https://www.nytimes.com/2024/02/05/business/media/taylor-swift-ai-fake-images.html. As I attempted to show using Exhibit C, the school district posted an image of my son participating in a school activity to its Facebook page against my will. Now that an image of my son was made publicly available, anyone in the world could use it create and disseminate deepfake child pornography. This is directly contrary to the school's claimed interest in the policy of protecting student privacy. Mark Zuckerberg, the CEO of Facebook, does not allow his children's faces to be shown on social media. See https://www.businessinsider.com/mark-zuckerberg-hides-kids-faces-on-social-media-should-you-2023-7. Furthermore, Mark Zuckerburg was recently grilled by congress regarding the effects of social media on children, including being accused on having "blood on his hands." See https://www.cbsnews.com/news/mark-zuckerberg-meta-x-child-exploitation/. Finally, Gilbert Community School District has utilized the services of Carl Markley to perform athletic physicals for students in the district on school property. Mr. Markley was very recently indicted

on numerous federal charges including sex trafficking and exploitation of a minor. See https://www.justice.gov/usao-sdia/pr/ames-man-charged-sex-trafficking-fourteen-victims-and-sexually-exploiting-one-minor. The proposed decision's inference that school staff and other school representatives are better at protecting student privacy than the students' own parents is clearly flawed. As such, the argument that the school district is trying to protect students with its recording policies is nonsensical and offensive and "does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test." *Reed v. Town of Gilbert*, 576 U.S. 155, 184 (2015).

7. In my previous briefs I extensively argued that the challenged policies grant unbridled discretion to the school staff when enforcing the policies. However, two cases that have been decided since this appeal was initiated are especially relevant to the unbridled discretion claim. The Eighth Circuit concluded that Linn Mar Community School District Board Policy 504.13-R was unconstitutional on its face under the First Amendment to the United States Constitution because of its potential for arbitrary enforcement. "We conclude that Parents Defending is likely to succeed on its claim that this portion of the policy is void for vagueness. A governmental policy is unconstitutionally vague if it fails to provide adequate notice of the proscribed conduct and lends itself to arbitrary enforcement. School disciplinary rules need not be as detailed as a criminal code that imposes criminal sanctions. But when a school policy reaches speech protected by the First Amendment, the vagueness doctrine demands a greater degree of specificity than in other contexts. As such, while a lesser standard of scrutiny is appropriate because of the public school setting, a proportionately greater level of scrutiny is required because the regulation reaches the exercise of free speech. The District's policy does not provide adequate notice of what conduct is prohibited." *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, No. 22-2927, 11-12 (8th Cir. Sep. 29, 2023) (internal quotes and citations omitted).

The challenged policy also cites bullying and harassment as concerns. However, "[a] school district cannot avoid the strictures of the First Amendment simply by defining certain speech as bullying or harassment." *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, No. 22-2927, 9 (8th Cir. Sep. 29, 2023) (internal quotes and citations omitted). Furthermore, the school district has presented no evidence that student or parent recording in the school environment was creating any significant problems in the school setting, much less to a degree that would give rise to a substantial and reasonable government interest. This is similar to the Southern District of Iowa's observation that "the State Defendants have presented no evidence that student access to books depicting sex acts was creating any significant problems in the school setting, much less to a degree that would give rise to a substantial and reasonable government interest justifying the across-the-board removal [of books]." *Penguin Random House et al v. John Robbins et al*, S.D. Iowa, 4:23-cf-00478 (December 29, 2023).

8. The proposed decision incorrectly finds that the school board engaged in a "discretionary action" in passing the challenged polices. In the *Sioux City* case that is cited, the Iowa Code explicitly bestowed discretion upon school boards regarding whether to provide bus service to students that lived within two miles of the school. Conversely, in this case the school board has not been granted discretion by the Iowa Code to pass policies that are inconsistent with the First Amendment, nor could they be. This is because the fundamental rights established by the First Amendment are not subject to the vote of elected officials. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend

on the outcome of no elections." *Board of Education v. Barnette*, 319 U.S. 624, 638 (1943). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642. Additionally, any portion of the Iowa Code that is interpreted to bestow such discretion upon school boards (such as Chapters 290 and 17A) is in and of itself unconstitutional under the First Amendment. In taking the oath of office, the members of the school board swore to support the Constitution. See Iowa Code Section 277.28.

9. Regarding the Equal Protection claims, the proposed decision errs in finding that teachers can be treated differently than students and parents regarding recording on school property. Because fundamental First Amendment rights are implicated, strict scrutiny must be applied. The proposed decision makes no mention of what level of scrutiny was applied. The distinction between students and teachers in the decision is unpersuasive. A photograph or video taken by a teacher using their mobile device has just as much potential to violate student privacy as those taken by students or parents. The Iowa Legislature is currently endeavoring to arm teachers in the school environment. This makes them very much like law enforcement officers. In the scenario where staff are armed, students should at least have the ability to document the manner in which staff employ their firearms. When a teacher is shooting at a student, it is nonsensical for the student to have to ask that teacher for permission to record them engaging in that act. The proposed decision states "Teachers and staff are responsible for complying with FERPA and have front line responsibility for ensuring safety and minimizing disruption in the school environment; students and parents do not have these same obligations." However, as stated previously the school district entered no evidence into the record claiming that it has documented

a problem with disruption to the school environment due to student or parent recording activities. Conversely, I did attempt to enter evidence into the record in Exhibit C that the school staff had violated FERPA through the use and dissemination of a photograph of a student taken by school staff. If Gilbert Community has problems with photography and recording on its property, those problems are being perpetrated by school staff, not parents and students. It is clear that the school district's goal with this policy is to allow staff to do whatever they want in order to suppress the dissemination of information that is critical of the school district. The differing consequences for teachers and students that damage school recording equipment also violates the Equal Protection clause. The proposed decision states "[d]iscipline of employees is governed by an employment contract, whereas discipline of students is guided by the district's discipline policies." I entered the Employee Handbook into the record as Exhibit F. However, neither the school district nor the proposed decision make any effort to explain where in the Employee Handbook that discipline for employees who damage or destroy school owned recording devices is defined. In order for this discrepancy to be upheld, at a minimum the school district should be required to articulate some rational basis regarding why students can be required to reimburse the school district for damage to school owned recording devices but not school staff. The implication here is that, for the same infraction, minors can be deprived of money (life, liberty, or property) without due process of law, but paid government officials acting in an official capacity cannot. This violates the fundamental principles of our form of government.

10. I have already addressed the void for vagueness challenges to the challenged policies with my citations of *Parents Defending* and *Penguin v. Robbins*. These cases make it clear that school policies that implicate the First Amendment may be challenged on their face and that they

are subject to heightened scrutiny. The challenged policies utterly fail to inform men of common intelligence when it is permissible to record on school property and when it is not.

11. In the scheduling order, the Department's General Counsel instructed the parties to address the relationship between this appeal and State Board Appeal 5168. It is my position that the policies challenged in both appeals delegate unbridled discretion to the administrative officials charged with their enforcement. However, appeal 5168 was focused on holding government officials accountable for their actions, and this appeal is focused on protecting the privacy and other rights of students. During the hearing before the State Board in March of 2023, the school district's legal counsel (Carrie Weber) and Superintendent Christine Trujillo argued that allowing parents to video record IEP meetings would violate the privacy of the school staff and make them feel uncomfortable. Less than two months later, the school board held a first reading of Board Policy 804.06, which states that "district-generated recordings of students and staff engaging in the district's educational and extracurricular programs are essential to engage positively with the school community, keep parents and community members informed, and promote the value of public education." Contrary to what the school district claimed in its previous brief, this policy makes no exception for parents to opt out of the school district's photographs and video recordings regarding their children. As discussed earlier, in reviewing the policy, the policy must be interpreted as written. The school district cannot have it both ways. If it would violate the privacy of staff for them to be video recording during an IEP meeting, then it also violates the privacy of students for the school district to photograph and video record students in the classroom and disseminate these photographs and videos via social media. In short, the policies challenged in appeals 5168 and 5175 are both unconstitutional, because they both allow school staff unbridled discretion to interpret them however they want,

including in ways that are not viewpoint-neutral. Furthermore, in *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 201 L. Ed. 2d 201 (2018), the Supreme Court struck down a Minnesota law restricting campaign apparel in a non-public forum in a 7-2 vote because the state failed to "articulate some sensible basis for distinguishing what must come in from what must stay out." However, the two dissenting justices dissented not because they felt the law was constitutional, but because the remaining justices declined to certify the case to the Minnesota Supreme Court regarding "the proper interpretation of that state law." This appeal gives the State of Iowa that opportunity to pass upon the meaning of Gilbert Community School District Board Policies 804.06 and 804.06R1. These policies clearly fail to "articulate[s] some sensible basis for distinguishing what must come in from what must stay out."

12. In relief, I respectfully request that the State Board of Education allow the excluded Exhibits to be entered into the record and that I be given an opportunity to testify and cross-examine the witnesses regarding the excluded exhibits. Second, I request that I be allowed to cross-examine Superintendent Trujillo regarding her testimony that the board held three readings of the policies. Third, I respectfully request that the State Board of Education issue a declaratory order stating that Gilbert Community School District Board Policies 804.6 and 804.6R1 violate my rights and the rights of my children under the First Amendment to the United States Constitution. Fourth, I request that the State Board of Education issue a declaratory order stating that Gilbert Community School District Board Policies 804.6 and 804.6R1 violate my rights and my children's rights to Equal Protection under the Fourteenth Amendment to the United States Constitution. Fifth, I respectfully request that the State Board of Education issue a declaratory order stating that Gilbert Community School District Board Policies 804.6 and 804.6R1 violate my rights and my children's rights to Due Process under the Fourteenth Amendment to the

United States Constitution because they are unconstitutionally vague. Finally, I request that the State Board of Education provide any other relief deemed equitable and just.

Based on these arguments, Appellant respectfully requests that the requested relief be granted.

Dated this 13th day of February, 2024.

ERIC HENELY
308 Hawthorne Circle
Gilbert, Iowa 50105
Telephone:515-357-1733

Certificate of Service

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on February 13th, 2024 by U.S. Mail.

Signature _____

Eric Henely

BEFORE THE IOWA DEPARTMENT OF EDUCATION

ERIC HENELY, Appellant, vs. GILBERT COMMUNITY SCHOOL DISTRICT, Appellee.	Dept. Ed. Docket No. 5175 DIA No. 24DOE0001 APPELLANT'S LIST OF EXCEPTIONS

Appellant respectfully submits the following list of exceptions regarding State Board Appeal 5175:

1. The specific findings or conclusions to which exception is taken and any other exceptions to the decision are as follows (281 IAC 6.17(5)(c)):

   a. The administrative law judge abused her discretion by sustaining the school district's objections to Appellant's Exhibits C, D, and G.

   b. The administrative law judge abused her discretion by sustaining the school district's objection to cross examination regarding Superintendent Trujillo's testimony that "The board of directors placed the final policy on the agenda for the June 12, 2023 meeting and voted on its adoption after it had previously undergone a first, second, and third read by the board. (Trujillo Testimony)."

   c. The proposed decision makes an error of fact in finding that "The board of directors placed the final policy on the agenda for the June 12, 2023 board meeting and voted on its adoption after it had previously undergone a first, second, and third read by the board. (Trujillo Testimony)."

d. The proposed decision makes an error of law in concluding that the school board has an unreasonable amount of discretion when implementing a policy that regulates Constitutional Rights.

e. The proposed decision makes an error of law in concluding that the policy does not violate the Free Speech and Free Press clauses of the First Amendment to the United States Constitution.

f. The proposed decision makes an error of law in concluding that the policy does not violate my rights and my children's rights to Equal Protection under the Fourteenth Amendment to the United States Constitution.

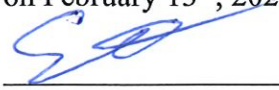
g. The proposed decision makes an error of law in concluding that the policy does not violate my rights and my children's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution by being unconstitutionally vague.

Dated this 13th day of February, 2024.

ERIC HENELY
308 Hawthorne Circle
Gilbert, Iowa 50105
Telephone:515-357-1733

Certificate of Service

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on February 13th, 2024 by U.S. Mail.

Signature 

Eric Henely

BEFORE THE IOWA DEPARTMENT OF EDUCATION

ERIC HENELY, Appellant, vs. GILBERT COMMUNITY SCHOOL DISTIRCT, Appellee.	Dept. Ed. Docket No. 5175 DIA No. 24 DOE 0001 **APPELLEE'S BRIEF IN SUPPORT OF PROPOSED DECISION**

Appellee Gilbert Community School District ("District") submits the following Brief in Support of Proposed Decision. At the outset, the District notes that it never received a brief from the Appellant in this matter, which was due February 19th per the Status and Scheduling Order issued January 26, 2024 by General Counsel Thomas Mayes.

I. Procedural Background

In March 2023, the State Board affirmed a first appeal filed by Appellant from an ALJ's decision that a previous version of the District's recording policy did not violate the First Amendment. The State Board's decision was appealed to the Story Count District Court, which also affirmed the State Board and ALJ's conclusions. Ex. 1 (District Court Merits Order). Appellant has subsequently appealed that decision to the Iowa Supreme Court. (This action generally shall be referred to herein as the "First Appeal").

Meanwhile, the District adopted a new policy concerning recording and Appellant filed a second appeal alleging violations of the First Amendment, Equal Protection Clause, and Due Process Clause. Following a hearing in front of Administrative Law Judge Laura Lockard on October 9, 2023, Judge Lockard issued a proposed decision finding the District's policy did not violate any of these Constitutional provisions and appellant filed this appeal. (This action generally shall be referred to herein as the "Second Appeal"). Appellee's urge the State Board to dismiss the Appeal, and fully affirm and adopt the ALJ's Proposed Order.

II. Application of Res Judicata or Principles

The Status and Scheduling Order issued by Mr. Mayes on January 26, 2024 requested the parties to "address the relationship between this appeal [the Second Appeal] and the State Board's March 2023 decision involving the parties as well as subsequent judicial proceedings [the First Appeal]."

Notably, in the First Appeal, the Story County District Court concluded that it was not proper for Appellant to raise a direct constitutional attack on the policy via a 290 appeal to the State Board and subsequent judicial review action under Iowa Code Chapter 17A. Ex. 1 at 9 ("First, the Henelys are incorrect in their assertion that in this case this Court must address the novel question of whether the First Amendment protects audiovisual recordings in the school environment. The Henelys filed their petition pursuant to Iowa Code 17A.19, Judicial Review. This section specifically provides for judicial review of agency action."). Accordingly, Appellees urge the State Board to consider ONLY whether the Gilbert Board of Directors abused its discretion in adopting the policy and not reach the merits of whether the policy violates any constitutional provisions.

Even if the State Board decides to reach the merits, the Second Appeal contains the same First Amendment challenge presented in the First Appeal. Although the policy language has changed, the Appellant's challenge to the policy maintains the same premise – the policy violates the First Amendment because it is an unlawful restriction on allegedly protected speech and gives employees unlawful discretion to either permit or prevent that speech.

Appellees thus urge the State Board to consider whether the Second Appeal is barred by the doctrine of claim preclusion:

> The general rule of claim preclusion provides a valid and final judgment on a claim precludes a second action on that claim or any part of it. *See Bennett v. MC No. 619, Inc.,* 586 N.W.2d 512, 516 (Iowa 1998). The rule applies not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which could have been offered for that purpose. *Iowa Coal Min. Co. v. Monroe County,* 555 N.W.2d 418, 441 (Iowa 1996). Claim preclusion, as opposed to issue preclusion, may foreclose litigation of matters that have never been litigated. *Penn v. Iowa State Bd. of Regents,* 577 N.W.2d 393, 398 (Iowa 1998) (claim preclusion bars all matters actually determined in the first action and all relevant matters that could have been determined). It does not, however, apply unless the party against whom preclusion is asserted had a "full and fair opportunity" to litigate the claim or issue in the first action. *Whalen v. Connelly,* 621 N.W.2d 681, 685 (Iowa 2000) (citations omitted). A second claim is likely to be barred by claim preclusion where the "acts complained of, and the recovery demanded are the same or where the same evidence will support both actions." *Id.* (citations omitted). A plaintiff is not entitled to a second day in court by alleging a new ground of recovery for the same wrong. *Id.; Bennett,* 586 N.W.2d at 517 ("a party is not entitled to a 'second bite' simply by alleging a new theory of recovery for the same wrong"). When we consider a defense of claim preclusion, we look for the presence of three factors: the parties in the first and second action were the same; the claim in the second suit could have been fully and fairly adjudicated in the prior case; and there was a final judgment on the merits in the first action. *See* 50 C.J.S. *Judgment* §§ 702, 703, at 242–45 (1997). The absence of any one of these elements is fatal to a defense of claim preclusion. *Id.* § 704, at 246.

Arnevik v. Univ. of Minnesota Bd. of Regents, 642 N.W.2d 315, 319 (Iowa 2002).

Here, the parties are identical. The First Amendment challenge was fully litigated and a final judgment was issued on the merits by the Story County District Court. The arguments related to the Equal Protection Clause could have but were not raised by Appellant in the First Appeal. Accordingly, those claims should also now be precluded. The fact that the language of the policy changed is not a defense to the imposition of the claim preclusion doctrine. *See Spiker v. Spiker*, 708 N.W.2d 347, 352-356 (Iowa 2006) (discussing principle that change in law does not preclude the use of the claim preclusion doctrine). The State Board could consider staying the Second Appeal while the appeal of the First Appeal to the Supreme Court is pending.

III. The ALJ's Proposed Order Should be Affirmed

This appeal concerns the decision of the Gilbert Community School District Board of Directors ("Board") to approve a policy concerning photography and recording of all kinds. A hearing was held on October 9, 2023 via telephone before administrative law judge Laura Lockard. The parties were invited to submit post-hearing briefing. A proposed order was issued December 22, 2023, concluding that the policy did not violate any of the Constitutional provisions.

On appeal of that decision to the State Board, Appellants argue that the ALJ erred by sustaining various Appellee objections to Appellant's evidence during the hearing and that the ALJ erred in concluding that the District's policy does not violate the First Amendment, the Equal Protection Clause, and the Due Process Clause. The challenged Policy 804.06 states as follows:

> *The District believes in the importance of providing a safe and enriching environment for teaching and learning. Recording devices of all kinds, including still photography, video, and audio, can be valuable teaching, learning, and safety tools. Recording also has the potential to substantially disrupt the school district environment and may invade the privacy rights of individuals present on school district property or at school district events. This policy is intended to place reasonable restrictions on recording of any kind on school district property and at school district events to maintain the safety and decorum of the school district environment. This policy is not intended to be construed or enforced in a way that infringes on any individual's First Amendment right or infringes upon employee activity protected by law.*
>
> *<u>District-Generated Recordings</u>*
>
> *The District uses digital recording devices on school property, including school transportation vehicles, to help maintain safety and safeguard District property. Recording devices also have several legitimate educational purposes to enrich the curriculum and aid in student learning. Recording may be an important part of student lessons or used to facilitate employee performance review and professional development. Additionally, district-generated recordings of students and staff engaging in the district's educational and extracurricular programs are essential to engage positively with the school community, keep parents and community members informed, and promote the value of public education.*
>
> *Recordings of students have the potential to be considered education records under the Family Education Rights and Privacy Act (FERPA). Recordings shall be maintained and accessed*

only in compliance with FERPA. Certain recordings of employees may also be considered personnel records under Iowa law and shall be maintained and accessed only in compliance with those laws.

Non-District Generated Recordings

The use of non-district owned recording devices on school property and at school events will be regulated to maintain the safety and decorum of the school district environment. Students, parents, community members, and visitors will not be permitted to take recordings during school hours on school property unless the recording is authorized in advance by a staff member. This policy does not apply to recording at public events or in public spaces.

Regulations Applicable to all Recordings

In order to balance privacy and safety interests, no recording will be allowed on District property where individuals maintain a reasonable expectation of privacy. These areas include but aren't necessarily limited to: the nurse's office, restrooms, locker rooms, changing areas, lactation spaces, and employee break rooms. No individual is entitled to use a recording device in a way that violates any law, violates the District's anti-harassment, anti-bullying, or anti-discrimination policies, or in a way that creates a substantial disruption in the learning environment.

In determining whether recording is appropriate, District employees should use professional judgment and consider the following factors: educational purpose of the recording, privacy of the individuals involved, and the nature of the setting. All questions or concerns regarding recordings on school district property should be directed to the building principal.

The standard of review for decisions of a local school board under Iowa Code Section 290.1 is abuse of discretion:

> "[W]here a statute provides for a review of a school district's discretionary action, the review, by necessary implication, is limited to determining whether the school district abused its discretion." *Sioux City Cmty. Sch. Dist. v. Iowa Dep't of Educ.*, 659 N.W.2d 563, 568 (2003). The abuse of discretion standard requires the Board to look only at whether a reasonable person could have found sufficient evidence to come to the same conclusion as the school district. *Id*. at 569; *see also* Iowa Code § 17A.19(10)(f)(1). If a decision was not based upon substantial evidence or was based on an erroneous application of law we will find the decision is unreasonable. *Id*. The Board may not substitute its own judgment for that of the school district. *See id*.

In re Religious Music, 27 D.o.E. App. Dec. 609 (2016), *available at* Book 27 Decision 609.pdf (educateiowa.gov).

Because the Board did not abuse its discretion in adopting the handbook language, and the handbook does not violate any Constitutional provision, this Appeal should be denied. The ALJ's Proposed Order should be adopted and affirmed in its entirety.

IV. The ALJ's Evidentiary Rulings were Not an Abuse of Discretion

Appellant did not file a brief in this matter. Thus, it is difficult to discern the basis for exceptions (a)-(c) in the Notice of Appeal. Appellant states that the ALJ erred by sustaining objections to Appellant's Exhibits C, D, and G. Exhibit C was a photo of Appellant's son taken at a school event, and Exhibit D included photographs and videos from the District's Facebook Page. Exhibit G contained School Board Policies concerning student directory information. These exhibits were irrelevant as to the legal claims raised in the appeal and it was appropriate for the ALJ to sustain the objection.

Appellant also appeals the ALJ's decisions to sustain school district objections to certain questions on cross examination of Superintendent Christine Trujillo regarding the adoption of the challenged policy. Appellant had already attempted to challenge the process the Board used to adopt this policy in front of the Iowa Public Information Board (IPIB), and the IPIB found no violation. Accordingly, it was proper to sustain the objections to questions regarding the policy adoption process which was not at issue in the appeal and which was already determined to be appropriate by IPIB.

V. There is no Established First Amendment Right to Record in a School District Environment

Appellant argues that the ALJ made an error of law in concluding that the Board Policy did not violate the First Amendment, the Equal Protection Clause, or the Due Process Clause. The expressive activity implicated by the policy is video, photography, or audio recording on school property during school activities. Appellant bears the burden of establishing that the challenged handbook language violates the First Amendment. *See, e.g.*, *In re GEER II Mental Health Schools Grant*, 30 D.o.E. App. Dec. 159, 160 (2021). Appellant must first establish that the expression in question is even protected by the First Amendment. *See Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

There is no binding authority that such expression is protected by the First Amendment, which Appellants have previously acknowledged in the First Appeal. Accordingly, this claim fails with no further analysis needed. *See Szabla v. City of Brooklyn Park, Minnesota*, 486 F.3d 385, 393-94 (8th Cir. 2007) (explaining that a municipal policymaker cannot be subject to liability in certain contexts unless a constitutional right has been 'clearly established.'). It would be impossible to conclude that the Board of Directors abused its discretion in adopting this policy when even the Appellant acknowledges there is no clearly established First Amendment right at stake. The ALJ did not address this argument in the present proposed order, however, the Story County District Court did make such a finding: "Having reviewed the legal arguments made by the Henelys, the Court concludes the Henelys have failed to establish there is a First Amendment right to video record in the public-school setting." Ex. 1 at 11.

VI. Even if there was such a Right, A School District is a Non-Public Forum and Restrictions on Speech must only be Reasonable and Viewpoint Neutral

Within school district operations, many different forums exist. However, at issue here are those spaces which constitute non-public forums. *See, e.g.*, *Perry Educ. Assn. v. Perry Local Educators Assn.*, 460 U.S. 37 (1983) (school facilities are only public forums if school authorities have "by policy or practice" opened facilities for "indiscriminate use by the general public."). Restrictions on speech in a non-public forum must only be reasonable in light of the purpose for which the forum exists and viewpoint neutral. *Victory Through Jesus Sports Ministry Foundation v. Lee's Summit R-7 Sch. Dist.*, 640 F.3d 329, 335 (8th Cir. 2011). Restrictions "need not be the most reasonable or only reasonable limitation" to be permissible. *Cornelius v. NAACP Legal Defense and Educ. Fund*, Inc., 473 U.S. 788, 808 (1985). The ALJ correctly concluded that this is the standard under which the policy should be considered, and rejected Appellant's contention that the *Tinker* standard should be applied and that the policy violates the First Amendment because it gives employees unbridled discretion to approve or deny recording. The policy is properly analyzed under the forum analysis, using the standard applicable to a non-public forum, and does not give employees unbridled discretion. The Appeal must be dismissed. The ALJ's order should be adopted and affirmed by the State Board in its entirety.

VII. The Challenged Policy does not violate the Equal Protection Clause

The ALJ correctly concluded that the challenged policy does not even implicate the Equal Protection Clause because the classifications within the policy do not concern similarly situated individuals. The policy addresses conduct by district staff, students, parents, and other community members. The ALJ correctly concluded these groups of people are not similarly situated, and have different obligations and responsibilities in a school district environment. The Appeal must be dismissed. The ALJ's order should be adopted and affirmed by the State Board in its entirety.

VIII. The Challenged Policy does not violate the Due Process Clause

The ALJ similarly rejected Appellant's argument that the policy violated the Due Process Clause. First, Appellant argued that the policy violated the Due Process Clause because it had a different approval process for recording than that found in Policy 902.04 concerning live broadcasts. Second, Appellant argued that the policy gives too much discretion to staff to make decisions about who would be permitted to record and when. However, the ALJ correctly concluded that the first argument did not implicate Due Process and the second argument failed. The ALJ held that "the policy outlines the concerns that are being balanced and allows district employees to use their professional judgment in making decisions." The factors to be considered the policy include "the educational purpose of the recording, privacy of the individuals involved, and the nature of the setting." Notably, Appellant argued in the First Appeal that the previous policy concerning recording was faulty because it did not contain an explicit list of considerations which have now been added to the policy. The Appeal must be denied. The ALJ's order should be adopted and affirmed by the State Board in its entirety.

IX. Conclusion

This Appeal is without merit and should be denied in its entirety. Appellees respectfully request that the State Board adopt and affirm the ALJ's Proposed Order in full.

Respectfully submitted,

/s/ *Carrie Weber*
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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings, on

February 29, 2024

By

X Electronically through Efile

Signature */s/ .Carrie Weber*

Original filed via Efile

Copy to:

Eric and Christine Henely
308 Hawthorne Circle
Gilbert, IA 50105
COMPLAINANTS

IN THE IOWA DISTRICT COURT FOR STORY COUNTY

Appellee's Exhibit One

ERIC HENELY and CHRISTINE HENELY, Petitioners, v. IOWA DEPARTMENT OF EDUCATION Respondent, and GILBERT COMMUNITY SCHOOL DISTRICT Intervenor.	CASE NO. CVCV053108 ORDER

Petitioners Eric Henely and Christine Henely (hereafter "the Henelys") filed their Petition for Judicial Review on March 30, 2023. Hearing on the matter was held on November 30, 2023, via teleconference. The Henelys represent themselves in this matter and both appeared by telephone for the hearing. The Respondent, the Iowa Department of Education (hereafter "the Department"), appeared by attorney Tyler Eason. The Intervenor Gilbert Community School District (hereafter "the District") appeared by attorney Carrie Weber. Superintendent Christine Trujillo was also present. The hearing was reported. Having considered the parties' respective filings, the arguments made at the hearing, and the applicable law, the Court now denies the Henelys' petition for the reasons set forth below.

FACTUAL BACKGROUND

The factual background is essentially undisputed. The following facts are taken from the Certified Record (C.R.).

In August of 2022, the District issued its 2022-23 student handbooks, which contained provisions regulating audio and video recording and photography on school

property. On or about September 12, 2022, the District's Board of Directors amended the relevant handbook policies. C.R. Vol. 4, p. 242. The amended policy stated:

> At no time are students or visitors authorized to video capture, photograph, or audio record others in the school building or on school property (to include school vehicles) while at school activities (unless recording a public performance, such as a school play, game, concert, contest, etc.), without the consent of a teacher, coach, or school administrator.
>
> C.R. Vol. 4, p. 240.

Following the adoption of this policy, the Henelys requested the ability to video record Individualized Educational Plan (IEP) meetings with school employees. Those requests were denied; however, they have been allowed to audio record these meetings.

A hearing on the matter was held on November 1, 2022, before Administrative Law Judge (ALJ) Laura Lockard. C.R. Vol. 1, p. 18. On January 27, 2023, Judge Lockard issued a proposed decision denying the Henelys' appeal and finding there was no abuse of discretion.

On February 8, 2023, the Henelys filed a Notice of Appeal of the proposed decision to the Iowa State Board of Education (hereafter "the State Board"), wherein the District was the appellee. C.R. Vol. 5, p. 360. On March 23, 2023, the State Board heard the appeal in Iowa Department of Education Docket Number 5168. C.R. Vol. 5, p. 342-44. Judge Lockard's proposed decision was adopted by the State Board. C.R. Vol. 5, p. 345.

The Henelys filed their petition for judicial review of the State Board's decision on March 30, 2023, requesting that the court declare that the challenged handbook policy is unconstitutional. They seek a permanent injunction against the District, barring the District from enforcing the policy.

The District filed a motion to intervene on April 10. The Henelys filed their resistance to the motion on April 18. On May 3, the court entered an order allowing the District to intervene.

The Henelys the filed a Motion for Preliminary Injunction on May 14, 2023. The District filed its resistance to the motion on May 24. The Henelys filed their reply to the resistance on May 31. The motion was ultimately denied by the court on August 9.

While the temporary injunction motion was pending and before a ruling was issued, the Department filed both its Answer and a Motion to Dismiss on July 20, 2023. The Henelys filed a resistance to the motion to dismiss on July 27. The Department's motion was denied on August 16.

This matter came before the Court for hearing on November 30, 2023.

LEGAL STANDARD

Persons aggrieved by final decisions of School Boards may appeal to the State Board of Education. Iowa Code § 290.1. Iowa Code section 17A governs judicial review of final administrative agency action. Iowa Code § 17A.19. The district court's review of an agency's findings is at law and not de novo. *Harlan v. Iowa Dep't of Job Servs.*, 350 N.W.2d 192, 193 (Iowa 1984). The petitioners filed this Petition for Judicial Review with the district court. A district court hearing such a petition acts in an appellate capacity. *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (Iowa 2002) (citing Iowa Code § 17A.19(8)) . The burden is on the petitioners to demonstrate prejudice and invalidity of the agency action at issue. Iowa Code 17A.19(8)(a).

The district court must give "appropriate deference to the view of the agency with respect to particular matters that have been vested by a provision of law in the discretion

of the agency." Iowa Code § 17A.11(c). The State Board has a duty to "hear appeals of persons aggrieved by decisions of boards of directors of school corporations…." Iowa Code § 256.7(6).

LEGAL ANALYSIS AND CONCLUSIONS

In their petition for judicial review, the agency action the Henelys appealed from was the final order of the State Board of Education dated March 23, 2023. Iowa Code § 17A.19(4)(b). They asserted the challenged policy is unconstitutional under the First Amendment of the United States Constitution, as applied to the States by the Fourteenth Amendment of the United States Constitution. Iowa Code § 17A.19(4)(e). The Henelys requested a declaration that the challenged policy is unconstitutional on its face and as applied. They also requested a permanent injunction barring the District from enforcing the challenged policy.

In their appeal brief, the Henelys clarify they are claiming that the School Board and the State Board acted unconstitutionality pursuant to Iowa Code section 17A.10(a), although they assert their belief that several other subparagraphs could also apply in this case. They then contend interpretation of the United States Constitution is not vested in the Department of Education by law. Thus, they argue this Court should not give any deference to the agency's determinations as directed by section 17A.11(b) and the appropriate standard of review is de novo. They nevertheless claim the handbook policy fails regardless of the standard applied by the Court, be it de novo or abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996).

The Henelys further challenge the State Board's decision. They reiterate the variety of arguments made in relation to their request for a preliminary injunction regarding

the applicability of the First Amendment to this case. As in their May of 2023 filings, they rely on a survey of federal appellate case law from across the United States to support their assertions. They assert audiovisual recordings generally implicate First Amendment protections.

They contend there exists a clearly established right to film government officials in the performance of their duties and matters of public concern, which includes the right to film police officers. *See Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011) (finding plaintiff who used cellphone to film police officers arresting a man on the Boston Common exercised "a basic, vital, and well-established liberty safeguarded by the First Amendment" to film government officials in the discharge of their duties in a public space.). They claim the act of making an audiovisual recording must be "included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording." *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012). They also note courts rely on audiovisual recordings as evidence. *See Scott v. Harris*, 550 U.S. 372, 378-81 (2007) (dash camera footage depicted termination of petitioner-deputy's high-speed pursuit of respondent's vehicle).

Additionally, the Henelys claim it is clearly established that public schools are subject to the First Amendment. *Tinker v. Des Moines Independent Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969). They claim that teachers have no reasonable expectation of privacy in the performance of their duties. *See Roberts v. Houston Indep. Sch. Dist.*, 788 S.W.2d 107, 111 (Tex. App. 1990) (teacher's employment contract terminated following a series of written and five videotaped assessments of teaching performance).

The Henelys then cite to *Animal Legal Defense Fund v. Reynolds*, 630 F. Supp.3d 1105 (S.D. Iowa 2022) in support of their appeal. They also make arguments regarding viewpoint discrimination and the "unbridled discretion" of school employees in enforcing the policy; the status of the forum as either limited or non-public; the underinclusivity of the challenged policy; the Individuals with Disabilities Education Act (IDEA); strict scrutiny; how prohibiting parents from making audiovisual recordings of interactions with school staff when students are absent burdens political speech; and an eavesdropping statute in Illinois, a "two-party" consent state, in contrast to Iowa being a "one-party" consent state.

Finally, at the November 30 hearing, the Henelys conceded they could have brought their case in a lawsuit in state or federal court. However, they took the position that whether the Board of Education or the School Board acted unconstitutionally is an abuse of discretion of which this Court is the ultimate arbiter of constitutionality, not a state agency. In other words, the Henelys' effectively asserted the issue of constitutionally is before this Court, regardless of their pleadings.

Based on this collection of case law, the Henelys claim there is an established First Amendment protection of the right to make audiovisual recordings on school property. They ask the Court to declare the Department's decision unconstitutional, both on its face and as applied, because it violates the Free Speech and Free Press clauses of the First Amendment. They further ask the Court to enjoin the District from enforcing the challenged policy.

In its resistance to the petition, the Department asks the Court to stay focused on the relevant issues before the Court in such proceedings. It reminds the Court of the

requirement to give appropriate deference to the agency's decision. Iowa Code § 17A.11(c). Moreover, the Department emphasizes that the Henelys bear the burden of demonstrating the prejudice and invalidity of the agency action at issue. *Colwell v. Iowa Dep't of Human Serv.*, 923 N.W.2d 225, 230 (Iowa 2019).

The Department further argues the Henelys' constitutional challenge is directed at the School Board decision, not the final agency decision, which is inappropriate for this action. The Department asserts it is only before this Court for the specific purpose of defending the March 23, 2023 decision and the subsequent action filed by the Henelys is governed by Iowa Code Chapter 17A. The Henelys' burden requires they prove the action taken by the State Board of Education, not the School Board's decision, was unconstitutional on its face or as applied.

The Department emphasizes the Henelys did not plead and do not argue that the decision is not supported by substantial evidence. Nor do they plead the decision was based upon an erroneous interpretation of the law or any other ground set forth in Chapter 17A.

While the Henelys assert the challenged policy is unconstitutional and ask this Court to declare it as such, the Department contends this is an inappropriate argument for their petition for judicial review. The Department argues that a judicial review petition alleging a violation of Iowa Code section 17.19(10)(a) pleads that a practice, policy, procedure, or code section used by the agency is either unconstitutional or violated their due process rights. *See, e.g., Bonilla v. Iowa Bd. of Parole*, 930 N.W.2d 751, 766-67 (Iowa 2019).

Finally, the Department states the Henelys are at liberty to bring suits in federal and state courts alleging the Gilbert policies are unconstitutional under the United States or Iowa Constitutions. However, the Department contends a petition for judicial review is not the appropriate vehicle for the challenges made by the Henelys. The Department argues the Henelys failed to allege any unconstitutional action taken by the State Board or interpretation of the Iowa Code or Administrative Rules as applied to them in this case.

For all of these reasons, the Department asserts the Henelys have failed to meet their burden of proof as required under Iowa Code section 17A.19. Thus, the Department asks the Court to affirm the decision of the State Board of Education.

The District also filed a resistance to the Henelys' petition, arguing the agency action should be affirmed. First, the District argues the Henelys filed a limited action pursuant to Iowa Code section 290.1 and they are bound by their pleadings. The District asserts the focus of the case is limited to whether the District Board of Directors' decision to approve the challenged handbook language was reasonable or whether the School Board abused its discretion, not whether the policy violated the Henelys' First Amendment rights. *See Sioux City Comm. Sch. Dist. V. Iowa Dept. of Educ.*, 659 N.W.2d 563, 568 (Iowa 2003). Thus, the District contends there is no "as applied" relief available to the Henelys.

Next, the District argues the Henelys have the burden of establishing the expression in question is protected by the First Amendment and they have failed to meet it. *See Clark Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). The District asserts the Henelys have not established that recording in public schools carries First Amendment protections. It contends the Henelys' reliance on *Animal Legal Defense*

Fund, 630 F. Supp.3d 1105 is misplaced. [addresses "Ag-Gag" case.] The District further asserts the challenged handbook language does not violate the First Amendment. For these reasons, the District asks the Court to affirm the decision.

The Court concludes the Henelys' petition should be denied. First, the Henelys are incorrect in their assertion that in this case this Court must address the novel question of whether the First Amendment protects audiovisual recordings in the school environment. The Henelys filed their petition pursuant to Iowa Code section 17A.19, Judicial Review. This section specifically provides for judicial review of agency action.

Pursuant to section 17A.19(10), the Court has the authority to "affirm the agency action or remand to the agency for further proceedings." The Court is required to "reverse, modify, or grant other appropriate relief from agency action," only if the Court determines the substantial rights of the person seeking judicial relief have been prejudiced because the agency action was invalid, for any of the fourteen reasons enumerated in the statute. Iowa Code § 17A.19(10)(a)-(n); *see also Bonilla*, 930 N.W.2d at 762. The Iowa Supreme Court explained the prejudice requirement "is a direction to the court that an agency's action should not be tampered with unless the complaining party has in fact been harmed." *Bonilla*, 930 N.W.2d at 763 (quoting *City of Des Moines v. Pub. Emp't Relations Bd.*, 275 N.W.2d 753, 759 (Iowa 1979)).

Furthermore, the Court must "give appropriate deference to the view of the agency with respect to particular matters that have been vested by a provision of law in the discretion of the agency." Iowa Code § 17A.19(11)(c). The State Board has a duty to "hear appeals of persons aggrieved by decisions of boards of directors of school corporations…." Iowa Code § 256.7(6). The State Board "may review the record" and

must "review the decision of…the administrative law judge…" *Id*. Based thereon, the State Board "may affirm, modify, or vacate the decision, or may direct a rehearing before the director." *Id*. The Court is accordingly limited to in its review of the challenged agency action to determine whether the agency's decision to affirm in this case was valid.

On January 27, 2023, Judge Lockard issued the proposed decision that denied the Henelys' appeal and was ultimately affirmed by the State Board. Specifically, Judge Lockard concluded the "school board's decision to approve the policy regarding photography, audio recording, and video recording was not an abuse of its discretion." C.R. Vol. 1, p. 23.

Then, the Henelys appealed the proposed decision to the State Board of Education. C.R. Vol. 5, p. 360. This appeal was Iowa Department of Education Docket Number 5168. On March 23, 2023, the State Board heard the appeal. The Certified Record contains the minutes of the State Board meeting at which this occurred. C.R. Vol. 5, p. 342-44. The State Board heard arguments from the Henely's and then from the District. The State Board ultimately voted to affirm Judge Lockard's decision. C.R. Vol. 5, p. 345.

Section 17A.19 requires the court to "make a separate and distinct ruling on each material issue on which the court's decision is based." Iowa Code § 17A.19(9). Although the parties engage in various degrees of analysis regarding the First Amendment implications of the underlying challenged policy, the Court concludes this is not a material issue on which this decision is based, as it is almost entirely directed at the underlying decision of the District to adopt the challenged policy in the first place. Thus, the Court will not engage in a detailed analysis of every constitutional argument raised by the

Henelys in their brief. To the extent this order does not address each and every argument raised by the Henelys, this Court determined the arguments not addressed are inapplicable to the issues set forth in this petition for judicial review. Nevertheless, as the parties (specifically the Henelys and the District) spent a notable portion of their briefing addressing the First Amendment, the Court would be remiss not to address the matter at all.

The Board ultimately adopted the very detailed and well written Proposed Decision filed by ALJ Lockard. That ruling addressed in detail the same or similar arguments made by the Henely's in this appeal, based upon the extensive record provided below.

Having reviewed the legal arguments made by the Henelys, the Court concludes the Henelys have failed to establish there is a First Amendment right to video record in the public-school setting. Although a variety of cases illustrate video recording can be a category of expression protected by the First Amendment, this case does not involve government officials performing their duties in a public space, police officers in parks, or school board members at a public board meeting. Nor does this case involve the Henelys being prevented from engaging in any expression themselves. This case involves the Henelys being prevented from video recording others speaking during a private IEP meeting. The Board, in adopting the ALJ's decision, and finding that the policy adopted by the school board regarding photography, audio recording, and video recording was reasonable, considering the need to maintain an orderly and productive learning environment and to protect the rights of students and others in the school setting, did not abuse its discretion or violate the Henely's First Amendment rights. This Court finds accordingly.

The Henely's have failed to establish that they have been prejudiced because the agency action was invalid, for any of the fourteen reasons enumerated in the statute. Iowa Code § 17A.19(10)(a)-(n); *see also Bonilla*, 930 N.W.2d at 762, or that they have been harmed. Id. at 763. Viewing the record as a whole, this Court finds that the ALJ's Decision as adopted by the Board is supported by substantial evidence. Based thereon, the Court concludes that the Henelys' petition should be denied.

ORDER

IT IS THEREFORE ORDERED that the Petitioners Eric Henely and Christine Henely's Petition for Judicial Review is hereby DENIED.

CLERK TO PROVIDE COPIES TO:
Parties of Record

State of Iowa Courts

Case Number	**Case Title**
CVCV053108	ERIC & CHRISTINE HENELY VS IOWA DEPT OF EDUCATION
Type:	DISMISSED PER COURT

So Ordered

John J. Haney

John J. Haney, District Court Judge,
Second Judicial District of Iowa

Electronically signed on 2023-12-27 09:37:09

BEFORE THE IOWA DEPARTMENT OF EDUCATION

ERIC HENELY, Appellant, vs. GILBERT COMMUNITY SCHOOL DISTRICT, Appellee.	Dept. Ed. Docket No. 5175 APPELLANT'S REPLY BRIEF

Appellant respectfully submits the following reply brief regarding State Board Appeal 5175:

1. Appellee begins by claiming that it did not receive the appeal brief dated February 13, 2024. Appellant mailed the brief to both the Appellee and the Department of Education on February 13, 2024 via certified mail. Regarding this delivery, the Postal Service has shared with me that its delivery person was in the 100 block of Court Avenue when the item was signed for based on GPS records. The 100 block of Court Avenue contains the building housing Ahlers & Cooney, a private parking garage, and a Polk County Administration Building. It seems unlikely that this item was misdelivered. Furthermore, the Appellee never made any effort to contact the


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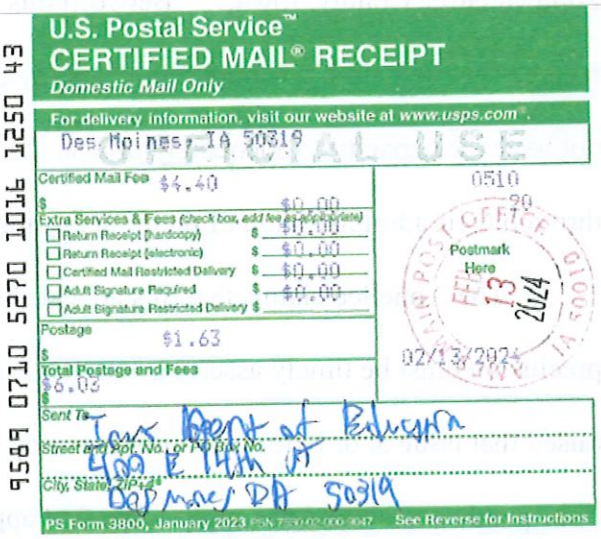
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Appellant to inquire regarding the status of the brief until filing its own brief, which was postmarked on February 29th and which I received on March 4, 2024.

2. Appellee also attached 7 pages regarding a real estate transaction between Lewis Central Community School District and Danny A. Bowen and Julie A. Bowen to its brief. This documentation shows a transaction amount in the value of $174,523.62 regarding "a parcel of land located in the NW ¼ of Section 17, Township 74 North, Range 43 West of the 5th P.M., Pottawattamie County, Iowa…" Between this and its questionable claim regarding its failure to receive certified mail, this only reinforces my claim that the school district and its officials do not have the capacity to adequately protect the privacy of students in the school environment through their administration of their unconstitutionally vague recording policies.

3. The Appellee claims that this appeal should be dismissed due to issue preclusion. Issue preclusion must be timely asserted, and the district has failed to do this. The district could have raised that issue at or before the initial hearing on this matter, but it chose not to. Regardless, issue preclusion should not apply. The first appeal was focused on the Appellant's ability to

record school staff in the school environment. The Appellee's argued that this would violate the privacy of the staff and make them feel uncomfortable. This appeal directly flows out of that argument: if a parent video recording staff in a school environment would violate their privacy and make them feel uncomfortable, it logically flows from this that it would violate the privacy of students and make them feel uncomfortable when staff members exercise their unbridled discretion to photograph and video record students in the school environment and post these photographs and recordings to the district's publicly accessible Facebook page. The First Amendment argument in this case is that the school is compelling students to participate in speech that "promotes the value of public education" and that this violates the rights of my children because the school cannot compel students to adopt a government sponsored viewpoint or directly espouse its ideological message. This issue preclusion claim also raises some Due Process issues. If a school district passes a policy of questionable constitutionality and a patron challenges it under the First Amendment and is unsuccessful, this would then leave the district free to pass any subsequent policy it chooses, no matter how egregiously unconstitutional, and the patron would be unable to challenge it. For example, under this argument, in this case Board Policy 804.06 could state that only people of African descent could take photographs or videos in the school environment, and I would be unable to challenge that. Notably, while not written in either policy, both policies give staff unbridled discretion to do precisely this without even telling the requestor the reason for their decision. In this situation, the school has followed a policy of questionable constitutionality with one that is clearly unconstitutional on its face because the new policy states that its purpose is to "promote the value of public education." This is not a viewpoint-neutral purpose. The conclusion that photography and video recording in the school environment does not implicate First Amendment issues is directly undermined by the

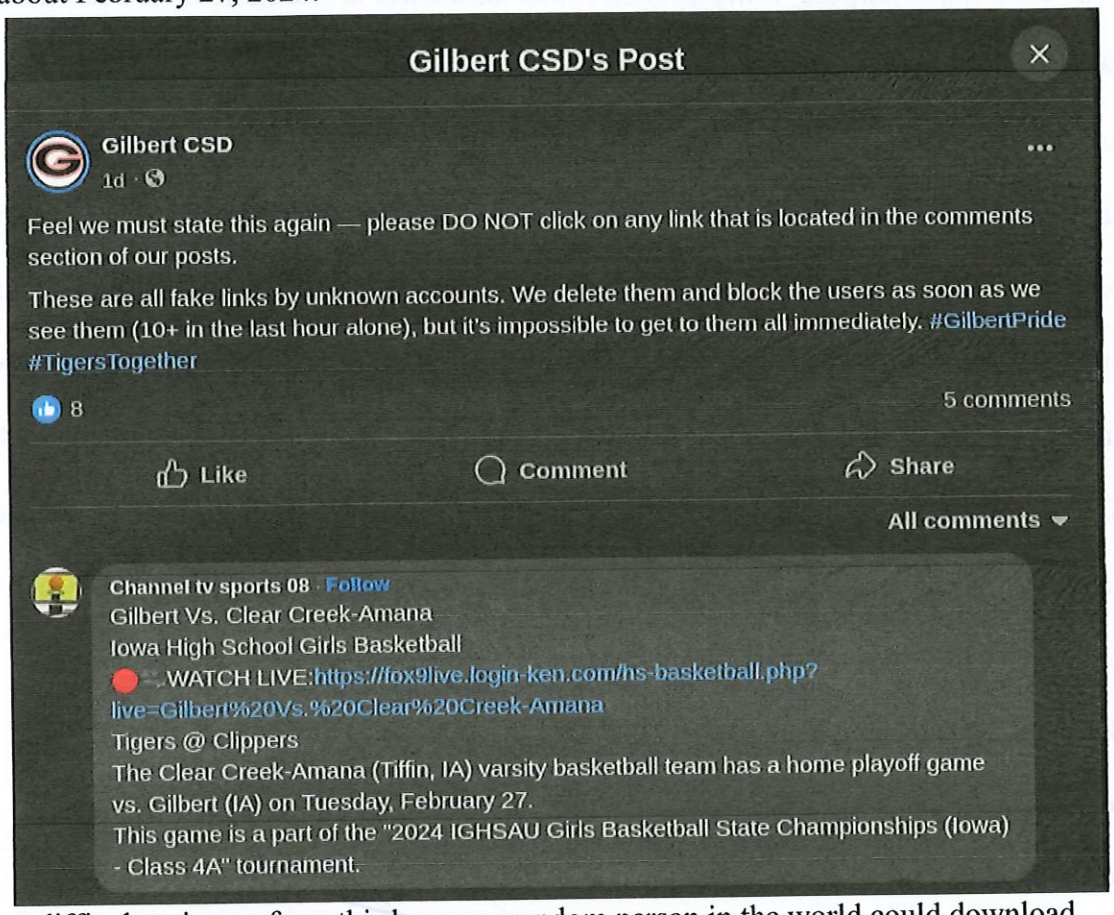
school's own actions in posting videos and photographs of students on its Facebook page for the explicit purpose of promoting the value of public education. Finally, the state of the law has changed since the last appeal. It is now clearly established that school policies affecting speech must provide adequate notice of what conduct is prohibited. See *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, No. 22-2927 (8th Cir. Sep. 29, 2023) and *Penguin Random House et al v. John Robbins et al*, S.D. Iowa, 4:23-cf-00478 (December 29, 2023).

4. Regarding the district's request to stay this appeal until the Supreme Court Case is decided, this should be denied. The very purpose of claims under Iowa Code chapters 290 and 17A is to give parents a faster, simpler, and more cost-efficient method to challenge school board actions. See Iowa Code Section 17A.1(3) which states "The purposes of this chapter are… to increase accountability of administrative agencies… to increase fairness of agencies in their conduct of contested case proceedings; and to simplify the process of judicial review of agency action as well as increase its ease and availability." Furthermore, failure to issue a timely ruling would trigger my right to judicial review anyway. See Iowa Code Section 17A.19(1).

5. The district again tries to raise an irrelevant qualified immunity defense for its staff. I am not seeking monetary damages from any school official. I am simply seeking declaratory and injunctive relief regarding the constitutionality of the policy. Having said this, it is my position that the law regarding compelled political and ideological speech has been clearly established at least since *Board of Education v. Barnette*, 319 U.S. 624 (1943).

6. The school claims that this policy only affects non-public forums. This is false. The school district's Facebook page is publicly available and contains photographs and videos of students (including sometimes over the objection of the student's parents). The school district also allows the public to freely comment on its Facebook page. This makes the district's

Facebook page a designated public forum. Notably, this public forum sometimes includes comments that are anonymous and that contain abusive links, such as this one which was posted on or about February 27, 2024:



It is not difficult to image from this how any random person in the world could download photographs and videos of students captured by the school district in the school environment that are on the school district's Facebook page and modify them for illigitimage and possibly illegal purposes.

7. Regarding the Due Process claim, the challenged policy does contain a list of factors that staff "should" consider when making decisions about requests to record. However, the use of the word "should" is fatal, because it does not require staff to consider those factors or only those factors. Furthermore, the factors themselves are unconstitutionally vague. How is a staff

member supposed to determine if a recording has an "educational purpose"? Does a photograph of an unwilling student playing middleball that is posted to the school district's Facebook page have an "educational purpose"? My opinion is that the answer to that question is a resounding no. What is the definition of "educational purpose"? A video of someone performing a sex act can have an educational purpose. The policy is unconstitutionally vague because it failes to define the vague term "educational purpose". This is exactly what the Eighth Circuit decided in *Parents Defending*. "The District's policy does not provide adequate notice of what conduct is prohibited, because it fails to define the term respect. As the district court acknowledged, respect has various meanings." *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, No. 22-2927, 12 (8th Cir. Sep. 29, 2023). In order for the policy to survive a vagueness challenge, it must clearly define when it is permissible to photograph and record in the school environment and when it is not. Absent a clear answer to this question, the policy cannot be constitutionally enforced.

Based on these arguments, Appellant respectfully requests that the requested relief be granted.

Dated this 7th day of March, 2024.

ERIC HENELY
308 Hawthorne Circle
Gilbert, Iowa 50105
Telephone:515-357-1733

Certificate of Service

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on March 7th, 2024 by U.S. Mail.

Signature _____

Eric Henely

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FAQs

BEFORE THE IOWA STATE BOARD OF EDUCATION

Eric Henely,	)	
	)	
Appellant,	)	Docket 5175
	)	
-vs-	)	
	)	STATUS UPDATE ORDER
Gilbert Community School District,	)	LOCATION OF MARCH 21
	)	STATE BOARD MEETING
Appellee.	)	

This matter has been brought to my attention for review. The State Board of Education will be meeting on March 21, 2024, in Storm Lake, Iowa. The parties and counsel are able to participate in oral argument in person or by Zoom. If the parties choose to be personally present, this will be at their costs.

Please inform the undersigned by March 14, 2024, whether parties and counsel will be personally present or will participate by Zoom.

Done on February 16, 2024, in Des Moines.

Iowa State Board of Education, by

Thomas A. Mayes
General Counsel
Iowa Department of Education

Copies to:

- Appellant, by ordinary mail
- Carrie Weber, counsel for Appellee, by electronic mail
- Tyler Eason, Assistant Attorney General, by electronic mail