

No. 23-1306

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

COREY MCNELLIS,

Plaintiff - Appellant,

v.

DOUGLAS COUNTY SCHOOL DISTRICT,

Defendant - Appellee.

On Appeal from the United States District Court
for the District of Colorado
No. 1:22-CV-01636
Hon. Raymond P. Moore

APPENDIX TO APPELLANT'S BRIEF

Spencer J. Kontnik
KONTNIK | COHEN, LLC
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Denver, Colorado 80206
Telephone: (720) 449-8448

Attorney for Plaintiff - Appellant
COREY MCNELLIS

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05	[Doc 19-1] Motion to Dismiss - Ex. A, Assistant Principal-Athletic Director High School Job Description	08/30/2022	1	050
06	[Doc 19-2] Motion to Dismiss - Ex. B, The Laramie Project Email Chain	08/30/2022	1	054
07	[Doc 19-3] Motion to Dismiss - Ex. C, November 3, 2020 Termination Notice	08/30/2022	1	062
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ALLMTN,APPEAL,INTERPRETER,JD1,MJ CIV PP,TERMED

U.S. District Court - District of Colorado
District of Colorado (Denver)
CIVIL DOCKET FOR CASE #: 1:22-cv-01636-RM-STV

McNellis v. Douglas County School District
Assigned to: Judge Raymond P. Moore
Referred to: Magistrate Judge Scott T. Varholak
Case in other court: U.S. Court of Appeals, 10th Circuit, 23-01306
Cause: 42:2000(e)(2) - (r)(1) -- Job Discrimination (Religion)

Date Filed: 07/01/2022
Date Terminated: 08/28/2023
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

Corey McNellis

represented by **Spencer J. Kontnik**
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TERMINATED: 05/10/2023
ATTORNEY TO BE NOTICED

V.

Defendant

Douglas County School District

represented by **Jonathan Patrick Fero**

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TERMINATED: 02/28/2023

Michael Brent Case

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ATTORNEY TO BE NOTICED

Defendant

Cathy Franklin

*In her Official Capacity as the Director of
Human Resources for Douglas County School
District
TERMINATED: 09/20/2022*

represented by **Mary Barham Gray**

(See above for address)
TERMINATED: 02/28/2023

Michael Brent Case

(See above for address)
ATTORNEY TO BE NOTICED

Scott Alexander Goodstein

(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Cathy (I) Franklin
in her individual capacity
 TERMINATED: 09/20/2022

represented by **Mary Barham Gray**
 (See above for address)
 TERMINATED: 02/28/2023

Michael Brent Case
 (See above for address)
 ATTORNEY TO BE NOTICED

Scott Alexander Goodstein
 (See above for address)
 ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
07/01/2022	1	COMPLAINT against Douglas County School District, Cathy Franklin (Filing fee \$ 402,Receipt Number ACODC-8534760)Attorney Spencer J. Kontnik added to party COREY MCNELLIS(pty:pla), filed by COREY MCNELLIS. (Attachments: # 1 Civil Cover Sheet) (Kontnik, Spencer) (Entered: 07/01/2022)
07/01/2022	2	Case assigned to Judge Robert E. Blackburn and drawn to Magistrate Judge S. Kato Crews. Text Only Entry (norlin,) (Entered: 07/01/2022)
07/01/2022	3	Magistrate Judge consent form issued pursuant to 28 U.S.C. 636(c). No Summons Issued. (norlin,) (Entered: 07/01/2022)
07/06/2022	4	MEMORANDUM RETURNING CASE by Senior Judge Blackburn. This case is randomly reassigned to Magistrate Judge Scott T. Varholak. All future pleadings should be designated as 22-cv-01636-STV. (athom,) (Entered: 07/06/2022)
07/06/2022	5	Magistrate Judge consent form issued pursuant to D.C.COLO.LCivR 40.1, direct assignment of civil actions to full time magistrate judges. (athom,) (Entered: 07/06/2022)
07/06/2022	6	ORDER SETTING DEADLINE FOR FILING ELECTION CONCERNING CONSENT/NON-CONSENT TO MAGISTRATE JURISDICTION FORM AND SETTING SCHEDULING CONFERENCE by Magistrate Judge Scott T. Varholak on 6 July 2022. Consent Form due by 8/30/2022. Proposed Scheduling Order due 9/6/2022. Scheduling Conference set for 9/13/2022 10:30 AM in Courtroom A 402 before Magistrate Judge Scott T. Varholak. (cmadr,) (Entered: 07/06/2022)
07/06/2022	7	NOTICE of Entry of Appearance by Mary Barham Gray on behalf of All Defendants Attorney Mary Barham Gray added to party Douglas County School District(pty:dft), Attorney Mary Barham Gray added to party Cathy Franklin(pty:dft), Attorney Mary Barham Gray added to party Cathy (I) Franklin(pty:dft) (Gray, Mary) (Entered: 07/06/2022)
07/06/2022	8	WAIVER OF SERVICE Returned Executed by Douglas County School District, Cathy (I) Franklin, Cathy Franklin. All Defendants. (Gray, Mary) (Entered: 07/06/2022)
07/06/2022	9	NOTICE of Entry of Appearance by Scott Alexander Goodstein on behalf of All Defendants Attorney Scott Alexander Goodstein added to party Douglas County School District(pty:dft), Attorney Scott Alexander Goodstein added to party Cathy Franklin(pty:dft), Attorney Scott Alexander Goodstein added to party Cathy (I) Franklin(pty:dft) (Goodstein, Scott) (Entered: 07/06/2022)
07/07/2022	10	NOTICE of Entry of Appearance by Austin Murray Cohen on behalf of Corey McNellisAttorney Austin Murray Cohen added to party Corey McNellis(pty:pla) (Cohen, Austin) (Entered: 07/07/2022)

07/12/2022	11	NOTICE of Entry of Appearance by Matthew Louis Fenicle on behalf of Corey McNellisAttorney Matthew Louis Fenicle added to party Corey McNellis(pty:pla) (Fenicle, Matthew) (Entered: 07/12/2022)
07/12/2022	12	NOTICE of Entry of Appearance by Morgan Elizabeth Hamrick on behalf of Corey McNellisAttorney Morgan Elizabeth Hamrick added to party Corey McNellis(pty:pla) (Hamrick, Morgan) (Entered: 07/12/2022)
07/29/2022	13	CONSENT to Jurisdiction of Magistrate Judge by Defendants Douglas County School District, Cathy Franklin, Cathy (I) Franklin All parties do not consent.. (Gray, Mary) (Entered: 07/29/2022)
08/01/2022	14	CASE REASSIGNED pursuant to 13 Consent to Jurisdiction of Magistrate Judge. All parties do not consent. This case is randomly reassigned to Judge Raymond P. Moore and drawn to Scott T. Varholak. All future pleadings should be designated as 22-cv-01636-RM. (Text Only Entry) (csarr,) (Entered: 08/01/2022)
08/02/2022	15	ORDER REFERRING CASE to Magistrate Judge Scott T. Varholak. Pursuant to 28 U.S.C. § 636(b)(1)(A) and (B) and Fed. R. Civ. P. 72(a) and (b), this case is referred to the assigned United States Magistrate Judge to (1) convene a scheduling conference under Fed. R. Civ. P. 16(b) and enter a scheduling order meeting the requirements of D.C.COLO.LCivR 16.2, (2) conduct such status conferences and issue such orders necessary for compliance with the scheduling order, including amendments or modifications of the scheduling order upon a showing of good cause, (3) hear and determine pretrial matters, including discovery and other non-dispositive motions, (4) conduct a pretrial conference and enter a pretrial order, and (5) conduct hearings, including evidentiary hearings, and submit proposed findings of fact and recommendations for rulings on dispositive motions. Court sponsored alternative dispute resolution is governed by D.C.COLO.LCivR 16.6. On the recommendation or informal request of the magistrate judge or on the request of the parties by motion, this court may direct the parties to engage in an early neutral evaluation, a settlement conference, or another alternative dispute resolution proceeding. By Judge Raymond P. Moore on 8/2/2022. (Text Only Entry) (rmsec) (Entered: 08/02/2022)
08/02/2022	16	MINUTE ORDER: With the assignment of this matter, the parties are advised that throughout this case they are expected to be familiar and comply with not only the Local Rules of this District, but also Judge Raymond P. Moore's Civil Practice Standards, which may be found at: http://www.cod.uscourts.gov/JudicialOfficers/ActiveArticleIIIJudges/HonRaymondPMoore.aspx . SO ORDERED by Judge Raymond P. Moore on 8/2/2022. (Text Only Entry) (rmsec) (Entered: 08/02/2022)
08/23/2022	17	Proposed Scheduling Order by Plaintiff Corey McNellis. (Kontnik, Spencer) (Entered: 08/23/2022)
08/29/2022	18	NOTICE of Entry of Appearance of <i>Michael Brent Case</i> by Michael Brent Case on behalf of All Defendants Attorney Michael Brent Case added to party Douglas County School District(pty:dft), Attorney Michael Brent Case added to party Cathy Franklin(pty:dft), Attorney Michael Brent Case added to party Cathy (I) Franklin(pty:dft) (Case, Michael) (Entered: 08/29/2022)
08/30/2022	19	MOTION to Dismiss by Defendants Douglas County School District, Cathy Franklin, Cathy (I) Franklin. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Case, Michael) (Entered: 08/30/2022)
08/30/2022	20	MOTION to Stay <i>Discovery</i> by Defendants Douglas County School District, Cathy Franklin, Cathy (I) Franklin. (Gray, Mary) (Entered: 08/30/2022)
08/31/2022	21	MEMORANDUM regarding 20 MOTION to Stay <i>Discovery</i> filed by Cathy Franklin, Douglas County School District, Cathy (I) Franklin, 19 MOTION to Dismiss filed by Cathy Franklin, Douglas County School District, Cathy (I) Franklin. Motions referred to Magistrate Judge Scott

		T. Varholak. By Judge Raymond P. Moore on 8/31/2022. (Text Only Entry) (rmsec) (Entered: 08/31/2022)
09/09/2022	22	MINUTE ORDER This matter is before the Court on 20 Defendants' Motion to Stay Discovery (the "Motion"). The Motion is set for a Hearing on 10/12/22 at 11:00 AM in Courtroom A 402 before Magistrate Judge Scott T. Varholak. It is FURTHER ORDERED that the Scheduling Conference set for 9/13/2022 10:30 AM is VACATED. SO ORDERED, by Magistrate Judge Scott T. Varholak on 9/9/22. Text Only Entry (stvlc3, Andrew) (Entered: 09/09/2022)
09/20/2022	23	NOTICE of Filing Amended Pleading <i>First Amended Complaint</i> by Plaintiff Corey McNellis (Attachments: # 1 Exhibit 1 - Redlined Amended Complaint)(Kontnik, Spencer) (Entered: 09/20/2022)
09/20/2022	24	AMENDED COMPLAINT against Douglas County School District, filed by Corey McNellis. (Kontnik, Spencer) (Entered: 09/20/2022)
09/20/2022	25	RESPONSE to 20 MOTION to Stay <i>Discovery</i> filed by Plaintiff Corey McNellis. (Kontnik, Spencer) (Entered: 09/20/2022)
09/21/2022	26	Upon Plaintiff's 23 Notice of Filing Amended Complaint, Defendant's 19 Motion to Dismiss is found to be MOOT. <i>See, e.g., Gilles v. United States</i> , 906 F.2d 1386, 1389 (10th Cir. 1990) ("a pleading that has been amended under Rule 15(a) supersedes the pleading it modifies") (internal quotation marks omitted). SO ORDERED, by Magistrate Judge Scott T. Varholak on 9/21/22. Text Only Entry(stvlc3, Andrew) (Entered: 09/21/2022)
09/23/2022	27	Unopposed MOTION to Withdraw 20 MOTION to Stay <i>Discovery and Convert October 12, 2022 Hearing to a Scheduling Conference</i> by Defendants Douglas County School District, Cathy Franklin, Cathy (I) Franklin. (Case, Michael) (Entered: 09/23/2022)
09/23/2022	28	MEMORANDUM regarding 27 Unopposed MOTION to Withdraw 20 MOTION to Stay <i>Discovery and Convert October 12, 2022 Hearing to a Scheduling Conference</i> filed by Cathy Franklin, Douglas County School District, Cathy (I) Franklin. Motion referred to Magistrate Judge Scott T. Varholak. By Judge Raymond P. Moore on 9/23/2022. (Text Only Entry) (rmsec) (Entered: 09/23/2022)
09/23/2022	29	ORDER granting 27 Defendant's Unopposed Motion to Withdraw Motion. Accordingly, 20 Defendant's Motion to Stay Discovery is WITHDRAWN. It is FURTHER ORDERED that the Motion Hearing set for 10/12/22 at 11:00 AM is CONVERTED into a Scheduling Conference at the same date and time in Courtroom A 402 before Magistrate Judge Scott T. Varholak. The Proposed Scheduling Order is due 10/5/2022. SO ORDERED, by Magistrate Judge Scott T. Varholak on 9/23/22. Text Only Entry(stvlc3, Andrew) (Entered: 09/23/2022)
10/03/2022	30	Unopposed MOTION for Extension of Time to File Answer or Otherwise Respond re 24 Amended Complaint by Defendants Douglas County School District, Cathy Franklin, Cathy (I) Franklin. (Gray, Mary) (Entered: 10/03/2022)
10/03/2022	31	MEMORANDUM regarding 30 Unopposed MOTION for Extension of Time to File Answer or Otherwise Respond re 24 Amended Complaint filed by Cathy Franklin, Douglas County School District, Cathy (I) Franklin. Motion referred to Magistrate Judge Scott T. Varholak. By Judge Raymond P. Moore on 10/3/2022. (Text Only Entry) (rmsec) (Entered: 10/03/2022)
10/03/2022	32	ORDER granting 30 Defendants' Unopposed Motion for Extension. For good cause shown, Defendants shall respond to Plaintiff's First Amended Complaint not later than 10/11/2022. SO ORDERED, by Magistrate Judge Scott T. Varholak on 10/3/22. Text Only Entry(stvlc3, Andrew) (Entered: 10/03/2022)
10/06/2022	33	Proposed Scheduling Order by Plaintiff Corey McNellis. (Fenicle, Matthew) (Entered: 10/06/2022)
10/11/2022	34	MOTION to Dismiss <i>First Amended Complaint</i> by Defendant Douglas County School District. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Gray, Mary) (Entered: 10/11/2022)

		10/11/2022)
10/12/2022	35	MINUTE ENTRY for Scheduling Conference held before Magistrate Judge Scott T. Varholak on 10/12/2022. Discovery due by 5/12/2023. Dispositive Motions due by 6/12/2023. Final Pretrial Conference set for 9/27/2023 09:15 AM in Courtroom A 402 before Magistrate Judge Scott T. Varholak. FTR: A402. (morti,) (Entered: 10/12/2022)
10/12/2022	36	SCHEDULING ORDER: by Magistrate Judge Scott T. Varholak on 10/12/2022. (morti,) (Entered: 10/12/2022)
11/01/2022	37	RESPONSE to 34 MOTION to Dismiss <i>First Amended Complaint</i> filed by Plaintiff Corey McNellis. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3)(Kontnik, Spencer) (Entered: 11/01/2022)
11/15/2022	38	REPLY to Response to 34 MOTION to Dismiss <i>First Amended Complaint in Support of Motion to Dismiss First Amended Complaint</i> filed by Defendant Douglas County School District. (Gray, Mary) (Entered: 11/15/2022)
02/13/2023	39	NOTICE of Entry of Appearance by Jonathan Patrick Fero on behalf of Douglas County School DistrictAttorney Jonathan Patrick Fero added to party Douglas County School District(pty:dft) (Fero, Jonathan) (Entered: 02/13/2023)
02/28/2023	40	Unopposed MOTION to Withdraw as Attorney by Defendant Douglas County School District. (Gray, Mary) (Entered: 02/28/2023)
02/28/2023	41	MEMORANDUM regarding 40 Unopposed MOTION to Withdraw as Attorney filed by Douglas County School District. Motion referred to Magistrate Judge Scott T. Varholak. By Judge Raymond P. Moore on 2/28/2023. (Text Only Entry) (rmsec) (Entered: 02/28/2023)
02/28/2023	42	ORDER granting 40 Motion for Withdrawal by Mary b. Gray, Esq., Counsel for Defendants. Attorney Mary B. Gray is relieved of any further representation of Defendants. The Clerk of Court is instructed to terminate Attorney Gray as counsel of record, and to remove their name from the electronic certificate of mailing. Defendants shall continue to be represented by Attorneys Fero, Case, and Goodstein of Semple, Farrington, Everall and Case, P.C. SO ORDERED, by Magistrate Judge Scott T. Varholak on 2/28/23. Text Only Entry(stvlc3, Andrew) (Entered: 02/28/2023)
03/13/2023	43	ADVISORY NOTICE TO ATTORNEY AND COURT: Austin Murray Cohen failed to pay the 2022 Biennial Fee. Under D.C.COLO.LAttyR 3(a) and District Court General Order 2022-7, counsel was administratively removed from the Court's attorney roll. Counsel must submit another bar application through PACER, pay the application fee, and, upon reinstatement, file a Notice of Entry of Appearance to continue as counsel of record in this case. Please visit and fully review the Attorney Admission page for instructions on readmission (http://www.cod.uscourts.gov/Attorney Information/AttorneyAdmissionInformation.aspx) before contacting the Court for assistance. (Text Only Entry) (jdyne) (Entered: 03/13/2023)
03/15/2023	44	NOTICE of Entry of Appearance by Austin M. Cohen on behalf of Corey McNellis (Cohen, Austin) (Entered: 03/15/2023)
03/31/2023	45	Unopposed MOTION for Extension of Time to <i>Affirmative Expert Deadline</i> by Plaintiff Corey McNellis. (Kontnik, Spencer) (Entered: 03/31/2023)
03/31/2023	46	MEMORANDUM regarding 45 Unopposed MOTION for Extension of Time to <i>Affirmative Expert Deadline</i> filed by Corey McNellis. Motion referred to Magistrate Judge Scott T. Varholak. By Judge Raymond P. Moore on 3/31/2023. (Text Only Entry) (rmsec) (Entered: 03/31/2023)
03/31/2023	47	ORDER granting 45 Plaintiff's Unopposed Motion for Extension. For good cause shown, certain deadlines in this case are EXTENDED as follows: affirmative expert designations are now due April 25, 2023; rebuttal expert designations are now due June 5, 2023. SO ORDERED, by Magistrate Judge Scott T. Varholak on 3/31/23. Text Only Entry(stvlc3, Andrew) (Entered: 03/31/2023)

05/09/2023	48	MOTION to Withdraw as Attorney of Record of <i>Morgan E. Hamrick</i> by Plaintiff Corey McNellis. (Kontnik, Spencer) (Entered: 05/09/2023)
05/10/2023	49	ORDER granting 48 Motion to Withdraw as Attorney. Attorney Morgan Elizabeth Hamrick terminated. SO ORDERED by Judge Raymond P. Moore on 5/10/2023. (Text Only Entry) (rmsec) Modified on 5/10/2023 to terminate correct attorney (sdunb,). (Entered: 05/10/2023)
06/06/2023	50	Joint MOTION to Amend/Correct/Modify 36 Scheduling Order by Plaintiff Corey McNellis. (Kontnik, Spencer) (Entered: 06/06/2023)
06/07/2023	51	MEMORANDUM regarding 50 Joint MOTION to Amend/Correct/Modify 36 Scheduling Order filed by Corey McNellis. Motion referred to Magistrate Judge Scott T. Varholak. By Judge Raymond P. Moore on 6/7/2023. (Text Only Entry) (rmsec) (Entered: 06/07/2023)
06/07/2023	52	ORDER granting the parties' 50 Joint Motion to Amend Scheduling Order. For good cause shown, certain deadlines are EXTENDED as follows: Written Discovery Deadline: July 17, 2023; Discovery Cutoff: August 7, 2023; Dispositive Motion Deadline: September 11, 2023. SO ORDERED, by Magistrate Judge Scott T. Varholak on 6/7/23. Text Only Entry(stvlc3, Andrew) (Entered: 06/07/2023)
08/28/2023	53	ORDER granting 34 Motion to Dismiss by Judge Raymond P. Moore on 8/28/23.(jdyne) (Entered: 08/28/2023)
08/28/2023	54	FINAL JUDGMENT: 34 Motion to Dismiss is granted; case is closed. By Clerk on 8/28/23. (jdyne) (Entered: 08/28/2023)
09/11/2023	55	Proposed Bill of Costs by Defendant Douglas County School District. (Attachments: # 1 Continuation of Main Document Itemization of Costs & backup, # 2 Continuation of Main Document Statement Re: Defendant's Proposed Bill of Costs)(Fero, Jonathan) (Entered: 09/11/2023)
09/27/2023	56	NOTICE OF APPEAL as to 53 Order on Motion to Dismiss, 54 Judgment by Plaintiff Corey McNellis (Filing fee \$ 505, Receipt Number ACODC-9315681) (Kontnik, Spencer) (Entered: 09/27/2023)
09/28/2023	57	LETTER Transmitting Notice of Appeal to all counsel advising of the transmittal of the 56 Notice of Appeal filed by Corey McNellis to the U.S. Court of Appeals. (Retained Counsel, Fee paid) (Attachments: # 1 Docket Sheet, # 2 Preliminary Record)(jtorr,) (Entered: 09/28/2023)
09/28/2023	58	USCA Case Number 23-1306 for 56 Notice of Appeal filed by Corey McNellis. (jtorr,) (Entered: 09/29/2023)
10/03/2023	59	NOTICE by Clerk re 55 Proposed Bill of Costs. As set in the Proposed Bill, the hearing for this matter will be held on October 17, 2023 at 9:30 a.m. MST. The hearing will be held IN PERSON - the parties are directed to have counsel asserting the Proposed Bill of Costs and opposing counsel presenting objections be physically present for the hearing. The hearing will be held in Courtroom C401 (4th floor) of the Byron Rogers U.S. Courthouse, 1929 Stout Street, Denver [NOT the Arraj Courthouse].The Clerk reminds the parties that a Statement of Conferral must be filed no later than the close of business of the clerk's office at 5:00 p.m. (Mountain Time) the day before the hearing in order to confirm the attempts to reach a settlement on either some or all of the requested costs, per local rules LCivR 54.1 and 77.1, and to confirm the parties have utilized the Clerk's Guide to Bills of Cost Hearings (see attached) in their discussions. Failure to file a Statement of Conferral by the close of business the day before the hearing will result in the Bill of Costs being summarily denied and the hearing will be vacated. Finally, the Clerk strongly encourages the parties to reach an agreement as to individual costs items - or preferably - a global settlement, in light of the Rule One directive that the court and PARTIES work to secure the just, speedy, and inexpensive determination of every action and proceeding. (ashee) (Entered: 10/03/2023)
10/13/2023	60	LETTER TO USCA and all counsel certifying the record is complete as to 56 Notice of Appeal filed by Corey McNellis. A transcript order form was filed stating that a transcript is not

		necessary. (Appeal No. 23-1306) Text Only Entry. (jtorr,) (Entered: 10/13/2023)
10/16/2023	61	MOTION to Vacate <i>and Dismiss or in the Alternative Stay the Bill of Costs Hearing</i> by Plaintiff Corey McNellis. (Kontnik, Spencer) (Entered: 10/16/2023)
10/17/2023	62	ORDER: Before the Court is Plaintiff's Forthwith Motion to Dismiss and Vacate Defendant's Bill of Costs or in the Alternative Stay the Hearing on Costs 61 . Pursuant to D.C.COLO.LCivR 54.1, the Clerk shall tax costs in favor of a prevailing party, in this case Defendant, unless otherwise ordered. No such order has been issued in this case. Accordingly, Plaintiff's Motion is DENIED. SO ORDERED by Judge Raymond P. Moore on 10/17/2023. (Text Only Entry)(rmsec) (Entered: 10/17/2023)
10/17/2023	63	Costs Taxed by Clerk in the amount of \$5,640.45 against Plaintiff McNellis and in favor of Defendant Douglas County School District. Costs hearing held Oct. 17, 2023, in Courtroom C401 of the Rogers Courthouse, counsel for Plaintiff and Defendant present. (adubo) (Entered: 10/17/2023)
10/24/2023	64	OBJECTIONS to 55 Proposed Bill of Costs, 63 Costs Taxed, by Plaintiff Corey McNellis. (Fenicle, Matthew) (Entered: 10/24/2023)
10/26/2023	65	MINUTE ORDER: Before the Court is Plaintiff's Objection to the October 17, 2023, Order on Costs 64 , seeking an order staying the Order on Costs until after the Tenth Circuit has heard the pending appeal in this matter. Plaintiff concedes that Defendant is entitled to its costs if the appeal is unsuccessful. Having considered the request, the Court will GRANT the request to STAY the Order. In the event the appeal is unsuccessful, costs shall be due within fourteen days of the issuance of the mandate. If the appeal is successful, Plaintiff may seek additional relief as he sees appropriate.SO ORDERED by Judge Raymond P. Moore on 10/26/2023. (Text Only Entry) (rmsec) (Entered: 10/26/2023)

PACER Service Center			
Transaction Receipt			
12/04/2023 12:06:56			
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:22-cv-1636

COREY MCNELLIS,

Plaintiff,

v.

DOUGLAS COUNTY SCHOOL DISTRICT, AND CATHY FRANKLIN, IN HER
INDIVIDUAL AND OFFICAL CAPACITY AS THE DIRECTOR OF HUMAN RESOURCES
FOR DOUGLAS COUNTY SCHOOL DISTRICT,

Defendants.

COMPLAINT AND JURY DEMAND

Plaintiff, Corey McNellis, by and through his attorneys of KONTNIK | COHEN, LLC, hereby bring this *Complaint and Jury Demand* against Defendants, Douglas County School District (“DCSD”) and Cathy Franklin, in her individual and official capacity (collectively “Defendants”), under U.S. Const Amend. 1 and Section 42 U.S.C. § 1983, Title VII of the Civil Rights Act of 1964 (“Title VII”), and the Colorado Anti-Discrimination Act (“CADA”), and states as follows:

I. INTRODUCTION

1. Mr. McNellis was employed by Ponderosa High School for approximately fourteen (14) years without any disciplinary action. On October 5, 2021, three days after Mr. McNellis expressed his Christian belief, as the father of a student at Ponderosa, and in response to a question by a co-worker, Mr. McNellis was placed on leave and terminated. Defendants discriminated toward Mr. McNellis based on his Christian belief and because he expressed his views, which are protected by the First Amendment.

PARTIES

2. Plaintiff, Corey McNellis is currently, and at all times relevant to this lawsuit, a resident of the state of Colorado.

3. Defendant DCSD, is located at 701 Prairie Hawk Drive Castle Rock, CO.

4. Defendant DCSD is a publicly funded school district under the control of state and local government in Colorado.

5. Defendant DCSD oversees Ponderosa, where Mr. McNellis worked from August 2007 until his wrongful termination on October 29, 2020.

6. Defendant Franklin is currently, and at all times relevant to this lawsuit, a resident of the state of Colorado.

7. Upon information and belief Defendant Franklin is currently, and at all times relevant to this lawsuit, was the Director of Human Resources for Defendant DCSD.

8. Upon information and belief Defendant Franklin was responsible for the decision to terminate Mr. McNellis in violation of 42 U.S.C. § 1983, Title VII, and CADA.

II. JURISDICTION AND VENUE

9. This action arises under the laws of the United States. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §§ 1331 and 1343 for the federal law claims, and 28 U.S.C. § 1367 for the state law claims.

10. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because the events giving rise to these claims occurred in the District of Colorado and the Defendants reside in the State of Colorado.

11. Mr. McNellis established all necessary conditions precedent to filing this Complaint and Jury Demand (“Complaint”).

12. A Joint Charge of Discrimination (CCRD Charge No. E2100010411 and EEOC Charge No. 32A202100404) was filed with the Colorado Civil Rights Division (“CCRD”) and the Equal Employment Opportunity Commission (“EEOC”) on February 23, 2021. Mr. McNellis received a letter of right to sue from the CCRD on April 5, 2022, and the EEOC by way of the U.S. Department of Justice on May 4, 2022. This action is being commenced within ninety (90) days of the CCRD and EEOC notices.

III. FACTUAL ALLEGATIONS

Background Information

13. Mr. McNellis worked at Ponderosa High School for fourteen years.
14. Mr. McNellis began his career with Ponderosa as the Social Studies Teacher and Assistant Coach in 2007 with a base salary of \$37,196.00.
15. For Mr. McNellis’ evaluation for the 2007/2008 year, as a social studies teacher, Mr. McNellis received all professional remarks, which is the highest mark possible.
16. At the end of the school year, DCSD elected to renew Mr. McNellis’ contract as a Social Studies Teacher and promoted him to Head Coach for the 2008/2009 school year.
17. Mr. McNellis was also provided with a pay increase for the new school year to \$39,201.00.
18. For Mr. McNellis’ evaluation for the 2008/2009 year, as a social studies teacher, Mr. McNellis again received all professional remarks the highest marks possible.
19. At the end of the school year, DCSD elected to renew Mr. McNellis’ contract as a Social Studies Teacher and Head Coach for the 2009/2010 school year.
20. For Mr. McNellis’ evaluation for the 2009/2010 year, as a social studies teacher, Mr. McNellis again received all professional remarks, the highest marks possible.

21. At the end of the school year, DCSD elected to renew Mr. McNellis' contract as a Social Studies Teacher and Head Coach for the 2010/2011 school year.

22. For Mr. McNellis' evaluation for the 2010/2011 year, as a social studies teacher, Mr. McNellis received all professional remarks and one distinguished remark.

23. Mr. McNellis received comments such as "his students certainly do feel valued and challenged in his classes. He strives to make his lessons rigorous and relevant for his kids."

24. At the end of the school year, DCSD elected to renew Mr. McNellis' contract as a Social Studies Teacher and Head Coach for the 2011/2012 school year.

25. For Mr. McNellis' evaluation for the 2011/2012 year, as a social studies teacher, Mr. McNellis received all highly effective and effective marks, the two highest possible remarks.

26. At the end of the school year, DCSD elected to promote Mr. McNellis to Dean of Students for the 2012/2013 school year.

27. This promotion came with a pay increase to \$40,650.00.

28. For Mr. McNellis' evaluation for the 2012/2013 year, as the Dean of Students, Mr. McNellis never received less than a 3.0 rating out of a total 4.0 and was consistently rated as highly effective.

29. At the end of the school year, DCSD elected to renew Mr. McNellis' contract as the Dean of Students and Head Coach for the 2013/2014 school year.

30. Mr. McNellis also received a pay increase to \$42,276.00 for the 2013/2014 school year.

31. At the end of the school year, DCSD elected to renew Mr. McNellis' contract as the Dean of Students and Head Coach for the 2014/2015 school year.

32. Mr. McNellis was given a raise to \$43,755.66 for the 2014/2015 school year.

33. At the end of the school year, DCSD elected to promote Mr. McNellis to the positions of Athletic Director and Assistant Principal for the 2016/2017 school year.

34. This promotion came with a pay increase to an annual salary of approximately \$90,000.

35. At the time of his termination, Mr. McNellis was earning approximately \$98,285 annually.

36. Throughout his employment with DCSD, Mr. McNellis had consistently received excellent performance reviews, as well as a steady increase in salary.

37. Until October 5, 2020, Mr. McNellis never received disciplinary action.

38. During the 2020 school year, Mr. McNellis was the parent of a child who was attending Ponderosa.

The Laramie Project Emails

39. On October 2, 2020, during the peak of the COVID-19 pandemic, Ms. Kayla Diaz, Ponderosa's Theatre Director, sent a group email to the entire Ponderosa staff including Mr. McNellis.

40. Ms. Diaz informed all staff members that Ponderosa's Theatre Company would be performing The Laramie Project on October 23 and 24 of 2020.

41. The Laramie Project is a religiously charged play that covers distressing material. The play depicts the aftermath of the 1998 murder of Matthew Shepard in Laramie, Wyoming. The murder is widely acknowledged to have been a hate crime motivated by Shepard's sexuality.

42. The play consists of a series of interviews from members of the Laramie community. Several of the characters interviewed are Christian leaders, some of whom share

unsavory opinions regarding Shepard’s murder, and cite their Christian faith as the reason for their views.

43. In her October 2, 2020 email, Ms. Diaz acknowledged the controversial nature of the play. The email states, in relevant part:

Due to language and content discussed in the show (there is no violence shown, only discussed) this is not a family-friendly show. We are advertising “[f]or mature audiences” and I would generally recommend high school age and up. We will be reaching out more soon about advertising in the school, but it is important that I can answer any question you may have and that you are aware of the nature of the play so that if we have students who have an aggressively adverse reaction to our show choice that you can support us in helping students understand. This is a play about perspectives, and we would not want anyone in the school to believe we are making a statement against anything other than hate and violence.

44. Ms. Diaz’s October 2, 2020, email specifically elicited responses from the rest of the staff stating that she would be happy to “answer any questions [they] may have.”

45. On October 2, 2020, Mr. McNellis responded to the email chain created by Ms. Diaz and stated:

Thanks Kayla [Ms. Diaz], I appreciate the email and I really do admire the hard work that you do. As a Dad of a student here and also as an employee in the school, what is my recourse if I disagree with the production? Was this a heads up to see if everyone is cool?

46. Mr. McNellis’ response was written on Friday evening and was written as a father of a student at Ponderosa, asking what recourse he may have to a school production that is not family friendly.

47. Several staff members responded to Ms. Diaz’s email offering their expertise.

48. Mr. Monroe, the history teacher, responded to the October 2, 2020, email from Ms. Diaz acknowledging the difficulty of the subject matter and offering to help by providing a “Social Studies perspective,”

49. Ms. Carda responded and emphasized that, “[n]ot everyone has to agree with every ideology that exists, but it is the discourse that is invoked that matters.”

50. Mr. McNellis responded to the emails from the other staff and offered to provide a Christian perspective.

51. Mr. McNellis made it clear that offer was in his capacity as a father stating, “[f]or the record, all of administration does not agree with me on this. I am totally solo.”

52. Between October 2, 2021, and October 5, 2021, the emails regarding The Laramie Project were shared with DCSD’s Human Resources Director, Cathy Franklin, the Director of Schools, Daniel Winsor, and Ponderosa Principal, Tim Ottmann.

Ponderosa’s Discrimination and Retaliation Toward Mr. McNellis

53. On Saturday, Mr. Winsor called Mr. McNellis and informed him that Mr. McNellis needed to stay home on Monday.

54. Mr. McNellis asked Mr. Winsor why he was being told to stay home and if he acted unprofessionally in anyway.

55. Mr. Winsor informed Mr. McNellis that nothing was unprofessional, but that Ponderosa needed Mr. McNellis to stay home Monday because of his “religious comments.”

56. On October 5, 2020, three days after Mr. McNellis expressed his Christian belief in a public forum, Ms. Franklin, Mr. Winsor, and Mr. Ottmann called Mr. McNellis for a virtual meeting (the “Meeting”).

57. Ms. Franklin, Mr. Winsor, and Mr. Ottmann had reviewed the emails regarding the Laramie Project prior to the Meeting.

58. During the Meeting, Defendants informed Mr. McNellis that he was being placed on leave.

59. Defendants' decision to place Mr. McNellis on leave was an adverse employment decision.

60. Defendants' decision to place Mr. McNellis on leave was due to Mr. McNellis' decision to express his First Amendment views, as a father, regarding his Christian beliefs.

61. Defendants' decision to place Mr. McNellis on leave was in retaliation to Mr. McNellis' decision to express his views under the First Amendment regarding his Christian belief.

62. At the time Defendants placed Mr. McNellis on leave, Defendants did not have a legitimate non-discriminatory reason to place Mr. McNellis on leave or to terminate Mr. McNellis.

63. At the conclusion of the Meeting, Defendants informed Mr. McNellis that it would be conducting further investigation regarding Mr. McNellis' email related to The Laramie Project.

64. At the conclusion of the Meeting, however, Defendants already possessed all the emails related to Mr. McNellis' statement(s) regarding The Laramie Project.

65. At the conclusion of the Meeting, there was nothing further to investigate regarding Mr. McNellis' email statements related to The Laramie Project.

66. Instead, Defendants elected to "investigate" Mr. McNellis based on his expression of his Christian faith as a father of a student at Ponderosa.

67. Defendants' decision to investigate Mr. McNellis based on his statement regarding his Christian faith constitutes an adverse employment action.

68. Defendants' decision to investigate Mr. McNellis based on his statement regarding his Christian faith was retaliatory.

69. Defendants used the investigation to try to obtain evidence that it could use to support a decision to terminate Mr. McNellis.

70. During its investigation, Defendants received a complaint from a teacher claiming that Mr. McNellis was part of a good ole boys club.

71. The allegation that Mr. McNellis was part of a good ole boys club included numerous other male teachers, and administrators including Principal Ottmann.

72. None of the other male teachers or administrators including Principal Ottmann were investigated, placed on leave, or otherwise disciplined.

73. Mr. McNellis was the only individual investigated, placed on leave, and/or disciplined based on the vague allegations that there was a good ole boys club at Ponderosa.

74. Defendants' decision to discipline Mr. McNellis based on a vague and ambiguous allegation that he was part of a good ole boys club was pretextual.

75. Mr. McNellis was treated less favorably than his counterparts who were also named as part of a good ole boys club based on his decision to express his religious affiliation and exercise his First Amendment rights.

76. During its investigation, Defendants also uncovered a single email indicating that Mr. McNellis had complained "as a parent" about Ponderosa's communications regarding its COVID safety protocols.

77. Other faculty and administrators complained about Ponderosa's communications regarding its COVID safety protocols.

78. No other faculty or administrators were investigated, placed on leave, and/or disciplined based on their complaints regarding Ponderosa's communications related to its safety protocols.

79. Defendants' decision to terminate Mr. McNellis based on a complaint related to Ponderosa's communications regarding its COVID safety protocols was pretextual.

80. Mr. McNellis was treated less favorably than his counterparts who also complained about Ponderosa's COVID safety protocols.

81. Mr. McNellis was never consulted or given the opportunity to defend himself during the purported investigation.

82. On October 29, 2020, after a purported investigation, Defendants terminated Mr. McNellis' employment.

83. Ponderosa directly cited Mr. McNellis' emails regarding The Laramie Project as the reason for his termination.

84. Mr. Ottmann, the Principal of Ponderosa, admits that the contents of Mr. McNellis email regarding The Laramie Project were the "catalyst for his firing."

85. Mr. Ottmann further admits that Mr. McNellis was terminated based on his religious views.

86. As a direct and proximate result of Defendants' conduct, Mr. McNellis has been damaged in an amount to be proven at trial.

IV. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Defendant DCSD: Discrimination - Title VII, 42 U.S.C. § 2000 e-2(a)(1))

87. At all relevant times, Mr. McNellis is considered a protected class under Title VII because he is a Christian. 42 U.S.C. § 2000e-2(a)(1).

88. At all relevant times, Mr. McNellis was qualified to perform the position of Assistant Principal and Athletic Director.

89. Defendants discriminated against Mr. McNellis based on his religion.

90. Defendants treated Mr. McNellis less favorably than his similarly situated employees by taking the following actions including, but not limited to, the following:
- a. Investigating only Mr. McNellis despite multiple complaints against other members of Defendants' staff and even members of the Administration;
 - b. Failing to involve Mr. McNellis in the investigation against him;
 - c. Failing to interview anyone who would support Mr. McNellis or provide a different opinion than those who Defendants interviewed;
 - d. Placing Mr. McNellis on administrative leave; and
 - e. Terminating Mr. McNellis based on comments he made in his individual capacity as a father of a child at Defendants' school.

91. As a result of Defendants' actions, Mr. McNellis has suffered damages, including but not limited to the loss of past and future wages and benefits, loss of professional opportunities, emotional distress, and mental pain and anguish.

92. Mr. McNellis is entitled to his attorney's fees and costs incurred in this matter.

93. Mr. McNellis is further entitled to all other forms of relief as permitted under Title VII.

SECOND CLAIM FOR RELIEF

(Defendant DCSD: Retaliation - Title VII, 42 U.S.C. § 2000e-3(a))

121. Mr. McNellis hereby incorporates the allegations as if fully set forth herein.

122. At all relevant times, Mr. McNellis is considered a protected class under Title VII because he is a Christian. 42 U.S.C. § 2000e-2(a)(1).

123. At all relevant times, Mr. McNellis was qualified to perform the position of Assistant Principal and Athletic Director.

124. Defendants retaliated against Mr. McNellis based on his religion.

125. As a direct result of Mr. McNellis' identification as Christian male, Defendants subjected Mr. McNellis to actions which a reasonable employee would have found materially adverse.

126. Defendants treated Mr. McNellis more adversely than similarly situated co-workers.

127. Defendants' retaliation included, but was not limited to:

- a. Investigating only Mr. McNellis despite multiple complaints against other members of Defendants staff and even members of the Administration;
- b. Placing Mr. McNellis on administrative leave; and
- c. Terminating Mr. McNellis based on comments he made in his individual capacity as a Christian and a father of a child at Defendants' school.

128. Defendants' retaliatory conduct was the direct and proximate cause of Mr. McNellis' injuries, damages, and losses.

129. As a result of Defendants' actions, Mr. McNellis has suffered damages, including but not limited to the loss of past and future wages and benefits, loss of professional opportunities, emotional distress, and mental pain and anguish.

130. Mr. McNellis is entitled to his attorney's fees and costs incurred in this matter.

131. Mr. McNellis is further entitled to all other forms of relief as permitted under Title VII.

THIRD CLAIM FOR RELIEF

(Defendant DCSD: Discrimination – CADA, C.R.S. §§ 24-34-401 *et seq*)

132. Mr. McNellis hereby incorporates the allegations as if fully set forth herein.

133. At all relevant times, Mr. McNellis is considered a protected class under CADA because he is a Christian.

134. At all relevant times, Mr. McNellis was qualified to perform the position of Assistant Principal and Athletic Director.

135. Defendants discriminated against Mr. McNellis based on his religion.

136. Defendants treated Mr. McNellis more adversely than similarly situated co-workers by taking the following actions including, but not limited to, the following:

- a. Investigating only Mr. McNellis despite multiple complaints against other members of Defendants staff and even members of the Administration;
- b. Failing to involve Mr. McNellis in the investigation against him;
- c. Failing to interview anyone who would support Mr. McNellis or provide a different opinion than those who Defendants interviewed;
- d. Placing Mr. McNellis on administrative leave; and
- e. Terminating Mr. McNellis based on comments he made in his individual capacity as a father of a child at Defendants' school.

137. Defendants' conduct was the direct and proximate cause of Mr. McNellis' injuries, damages, and losses.

138. As a result of Defendants' actions, Mr. McNellis has suffered damages, including but not limited to the loss of past and future wages and benefits, loss of professional opportunities, emotional distress, and mental pain and anguish.

139. Mr. McNellis is entitled to his attorney's fees and costs incurred in this matter.

140. Mr. McNellis is further entitled to all other forms of relief as permitted under CADA.

FOURTH CLAIM FOR RELIEF

(Defendant DCSD: Retaliation - CADA, C.R.S. §§ 24-34-401 *et seq*)

141. Mr. McNellis hereby incorporates the allegations as if fully set forth herein.

142. At all relevant times, Mr. McNellis is considered a protected class under CADA because he is a Christian.

143. At all relevant times, Mr. McNellis was qualified to perform the position of Assistant Principal and Athletic Director.

144. Defendants retaliated against Mr. McNellis based on his religion as described herein.

145. As a direct result of Mr. McNellis' opposition to the activities prohibited by CADA, Defendants subjected Mr. McNellis to actions which a reasonable employee would have found materially adverse.

146. Defendants treated Mr. McNellis more adversely than similarly situated co-workers.

147. Defendants' retaliation included, but was not limited to:

- a. Investigating only Mr. McNellis despite multiple complaints against other members of Defendants' staff and even members of the Administration;
- b. Placing Mr. McNellis on administrative leave; and
- c. Terminating Mr. McNellis based on comments he made in his individual capacity as a Christian and a father of a child at Defendants' school.

148. Defendants' retaliatory conduct was the direct and proximate cause of Mr. McNellis' injuries, damages, and losses.

149. As a result of Defendants' actions, Mr. McNellis has suffered damages including but not limited to the loss of past and future wages and benefits, loss of professional opportunities, emotional distress, and mental pain and anguish.

150. Mr. McNellis is entitled to his attorney's fees and costs incurred in this matter.

151. Mr. McNellis is further entitled to all other forms of relief as permitted under CADA.

FIFTH CLAIM FOR RELIEF

(Defendants: Retaliation – Free Speech, 42 USC § 1983)

152. Mr. McNellis hereby incorporates the foregoing allegations as if fully set forth herein.

153. Section 1983 of 42 U.S.C. in pertinent part states “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress...”

154. When Mr. McNellis expressed his concern, as a parent, regarding the performance of The Laramie Project at Ponderosa, he was exercising his right to free speech under the First Amendment to the U.S. Constitution and under 42 U.S.C. §1983.

155. Mr. McNellis’ speech on October 2, 2020, related to a school production was on a topic of public concern.

156. Defendants placed Mr. McNellis on administrative leave and launched their investigation in retaliation against Mr. McNellis’ exercise of protected free speech.

157. Defendants terminated Mr. McNellis based on Mr. McNellis’ exercise of protected free speech.

158. When Defendants retaliated against Mr. McNellis, as a public entity, they did so under the color of state law.

159. As a parent of a child at Ponderosa High School, Mr. McNellis' concern for the wellbeing of his child and for the other students at Ponderosa drastically outweighed Ponderosa's interest in performing a highly controversial play, in what was already a stressful time for the students.

160. Defendants' actions to place Mr. McNellis on administrative leave, conduct an investigation, and terminate him proximately caused Mr. McNellis significant damages including but not limited to, mental anguish, emotional distress, loss of enjoyment of life, and damage to his reputation.

161. Defendants' decision to terminate Mr. McNellis proximately caused Mr. McNellis significant damages, including but not limited to, loss of back pay, loss of front pay, mental anguish, emotional distress, loss of enjoyment of life, and damage to his reputation.

162. Mr. McNellis is further entitled to all other forms of relief as permitted under 42 USC § 1983.

SIXTH CLAIM FOR RELIEF
(Defendants: Due Process, 42 USC § 1983)

163. Mr. McNellis hereby incorporates the foregoing allegations as if fully set forth herein.

164. Section 1983 of 42 U.S.C. in pertinent part states “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress...”

165. The Fourteenth (14th) Amendment in relevant part states “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

166. When Mr. McNellis expressed his concern, as a parent, regarding the performance of The Laramie Project at Ponderosa, he was exercising his right to free speech under the First Amendment to the U.S. Constitution and under 42 U.S.C. §1983.

167. Mr. McNellis’ speech on October 2, 2020, related to a school play was on a topic of public concern.

168. When Defendants launched an investigation against Mr. McNellis and placed Mr. McNellis on administrative leave and eventually terminated Mr. McNellis, they did so under the color of state law.

169. Defendants placed Mr. McNellis on administrative leave and subsequently launched an investigation into Mr. McNellis’ emails regarding the Laramie Project but refused to listen or interview Mr. McNellis denying him of his Due Process Rights under the Fourteenth (14th) Amendment.

170. Defendants also refused to interview individuals within Ponderosa who were willing to speak on Mr. McNellis’ behalf in direct violation of Mr. McNellis’ Due Process rights under the Fourteenth (14th) Amendment.

171. Ultimately Defendants’ investigation, that did not include Mr. McNellis or anyone who would speak on his behalf, led Defendants to terminate Mr. McNellis.

172. As a parent of a child at Ponderosa High School, Mr. McNellis’ concern for the wellbeing of his child and for the other students at Ponderosa drastically outweighed Ponderosa’s

interest in performing a highly controversial play, in what was already a stressful time for the students.

173. Defendants' actions to place Mr. McNellis on administrative leave and investigate him proximately caused Mr. McNellis significant damages including but not limited to, mental anguish, emotional distress, loss of enjoyment of life, and damage to his reputation.

174. Defendants' decision to terminate Mr. McNellis proximately caused Mr. McNellis significant damages, including but not limited to, loss of back pay, loss of front pay, mental anguish, emotional distress, loss of enjoyment of life, and damage to his reputation.

175. Mr. McNellis is further entitled to all other forms of relief as permitted under 42 USC § 1983.

PRAYER FOR RELIEF

WHEREFORE, Mr. McNellis respectfully requests a trial by jury on all issues so triable, and damages, as follows:

- a. The Court award Plaintiff compensatory damages, including but not limited to those for emotional distress and pain and suffering;
- b. The Court award Plaintiff actual economic damages and consequential damages arising out of Defendants' conduct as established at trial;
- c. The Court award Plaintiff punitive damages for claims as allowed by law and in amount to be determined at trial;
- d. The Court award Plaintiff his reasonable attorneys' fees and costs in this action as permitted by law;

- e. The Court award pre-judgment and post-judgment interest at the highest lawful rate; and
- f. The Court award any such further relief as this Court deems just and proper.

Plaintiff requests a trial to a jury on all issues so triable.

Dated: July 1, 2022

Respectfully submitted,

/s Spencer J. Kontnik

Spencer J. Kontnik, #47447

Matthew Fenicle, # 57055

KONTNIK | COHEN, LLC

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Denver, Colorado 80206

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Attorneys for Plaintiff: COREY MCNELLIS

JS 44 (Rev. 04/21)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

COREY MCNELLIS

(b) County of Residence of First Listed Plaintiff Douglas County
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
Spencer J. Kontnik & Morgan E. Hamrick; Kontnik | Cohen, LLC
201 Steele Street, Ste. 210, Denver, Colorado 80206
(720) 449-8448, skontnik@kontnikcohen.com

DEFENDANTS

DOUGLAS COUNTY SCHOOL DISTRICT, AND CATHY FRANKLIN, IN HER INDIVIDUAL AND OFFICAL CAPACITY AS THE DIRECTOR OF HUMAN RESOURCES FOR DOUGLAS COUNTY SCHOOL DISTRICT

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
 3 Federal Question (U.S. Government Not a Party)
 2 U.S. Government Defendant
 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/ Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability LABOR <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 INTELLECTUAL PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 880 Defend Trade Secrets Act of 2016 SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input checked="" type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
 2 Removed from State Court
 3 Remanded from Appellate Court
 4 Reinstated or Reopened
 5 Transferred from Another District (specify)
 6 Multidistrict Litigation - Transfer
 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 U.S.C. § 1983; Title VII of the Civil Rights Act of 1964; and the Colorado Anti-Discrimination Act
Brief description of cause:
Discrimination based on religious beliefs of Plaintiff.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. **DEMAND \$** _____
CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE: July 1, 2022
SIGNATURE OF ATTORNEY OF RECORD: s/ Spencer J. Kontnik

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
- United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
- Original Proceedings. (1) Cases which originate in the United States district courts.
- Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
- Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
- Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
- PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7.** Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- Date and Attorney Signature.** Date and sign the civil cover sheet.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 22-cv-01636-RM-STV

COREY MCNELLIS,

Plaintiff,

v.

DOUGLAS COUNTY SCHOOL DISTRICT, AND CATHY FRANKLIN, IN HER
INDIVIDUAL AND OFFICIAL CAPACITY AS THE DIRECTOR OF HUMAN RESOURCES
FOR DOUGLAS COUNTY SCHOOL DISTRICT,

Defendants.

MOTION TO DISMISS

Defendants Douglas County School District (the “School District”) and Cathy Franklin (“Franklin”) move to dismiss this case pursuant to Fed. R. Civ. P. 12(b)(6).

CONFERRAL

One of undersigned counsel conferred with Plaintiff’s counsel regarding the arguments in this motion during the Fed. R. Civ. P. 26(f) conference. Plaintiff opposes the motion and Defendants believe that amendment would not overcome their arguments.

INTRODUCTION

This is an employment case concerning the School District’s termination of Plaintiff Corey McNellis (“McNellis”), a former high school administrator. McNellis asserts § 1983 claims against the School District and one of its Human Resources Directors, Franklin, for First Amendment free speech retaliation and a procedural due process violation. Claiming he was terminated because of his Christian religion, McNellis also asserts Title VII and Colorado Anti-Discrimination Act

(“CADA”) discrimination and retaliation claims against the School District alone. However, as explained below, the allegations in McNellis’ complaint fail to state a claim upon which relief can be granted.

LEGAL STANDARD

As the Court noted in *Citizens for Const. Integrity v. United States*, 2021 WL 4241336, at *1 (D. Colo. Aug. 30, 2021) (unpublished):

In evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court must accept as true all well-pleaded factual allegations in the complaint, view those allegations in the light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff’s favor. *Brokers’ Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1136 (10th Cir. 2014); *Mink v. Knox*, 613 F.3d 995, 1000 (10th Cir. 2010). The complaint must allege a “plausible” right to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007); *see also id.* at 555 (“Factual allegations must be enough to raise a right to relief above the speculative level.”). Conclusory allegations are insufficient, *Cory v. Allstate Ins.*, 583 F.3d 1240, 1244 (10th Cir. 2009), and courts “are not bound to accept as true a legal conclusion couched as a factual allegation,” *Twombly*, 550 U.S. at 555 (quotation omitted).

RELEVANT FACTUAL ALLEGATIONS

The School District is a Colorado public school district. Complaint and Jury Demand (Doc. 1, the “Complaint”). ¶ 4. Franklin works for the School District as a Director of Human Resources. *Id.* at ¶ 7. McNellis worked at the School District’s Ponderosa High School (“Ponderosa”). *Id.* at ¶ 5. During the 2020/21 school year, he was employed as an Assistant Principal and Athletic Director. *Id.* at ¶ 33. Among McNellis’ responsibilities in that position was to “coordinate effective communications strategies among the students, the community, the faculty and the

administration.” Ex. A, Assistant Principal/Athletic Director – High School Job Description.¹

McNellis’ child also attended Ponderosa that year. *Id.* at ¶ 38.

On October 2, 2020, Ponderosa Theatre Director Kayla Diaz (“Diaz”) “sent a group email to the entire Ponderosa staff including Mr. McNellis” informing them that “Ponderosa’s Theatre Company would be performing” the play *The Laramie Project* on October 23-24, 2020. According to McNellis, *The Laramie Project* “is a religiously charged play that covers distressing material. The play depicts the aftermath of the 1998 murder of Matthew Shepard in Laramie, Wyoming. The murder is widely acknowledged to have been a hate crime motivated by Shepard’s sexuality. The play consists of a series of interviews from members of the Laramie community. Several of the characters interviewed are Christian leaders, some of whom share unsavory opinions regarding Shepard’s murder, and cite their Christian faith as the reason for their views.” *Id.* at ¶¶ 41-42.

Diaz’s email warned that it was “not a family-friendly show,” but “generally [recommended for] high school age and up” and that “it [was] important that [she could] answer any question [the staff] may have and that [the staff was] aware of the nature of the play so that if we have students who have an aggressively adverse reaction to our show choice that [the staff] can support us in helping students understand. ... We would not want anyone in the school to believe we are making a statement against anything other than hate and violence.” *Id.* at ¶ 43.

McNellis responded with an email to the entire Ponderosa staff: “Thanks Kayla, I appreciate the email and I really do admire the hard work that you do. As a Dad of a student here and also an employee in the school, what is my recourse if I disagree with the production? Was

¹ The Court may take judicial notice of public documents, such as District employee job descriptions, without converting the motion to one for summary judgment. *Shifrin v. Colorado*, 2010 WL 2943348, * 5 (10th Cir. 2010), citing *Van Woudenbert ex rel Foor v. Gibson*, 211 F.3d 560, 568 (10th Cir. 2006).

this a heads up to see if everyone is cool?” *Id.* at ¶ 45. Other staff members also responded to Diaz’s email, with one “acknowledging the difficulty of the subject matter and offering to help by providing a ‘Social Studies perspective’” and another indicating that “not everyone has to agree with every ideology that exists, but it is the discourse that is invoked that matters.” *Id.* at ¶¶ 48-49.

The Complaint alleges that McNellis subsequently “responded to the emails from the other staff and offered to provide a Christian perspective.” *Id.* at ¶ 50. Those “responses” consisted of three additional emails to the entire Ponderosa staff: (i) at 9:37 p.m., McNellis wrote “As a christian [sic] I would love to collaborate with your project. Please let me know if the love that Jesus can provide will help your play”; (ii) at 9:52 p.m., he wrote “For the record, all of administration does not agree with me on this. I am totally solo. Good night Mustangs!”; and (iii) at 10:27 a.m. on October 3, 2021, he wrote “I understand people support this. Forgive me for having a different viewpoint and the audacity to publicly share it.” Ex. B.² McNellis sent the emails using his School District email address and used a signature identifying himself as the Ponderosa “Athletic Director/Assistant Principal.” *Id.*

The emails were shared with Franklin, School District Director of Schools Daniel Winsor (“Winsor”), and Ponderosa Principal Timm Ottman (“Ottman”). Complaint, ¶ 52. On Saturday, October 5, 2021, Winsor instructed McNellis to stay home the following Monday and, when McNellis asked why, told McNellis it was “because of his ‘religious comments.’” *Id.* at ¶¶ 53-55. That same day, Franklin, Winsor, and Ottman convened a meeting with McNellis to inform him that he was being placed on leave and that they “would be conducting further investigation

² The Complaint refers to McNellis’ emails. A defendant may submit an indisputably authentic copy of a document referred to in a plaintiff’s complaint with a motion to dismiss without converting the motion to one for summary judgment. *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384-84 (10th Cir. 1997).

regarding Mr. McNellis’ email related to The Laramie Project.” *Id.* at ¶¶ 56-58 and 63. This despite that the School District and Franklin “already possessed all the emails related to Mr. McNellis’ email related to The Laramie Project.” *Id.* at ¶ 64.

During the investigation, the School District and Franklin “received a complaint from a teacher claiming that Mr. McNellis was part of a good ole boys club” that included “numerous other male teachers, and administrators including Principal Ottman.” *Id.* at ¶¶ 70-71. But none of the other alleged members were “investigated, placed on leave, or otherwise disciplined” based on those allegations. *Id.* at ¶¶ 72-73. In addition, the investigation “uncovered a single email indicating that Mr. McNellis had complained ‘as a parent’ about Ponderosa’s communications regarding its COVID safety protocols.” *Id.* at ¶ 76. However, other “faculty and administrators” had the same complaints, and none of them were “investigated, placed on leave, or otherwise disciplined.” *Id.* at ¶¶ 77-78. McNellis “was never consulted or given the opportunity to defend himself during the purported investigation.” *Id.* at ¶ 81.

“On October 29, [2021] ... Defendants terminated Mr. McNellis’ employment.” *Id.* at ¶ 82. McNellis believes that “Franklin was responsible for the decision to terminate” him. *Id.* at ¶ 8. McNellis’ emails regarding *The Laramie Project* were directly cited as the reason for his termination. *Id.* at ¶ 83. Other reasons were cited, too, and the District’s termination notice stated it met with McNellis on October 5, 19, and 27 to discuss the allegations, which McNellis denied were true. Ex. C.³ Ottman admits that the emails “were the catalyst for his firing” and that “McNellis was terminated based on his religious views.” Complaint, ¶¶ 84-85.

³ The complaint refers to McNellis’ termination letter and thus it may be considered without converting this motion to one for summary judgment. *See GFF Corp.*, 130 F.3d at 1384-84.

ARGUMENT

I. § 1983 Claims (5 and 6).

a. First Amendment Retaliation (Claim 5).

District courts evaluate a public employee’s First Amendment claim under the five-prong *Garcetti/Pickering* test. *Roberts v. Winder*, 16 F.4th 1367, 1381 (10th Cir. 2021). There, a court must determine whether (1) the speech was made pursuant to an employee’s official duties; (2) the speech was on a matter of public concern; (3) the government’s interests as an employer in promoting efficient public service outweigh a plaintiff’s free speech interests; (4) the speech was a motivating factor in the adverse employment action; and (5) the same employment decision would have been made without the protected speech. *Id.*

i. McNellis failed to allege that his speech was *not* made pursuant to his official duties.

A public employee’s speech made pursuant to his official duties does not enjoy the protection of the First Amendment. *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006). The plaintiff carries the burden to establish that the contested speech was not made pursuant to official duties. *Casey v. W. Las Vegas Ind. Sch. Dist.* 473 F.3d 1323, 1328 (10th Cir. 2007). The Tenth Circuit has “taken a broad view of the meaning of speech that is pursuant to an employee’s official duties.” *Rohrbough v. Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 746 (10th Cir. 2010). It takes “a practical view of all the facts and circumstances surrounding the speech and the employment relationship, looking both to the content of the speech, as well as the employee’s chosen audience, to determine whether the speech is made pursuant to an employee’s official duties.” *Id.*; *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1204 (10th Cir. 2007). “Speech is made pursuant to official duties if it is generally consistent with the type of activities an employee was

paid to do.” *Id.* at 1203.

Here, McNellis admitted in the emails he sent about *The Laramie Project* that he was speaking as a public employee. *See* Complaint, ¶ 45 (“As a Dad of a student here and also an employee in the school...”). Despite this straightforward admission, McNellis apparently contends that his speech is not foreclosed from protection by *Garcetti* because he was simultaneously speaking as a parent of a Ponderosa student. However, the Supreme Court’s well-known basic rule is “that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” *Garcetti*, 547 U.S. at 421. McNellis’ admission that he was speaking as a public employee means that—notwithstanding his characterization of his speech—he was not speaking as a citizen. *See id.*

In any event, “the practical view of the facts and circumstances surrounding the speech” the Tenth Circuit prescribes confirms that McNellis was speaking as an employee. *See Rohrbough*, 596 F.3d at 746; *Brammer-Hoelter*, 492 F.3d at 1204. Even though the speech at issue need not be encapsulated in an employee’s job description to be considered pursuant to the employee’s official duties, *Brammer-Hoelter*, 492 F.3d at 1203, McNellis’ job description did just that: he was responsible for “[coordinating] effective communications strategies among the students, the community, the faculty and the administration.” McNellis’ communications concerning *The Laramie Project* fall squarely within that duty. Moreover, McNellis was using his School District email address through the School District email system to simultaneously email a captive audience of the entire Ponderosa staff about a School District program conducted at a school in which he was an administrator, signing the emails as the Ponderosa Athletic Director/Assistant Principal.

See, e.g., Weintraub v. Bd. of Educ. of City Sch. Dist. of City of New York, 593 F.3d 196, 204 (2nd Cir. 2010) (speech through channels only available to those working in the school not made as citizen). The facts and circumstances of the speech at issue confirm that its protection is foreclosed by *Garcetti* and its progeny. This requires dismissal of the First Amendment claim.⁴

- ii. McNellis failed to allege his speech was a motivating factor in any decision by the School District board of education, the only entity who can bind the School District to liability under § 1983.

A municipality cannot be held liable for the actions of its employees pursuant to § 1983 under a theory of *respondeat superior*. *Marshall v. Columbia Lea Reg. Hosp.*, 345 F.3d 1157, 1177 (10th Cir. 2003) (citation omitted). Instead, a plaintiff must show that the unconstitutional actions of an employee were (1) carried out by an official with final policy making authority with respect to the challenged action or (2) representative of an official policy or custom of the municipal institution. *Murrell v. School Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1249 (10th Cir. 1999). These principles apply to school districts, which are “municipalities” for purposes of § 1983. *Jett v. Dallas Ind. Sch. Dist.*, 491 U.S. 701, 733 (1989). In identifying final municipal policymakers, the courts must examine state laws and local ordinances or regulations to determine where the statutory law places the responsibility for making law or setting policy in a particular area. *Ledbetter v. City of Topeka, Kan.*, 318 F.3d 1183, 1189 (10th Cir. 2003). Colorado law provides that a school district’s board of education has the final policymaking authority to “employ all personnel required to maintain the operations and carry out the education program of the district....” Section 22-32-109(1)(f)(I), C.R.S. The only delegation of final policymaking authority

⁴ Pre-*Garcetti* cases also recognized that internal speech by school employees consisting of disputes over school play productions and other curricular/administrative matters does not amount to a matter of public concern. *See, e.g., Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 368-69 (4th Cir. 1998); *Finch v. Fort Bend Ind. Sch. Dist.*, 333 F.3d 555, 563-64 (5th Cir. 2003). McNellis’ First Amendment claim must also be dismissed for this reason.

that can impose liability on the District is legal delegation. *Milligan-Hitt v. Bd. of Trustees, Sheridan Cty., Sch. Dist. No. 2*, 523 F.3d 1219, 1230 (10th Cir. 2008). To sustain liability against the District, McNellis must prove that the allegedly unconstitutional actions were enacted pursuant to an official custom or policy of the District or an action carried out by the School District Board of Education (“Board”).

The Complaint describes neither any scenario rising to the level of a custom or policy, nor any action at all by the Board. Even if McNellis amended his Complaint to allege that the Board ratified his termination, there could be no allegation that the Board knew of the speech he wrongfully alleges was protected. This precludes McNellis from establishing that his speech was a motivating factor in the employment decision by those who could bind the School District for the purposes of § 1983. *See Bunch v. Ind. Sch. Dist. No. I-050, Osage Cnty.*, 435 Fed. Appx. 784, 789 (10th Cir. 2011) (unpublished), *citing Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1203 (10th Cir. 2008) (“[A plaintiff] must come forward with evidence from which a reasonable factfinder could conclude that those who decided to fire him had knowledge of his protected activity.”). This presents an additional basis for dismissal of this claim against the School District.

b. Procedural Due Process (Claim 6).

A procedural due process claimant must establish: (1) the existence of a constitutionally cognizable liberty or property interest; and (2) a deprivation of that interest without an appropriate level of process or procedural safeguards. *Harper v. Mancos Sch. Dist. RE-6*, 837 F. Supp. 2d 1211, 1220–21 (D. Colo. 2011), *citing Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1219 (10th Cir. 2006).

- i. McNellis failed to allege a constitutionally cognizable interest in remaining in his position.

“[T]he range of interests protected by procedural due process is not infinite.” *Bd. of Regents v. Roth*, 408 U.S. 564, 570 (1972). To be constitutionally cognizable, “[a] property interest must be specific and presently enforceable.” *Doyle v. Okla. Bar Ass’n*, 998 F.2d 1559, 1569 (10th Cir. 1993). When asserting a procedural due process claim based on the deprivation of a benefit, like employment, the plaintiff “clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must have a legitimate claim of entitlement to it.” *Id.* (quoting *Roth*, 408 U.S. at 577). “Furthermore, property interests are not created by the Constitution itself; rather, they are derived from independent sources such as state laws, administrative rules, or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Heutzenroeder v. Mesa County Valley Sch. Dist. 51*, 391 Fed. Appx. 688, 691-692 (10th Cir. 2010) (quoting *Roth*, 408 U.S. at 577). A public employee may have a constitutionally cognizable property interest in continued employment if the employee is tenured pursuant to state law or if “there is a clearly implied promise of continued employment.” *Roth*, 408 U.S. at 577. Colorado state law “do[es] not provide tenure or other similar protections for principals and other administrators.” *Heutzenroeder*, 391 Fed. Appx. at 692, citing *Draper v. Sch. Dist. No. 1, City and Cnty. of Denver*, 486 P.2d 1048, 1049 (Colo. 1971) and *Wheeler v. Sch. Dist. No. 20, Cnty. of El Paso*, 535 P.2d 206, 208 (Colo. 1975).

The Complaint contains no allegations that would establish that McNellis had a cognizable interest in his position at Ponderosa. Even given a chance to amend, McNellis could not allege more than a unilateral expectation of so continuing. He had no tenure-style protections and cannot

point to any other source that would confer an entitlement. This requires dismissal of his due process claim.

- ii. McNellis failed to allege he was terminated without an appropriate level of process.

Public employees with a property interest in their continued employment are entitled to process in the form of notice, an explanation of the charges against them, and an opportunity to respond. *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 519 (10th Cir. 1998). McNellis’ allegations—together with statements within the termination notice that the Court may consider—demonstrate that he had all three. McNellis attempts to artfully plead around this reality by alleging that the School District officials did not “interview” or “listen to him,” but he never specifically alleges that he was not noticed of the allegations against him, that the allegations were not explained to him, or that he was not given an opportunity to respond. Indeed, in a misguided attempt to assert a discrimination claim, McNellis alludes to the allegations against him, and does not plead that he discovered them in any other way than one that would satisfy due process requirements.

- c. Franklin asserts qualified immunity from both constitutional claims; McNellis failed to allege that she violated his constitutional rights or that such rights are clearly established.

When a public official asserts qualified immunity, as Franklin does here, “the plaintiff must show: (1) the defendant’s actions violated a constitutional or statutory right, and (2) that right was clearly established at the time of the defendant’s complained-about conduct.” *Truman v. Orem City*, 1 F. 4th 1227, 1235 (10th Cir. 2021). “A right is clearly established when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the right must be as the plaintiff maintains. Thus, the contours of the right must

be sufficiently clear so that a reasonable official would understand that what he is doing violates that right.” *Id.*

As argued above, McNellis has not established a constitutional violation. Because “personal participation is an essential element in a § 1983 claim,” *Bennett v. Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976), this is especially true as to Franklin herself. The only allegations made against her are that she worked for the School District as a Director of Human Resources (¶ 7); saw McNellis’ emails regarding *The Laramie Project* (¶ 57); was among a group that met with McNellis about them (¶ 56); and that “upon information and belief,” “was responsible for the decision to terminate Mr. McNellis” (¶ 8). Putting aside the above-described basic failure of McNellis’ claims, McNellis makes no allegations specifically connecting Franklin to the alleged deprivations—e.g., her motivation for allegedly deciding to terminate him or her role in preventing him from receiving process—that would justify naming her as an individual defendant and subjecting her to discovery. The cases are against McNellis on his claims, underscoring the absence of any authority that would have informed Franklin that her, even as alleged, scant involvement violated McNellis’ constitutional rights.

II. Title VII and CADA Discrimination (Claims 1 and 3) – McNellis failed to allege he was terminated under circumstances giving rise to an inference of discrimination.

The substantive analysis for discrimination claims under CADA is identical for discrimination claims under Title VII. *See Agassounon v. Jeppesen Sanderson, Inc.*, 688 Fed. Appx. 507, 509 (10th Cir. 2017) (unpublished); *Barrington v. United Airlines, Inc.*, 566 F. Supp. 3d 1102, 1115 n. 2 (D. Colo. 2021). To establish a prima facie case of discrimination, a plaintiff must demonstrate that (1) he was a member of a protected class; (2) he was qualified and satisfactorily performing his job; and (3) he was terminated under circumstances giving rise to an

inference of discrimination. *Barlow v. C.R. England, Inc.*, 703 F.3d 497, 505 (10th Cir. 2012). To establish the third element, McNellis attempts to proceed by alleging preferential treatment given to other employees. *See id.*

However, McNellis fails to allege sufficient facts to satisfy the pleading standard *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) set for this type of case:

A plaintiff must include enough context and detail to link the allegedly adverse employment action to a discriminatory or retaliatory motive with something besides sheer speculation. A plaintiff should have—and must plead—at least some relevant information to make the claims plausible on their face. Thus, it is insufficient for a plaintiff to allege, for instance, that she did not receive an employment benefit that “similarly situated” employees received. A plaintiff’s assertion that she is “similarly situated” to other employees is just a legal conclusion—and a legal conclusion is never enough. Rather, a plaintiff must allege some set of facts—not just legal conclusions—that taken together plausibly suggest differential treatment of similarly situated employees. Pleadings that do not allow for at least a reasonable inference of the legally relevant facts are insufficient.

Bekkem v. Wilkie, 915 F.3d 1258, 1274-75 (10th Cir. 2019) (internal citations and quotations omitted).

Like the unsuccessful plaintiff in *Bekkem*, McNellis refers to “similarly situated employees” whom he believes were treated more favorably, but he does not identify them or allege any additional details showing that said unnamed employees do not share his protected class or that they were not terminated for doing the same acts as him. *See id.* at 1275. Without those additional details, McNellis’ conclusory allegations are “insufficient to indicate that ... discrimination was the plausible, rather than just the possible reason” for his termination. *Id.*

McNellis claims that it was Franklin who decided to terminate him, but includes no allegations suggesting that she was motivated by anti-Christian animus. He pleads that Ottman

“admits that Mr. McNellis was terminated based on his religious views,” but makes no allegations connecting that admission to a decision-maker. McNellis seems to believe he states a claim by simply alleging he was terminated at least in part for writing emails in which he stated he was a Christian and mentioned Jesus. Not so. *See Allison v. Digital Mgmt. Inc.*, 2013 WL 5862647, **3-4 (D. Colo. Oct. 13, 2013) (unpublished).

III. Title VII and CADA Retaliation (Claims 2 and 4) – McNellis failed to allege that he engaged in protected activity.

To state a prima facie case of Title VII or CADA retaliation,⁵ the plaintiff must plausibly allege “(1) that he engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that the protected activity was the but-for cause of the employer’s actions. *Id.*, citing *Khalik v. United Air Lines*, 671 F.3d 1188, 1193 (10th Cir. 2012); *Deere v. XPO Logistics Freight, Inc.*, 2019 WL 699112, *10 (D. Colo. Feb. 20, 2019) (Moore, J.) (unpublished) (as to third element).

The Complaint is devoid of any allegation that McNellis engaged in protected activity, i.e., complained to any School District official that he was being discriminated against or participated in a Title VII investigation or hearing. Rather, McNellis attempts to proceed in the same manner as with his discrimination claims, wherein he claims the School District took adverse employment actions against him because he was a Christian or expressed Christian beliefs. *Compare* Complaint, ¶¶ 87-93 and 133-140 with ¶¶ 122-131 and 142-151. This approach does not appreciate the distinction between retaliation and discrimination claims articulated by the Supreme Court in *Burlington Northern and Santa Fe. Ry. Co. v. White*, 548 U.S. 53, 63 (2006). Allegations that an

⁵ CADA retaliation claims are likewise analyzed in the same manner as Title VII retaliation claims. *Agassounon*, 688 Fed.Appx at 509; *Barrington*, 566 F. Supp. 3d at 1115 n. 2.

employee has been mistreated because of his protected class—rather than because the employee has opposed discrimination against the employee or someone else or participated in an investigation, proceeding, or hearing under Title VII—simply do not support a retaliation claim. *Id.*; see *Vaughn v. Epworth Villa*, 537 F.3d 1147, 1151 (2008) (describing the two categories of protected activity). Without allegations that McNellis engaged in protected activity, his retaliation claims must be dismissed.

CONCLUSION

For the reasons stated above, the School District and Franklin respectfully request that this case be dismissed with prejudice.

RESPECTFULLY SUBMITTED this 30th day of August, 2022.

SEMPLER, FARRINGTON, EVERALL & CASE, P.C.

By: s/Michael Brent Case

Michael Brent Case
Mary B. Gray
Scott Goodstein
1120 Lincoln Street, Suite 1308
Denver, CO 80203
(303) 595-0941
bcase@semplelaw.com
mgray@semplelaw.com
sgoodstein@semplelaw.com

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August, 2022, a correct copy of the foregoing **MOTION TO DISMISS** was filed and served via CM/ECF to the following:

Spencer J. Kontnik, #47447
Matthew Fenicle, # 57055
KONTNIK | COHEN, LLC
201 Steele Street, Suite 210
Denver, Colorado 80206
Telephone: (720) 449-8448
skontnik@kontnikcohen.com
mfenicle@kontnikcohen.com
Attorneys for Plaintiff

By: s/ Kathleen Schmidt

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08/30/2022
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Overview

Overview

Inactive	No
Effective Date	10/01/2020
Date of Last Change	01/14/2022 02:33:13.181 PM
Job Profile Name	Assistant Principal/Athletic Director - High School
Job Code	20036
Include Job Code in Name	No
Job Profile Summary	Assist in the administration and supervision of the organization and operation of the best possible learning environment for students of the school.
Job Description	
Additional Job Description	
Job Title Default	
Restrict to Country	
Job Level	29 School Administration
Job Family	Administrative - School
Job Classifications	0003 - Assistant Principal, Teaching (EEO Codes-United States of America) 106 - Assistant/Deputy/Associate Principal (CDE Codes-United States of America)
Work Shift Required	No
Public Job	No
Referral Payment Plan	

Characteristics

Difficulty to Fill	No
Critical Job	No

Compensation

Compensation Grade	Administrative-Annual
Compensation Grade Profile	Assistant Principal - High School
Impacted Eligibility Rules	Administrative Assistant Principal Assistant Principal - High School HS Additional Responsibility - AP, Dean, PLS Merit Plan Lump Sum Increase - License Merit Plan Percentage Increase - License Merit Plan - Principal, Assistant Principal, & Admin Dean Merit - School Admin & Dean for 16-17

Pay

EXHIBIT A

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Pay Rate Type

Pay Rate Types

Country	Pay Rate Type
United States of America	Annual Salary

Job Exempt

Job Exempt

Country / Country Region	Job Exempt
United States of America	Yes
United States of America - Colorado	Yes

Workers' Compensation Code

Worker's Compensation Codes

Workers' Compensation Code	Country	Country Region	Location
8868 - Schools-professional employees & clerical (United States of America)	United States of America		

Qualifications

Certifications

Certification

Required	Country	Certification (Predefined)	Certification (Not Predefined)	Issuer (Not Predefined)
Yes			Type D Principal's License	Colorado Department of Education

Competencies

Competencies

Required	Competency	Target Rating

Competencies from Other Sources

Required	Competency	Target Rating	Source	Source Type

Education

Education

EXHIBIT A

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Required	Degree	Field of Study
Yes	Master's Degree	

Languages

Required	Language	Ability	Proficiency

Responsibilities

Required	Responsibility
	--- Collaborate with District Administrators regarding strategies for complying with state accreditation, accountability and school improvement requirements, including data collection and analysis of school wide student academic achievement, patterns of low student performance, and achievement discrepancies.
	--- Conduct effective student disciplinary measures, ensuring uninterrupted instructional and co-curricular practices, as well as demonstrating behavioral expectations.
	--- Assist in the utilization of appropriate resources of the staff, student body, school district and the community to develop and maintain highly effective instructional and co-curricular programs.
	--- Participate in the management of day-to-day operations of the school facility including purchase of instructional supplies, material & equipment, coordinating capital reserve process (small & large capital). Ensure safety of staff and students during emergency procedures.
	--- Plan and implement human resources activities: hiring/mentoring/disciplining; terminations; staffing design/master schedule; professional development activities; evaluations.
	--- Coordinate effective communications strategies among the students, the community, the faculty and the administration.
	--- Perform other related duties as assigned or requested.

EXHIBIT A

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Required	Responsibility

Skills

Skills

Required	Skill
----------	-------

EXHIBIT A



Kristina Blomquist <kblomquist@dcsdk12.org>

The Laramie Project: Oct 23-24 (Letter from Ambassadors & Tickets)

19 messages

Kayla Diaz <kjdiaz@dcsdk12.org>

Fri, Oct 2, 2020 at 2:19 PM

To: Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Hello everyone!

Knowing that a lot of our Ponderosa Theatre Company students would benefit socially and emotionally from being part of live theatre again, Nikki (our new Technical Theatre teacher!) and I selected The Laramie Project for our first production of the year- masks and distancing and all. We predicted that our students would want to learn about this story and participate in meaningful dialogue during a time when they may feel stuck and powerless. Our students are incredibly resilient and have been working hard to learn about this story and represent it authentically and respectfully. We have been rehearsing both online and in-person with precautions for about a month and preparing to live-stream our show from the school to audiences at home.

For this special production, we have a group of students as the Ambassador Crew. These students are responsible for research, communication, and helping ensure that Ponderosa and our community understand why we chose the show and that our audiences are informed about the nature and topic of the show. Please read the letter below written by our student Ambassadors asking for your awareness, and look for ticket information at the end of this email.

Dear Staff,

We hope that you've all had a great start to your year!

On October 23 and 24, Ponderosa Theatre Company will be presenting The Laramie Project. This show will be live-streamed and covers heavier topics than our previous productions. Some of you may already know the story of Matthew Shepard. If not, we are here to give you some context. In 1998, Matthew Shepard, a gay college student, was murdered on the outskirts of Laramie, Wyoming. His death sparked outrage throughout the nation, as well as controversy. There were many contesting opinions and arguments, but in the end, what matters to our show is how it affected the Laramie community.

The Laramie Project is the true story of the impact of a hate crime in a small town, told through interviews with community members and translated into a script. It is not specifically about the way Matthew Shepard died, and it is not a reenactment of the event.

We would like you to know this, so that you and your students are aware of exactly what The Laramie Project is and what it is not. There are a few things that we feel are important to make clear:

1. Our intention is not to push any kind agenda. We hope this story and the experiences of Laramie's people inspire reflection and thought.
2. The show does not focus solely on Matthew Shepard's murder, but on its impact.
3. This is meant to be a discussion, not a battle. We want to bring to light perspectives, share human experience, and start a conversation.

We as a company would like to thank you for your support during our show process. You all contribute so much to helping the theatre, and we are appreciative that this show will be no different. The performances will be October 23 at 7pm and October 24 at 2pm and 7pm. More information is available on ponderosatheatre.com.

Thank you,
The Laramie Project Ambassador Crew
[Redacted] - Director of Ambassadors

I am very proud of the maturity and responsibility these students have taken on to learn about the history of this event and to bring the story of Laramie into our theater. I know that your support means a lot to them. Here is how you can see the show from home:

- You can purchase tickets and read more about the show and live-streaming at the following site:

<https://www.onthestage.com/show/ponderosa-high-school/the-laramie-project-35861/>

EXHIBIT B

- As we have in the past, I would like to offer free admission to the show for staff members. However, because we are using a new ticketing system that is an all-in-one package for live-streaming, I cannot create a \$0 promo code. The online fees associated with each ticket cover our use of Switcher Studio and the platform for our encrypted links for audience members. However, I can make it as close to free as possible!
- Please add one student/single ticket for each link you would like to receive (one link per device), and use the promo code "Staff2021" - this will make the ticket price about \$0.50 and then you will only have to pay the few dollars in fees that allow us to use the platform.

Due to language and the content discussed in the show (there is no violence shown, only discussed) this is not a family-friendly show. We are advertising "For mature audiences" and I would generally recommend high school age and up. We will be reaching out more soon about advertising in the school, but it is important that I can answer any questions you may have and that you are aware of the nature of the play so that if we have students who have an aggressively adverse reaction to our show choice that you can support us in helping students understand. This is a play about perspectives, and we would not want anyone in the school to believe that we are making a statement against anything other than hate and violence.

Thank you so much for reading, your support, and for working with us to make Ponderosa a safe place for us to tell a story such as this.

Kayla Diaz
(She/Her/Hers)
Theatre Teacher & Director
Thespian Troupe #5397
Ponderosa High School
303-387-4000 - <https://www.ponderosatheatre.com>
2020-2021 SEASON
The Laramie Project - October 2020
The 25th Annual Putnam County Spelling Bee - Spring 2021
Student Directed Children's Show - Spring 2021
Tech/Theatre 3 One Acts - Spring 2021
Macbeth - June 2021

Corey McNellis <Corey.McNellis@dcsdk12.org> Fri, Oct 2, 2020 at 8:16 PM
To: Kayla Diaz <kjdiaz@dcsdk12.org>
Cc: Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Thanks Kayla, I appreciate the email and I really do admire the hard work that you do. As a Dad of a student here and also as an employee in the school, what is my recourse if I disagree with the production? Was this a heads up to see if everyone is cool?

Corey McNellis
Athletic Director/Assistant Principal
Ponderosa High School
303-387-4100

[Quoted text hidden]

Dana Swanson <dswanson@dcsdk12.org> Fri, Oct 2, 2020 at 9:01 PM
To: Kayla Diaz <kjdiaz@dcsdk12.org>
Cc: Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Hello Kayla,

Thank you so much for deciding to do a show that so closely connects to Ponderosa High School's core values of kindness, empathy, and respect. The connection to our anti-bullying program, "Dude, be nice", is incredible too. I can only imagine how impactful this show has been for your students and will be for all of our students. Truly, thank you so much for empowering students during this challenging time.

I have never seen this show, and I cannot wait to see it to better understand. I read a summary online, and it appears this show is a wonderful depiction of multiple perspectives on a single event.

I will be personally inviting other Ponderosa Theater Company alums to it. If you wouldn't mind sending me a digital copy of the poster, I think I will even invite some other groups like the Gender Sexuality Alliances in DCSD, parents I've met in the DCSD Equity Growth Zone Community Group, and more.

Thanks again for everything you do for all students,

Dana Swanson
Ponderosa High School
English I, Creative Writing, Content Read/ Write

EXHIBIT B

READ Contact
dana.swanson@dcsdk12.org
<https://sites.google.com/dcsdk12.org/phs-swanson/>

Douglas County Federation member since 2017
[Quoted text hidden]

Melissa Nansen <Melissa.Nansen@dcsdk12.org> Fri, Oct 2, 2020 at 9:01 PM
To: Kayla Diaz <kjdiaz@dcsdk12.org>
Cc: Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

I love that your students are so passionate about their craft and in tune with the current climate that they have chosen such a powerful piece of work. This is right in line with our "dude be nice". I can't wait to watch it!
[Quoted text hidden]

--
Melissa Nansen, M.ed
Professional Learning Specialist/Instructional Coach
Link Crew Supervisor
Ponderosa High School

[Canvas Tips and Troubleshooting \(for teachers\)](#)
[Canvas Videos](#)

Want to GoogleMeet OR Office? Book a time HERE
Make sure to include HOW we are meeting

Confidentiality Statement: This transmission contains information from Douglas County School District which may be confidential and protected by FERPA. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the content of this information is prohibited. If you have received this communication in error, please notify me immediately by email and delete the original message. Thank you.

Ryan Monroe <ryan.monroe@dcsdk12.org> Fri, Oct 2, 2020 at 9:19 PM
To: Kayla Diaz <kjdiaz@dcsdk12.org>
Cc: Additional PHS List <additional_phs.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Kayla,

As a history teacher I'm glad to hear that our students are engaging with important historical events across subject areas. I know that engaging with difficult subject matter can be difficult, but that is why it is important.

I have absolute faith in you as a professional to present these touchy subjects in an educational and artistic way, however if you want a Social Studies perspective I would be happy to help in whatever way I can!
[Quoted text hidden]

Cheryl Heaton <cheryl.heaton@dcsdk12.org> Fri, Oct 2, 2020 at 9:20 PM
To: Corey McNellis <Corey.McNellis@dcsdk12.org>
Cc: Kayla Diaz <kjdiaz@dcsdk12.org>, Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Kayla,

I want to say how much I respect you for deciding to do a play that pushes students to critically think about our society and the prejudice and racism that exists on a daily basis for people. I agree with Dana and Melissa we all need to just be nice. In these times what we all need is support from one another. I support you!!!

Cheryl
[Quoted text hidden]

--
Cheryl Heaton
Social Studies Teacher
National Honor Society Advisor
Ponderosa High School

Sandra Gabel <Sandra.Gabel@dcsdk12.org> Fri, Oct 2, 2020 at 9:25 PM
To: Cheryl Heaton <cheryl.heaton@dcsdk12.org>
Cc: Additional PHS List <Additional_PHS.list@dcsdk12.org>, Corey McNellis <Corey.McNellis@dcsdk12.org>, Kayla Diaz <kjdiaz@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Kayla,

EXHIBIT B

Thank you for taking on such difficult but important topics in our society. In these trying times we need more love and less hate.

I trust your professionalism as an outstanding educator to present this subject in a way that presents perspectives without judgement!
Bravo!

[Quoted text hidden]

--

Sandra Gabel
Ponderosa High School
sandra.gabel@dcsdk12.org
303-387-4000

Ashley Carda <Ashley.Carda@dcsdk12.org> Fri, Oct 2, 2020 at 9:26 PM
To: Kayla Diaz <kjdiaz@dcsdk12.org>
Cc: Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Kayla,

I am so grateful for your willingness to bring up the tough conversations. It is more important than ever to expose our students to the wide variety of perspectives that we all have. I truly believe that discussion around these topics is the way society moves forward. Not everyone has to agree with every ideology that exists, but it is the discourse that is invoked that matters.

Thank you for your willingness to involve all of us in your production, and for giving our students the opportunity to explore the diverse landscape of our world today.

Ashley Carda

[Quoted text hidden]

Gary Cordray <gary.cordray@dcsdk12.org> Fri, Oct 2, 2020 at 9:29 PM
To: Sandra Gabel <Sandra.Gabel@dcsdk12.org>
Cc: Cheryl Heaton <cheryl.heaton@dcsdk12.org>, Additional PHS List <Additional_PHS.list@dcsdk12.org>, Corey McNellis <Corey.McNellis@dcsdk12.org>, Kayla Diaz <kjdiaz@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

I am very impressed with the way your students presented themselves in their letter. You have obviously taught them to be respectful and mature. I look forward to the production. Thanks for being a positive influence on our students and community.

[Quoted text hidden]

Corey McNellis <Corey.McNellis@dcsdk12.org> Fri, Oct 2, 2020 at 9:37 PM
To: Gary Cordray <gary.cordray@dcsdk12.org>
Cc: Sandra Gabel <Sandra.Gabel@dcsdk12.org>, Cheryl Heaton <cheryl.heaton@dcsdk12.org>, Additional PHS List <Additional_PHS.list@dcsdk12.org>, Kayla Diaz <kjdiaz@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

As a christian I would love to collaborate with your project. Please let me know if the love that Jesus can provide will help your play.

Thanks!

Corey McNellis
Athletic Director/Assistant Principal
Ponderosa High School
303-387-4100

[Quoted text hidden]

Julie Lopez <Julie.Lopez@dcsdk12.org> Fri, Oct 2, 2020 at 9:48 PM
To: Kayla Diaz <kjdiaz@dcsdk12.org>
Cc: Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Kayla,

I love the fact that you are doing this. [REDACTED] and I had many conversations this summer about this topic. With the last name Lopez it is amazing what people say to my children and me ("You don't look like a Lopez" is a common statement). I think this will create an awareness that all people do matter, especially those who are different from themselves. I often think about how people with disabilities (my own son included) have been treated. It is such an important topic. As a parent, I appreciate the fact you are opening the door for family discussions about all people.

On Fri, Oct 2, 2020 at 2:20 PM Kayla Diaz <kjdiaz@dcsdk12.org> wrote:

[Quoted text hidden]

--

Julie Lopez
Learning Specialist

EXHIBIT B

Ponderosa High School
303-387-4233

Corey McNellis <Corey.McNellis@dcsdk12.org> Fri, Oct 2, 2020 at 9:52 PM
To: Julie Lopez <Julie.Lopez@dcsdk12.org>
Cc: Kayla Diaz <kjdiaz@dcsdk12.org>, Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

For the record, all of administration does not agree with me on this. I am totally solo. Good night Mustangs!

Corey McNellis
Athletic Director/Assistant Principal
Ponderosa High School
303-387-4100

[Quoted text hidden]

Nicole Iannone <niannone@dcsdk12.org> Fri, Oct 2, 2020 at 10:44 PM
To: Kayla Diaz <kjdiaz@dcsdk12.org>
Cc: Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Kayla and Nikki,

As a parent, a staff member, and a theatre lover, thank you for allowing these kids to take on projects that push us all out of our comfort zones. It is so important that we as a community show acceptance, love, and compassion for those that may be different than us. The way the Ponderosa Theatre Company tackled the Stem Shooting and Lockdown showed the strength of our students hearts and minds. They instinctively took that story and translated their emotions with power, empathy, and understanding beyond their years. I can not wait to see how they bring The Laramie Project to life and shine a light on prejudice and how to fight it with tolerance and love.

This is the time to stand together as the Mustang community and show our students that "Dude be Nice" is not just a poster in the hallways or a catch phrase but something everyone in our building can get behind and truly believes in.

Way to go PTC!

Nicole Iannone

On Fri, Oct 2, 2020 at 2:20 PM Kayla Diaz <kjdiaz@dcsdk12.org> wrote:

[Quoted text hidden]

Bret Weller <Bret.Weller@dcsdk12.org> Sat, Oct 3, 2020 at 9:08 AM
To: Nicole Iannone <niannone@dcsdk12.org>
Cc: Kayla Diaz <kjdiaz@dcsdk12.org>, Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Hi Ponderosa Theater Department,

I think a play that denounces hate crime violence is a very appropriate choice in these times. Its format will allow you all sorts of choices in the event that the pandemic decides to interfere again. I read this play back in 2003 and was struck by how many in the media completely mischaracterized it. Looking forward to it.

Bret Weller

[Quoted text hidden]

--

Bret Weller M.A.Ed.
Chair, Department of English
Faculty Advisor, National English Honor Society
Ponderosa High School
Proud, Productive, Proven!
Bret.Weller@dcsdk12.org

Emma Michel <emichel@dcsdk12.org> Sat, Oct 3, 2020 at 9:36 AM
To: Bret Weller <Bret.Weller@dcsdk12.org>
Cc: Nicole Iannone <niannone@dcsdk12.org>, Kayla Diaz <kjdiaz@dcsdk12.org>, Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

I am in full support of producing The Laramie Project, and have been involved with many productions of this play over the years. It truly reflects the values and conversations we want to be fostering in our students and provides perspectives and insights that show how complicated and multidimensional our world really is. Giving voices to the marginalized groups in a safe and educated way is something we are always striving for, as well as opening ourselves up to new perspectives. Discussions are enhanced and deepened when all voices are represented. Thank you, Kayla, for giving our school a platform for meaningful discussion!

[Quoted text hidden]

EXHIBIT B

Britany Ederveen <britany.ederveen@dcsdk12.org>

Sat, Oct 3, 2020 at 9:46 AM

To: Emma Michel <emichel@dcsdk12.org>

Cc: Bret Weller <Bret.Weller@dcsdk12.org>, Nicole Iannone <niannone@dcsdk12.org>, Kayla Diaz <kjdiaz@dcsdk12.org>, Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Ponderosa Theater,

I echo what Bret and Emma have expressed. I, too, am familiar with the play as I've used it in conjunction with 'To Kill a Mockingbird'; it is powerful, thought provoking, and reflective. Many of my students who are involved in the production have been buzzing in most recent weeks and I am impressed with their maturity and inspired by their passion.

I am looking forward to the production,

Britany Ederveen

[Quoted text hidden]

Kate Noon-Ulvila <cnoonulvila@dcsdk12.org>

Sat, Oct 3, 2020 at 10:22 AM

To: Britany Ederveen <britany.ederveen@dcsdk12.org>

Cc: Emma Michel <emichel@dcsdk12.org>, Bret Weller <Bret.Weller@dcsdk12.org>, Nicole Iannone <niannone@dcsdk12.org>, Kayla Diaz <kjdiaz@dcsdk12.org>, Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

As a teacher, parent, and Ponderosa Theatre alum, I absolutely support the theater teachers, students, and *The Laramie Project*. I have always been grateful to my former PHS theatre teachers for making the theater a welcoming space for **ALL** students, including LGBTQIA+ students, especially at a time when acceptance was not in abundance. Although I've taught for many years, this is my first year teaching at Ponderosa. I certainly hope that things have changed since 1996.

In addition, *The Laramie Project* has a personal connection for me. I was a student at the University of Wyoming from 96 - 97, a year before Matthew Shepard was killed. Although I had a full-ride theater scholarship and the Theatre Department was incredible, I transferred after a year because of the blatant bigotry, racism, homophobia, and misogyny that was a daily occurrence on campus. Certainly, I was not affected to the extent that others were. I still remember sitting in my dorm room at CU on cold day in October 1998 and hearing that a young gay man had been badly beaten in Laramie. I frantically called my friends to make sure that it wasn't them. To this day, I remember the fear in their voices and the confusion that something like that could happen in a town like Laramie. It did transform the community. People who were supportive of the LGBTQIA+ community began to make their voices heard over the voices of hate. My friends organized a march in support of Matthew Shepard and his family at the end of the UW Homecoming Parade and began the tough conversations that were needed to make changes on campus. The community came together to further impact change for the better.

I've had many opportunities to see *The Laramie Project* but never did until 2013 when it was performed at the school I was teaching. I was asked to speak after the event. It is an emotional play and instantly took me back to that time of my life. It was strange to see people who I knew like Harry Woods, my theatre advisor, as "characters" in the play.

At my previous school, because of the positive work our LGBTQIA+ Task Force and Student Alliance had done, we were approached by [The Matthew Shepard Foundation](#) and the Mexican Consulate to partner for a showing of "[Matt Shepard is a Friend of Mine](#)". (It was unfortunately postponed due to COVID). It is a documentary made by those who knew him best to show the real Matt Shepard. It is a very different account of Matthew Shepard than in the play.

Coming from a school that was so supportive of our LGBTQIA+ teachers, staff, and students, I am surprised by some of the comments and lack of support for our students. The fact the students are anticipating some backlash, and have already received it, makes me very concerned for our teachers, staff, and students who are part of the LGBTQIA+ community.

If you were not aware, October is [LGBTQ History Month](#). It's reassuring to hear all these voices of support, but clearly Ponderosa has more work to do in terms of LGBTQIA+ inclusion. I wanted to share some statistics from [The Trevor Project](#) to show why supporting our LGBTQIA+ students is so important.

- 39% of LGBTQ youth seriously considered attempting suicide in the past twelve months, with more than half of transgender and non-binary youth having seriously considered
- 71% of LGBTQ youth reported feeling sad or hopeless for at least two weeks in the past year
- Less than half of LGBTQ respondents were out to an adult at school, with youth less likely to disclose their gender identity than sexual orientation

EXHIBIT B

- 2 in 3 LGBTQ youth reported that someone tried to convince them to change their sexual orientation or gender identity, with youth who have undergone conversion therapy more than twice as likely to attempt suicide as those who did not
- 71% of LGBTQ youth in our study reported discrimination due to either their sexual orientation or gender identity
- 87% of LGBTQ youth said it was important to them to reach out to a crisis intervention organization that focuses on LGBTQ youth and 98% said a safe space social networking site for LGBTQ youth would be valuable to them

I also want to make sure our teachers and students have additional resources. If you need more, please let me know.

- [The Center on Colfax](#) - Includes Rainbow Alley, a safe, brave space where LGBTQ youth (ages 11-21) and their allies find support and acceptance.
- [The Trevor Project Suicide Hotline](#) - Provides crisis intervention and suicide prevention services to lesbian, gay, bisexual, transgender, queer & questioning (LGBTQ) young people under 25.
- [GLSEN](#) - **GLSEN** works to ensure that LGBTQ students are able to learn and grow in a school environment free from bullying and harassment.
- [PFLAG](#) - Provides support, information, and resources for LGBTQ+ people, their parents and families, and allies
- [Campus Pride Index](#) - National Listing of LGBTQ-Friendly Colleges & Universities

I hope that our LGBTQIA+ teachers, staff, and students know that there are those of us who support and accept them. I appreciate the Ambassador Crew for their bravery, compassion, and willingness to start the conversation.

Sincerely,

Kate Noon-Ulvila

[Quoted text hidden]

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Kate Noon-Ulvila, M.Ed
English Language Development Teacher
Sagewood Middle School/
Ponderosa High School
Office: (303) 387-4257
[Ms. N's Website](#)

Corey McNellis <Corey.McNellis@dcsdk12.org> Sat, Oct 3, 2020 at 10:27 AM
 To: Britany Ederveen <britany.ederveen@dcsdk12.org>
 Cc: Additional PHS List <Additional_PHS.list@dcsdk12.org>, Bret Weller <Bret.Weller@dcsdk12.org>, Emma Michel <emichel@dcsdk12.org>, Kayla Diaz <kjdiaz@dcsdk12.org>, Nicole Iannone <niannone@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

I understand people support this. Forgive me for having a different viewpoint and the audacity to publicly share it.

[Quoted text hidden]

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[Quoted text hidden]

Thomas Flynn <tjflynn@dcsdk12.org> Sat, Oct 3, 2020 at 10:57 AM
 To: Corey McNellis <Corey.McNellis@dcsdk12.org>
 Cc: Britany Ederveen <britany.ederveen@dcsdk12.org>, Additional PHS List <Additional_PHS.list@dcsdk12.org>, Bret Weller <Bret.Weller@dcsdk12.org>, Emma Michel <emichel@dcsdk12.org>, Kayla Diaz <kjdiaz@dcsdk12.org>, Nicole Iannone <niannone@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Corey,

I want to thank you for having the courage to express another point of view and hopefully making it okay for others, including our students, to express viewpoints that they sincerely hold. I think that is an important element of the Dude Be Nice campaign to allow for the free exchange and discussion of ideas.

Have a great weekend everyone,

[Quoted text hidden]

--

Tom Flynn
STEM - Engineering
Varsity Golf Coach
Assistant Boys Basketball Coach

EXHIBIT B

Ponderosa HS

EXHIBIT B



November 3, 2020

Mr. Corey McNellis
22337 E. Idyllwilde Drive
Parker, Colorado 80138

Re: Termination Notice

Dear Mr. McNellis:

Please allow this letter to confirm your employment with Douglas County School District (“District”) was ended effective October 29, 2020. Your employment with the District was ended for the reasons set forth below.

On October 5, 2020, the District commenced an investigation into allegations that you made discriminatory and unprofessional comments during an email exchange with Ponderosa High School (“Ponderosa”) staff regarding a proposed school play. During the course of the investigation, numerous Ponderosa staff came forward and expressed their displeasure with your comments because they believed your comments were unprofessional and displayed a discriminatory bias against staff and students who represent and/or support the LGBTQ community. Moreover, during the course of the investigation, Ponderosa staff asserted other allegations against you with respect to your conduct that were unrelated to the abovementioned email exchange. Ponderosa staff asserted that you had made sexist and racist comments in the past, had attempted to change student grades, failed to follow mandatory District safety practices with regard to COVID-19, and promoted in an educational environment that favored some students and staff over others. The District met with you on October 5th, 19th and 27th to discuss these allegations; you have denied engaging in any of the above conduct.

Following a review of the allegations made against you, it is the District’s determination that it is more likely than not that you engaged in the misconduct alleged by Ponderosa staff. What is more, it is clear from the District’s investigation that you cannot return to Ponderosa as a building leader given the level of disruption, distress and mistrust your conduct has engendered. It is for these reasons that the District has determined to terminate your employment.

Moving forward, please find below pertinent information with regard to your separation from the District.

1. Any final pay owed to you will be paid on the November 20, 2020 paycheck.
2. Any District insurance ended on October 31, 2020. You will receive COBRA information (if applicable) at your home address explaining the continuation of those benefits.



3. If you have an HSA account with a fund balance, you may continue to use the funds for medical purposes. Once the funds are used, the account will automatically be closed.
4. Contact PERA at 303-832-9550 and discuss your PERA funds options.
5. If you have money in one of the District's retirement plans, contact the vendor directly to discuss your plan options.
 - AXA Equivest – 403b or 457 plans – 1-800-628-6673
 - AXA Momentum – 401a – 1-800-528-0204
 - Metlife – 403b, 457b, Roth 403b – 720-301-4038
6. Any Sick and Personal leave balance will be paid out at \$62.00/day for up to 130 days for employees who have completed ten consecutive years of service with the District.

Should you have any questions, you may reach out to me at 720-433-1285.

Sincerely,

A handwritten signature in black ink that reads 'Cathy Franklin'.

Cathy Franklin
Director of Human Resources

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:22-cv-1636-RM-STV

COREY MCNELLIS,

Plaintiff,

v.

DOUGLAS COUNTY SCHOOL DISTRICT,
Defendant.

NOTICE OF FILING FIRST AMENDED COMPLAINT

Plaintiff, Corey McNellis, by and through his attorneys at KONTNIK | COHEN, LLC, hereby submits this Notice of Filing First Amended Complaint and states as follows:

Pursuant to Fed. R. Civ. P. 15(a)(1)(B) and D.C.COLO.LCivR 15.1, Plaintiff hereby submits his First Amended Complaint filed as a matter of course. Attached hereto is **Exhibit 1** with track changes denoting any additions or deletions to the Complaint. A clean copy of the First Amended Complaint will be filed separately from this notice.

Dated: September 20, 2022.

KONTNIK | COHEN, LLC
s/ Spencer J. Kontnik
Spencer J. Kontnik
Matthew L. Fenicle
Morgan E. Hamrick
201 Steele Street, Suite 210
Denver, Colorado 80206
Telephone: (720) 449-8448
skontnik@kontnikcohen.com
mfenicle@kontnikcohen.com
mhamrick@kontnikcohen.com
Attorneys for Plaintiff COREY MCNELLIS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:22-cv-1636-~~RM-STV~~

COREY MCNELLIS,

Plaintiff,

v.

~~DOUGLAS COUNTY SCHOOL DISTRICT, AND CATHY FRANKLIN, IN HER
INDIVIDUAL AND OFFICAL CAPACITY AS THE DIRECTOR OF HUMAN RESOURCES
FOR DOUGLAS COUNTY SCHOOL DISTRICT,~~

Defendants.

FIRST AMENDED COMPLAINT AND JURY DEMAND

Plaintiff, Corey McNellis, by and through his attorneys of KONTNIK | COHEN, LLC, hereby bring this *First Amended Complaint and Jury Demand* against Defendants, Douglas County School District (“DCSD”) and ~~Cathy Franklin, in her individual and official capacity~~ (~~collectively “Defendants”~~), under U.S. Const Amend. 1 and Section 42 U.S.C. § 1983, Title VII of the Civil Rights Act of 1964 (“Title VII”), and the Colorado Anti-Discrimination Act (“CADA”), and states as follows:

I. INTRODUCTION

1. Mr. McNellis was employed by Ponderosa High School for approximately fourteen (14) years without any disciplinary action. On October 5, 2021, three days after Mr. McNellis expressed his Christian belief, as the father of a student at Ponderosa, and in response to a question by a co-worker, Mr. McNellis was placed on leave and terminated. Defendants discriminated toward Mr. McNellis based on his Christian belief and because he expressed his views, which are protected by the First Amendment.

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PARTIES

2. Plaintiff, Corey McNellis is currently, and at all times relevant to this lawsuit, a resident of the state of Colorado.

3. Defendant DCSD, is located at 701 Prairie Hawk Drive Castle Rock, [CO Colorado 80109](#).

4. Defendant DCSD is a publicly funded school district under the control of state and local government in Colorado.

5. Defendant DCSD encompasses the Board of Education for Douglass County (“the Board”) as “[t]he general assembly shall, by law, provide for organization of school districts ... in each of which shall be established a board of education, to consist of three or more directors ... Said directors shall have control of instruction in the public schools of their respective districts.”

4-6. As set forth herein Plaintiff has allegations against both DCSD and the Board; however, they constitute the same entity and may be referred to interchangeably

7. Defendant DCSD oversees and operates Ponderosa High School (“Ponderosa”), where Mr. McNellis worked from August 2007 until his wrongful termination on October 29, 2020. ~~Defendant Franklin is currently, and at all times relevant to this lawsuit, a resident of the state of Colorado.~~

8. The Board is currently, and at all times relevant to this lawsuit, the policy-making body of DCSD, and it delegates its powers and duties to the Superintendent and administrative team of DCSD to execute its policies and powers.

9. With respect to DCSD, the Board has delegated its powers to DCSD’s employees.

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~~10.~~ Specifically, with respect to DCSD, the Board has delegated its powers and duties to, among others, former Ponderosa Principal (Tim Ottmann), DCDS Human Resources Director (Cathy Franklin), and DCSD Director of Schools (Daniel Winsor).

~~5-11.~~ The decision-making authority relating to employment decisions of employees within DCSD (and Ponderosa) lies with the Board including the individuals the Board has delegated its powers and duties to.

~~6.~~ Upon information and belief Defendant Franklin is currently, and at all times relevant to this lawsuit, was the Director of Human Resources for Defendant DCSD.

~~7-12.~~ Upon information and belief Defendant Franklin Defendant was responsible for the decision to terminate Mr. McNellis in violation of 42 U.S.C. § 1983, Title VII, and CADA.

II. JURISDICTION AND VENUE

~~8-13.~~ This action arises under the laws of the United States. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §§ 1331 and 1343 for the federal law claims, and 28 U.S.C. § 1367 for the state law claims.

~~9-14.~~ Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because the events giving rise to these claims occurred in the District of Colorado and the Defendants reside in the State of Colorado.

~~10-15.~~ Mr. McNellis established all necessary conditions precedent to filing this First Amended Complaint and Jury Demand (“Amended Complaint”).

~~11-16.~~ A Joint Charge of Discrimination (CCRD Charge No. E2100010411 and EEOC Charge No. 32A202100404) was filed with the Colorado Civil Rights Division (“CCRD”) and the Equal Employment Opportunity Commission (“EEOC”) on February 23, 2021. Mr. McNellis received a letter of right to sue from the CCRD on April 5, 2022, and the EEOC by way of the

U.S. Department of Justice on May 4, 2022. This action is being commenced within ninety (90) days of the CCRD and EEOC notices.

III. FACTUAL ALLEGATIONS

Background Information

~~12-17.~~ Mr. McNellis worked at Ponderosa High School for fourteen years.

~~13-18.~~ Mr. McNellis began his career with Ponderosa as the Social Studies Teacher and Assistant Coach in 2007 with a base salary of \$37,196.00.

~~14-19.~~ For Mr. McNellis' evaluation for the 2007/2008 year, as a social studies teacher, Mr. McNellis received all professional remarks, which is the highest mark possible.

~~15-20.~~ At the end of the school year, DCSD elected to renew Mr. McNellis' contract as a Social Studies Teacher and promoted him to Head Coach for the 2008/2009 school year.

~~16-21.~~ Mr. McNellis was also provided with a pay increase for the new school year to \$39,201.00.

~~17-22.~~ For Mr. McNellis' evaluation for the 2008/2009 year, as a social studies teacher, Mr. McNellis again received all professional remarks, the highest marks possible.

~~18-23.~~ At the end of the school year, DCSD elected to renew Mr. McNellis' contract as a Social Studies Teacher and Head Coach for the 2009/2010 school year.

~~19-24.~~ For Mr. McNellis' evaluation for the 2009/2010 year, as a social studies teacher, Mr. McNellis again received all professional remarks, the highest marks possible.

~~20-25.~~ At the end of the school year, DCSD elected to renew Mr. McNellis' contract as a Social Studies Teacher and Head Coach for the 2010/2011 school year.

~~21-26.~~ For Mr. McNellis' evaluation for the 2010/2011 year, as a social studies teacher, Mr. McNellis received all professional remarks and one distinguished remark.

22-27. Mr. McNellis received comments such as “his students certainly do feel valued and challenged in his classes. He strives to make his lessons rigorous and relevant for his kids.”

23-28. At the end of the school year, DCSD elected to renew Mr. McNellis’ contract as a Social Studies Teacher and Head Coach for the 2011/2012 school year.

24-29. For Mr. McNellis’ evaluation for the 2011/2012 year, as a social studies teacher, Mr. McNellis received all highly effective and effective marks, the two highest possible remarks.

25-30. At the end of the school year, DCSD elected to promote Mr. McNellis to Dean of Students for the 2012/2013 school year.

26-31. This promotion came with a pay increase to \$40,650.00.

27-32. For Mr. McNellis’ evaluation for the 2012/2013 year, as the Dean of Students, Mr. McNellis never received less than a 3.0 rating out of a total 4.0 and was consistently rated as highly effective.

28-33. At the end of the school year, DCSD elected to renew Mr. McNellis’ contract as the Dean of Students and Head Coach for the 2013/2014 school year.

29-34. Mr. McNellis also received a pay increase to \$42,276.00 for the 2013/2014 school year.

30-35. At the end of the school year, DCSD elected to renew Mr. McNellis’ contract as the Dean of Students and Head Coach for the 2014/2015 school year.

31-36. Mr. McNellis was given a raise to \$43,755.66 for the 2014/2015 school year.

32-37. At the end of the school year, DCSD elected to promote Mr. McNellis to the positions of Athletic Director and Assistant Principal for the 2016/2017 school year.

33-38. This promotion came with a pay increase to an annual salary of approximately \$90,000.

39. At the time of his termination, Mr. McNellis was earning approximately \$98,285 annually as both the Athletic Director and Assistant Principal.

40. As the Assistant Principal Mr. McNellis was part of the Administrative Team, which would discuss some aspects of extracurricular activities.

41. The Administrative Team was made up of Principal Ottmann and the Assistant Principals including Mr. McNellis.

42. The Administrative Team would meet once a week to discuss any issues that may arise with respect to extracurricular activities.

43. The Administrative Team would not debate, discuss, or otherwise address the issues under their purview in a public forum or with the entire staff at Ponderosa.

~~34-44.~~ The Administrative Team was not responsible for determining the content of the school plays that were produced by the theatre department.

~~35.~~

~~36-45.~~ Throughout his employment with DCSD, Mr. McNellis had consistently received excellent performance reviews, as well as a steady increase in salary.

~~37-46.~~ Until October 5, 2020, Mr. McNellis never received disciplinary action.

47. During the 2020 school year, Mr. McNellis was the parent of a child who was attending Ponderosa.

48. From the 2008 school year until his termination, Mr. McNellis was the Fellowship of Christian Athletes (“FCA”) point person for Ponderosa.

49. Defendants was aware that Mr. McNellis was the FCA point person for Ponderosa.

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The Laramie Project Emails

50. On October 2, 2020, during the peak of the COVID-19 pandemic, Ms. Kayla Diaz, Ponderosa’s Theatre Director, sent a group email to the entire Ponderosa staff including Mr. McNellis regarding the content of a planned school play.

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~~38-51.~~ Ms. Diaz did not discuss the content of the school play with the Administrative Team prior to sending an email to the entire Ponderosa staff soliciting feedback.

52. Ms. Diaz did not send an email or otherwise address the issues regarding the school play with the Administrative Team prior to sending an email to the entire staff at Ponderosa.

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~~39-53.~~ In her October 2, 2022, email, Ms. Diaz informed all staff members that Ponderosa’s Theatre Company would be performing The Laramie Project on October 23 and 24 of 2020.

~~40-54.~~ The Laramie Project is a religiously charged play that covers distressing material. The play depicts the aftermath of the 1998 murder of Matthew Shepard in Laramie, Wyoming. The murder is widely acknowledged to have been a hate crime motivated by Shepard’s sexuality.

~~41-55.~~ The play consists of a series of interviews from members of the Laramie community. Several of the characters interviewed are Christian leaders, some of whom share unsavory opinions regarding Shepard’s murder, and cite their Christian faith as the reason for their views.

~~42-56.~~ In her October 2, 2020, email, Ms. Diaz acknowledged the controversial nature of the play. The email states, in relevant part:

Due to language and content discussed in the show (there is no violence shown, only discussed) this is not a family-friendly show. We are advertising “[f]or mature audiences” and I would generally recommend high school age and up. We will be reaching out more soon about advertising in the school, but it is important

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that I can answer any question you may have and that you are aware of the nature of the play so that if we have students who have an aggressively adverse reaction to our show choice that you can support us in helping students understand. This is a play about perspectives, and we would not want anyone in the school to believe we are making a statement against anything other than hate and violence.

57. In the October 2, 2022, email, Ms. Diaz specifically acknowledges the general effect on the public the play would have stating that, “it is not a family-friendly show”, and the school was “advertising ‘[f]or mature audiences”, and that she “would generally recommend high school age and up.”

43-58. Ms. Diaz’s October 2, 2020, email specifically elicited responses from the rest of the staff stating that she would be happy to “answer any questions [they]may have.”

44-59. On October 2, 2020, Mr. McNellis responded to the email chain created by Ms. Diaz and stated:

Thanks Kayla [Ms. Diaz], I appreciate the email and I really do admire the hard work that you do. As a Dad of a student here and also as an employee in the school, what is my recourse if I disagree with the production? Was this a heads up to see if everyone is cool?

45-60. Mr. McNellis’ response was written on Friday evening and was written as a father of a student at Ponderosa, asking what recourse he may have to a school production that is not family friendly.

46-61. Several staff members responded to Ms. Diaz’s email offering their expertise.

47-62. Mr. Monroe, the history teacher, responded to the October 2, 2020, email from Ms. Diaz acknowledging the difficulty of the subject matter and offering to help by providing a “Social Studies perspective,”

48-63. Ms. Carda responded and emphasized that, “[n]ot everyone has to agree with every ideology that exists, but it is the discourse that is invoked that matters.”

~~49-64.~~ Mr. McNellis responded to the emails from the other staff and offered to provide a Christian perspective.

~~50-65.~~ Mr. McNellis made it clear that offer was in his capacity as a father and not an administrator stating, “[f]or the record, all of administration does not agree with me on this. I am totally solo.”

~~51-66.~~ Between October 2, 2021, and October 5, 2021, the emails regarding The Laramie Project were shared with DCSD’s Human Resources Director, Cathy Franklin, the Director of Schools, Daniel Winsor, and Ponderosa Principal, Tim Ottmann.

Ponderosa’s Discrimination and Retaliation Toward Mr. McNellis

~~67.~~ On Saturday, Mr. Winsor called Mr. McNellis and informed him that Mr. McNellis needed to stay home on Monday.

~~52-68.~~ Mr. Winsor was acting in his official capacity as an employee of DCSD based on the authority delegated to him by the Board when he instructed Mr. McNellis to stay home.

~~53-69.~~ Mr. McNellis asked Mr. Winsor why he was being told to stay home and if he acted unprofessionally in any way.

~~70.~~ Mr. Winsor informed Mr. McNellis that nothing was unprofessional, but that Ponderosa needed Mr. McNellis to stay home Monday because of his “religious comments.”

~~71.~~ Mr. McNellis questioned Defendant’s decision to have him stay home because he believed he was being treated differently based on the “religious comments.”

~~72.~~ Mr. McNellis was shocked by Defendant’s decision but Mr. Winsor informed Mr. McNellis that he did not need to worry.

~~73.~~ Defendant’s decision to instruct Mr. McNellis to stay home was an adverse employment decision.

74. Defendant's decision to instruct Mr. McNellis to stay home was due to Mr. McNellis' decision to express his First Amendment views, as a father, regarding his Christian beliefs.

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75. At the time Defendant instructed Mr. McNellis to stay home, Defendant did not have a legitimate non-discriminatory reason to request that he stay home.

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~~54-76.~~ Mr. McNellis was treated differently than the other teachers that responded to the email chain based on his religion and decision to express the same under the protection of the First Amendment.

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77. On October 5, 2020, three days after Mr. McNellis expressed his Christian belief in a public forum, Ms. Franklin, Mr. Winsor, and Mr. Ottmann called Mr. McNellis for a virtual meeting (the "Meeting").

~~55-78.~~ Ms. Franklin, Mr. Winsor, and Mr. Ottmann were acting in their official capacity as employees of DCSD based on the authority delegated to them by the Board during the Meeting.

79. Ms. Franklin, Mr. Winsor, and Mr. Ottmann had reviewed the emails regarding the Laramie Project prior to the Meeting.

~~56-80.~~ Ms. Franklin led the meeting and informed Mr. McNellis that Defendant was investigating him due to the "religious comments."

81. During the Meeting, Defendant informed Mr. McNellis that he was being placed on leave during the Meeting.

82. Mr. McNellis was not given a full and equal opportunity to defend his "religious comments" from his emails during the Meeting and had no recourse against the decision to place him on leave.

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83. Mr. McNellis objected to Defendant's² conduct during the Meeting because he did not feel comfortable with the way the meeting went because the Defendants was going to suspend him and investigate him for the "religious comments."

84. Ms. Franklin informed Mr. McNellis that there was no need for a HR representative because the school was "looking out" for Mr. McNellis as well.

85. Upon information and belief, David Ray, the Chairman of the Board of Education for Douglas County, was aware of Defendant's investigation into Mr. McNellis.

~~57-86.~~ Upon information and belief, Mr. Ray knew of email complaints against Mr. McNellis that were related to his emails in response to the Laramie Project.

~~58-87.~~ Defendant's² decision to place Mr. McNellis on leave was an adverse employment decision.

~~59-88.~~ Defendant's² decision to place Mr. McNellis on leave was due to Mr. McNellis' decision to express his First Amendment views, as a father, regarding his Christian beliefs.

~~60-89.~~ Defendant's² decision to place Mr. McNellis on leave was in retaliation to Mr. McNellis' decision to express his views under the First Amendment regarding his Christian belief and to complain about the same in subsequent meetings with DCSD's staff.

~~64-90.~~ At the time Defendants placed Mr. McNellis on leave, Defendants did not have a legitimate non-discriminatory reason to place Mr. McNellis on leave or to terminate Mr. McNellis.

~~62-91.~~ At the conclusion of the Meeting, Defendants informed Mr. McNellis that it would be conducting further investigation regarding Mr. McNellis' email related to The Laramie Project.

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~~63-92.~~ At the conclusion of the Meeting, however, Defendants already possessed all the emails related to Mr. McNellis' statement(s) regarding The Laramie Project.

~~64-93.~~ At the conclusion of the Meeting, there was nothing further to investigate regarding Mr. McNellis' email statements related to The Laramie Project.

~~94.~~ Instead, Defendants elected to "investigate" Mr. McNellis based on his expression of his Christian faith as a father of a student at Ponderosa.

~~95.~~ While on leave, Mr. McNellis complained to Principal Ottmann that he was being investigated based on his Christian beliefs.

~~96.~~ When asked by several co-workers about his leave, Mr. McNellis complained that he was on leave while Defendant investigated him based on his Christian beliefs.

~~65-97.~~ Defendant was aware that Mr. McNellis had complained to Principal Ottmann and other staff members regarding retaliation based on his religious beliefs.

~~66-98.~~ Defendant's decision to investigate Mr. McNellis based on his statement regarding his Christian faith constitutes an adverse employment action.

~~67-99.~~ Defendant's decision to investigate Mr. McNellis based on his statement regarding his Christian faith was retaliatory.

~~68-100.~~ Defendants used the investigation to try to obtain evidence that it could use to support a decision to terminate Mr. McNellis.

~~69.~~ During its investigation, Defendants received a complaint from a teacher claiming that Mr. McNellis was part of a good ole boys club.

~~70-101.~~ The allegation that Mr. McNellis was part of a good ole boys club included numerous other male teachers, and administrators including Principal Ottmann, Jarod Nicholson, and Joseph Schubarth.

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71.102. None of the other foregoing male teachers or administrators including Principal Ottmann were investigated, placed on leave, or otherwise disciplined.

72.103. Mr. McNellis was the only individual investigated, placed on leave, and/or disciplined based on the vague allegations that there was a good ole boys club at Ponderosa.

73.104. Defendant's² decision to discipline Mr. McNellis based on a vague and ambiguous allegation that he was part of a good ole boys club was pretextual.

74.105. Mr. McNellis was treated less favorably than his counterparts who were also named as part of a good ole boys club based on his decision to express his religious affiliation and exercise his First Amendment rights.

75.106. During its investigation, Defendant^s also uncovered a single email indicating that Mr. McNellis had complained "as a parent" about Ponderosa's communications regarding its COVID safety protocols.

76.107. Other faculty and administrators complained about Ponderosa's communications regarding its COVID safety protocols.

77.108. No other faculty or administrators were investigated, placed on leave, and/or disciplined based on their complaints regarding Ponderosa's communications related to its safety protocols.

78.109. Defendant's² decision to terminate Mr. McNellis based on a complaint related to Ponderosa's communications regarding its COVID safety protocols was pretextual.

110. Mr. McNellis was treated less favorably than his counterparts who also complained about Ponderosa's COVID safety protocols.

79.111. To the extent Defendant claims it terminated Mr. McNellis based on COVID protocols, Defendant's justification is pretextual.

~~80-112.~~ Mr. McNellis was never consulted or given the opportunity to defend himself during the purported investigation.

~~81-113.~~ On October 29, 2020, after a purported investigation, Defendants terminated Mr. McNellis' employment.

~~82-114.~~ ~~Ponderosa Defendant~~ directly cited Mr. McNellis' emails regarding The Laramie Project as the reason for his termination.

~~83-115.~~ Mr. Ottmann, the Principal of Ponderosa, ~~admits-wrote a letter admitting~~ that the contents of Mr. McNellis' email regarding The Laramie Project were the "catalyst for his firing."

~~116.~~ Mr. Ottmann further ~~admitted in the letter s~~ that Mr. McNellis was terminated based on his religious views.

~~84-117.~~ ~~Defendant knew of the emails sent by Mr. McNellis regarding the Laramie Project, knew of the investigation into Mr. McNellis relating to the religious comments, knew of the expansion of the investigation into other issues beyond the religious comments, and participated in the decision to terminate Mr. McNellis.~~

~~118.~~ As a direct and proximate result of Defendant's² conduct, Mr. McNellis has been damaged in an amount to be proven at trial.

~~V.~~ **IV. CLAIMS FOR RELIEF**

FIRST CLAIM FOR RELIEF

~~(Defendant DCSD- Discrimination - Title VII, 42 U.S.C. § 2000 e-2(a)(1))~~

~~85-119.~~ At all relevant times, Mr. McNellis is considered a protected class under Title VII because he is a Christian. 42 U.S.C. § 2000e-2(a)(1).

~~86.120.~~ At all relevant times, Mr. McNellis was qualified to perform the position of Assistant Principal and Athletic Director.

~~87.121.~~ Defendant~~s~~ discriminated against Mr. McNellis based on his religion.

~~88.122.~~ Defendant~~s~~ treated Mr. McNellis less favorably than his similarly situated employees by taking the following actions including, but not limited to, the following:

- a. Investigating only Mr. McNellis despite multiple complaints against other members of Defendant~~s~~ staff and even members of the Administration;
- b. Failing to involve Mr. McNellis in the investigation against him;
- c. Failing to interview anyone who would support Mr. McNellis or provide a different opinion than those who Defendant~~s~~ interviewed;
- d. Placing Mr. McNellis on administrative leave; and
- e. Terminating Mr. McNellis based on comments he made in his individual capacity as a father of a child at Defendant~~s~~ school.

~~89.123.~~ As a result of Defendant~~s~~ actions, Mr. McNellis has suffered damages, including but not limited to the loss of past and future wages and benefits, loss of professional opportunities, emotional distress, and mental pain and anguish.

~~90.124.~~ Mr. McNellis is entitled to his attorney's fees and costs incurred in this matter.

~~125.~~ Mr. McNellis is further entitled to all other forms of relief as permitted under Title VII.

SECOND CLAIM FOR RELIEF
(~~Defendant DCSD~~-Retaliation - Title VII, 42 U.S.C. § 2000e-3(a))

121. Mr. McNellis hereby incorporates the allegations as if fully set forth herein.

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122. At all relevant times, Mr. McNellis is considered a protected class under Title VII because he is a Christian. 42 U.S.C. § 2000e-2(a)(1).

123. At all relevant times, Mr. McNellis was qualified to perform the position of Assistant Principal and Athletic Director.

124. Defendant~~s~~ retaliated against Mr. McNellis based on his religion.

125. As a direct result of Mr. McNellis' identification as Christian male, Defendant~~s~~ subjected Mr. McNellis to actions which a reasonable employee would have found materially adverse.

126. Defendant~~s~~ treated Mr. McNellis more adversely than similarly situated co-workers.

127. Defendant~~s~~' retaliation included, but was not limited to:

a. Investigating only Mr. McNellis despite multiple complaints against other members of Defendant~~s~~ staff and even members of the Administration;

a-b. Investigating Mr. McNellis based on his religious comments despite his objections regarding the same;

b-c. Placing Mr. McNellis on administrative leave; and

e-d. Terminating Mr. McNellis based on comments he made in his individual capacity as a Christian and a father of a child at Defendant~~s~~ school.

128. Defendant~~s~~' retaliatory conduct was the direct and proximate cause of Mr. McNellis' injuries, damages, and losses.

129. As a result of Defendant~~s~~' actions, Mr. McNellis has suffered damages, including but not limited to the loss of past and future wages and benefits, loss of professional opportunities, emotional distress, and mental pain and anguish.

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130. Mr. McNellis is entitled to his attorney's fees and costs incurred in this matter.

131. Mr. McNellis is further entitled to all other forms of relief as permitted under Title VII.

THIRD CLAIM FOR RELIEF

(~~Defendant DCSD~~-Discrimination – CADA, C.R.S. §§ 24-34-401 *et seq*)

132. Mr. McNellis hereby incorporates the allegations as if fully set forth herein.

133. At all relevant times, Mr. McNellis is considered a protected class under CADA because he is a Christian.

134. At all relevant times, Mr. McNellis was qualified to perform the position of Assistant Principal and Athletic Director.

135. Defendant~~s~~ discriminated against Mr. McNellis based on his religion.

136. Defendant~~s~~ treated Mr. McNellis more adversely than similarly situated co-workers by taking the following actions including, but not limited to, the following:

- a. Investigating only Mr. McNellis despite multiple complaints against other members of Defendant~~'s~~ staff and even members of the Administration;
- b. Failing to involve Mr. McNellis in the investigation against him;
- c. Failing to interview anyone who would support Mr. McNellis or provide a different opinion than those who Defendant~~s~~ interviewed;
- d. Placing Mr. McNellis on administrative leave; and
- e. Terminating Mr. McNellis based on comments he made in his individual capacity as a father of a child at Defendant~~'s~~ school.

137. Defendant~~'s~~ conduct was the direct and proximate cause of Mr. McNellis' injuries, damages, and losses.

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138. As a result of Defendant's actions, Mr. McNellis has suffered damages, including but not limited to the loss of past and future wages and benefits, loss of professional opportunities, emotional distress, and mental pain and anguish.

~~139.~~ Mr. McNellis is entitled to his attorney's fees and costs incurred in this matter.

~~139.~~

~~_____~~ Mr. McNellis is further entitled to all other forms of relief as permitted under CADA.

~~_____~~
~~_____~~

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FOURTH CLAIM FOR RELIEF

~~(Defendant DCSD):~~ Retaliation - CADA, C.R.S. §§ 24-34-401 *et seq*)

141. Mr. McNellis hereby incorporates the allegations as if fully set forth herein.

142. At all relevant times, Mr. McNellis is considered a protected class under CADA because he is a Christian.

143. At all relevant times, Mr. McNellis was qualified to perform the position of Assistant Principal and Athletic Director.

144. Defendant's retaliated against Mr. McNellis based on his religion as described herein.

145. As a direct result of Mr. McNellis' opposition to the activities prohibited by CADA, Defendant's subjected Mr. McNellis to actions which a reasonable employee would have found materially adverse.

146. Defendant's treated Mr. McNellis more adversely than similarly situated co-workers.

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147. Defendant's retaliation included, but was not limited to:

- a. Investigating only Mr. McNellis despite multiple complaints against other members of Defendant's staff and even members of the Administration;
- b. Investigating Mr. McNellis based on his religious comments despite his objections regarding the same;
- c. Placing Mr. McNellis on administrative leave; and
- d. Terminating Mr. McNellis based on comments he made in his individual capacity as a Christian and a father of a child at Defendant's school.

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148. Defendant's retaliatory conduct was the direct and proximate cause of Mr. McNellis' injuries, damages, and losses.

149. As a result of Defendant's actions, Mr. McNellis has suffered damages including but not limited to the loss of past and future wages and benefits, loss of professional opportunities, emotional distress, and mental pain and anguish.

150. Mr. McNellis is entitled to his attorney's fees and costs incurred in this matter.

151. Mr. McNellis is further entitled to all other forms of relief as permitted under CADA.

FIFTH CLAIM FOR RELIEF
(~~Defendants~~-Retaliation – Free Speech, 42 USC § 1983)

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152. Mr. McNellis hereby incorporates the foregoing allegations as if fully set forth herein.

153. Section 1983 of 42 U.S.C. in pertinent part states "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

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secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress...”

154. When Mr. McNellis expressed his concern, as a parent, regarding the performance of The Laramie Project at Ponderosa, he was exercising his right to free speech under the First Amendment to the U.S. Constitution and under 42 U.S.C. §1983.

155. Mr. McNellis’ speech on October 2, 2020, related to a school production was on a topic of public concern.

156. Defendant~~s~~ placed Mr. McNellis on administrative leave and launched their investigation in retaliation against Mr. McNellis’ exercise of protected free speech.

157. Defendant~~s~~ terminated Mr. McNellis based on Mr. McNellis’ exercise of protected free speech.

158. When Defendant~~s~~ retaliated against Mr. McNellis, as a public entity, they did so under the color of state law.

159. As a parent of a child at Ponderosa High School, Mr. McNellis’ concern for the wellbeing of his child and for the other students at Ponderosa drastically outweighed Ponderosa’s interest in performing a highly controversial play, in what was already a stressful time for the students.

160. Defendant~~s~~’ actions to place Mr. McNellis on administrative leave, conduct an investigation, and terminate him proximately caused Mr. McNellis significant damages including but not limited to, mental anguish, emotional distress, loss of enjoyment of life, and damage to his reputation.

161. Defendant's decision to terminate Mr. McNellis proximately caused Mr. McNellis significant damages, including but not limited to, loss of back pay, loss of front pay, mental anguish, emotional distress, loss of enjoyment of life, and damage to his reputation.

162. Mr. McNellis is further entitled to all other forms of relief as permitted under 42 USC § 1983.

~~SIXTH CLAIM FOR RELIEF
(Defendants: Due Process, 42 USC § 1983)~~

166. Mr. McNellis hereby incorporates the foregoing allegations as if fully set forth herein.

167. Section 1983 of 42 U.S.C. in pertinent part states "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress..."

168. The Fourteenth (14th) Amendment in relevant part states "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

169. When Mr. McNellis expressed his concern, as a parent, regarding the performance of The Laramie Project at Ponderosa, he was exercising his right to free speech under the First Amendment to the U.S. Constitution and under 42 U.S.C. §1983.

170. Mr. McNellis' speech on October 2, 2020, related to a school play was on a topic of public concern.

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~~171. —When Defendants launched an investigation against Mr. McNellis and placed Mr. McNellis on administrative leave and eventually terminated Mr. McNellis, they did so under the color of state law.~~

~~172. —Defendants placed Mr. McNellis on administrative leave and subsequently launched an investigation into Mr. McNellis' emails regarding the Laramie Project but refused to listen or interview Mr. McNellis denying him of his Due Process Rights under the Fourteenth (14th) Amendment.~~

~~173. —Defendants also refused to interview individuals within Ponderosa who were willing to speak on Mr. McNellis' behalf in direct violation of Mr. McNellis' Due Process rights under the Fourteenth (14th) Amendment.~~

~~174. —Ultimately Defendants' investigation, that did not include Mr. McNellis or anyone who would speak on his behalf, led Defendants to terminate Mr. McNellis.~~

~~175. —As a parent of a child at Ponderosa High School, Mr. McNellis' concern for the wellbeing of his child and for the other students at Ponderosa drastically outweighed Ponderosa's interest in performing a highly controversial play, in what was already a stressful time for the students.~~

~~176. —Defendants' actions to place Mr. McNellis on administrative leave and investigate him proximately caused Mr. McNellis significant damages including but not limited to, mental anguish, emotional distress, loss of enjoyment of life, and damage to his reputation.~~

~~177. —Defendants' decision to terminate Mr. McNellis proximately caused Mr. McNellis significant damages, including but not limited to, loss of back pay, loss of front pay, mental anguish, emotional distress, loss of enjoyment of life, and damage to his reputation.~~

~~Mr. McNellis is further entitled to all other forms of relief as permitted under 42 USC § 1983.~~

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PRAYER FOR RELIEF

WHEREFORE, Mr. McNellis respectfully requests a trial by jury on all issues so triable, and damages, as follows:

- a. The Court award Plaintiff compensatory damages, including but not limited to those for emotional distress and pain and suffering;
- b. The Court award Plaintiff actual economic damages and consequential damages arising out of Defendant's² conduct as established at trial;
- c. The Court award Plaintiff punitive damages for claims as allowed by law and in amount to be determined at trial;
- d. The Court award Plaintiff his reasonable attorneys' fees and costs in this action as permitted by law;
- e. The Court award pre-judgment and post-judgment interest at the highest lawful rate; and
- f. The Court award any such further relief as this Court deems just and proper.

Plaintiff requests a trial to a jury on all issues so triable.

Dated: September 20, 2022

Respectfully submitted,

/s/ Spencer J. Kontnik
 Spencer J. Kontnik, #47447
 Matthew Fenicle, # 57055
 KONTNIK | COHEN, LLC
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Attorneys for Plaintiff: COREY MCNELLIS

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:22-cv-1636-RM-STV

COREY MCNELLIS,

Plaintiff,

v.

DOUGLAS COUNTY SCHOOL DISTRICT,

Defendant.

FIRST AMENDED COMPLAINT AND JURY DEMAND

Plaintiff, Corey McNellis, by and through his attorneys of KONTNIK | COHEN, LLC, hereby bring this *First Amended Complaint and Jury Demand* against Defendant, Douglas County School District (“DCSD”) and, under U.S. Const Amend. 1 and Section 42 U.S.C. § 1983, Title VII of the Civil Rights Act of 1964 (“Title VII”), and the Colorado Anti-Discrimination Act (“CADA”), and states as follows:

I. INTRODUCTION

1. Mr. McNellis was employed by Ponderosa High School for approximately fourteen (14) years without any disciplinary action. On October 5, 2021, three days after Mr. McNellis expressed his Christian belief, as the father of a student at Ponderosa, and in response to a question by a co-worker, Mr. McNellis was placed on leave and terminated. Defendant discriminated toward Mr. McNellis based on his Christian belief and because he expressed his views, which are protected by the First Amendment.

PARTIES

2. Plaintiff, Corey McNellis is currently, and at all times relevant to this lawsuit, a resident of the state of Colorado.

3. Defendant DCSD, is located at 701 Prairie Hawk Drive Castle Rock, Colorado 80109.

4. Defendant DCSD is a publicly funded school district under the control of state and local government in Colorado.

5. Defendant DCSD encompasses the Board of Education for Douglass County (“the Board”) as “[t]he general assembly shall, by law, provide for organization of school districts ... in each of which shall be established a board of education, to consist of three or more directors ... Said directors shall have control of instruction in the public schools of their respective districts.”

6. As set forth herein Plaintiff has allegations against both DCSD and the Board; however, they constitute the same entity and may be referred to interchangeably

7. Defendant DCSD oversees and operates Ponderosa High School (“Ponderosa”), where Mr. McNellis worked from August 2007 until his wrongful termination on October 29, 2020.

8. The Board is currently, and at all times relevant to this lawsuit, the policy-making body of DCSD, and it delegates its powers and duties to the Superintendent and administrative team of DCSD to execute its policies and powers.

9. With respect to DCSD, the Board has delegated its powers to DCSD’s employees.

10. Specifically, with respect to DCSD, the Board has delegated its powers and duties to, among others, former Ponderosa Principal (Tim Ottmann), DCDS Human Resources Director (Cathy Franklin), and DCSD Director of Schools (Daniel Winsor).

11. The decision-making authority relating to employment decisions of employees within DCSD (and Ponderosa) lies with the Board including the individuals the Board has delegated its powers and duties to.

12. Upon information and belief Defendant was responsible for the decision to terminate Mr. McNellis in violation of 42 U.S.C. § 1983, Title VII, and CADA.

II. JURISDICTION AND VENUE

13. This action arises under the laws of the United States. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §§ 1331 and 1343 for the federal law claims, and 28 U.S.C. § 1367 for the state law claims.

14. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because the events giving rise to these claims occurred in the District of Colorado and the Defendant resides in the State of Colorado.

15. Mr. McNellis established all necessary conditions precedent to filing this First Amended Complaint and Jury Demand (“Amended Complaint”).

16. A Joint Charge of Discrimination (CCRD Charge No. E2100010411 and EEOC Charge No. 32A202100404) was filed with the Colorado Civil Rights Division (“CCRD”) and the Equal Employment Opportunity Commission (“EEOC”) on February 23, 2021. Mr. McNellis received a letter of right to sue from the CCRD on April 5, 2022, and the EEOC by way of the U.S. Department of Justice on May 4, 2022. This action is being commenced within ninety (90) days of the CCRD and EEOC notices.

III. FACTUAL ALLEGATIONS

Background Information

17. Mr. McNellis worked at Ponderosa High School for fourteen years.

18. Mr. McNellis began his career with Ponderosa as the Social Studies Teacher and Assistant Coach in 2007 with a base salary of \$37,196.00.

19. For Mr. McNellis' evaluation for the 2007/2008 year, as a social studies teacher, Mr. McNellis received all professional remarks, which is the highest mark possible.

20. At the end of the school year, DCSD elected to renew Mr. McNellis' contract as a Social Studies Teacher and promoted him to Head Coach for the 2008/2009 school year.

21. Mr. McNellis was also provided with a pay increase for the new school year to \$39,201.00.

22. For Mr. McNellis' evaluation for the 2008/2009 year, as a social studies teacher, Mr. McNellis again received all professional remarks, the highest marks possible.

23. At the end of the school year, DCSD elected to renew Mr. McNellis' contract as a Social Studies Teacher and Head Coach for the 2009/2010 school year.

24. For Mr. McNellis' evaluation for the 2009/2010 year, as a social studies teacher, Mr. McNellis again received all professional remarks, the highest marks possible.

25. At the end of the school year, DCSD elected to renew Mr. McNellis' contract as a Social Studies Teacher and Head Coach for the 2010/2011 school year.

26. For Mr. McNellis' evaluation for the 2010/2011 year, as a social studies teacher, Mr. McNellis received all professional remarks and one distinguished remark.

27. Mr. McNellis received comments such as "his students certainly do feel valued and challenged in his classes. He strives to make his lessons rigorous and relevant for his kids."

28. At the end of the school year, DCSD elected to renew Mr. McNellis' contract as a Social Studies Teacher and Head Coach for the 2011/2012 school year.

29. For Mr. McNellis' evaluation for the 2011/2012 year, as a social studies teacher, Mr. McNellis received all highly effective and effective marks, the two highest possible marks.

30. At the end of the school year, DCSD elected to promote Mr. McNellis to Dean of Students for the 2012/2013 school year.

31. This promotion came with a pay increase to \$40,650.00.

32. For Mr. McNellis' evaluation for the 2012/2013 year, as the Dean of Students, Mr. McNellis never received less than a 3.0 rating out of a total 4.0 and was consistently rated as highly effective.

33. At the end of the school year, DCSD elected to renew Mr. McNellis' contract as the Dean of Students and Head Coach for the 2013/2014 school year.

34. Mr. McNellis also received a pay increase to \$42,276.00 for the 2013/2014 school year.

35. At the end of the school year, DCSD elected to renew Mr. McNellis' contract as the Dean of Students and Head Coach for the 2014/2015 school year.

36. Mr. McNellis was given a raise to \$43,755.66 for the 2014/2015 school year.

37. At the end of the school year, DCSD elected to promote Mr. McNellis to the positions of Athletic Director and Assistant Principal for the 2016/2017 school year.

38. This promotion came with a pay increase to an annual salary of approximately \$90,000.

39. At the time of his termination, Mr. McNellis was earning approximately \$98,285 annually as both the Athletic Director and Assistant Principal.

40. As the Assistant Principal Mr. McNellis was part of the Administrative Team, which would discuss some aspects of extracurricular activities.

41. The Administrative Team was made up of Principal Ottmann and the Assistant Principals including Mr. McNellis.

42. The Administrative Team would meet once a week to discuss any issues that may arise with respect to extracurricular activities.

43. The Administrative Team would not debate, discuss, or otherwise address the issues under their purview in a public forum or with the entire staff at Ponderosa.

44. The Administrative Team was not responsible for determining the content of the school plays that were produced by the theatre department.

45. Throughout his employment with DCSD, Mr. McNellis had consistently received excellent performance reviews, as well as a steady increase in salary.

46. Until October 5, 2020, Mr. McNellis never received disciplinary action.

47. During the 2020 school year, Mr. McNellis was the parent of a child who was attending Ponderosa.

48. From the 2008 school year until his termination, Mr. McNellis was the Fellowship of Christian Athletes (“FCA”) point person for Ponderosa.

49. Defendant was aware that Mr. McNellis was the FCA point person for Ponderosa.

The Laramie Project Emails

50. On October 2, 2020, during the peak of the COVID-19 pandemic, Ms. Kayla Diaz, Ponderosa’s Theatre Director, sent a group email to the entire Ponderosa staff including Mr. McNellis regarding the content of a planned school play.

51. Ms. Diaz did not discuss the content of the school play with the Administrative Team prior to sending an email to the entire Ponderosa staff soliciting feedback.

52. Ms. Diaz did not send an email or otherwise address the issues regarding the school play with the Administrative Team prior to sending an email to the entire staff at Ponderosa.

53. In her October 2, 2022, email, Ms. Diaz informed all staff members that Ponderosa's Theatre Company would be performing The Laramie Project on October 23 and 24 of 2020.

54. The Laramie Project is a religiously charged play that covers distressing material. The play depicts the aftermath of the 1998 murder of Matthew Shepard in Laramie, Wyoming. The murder is widely acknowledged to have been a hate crime motivated by Shepard's sexuality.

55. The play consists of a series of interviews from members of the Laramie community. Several of the characters interviewed are Christian leaders, some of whom share unsavory opinions regarding Shepard's murder, and cite their Christian faith as the reason for their views.

56. In her October 2, 2020, email, Ms. Diaz acknowledged the controversial nature of the play. The email states, in relevant part:

Due to language and content discussed in the show (there is no violence shown, only discussed) this is not a family-friendly show. We are advertising "[f]or mature audiences" and I would generally recommend high school age and up. We will be reaching out more soon about advertising in the school, but it is important that I can answer any question you may have and that you are aware of the nature of the play so that if we have students who have an aggressively adverse reaction to our show choice that you can support us in helping students understand. This is a play about perspectives, and we would not want anyone in the school to believe we are making a statement against anything other than hate and violence.

57. In the October 2, 2022, email, Ms. Diaz specifically acknowledges the general effect on the public the play would have stating that, "it is not a family-friendly show", and the

school was “advertising ‘[f]or mature audiences’”, and that she “would generally recommend high school age and up.”

58. Ms. Diaz’s October 2, 2020, email specifically elicited responses from the rest of the staff stating that she would be happy to “answer any questions [they] may have.”

59. On October 2, 2020, Mr. McNellis responded to the email chain created by Ms. Diaz and stated:

Thanks Kayla [Ms. Diaz], I appreciate the email and I really do admire the hard work that you do. As a Dad of a student here and also as an employee in the school, what is my recourse if I disagree with the production? Was this a heads up to see if everyone is cool?

60. Mr. McNellis’ response was written on Friday evening and was written as a father of a student at Ponderosa, asking what recourse he may have to a school production that is not family friendly.

61. Several staff members responded to Ms. Diaz’s email offering their expertise.

62. Mr. Monroe, the history teacher, responded to the October 2, 2020, email from Ms. Diaz acknowledging the difficulty of the subject matter and offering to help by providing a “Social Studies perspective,”

63. Ms. Carda responded and emphasized that, “[n]ot everyone has to agree with every ideology that exists, but it is the discourse that is invoked that matters.”

64. Mr. McNellis responded to the emails from the other staff and offered to provide a Christian perspective.

65. Mr. McNellis made it clear that offer was in his capacity as a father and not an administrator stating, “[f]or the record, all of administration does not agree with me on this. I am totally solo.”

66. Between October 2, 2021, and October 5, 2021, the emails regarding The Laramie Project were shared with DCSD’s Human Resources Director, Cathy Franklin, the Director of Schools, Daniel Winsor, and Ponderosa Principal, Tim Ottmann.

Ponderosa’s Discrimination and Retaliation Toward Mr. McNellis

67. On Saturday, Mr. Winsor called Mr. McNellis and informed him that Mr. McNellis needed to stay home on Monday.

68. Mr. Winsor was acting in his official capacity as an employee of DCSD based on the authority delegated to him by the Board when he instructed Mr. McNellis to stay home.

69. Mr. McNellis asked Mr. Winsor why he was being told to stay home and if he acted unprofessionally in any way.

70. Mr. Winsor informed Mr. McNellis that nothing was unprofessional, but that Ponderosa needed Mr. McNellis to stay home Monday because of his “religious comments.”

71. Mr. McNellis questioned Defendant’s decision to have him stay home because he believed he was being treated differently based on the “religious comments.”

72. Mr. McNellis was shocked by Defendant’s decision but Mr. Winsor informed Mr. McNellis that he did not need to worry.

73. Defendant’s decision to instruct Mr. McNellis to stay home was an adverse employment decision.

74. Defendant’s decision to instruct Mr. McNellis to stay home was due to Mr. McNellis’ decision to express his First Amendment views, as a father, regarding his Christian beliefs.

75. At the time Defendant instructed Mr. McNellis to stay home, Defendant did not have a legitimate non-discriminatory reason to request that he stay home.

76. Mr. McNellis was treated differently than the other teachers that responded to the email chain based on his religion and decision to express the same under the protection of the First Amendment.

77. On October 5, 2020, three days after Mr. McNellis expressed his Christian belief in a public forum, Ms. Franklin, Mr. Winsor, and Mr. Ottmann called Mr. McNellis for a virtual meeting (the “Meeting”).

78. Ms. Franklin, Mr. Winsor, and Mr. Ottmann were acting in their official capacity as employees of DCSD based on the authority delegated to them by the Board during the Meeting.

79. Ms. Franklin, Mr. Winsor, and Mr. Ottmann had reviewed the emails regarding the Laramie Project prior to the Meeting.

80. Ms. Franklin led the meeting and informed Mr. McNellis that Defendant was investigating him due to the “religious comments.”

81. Defendant informed Mr. McNellis that he was being placed on leave during the Meeting.

82. Mr. McNellis was not given a full and equal opportunity to defend his “religious comments” from his emails during the Meeting and had no recourse against the decision to place him on leave.

83. Mr. McNellis objected to Defendant’s conduct during the Meeting because he did not feel comfortable with the way the meeting went because the Defendant was going to suspend him and investigate him for the “religious comments.”

84. Ms. Franklin informed Mr. McNellis that there was no need for a HR representative because the school was “looking out” for Mr. McNellis as well.

85. Upon information and belief, David Ray, the Chairman of the Board of Education for Douglas County, was aware of Defendant's investigation into Mr. McNellis.

86. Upon information and belief, Mr. Ray knew of email complaints against Mr. McNellis that were related to his emails in response to the Laramie Project.

87. Defendant's decision to place Mr. McNellis on leave was an adverse employment decision.

88. Defendant's decision to place Mr. McNellis on leave was due to Mr. McNellis' decision to express his First Amendment views, as a father, regarding his Christian beliefs.

89. Defendant's decision to place Mr. McNellis on leave was in retaliation to Mr. McNellis' decision to express his views under the First Amendment regarding his Christian belief and to complain about the same in subsequent meetings with DCSD's staff.

90. At the time Defendant placed Mr. McNellis on leave, Defendant did not have a legitimate non-discriminatory reason to place Mr. McNellis on leave or to terminate Mr. McNellis.

91. At the conclusion of the Meeting, Defendant informed Mr. McNellis that it would be conducting further investigation regarding Mr. McNellis' email related to The Laramie Project.

92. At the conclusion of the Meeting, however, Defendant already possessed all the emails related to Mr. McNellis' statement(s) regarding The Laramie Project.

93. At the conclusion of the Meeting, there was nothing further to investigate regarding Mr. McNellis' email statements related to The Laramie Project.

94. Instead, Defendant elected to "investigate" Mr. McNellis based on his expression of his Christian faith as a father of a student at Ponderosa.

95. While on leave, Mr. McNellis complained to Principal Ottmann that he was being investigated based on his Christian beliefs.

96. When asked by several co-workers about his leave, Mr. McNellis complained that he was on leave while Defendant investigated him based on his Christian beliefs.

97. Defendant was aware that Mr. McNellis had complained to Principal Ottmann and other staff members regarding retaliation based on his religious beliefs.

98. Defendant's decision to investigate Mr. McNellis based on his statement regarding his Christian faith constitutes an adverse employment action.

99. Defendant's decision to investigate Mr. McNellis based on his statement regarding his Christian faith was retaliatory.

100. Defendant used the investigation to try to obtain evidence that it could use to support a decision to terminate Mr. McNellis.

101. During its investigation, Defendant received a complaint from a teacher claiming that Mr. McNellis was part of a good ole boys club. The allegation that Mr. McNellis was part of a good ole boys club included numerous other male teachers, and administrators including Principal Ottmann, Jarod Nicholson, and Joseph Schubarth.

102. None of the other foregoing male teachers or administrators were investigated, placed on leave, or otherwise disciplined.

103. Mr. McNellis was the only individual investigated, placed on leave, and/or disciplined based on the vague allegations that there was a good ole boys club at Ponderosa.

104. Defendant's decision to discipline Mr. McNellis based on a vague and ambiguous allegation that he was part of a good ole boys club was pretextual.

105. Mr. McNellis was treated less favorably than his counterparts who were also named as part of a good ole boys club based on his decision to express his religious affiliation and exercise his First Amendment rights.

106. During its investigation, Defendant also uncovered a single email indicating that Mr. McNellis had complained “as a parent” about Ponderosa’s communications regarding its COVID safety protocols.

107. Other faculty and administrators complained about Ponderosa’s communications regarding its COVID safety protocols.

108. No other faculty or administrators were investigated, placed on leave, and/or disciplined based on their complaints regarding Ponderosa’s communications related to its safety protocols.

109. Defendant’s decision to terminate Mr. McNellis based on a complaint related to Ponderosa’s communications regarding its COVID safety protocols was pretextual.

110. Mr. McNellis was treated less favorably than his counterparts who also complained about Ponderosa’s COVID safety protocols.

111. To the extent Defendant claims it terminated Mr. McNellis based on COVID protocols, Defendant’s justification is pretextual.

112. Mr. McNellis was never consulted or given the opportunity to defend himself during the purported investigation.

113. On October 29, 2020, after a purported investigation, Defendant terminated Mr. McNellis’ employment.

114. Defendant directly cited Mr. McNellis’ emails regarding The Laramie Project as the reason for his termination.

115. Mr. Ottmann, the Principal of Ponderosa, wrote a letter admitting that the contents of Mr. McNellis' email regarding The Laramie Project were the "catalyst for his firing."

116. Mr. Ottmann further admitted in the letter that Mr. McNellis was terminated based on his religious views.

117. Defendant knew of the emails sent by Mr. McNellis regarding the Laramie Project, knew of the investigation into Mr. McNellis relating to the religious comments, knew of the expansion of the investigation into other issues beyond the religious comments, and participated in the decision to terminate Mr. McNellis.

118. As a direct and proximate result of Defendant's conduct, Mr. McNellis has been damaged in an amount to be proven at trial.

IV. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Discrimination - Title VII, 42 U.S.C. § 2000 e-2(a)(1))

119. At all relevant times, Mr. McNellis is considered a protected class under Title VII because he is a Christian. 42 U.S.C. § 2000e-2(a)(1).

120. At all relevant times, Mr. McNellis was qualified to perform the position of Assistant Principal and Athletic Director.

121. Defendant discriminated against Mr. McNellis based on his religion.

122. Defendant treated Mr. McNellis less favorably than his similarly situated employees by taking the following actions including, but not limited to, the following:

- a. Investigating only Mr. McNellis despite multiple complaints against other members of Defendant's staff and even members of the Administration;
- b. Failing to involve Mr. McNellis in the investigation against him;

- c. Failing to interview anyone who would support Mr. McNellis or provide a different opinion than those who Defendant interviewed;
- d. Placing Mr. McNellis on administrative leave; and
- e. Terminating Mr. McNellis based on comments he made in his individual capacity as a father of a child at Defendant's school.

123. As a result of Defendant's actions, Mr. McNellis has suffered damages, including but not limited to the loss of past and future wages and benefits, loss of professional opportunities, emotional distress, and mental pain and anguish.

124. Mr. McNellis is entitled to his attorney's fees and costs incurred in this matter.

125. Mr. McNellis is further entitled to all other forms of relief as permitted under Title VII.

SECOND CLAIM FOR RELIEF
(Retaliation - Title VII, 42 U.S.C. § 2000e-3(a))

121. Mr. McNellis hereby incorporates the allegations as if fully set forth herein.

122. At all relevant times, Mr. McNellis is considered a protected class under Title VII because he is a Christian. 42 U.S.C. § 2000e-2(a)(1).

123. At all relevant times, Mr. McNellis was qualified to perform the position of Assistant Principal and Athletic Director.

124. Defendant retaliated against Mr. McNellis based on his religion.

125. As a direct result of Mr. McNellis' identification as Christian male, Defendant subjected Mr. McNellis to actions which a reasonable employee would have found materially adverse.

126. Defendant treated Mr. McNellis more adversely than similarly situated co-workers.

127. Defendant's retaliation included, but was not limited to:
 - a. Investigating only Mr. McNellis despite multiple complaints against other members of Defendant's staff and even members of the Administration;
 - b. Investigating Mr. McNellis based on his religious comments despite his objections regarding the same;
 - c. Placing Mr. McNellis on administrative leave; and
 - d. Terminating Mr. McNellis based on comments he made in his individual capacity as a Christian and a father of a child at Defendant's school.

128. Defendant's retaliatory conduct was the direct and proximate cause of Mr. McNellis' injuries, damages, and losses.

129. As a result of Defendant's actions, Mr. McNellis has suffered damages, including but not limited to the loss of past and future wages and benefits, loss of professional opportunities, emotional distress, and mental pain and anguish.

130. Mr. McNellis is entitled to his attorney's fees and costs incurred in this matter.

131. Mr. McNellis is further entitled to all other forms of relief as permitted under Title VII.

THIRD CLAIM FOR RELIEF

(Discrimination – CADA, C.R.S. §§ 24-34-401 *et seq*)

132. Mr. McNellis hereby incorporates the allegations as if fully set forth herein.

133. At all relevant times, Mr. McNellis is considered a protected class under CADA because he is a Christian.

134. At all relevant times, Mr. McNellis was qualified to perform the position of Assistant Principal and Athletic Director.

135. Defendant discriminated against Mr. McNellis based on his religion.

136. Defendant treated Mr. McNellis more adversely than similarly situated co-workers by taking the following actions including, but not limited to, the following:

- a. Investigating only Mr. McNellis despite multiple complaints against other members of Defendant's staff and even members of the Administration;
- b. Failing to involve Mr. McNellis in the investigation against him;
- c. Failing to interview anyone who would support Mr. McNellis or provide a different opinion than those who Defendant interviewed;
- d. Placing Mr. McNellis on administrative leave; and
- e. Terminating Mr. McNellis based on comments he made in his individual capacity as a father of a child at Defendant's school.

137. Defendant's conduct was the direct and proximate cause of Mr. McNellis' injuries, damages, and losses.

138. As a result of Defendant's actions, Mr. McNellis has suffered damages, including but not limited to the loss of past and future wages and benefits, loss of professional opportunities, emotional distress, and mental pain and anguish.

139. Mr. McNellis is entitled to his attorney's fees and costs incurred in this matter. Mr. McNellis is further entitled to all other forms of relief as permitted under CADA.

FOURTH CLAIM FOR RELIEF
(Retaliation - CADA, C.R.S. §§ 24-34-401 *et seq*)

141. Mr. McNellis hereby incorporates the allegations as if fully set forth herein.

142. At all relevant times, Mr. McNellis is considered a protected class under CADA because he is a Christian.

143. At all relevant times, Mr. McNellis was qualified to perform the position of Assistant Principal and Athletic Director.

144. Defendant retaliated against Mr. McNellis based on his religion as described herein.

145. As a direct result of Mr. McNellis' opposition to the activities prohibited by CADA, Defendant subjected Mr. McNellis to actions which a reasonable employee would have found materially adverse.

146. Defendant treated Mr. McNellis more adversely than similarly situated co-workers.

147. Defendant's retaliation included, but was not limited to:

- a. Investigating only Mr. McNellis despite multiple complaints against other members of Defendant's staff and even members of the Administration;
- b. Investigating Mr. McNellis based on his religious comments despite his objections regarding the same;
- c. Placing Mr. McNellis on administrative leave; and
- d. Terminating Mr. McNellis based on comments he made in his individual capacity as a Christian and a father of a child at Defendant's school.

148. Defendant's retaliatory conduct was the direct and proximate cause of Mr. McNellis' injuries, damages, and losses.

149. As a result of Defendant's actions, Mr. McNellis has suffered damages including but not limited to the loss of past and future wages and benefits, loss of professional opportunities, emotional distress, and mental pain and anguish.

150. Mr. McNellis is entitled to his attorney's fees and costs incurred in this matter.

151. Mr. McNellis is further entitled to all other forms of relief as permitted under CADA.

FIFTH CLAIM FOR RELIEF
(Retaliation – Free Speech, 42 USC § 1983)

152. Mr. McNellis hereby incorporates the foregoing allegations as if fully set forth herein.

153. Section 1983 of 42 U.S.C. in pertinent part states “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress...”

154. When Mr. McNellis expressed his concern, as a parent, regarding the performance of The Laramie Project at Ponderosa, he was exercising his right to free speech under the First Amendment to the U.S. Constitution and under 42 U.S.C. §1983.

155. Mr. McNellis’ speech on October 2, 2020, related to a school production was on a topic of public concern.

156. Defendant placed Mr. McNellis on administrative leave and launched their investigation in retaliation against Mr. McNellis’ exercise of protected free speech.

157. Defendant terminated Mr. McNellis based on Mr. McNellis’ exercise of protected free speech.

158. When Defendant retaliated against Mr. McNellis, as a public entity, they did so under the color of state law.

159. As a parent of a child at Ponderosa High School, Mr. McNellis’ concern for the wellbeing of his child and for the other students at Ponderosa drastically outweighed Ponderosa’s

interest in performing a highly controversial play, in what was already a stressful time for the students.

160. Defendant's actions to place Mr. McNellis on administrative leave, conduct an investigation, and terminate him proximately caused Mr. McNellis significant damages including but not limited to, mental anguish, emotional distress, loss of enjoyment of life, and damage to his reputation.

161. Defendant's decision to terminate Mr. McNellis proximately caused Mr. McNellis significant damages, including but not limited to, loss of back pay, loss of front pay, mental anguish, emotional distress, loss of enjoyment of life, and damage to his reputation.

162. Mr. McNellis is further entitled to all other forms of relief as permitted under 42 USC § 1983.

PRAYER FOR RELIEF

WHEREFORE, Mr. McNellis respectfully requests a trial by jury on all issues so triable, and damages, as follows:

- a. The Court award Plaintiff compensatory damages, including but not limited to those for emotional distress and pain and suffering;
- b. The Court award Plaintiff actual economic damages and consequential damages arising out of Defendant's conduct as established at trial;
- c. The Court award Plaintiff punitive damages for claims as allowed by law and in amount to be determined at trial;
- d. The Court award Plaintiff his reasonable attorneys' fees and costs in this action as permitted by law;

- e. The Court award pre-judgment and post-judgment interest at the highest lawful rate; and
- f. The Court award any such further relief as this Court deems just and proper.

Plaintiff requests a trial to a jury on all issues so triable.

Dated: September 20, 2022

Respectfully submitted,

s/ Spencer J. Kontnik

Spencer J. Kontnik, #47447

Matthew Fenicle, # 57055

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From: COD_ENotice@cod.uscourts.gov
Sent: Wednesday, September 21, 2022 9:23 AM
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Subject: Activity in Case 1:22-cv-01636-RM-STV McNellis v. Douglas County School District Order on Motion to Dismiss

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U.S. District Court - District of Colorado

District of Colorado

Notice of Electronic Filing

The following transaction was entered on 9/21/2022 at 9:23 AM MDT and filed on 9/21/2022

Case Name: McNellis v. Douglas County School District

Case Number: [1:22-cv-01636-RM-STV](#)

Filer:

Document Number: 26(No document attached)

Docket Text:

Upon Plaintiff's [23] Notice of Filing Amended Complaint, Defendant's [19] Motion to Dismiss is found to be MOOT. See, e.g., *Gilles v. United States*, 906 F.2d 1386, 1389 (10th Cir. 1990) ("a pleading that has been amended under Rule 15(a) supersedes the pleading it modifies") (internal quotation marks omitted). SO ORDERED, by Magistrate Judge Scott T. Varholak on 9/21/22. Text Only Entry(stvlc3, Andrew)

1:22-cv-01636-RM-STV Notice has been electronically mailed to:

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1:22-cv-01636-RM-STV Notice has been mailed by the filer to:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 22-cv-01636-RM-STV

COREY MCNELLIS,

Plaintiff,

v.

DOUGLAS COUNTY SCHOOL DISTRICT,

Defendant.

MOTION TO DISMISS FIRST AMENDED COMPLAINT

Defendant Douglas County School District (the “School District”) moves to dismiss Plaintiff’s First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6).

CONFERRAL

Undersigned counsel conferred with Plaintiff’s counsel regarding the arguments in this motion. Plaintiff opposes the motion.

INTRODUCTION

This is an employment case concerning the School District’s termination of Plaintiff Corey McNellis (“McNellis”), a former high school administrator. McNellis asserts a § 1983 claim against the School District for First Amendment free speech retaliation. Claiming he was terminated because of his Christian religion, McNellis also asserts Title VII and Colorado Anti-Discrimination Act (“CADA”) discrimination and retaliation claims against the School District. However, as explained below, the allegations in McNellis’ First Amended complaint fail to state a claim upon which relief can be granted.

LEGAL STANDARD

As the Court noted in *Citizens for Const. Integrity v. United States*, 2021 WL 4241336, at

*1 (D. Colo. Aug. 30, 2021) (unpublished):

In evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court must accept as true all well-pleaded factual allegations in the complaint, view those allegations in the light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor. *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1136 (10th Cir. 2014); *Mink v. Knox*, 613 F.3d 995, 1000 (10th Cir. 2010). The complaint must allege a "plausible" right to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007); see also *id.* at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level."). Conclusory allegations are insufficient, *Cory v. Allstate Ins.*, 583 F.3d 1240, 1244 (10th Cir. 2009), and courts "are not bound to accept as true a legal conclusion couched as a factual allegation," *Twombly*, 550 U.S. at 555 (quotation omitted).

RELEVANT FACTUAL ALLEGATIONS

The School District is a Colorado public school district. First Am. Compl. (Doc. 24, the "Complaint"), ¶ 4. It is governed by a Board of Education ("Board"). *Id.* at ¶ 5.

Pursuant to Board Policy CBA/CBC, the Board has delegated day-to-day School District operations to the District's Superintendent; however, it has specifically retained the right to make employment decisions, stating in the Policy that the Superintendent shall only make recommendations to the Board in that regard. Ex. A ("The Superintendent shall: ... Recommend to the Board personnel selection, employment, assignment, transfer, and suspension").¹

¹ The Court may take judicial notice of public documents, such as School District policies, without converting the motion to one for summary judgment. *Shifrin v. Colorado*, 2010 WL 2943348, *5 (10th Cir. 2010), citing *Van Woudenberg ex rel Foor v. Gibson*, 211 F.3d 560, 568 (10th Cir. 2006).

McNellis worked at the School District’s Ponderosa High School (“Ponderosa”). *Id.* at ¶ 17. During the 2020/21 school year, he was employed as an Assistant Principal and Athletic Director. *Id.* at ¶¶ 37, 39. McNellis’ child also attended Ponderosa that year. *Id.* at ¶ 47.

Among McNellis’ job duties was to “coordinate effective communications strategies among the students, the community, the faculty and the administration.” Ex. B, Assistant Principal/Athletic Director – High School Job Description.² “McNellis was part of [Ponderosa’s] Administrative Team, which would discuss some aspects of extracurricular activities.” Complaint, ¶ 40. The Administrative Team, which consisted of Ponderosa Principal Tim Ottmann and the Assistant Principals, met privately once a week to discuss extracurricular activities. *Id.* at ¶¶ 41–43. “The Administrative Team was not responsible for determining the content of the school plays that were produced by the theater department.” *Id.* at ¶ 44. McNellis was “the Fellowship of Christian Athletes (“FCA”) point person for Ponderosa” for twelve years preceding his termination, a position the School District knew he held. *Id.* at ¶¶ 48-49.

On October 2, 2020, Ponderosa Theater Director Kayla Diaz (“Diaz”) “sent a group email to the entire Ponderosa staff including McNellis regarding the content of a planned school play.” *Id.* at ¶ 50. Diaz had not discussed the play with the Administrative Team prior to “sending an email to the entire Ponderosa staff soliciting feedback.” *Id.* at ¶¶ 51–52. Diaz “informed all staff members that Ponderosa’s Theatre Company would be performing *The Laramie Project* on October 23-24, 2020.” *Id.* at ¶ 53. According to McNellis, *The Laramie Project* “is a religiously charged play that covers distressing material. The play depicts the aftermath of the 1998 murder

² The Court may take judicial notice of public documents, such as School District employee job descriptions, without converting the motion to one for summary judgment. *Shifrin*, 2010 WL 2943348 at * 5.

of Matthew Shepard in Laramie, Wyoming. The murder is widely acknowledged to have been a hate crime motivated by Shepard’s sexuality. The play consists of a series of interviews from members of the Laramie community. Several of the characters interviewed are Christian leaders, some of whom share unsavory opinions regarding Shepard’s murder, and cite their Christian faith as the reason for their views.” *Id.* at ¶¶ 54-55.

Diaz’s email warned that it was “not a family-friendly show,” but “generally [recommended for] high school age and up” and that “it [was] important that [she could] answer any question [the staff] may have and that [the staff was] aware of the nature of the play so that if we have students who have an aggressively adverse reaction to our show choice that [the staff] can support us in helping students understand. ... We would not want anyone in the school to believe we are making a statement against anything other than hate and violence.” *Id.* at ¶¶ 56-57.

McNellis responded with an email to the entire Ponderosa staff: “Thanks Kayla, I appreciate the email and I really do admire the hard work that you do. As a Dad of a student here and also an employee in the school, what is my recourse if I disagree with the production? Was this a heads up to see if everyone is cool?” *Id.* at ¶ 59. Other staff members also responded to Diaz’s email, with one “acknowledging the difficulty of the subject matter and offering to help by providing a ‘Social Studies perspective’” and another indicating that “not everyone has to agree with every ideology that exists, but it is the discourse that is invoked that matters.” *Id.* at ¶¶ 62-63.

The Amended Complaint alleges that McNellis subsequently “responded to the emails from the other staff and offered to provide a Christian perspective.” *Id.* at ¶ 64. Those “responses” consisted of three additional emails to the entire Ponderosa staff: (i) at 9:37 p.m., McNellis wrote “As a christian [sic] I would love to collaborate with your project. Please let me know if the love

that Jesus can provide will help your play”; (ii) at 9:52 p.m., he wrote “For the record, all of administration does not agree with me on this. I am totally solo. Good night Mustangs!”; and (iii) at 10:27 a.m. on October 3, 2021, he wrote “I understand people support this. Forgive me for having a different viewpoint and the audacity to publicly share it.” Ex. C.³ McNellis sent the emails using his School District email address and used a signature identifying himself as the Ponderosa “Athletic Director/Assistant Principal.” *Id.*

The emails were shared with School District Human Resources Director Cathy Franklin (“Franklin”), School District Director of Schools Daniel Winsor (“Winsor”), and Ponderosa Principal Tim Ottmann (“Ottmann”). Complaint, ¶ 66. On Saturday, October 5, 2021, Winsor instructed McNellis to stay home the following Monday and, when McNellis asked why, told McNellis it was “because of his ‘religious comments.’” *Id.* at ¶¶ 67, 69-70. “McNellis questioned Defendant’s decision to have him stay home because he believed he was being treated differently based on the ‘religious comments.’” *Id.* at ¶ 71. Three days later, Franklin, Winsor, and Ottmann convened a meeting with McNellis to inform him that he was being placed on leave and that they “would be conducting further investigation regarding Mr. McNellis’ email related to The Laramie Project.” *Id.* at ¶¶ 77, 79–81, and 91. This despite that the School District and Franklin “already possessed all the emails related to Mr. McNellis’ email related to The Laramie Project.” *Id.* at ¶ 92. “Mr. McNellis objected to Defendant’s conduct during the Meeting because he did not feel comfortable with the way the meeting went because the Defendant was going to suspend him and investigate him for the ‘religious comments.’” *Id.* at ¶ 83. “Upon information and belief, David

³ The Complaint refers to McNellis’ emails. *E.g.*, ¶¶ 59 and 64-65 A defendant may submit an indisputably authentic copy of a document referred to in a plaintiff’s complaint with a motion to dismiss without converting the motion to one for summary judgment. *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384-84 (10th Cir. 1997).

Ray, the Chairman of the Board of Education for [the District], was aware of Defendant’s investigation into Mr. McNellis” and also “knew of email complaints against Mr. McNellis that were related to his emails in response to the Laramie Project.” *Id.* at ¶¶ 85–86. “While on leave, Mr. McNellis complained to Principal Ottmann that he was being investigated based on his Christian beliefs.” *Id.* at ¶ 95. He also complained to several coworkers. *Id.* at ¶ 96.

During the investigation, the School District and Franklin “received a complaint from a teacher claiming that Mr. McNellis was part of a good ole boys club” that included “numerous other male teachers, and administrators including Principal Ottmann, Jarod Nicholson, and Joseph Schubarth.” *Id.* at ¶ 101. But none of the other alleged “good ole boys club” members were “investigated, placed on leave, or otherwise disciplined” based on those allegations. *Id.* at ¶ 102. In addition, the investigation “uncovered a single email indicating that Mr. McNellis had complained ‘as a parent’ about Ponderosa’s communications regarding its COVID safety protocols.” *Id.* at ¶ 106. However, other “faculty and administrators” had the same complaints, and none of them were “investigated, placed on leave, or otherwise disciplined.” *Id.* at ¶¶ 107 - 108.

“On October 29, [2021] ... Defendants terminated Mr. McNellis’ employment.” *Id.* at ¶ 113. McNellis’ emails regarding *The Laramie Project* were directly cited as the reason for his termination. *Id.* at ¶ 114. After McNellis was terminated and after Ottmann retired as Ponderosa’s principal, Ottmann wrote a letter to the District in which he asserted his “perspective about what happened to [McNellis],” stating that although he was not the decisionmaker regarding McNellis’ termination, he believed McNellis’ religious views played a role. *See Ex. D* (“it wasn’t my decision

to make”).⁴

ARGUMENT

I. § 1983 First Amendment Retaliation claim (Claim 5).

District courts evaluate a public employee’s First Amendment claim under the five-prong *Garcetti/Pickering* test. *Roberts v. Winder*, 16 F.4th 1367, 1381 (10th Cir. 2021). There, a court must determine whether (1) the speech was made pursuant to an employee’s official duties; (2) the speech was on a matter of public concern; (3) the government’s interests as an employer in promoting efficient public service outweigh a plaintiff’s free speech interests; (4) the speech was a motivating factor in the adverse employment action; and (5) the same employment decision would have been made without the protected speech. *Id.*

- i. McNellis failed to plead sufficient facts to allege that his speech was *not* made pursuant to his official duties.

A public employee’s speech made pursuant to his official duties does not enjoy the protection of the First Amendment. *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006). The plaintiff carries the burden to establish that the contested speech was not made pursuant to official duties. *Casey v. W. Las Vegas Ind. Sch. Dist.* 473 F.3d 1323, 1328 (10th Cir. 2007). The Tenth Circuit has “taken a broad view of the meaning of speech that is pursuant to an employee’s official duties.” *Rohrbough v. Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 746 (10th Cir. 2010). It takes “a practical view of all the facts and circumstances surrounding the speech and the employment relationship, looking both to the content of the speech, as well as the employee’s chosen audience, to determine whether the speech is made pursuant to an employee’s official duties.” *Id.*; *Brammer-*

⁴ The complaint refers to Ottmann’s letter and thus it may be considered without converting this motion to one for summary judgment. See *GFF Corp.*, 130 F.3d at 1384-84.

Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1204 (10th Cir. 2007). “Speech is made pursuant to official duties if it is generally consistent with the type of activities an employee was paid to do.” *Id.* at 1203.

Here, McNellis admitted in the emails he sent about *The Laramie Project* that he was speaking as a public employee. *See* Complaint, ¶ 59 (“As a Dad of a student here and also an employee in the school...”). Despite this straightforward admission, McNellis apparently contends that his speech is not foreclosed from protection by *Garcetti* because he was simultaneously speaking as a parent of a Ponderosa student. However, the Supreme Court’s well-known basic rule is “that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” *Garcetti*, 547 U.S. at 421. McNellis’ admission that he was speaking as a public employee means that—notwithstanding his characterization of his speech—he was not speaking as a citizen. *See id.* McNellis’ conclusory allegations that he was speaking “in his capacity of a father” and other similar statements are insufficient to show that he was speaking as a private citizen. *See Twombly*, 550 U.S. at 555 (quotation omitted). The conclusory allegation is particularly insufficient when it strikes against McNellis’ own admission that he was speaking as a School District employee.

In any event, “the practical view of the facts and circumstances surrounding the speech” the Tenth Circuit prescribes confirms that McNellis was speaking as an employee. *See Rohrbough*, 596 F.3d at 746; *Brammer-Hoelter*, 492 F.3d at 1204. Even though the speech at issue need not be encapsulated in an employee’s job description to be considered pursuant to the employee’s official duties, *Brammer-Hoelter*, 492 F.3d at 1203, McNellis’ job description did just that: he was

responsible for “[coordinating] effective communications strategies among the students, the community, the faculty and the administration.” McNellis’ communications concerning *The Laramie Project* fall squarely within that duty. Moreover, McNellis was using his School District email address through the School District email system to simultaneously email a captive audience of the entire Ponderosa staff about a School District program conducted at a school in which he was an administrator, signing the emails as the Ponderosa Athletic Director/Assistant Principal. *See, e.g., Weintraub v. Bd. of Educ. of City Sch. Dist. of City of New York*, 593 F.3d 196, 204 (2nd Cir. 2010) (speech through channels only available to those working in the school not made as citizen).

Furthermore, McNellis admits that part of his job duties involved meeting “once a week to discuss any issues that may arise with respect to extracurricular activities.” Am. Compl., ¶ 42. Although he states that the Administrative Team did not hold such discussion in a “public forum or with the entire staff at Ponderosa,” he does not allege that he was prohibited from doing so. Nor does his statement that “all administration does not agree with [him]” insulate him from a finding that he was speaking pursuant to his official duties. To the contrary, the facts and circumstances of the speech at issue confirm that its protection is foreclosed by *Garcetti* and its progeny. This requires dismissal of the First Amendment claim.

- ii. McNellis failed to plead sufficient facts to allege that his speech was a matter of public concern.

Finally, McNellis’ speech about a district-sanctioned play is not protected activity because it does not amount to speech about a matter of public concern. Matters of public concern are those that “can be fairly considered as relating to any matter of political, social, or other concern to the community.” *Withiam v. Baptist Health Care of Okla.*, 98 F.3d 581, 583 (10th Cir. 1996). “It is

not enough that its subject matter could in [certain] circumstances, [be] the topic of a communication to the public that might be of general interest. What is actually said on that topic must itself be of public concern.” *Wilson v. City of Littleton, Co.*, 732 F.2d 765, 768 (10th Cir. 1984). An employee’s personal feeling on a matter that could be of general interest to the public is not a matter of public concern under the First Amendment. *Id.* Although the school play could generally have been of interest to the public, McNellis’ personal feelings about it are not matters of public concern sufficient to give rise to First Amendment protection. Moreover, courts have held that internal speech by school employees consisting of disputes over school play productions and other curricular/administrative matters does not amount to a matter of public concern. *See, e.g., Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 368-69 (4th Cir. 1998); *Finch v. Fort Bend Ind. Sch. Dist.*, 333 F.3d 555, 563-64 (5th Cir. 2003). McNellis’ First Amendment claim must also be dismissed for this reason.

- iii. McNellis failed to allege his speech was a motivating factor in any decision by the School District’s Board of Education, the only entity who can bind the School District to liability under § 1983.

A municipality cannot be held liable for the actions of its employees pursuant to § 1983 under a theory of *respondeat superior*. *Marshall v. Columbia Lea Reg. Hosp.*, 345 F.3d 1157, 1177 (10th Cir. 2003) (citation omitted). Instead, a plaintiff must show that the unconstitutional actions of an employee were (1) carried out by an official with final policy making authority with respect to the challenged action or (2) representative of an official policy or custom of the municipal institution. *Murrell v. School Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1249 (10th Cir. 1999). These principles apply to school districts, which are “municipalities” for purposes of § 1983. *Jett v. Dallas Ind. Sch. Dist.*, 491 U.S. 701, 733 (1989). In identifying final municipal policymakers,

the courts must examine state laws and local ordinances or regulations to determine where the statutory law places the responsibility for making law or setting policy in a particular area. *Ledbetter v. City of Topeka, Kan.*, 318 F.3d 1183, 1189 (10th Cir. 2003).

To sustain liability against the District, McNellis must prove that the allegedly unconstitutional actions were enacted pursuant to an official custom or policy of the District or an action carried out by a final policymaker for the District. *See Murrell*, 186 F.3d at 1249; *Marshall*, 345 F.3d at 1177. The only delegation of final policymaking authority that can impose liability on the District is legal delegation. *Milligan-Hitt v. Bd. of Trustees, Sheridan Cty., Sch. Dist. No. 2*, 523 F.3d 1219, 1230 (10th Cir. 2008). Colorado law provides that a school district’s board of education has the final policymaking authority to “employ all personnel required to maintain the operations and carry out the education program of the district....” Section 22-32-109(1)(f)(I), C.R.S.

McNellis alleges in paragraphs 8 – 11 of the Amended Complaint that the Board delegated its “powers and duties to the Superintendent and administrative team of DCSD” and to “DCSD’s employees,” including “Ponderosa Principal (Tim Ottmann), DCSD Human Resources Director (Cathy Franklin), and DCSD Director of Schools (Daniel Winsor).” However, legally only the Board has policymaking authority for the District with respect to employment decisions. *See* Section 22-32-109(1)(f)(I), C.R.S.; Ex. A. While McNellis seems to be attempting to argue that the Board *effectively* delegated its decision-making with respect to his employment to the named administrators, *Milligan-Hitt* teaches that this is not sufficient to endow them with policymaking authority. 523 F.3d at 1230. The Board has not legally delegated its decision-making authority with respect to employment to anyone; it could only do so by “legal” action, e.g., adopting a policy.

See Ledbetter, 313 F.3d at 1189 (courts examine state laws and policies to determine who is a final policymaker for the purposes of § 1983 claims). Pursuant to Board Policy CBA/CBC, the Board has in fact *retained* its authority to review employment decisions by charging the Superintendent to make *recommendations* thereon. This ability to review is a hallmark of retaining policymaking authority for the purposes of § 1983. *See Randle v. City of Aurora*, 69 F.3d 441, 448 (10th Cir. 1995) (individual is not a § 1983 final policymaker when decisions are subject to meaningful review). The Amended Complaint describes neither any scenario rising to the level of a custom or policy, nor any action at all by the Board.

Faced with the above authority, McNellis seems to attempt to salvage his claim by alleging that one Board Member, David Ray, knew about McNellis’ *Laramie Project* emails and the ensuing investigation, but it does not allege that Ray shared that information with other Board members, developed any retaliatory animus because of that knowledge, or that that knowledge led the Board in any way to retaliate against McNellis. Even assuming Director Ray harbored the requisite knowledge and retaliatory animus, it alone would be insufficient to support a claim for municipal liability against a governing board that acts as a group. *See Fortner v. County of El Paso*, 2015 WL 10384289, *13 (D. Colo. 2015) (a single board member’s actions cannot bind a multimember board) (unpublished). This precludes McNellis from establishing that his speech was a motivating factor in the employment decision by those who could bind the School District for the purposes of § 1983. *See Bunch v. Ind. Sch. Dist. No. I-050, Osage Cnty.*, 435 Fed. Appx. 784, 789 (10th Cir. 2011) (unpublished), *citing Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1203 (10th Cir. 2008) (“[A plaintiff] must come forward with evidence from which a reasonable

factfinder could conclude that those who decided to fire him had knowledge of his protected activity.”). This presents an additional basis for dismissal of this claim against the School District.

II. Title VII and CADA Discrimination (Claims 1 and 3) – McNellis failed to allege he was terminated under circumstances giving rise to an inference of discrimination.

The substantive analysis for discrimination claims under CADA is identical for discrimination claims under Title VII. *See Agassounon v. Jeppesen Sanderson, Inc.*, 688 Fed. Appx. 507, 509 (10th Cir. 2017) (unpublished); *Barrington v. United Airlines, Inc.*, 566 F. Supp. 3d 1102, 1115 n. 2 (D. Colo. 2021). To establish a prima facie case of discrimination, a plaintiff must demonstrate that (1) he was a member of a protected class; (2) he was qualified and satisfactorily performing his job; and (3) he was terminated under circumstances giving rise to an inference of discrimination. *Barlow v. C.R. England, Inc.*, 703 F.3d 497, 505 (10th Cir. 2012). To establish the third element, McNellis attempts to proceed by alleging preferential treatment given to other employees. *See id.*

However, McNellis fails to allege sufficient facts to satisfy the pleading standard *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) set for this type of case:

A plaintiff must include enough context and detail to link the allegedly adverse employment action to a discriminatory or retaliatory motive with something besides sheer speculation. A plaintiff should have—and must plead—at least some relevant information to make the claims plausible on their face. Thus, it is insufficient for a plaintiff to allege, for instance, that she did not receive an employment benefit that “similarly situated” employees received. A plaintiff’s assertion that she is “similarly situated” to other employees is just a legal conclusion—and a legal conclusion is never enough. Rather, a plaintiff must allege some set of facts—not just legal conclusions—that taken together plausibly suggest differential treatment of similarly situated employees. Pleadings that do not allow for at least a reasonable inference of the legally relevant facts are insufficient.

Bekkem v. Wilkie, 915 F.3d 1258, 1274-75 (10th Cir. 2019) (internal citations and quotations omitted).

Like the unsuccessful plaintiff in *Bekkem*, McNellis refers to “similarly situated employees” whom he believes were treated more favorably. Although he identifies three of them – Ottmann, Nicholson, and Schubarth – as those who were alleged to have been in a “good ole boys club” but were not disciplined, he does not allege any additional details showing that said employees do not share his protected class or that they were not terminated for doing the same acts as him. *See id.* at 1275. While McNellis also suggests that he and other employees engaged in complaints about COVID-19 protocols, yet only he was terminated for them, he does not identify the other employees or state whether they did not share his protected class. Without those additional details, McNellis’ conclusory allegations that he was treated differently than others are “insufficient to indicate that ... discrimination was the plausible, rather than just the possible reason” for his termination. *Id.*

Moreover, McNellis does not identify who he believes made the decision to terminate him and does not state whether they were motivated by anti-Christian animus. McNellis asserts that Ottmann admitted in a letter that the District discriminated against McNellis, but this assertion is unsupported by the letter itself. *See Ex. D.* In any event, Ottmann states that he was not the decisionmaker. *Id.* Moreover, McNellis makes no allegations connecting Ottmann’s allegations to a decision-maker. McNellis seems to believe he states a claim by simply alleging he was terminated at least in part for writing emails in which he stated he was a Christian and mentioned Jesus. Not so. *See Allison v. Digital Mgmt. Inc.*, 2013 WL 5862647, **3-4 (D. Colo. Oct. 13, 2013) (unpublished).

III. Title VII and CADA Retaliation (Claims 2 and 4) – McNellis failed to allege that his protected activity was the but-for cause of his termination.

To state a prima facie case of Title VII or CADA retaliation,⁵ the plaintiff must plausibly allege “(1) that he engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that the protected activity was the but-for cause of the employer’s actions. *Allison*, 2013 WL 5862647, **3-4, citing *Khalik v. United Air Lines*, 671 F.3d 1188, 1193 (10th Cir. 2012); *Deere v. XPO Logistics Freight, Inc.*, 2019 WL 699112, *10 (D. Colo. Feb. 20, 2019) (Moore, J.) (unpublished) (as to third element). Only one of McNellis’ allegations constitutes protected activity and it has no causal connection to McNellis’ termination.

- i. McNellis has alleged only one instance of protected activity.

McNellis suggests he engaged in protected opposition by stating he is a Christian and making religious comments about *The Laramie Project* (Complaint, Second Claim for Relief, ¶¶ 124-25 and 127); questioning the School District’s decision to place him on leave “because he believed he was being treated differently based on the ‘religious comments’” (*Id.* at ¶ 71); complaining to Ottmann that he was being investigated based on his Christian beliefs (*Id.* at ¶ 95); and making the same complaint to “coworkers” (*Id.* at ¶ 96).

“Opposition to an employer’s conduct is protected” by Title VII “only if it is opposition to a ‘practice made an unlawful employment practice by [Title VII].” *Petersen v. Utah Dept. of Corrs.*, 301 F.3d 1182, 1188 (10th Cir. 2002); *see also Trujillo v. Bd. of Educ. Of Alb. Pub. Sch.*, 2007 WL 2296903, *8 (D.N.M. 2007) (employee’s complaint alleging abuse of students was not

⁵ CADA retaliation claims are likewise analyzed in the same manner as Title VII retaliation claims. *Agassounon*, 688 Fed.Appx at 509; *Barrington*, 566 F. Supp. 3d at 1115 n. 2.

protected activity under Title VII). Complaints that are not specific in nature are insufficient to constitute protected activity under Title VII. *Dean v. Computer Sciences Corp.*, 384 F. App'x 831, 839 (10th Cir. 2010) (employee who alleged she was the only African American at the company, described herself as a “single black mother,” and complained she was being treated poorly did not engage in protected activity under Title VII because she failed to link the alleged conduct to her race); *Anderson v. Academy Sch. Dist. 20*, 122 Fed. Appx. 912, 916 (10th Cir. 2004) (employee who characterized written complaint as harassment/discrimination complaint but failed to link racial bias to misconduct does not constitute protected activity).

McNellis’ status as a Christian and his *Laramie Project* emails are not protected activity because they are not complaints about discriminatory employment practices. McNellis fails to appreciate the distinction between retaliation and discrimination claims articulated by the Supreme Court in *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006). Allegations that an employee has been mistreated because of his protected class—rather than because the employee has opposed discrimination against the employee or someone else or participated in an investigation, proceeding, or hearing under Title VII—simply do not support a retaliation claim. *Id.*; see *Vaughn v. Epworth Villa*, 537 F.3d 1147, 1151 (2008) (describing the two categories of protected activity).

McNellis’ vague statements that he “questioned Winsor’s motive” and “questioned Defendant’s conduct” also do not constitute cognizable protected opposition because they do not allege that McNellis articulated complaints of discrimination. Rather, the artful pleading of these allegations indicates that they reflect McNellis’ then-unstated feelings and beliefs. Nor is McNellis’ complaint to coworkers, who had no supervisory authority over him and did not relay

the complaint to supervisors, protected activity. *See Bullard v. Goodyear Tire & Rubber Co.*, 2011 WL 4092192 *11 (D. Kan. 2011) (complaints to coworkers not protected activity). Thus, the only protected activity in which McNellis alleges he engaged was the complaint to Ottmann “that he was being investigated based on his Christian beliefs.” Am. Compl., ¶ 95.

- ii. McNellis has not pled causal connection between his complaint to Ottmann and his termination.

To engage in unlawful retaliation, an alleged retaliator must at least know of an employee’s protected activity. *See Petersen v. Utah Dep’t of Corr.*, 301 F.3d 1182, 1188–89 (10th Cir. 2002). Here, Ottmann was not the decisionmaker. *See* Ex. D. Nor is there any allegation that Ottmann told anyone, much less the unnamed decisionmakers, about McNellis’ complaint that he was being discriminated against. Because McNellis has failed to allege that any decisionmaker knew about his complaint, he has not adequately alleged the causation element and his retaliation claim is subject to dismissal. *See Petersen*, 301 F.3d at 1188-89.

Additionally, McNellis cannot prove any causal connection between his termination and any of the alleged protected activity following October 5, 2020, the date he was placed on leave to investigate his *Laramie Project* emails. Once McNellis was on leave, the School District knew that the results of the investigation could lead to discipline, undermining any argument that subsequent complaints led to his termination. *See Nixon v. City and County of Denver*, 784 F.3d 1364, 1370 (10th Cir. 2015) (proceeding on an avenue previously contemplated prior to protected activity is not evidence of causation). As a result, McNellis cannot prove a causal connection between the alleged protected activity and his termination.

CONCLUSION

For the reasons stated above, the School District respectfully requests that this case be dismissed with prejudice.

RESPECTFULLY SUBMITTED this 11th day of October, 2022.

SEMPLER, FARRINGTON, EVERALL & CASE, P.C.

By: s/Mary B. Gray

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of October, 2022, a correct copy of the foregoing **MOTION TO DISMISS** was filed and served via CM/ECF to the following:

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By: s/ Kathleen Schmidt

Board File: CBA/CBC

**QUALIFICATIONS/POWERS AND RESPONSIBILITIES OF SUPERINTENDENT
(JOB DESCRIPTION)**

TITLE: Superintendent QUALIFICATIONS:

1. Eligible for Superintendent license
2. Masters required; doctorate preferred
3. Principal experience preferred; Central Office Administrator experience preferred
4. Such alternatives to the above qualifications as the Board may find appropriate and acceptable.

REPORTS TO: Board of Education (Board)

SUPERVISES: Directly or indirectly all employees of the district

JOB GOAL To provide leadership in developing and maintaining the best possible educational programs and services.

PERFORMANCE RESPONSIBILITIES:

The Board subscribes to a hybrid governing structure that references a Policy Governance© model where the sole, official connection to the operational organization of the district, its achievement, and conduct is through the district’s chief executive officer (CEO), titled “Superintendent.”

The Superintendent shall be responsible for the general management of the schools of the district under the requirements of the state and the policies of the Board. The Superintendent shall be responsible for guiding the development of the educational objectives and programs of the school district to fulfill the educational needs of all students. The Superintendent shall provide overall direction to the activities of the school district and its personnel toward the accomplishment of district goals, administer the policies of the Board, conserve the school district’s assets and resources, and maintain and enhance the school district’s standing in all its internal and external relationships.

The Board will instruct the Superintendent through written policies that prescribe the organizational Ends to be achieved and describe organizational situations and actions to be avoided (Executive Limitations).

The management responsibilities of the Superintendent shall extend to all activities of the district, to all phases of the educational program, and to all parts of the physical plant.

1. **Operations.** The Superintendent shall:
 - a. Manage the work of all personnel in planning and program development and direct the activities of the school district. The Superintendent may delegate these responsibilities together with appropriate authority, but may not delegate nor relinquish ultimate responsibility for results of any portion of the accountability.
 - b. Manage the development of long- and short-range educational objectives for the improvement and growth of the school district and of educational activities in the school district.

- c. Manage the development of the overall educational process and administrative procedures and controls necessary to the implementation of educational programs for the achievement of the educational objectives of the school district, including the district's academic standards.
 - d. Manage the regular and systematic evaluation, analysis, and appraisal of the achievements of students and the performance of personnel in each of the educational programs or activities against stated objectives of the school district.
 - e. Report to the Board the progress and status of the programs and activities of the school district.
 - f. Inform the Board on all matters of major importance or significance to the activities, programs, and progress of the school district.
 - g. Ensure equity for all students, in all buildings, and in all settings.
2. **Organization.** The Superintendent shall:
 - a. Establish and maintain an administrative organization which provides for the effective management of all the essential functions of the school district.
 - b. Recommend proposed revisions to the organization of the management structure including the establishment or elimination or a revision of administrative positions.
3. **Personnel.** The Superintendent shall:
 - a. Develop and recommend the following policies and programs for personnel: recruitment, selection and employment, employee relations, employee benefits and services, employee safety, personnel evaluation, and salary administration for the school district.
 - b. Ensure the maintenance of properly trained and adequate number of administrative and supervisory personnel throughout the school district.
 - c. Recommend to the Board personnel selection, employment, assignment, transfer, and suspension.
 - d. Supervise assigned personnel and conduct periodic evaluations and appraisals of their performance.
 - e. Recommend personnel salary increases and adjustments.
 - f. Develop and recommend to the Board job classifications for all new positions.
4. **Finances.** The Superintendent shall:
 - a. Direct the development of the annual budget of the school district.
 - b. Review and recommend programs and supporting data for funds to be included in the annual budget of the school district.
 - c. Provide for the overall management of the school district's financial activities and take appropriate action to ensure that expenses are kept within the approved budgetary limits of the school district.
 - d. Assist principals and directors in maintaining economy and efficiency in the operation of their administrative units.
 - e. Maintain an active contact and familiarization with all local, state, federal, and philanthropic programs which provide or could provide financial assistance to the district.
5. **Relationships.** The Superintendent shall:

- a. Act as executive officer , subject to supervision by the Board.
- b. Act as professional adviser to the Board.
- c. Attend meetings of the Board with the right to comment on all issues.
- d. Prepare the agenda for all educational matters for all meetings of the Board and deliver the agenda with pertinent information on each item well in advance of the meeting.
- e. Participate in the affairs of local, state, and national professional organizations.
- f. Serve as a representative of the school system and the community at meetings on the local, state, and national level.
- g. Maintain a cooperative working relationship between the schools and the community and community agencies.
- h. Establish and maintain such other relationships within and outside the school district as required to carry out his or her responsibility.
- i. Establish and maintain relationships of trust and respect.

Adopted: March 20, 2018

Revised by the Board: June 18, 2019

LEGAL REFS.:

C.R.S. 22-9-106 (4) (qualifications to evaluate personnel)

C.R.S. 22-32-110(1)(g) (*Board power to employ a CEO*)

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Overview

Overview

Inactive	No
Effective Date	10/01/2020
Date of Last Change	01/14/2022 02:33:13.181 PM
Job Profile Name	Assistant Principal/Athletic Director - High School
Job Code	20036
Include Job Code in Name	No
Job Profile Summary	Assist in the administration and supervision of the organization and operation of the best possible learning environment for students of the school.
Job Description	
Additional Job Description	
Job Title Default	
Restrict to Country	
Job Level	29 School Administration
Job Family	Administrative - School
Job Classifications	0003 - Assistant Principal, Teaching (EEO Codes-United States of America) 106 - Assistant/Deputy/Associate Principal (CDE Codes-United States of America)
Work Shift Required	No
Public Job	No
Referral Payment Plan	

Characteristics

Difficulty to Fill	No
Critical Job	No

Compensation

Compensation Grade	Administrative-Annual
Compensation Grade Profile	Assistant Principal - High School
Impacted Eligibility Rules	Administrative Assistant Principal Assistant Principal - High School HS Additional Responsibility - AP, Dean, PLS Merit Plan Lump Sum Increase - License Merit Plan Percentage Increase - License Merit Plan - Principal, Assistant Principal, & Admin Dean Merit - School Admin & Dean for 16-17

Pay

EXHIBIT B



Pay Rate Type

Pay Rate Types

Country	Pay Rate Type
United States of America	Annual Salary

Job Exempt

Job Exempt

Country / Country Region	Job Exempt
United States of America	Yes
United States of America - Colorado	Yes

Workers' Compensation Code

Worker's Compensation Codes

Workers' Compensation Code	Country	Country Region	Location
8868 - Schools-professional employees & clerical (United States of America)	United States of America		

Qualifications

Certifications

Certification

Required	Country	Certification (Predefined)	Certification (Not Predefined)	Issuer (Not Predefined)
Yes			Type D Principal's License	Colorado Department of Education

Competencies

Competencies

Required	Competency	Target Rating

Competencies from Other Sources

Required	Competency	Target Rating	Source	Source Type

Education

Education

EXHIBIT B

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Required	Degree	Field of Study
Yes	Master's Degree	

Languages

Required	Language	Ability	Proficiency

Responsibilities

Required	Responsibility
	--- Collaborate with District Administrators regarding strategies for complying with state accreditation, accountability and school improvement requirements, including data collection and analysis of school wide student academic achievement, patterns of low student performance, and achievement discrepancies.
	--- Conduct effective student disciplinary measures, ensuring uninterrupted instructional and co-curricular practices, as well as demonstrating behavioral expectations.
	--- Assist in the utilization of appropriate resources of the staff, student body, school district and the community to develop and maintain highly effective instructional and co-curricular programs.
	--- Participate in the management of day-to-day operations of the school facility including purchase of instructional supplies, material & equipment, coordinating capital reserve process (small & large capital). Ensure safety of staff and students during emergency procedures.
	--- Plan and implement human resources activities: hiring/mentoring/disciplining; terminations; staffing design/master schedule; professional development activities; evaluations.
	--- Coordinate effective communications strategies among the students, the community, the faculty and the administration.
	--- Perform other related duties as assigned or requested.

EXHIBIT B

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Required	Responsibility

Skills

Required	Skill

EXHIBIT B



Kristina Blomquist <kblomquist@dcsdk12.org>

The Laramie Project: Oct 23-24 (Letter from Ambassadors & Tickets)

19 messages

Kayla Diaz <kjdiaz@dcsdk12.org>

Fri, Oct 2, 2020 at 2:19 PM

To: Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Hello everyone!

Knowing that a lot of our Ponderosa Theatre Company students would benefit socially and emotionally from being part of live theatre again, Nikki (our new Technical Theatre teacher!) and I selected The Laramie Project for our first production of the year- masks and distancing and all. We predicted that our students would want to learn about this story and participate in meaningful dialogue during a time when they may feel stuck and powerless. Our students are incredibly resilient and have been working hard to learn about this story and represent it authentically and respectfully. We have been rehearsing both online and in-person with precautions for about a month and preparing to live-stream our show from the school to audiences at home.

For this special production, we have a group of students as the Ambassador Crew. These students are responsible for research, communication, and helping ensure that Ponderosa and our community understand why we chose the show and that our audiences are informed about the nature and topic of the show. Please read the letter below written by our student Ambassadors asking for your awareness, and look for ticket information at the end of this email.

Dear Staff,

We hope that you've all had a great start to your year!

On October 23 and 24, Ponderosa Theatre Company will be presenting The Laramie Project. This show will be live-streamed and covers heavier topics than our previous productions. Some of you may already know the story of Matthew Shepard. If not, we are here to give you some context. In 1998, Matthew Shepard, a gay college student, was murdered on the outskirts of Laramie, Wyoming. His death sparked outrage throughout the nation, as well as controversy. There were many contesting opinions and arguments, but in the end, what matters to our show is how it affected the Laramie community.

The Laramie Project is the true story of the impact of a hate crime in a small town, told through interviews with community members and translated into a script. It is not specifically about the way Matthew Shepard died, and it is not a reenactment of the event.

We would like you to know this, so that you and your students are aware of exactly what The Laramie Project is and what it is not. There are a few things that we feel are important to make clear:

1. Our intention is not to push any kind agenda. We hope this story and the experiences of Laramie's people inspire reflection and thought.
2. The show does not focus solely on Matthew Shepard's murder, but on its impact.
3. This is meant to be a discussion, not a battle. We want to bring to light perspectives, share human experience, and start a conversation.

We as a company would like to thank you for your support during our show process. You all contribute so much to helping the theatre, and we are appreciative that this show will be no different. The performances will be October 23 at 7pm and October 24 at 2pm and 7pm. More information is available on ponderosatheatre.com.

Thank you,
The Laramie Project Ambassador Crew
[Redacted] - Director of Ambassadors

I am very proud of the maturity and responsibility these students have taken on to learn about the history of this event and to bring the story of Laramie into our theater. I know that your support means a lot to them. Here is how you can see the show from home:

- You can purchase tickets and read more about the show and live-streaming at the following site:

<https://www.onthestage.com/show/ponderosa-high-school/the-laramie-project-35861/>

EXHIBIT C

- As we have in the past, I would like to offer free admission to the show for staff members. However, because we are using a new ticketing system that is an all-in-one package for live-streaming, I cannot create a \$0 promo code. The online fees associated with each ticket cover our use of Switcher Studio and the platform for our encrypted links for audience members. However, I can make it as close to free as possible!
- Please add one student/single ticket for each link you would like to receive (one link per device), and use the promo code "Staff2021" - this will make the ticket price about \$0.50 and then you will only have to pay the few dollars in fees that allow us to use the platform.

Due to language and the content discussed in the show (there is no violence shown, only discussed) this is not a family-friendly show. We are advertising "For mature audiences" and I would generally recommend high school age and up. We will be reaching out more soon about advertising in the school, but it is important that I can answer any questions you may have and that you are aware of the nature of the play so that if we have students who have an aggressively adverse reaction to our show choice that you can support us in helping students understand. This is a play about perspectives, and we would not want anyone in the school to believe that we are making a statement against anything other than hate and violence.

Thank you so much for reading, your support, and for working with us to make Ponderosa a safe place for us to tell a story such as this.

Kayla Diaz
 (She/Her/Hers)
 Theatre Teacher & Director
 Thespian Troupe #5397
 Ponderosa High School
 303-387-4000 - <https://www.ponderosatheatre.com>
2020-2021 SEASON
The Laramie Project - October 2020
The 25th Annual Putnam County Spelling Bee - Spring 2021
Student Directed Children's Show - Spring 2021
Tech/Theatre 3 One Acts - Spring 2021
Macbeth - June 2021

Corey McNellis <Corey.McNellis@dcsdk12.org> Fri, Oct 2, 2020 at 8:16 PM
 To: Kayla Diaz <kjdiaz@dcsdk12.org>
 Cc: Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Thanks Kayla, I appreciate the email and I really do admire the hard work that you do. As a Dad of a student here and also as an employee in the school, what is my recourse if I disagree with the production? Was this a heads up to see if everyone is cool?

Corey McNellis
 Athletic Director/Assistant Principal
 Ponderosa High School
 303-387-4100

[Quoted text hidden]

Dana Swanson <dswanson@dcsdk12.org> Fri, Oct 2, 2020 at 9:01 PM
 To: Kayla Diaz <kjdiaz@dcsdk12.org>
 Cc: Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Hello Kayla,

Thank you so much for deciding to do a show that so closely connects to Ponderosa High School's core values of kindness, empathy, and respect. The connection to our anti-bullying program, "Dude, be nice", is incredible too. I can only imagine how impactful this show has been for your students and will be for all of our students. Truly, thank you so much for empowering students during this challenging time.

I have never seen this show, and I cannot wait to see it to better understand. I read a summary online, and it appears this show is a wonderful depiction of multiple perspectives on a single event.

I will be personally inviting other Ponderosa Theater Company alums to it. If you wouldn't mind sending me a digital copy of the poster, I think I will even invite some other groups like the Gender Sexuality Alliances in DCSD, parents I've met in the DCSD Equity Growth Zone Community Group, and more.

Thanks again for everything you do for all students,

Dana Swanson
 Ponderosa High School
 English I, Creative Writing, Content Read/ Write

EXHIBIT C

READ Contact
dana.swanson@dcsdk12.org
<https://sites.google.com/dcsdk12.org/phs-swanson/>

Douglas County Federation member since 2017
[Quoted text hidden]

Melissa Nansen <Melissa.Nansen@dcsdk12.org> Fri, Oct 2, 2020 at 9:01 PM
To: Kayla Diaz <kjdiaz@dcsdk12.org>
Cc: Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

I love that your students are so passionate about their craft and in tune with the current climate that they have chosen such a powerful piece of work. This is right in line with our "dude be nice". I can't wait to watch it!
[Quoted text hidden]

--
Melissa Nansen, M.ed
Professional Learning Specialist/Instructional Coach
Link Crew Supervisor
Ponderosa High School

[Canvas Tips and Troubleshooting \(for teachers\)](#)
[Canvas Videos](#)

Want to GoogleMeet OR Office? Book a time HERE
Make sure to include HOW we are meeting

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Ryan Monroe <ryan.monroe@dcsdk12.org> Fri, Oct 2, 2020 at 9:19 PM
To: Kayla Diaz <kjdiaz@dcsdk12.org>
Cc: Additional PHS List <additional_phs.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Kayla,

As a history teacher I'm glad to hear that our students are engaging with important historical events across subject areas. I know that engaging with difficult subject matter can be difficult, but that is why it is important.

I have absolute faith in you as a professional to present these touchy subjects in an educational and artistic way, however if you want a Social Studies perspective I would be happy to help in whatever way I can!
[Quoted text hidden]

Cheryl Heaton <cheryl.heaton@dcsdk12.org> Fri, Oct 2, 2020 at 9:20 PM
To: Corey McNellis <Corey.McNellis@dcsdk12.org>
Cc: Kayla Diaz <kjdiaz@dcsdk12.org>, Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Kayla,

I want to say how much I respect you for deciding to do a play that pushes students to critically think about our society and the prejudice and racism that exists on a daily basis for people. I agree with Dana and Melissa we all need to just be nice. In these times what we all need is support from one another. I support you!!!

Cheryl
[Quoted text hidden]

--
Cheryl Heaton
Social Studies Teacher
National Honor Society Advisor
Ponderosa High School

Sandra Gabel <Sandra.Gabel@dcsdk12.org> Fri, Oct 2, 2020 at 9:25 PM
To: Cheryl Heaton <cheryl.heaton@dcsdk12.org>
Cc: Additional PHS List <Additional_PHS.list@dcsdk12.org>, Corey McNellis <Corey.McNellis@dcsdk12.org>, Kayla Diaz <kjdiaz@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Kayla,

EXHIBIT C

Thank you for taking on such difficult but important topics in our society. In these trying times we need more love and less hate.

I trust your professionalism as an outstanding educator to present this subject in a way that presents perspectives without judgement!
Bravo!

[Quoted text hidden]

--

Sandra Gabel
Ponderosa High School
sandra.gabel@dcsdk12.org
303-387-4000

Ashley Carda <Ashley.Carda@dcsdk12.org>

Fri, Oct 2, 2020 at 9:26 PM

To: Kayla Diaz <kjdiaz@dcsdk12.org>

Cc: Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Kayla,

I am so grateful for your willingness to bring up the tough conversations. It is more important than ever to expose our students to the wide variety of perspectives that we all have. I truly believe that discussion around these topics is the way society moves forward. Not everyone has to agree with every ideology that exists, but it is the discourse that is invoked that matters.

Thank you for your willingness to involve all of us in your production, and for giving our students the opportunity to explore the diverse landscape of our world today.

Ashley Carda

[Quoted text hidden]

Gary Cordray <gary.cordray@dcsdk12.org>

Fri, Oct 2, 2020 at 9:29 PM

To: Sandra Gabel <Sandra.Gabel@dcsdk12.org>

Cc: Cheryl Heaton <cheryl.heaton@dcsdk12.org>, Additional PHS List <Additional_PHS.list@dcsdk12.org>, Corey McNellis <Corey.McNellis@dcsdk12.org>, Kayla Diaz <kjdiaz@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

I am very impressed with the way your students presented themselves in their letter. You have obviously taught them to be respectful and mature. I look forward to the production. Thanks for being a positive influence on our students and community.

[Quoted text hidden]

Corey McNellis <Corey.McNellis@dcsdk12.org>

Fri, Oct 2, 2020 at 9:37 PM

To: Gary Cordray <gary.cordray@dcsdk12.org>

Cc: Sandra Gabel <Sandra.Gabel@dcsdk12.org>, Cheryl Heaton <cheryl.heaton@dcsdk12.org>, Additional PHS List <Additional_PHS.list@dcsdk12.org>, Kayla Diaz <kjdiaz@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

As a christian I would love to collaborate with your project. Please let me know if the love that Jesus can provide will help your play.

Thanks!

Corey McNellis
Athletic Director/Assistant Principal
Ponderosa High School
303-387-4100

[Quoted text hidden]

Julie Lopez <Julie.Lopez@dcsdk12.org>

Fri, Oct 2, 2020 at 9:48 PM

To: Kayla Diaz <kjdiaz@dcsdk12.org>

Cc: Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Kayla,

I love the fact that you are doing this. [REDACTED] and I had many conversations this summer about this topic. With the last name Lopez it is amazing what people say to my children and me ("You don't look like a Lopez" is a common statement). I think this will create an awareness that all people do matter, especially those who are different from themselves. I often think about how people with disabilities (my own son included) have been treated. It is such an important topic. As a parent, I appreciate the fact you are opening the door for family discussions about all people.

On Fri, Oct 2, 2020 at 2:20 PM Kayla Diaz <kjdiaz@dcsdk12.org> wrote:

[Quoted text hidden]

--

Julie Lopez
Learning Specialist

EXHIBIT C

Ponderosa High School
303-387-4233

Corey McNellis <Corey.McNellis@dcsdk12.org> Fri, Oct 2, 2020 at 9:52 PM
To: Julie Lopez <Julie.Lopez@dcsdk12.org>
Cc: Kayla Diaz <kjdiaz@dcsdk12.org>, Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

For the record, all of administration does not agree with me on this. I am totally solo. Good night Mustangs!

Corey McNellis
Athletic Director/Assistant Principal
Ponderosa High School
303-387-4100

[Quoted text hidden]

Nicole Iannone <niannone@dcsdk12.org> Fri, Oct 2, 2020 at 10:44 PM
To: Kayla Diaz <kjdiaz@dcsdk12.org>
Cc: Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Kayla and Nikki,

As a parent, a staff member, and a theatre lover, thank you for allowing these kids to take on projects that push us all out of our comfort zones. It is so important that we as a community show acceptance, love, and compassion for those that may be different than us. The way the Ponderosa Theatre Company tackled the Stem Shooting and Lockdown showed the strength of our students hearts and minds. They instinctively took that story and translated their emotions with power, empathy, and understanding beyond their years. I can not wait to see how they bring The Laramie Project to life and shine a light on prejudice and how to fight it with tolerance and love.

This is the time to stand together as the Mustang community and show our students that "Dude be Nice" is not just a poster in the hallways or a catch phrase but something everyone in our building can get behind and truly believes in.

Way to go PTC!

Nicole Iannone

On Fri, Oct 2, 2020 at 2:20 PM Kayla Diaz <kjdiaz@dcsdk12.org> wrote:

[Quoted text hidden]

Bret Weller <Bret.Weller@dcsdk12.org> Sat, Oct 3, 2020 at 9:08 AM
To: Nicole Iannone <niannone@dcsdk12.org>
Cc: Kayla Diaz <kjdiaz@dcsdk12.org>, Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Hi Ponderosa Theater Department,

I think a play that denounces hate crime violence is a very appropriate choice in these times. Its format will allow you all sorts of choices in the event that the pandemic decides to interfere again. I read this play back in 2003 and was struck by how many in the media completely mischaracterized it. Looking forward to it.

Bret Weller

[Quoted text hidden]

--

Bret Weller M.A.Ed.
Chair, Department of English
Faculty Advisor, National English Honor Society
Ponderosa High School
Proud, Productive, Proven!
Bret.Weller@dcsdk12.org

Emma Michel <emichel@dcsdk12.org> Sat, Oct 3, 2020 at 9:36 AM
To: Bret Weller <Bret.Weller@dcsdk12.org>
Cc: Nicole Iannone <niannone@dcsdk12.org>, Kayla Diaz <kjdiaz@dcsdk12.org>, Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

I am in full support of producing The Laramie Project, and have been involved with many productions of this play over the years. It truly reflects the values and conversations we want to be fostering in our students and provides perspectives and insights that show how complicated and multidimensional our world really is. Giving voices to the marginalized groups in a safe and educated way is something we are always striving for, as well as opening ourselves up to new perspectives. Discussions are enhanced and deepened when all voices are represented. Thank you, Kayla, for giving our school a platform for meaningful discussion!

[Quoted text hidden]

EXHIBIT C

Britany Ederveen <britany.ederveen@dcsdk12.org> Sat, Oct 3, 2020 at 9:46 AM
To: Emma Michel <emichel@dcsdk12.org>
Cc: Bret Weller <Bret.Weller@dcsdk12.org>, Nicole Iannone <niannone@dcsdk12.org>, Kayla Diaz <kjdiaz@dcsdk12.org>, Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Ponderosa Theater,

I echo what Bret and Emma have expressed. I, too, am familiar with the play as I've used it in conjunction with 'To Kill a Mockingbird'; it is powerful, thought provoking, and reflective. Many of my students who are involved in the production have been buzzing in most recent weeks and I am impressed with their maturity and inspired by their passion.

I am looking forward to the production,

Britany Ederveen
[Quoted text hidden]

Kate Noon-Ulvila <cnoonulvila@dcsdk12.org> Sat, Oct 3, 2020 at 10:22 AM
To: Britany Ederveen <britany.ederveen@dcsdk12.org>
Cc: Emma Michel <emichel@dcsdk12.org>, Bret Weller <Bret.Weller@dcsdk12.org>, Nicole Iannone <niannone@dcsdk12.org>, Kayla Diaz <kjdiaz@dcsdk12.org>, Additional PHS List <Additional_PHS.list@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

As a teacher, parent, and Ponderosa Theatre alum, I absolutely support the theater teachers, students, and *The Laramie Project*. I have always been grateful to my former PHS theatre teachers for making the theater a welcoming space for **ALL** students, including LGBTQIA+ students, especially at a time when acceptance was not in abundance. Although I've taught for many years, this is my first year teaching at Ponderosa. I certainly hope that things have changed since 1996.

In addition, *The Laramie Project* has a personal connection for me. I was a student at the University of Wyoming from 96 - 97, a year before Matthew Shepard was killed. Although I had a full-ride theater scholarship and the Theatre Department was incredible, I transferred after a year because of the blatant bigotry, racism, homophobia, and misogyny that was a daily occurrence on campus. Certainly, I was not affected to the extent that others were. I still remember sitting in my dorm room at CU on cold day in October 1998 and hearing that a young gay man had been badly beaten in Laramie. I frantically called my friends to make sure that it wasn't them. To this day, I remember the fear in their voices and the confusion that something like that could happen in a town like Laramie. It did transform the community. People who were supportive of the LGBTQIA+ community began to make their voices heard over the voices of hate. My friends organized a march in support of Matthew Shepard and his family at the end of the UW Homecoming Parade and began the tough conversations that were needed to make changes on campus. The community came together to further impact change for the better.

I've had many opportunities to see *The Laramie Project* but never did until 2013 when it was performed at the school I was teaching. I was asked to speak after the event. It is an emotional play and instantly took me back to that time of my life. It was strange to see people who I knew like Harry Woods, my theatre advisor, as "characters" in the play.

At my previous school, because of the positive work our LGBTQIA+ Task Force and Student Alliance had done, we were approached by [The Matthew Shepard Foundation](#) and the Mexican Consulate to partner for a showing of "[Matt Shepard is a Friend of Mine](#)". (It was unfortunately postponed due to COVID). It is a documentary made by those who knew him best to show the real Matt Shepard. It is a very different account of Matthew Shepard than in the play.

Coming from a school that was so supportive of our LGBTQIA+ teachers, staff, and students, I am surprised by some of the comments and lack of support for our students. The fact the students are anticipating some backlash, and have already received it, makes me very concerned for our teachers, staff, and students who are part of the LGBTQIA+ community.

If you were not aware, October is [LGBTQ History Month](#). It's reassuring to hear all these voices of support, but clearly Ponderosa has more work to do in terms of LGBTQIA+ inclusion. I wanted to share some statistics from [The Trevor Project](#) to show why supporting our LGBTQIA+ students is so important.

- 39% of LGBTQ youth seriously considered attempting suicide in the past twelve months, with more than half of transgender and non-binary youth having seriously considered
- 71% of LGBTQ youth reported feeling sad or hopeless for at least two weeks in the past year
- Less than half of LGBTQ respondents were out to an adult at school, with youth less likely to disclose their gender identity than sexual orientation

EXHIBIT C

- 2 in 3 LGBTQ youth reported that someone tried to convince them to change their sexual orientation or gender identity, with youth who have undergone conversion therapy more than twice as likely to attempt suicide as those who did not
- 71% of LGBTQ youth in our study reported discrimination due to either their sexual orientation or gender identity
- 87% of LGBTQ youth said it was important to them to reach out to a crisis intervention organization that focuses on LGBTQ youth and 98% said a safe space social networking site for LGBTQ youth would be valuable to them

I also want to make sure our teachers and students have additional resources. If you need more, please let me know.

- [The Center on Colfax](#) - Includes Rainbow Alley, a safe, brave space where LGBTQ youth (ages 11-21) and their allies find support and acceptance.
- [The Trevor Project Suicide Hotline](#) - Provides crisis intervention and suicide prevention services to lesbian, gay, bisexual, transgender, queer & questioning (LGBTQ) young people under 25.
- [GLSEN](#) - **GLSEN** works to ensure that LGBTQ students are able to learn and grow in a school environment free from bullying and harassment.
- [PFLAG](#) - Provides support, information, and resources for LGBTQ+ people, their parents and families, and allies
- [Campus Pride Index](#) - National Listing of LGBTQ-Friendly Colleges & Universities

I hope that our LGBTQIA+ teachers, staff, and students know that there are those of us who support and accept them. I appreciate the Ambassador Crew for their bravery, compassion, and willingness to start the conversation.

Sincerely,

Kate Noon-Ulvila

[Quoted text hidden]

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Kate Noon-Ulvila, M.Ed
English Language Development Teacher
Sagewood Middle School/
Ponderosa High School
Office: (303) 387-4257
[Ms. N's Website](#)

Corey McNellis <Corey.McNellis@dcsdk12.org> Sat, Oct 3, 2020 at 10:27 AM

To: Britany Ederveen <britany.ederveen@dcsdk12.org>
Cc: Additional PHS List <Additional_PHS.list@dcsdk12.org>, Bret Weller <Bret.Weller@dcsdk12.org>, Emma Michel <emichel@dcsdk12.org>, Kayla Diaz <kjdiaz@dcsdk12.org>, Nicole Iannone <niannone@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

I understand people support this. Forgive me for having a different viewpoint and the audacity to publicly share it.

[Quoted text hidden]

--

[Quoted text hidden]

Thomas Flynn <tjflynn@dcsdk12.org> Sat, Oct 3, 2020 at 10:57 AM

To: Corey McNellis <Corey.McNellis@dcsdk12.org>
Cc: Britany Ederveen <britany.ederveen@dcsdk12.org>, Additional PHS List <Additional_PHS.list@dcsdk12.org>, Bret Weller <Bret.Weller@dcsdk12.org>, Emma Michel <emichel@dcsdk12.org>, Kayla Diaz <kjdiaz@dcsdk12.org>, Nicole Iannone <niannone@dcsdk12.org>, PHS <phs.list@dcsdk12.org>

Corey,

I want to thank you for having the courage to express another point of view and hopefully making it okay for others, including our students, to express viewpoints that they sincerely hold. I think that is an important element of the Dude Be Nice campaign to allow for the free exchange and discussion of ideas.

Have a great weekend everyone,

[Quoted text hidden]

--

Tom Flynn
STEM - Engineering
Varsity Golf Coach
Assistant Boys Basketball Coach

EXHIBIT C

Ponderosa HS

EXHIBIT C

July 1, 2022

To Whom It May Concern,

I'm writing this letter on behalf of Corey McNellis, a lifelong friend and colleague. I apologize for the delay in writing this, as I didn't feel comfortable writing it while I was still employed by the Douglas County School District. I officially retired at the end of June so I'm finally able to give you my perspective on what happened to Corey.

Our relationship dates back to 1990, when I started my teaching and coaching career at Ponderosa High School. I had the pleasure of coaching Corey as a junior wrestler, then later as a high school wrestler. From the beginning, Corey stood out as a tenacious, hard working, talented wrestler who committed himself to being the best. Corey ended up being a two-time state champion and a Dave Schultz award winner. The Dave Schultz award is the highest honor given to a high school wrestler, and is based on wrestling success, academics and character.

After high school, Corey pursued his wrestling career at Wisconsin, where he ended up being a starter for the badgers. Corey battled through numerous knee injuries during his college career, but finished as a successful college wrestler with a degree in Business. After high school, Corey started his career in the car business, but later realized that teaching and coaching was his calling. He pursued a degree in teaching, and ended up being a Social Studies teacher and Assistant Wrestling Coach at Ponderosa. Both as a coach and a teacher, Corey was always very dependable, hard working, caring, and thoughtful. Corey was well-liked by students, staff, parents and colleagues, and always put forth his best effort.

Corey eventually replaced me as the head wrestling coach when I retired in 2008. During his tenure, the Mustangs won two 5A state championships, seven league championships and five regional titles. Corey was well respected among other coaches throughout the state, and he worked hard to maintain the standards of excellence of the Ponderosa wrestling program. When I became the Principal in 2018, Corey was selected to replace me as the Athletic Director. Under Corey's leadership, the athletic program flourished, winning numerous league and state championships. Corey also focused on improving the overall athletic grade point average, which he was successful at attaining. Corey is also an incredible husband and father who puts his family first. He is an outstanding role model for his three kids, and a loving husband to his wife, Tanya.

In October of 2020, Corey responded to an email from our theater teacher regarding the play "The Laramie Project". He was concerned about the negative portrayal of Christians within the play and asked to have a conversation with our theater teacher. Unfortunately, certain people within the building felt like his email was inappropriate and contacted Human Resources. The

EXHIBIT D
McNellis_000014

contents of the email was eventually the catalyst for his firing, which I thought went too far. I felt like a "Letter of Reprimand" would have been appropriate, along with a conversation and perhaps an apology. I later learned that a specific group of people "piled on" the complaints about Corey, which played into the decision to ultimately terminate him as a DCSD employee.

I truly believe that Corey was "railroaded" by this specific group of people based on his political and religious views. In my opinion, his firing was unjust and unfair, and unfortunately, even though I was the principal, I couldn't save him because it wasn't my decision to make. If you have any questions about Corey or this situation, please don't hesitate to reach out.

Respectfully,



Tim Ottmann, Retired Principal
Ponderosa High School
303-909-5593
tfottmann22@gmail.com

EXHIBIT D
McNellis_000015

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:22-cv-1636-RM-STV

COREY MCNELLIS,

Plaintiff,

v.

DOUGLAS COUNTY SCHOOL DISTRICT,

Defendant.

**RESPONSE TO DEFENDANT’S MOTION TO DISMISS THE FIRST AMENDED
COMPLAINT**

Plaintiff, Corey McNellis, by and through his attorneys at KONTNIK | COHEN, LLC, submits this Response to Defendant’s Motion to Dismiss the First Amended Complaint and states as follows:

INTRODUCTION

As a father to a student at Ponderosa High School, Mr. McNellis had genuine concerns about the school’s upcoming theater production and its portrayal of his Christian religion. When Mr. McNellis attempted to have a conversation with the school about his concerns as a parent, the school terminated his employment for his religious beliefs. Defendant ignores the allegations in the Amended Complaint and overlooks the facts that Mr. McNellis complained about an investigation and suspension, that he believed it was tied to his religion, and that he was terminated due to these complaints. Plaintiff clearly pled sufficient facts in his Amended Complaint to pursue claims for discrimination under U.S. Const Amend. 1 and Section 42 U.S.C.

§ 1983, Title VII of the Civil Rights Act of 1964 (“Title VII”), and the Colorado Anti-Discrimination Act (“CADA”).

LEGAL STANDARD

Granting a motion to dismiss “is a harsh remedy which must be cautiously studied, not to effectuate the spirit of the liberal rules of pleadings but also to protect the interest of justice.”

Dias v. City & Cnty of Denver, 567 F.3d 1169, 1178 (10th Cir. 2009.) At this stage of the litigation, Plaintiff need only plead facts that “nudge his claims across the line from conceivable to plausible” in order to survive a motion to dismiss. *Khalik v. United Air Lines*, 671 F.3d 1188, 1192-93 (10th Cir. 2021) (holding that a plaintiff need not establish the element(s) of his claim, and a plaintiff need only set forth facts “to make the claims plausible on their face.”)

ARGUMENT

1. Plaintiff Sufficiently Alleged Retaliation Under §1983 for a First Amendment Retaliation Claim.

Plaintiff acknowledges that the guiding standard for evaluating a public employee’s First Amendment claim is the five prong¹ *Garcetti/Pickering* test enumerated in *Roberts v. Winder*, 16 F.4th 1367, 1381 (10th Cir. 2021). It is important to note that the Tenth Circuit has held that “[t]he first three prongs are said to be issues of law to be decided by the court; the last two are factual issues to be decided by the factfinder.” *Morris v. City of Colorado Springs*, 666 F.3d 654,

¹ The five prong *Garcetti/Pickering* test considers whether (1) the speech was made pursuant to an employee’s official duties; (2) the speech was on a matter of public concern; (3) the government’s interests as an employer in promoting efficient public service outweighs a plaintiff’s free speech interests; (4) the speech was a motivating factor in the adverse employment action; and (5) the same employment decision would have been made without the protected speech. See *Roberts*, 16 F.4th at 1381.

661 (10th Cir. 2012) (quoting *Dixon v. Kirkpatrick*, 553 F.3d 1294, 1302 (10th Cir. 2009)).

Defendant only contends that Plaintiff failed to allege sufficient facts for the first, second, and fourth prongs of the *Garcetti/Pickering* test. *See* Def. Motion to Dismiss Am. Compl. pgs. 7-13.

A. Plaintiff alleged that his protected speech was not made pursuant to his official duties.

In determining whether an employee engaged in protected speech not pursuant to their official duties, it “requires a practical and holistic view of the relationship between the speaker’s employment and the speech at issue.” *See Bailey v. Indep. Sch. Dist. No. 69 of Canadian Cnty. Oklahoma*, 896 F.3d 1176, 1182 (10th Cir. 2018) (citing *Chavez-Rodriguez v. City of Santa Fe*, 596 F.3d 708, 713 (10th Cir. 2010)). Importantly, in making this determination, no single factor is dispositive, and it is necessary to take “a practical view of all the facts and circumstances surrounding the speech and the employment relationship.” *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1204 (10th Cir. 2007) (citing *Garcetti v. Ceballos*, 547 U.S. at 424, (2006)); *see also Bailey*, 896 F. 3d at 1182. The U.S. Supreme Court in *Garcetti* further advises that not all speech that occurs at work is made pursuant to an employee's official duties, nor is all speech about the subject matter of an employee's work made pursuant to the employee's official duties. *Garcetti*, 547 U.S. at 420-21.

Plaintiff’s allegations in the Amended Complaint, when taken altogether, demonstrate that Plaintiff was making his comments regarding the play after hours, as a father, and without the support from the administration, and this was in no way how he, as an administrator, discussed these issues. *See* Pltf.’s Am. Compl. at ¶¶ 41-44, 59-60, 65.

Specifically, Plaintiff alleges that the “response was written on Friday evening and was written as a father of a student at Ponderosa...” *See* Pltf.’s Am. Compl. at ¶ 60. Plaintiff alleges

a distinction between his official duties as an administrator discussing a school play, which would have taken place in the weekly administrative meeting, amongst all administrators. *See* Pltf.’s Am. Compl. at ¶¶ 40-44. In fact, Plaintiff explicitly alleges that “[t]he Administrative Team would not debate, discuss, or otherwise address the issues under their purview in a public forum or with the entire staff at Ponderosa.” *See* Pltf.’s Am. Compl. at ¶ 43. If Plaintiff was engaging in his official duties, it would have been in a “roundtable” discussion, amongst all the administration, while in their weekly meeting. *Id.* Plaintiff also alleged that “[t]he Administrative Team was not responsible for determining the content of the school plays that were produced by the theatre department.” *See* Pltf.’s Am. Compl. at ¶ 44. This further demonstrates that Plaintiff was not just acting as a father, but he was in no way acting pursuant to his official duties. Therefore, Plaintiff has alleged sufficient facts to plead that he was not acting in his official capacity when engaging in his protected speech.

B. Plaintiff plead sufficient facts to allege that his speech was a matter of public concern.

The Tenth Circuit has defined a matter of public concern as “those of interest to the community, whether for social, political, or other reasons.” *Brammer-Hoelter*, 492 F.3d at 1205 (10th Cir. 2007) (quoting *Lighton v. Univ. of Utah*, 209 F.3d 1213, 1224 (10th Cir.2000)). The Tenth Circuit has also determined that speech regarding an election is a matter of public concern but speech regarding grievances about internal departmental affairs, disputes over the term of employment, and workplace frustration are not. *See Brammer-Hoelter*, 492 F.3d at 1205.

Plaintiff alleged that his speech was a matter of public concern because it was in response to an email from Ponderosa’s theater teacher, Kayla Diaz, who expressly stated that “[d]ue to language and content discussed in the show...this is not a family-friendly show.... We are

advertising for mature audiences... and I would generally recommend high school age and up... This is a play about perspectives...” See Pltf.’s Am. Compl. at ¶ 56. Plaintiff further alleges that Ms. Diaz acknowledges the general effect that they play would have on the public, and that the “email specifically elicited responses from the rest of the staff stating that she would be happy to ‘answer any questions [they] may have.’” See Pltf.’s Am. Compl. at ¶ 57-58. Plaintiff’s allegations related to Ms. Diaz’s email clearly demonstrate that Ms. Diaz was aware of the general effect that putting on a play such as the Laramie Project would have on the public.

Moreover, Plaintiff alleges that in his replies to this email, Plaintiff is not just expressing his personal views as a father of a child at Ponderosa, but also as a Christian. See Pltf.’s Am. Compl. at ¶ 64. These allegations demonstrate that Plaintiff was not only responding to an email that was eliciting potential concerns about the public’s reaction, but that he wanted to be involved, not for himself, but on behalf of his Christian faith. *Id.* These allegations are more than just “personal feelings,” as Defendant contends, and are instead matters based on Plaintiff’s entire religion. Therefore, Plaintiff has alleged sufficient facts to plead that his speech was a matter of public concern.

C. Plaintiff sufficiently alleged his speech was a motivating factor in his termination by the School District’s Board of Education.

This Court should look to Plaintiff’s well-pled facts in his Amended Complaint alleging that the Board of Education (“Board”) delegated its decision-making authority as it pertains to employee retention to Defendant Douglas County School District (“DCSD”), and that the School District itself terminated Mr. McNellis based on his protected speech. See Pltf.’s Am. Compl. at ¶¶ 8-12. Specifically, Plaintiff pled that the Board delegated its powers and duties to the Superintendent and administrative team of DCSD to execute its policies and powers. Pltf.’s Am.

Compl. at ¶ 8. Plaintiff further alleged that “[w]ith respect to DCSD, the Board has delegated its powers to DCSD’s employees” and “the Board has delegated its powers and duties to, among others, former Ponderosa Principal (Tim Ottmann), DCDS Human Resources Director (Cathy Franklin), and DCSD Director of Schools (Daniel Winsor).” *See* Pltf.’s Am. Compl. at ¶¶ 9-10. When looking at the school Board policies in Defendant’s Exhibit A coupled with Plaintiff’s Exhibits 1, 2, and 3, it is clear that the Board’s policies have many inconsistencies and discovery is needed to further explore this issue.²

Defendant acknowledges that Plaintiff has sufficiently pled facts that demonstrate the Board has delegated its policies and powers to DCSD’s employees, specifically as it relates to the employment decisions of employees within DCSD. *See* Def. Motion to Dismiss Am. Compl. pgs. 11-12. Faced with these well pled facts, Defendant then tries to argue that while the Board may have delegated its authority to DCSD and its employees, it did not do so legally, and therefore, the Board still retains the ultimate decision-making authority. *Id.* This is not the standard. This Court, as well as the Supreme Court of Colorado, have interpreted Colo. Rev. Stat. Ann. § 22-32-109 to permit a Board of Education to delegate decision-making authority to the District, or even specific individuals within the District, through its written policies. *See Lee v. Denver Pub. Sch.*, No. 20-CV-1989-WJM-MEH, 2022 WL 5241884, at *10 (D. Colo. Oct. 6, 2022) (finding that the Board had delegated its hiring and firing decisions to the superintendent through their policies.); *see also* (*Saye v. St. Vrain Valley Sch. Dist.*, 650 F. Supp. 716, 722 (D.

² The Court may take judicial notice of public documents, such as School District policies, without converting the motion to one for summary judgment. *Shifrin v. Colorado*, 2010 WL 2943348, *5 (10th Cir. 2010), *citing Van Woudenbert ex rel Foor v. Gibson*, 211 F.3d 560, 568 (10th Cir. 2006).

Colo. 1986)) (“Where there was an effective delegation of power to make final employment policy to the principal and superintendent, Colorado law notwithstanding, their decisions constitute the district's final employment policy and as such give rise to municipal liability under 42 U.S.C. § 1983); *see also Fremont Re-1 Sch. Dist. v. Jacobs*, 737 P.2d 816, 819 (Colo. 1987) (holding that the discharge of a bus-driver was an administrative function of the Board of Education that was subject to delegation).

As this Court, and Defendant are aware³, filing suit against the School District and Board of Education, or directors, is redundant as the District encompasses the Board. *See Roe v. Karval Sch. Dist.* RE23, Civ. No. 12-cv-00239-WYD-KLM, 2013 WL 1858464, at *7 (D. Colo. May 2, 2013) (finding that the Board is not a separate entity from the District); *see also (K.D. by Nipper v. Harrison Sch. Dist. Two*, Civ. No. 17-cv-2391-WJM-NRN, 2018 WL 4467300, at *6 (D. Colo. Sept. 18, 2018) (finding that only the District may be sued.) Defendant attempts to shelter itself from all litigation under § 1983 by stating that the Douglas County Board of Education (Board of Education) is the only entity who can bind DCSD to liability under § 1983. *See* Def. Motion to Dismiss Am. Compl. pgs. 10-13.

Defendant’s arguments that the Board of Education has the ultimate decision-making authority, but the Board of Education cannot be sued is irrational. Defendant argues that neither the Board or District can be sued because although the Board of Education delegated its

³ Defendant conferred with Plaintiff regarding this exact issue on September 16, 2022, by phone, and a follow up email attaching the recommendation for Summary Judgement of Magistrate Judge S. Kato Crews. In this case, the Cherry Creek Board of Education was a named Defendant along with the school district. Magistrate Judge S. Kato Crews recommended Summary Judgment as to the Board of Education finding that the lawsuit encompassing both the Board and the District was redundant.

authority to the District, it did not do so “legally” and thus Plaintiff’s §1983 claims must fail. Such rationale would lead to an absurd result that DCSD, and School Districts across Colorado, are sheltered from liability for claims arising under §1983. Defendant attempts to point the finger at the Board of Education for the ultimate decision-making authority to terminate staff, while at the same time knowing that the Board of Education is statutorily exempt from suit, and have delegated these decision making powers to the individuals who work day-to-day with Defendants staff. *See supra*. If Defendant’s logic is correct, Defendant has found a way to shield itself from any and all potential claims under §1983. As described above, this Court, as well as the Supreme Court of Colorado, have found that school districts across Colorado, identical to Defendant, can delegate their decision-making authority away to individuals within school districts which would make them liable to claims under §1983 such as the instant matter.

Plaintiff further alleged that the chairman of the Board of Education, at the time, knew about Plaintiff’s emails regarding the Laramie Project and the ensuing investigation. Pltf.’s Am. Compl. at ¶¶ 85-86. Plaintiff does not allege that a single Board member had the requisite knowledge, but that the Chairman of the entire Board of Education obtained that knowledge. *See* Pltf.’s Am. Compl. at ¶¶ 85-86. Thus, this Court should reject Defendant’s arguments that the Board of Education is the only entity who can bind Defendant to liability under §1983 and find that Plaintiff sufficiently alleged the Board delegated its decision-making authority regarding employee retention to individuals within DCSD and Ponderosa and that he sufficiently alleged his speech was a motivating factor by a decision maker.

2. Plaintiff alleged he was terminated due to his Religious Comments.

Defendant wholly misconstrues Plaintiff's allegations as it relates to his claims for discrimination under Title VII and CADA by focusing only on the "similarly situated" theory of discrimination, when in fact, Plaintiff has plead that he was discriminated by simply expressing his religious beliefs. *See* Pltf.'s Am. Compl. at ¶¶ 1, 64, 74, 77, 88-89, 94-96, 98-99, 121, 135. Plaintiff does, in fact, discuss how other co-workers were "similarly situated" but not terminated; however, Plaintiff does so to show that the investigative process itself was discriminatory. *See* Pltf.'s Am. Compl. at ¶¶ 101-08, 110. Plaintiff's allegations in this regard demonstrate how the investigation commenced due to Plaintiff's religious comments but quickly morphed into several other complaints against Plaintiff, as well as several other administrators and staff of Ponderosa. *Id.*

While the investigation demonstrated that there were complaints against these other administrators such as breaking COVID protocols and being a part of "the good ole boys club," Plaintiff was the only one who received complaints about religious comments, the only employee investigated in this matter, and the only employee terminated after this investigation. *Id.* The issue, here, is that while there were similarly situated employees, in terms of complaints against them, Plaintiff was the only individual who expressed his religious beliefs and, in turn, was the only individual terminated due to expressing these beliefs. *See* Pltf.'s Am. Compl. at ¶¶ 1, 64, 74, 77, 88-89, 94-96, 98-99, 101-08, 110, 121.

Plaintiff has also alleged that Cathy Franklin, Daniel Winsor, and Tim Ottmann were all involved in the investigation, suspension, and were responsible for ultimately terminating Plaintiff. *See* Pltf.'s Am. Compl. at ¶¶ 66, 68, 70, 74-75, 77-81, 82-84, 88-91, 94-95, 113-17.

Defendant then purports to get into a factual dispute regarding the letter from Principal Ottmann as to whether he was a decision maker. Factual arguments, such as these, are not appropriate at this juncture where Plaintiff’s allegations are to be taken as true, and there has been no discovery done as to the veracity of the statements in this letter from Principal Ottmann. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). Therefore, this Court should deny Defendant’s Motion to Dismiss Plaintiff’s Claims for discrimination under Title VII and CADA as Plaintiff has plead sufficient facts to allege that he was terminated due to his religious comments.

3. Plaintiff Sufficiently Alleged That there was a Causal Connection Between His Protected Activity and His Termination.

A. Plaintiff alleged he engaged in a protected activity which led to his termination.

Defendant attempts to mislead the Court from the well-established case law of the Tenth Circuit and raise the burden from causal connection to “but-for” cause by citing to two unpublished cases, one of which is not related to the elements of retaliation.⁴ *See* Def. Motion to Dismiss Am. Compl. pgs. 15-17. Defendant cites to the unpublished opinion in *Allison v. Digital Mgmt. Inc.*, 2013 WL 5862647, **3-4 (D. Colo. Oct. 13, 2013) for the proposition that an element of a Title VII retaliation claim requires proof that engaging in the protected activity is a but-for cause of the employee’s termination. *See* Def. Motion to Dismiss Am. Compl. pgs. 15-17. This case seemingly stands alone in this circuit as the Tenth Circuit has held that “[t]o state a

⁴ Defendant also cites to *Deere v. XPO Logistics Freight, Inc.*, 2019 WL 699112, *10 (D. Colo. Feb. 20, 2019) (Moore, J.) (unpublished) in an attempt to bolster the but-for argument. While *Deere* did confront the issues of retaliation, the portion that the Defendant seemingly recites for the “but-for” element relates to the “protected class status” being a but-for cause of the employer’s actions. *Id.*

prima facie case of retaliation, [an employee] must demonstrate that (1) [they] engaged in protected opposition to discrimination; (2) [the employer] took an adverse employment action against [the employee]; and (3) there exists a causal connection between the protected activity and the adverse action.” *Fassbender v. Correct Care Sols., LLC*, 890 F.3d 876, 890 (10th Cir. May 15, 2018) (quoting *Stover v. Martinez*, 382 F.3d 1064, 1071 (10th Cir. 2004)). In fact, Defendant itself recognizes the correct standard in their Motion to Dismiss by using the term “casual connection,” in its argument. *See* Def. Motion to Dismiss Am. Compl. pg. 15.

Further, the Tenth Circuit has held that “[t]o show [an employee] engaged in protected activity, [the employee] doesn't need to show that [they] reported an actual Title VII violation; rather, [they] must only show “a reasonable good-faith belief that” [they were] opposing discrimination.” *Fassbender*, 890 F.3d at 890. Here, Defendant attempts to downplay Plaintiff’s well-pled facts that Plaintiff complained and expressed concerns that his suspension and investigation were related to his religious comments that he made as a Christian about The Laramie Project. *See* Pltf.’s Am. Compl. at ¶¶ 71, 82-83, 89, 95-97, 124-25 and 127(b), 147(b)). Plaintiff specifically alleged that he “questioned Defendant’s decision to have him stay home because he believed he was being treated differently based on the ‘religious comments.’” *Id.* at ¶ 71. Plaintiff further alleged that he “complained to Principal Ottmann that he was being investigated based on his Christian beliefs.” *Id.* at ¶ 95. More importantly, Principal Ottmann was on the investigative team which ultimately investigated and terminated Plaintiff. *Id.* at ¶¶ 10, 77-79, 117. Plaintiff further alleged that he not only complained to Principal Ottmann but also made the same complaint to several “coworkers” that he was being investigated for his religious comments. *Id.* at 96. While Defendant attempts to downplay Plaintiff’s protected activity,

Plaintiff has demonstrated that he pled sufficient facts to plead that he: (1) engaged in a protected activity in opposition to discrimination, (2) Defendant took an adverse employment action against Plaintiff by terminating him, and (3) there exists a causal connection between Plaintiff's complaints of the investigation due to his religious comments and his termination. Thus, dismissal is not warranted.

B. Plaintiff pled a causal connection between his complaint to Principal Ottmann and his termination.

Here, Defendant relied yet again on the letter from Principal Ottmann that has not been fully vetted for the exact meaning or truth behind the statement that he was not a "decisionmaker." As Plaintiff has alleged, Principal Ottmann not only took part in the investigation against him, but that the Board specifically delegated its decision-making authority as it pertains to employee decisions to Principal Ottmann, among others. *See* Pltf.'s Am. Compl. at ¶¶ 10, 77-78. Exhibit D, Principal Ottmann's letter, standing alone, is not enough to show that Plaintiff has not pled sufficient facts to demonstrate a causal connection between his complaint to Principal Ottmann, and his termination, as Plaintiff has done just that. As Plaintiff alleged, he complained to Principal Ottmann that the investigation and suspension was due to his religious comments and Plaintiff further alleged that Principal Ottmann investigated and had the power to terminate Plaintiff. Thus, this Court should reject Defendant's Motion to Dismiss Plaintiff's Claim for Title VII and CADA retaliation.

CONCLUSION

Plaintiff has pled sufficient facts to state a claim and Defendant has failed to meet its burden. Defendant's Motion should be denied in its entirety.

Response to Defendant's Motion to Dismiss the First Amended Complaint

Dated: November 1, 2022.

KONTNIK | COHEN, LLC

s/ Spencer J. Kontnik

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2022, I electronically filed the foregoing Response to Defendant's Motion to Dismiss the First Amended Complaint with the Clerk of the Court using the CM/ECF system. The filing will be served via email to the following:

Mary Gray
Semple, Farrington, Everall & Case, P.C.
mgray@semplelaw.com

s Leah B. Patnesky
Leah B. Patnesky

Response to Motion to Dismiss

*Focusing on Strategic Leadership,
Continuous Improvement
and Accountability*



**Board of Education
Policy Governance
Book**

- 1.1.6 The Board will monitor and discuss the Board's process and performance at each meeting. Self-monitoring will include at least an annual comparison of Board activity and discipline to policies in the Governance Process and Board-Superintendent Linkage categories.
- 1.1.7 All governing policies of the Board are contained in this document, and they remain in effect, unless amended or deleted by Board action.

GP 1.2 The Job of the Board

Specific job outputs of the Board, as an informed agent of the ownership, are those that ensure appropriate organizational performance. Accordingly, the Board has direct responsibility to create:

- 1.2.1 The link between the ownership and the operational organization.
- 1.2.2 Written governing policies that address the broadest levels of all organizational decisions and situations.
 - 1.2.2.1 Ends: Organizational products, impacts, benefits, outcomes, recipients, and their relative worth (what good for which recipients at what cost).
 - 1.2.2.2 Executive Limitations: Constraints on executive authority, which establish the prudence and ethics boundaries within which all executive activity and decisions must take place.
 - 1.2.2.3 Governance Process: Specification of how the Board conceives, carries out, and monitors its own task.
 - 1.2.2.4 Board-Superintendent Linkage: How power is delegated and its proper use monitored; the Superintendent's role, authority, and accountability.
- 1.2.3 Assurance of successful organizational performance.
- 1.2.4 A favorable legislative impact.
- 1.2.5 Reviewing, monitoring, and revising all Board policies.

GP 1.3 Board President Responsibilities

The Chair of the Board shall be titled "President." The President of the Board ensures the integrity of the Board's process and normally serves as the Board's official spokesperson. Accordingly, the President has the following authority and duties:

- 1.3.1 To lead the Board so that the Board's performance is consistent with its own rules and policies and those legitimately imposed on it from outside the organization.
 - 1.3.1.1 Board meeting deliberations are conducted and monitored to include only Board issues that, as defined in Board policy, belong to the Board to decide or monitor. Deliberations are fair, open and thorough, but also efficient, timely, orderly, and to the point.
 - 1.3.1.2 To make decisions that fall within the topics covered by Board policies on Governance Process and Board-Superintendent Linkage, except a) concerning the employment or termination of a Superintendent, and b) where the Board specifically delegates portions of this authority to others. The President is authorized to use any reasonable interpretation of the provisions in those policies.
 - 1.3.1.3 The President has no authority to make decisions about policies created by the Board in

Advise the Board of significant transfers of moneys within funds, any single non-budgeted purchase or expenditure of greater than \$500,000 and any other change substantially affecting the district's financial condition (e.g. anticipated bond refunding opportunities or ratings changes), the district's ability to achieve its mission, or which is in violation of the Board's policies.

Media coverage

Advise the Board of anticipated media coverage of material significance to the obligations or decisions of the Board.

Monitoring

1. Submit monitoring data requested by the Board in a timely, accurate and understandable fashion, directly addressing provisions of the Board policies being monitored, if applicable;
2. With the understanding that it is primarily the Board's responsibility to monitor its own compliance, advise the Board if, in the Superintendent's opinion, the Board, or its committees, are not in compliance with its own policies on Governance Process and Board-Superintendent Relationship; and
3. Report in a timely manner any actual or anticipated noncompliance with any Board Ends or Executive Limitations policy or policies.

Board communications

1. Provide a mechanism for official Board, officer, or committee communications; and
2. Work with the Board as a whole on Board policy issues except when:
 - a. Fulfilling individual requests for information as long as such requests do not require a material amount of staff time or resources, are not disruptive, and responses are conveyed to Board members consistent with the requirements of Open Meetings Law;
 - b. Working with officers or committees duly charged by the Board; or
 - c. Communicating with the Board president on emergency circumstances conveyed to other Board members as soon as possible.

Consent agenda

Supply for the consent agenda all items delegated to the Superintendent that are required by law or contract to be Board-approved, along with the minimum amount of supporting data necessary to keep the Board informed and a rationale for the superintendent's decision.

State reporting

Provide a summary to the Board of any significant data submitted to the State Board of Education regarding accreditation, accountability, or safety.

Personnel decisions

As permitted by law, provide, as soon as possible after decisions are made, information to the Board regarding personnel actions taken or recommended decision and, as appropriate, information regarding how the decision impacts the district's ability to operate and to achieve the Board's Ends.

Adopted: August 24, 2021

LEGAL REFS.: C.R.S. 22-11-101 et seq. (state accreditation)
C.R.S. 24-6-201 et seq. (Colorado Sunshine Act - public official disclosure law)

EL 5 Commitment to Accomplishment and Accountability

Accordingly, the Superintendent is responsible to assure that a safe schools plan is developed in accordance with applicable law and Board policies.

Adopted: August 24, 2021

LEGAL REFS.: C.R.S. 9-1-101 through 9-1-106 (construction requirements, fire escapes)
C.R.S. 22-1-130 (6) (safe school plan must include parent notification of employee criminal charges)
C.R.S. 22-3-101 through 22-3-104 (eye protective devices)
C.R.S. 22-32-109.1 (safe schools plan)
C.R.S. 22-32-109.1 (8) (inquiries to Colorado Department of Education regarding employees)
C.R.S. 22-32-110 (1)(k) (power to adopt policies related to employee safety and official conduct)
C.R.S. 22-32-124 (2), (3) (building inspections)
C.R.S. 24-10-106.5 (duty of care)

POLICY REFS.: ADD, Safe Schools

EL 11 Staff Treatment

With respect to treatment of staff, the Superintendent will promote practices so that working conditions, procedures, or actions supported or taken by the district's administration are lawful ethical, safe dignified, and in compliance with Board policy.

Accordingly, the Superintendent will:

1. Cause inquiries to be made which are required by law prior to hiring personnel and during employment;
2. Nominate candidates to the Board for instructional staff positions that meet all qualifications required by federal and state law;
3. Operate within written personnel policies and/or procedures that:
 - a. Comply with state and federal law;
 - b. Clarify personnel rules and procedures for staff;
 - c. Provide for effective handling of established grievance, complaint and/or due process procedures;
 - d. Protect against illegal working conditions;
 - e. Include job descriptions for all district positions;
 - f. Include notifications to employees regarding salary and benefit plans according to their positions;
 - g. Include a personnel performance evaluation system that complies with law; and
 - h. Comply with statutory requirements regarding reductions in force and other termination processes.
4. Not prevent staff from using established grievance, complaint, and/or due process procedures nor prevent staff from bringing a grievance or complaint to the Board when internal procedures have been exhausted and the employee alleges that Board policy has been violated;
5. Prohibit discrimination and retaliation against staff members consistent with state and federal law and the policies of the District;
6. Prohibit retaliation for non-disruptive internal expressions of dissent;
7. Honor the terms of any negotiated agreements with staff;
8. Provide staff with an opportunity to become familiar with their rights and responsibilities under district policy;

- 9. When appropriate and at the discretion of the Superintendent, respond to concerns raised by staff and timely report on such concerns and responses to the Board; and
- 10. Use methods of collecting, reviewing, transmitting, or storing information that protect confidential information.

Adopted: August 24, 2021

- LEGAL REFS.:
- C.R.S. 22-2-119 (duty to make inquiries prior to hiring)
 - C.R.S. 22-9-103 (1.5) (definition of licensed personnel)
 - C.R.S. 22-12-101 et seq. (Teacher and School Administrator Protection Act)
 - C.R.S. 22-32-109 (1) (Board of education-specific duties)
 - C.R.S. 22-32-109.1 (Board of education-specific duties)
 - C.R.S. 22-32-109.7 (inquiries prior to hiring)
 - C.R.S. 22-32-110 (Board power to be exercised in its judgment to discharge personnel)
 - C.R.S. 22-32-126 (employment and authority of principals)
 - C.R.S. 22-60.5-101 (Colorado Educator Licensing Act)
 - C.R.S. 22-60.5-114 (3) (State Board can waive some requirements for initial license applicants upon request of school district)
 - C.R.S. 22-60.5-201 (licensure reciprocity for out-of-state applicants)
 - C.R.S. 22-61-101 (discrimination in employment of teachers prohibited)
 - C.R.S. 22-61-103 (teacher’s oath)
 - C.R.S. 22-63-201 (all teachers must hold a teacher’s license or letter of authorization)
 - C.R.S. 22-63-202 (teacher employment contracts)
 - C.R.S. 24-10-102 et seq. (governmental immunity)
 - C.R.S. 24-34-402 (1) (discriminatory or unfair employment practices)
 - C.R.S. 24-72-202 (4.5) (definition of personnel file in open records law)

POLICY REFS.: G Personnel Board and Superintendent File Policies

OTHER REFS: DCSD Employee Guide

EL 12 Staff Compensation

With respect to employment compensation and benefits for employees, the Superintendent shall promote a compensation and benefits plan that furthers the fiscal integrity of the district.

Accordingly, the Superintendent will:

- 1. Not change his or her own compensation and benefits;
- 2. Refrain from promising or implying permanent or guaranteed employment;
- 3. Create obligations only for a term in which revenues can be safely projected and or in which dedicated reserves are created in alignment with statute;
- 4. Further efforts to develop and implement predictable salary schedules and pay plans for all employee groups that acknowledges experience/longevity, knowledge, and performance (e.g. skills, professional growth, responsibilities, and collaboration), other areas as derived by employee input processes, and in compliance with all requirements of state and federal law;
- 5. Develop and implement competitive employee benefits which may include, but not limited to, options for medical coverage, sick leave benefits and/or short term disability insurance, a health savings account or a medical flexible spending account, and voluntary life insurance.

Policy Process (Board Retention or Delegation of District Policy)	
The following chart indicates which district policies, regulations and exhibits are to be retained under the Board's authority and which are delegated by the Board to the superintendent.	
<i>NOTE: The chart will be reviewed and revised as the district's policy review and revision process continues. Documents shown in italics indicate policies, regulations or exhibits that may not yet be found in the district policy manual and will be recommended by CASB for the Board and/or superintendent's consideration. Additionally, some documents in the current district policy manual may be recommended for repeal and subsequently removed from the chart.</i>	
Board Authority	Superintendent Authority
Section A	Section A
AC, Nondiscrimination/Equal Opportunity	<i>AC-R, Nondiscrimination/Equal Opportunity (Complaint and Compliance Process) - Regulation</i>
	<i>AC-E-1, Nondiscrimination/Equal Opportunity (Sample Notice) - Exhibit</i>
	<i>AC-E-2, Nondiscrimination/Equal Opportunity (Complaint Form) - Exhibit</i>
<i>AD, School District Mission</i>	
ADC, Tobacco-Free Schools	
ADD, Safe Schools	<i>ADD-E, Safe Schools - Exhibit</i>
<i>ADE, Innovation in Education</i>	<i>ADE-R, Innovation in Education (Procedures for Establishment and Review of Innovation Schools and Innovation School Zones) - Regulation</i>
	<i>ADE-E, Innovation in Education - Exhibit</i>
ADF, Student Wellness	ADF-R, Student Wellness - Regulation
	AE, Accountability/Commitment to Accomplishment
	<i>AE-R, Accountability/Commitment to Accomplishment - Regulation</i>
<i>AEA, Standards Based Education</i>	
<i>AED*, Accreditation</i>	
<i>AEE*, Waiver of State Law and Regulation</i>	
Section B	Section B
BBBE, Unexpired Term Fulfillment/Vacancies	
BC, School Board Member Conduct	
<i>BC-R, School Board Member Financial Disclosure - Regulation</i>	
<i>BCA-E-1, Code of Ethics for School Board Members - Exhibit</i>	
<i>BCA-E-2, Board Member Code of Ethics - Exhibit</i>	

Superintendent File: BG-E

BCB, School Board Member Conflict of Interest	
BE, School Board Meetings	
BEAA*, Electronic Participation in School Board Meetings (Special Meetings Only)	
BEC, Executive Sessions	
BEDA, Notification of School Board Meetings	
BEDD, Rules of Order	
BEDF, Voting Method	
BEDG, Minutes	
BEDH, Public Participation at School Board Meetings	
BG, Policy Process	
<i>BG-R, Policy Adoption (Waiver Requests) - Regulation</i>	
BHC, Board Members' Access to District Records	
Section C	Section C
CBA/CBC, Qualifications/Powers and Responsibilities of Superintendent (Job Description)	
	CFA-R, Department Chairpersons - Regulation
Section D	Section D
	<i>DAC*, Federal Fiscal Compliance</i>
DB, Annual Budget	
DB-R, Annual Budget - Regulation	
DBD, Determination of Budget Priorities	
	DFA, Cash Management and Investment Policy
	DFA-R, Cash Management and Investment - Regulation
	DFB, Reserving Policy for Douglas County School District Medical Fund
	DFB-R, Reserving Policy for Douglas County School District Medical Fund - Regulation
	DFC, Certificates of Participation
	DFE, Gate Receipts and Admissions (Royalties)
	DG, Banking Services, Deposit of Funds, Authorized Signatures and Check Writing
	DG-R, Banking Services (And Deposit of Funds) - Regulation
	DH, Bonded Employees and Officers
DI, Fiscal Accounting	
	<i>DIA*, Online Schools and Online Programs (Permissible Documentation)</i>
DID, Capital Asset Reporting and Inventories	
DIE, Audits	

Superintendent File: BG-E

DJ, District Purchasing	DJ-R, Purchasing Procedures - Regulation
	DJA, Purchasing Authority
	<i>DJB*, Federal Procurement</i>
	<i>DJB*-R, Federal Procurement - Regulation</i>
	DJC, Petty Cash
<i>DJE, Bidding Procedures</i>	
	<i>DKC, Expense Authorization/Reimbursement (Mileage and Travel)</i>
Section E	Section E
	EBAB, Hazardous Materials
	EBAB-R, Hazardous Materials - Regulation
	EBB/EBBB, Accident Prevention and Procedures/First Aid/Accident Reports
	EBBA, Prevention of Disease/Infection Transmission
	EBBA-R, Prevention of Disease/Infection Transmission - Regulation
	EBCA, Disaster Plans
	EBCB, Fire Drills
	EBCB-R, Fire Drills - Regulation
	EBCE, School Closings and Cancellations
	EBCE-R, School Closings and Cancellations - Regulation
ECA/ECAB, Security/Access to Buildings	ECA-R, Video Surveillance Equipment - Regulation
	ECAC, Vandalism
	<i>ECAF, Use of Video and Audio Monitoring</i>
	ECD, Custodial Services
	ECE, Traffic and Parking Procedures
	ECF, Energy Policy
	EDB, Maintenance and Control of Materials and Equipment
	EDB-R, Maintenance and Control of Materials and Equipment - Regulation
	EEAA, Transportation Eligible Students
	EEAC, School Bus Scheduling and Routing
	EEAC-R, School Bus Scheduling and Routing - Regulation
	EEAE, School Bus Safety Program
	EEAEA, Bus Driver Requirements, Training and Responsibilities
EEAEAA, Controlled Substance and Alcohol Testing	EEAEAA-R, Controlled Substance and Alcohol Testing Procedure - Regulation
	EEAF, Special Use of School Buses
	EEAFB, Use of School Vehicles by Community Groups

Superintendent File: BG-E

	EEAFB-R, Use of School Vehicles by Community Groups - Regulation
	EEAG, Student Transportation in Private Vehicles
	EF, Nutrition Services
	<i>EF-E-1, School Meal Payments - Exhibit</i>
	<i>EF-E-2, Civil Rights Complaint Procedure for School Nutrition Program - Exhibit</i>
<i>EFEA*, Nutritious Food Choices</i>	
	EGAD, Copyright Compliance
	EGAD-R, Copyright Compliance - Regulation
	EGAEA, Electronic Communication
	EGD, Use of Electronic Signatures
	<i>EHB, Record Retention</i>
	EI, Insurance Management
Section F	Section F
	FAAA, Facilities Development Priority Objectives: Airports
	FAAA-R, Facilities Development Priority Objectives: Airports - Regulation
	FAAA-E, Airport Influence Area Criteria - Exhibit
	FBC-R, School Capacity Standards - Regulation
	FEG, Construction Contracts Bidding and Awards: General Contractors
	FEH, Supervision of Construction
	FEH-R-1, Building and Site Modification (BMP) - Regulation
FF, Naming New Facilities	
	FF-R, Naming New Facilities and Areas of Facilities - Regulation
	FFA, Memorials for Deceased Students and Staff
Section G	Section G
<i>GBA, Open Hiring/Equal Employment Opportunity</i>	
	GBA-R, Open Hiring/Equal Employment Opportunity - Regulation
<i>GBAA, Sexual Harassment</i>	
GBEA, Staff Ethics/Conflict of Interest	GBEA-R, Staff Ethics/Conflict of Interest - Regulation
GBEB, Staff Conduct	
	<i>GBEB-R, Staff Conduct (And Responsibilities) - Regulation</i>
GBEBA, Staff Dress Code	
GBEC, Alcohol and Drug-Free Workplace	
	GBEE, Staff Use of the Internet and Electronic Communications

Superintendent File: BG-E

	GBEE-R, Staff Use of the Internet and Electronic Communications - Regulation
	GBGA, Staff Health
	<i>GBGAB*, First Aid Training</i>
GBGB, Staff Personal Security and Safety	
	<i>GBGF, Federally-Mandated Family and Medical Leave</i>
	<i>GBGI, Staff Military Leave</i>
	<i>GBGK, Staff Legal Leave</i>
	GBI, Electronic Mail
	GBJ, Personnel Records and Files
GCE/GCF, Professional Staff Recruiting/Hiring	
GCEA/GCFA, Professional Staff Background Checks	
	<i>GCHA/GCHB, Mentor Teachers/Administrators</i>
	<i>GCHC*, Professional Staff Induction Program</i>
GCKAA*, Teacher Displacement	
	GCN-R, Integrity and Inter-rater Reliability in Evaluation of Licensed Staff - Regulation
	GCN-R-1, Integrity and Inter-rater Reliability in Evaluation of Licensed Staff Process - Regulation
<i>GCO, Evaluation of Licensed Personnel</i>	
<i>GCQA, Instructional Staff Reduction in Force</i>	
<i>GCQF, Discipline, Suspension and Dismissal of Professional Staff</i>	
	<i>GDA, Support Staff Positions</i>
	<i>GDBC, Support Staff Supplementary Pay/Overtime</i>
<i>GDE/GDF, Support Staff Recruiting/Hiring</i>	
GDEA, Support Staff Background Checks	
	<i>GDG, Part-Time and Substitute Support Staff Employment</i>
	<i>GDQB, Resignation of Support Staff</i>
	<i>GDQD, Discipline, Suspension and Dismissal of Support Staff</i>
Section H	Section H
HB, Policy Governing Relationships with Labor Unions or Labor Union-Affiliated Organizations	
Section I	Section I
IGA, Curriculum Development	IGA-R, Curriculum Development - Regulation
	IGA-E, District Course Proposal Form - Exhibit
	IGA-E-1, District Concurrent Enrollment Program Proposal - Exhibit
	<i>IHAM, Health and Family Life/Sex Education</i>

	<i>IHAM-R, Health and Family Life/Sex Education (Exemption Procedure) - Regulation</i>
	IHBA, Programs for Students with Disabilities
	IHBD, Equivalence of Services (Title I)
<i>IHBK*, Preparation for Postsecondary and Workforce Success</i>	<i>IHBK*-R, Preparation for Postsecondary and Workforce Success (Implementation Plan for Student Individual Career and Academic Plans) - Regulation</i>
IJ, Textbook and Instructional Materials Selection and Adoption	IJ-R, Textbook and Instructional Materials Selection and Adoption - Regulation
	IJ-E, Textbook and Instructional Materials Selection and Adoption Request Checklist - Exhibit
	IJ-E-1, Proposal to Adopt a Textbook - Exhibit
	IJ-E-2, Proposal to Adopt a Novel/Book-Length Work (Fiction, Non-Fiction, Drama) - Exhibit
IJA, Selection of Controversial Learning Resources	IJA-R, Selection of Controversial Learning Resources - Regulation
	IJA-E, Guest Speaker Permission Form - Exhibit
	IJB, Instructional Use of Media Resources
	IJB-R, Instructional Use of Media Resources - Regulation
IJC, Instructional Resources	
	IJL, Library Materials Selection and Adoption
	IJOA, Field Trips and Excursions
IK, State-Mandated Assessments	
IKA, Grading/Assessment Systems	
IKA-R, Grading/Assessment Systems (Exemption Procedure and Information to Parents/Guardians) - Regulation	
	IKAB, Student Progress Reports to Parents/Guardians and Students
	IKAB-R-1, Student Progress Reports to Parents and Students - Regulation
	IKE, Promotion and Retention of Students
IKF, Graduation Requirements	IKF-R-1, Diploma and Graduation Requirements - Regulation
	IKF-R-2, ?
	IKF-R-3, Graduation Competencies (beginning with the Class of 2021) - Regulation
	IKF-R-4, High School Grading and Transcripts - Regulation
<i>IKF-2, Graduation Requirements (Beginning with the Class of 2021)</i>	
	IKFA, Early Graduation
	IKFB, Community Service
	IKFC, Physical Education Waiver

	IKFC-E, Physical Education Waiver Application Form - Exhibit
	<i>ILBC, Early Literacy and Reading Comprehension (Colorado READ Act)</i>
	<i>ILBC-R, Early Literacy and Reading Comprehension (Procedures to Implement the Colorado READ Act) - Regulation</i>
	<i>IMB, Teaching about Controversial Issues and Use of Controversial Materials</i>
	IMBB, Exemptions from Required Instruction
	IMBB-R, Exemptions from Required Instruction - Regulation
IMDB, Flag Displays	
Section J	Section J
<i>JB, Equal Educational Opportunities</i>	
JBA, Nondiscrimination/Non-Harassment of Students	
<i>JBB*, Sexual Harassment</i>	
JBB, Nondiscrimination on the Basis of Disability	JBB-R, Nondiscrimination on the Basis of Disability - Regulation
	JBB-R-1, Section 504 Due Process Hearing Procedure - Regulation
	JBB-E-1, Section 504/ADA Form A - Exhibit
	JBB-E-2, Section 504/ADA Form B - Exhibit
	JBB-E-3, Section 504/ADA Form C - Exhibit
JC, School Attendance Areas	
JCA/JFB, Assignment of Students to Schools, School Choice and Open Enrollment	JCA/JFB-R, Assignment of Students to Schools, School Choice and Open Enrollment - Regulation
JEB, Entrance Age Requirements	
JF, Admission and Denial of Admission	JF-R-1, Procedures for Denial of Admission - Regulation
	JF-R-2, Admission and Denial of Admission (Procedures for Students in Out-of-Home Placements) - Regulation
JFAB, Admission of Nonresident and Homeless Students	JFAB-R, Student Residency - Regulation
<i>JFABB, Admission of Non-Immigrant Foreign Exchange Students</i>	
<i>JFABD, Homeless Students</i>	
	<i>JFABE*, Students in Foster Care</i>
	<i>JFABE*-R, Students in Foster Care - Regulation</i>
<i>JFBA, Intra-District Choice/Open Enrollment</i>	<i>JFBA-R, Intra-District Choice/Open Enrollment - Regulation</i>
<i>JFBB, Inter-District Choice/Open Enrollment</i>	<i>JFBB-R, Inter-District Choice/Open Enrollment - Regulation</i>
	<i>JFC, Student Withdrawal from School/Dropouts</i>

Superintendent File: BG-E

	<i>JFC-R, Student Withdrawal from School/Dropouts - Regulation</i>
JH, Student Absences and Excuses	JH-R, Student Count Documentation for Online Schools - Regulation
<i>JHB, Truancy</i>	
	JHCE-R, Responding to Receipt of a Do Not Resuscitate (DNR) Order or Cardiopulmonary Resuscitation (CPR) Directive - Regulation
JHD, Exemptions from School Attendance: School Release Permits	
JI/JIA, Student Rights and Responsibilities/Due Process Rights	
JIC, Student Conduct	
JICA, Student Dress Code	
JICC, Student Conduct in School Vehicles	JICC-R-1, Student Conduct in School Vehicles - Regulation
	JICC-R-2, Student Conduct on School Buses - Regulation
	JICC-R-3, Student Conduct on School Buses - Regulation
<i>JICDA, Code of Conduct</i>	
JICDE*, Bullying Prevention and Education	
JICEA, School-Related Student Publications	<i>JICEA-R, School-Related Student Publications (School Publications Code) - Regulation</i>
<i>JICEC*, Student Distribution of Noncurricular Materials</i>	
JICF, Gang-Related Behaviors and Dress	
JICG, Smoking and Other Uses of Tobacco by Students	
JICH, Drug and Alcohol Involvement by Students	JICH-R, Drug and Alcohol Involvement by Students - Regulation
JICI, Weapons in School	
JICJ, Student Use of District Information Technology	JICJ-R, Student Use of District Information Technology - Regulation
JIH, Student Interviews, Interrogations, Searches and Arrests	
	JIHA, Student Possession and Use of Portable Electronic Devices (Including Cellular Phones)
<i>JIHB, Parking Lot Searches</i>	
	JJA, Student Organizations (Secondary Schools)
	JJF, Student Activities Funds Management
	JJI, Interscholastic Athletics
	JJJ, Extracurricular Activity Eligibility
JK, Student Discipline	
<i>JK-R, Student Discipline - Regulation</i>	
<i>JK*-2, Discipline of Students with Disabilities</i>	

JKA, Use of Physical Intervention and Restraint	
JKA-R, Use of Physical Intervention and Restraint - Regulation	
JKBA*, Disciplinary Removal from Classroom	
JKBA*-R, Disciplinary Removal from Classroom - Regulation	
JKD/JKE, Suspension/Expulsion of Students (and Other Disciplinary Interventions)	
JKD/JKE-R, Suspension/Expulsion of Students (Hearing Procedures) - Regulation	
JKG*, Expulsion Prevention	
	JLCB, Immunization of Students
	JLCD, Administering Medications to Students
	JLCD-E-2, School Medication Administration Log - Exhibit
JLCDA*, Students with Food Allergies	
JLCDB*, Administration of Medical Marijuana to Qualified Students	JLCDB-E-1, Hemp Administration Attestation - Exhibit
	JLCDB-E-2, Cannabis Administration Attestation - Exhibit
JLDAC, Screening/Testing of Students (And Treatment of Mental Disorders)	JLDAC-E, Notification of Rights Under the Protection of Pupil Rights Amendment (PPRA) - Exhibit
JLJ*, Physical Activity	
JQ, Student Fees, Fines and Charges	
JRA/JRC, Student Records/Release of Information on Students	JRA/JRC-R, Student Records/Release of Information on Students (Review, Amendment and Hearing Procedures) - Regulation
	JRA/JRC-E-1, Student Records/Release of Information on Students (Notification to Parents and Students of Rights Concerning Student Education Records) - Exhibit
JRCA*, Sharing of Student Records/Information between School District and State Agencies	
JRCB*, Privacy and Protection of Confidential Student Information	
JRCB*-R, Privacy and Protection of Confidential Student Information (Hearing and Complaint Procedures) - Regulation	
JS*, Student Use of the Internet and Electronic Communications	
Section K	Section K
KBB, Parent and Family Engagement Policy	KBB-R, District Title I Parent and Family Engagement Policy - Regulation

Superintendent File: BG-E

	<i>KBBA, Custodial and Noncustodial Parent Rights and Responsibilities</i>
	<i>KDB, Public's Right to Know/Freedom of Information</i>
	<i>KDBA*, Parent Notification of Employee Criminal Charges</i>
KDE, Crisis Management (Safety, Readiness and Incident Management Planning)	
KE, Public Concerns and Complaints	
KEC, Public Complaints about Learning Resources	KEC-R, Public Complaints about Learning Resources - Regulation
	KEC-E, Citizen's Request for Reconsideration of Learning Resources - Exhibit
	KEE, Nondiscrimination of the Public on the Basis of Disability
	KEE-R, Nondiscrimination of the Public on the Basis of Disability - Regulation
	KEE-E-1, Section 504/ADA Form A - Exhibit
	KEE-E-2, Section 504/ADA Form B - Exhibit
	KEE-E-3, Section 504/ADA Form B - Exhibit
	KF, Community Use of School Facilities
	KF-R-1, Community Use of School Facilities - Regulation
KFA, Public Conduct on District Property	
KFA, Use of School Facilities for Telecommunications Equipment	
	KHB, Advertising in the School District and Revenue Enhancements
	KHB-R, Advertising in the School District and Revenue Enhancements - Regulation
	KHC, Distribution of Non-District Related Materials
	KHC-R, Distribution of Non-District Related Materials (for Non-Profit Organizations) - Regulation
	KHC-E, Distribution of Non-District Materials - Exhibit
KI, Visitors to the Schools	KI-R, Visitors and Volunteers in the Schools - Regulation
	<i>KLMA, Relations with Military Recruiters, Postsecondary Institutions and Prospective Employers</i>
Section L	Section L
LBD*, Relations with District Charter Schools	
LBD*-R, Relations with District Charter Schools (Procedures for Establishment, Review, Renewal, Revocation and Closure) - Regulation	

Response to Motion to Dismiss

Board File: GCQF

DISCIPLINE, SUSPENSION, NONRENEWAL AND DISMISSAL OF LICENSED STAFF

Teacher discipline and suspension

The superintendent or his/her designee shall be authorized to suspend with pay or place on administrative leave a teacher as a disciplinary measure and/or pending an internal investigation for alleged misconduct. However, a teacher shall not be subject to any disciplinary proceeding, including dismissal, for actions which were in good faith and in compliance with the district's conduct and discipline code, nor shall a contract nonrenewal be based on such lawful actions.

Probationary teacher nonrenewal

A district probationary teacher shall be re-employed for the succeeding academic year at the appropriate salary unless the Board does not renew the contract of such teacher pursuant to law. The superintendent may recommend that the Board not renew the employment contract of a probationary teacher for any reason he or she deems sufficient.

Dismissal of non-probationary staff

The Board shall follow procedures established by law for the dismissal of non-probationary teachers.

Adopted by the Board: June 9, 2020

LEGAL REFS.:

- C.R.S. 22-32-109.1(9) (*immunity provisions in safe schools law*)
- C.R.S. 22-63-202 (3) (*temporary suspension during contract period*)
- C.R.S. 22-63-202 (4) (*disclosure of reasons why left employment*)
- C.R.S. 22-63-203 (*renewal and non-renewal of probationary teacher contracts*)
- C.R.S. 22-63-301 *et seq.* (*dismissal of licensed staff*)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 22-cv-01636-RM-STV

COREY MCNELLIS,

Plaintiff,

v.

DOUGLAS COUNTY SCHOOL DISTRICT,

Defendant.

REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

Defendant Douglas County School District (the “School District”), replies in support of its motion to dismiss (“Motion”), as follows:

INTRODUCTION

Plaintiff Corey McNellis (“McNellis”), a former assistant principal at the School District’s Ponderosa High School (“Ponderosa”), alleges the School District terminated him in violation of the First Amendment following an email exchange in which he engaged with all of Ponderosa staff about a high school play. He also alleges the School District terminated him in violation of Title VII and the Colorado Anti-Discrimination Act (“CADA”) because of his religion, and that the School District retaliated against him in violation of those statutes. The Motion requested dismissal of McNellis’ complaint in its entirety. McNellis filed a response to the Motion (“Response”). For the reasons set forth in the Motion and below, McNellis’ Amended Complaint should be dismissed for failure to state a claim.

ARGUMENT

I. McNellis’ § 1983 First Amendment retaliation claim (Claim 5) fails as a matter of law.

The School District moved to dismiss McNellis’ First Amendment retaliation claim because he spoke as an employee, which precludes his claim. *See Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006) (employee speaking about his official duties is not entitled to First Amendment protection). The School District also argued that McNellis’ emails were not on a matter of public concern but were tantamount to personal grievances that were not entitled to First Amendment protection. *See Wilson v. City of Littleton, Co.*, 732 F.2d 765, 768 (10th Cir. 1984) (personal feelings not entitled to First Amendment protection). The School District also argued that McNellis’ First Amendment claim should be dismissed because he failed to plead municipal liability.

McNellis’ response to the Motion (“Response”) argued that when looking at the emails as a whole, this Court should determine that he was speaking as a parent of a Ponderosa student on a matter of public concern. He argued that his conclusory allegation that he was speaking as a parent trumps all other objective facts, including his statement in the emails that he was speaking as an administrator. He also argued that his speech about the school play was on a matter of public concern because the production was an adult-themed play that had been deemed by the theater teacher to be unfit for younger audiences and about which she solicited feedback. McNellis further argued that he pled sufficient facts to show municipal liability. These arguments fail.

i. McNellis was speaking as an employee.

McNellis and the School District agree that when considering whether a public employee speaks as an employee or a private citizen, courts take a “practical view of the facts and

circumstances surrounding the speech.” *Rohrbough v. Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 746 (10th Cir. 2010). The practical view of the facts of this case show that McNellis was speaking as an employee. First, McNellis specifically admitted that he was speaking as an employee when he wrote, “[a]s a Dad of a student here **and also an employee in the school**, what is my recourse if I disagree with the production? Was this a heads up to see if everyone is cool?” *Am. Compl.* at ¶ 59 (emphasis added). It is also undisputed that McNellis sent all the emails from his school district email account, and they included a signature block that identified him as “Corey McNellis, Athletic Director/Assistant Principal, Ponderosa High School.” *See* Motion to Dismiss, Ex. C. Multiple courts have found that when an employee admits he is speaking as an employee, identifies himself as an employee, and uses employer-sponsored email addresses, he is indeed speaking as an employee. *See Bowie v. Maddox*, 642 F.3d 1122, 1134 (D.C. Cir. 2011) (employee affidavit made in employee’s “official capacity” when he identified himself as an employee in the affidavit); *Mpoy v. Rhee*, 758 F.3d 285, 294 (D.C. Cir. 2014) (employee who sent email complaint wherein he identified himself as an employee in the opening line and closing signature was speaking as an employee).

Aside from the fact that McNellis specifically identified himself as an employee, thereby lending himself to unprotected speech, the audience and manner of his email communication shows that he was speaking in his official capacity. *See Pope v. Carl*, 2018 WL 4119938, *7 (E.D. KY 2018) (courts consider the audience and setting to determine whether speech is protected). Here, McNellis’ entire audience consisted of Ponderosa staff and the content of the speech addressed a school play. As discussed in the motion, McNellis’ speech was made to a captive audience of school employees, therefore the audience and manner of the communication shows

that McNellis was speaking as an employee. *See Weintraub v. Bd. of Educ. of City Sch. Dist. of City of New York*, 593 F.3d 196, 204 (2nd Cir. 2010) (speech through channels only available to those working in the school not made as citizen).

McNellis argues that his conclusory statement in the email and in the amended complaint that he was speaking as the “dad” of a School District student shows he was speaking as a private citizen. However, Plaintiff fails to cite any authority for the proposition that this conclusory statement overrides the admission that he was speaking as an administrator, or the fact that he identified himself as such and spoke solely to school staff members. Rather, as discussed in the Motion and above, the facts show that McNellis was speaking in his official capacity, and his speech is not entitled to First Amendment protection.

ii. McNellis’ speech was a personal grievance, not a matter of public concern.

The School District also argued that even if McNellis’ speech was not made in his official capacity, it was not made about a public concern and was merely a personal grievance about a school play that is not subject to First Amendment protection. The Response argued that the controversial content of the play made it a matter of public concern, and that his speech encapsulated concerns that could be held by other parents or members of the public. Plaintiff is mistaken.

Williams v. Gwinnett C’nty Pub. Schs., 425 Fed. Appx. 787 (11th Cir. 2011) is instructive here. In *Williams*, the plaintiff, a public school teacher, wrote an essay that he sent to the entire school staff complaining about a school therapy dog program. In the essay/email, the teacher “berated” another staff member for bringing a dog to school, complained that her desire to bring the dog did not overcome his allergy to dogs, and asked her to “respect...the fact that [his] rights

to eat, and teach, in a place free of pet dander must be acknowledged.” *Id.* at 788-89. Williams was eventually fired because of the email. The Eleventh Circuit determined that although the plaintiff alleged he was complaining for himself and the general public, the context and content of the email evidenced that he was merely expressing a personal grievance about a school program. *Id.* at 789-90. The court held that the plaintiff “distributed to his coworkers an essay that communicated his disdain for dogs in his workplace and his personal grievance against a staff member.” *Id.* Moreover, the court also determined that the plaintiff’s use of the school email system further evidenced that his speech was not protected. Here, McNellis’ email complaints about *The Laramie Project* evidence his disdain for the play and its contents. They do not evidence private speech on a matter of public concern. As a result, McNellis’ First Amendment claim fails.

iii. McNellis cannot prove municipal liability.

a. The Board is the final policymaker for the School District.

The School District argued that McNellis cannot show that a final policymaker for the School District violated his First Amendment rights because he cannot show that the Board, which is the only legal policymaker for the School District for the employment of administrators, knew about his protected speech when it terminated him. McNellis misapprehends the School District’s arguments and the legal concept of municipal liability.

First, McNellis mistakenly asserts that via its municipal liability analysis the School District is arguing that school districts could never be held responsible for constitutional violations. He also asserts that the School District is trying to make a distinction between the School District and its Board, despite previously arguing to his attorneys that they are one and the same. However, the School District has not argued that it can never be held liable for constitutional violations.

Rather, the School District correctly argued that public entities such as it may only be held responsible under Section 1983 if the alleged unconstitutional actions of an employee were (1) carried out by an official with final policy making authority with respect to the challenged action or (2) representative of an official policy or custom of the municipal institution. *Murrell v. School Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1249 (10th Cir. 1999). The School District further argued that McNellis has not pled that his rights were violated pursuant to an official policy or custom, nor did he sufficiently plead that a final policymaker for the School District violated his rights.

As discussed at length in the Motion, pursuant to law and School District policy, the only entity with legal policymaking authority related to School District administrator employment, including administrator termination, is the Board of Education through which the school district operates. *See* Section 22-32-109(1)(f)(I), C.R.S.; Motion to Dismiss Ex. A, Board Policy CBA/CBC. Therefore, for McNellis’ Section 1983 claim to move forward, he must show the Board of Education violated his rights.

McNellis argues that the “well-pled facts” in the Amended Complaint, in paragraphs 8-12, show that the Board delegated its policymaking authority to other district employees, including the Superintendent, administrators, and human resources employees. In support of his arguments, he cites to a number of Colorado state court cases, and one federal court case, that concluded a school district’s board of education delegated its authority to subordinate employees. *See* Response, p. 6–7. However, each of those cases is fact specific, and analyzed the particular school district policies at issue, determining that in each circumstance the school district’s board of education had **legally** delegated, through its policies, decisionmaking authority to others. No such

policies exist in McNellis’ case. To the contrary, the Board policy in question in this case, CBA/CBC, shows that the Board *retained* the right to hire and fire administrators such as McNellis. Thus, McNellis’ allegations that the Board delegated administrator hiring and firing authority to subordinates are unsupported by law or School District policy. Indeed, they are contrary to state law and policy and are nothing more than conclusory allegations that the Court is not required to consider. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

McNellis also argues that he is entitled to further discovery as to this issue, precluding dismissal at this stage, because “the Board’s policies” attached to his Response “have many inconsistencies and discovery is needed to further explore this issue.” Am. Compl., p. 6. This, too, is nothing more than a conclusory statement, as McNellis does not explain how the documents he attached are inconsistent with state law or Board Policy CBA/CBC. In any event, McNellis’ Exs. 1 through 3 do not conflict with state law or Policy CBA/CBC, but further evidence that only the Board has authority to terminate administrators.

Exhibit 1 is an incomplete copy of the School District’s “Board of Education Policy Governance Book,” and it is unclear what McNellis thinks is contradictory. Indeed, Exhibit 1 evidences that the Board has the authority to adopt policies, such as CBA/CBC, to explain the relationship between Superintendent and Board duties. *See* Ex. 1, p. 2, § GP 1.2 Job of the Board and § 1.3.1.2. Additionally, on page 3 of Ex. 1, the document states that a “consent agenda” must be provided to the Board that encompasses all items delegated to the Superintendent that must be Board approved. Pursuant to Board Policy CBA/CBC, this includes administrator employment recommendations made by the Superintendent that must be approved by the Board. Additionally, §EL 11 Staff Treatment, found at Ex. 1, p. 4, explains that the Superintendent has the authority to

ensure that administrators actions are all “lawful, ethical, safe, dignified, and in compliance with Board policy.” This portion gives the Superintendent the authority to recommend discipline, including termination which recommendations are made to the Board, for administrators who do not provide ethical treatment of staff. In short, the Policy Governance Book is consistent with state law and Policy CBA/CBC.

McNellis’ Exhibit 2 is a chart explaining the “policy process.” It is not a Board policy, and therefore has no bearing on the determination of final policymaking authority. Nonetheless, Exhibit 2 explains which Board Policies describe duties of the Board, the Superintendent, or someone else. Exhibit 2, page 2 states that CBA/CBC, which explains the Superintendent’s role, is a function of the Board. Exhibit 2 page 5 states that “professional staff recruiting/hiring” is a function of the Board, and states that Policy GCQF Discipline, Suspension, and Dismissal of Licensed Staff is a responsibility retained by the Board. Ex. 3, GCQF, pertains to “licensed staff,” or teachers, but nonetheless states that the Board retains the right to hire and dismiss teachers. Exhibits 2 and 3 are also consistent with state law and Policy CBA/CBC. McNellis has pled no facts, nor made any arguments, that support the conclusion that the Board is not the final policymaker regarding the employment of administrators such as McNellis.

b. There are no well-pled allegations that the Board knew of McNellis’ emails.

Finally, the School District argued that although one Board member allegedly knew of McNellis’ emails, there is no evidence he shared his knowledge with the Board, or that the Board considered the emails when voting to terminate McNellis. *See Fortner v. County of El Paso*, 2015 WL 10384289, *13 (D. Colo. 2015) (a single board member’s actions cannot bind a multimember board) (unpublished). In response, McNellis argues that because Director Ray was “chairman” of

the Board, his alleged knowledge is imputed to the other Board members. This is incorrect. As *Fortner* explains, the Board acts as a collective whole and does not act based on one member alone. *Id.* This is so regardless of the board member’s title. Thus, a single Board member’s alleged knowledge is not imputed to the Board, and one Board member’s alleged improper activity cannot bind the School District for purposes of municipal liability.

II. McNellis’ Title VII and CADA Discrimination (Claims 1 and 3) claims fail as a matter of law.

The School District argued that McNellis’ Title VII and CADA discrimination claims fail because he failed to plead he was terminated under circumstances giving rise to an inference of discrimination. *See Barlow v. C.R. England, Inc.*, 703 F.3d 497, 505 (10th Cir. 2012). The School District argued that McNellis was required to, but did not, plead facts to support the claim that non-Christians were treated more favorably than him. *Bekkem v. Wilkie*, 915 F.3d 1258, 1274-75 (10th Cir. 2019) (plaintiff pleading disparate treatment must specifically identify individuals outside of the protected class that were treated more favorably).

In response, McNellis asserts that his claim is not one of disparate treatment and that he was terminated solely for expressing his religious beliefs. Nonetheless, as to the disparate treatment analysis, he argues that Ponderosa staff also complained about other male administrators, specifically Ottmann, Joseph Schubarth, and Jarod Nicholson, yet they were not disciplined, thereby evidencing discrimination based on McNellis’ religion. But, as argued in the motion to dismiss, McNellis’ argument fails because McNellis does not state that Ottmann, Schubarth, and Nicholson are non-Christians, nor can he truthfully do so. As *Bekkem* teaches, to move forward with a disparate treatment claim, McNellis must identify similarly situated non-Christians who were treated more favorably than him. Because he has not and cannot do so, his claim fails.

That said, despite the allegations in the complaint, McNellis appears now to assert that his claim is that he was terminated because he expressed his Christian religious preferences in the email string. If that is the case, he must plead facts to show he: 1) belongs to a protected class; (2) performed his job satisfactorily; (3) suffered an adverse employment action; and (4) was terminated for his failure to “hold or follow his or her employer's religious beliefs.” *DeFreitas v. Horizon Inv. Mgmt. Corp.*, 577 F.3d 1151, 1162 (10th Cir. 2009); *Chavez v. Colo. Dep’t of Educ.*, 244 F. Supp. 3d 1106, 1126 (D. Colo. 2017); *Buonanno v. AT&T Broadband, LLC*, 313 F. Supp. 2d 1069, 1080 (D. Colo. 2004) (holding that a plaintiff alleging he was fired merely for expressing his religious beliefs must show that he was terminated for failing to follow his employer’s religious beliefs). This claim also fails.

McNellis fails to plead any facts about the religious beliefs held by the decisionmakers in this case, or anyone involved in the investigation of his misconduct. In the Response, McNellis argues that School District employees Cathy Franklin, Daniel Winsor, and Ottmann were all involved in the termination decision, but he does not describe how this “fact” evidences religious discrimination, nor does it. McNellis never alleged in the Complaint that any of those employees are non-Christians that discriminated against him for holding a different belief, nor can he make that assertion either. Because McNellis fails to identify non-Christians treated more favorably than him, or non-Christians that terminated him based on his religious beliefs and for a failure to follow theirs, his Title VII and CADA claims fail.

III. McNellis’ Title VII and CADA Retaliation (Claims 2 and 4) claims fail as a matter of law.

In the Motion, the School District argued that McNellis failed to plead facts to support his retaliation claim because he only engaged in protected opposition once – when he complained to

Ottmann that he felt he was being discriminated against – and that the complaint to Ottmann cannot support his claim because there is no evidence that any of the decisionmakers knew about the protected opposition. Although McNellis pleads in the Amended Complaint that Ottmann was a decisionmaker, McNellis’ allegation is belied by the lack of any allegations to support his attorneys’ musings and Ottmann’s own statements in a letter referenced by McNellis and attached to the motion to dismiss as School District Exhibit 4. McNellis argues that this is a factual dispute that requires discovery, but it does not.

As an initial matter, McNellis never pled that Ottmann was a decisionmaker. Rather, he pled that Ottmann attended the initial October 5, 2020 meeting wherein Franklin and Winsor discussed the emails with McNellis, but McNellis does not allege that Ottmann was involved in the decision to place him on leave or terminate him. McNellis also appears to reverse course in arguing that Ottman *could have been* a decisionmaker, notwithstanding McNellis’ voluntary inclusion of a statement by Ottman indicating that he was not. As discussed, the Court is permitted to consider a written document referenced in the complaint, and when the content of such document contradicts allegations in the complaint, the court need not accept the complaint’s allegations as true. *See Davis v. Utah*, 2021 WL 3930277, *3 (10th Cir. 2021). Here, McNellis’ assertion in the Reply that Ottmann was a decisionmaker is not supported by the allegations in the Complaint, and directly contradicts Ottmann’s own statement that he was not a decisionmaker. Thus, McNellis’ cannot show that any decisionmaker knew about his complaint. *See id.*

In the response, McNellis also asserts the School District “misled” the Court by using an incorrect *prima facie* standard because it cited *Allison v. Digital Mgmt. Inc.*, 2013 WL 5862647, **3-4 (D. Colo. 2013), and argued that for McNellis to proceed he must prove he (1) engaged in

protected activity; (2) suffered an adverse action; and (3) his protected activity was the “but-for” cause of the adverse action. McNellis argues that *Allison* “stands alone” and that the “but-for” test is improper. McNellis is once again mistaken.

In *Univ. of Tx. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013), the Supreme Court definitively held that “a plaintiff making a retaliation claim under [Title VII] must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.” The Tenth Circuit followed the Supreme Court’s guidance in *Barrett v. Salt Lake Cnty.*, 754 F.3d 864, 868 (10th Cir. 2014), holding again that a Title VII plaintiff must show but-for causation. Thus, to prove causation, McNellis must indeed satisfy the “but-for” test.

Nonetheless, McNellis’ claim fails under the “but-for test” and the “causal connection” framework (which is merely another way of stating the “but-for” test) because he cannot show there was any causal connection between his complaint to Ottmann and his termination. As discussed above, Ottmann was not a decisionmaker. Further, there is no allegation that any of the decisionmakers knew about McNellis’ complaint to Ottmann. Thus, they could not have terminated McNellis for that complaint. See *Lindsay v. Denver Public Schools, et al.*, 2022 WL 14813722, *7 (D. Colo. 2022) (holding that plaintiff’s retaliation claim failed because the decisionmakers did not know about her protected activity, and that “temporal proximity” alone was insufficient, without knowledge, to demonstrate causation); see also *Petersen v. Dep’t of Corr.*, 301 F.3d 1181, 1188 (10th Cir. 2002). McNellis also alleges he complained to “coworkers” about religious discrimination, but he does not allege any of those people told the decisionmakers about his complaints, either. Thus, he cannot sustain a retaliation claim based on the alleged complaint to coworkers. See *Lindsay*, 2022 WL 14813722, *7.

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 2022, a correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT** was filed and served via CM/ECF to the following:

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore**

Civil Action No. 22-cv-01636-RM-STV

COREY MCNELLIS,

Plaintiff,

v.

DOUGLAS COUNTY SCHOOL DISTRICT,

Defendant.

ORDER

This employment dispute is before the Court on Defendant’s Motion to Dismiss (ECF No. 34), which has been fully briefed (ECF Nos. 37, 38). For the reasons below, the Motion is granted.

I. LEGAL STANDARD

To defeat a motion to dismiss, the complaint must allege a “plausible” right to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007). The plaintiff’s “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Id.* at 555. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court must accept as true all well-pleaded factual allegations in the complaint, view those allegations in the light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff’s favor.

Brokers' Choice of Am., Inc. v. NBC Universal, Inc., 757 F.3d 1125, 1136 (10th Cir. 2014); *Mink v. Knox*, 613 F.3d 995, 1000 (10th Cir. 2010). However, conclusory allegations are insufficient, *Cory v. Allstate Ins.*, 583 F.3d 1240, 1244 (10th Cir. 2009), and courts “are not bound to accept as true a legal conclusion couched as a factual allegation,” *Twombly*, 550 U.S. at 555 (quotation omitted).

II. BACKGROUND

Plaintiff worked at Ponderosa High School, a public school overseen and operated by Defendant, for fourteen years. (ECF No. 24, ¶¶ 7, 17.) At the time he was terminated in October 2020, he had been promoted to the positions of Athletic Director and Assistant Principal, and his child was attending the school. (*Id.* at ¶¶ 39, 47.) In his capacity as Assistant Principal, Plaintiff was part of the Administrative Team—comprised of the Principal, Tim Ottmann, and other Assistant Principals—which met weekly to discuss issues regarding extracurricular activities. (*Id.* at ¶¶ 41, 42.)

On October 2, 2020, Ponderosa’s Theatre Director, Kayla Diaz, sent an email to Ponderosa staff about an upcoming school play, *The Laramie Project*. (*Id.* at ¶¶ 50, 53.) The email¹ explained: “*The Laramie Project* is the true story of the impact of a hate crime in a small town, told through interviews with community members and translated into a script.” (ECF No. 19-2 at 1.) It further stated: “In 1998, Matthew Shepard, a gay college student, was murdered on the outskirts of Laramie, Wyoming. His death sparked outrage throughout the nation, as well as controversy. There were many contesting opinions and arguments, but in the end, what matters

¹ On a motion to dismiss, “[c]ourts are permitted to review documents referred to in the complaint if the documents are central to the plaintiff’s claim and the parties do not dispute the documents’ authenticity.” *Toone v. Wells Fargo Bank, N.A.*, 716 F.3d 516, 521 (10th Cir. 2013) (quotation omitted). Thus, the Court may consider the email exchange prompted by Diaz’s email without converting the Motion into a motion for summary judgment.

to our show is how it affected the Laramie community.” (*Id.*) And it included this disclaimer: “Due to language and the content discussed in the show (there is no violence shown, only discussed) this is not a family-friendly show. We are advertising ‘For mature audiences’ and I would generally recommend high school age and up.” (*Id.* at 2.) Due to the COVID pandemic, the show was to be live-streamed. (*Id.* at 1.) The email was sent on a Friday afternoon. (*Id.* at 1.)

Several staff members responded to the email Friday evening and Saturday morning. The responses were generally supportive, and some suggested that the show would complement Ponderosa’s anti-bullying program. For example, one recipient responded, “Thank you so much for deciding to do a show that so closely connects to Ponderosa High School’s core values of kindness, empathy, and respect.” (*Id.* at 2.) Another responded, “As a history teacher I’m glad to hear that our students are engaging with important historical events across subject areas.” (*Id.* at 3.)

Plaintiff responded by sending three emails on Friday evening and another one on Saturday morning, stating as follows:

Thanks Kayla, I appreciate the email and I really do admire the hard work that you do. As a Dad of a student here and also as an employee in the school, what is my recourse if I disagree with the production? Was this a heads up to see if everyone is cool?

* * *

As a christian I would love to collaborate with your project. Please let me know if the love that Jesus can provide will help your play.

* * *

For the record, all of administration does not agree with me on this. I am totally solo. Good night Mustangs!

* * *

I understand people support this. Forgive me for having a different viewpoint and the audacity to publicly share it.

(*Id.* at 2, 4, 5, 7.) The emails had the same signature block:

Corey McNellis
Athletic Director/Assistant Principal
Ponderosa High School
303-387-4100

(*Id.*)

The emails were shared with Defendant’s Human Resources Director, Cathy Franklin; the Director of Schools, Daniel Winsor; and Mr. Ottmann. (ECF No. 24, ¶ 66.) On Saturday, Mr. Winsor called Plaintiff and told him he needed to stay home on Monday because of his “religious comments.” (*Id.* at ¶¶ 67, 70.)

The following Monday, Ms. Franklin, Mr. Winsor, and Mr. Ottmann called Plaintiff for a virtual meeting. (*Id.* at ¶ 77.) Plaintiff was informed that he was being placed on leave and investigated due to his religious comments. (*Id.* at ¶¶ 80, 81.) While on leave, Plaintiff complained to Mr. Ottmann and several coworkers that he was being investigated based on his Christian beliefs. (*Id.* at ¶¶ 95, 96.) As part of its investigation, Defendant received a complaint from a teacher claiming Plaintiff was part of a “good ole boys club” that included other male teachers and administrators, including Mr. Ottmann. (*Id.* at ¶ 101.) Defendant also uncovered an email indicating Plaintiff had complained “as a parent” about Ponderosa’s communications regarding its COVID safety protocols. (*Id.* at ¶ 106.)

On October 29, 2020, Defendant terminated Plaintiff’s employment, citing his emails regarding *The Laramie Project* as the reason for his termination. (*Id.* at ¶¶ 113, 114.)

In his Amended Complaint, Plaintiff alleges that he was discriminated and retaliated against because he is a Christian and that he was fired in retaliation for exercising his First Amendment rights. He asserts claims for (1) discrimination in violation of Title VII; (2) retaliation in violation of Title VII; (3) discrimination in violation of the Colorado Anti-Discrimination Act (“CADA”); (4) retaliation in violation of CADA; and (5) retaliation under 42 U.S.C. § 1983 for exercising his right to free speech under the First Amendment.

III. ANALYSIS

Defendant has moved to dismiss each of Plaintiff’s claims.

A. First Amendment Retaliation Claim

A public employee’s First Amendment claim is assessed using the five-prong *Garcetti/Pickering* test. *Roberts v. Winder*, 16 F.4th 1367, 1381 (10th Cir. 2021) (citing *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). That test requires the Court to determine whether

(1) the speech was made pursuant to the employee’s official duties, (2) the speech was made on a matter of public concern, (3) the government’s interests as an employer in promoting efficient public service outweigh a plaintiff’s free speech interests, (4) the speech was a motivating factor in the adverse employment action, and (5) the same employment decision would have been made without the protected speech.

Id. The first three prongs are issues of law to be resolved by the Court, while the last two are ordinarily for the trier of fact. *Rohrbough v. Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 745 (10th Cir. 2010).

Defendant contends that Plaintiff failed to plead sufficient facts to establish the first, second, and fourth prongs of the test, and the Court agrees.

1. Speech Made Pursuant to the Employee’s Official Duties

“The Tenth Circuit’s decisions addressing the first step of the *Garcetti/Pickering* analysis have taken a broad view of the meaning of speech that is pursuant to an employee’s official duties.” *Id.* at 746 (quotation omitted). “[I]f an employee engages in speech during the course of performing an official duty and the speech reasonably contributes to or facilitates the employee’s performance of the official duty, the speech is made pursuant to the employee’s official duties.” *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1203 (10th Cir. 2007). Included in this category is speech relating to tasks within an employee’s employment responsibilities as well as speech that is generally consistent with the type of activities the employee was paid to do. *See id.* However, “[t]he ultimate question is whether the employee speaks as a citizen or instead as a government employee—an individual acting in his or her professional capacity.” *Id.* (quotation omitted). Thus, not all speech about an employee’s work or that occurs at work is made pursuant to the employee’s official duties. *Id.* at 1204. Courts “must take a practical view of all the facts and circumstances surrounding the speech and the employment relationship.” *Id.*

Here, Plaintiff expressed his concerns about *The Laramie Project* “as an employee” in emails that were responses to a staff email sent by Ms. Diaz. (ECF No. 19-2 at 2.) The Complaint does not contain allegations demonstrating or suggesting that Plaintiff would have been aware of the show—at least at the time of the speech at issue—were it not for his status as a Ponderosa staff member. Plaintiff’s emails were sent from his district email address and listed his positions of Athletic Director and Assistant Principal in the signature portion, and Plaintiff does not allege that anyone besides Ponderosa staff were the intended recipients of his emails. Thus, this is not a case involving speech in the form of social media posts or statements to news

outlets. *Cf. Cowden v. Bd. of Governors*, 622 F. Supp. 3d 1019, 1031-33 (D. Colo. 2022). The circumstances suggest that commenting on issues related to the show with other Ponderosa staff members is generally consistent with the types of activities Plaintiff was paid to do, particularly as a member of the Administrative Team. These factors all weigh in favor of finding Plaintiff’s emails were made pursuant to his official duties.

On the other hand, Plaintiff points out that he also expressed his concerns “[a]s a Dad of a student here.” (ECF No. 19-2 at 2.) However, there is no allegation that other parents of Ponderosa students were included as recipients of Ms. Diaz’s email, which included a letter addressed, “Dear Staff.” (*Id.* at 1.) In the absence of allegations showing that he would have been included in the initial email or had access to this specific email exchange but for his role as an employee, the Court is not persuaded that Plaintiff’s reference to his parental status suffices to establish that he was speaking as a private citizen rather than a public employee.

See Rohrbough, 596 F.3d at 747 (noting that “the employee’s chosen audience” and “chosen method of disseminating speech” are appropriately considered when assessing whether speech falls within the scope of the employee’s official duties).

Nor does Plaintiff’s additional comment that “all of administration does not agree with me on this. I am totally solo” mean that his emails were not made pursuant to his official duties. (ECF No. 19-2 at 5.) Indeed, it could reasonably be interpreted to mean that he was speaking as an administrator, albeit one without the full backing of the Administrative Team. While the comment might also suggest that other Ponderosa employees did not necessarily agree with Plaintiff’s viewpoint on presenting *The Laramie Project* at the school, in the context of the ongoing exchange of emails among Ponderosa staff members, it does not demonstrate that

Plaintiff was speaking solely as a private citizen.

Finally, the fact that the emails were sent “after hours” does not move the needle here. *Cf. Brammer-Hoelter*, 492 F.3d at 1205 (concluding that speech that occurred outside the school, after hours, and with ordinary citizens and parents was not within the scope of the plaintiffs’ official duties as teachers). Employees commonly read and send work-related emails outside of work hours, and Plaintiff has not alleged that it was remarkable or unusual that Ponderosa employees responded to Ms. Diaz’s email “after hours” or that Ponderosa staff members—members of the Administrative Team included—did not regularly discuss work issues via email. And again, the absence of any indication that other parents or other members of the public were included in the email exchange reinforces the notion that the initial email and staff members’ responses to it were sent pursuant to the employees’ official duties.

Therefore, the Court finds Plaintiff has not alleged facts that would satisfy the first prong of the *Garcetti/Pickering* test.

2. Speech Was Made on a Matter of Public Concern

Regarding the second prong of the test, “[m]atters of concern are those of interest to the community, whether for social, political, or other reasons.” *Id.* (quotation omitted). “In determining whether speech pertains to a matter of public concern, the court may consider the motive of the speaker and whether the speech is calculated to disclose misconduct or merely deals with personal disputes and grievances unrelated to the public’s interest.” *Id.* (quotation omitted).

The fact that *The Laramie Project* itself gives rise to controversy and certainly addresses matters of public concern does not mean Plaintiff’s emails about it necessarily rise to the same

level. *See, e.g., Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 368 (4th Cir. 1998) (finding high school drama teacher’s selection of play did not present a matter of public concern). Plaintiff’s professed disagreement with the play, both as a parent and as a Christian, is a matter of personal, rather than public concern. Similarly, Plaintiff’s professed interest in collaborating with the show is not akin to matters such as elections, illegal conduct by government officials, or restrictions on freedom that have been held to be matters of public concern. *See id.* at 1206. Rather, it is a matter that “does not directly affect the community at large” and may aptly be considered “internal in scope and personal in nature.” *Bunger v. Univ. of Okla.*, 95 F.3d 987, 992 (10th Cir. 1996). As a result, the Court finds that Plaintiff’s emails do not address a matter of public concern.

3. Speech Was a Motivating Factor in the Adverse Employment Action

Regarding the fourth prong of the *Garcetti/Pickering* test, the Complaint lacks factual allegations that would establish that Plaintiff’s emails were a motivating factor in his firing. Although Plaintiff makes the conclusory assertion that “Defendant directly cited [his] emails regarding The Laramie Project as the reason for his termination” (ECF No. 24, ¶ 114), there are no specific allegations as to how the decision was made, or even by whom it was made. Conclusory allegations are insufficient to survive dismissal. *Cory*, 583 F.3d at 1244. Plaintiff’s allegations, taken as true, establish that his emails about *The Laramie Project* prompted Defendant to suspend Plaintiff and begin an investigation into his conduct at Ponderosa. And they establish that Mr. Ottmann, Ms. Franklin, and Mr. Winsor were primarily responsible for the decision to fire him. But it does not follow that simply because these individuals knew about the emails, his firing was “substantially motivated by” the emails as opposed to other

information that might have been gleaned from the investigation. Although the Complaint neglects to recite or describe Defendant's stated reasons for firing him, that does not mean the Court is required to accept Plaintiff's conclusory assertion as to the basis for his termination. Therefore, the Court finds the absence of factual allegations that would establish the fourth prong of the *Garcetti/Pickering* test provides another reason for dismissing Plaintiff's First Amendment retaliation claim.

To the extent Plaintiff contends that the investigation itself was retaliatory, he has not cited any authority for the proposition that a mere investigation can amount to an adverse employment action for the purpose of stating a retaliation claim. Nor does the Complaint contain allegations showing that the investigation amounted to "substantial harassment and abuse" that would support such a claim. *Brammer-Hoelter*, 492 F.3d at 1208.

Accordingly, the Complaint fails to state a First Amendment retaliation claim.

B. Title VII and CADA Discrimination Claims

Because Colorado and federal law apply the same standards to discrimination claims, Plaintiff's Title VII and CADA claims rise or fall together. *See Johnson v. Weld Cnty.*, 594 F.3d 1202, 1219 n.11 (10th Cir. 2010). A plaintiff proves such a claim either by direct evidence of discrimination or by following the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Khalik v. United Air Lines*, 671 F.3d 1188, 1192 (10th Cir. 2012). To set forth a prima facie case of discrimination, Plaintiff must establish that (1) he is a member of a protected class, (2) he suffered an adverse employment action, (3) he qualified for the position at issue, and (4) he was treated less favorably than others not in the protected class. *See id.* If the plaintiff establishes a prima facie case of discrimination, then the burden shifts to the

defendant to produce a legitimate, non-discriminatory reason for the adverse employment action. *Id.* Once the defendant does so, the burden shifts back to the plaintiff to show that the plaintiff's protected status was a determinative factor in the employment decision or that the employer's explanation is a pretext for discrimination. *Id.* The Court finds Plaintiff has failed to plead a prima facie case, so the rest of the burden-shifting framework does not come into play.

Plaintiff's discrimination claims are premised on his protected status as a Christian; therefore, to establish the fourth prong of his prima facie case he needed to plead that he was treated less favorably than non-Christians at Ponderosa or in the school district. Though he alleges in a conclusory fashion that other faculty and administrators engaged in conduct similar to his—such as being part of a “good ole boys club” and complaining about COVID safety protocols—without being investigated, placed on leave, or disciplined, nowhere does he allege that these individuals were non-Christians. Indeed, he fails to plead any facts about the religious beliefs of anyone associated with this case besides himself. Nor does he allege that the conduct of employees that he considers were similarly situated to him was more egregious or even as egregious as his. Although Plaintiff alleges that Mr. Ottmann, Ms. Franklin, and Mr. Winsor were the ones primarily responsible for firing him and that they knew about his emails concerning *The Laramie Project*, that does not amount to proof of religious discrimination. Plaintiff's argument to the contrary ignores the possibility that—consistent with the allegations in the Complaint—these individuals could also be Christians who might even have disagreed with Ms. Diaz's decision to perform *The Laramie Project* themselves while also believing that Plaintiff's comments were unprofessional and that, coupled with other conduct gleaned from the investigation, his termination was warranted. In any event, the allegations fall well short of

establishing the Plaintiff was treated less favorably than non-Christians.

In short, the Court finds Plaintiff's allegations have not nudged his discrimination claims across the line from conceivable to plausible, and therefore they must be dismissed.

See Twombly, 550 U.S. at 570.

C. Title VII and CADA Retaliation Claims

To state a prima facie Title VII or CADA retaliation claim, Plaintiff must show that (1) he engaged in protected opposition to discrimination, (2) a reasonable employee would have found the challenged action materially adverse, and (3) a causal connection existed between the protected activity and the materially adverse action. *See Bekkem v. Wilkie*, 915 F.3d 1258, 1267 (10th Cir. 2019). Again, the Court finds Plaintiff has failed to set forth allegations establishing a prima facie case.

First, Plaintiff's emails about *The Laramie Project* cannot be considered protected opposition to discrimination for purposes of stating a retaliation claim. Plaintiff does not argue otherwise. Second, while his complaints to Mr. Ottmann and other coworkers about the investigation and his suspension might be considered protected opposition to discrimination, there are no allegations showing a causal connection between those complaints and Plaintiff's firing. Plaintiff's conclusory allegations to the contrary are devoid of factual support.

Finally, Plaintiff's reliance on the letter² from Mr. Ottmann written after he retired as principal is misplaced. While the letter explains that Plaintiff's emails were the "catalyst" for his firing, nowhere does it state or imply that Plaintiff's firing was causally related to his opposition

² The letter is referred to in the Complaint, and Defendant does not dispute its authenticity; therefore, the Court considers it here. *See Toone*, 716 F.3d at 521.

to discrimination. (ECF No. 34-4 at 2.) Moreover, regardless of Mr. Ottmann’s opinions about Plaintiff’s termination, the letter also states that “it wasn’t [Mr. Ottmann’s] decision to make.” (*Id.*) Under the circumstances, it does not support the theory that Mr. Ottmann or anyone else retaliated against Plaintiff for his protected activity.

Accordingly, the Court finds Plaintiff’s allegations fail to state a retaliation claim.

IV. CONCLUSION

Therefore, the Motion to Dismiss (ECF No. 34) is GRANTED, and the Clerk is directed to CLOSE this case.

DATED this 28th day of August, 2023.

BY THE COURT:



RAYMOND P. MOORE
Senior United States District Judge

Kylee Dickinson

From: COD_ENotice@cod.uscourts.gov
Sent: Monday, August 28, 2023 11:59 AM
To: COD_ENotice@cod.uscourts.gov
Subject: Activity in Case 1:22-cv-01636-RM-STV McNellis v. Douglas County School District Judgment

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U.S. District Court - District of Colorado

District of Colorado

Notice of Electronic Filing

The following transaction was entered on 8/28/2023 at 11:58 AM MDT and filed on 8/28/2023

Case Name: McNellis v. Douglas County School District

Case Number: [1:22-cv-01636-RM-STV](#)

Filer:

WARNING: CASE CLOSED on 08/28/2023

Document Number: [54](#)

Docket Text:

FINAL JUDGMENT: [34] Motion to Dismiss is granted; case is closed. By Clerk on 8/28/23. (jdyne)

1:22-cv-01636-RM-STV Notice has been electronically mailed to:

Michael Brent Case bcase@semplelaw.com, emontoya@semplelaw.com, jsouthwell@semplelaw.com, kschmidt@semplelaw.com

Jonathan Patrick Fero jfero@semplelaw.com, emontoya@semplelaw.com, jsouthwell@semplelaw.com, kschmidt@semplelaw.com

Austin M. Cohen acohen@kontnikcohen.com, kdickinson@kontnikcohen.com, lpatnesky@kontnikcohen.com, skontnik@kontnikcohen.com

Morgan Elizabeth Hamrick (Terminated) mhamrick@kontnikcohen.com, ersmith@grsm.com, lhubchikquelland@grsm.com, lsmontoya@grsm.com

Scott Alexander Goodstein sgoodstein@semplelaw.com, emontoya@semplelaw.com, jsouthwell@semplelaw.com,

kschmidt@sempelaw.com

Matthew Louis Fenicle mfenicle@kontrnikcohen.com

1:22-cv-01636-RM-STV Notice has been mailed by the filer to:

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1071006659 [Date=8/28/2023] [FileNumber=9302276-0
] [7ff643c25e1819745d180206d468375f1efd4bf547607fe9c1d8689692781889d33
65153fbfc4244b3d27c3d4d33494a2eb5506ecc6c330ed47e2f860005bc77]]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:22-cv-1636-RM-STV

COREY MCNELLIS,

Plaintiff,

v.

DOUGLAS COUNTY SCHOOL DISTRICT,

Defendant.

NOTICE OF APPEAL

Notice is hereby given that Plaintiff, Corey McNellis, in the above captioned case, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the August 28, 2023 Order on the Motion to Dismiss granting Defendant's Motion to Dismiss and entering a final judgment in favor of the Defendant. *See* ECF 53-54.

Respectfully submitted on September 27, 2023.

KONTNIK | COHEN, LLC

s/ Spencer J. Kontnik

Spencer J. Kontnik

Austin M. Cohen

Matthew L. Fenicle

KONTNIK | COHEN, LLC

201 Steele Street, Suite 210

Denver, Colorado 80206

Telephone: (720) 449-8448

E-Mail: skontnik@kontnikcohen.com

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E-Mail: mfenicle@kontnikcohen.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2023, a true and correct copy of the foregoing was filed using the Court's CM/ECF System which will automatically serve a copy on all counsel of record.

s/ Kylee R. Dickinson
Kylee R. Dickinson



**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
OFFICE OF THE CLERK**

Alfred A. Arraj
United States Courthouse
901 19th Street
Denver, Colorado 80294
www.cod.uscourts.gov

Jeffrey P. Colwell
Clerk

Phone: (303) 844-3433

Date: 9/28/2023

Pro Se Retained CJA FPD USA or other
 Federal Agency
(Appeal Fee Exempt)

Case No: 22-cv-01636-RM-STV

Amended Notice of Appeal

Date Filed: 09/27/2023

Other pending appeals

Appellant: Corey McNellis

Transferred Successive
§2254 or §2255

Supplemental Record

Pro Se Appellant:

IFP forms mailed/given

Motion IFP pending

Appeal fee paid

IFP denied

Appeal fee not paid

Retained Counsel:

Appeal fee paid

Appeal fee not paid

Motion IFP filed

The Preliminary Record on Appeal is hereby transmitted to the Tenth Circuit Court of Appeals. Please refer to the forms, procedures, and requirements for ordering transcripts, preparing docketing statements and briefs, and designations of the record that are found on the Tenth Circuit's website, www.ca10.uscourts.gov.

If not already completed, either an appeal fee payment for filing this case or filing of a motion to proceed *in forma pauperis* will be made to this District Court.

The transcript order form must be filed in the District Court as well as the Court of Appeals within 14 days after the notice of appeal was filed with the District Court.

If you have questions, please contact this office.

Sincerely,

JEFFREY P. COLWELL, CLERK

by: s/ J. Torres
Deputy Clerk

cc: Clerk of the Court, Tenth Circuit Court of Appeals

ALLMTN,APPEAL,INTERPRETER,JD1,MJ CIV PP,TERMED

**U.S. District Court – District of Colorado
District of Colorado (Denver)
CIVIL DOCKET FOR CASE #: 1:22-cv-01636-RM-STV**

McNellis v. Douglas County School District
Assigned to: Judge Raymond P. Moore
Referred to: Magistrate Judge Scott T. Varholak
Cause: 42:2000(e)(2) – (r)(l) -- Job Discrimination (Religion)

Date Filed: 07/01/2022
Date Terminated: 08/28/2023
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

Corey McNellis

represented by **Spencer J. Kontnik**
Kontnik Cohen LLC
201 Steele Street
Suite 210
Denver, CO 80206
720-449-8448
Fax: 720-223-7273
Email: skontnik@kontnikcohen.com
LEAD ATTORNEY

Austin M. Cohen
Kontnik Cohen LLC
201 Steele Street
Suite 210
Denver, CO 80206
720-449-8448
Email: acohen@kontnikcohen.com
ATTORNEY TO BE NOTICED

Matthew Louis Fenicle
Kontnik Cohen LLC
201 Steele Street
Suite 210
Denver, CO 80206
720-449-8448
Email: mfenicle@kontnikcohen.com
ATTORNEY TO BE NOTICED

Morgan Elizabeth Hamrick
Kontnik Cohen LLC
201 Steele Street
Suite 210
Denver, CO 80206
720-449-8448
Fax: 720-223-7273
Email: mhamrick@kontnikcohen.com
TERMINATED: 05/10/2023
ATTORNEY TO BE NOTICED

V.

Defendant

Douglas County School District

represented by **Jonathan Patrick Fero**
Semple Farrington Everall & Case, P.C.
1120 Lincoln Street
The Chancery Building
Suite 1308
Denver, CO 80203
720-974-9731
Email: jfero@semplelaw.com

ATTORNEY TO BE NOTICED

Mary Barham Gray
Semple Farrington Everall & Case, P.C.
1120 Lincoln Street
The Chancery Building
Suite 1308
Denver, CO 80203
303-595-0941
Fax: 303-861-9608
Email: mgray@semplelaw.com
TERMINATED: 02/28/2023

Michael Brent Case
Semple Farrington Everall & Case, P.C.
1120 Lincoln Street
The Chancery Building
Suite 1308
Denver, CO 80203
303-595-0941
Fax: 303-861-9608
Email: bcase@semplelaw.com
ATTORNEY TO BE NOTICED

Scott Alexander Goodstein
Semple Farrington Everall & Case, P.C.
1120 Lincoln Street
The Chancery Building
Suite 1308
Denver, CO 80203
303-595-0941
Fax: 303-861-9608
Email: sgoodstein@semplelaw.com
ATTORNEY TO BE NOTICED

Defendant

Cathy Franklin
*In her Official Capacity as the Director of
Human Resources for Douglas County
School District
TERMINATED: 09/20/2022*

represented by **Mary Barham Gray**
(See above for address)
TERMINATED: 02/28/2023

Michael Brent Case
(See above for address)
ATTORNEY TO BE NOTICED

Scott Alexander Goodstein
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Cathy (I) Franklin
*in her individual capacity
TERMINATED: 09/20/2022*

represented by **Mary Barham Gray**
(See above for address)
TERMINATED: 02/28/2023

Michael Brent Case
(See above for address)
ATTORNEY TO BE NOTICED

Scott Alexander Goodstein
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
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09/27/2023	<u>56</u>	NOTICE OF APPEAL as to <u>53</u> Order on Motion to Dismiss, <u>54</u> Judgment by Plaintiff Corey McNellis (Filing fee \$ 505, Receipt Number ACODC-9315681) (Kontnik, Spencer) (Entered: 09/27/2023)
09/11/2023	<u>55</u>	Proposed Bill of Costs by Defendant Douglas County School District. (Attachments: # <u>1</u> Continuation of Main Document Itemization of Costs & backup, # <u>2</u> Continuation of Main Document Statement Re: Defendant's Proposed Bill of Costs)(Fero, Jonathan) (Entered: 09/11/2023)
08/28/2023	<u>54</u>	FINAL JUDGMENT: <u>34</u> Motion to Dismiss is granted; case is closed. By Clerk on 8/28/23. (jdyne) (Entered: 08/28/2023)
08/28/2023	<u>53</u>	ORDER granting <u>34</u> Motion to Dismiss by Judge Raymond P. Moore on 8/28/23.(jdyne) (Entered: 08/28/2023)
06/07/2023	52	ORDER granting the parties' <u>50</u> Joint Motion to Amend Scheduling Order. For good cause shown, certain deadlines are EXTENDED as follows: Written Discovery Deadline: July 17, 2023; Discovery Cutoff: August 7, 2023; Dispositive Motion Deadline: September 11, 2023. SO ORDERED, by Magistrate Judge Scott T. Varholak on 6/7/23. Text Only Entry(stvlc3, Andrew) (Entered: 06/07/2023)
06/07/2023	51	MEMORANDUM regarding <u>50</u> Joint MOTION to Amend/Correct/Modify <u>36</u> Scheduling Order filed by Corey McNellis. Motion referred to Magistrate Judge Scott T. Varholak. By Judge Raymond P. Moore on 6/7/2023. (Text Only Entry) (rmsec) (Entered: 06/07/2023)
06/06/2023	<u>50</u>	Joint MOTION to Amend/Correct/Modify <u>36</u> Scheduling Order by Plaintiff Corey McNellis. (Kontnik, Spencer) (Entered: 06/06/2023)
05/10/2023	49	ORDER granting <u>48</u> Motion to Withdraw as Attorney. Attorney Morgan Elizabeth Hamrick terminated. SO ORDERED by Judge Raymond P. Moore on 5/10/2023. (Text Only Entry)(rmsec) Modified on 5/10/2023 to terminate correct attorney (sdunb,). (Entered: 05/10/2023)
05/09/2023	<u>48</u>	MOTION to Withdraw as Attorney of Record of Morgan E. Hamrick by Plaintiff Corey McNellis. (Kontnik, Spencer) (Entered: 05/09/2023)
03/31/2023	47	ORDER granting <u>45</u> Plaintiff's Unopposed Motion for Extension. For good cause shown, certain deadlines in this case are EXTENDED as follows: affirmative expert designations are now due April 25, 2023; rebuttal expert designations are now due June 5, 2023. SO ORDERED, by Magistrate Judge Scott T. Varholak on 3/31/23. Text Only Entry(stvlc3, Andrew) (Entered: 03/31/2023)
03/31/2023	46	MEMORANDUM regarding <u>45</u> Unopposed MOTION for Extension of Time to <i>Affirmative Expert Deadline</i> filed by Corey McNellis. Motion referred to Magistrate Judge Scott T. Varholak. By Judge Raymond P. Moore on 3/31/2023. (Text Only Entry) (rmsec) (Entered: 03/31/2023)
03/31/2023	<u>45</u>	Unopposed MOTION for Extension of Time to <i>Affirmative Expert Deadline</i> by Plaintiff Corey McNellis. (Kontnik, Spencer) (Entered: 03/31/2023)
03/15/2023	<u>44</u>	NOTICE of Entry of Appearance by Austin M. Cohen on behalf of Corey McNellis (Cohen, Austin) (Entered: 03/15/2023)
03/13/2023	43	ADVISORY NOTICE TO ATTORNEY AND COURT: Austin Murray Cohen failed to pay the 2022 Biennial Fee. Under D.C.COLO.LAttyR 3(a) and District Court General Order 2022-7, counsel was administratively removed from the Court's attorney roll. Counsel must submit another bar application through PACER, pay the application fee, and, upon reinstatement, file a Notice of Entry of Appearance to continue as counsel of record in this case. Please visit and fully review the Attorney Admission page for instructions on readmission (http://www.cod.uscourts.gov/Attorney Information/AttorneyAdmissionInformation.aspx) before contacting the Court for assistance. (Text Only Entry) (jdyne) (Entered: 03/13/2023)
02/28/2023	42	ORDER granting <u>40</u> Motion for Withdrawal by Mary b. Gray, Esq., Counsel for Defendants. Attorney Mary B. Gray is relieved of any further representation of Defendants. The Clerk of Court is instructed to terminate Attorney Gray as counsel of record, and to remove their name from the electronic certificate of mailing. Defendants shall continue to be represented by Attorneys Fero, Case, and Goodstein of Semple, Farrington, Everall and Case, P.C. SO ORDERED, by Magistrate Judge Scott T. Varholak on 2/28/23. Text Only Entry(stvlc3, Andrew) (Entered: 02/28/2023)
02/28/2023	41	MEMORANDUM regarding <u>40</u> Unopposed MOTION to Withdraw as Attorney filed by Douglas County School District. Motion referred to Magistrate Judge Scott T. Varholak. By Judge

		Raymond P. Moore on 2/28/2023. (Text Only Entry) (rmsec) (Entered: 02/28/2023)
02/28/2023	<u>40</u>	Unopposed MOTION to Withdraw as Attorney by Defendant Douglas County School District. (Gray, Mary) (Entered: 02/28/2023)
02/13/2023	<u>39</u>	NOTICE of Entry of Appearance by Jonathan Patrick Fero on behalf of Douglas County School DistrictAttorney Jonathan Patrick Fero added to party Douglas County School District(pty:dft) (Fero, Jonathan) (Entered: 02/13/2023)
11/15/2022	<u>38</u>	REPLY to Response to <u>34</u> MOTION to Dismiss <i>First Amended Complaint in Support of Motion to Dismiss First Amended Complaint</i> filed by Defendant Douglas County School District. (Gray, Mary) (Entered: 11/15/2022)
11/01/2022	<u>37</u>	RESPONSE to <u>34</u> MOTION to Dismiss <i>First Amended Complaint</i> filed by Plaintiff Corey McNellis. (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2, # <u>3</u> Exhibit 3)(Kontnik, Spencer) (Entered: 11/01/2022)
10/12/2022	<u>36</u>	SCHEDULING ORDER: by Magistrate Judge Scott T. Varholak on 10/12/2022. (morti,) (Entered: 10/12/2022)
10/12/2022	<u>35</u>	MINUTE ENTRY for Scheduling Conference held before Magistrate Judge Scott T. Varholak on 10/12/2022. Discovery due by 5/12/2023. Dispositive Motions due by 6/12/2023. Final Pretrial Conference set for 9/27/2023 09:15 AM in Courtroom A 402 before Magistrate Judge Scott T. Varholak. FTR: A402. (morti,) (Entered: 10/12/2022)
10/11/2022	<u>34</u>	MOTION to Dismiss <i>First Amended Complaint</i> by Defendant Douglas County School District. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D)(Gray, Mary) (Entered: 10/11/2022)
10/06/2022	<u>33</u>	Proposed Scheduling Order by Plaintiff Corey McNellis. (Fenicle, Matthew) (Entered: 10/06/2022)
10/03/2022	<u>32</u>	ORDER granting <u>30</u> Defendants' Unopposed Motion for Extension. For good cause shown, Defendants shall respond to Plaintiff's First Amended Complaint not later than 10/11/2022. SO ORDERED, by Magistrate Judge Scott T. Varholak on 10/3/22. Text Only Entry(stvlc3, Andrew) (Entered: 10/03/2022)
10/03/2022	<u>31</u>	MEMORANDUM regarding <u>30</u> Unopposed MOTION for Extension of Time to File Answer or Otherwise Respond re <u>24</u> Amended Complaint filed by Cathy Franklin, Douglas County School District, Cathy (I) Franklin. Motion referred to Magistrate Judge Scott T. Varholak. By Judge Raymond P. Moore on 10/3/2022. (Text Only Entry) (rmsec) (Entered: 10/03/2022)
10/03/2022	<u>30</u>	Unopposed MOTION for Extension of Time to File Answer or Otherwise Respond re <u>24</u> Amended Complaint by Defendants Douglas County School District, Cathy Franklin, Cathy (I) Franklin. (Gray, Mary) (Entered: 10/03/2022)
09/23/2022	<u>29</u>	ORDER granting <u>27</u> Defendant's Unopposed Motion to Withdraw Motion. Accordingly, <u>20</u> Defendant's Motion to Stay Discovery is WITHDRAWN. It is FURTHER ORDERED that the Motion Hearing set for 10/12/22 at 11:00 AM is CONVERTED into a Scheduling Conference at the same date and time in Courtroom A 402 before Magistrate Judge Scott T. Varholak. The Proposed Scheduling Order is due 10/5/2022. SO ORDERED, by Magistrate Judge Scott T. Varholak on 9/23/22. Text Only Entry(stvlc3, Andrew) (Entered: 09/23/2022)
09/23/2022	<u>28</u>	MEMORANDUM regarding <u>27</u> Unopposed MOTION to Withdraw <u>20</u> MOTION to Stay <i>Discovery and Convert October 12, 2022 Hearing to a Scheduling Conference</i> filed by Cathy Franklin, Douglas County School District, Cathy (I) Franklin. Motion referred to Magistrate Judge Scott T. Varholak. By Judge Raymond P. Moore on 9/23/2022. (Text Only Entry) (rmsec) (Entered: 09/23/2022)
09/23/2022	<u>27</u>	Unopposed MOTION to Withdraw <u>20</u> MOTION to Stay <i>Discovery and Convert October 12, 2022 Hearing to a Scheduling Conference</i> by Defendants Douglas County School District, Cathy Franklin, Cathy (I) Franklin. (Case, Michael) (Entered: 09/23/2022)
09/21/2022	<u>26</u>	Upon Plaintiff's <u>23</u> Notice of Filing Amended Complaint, Defendant's <u>19</u> Motion to Dismiss is found to be MOOT. <i>See, e.g., Gilles v. United States</i> , 906 F.2d 1386, 1389 (10th Cir. 1990) ("a pleading that has been amended under Rule 15(a) supersedes the pleading it modifies") (internal quotation marks omitted). SO ORDERED, by Magistrate Judge Scott T. Varholak on 9/21/22. Text Only Entry(stvlc3, Andrew) (Entered: 09/21/2022)

09/20/2022	<u>25</u>	RESPONSE to <u>20</u> MOTION to Stay <i>Discovery</i> filed by Plaintiff Corey McNellis. (Kontnik, Spencer) (Entered: 09/20/2022)
09/20/2022	<u>24</u>	AMENDED COMPLAINT against Douglas County School District, filed by Corey McNellis.(Kontnik, Spencer) (Entered: 09/20/2022)
09/20/2022	<u>23</u>	NOTICE of Filing Amended Pleading <i>First Amended Complaint</i> by Plaintiff Corey McNellis (Attachments: # <u>1</u> Exhibit 1 – Redlined Amended Complaint)(Kontnik, Spencer) (Entered: 09/20/2022)
09/09/2022	<u>22</u>	MINUTE ORDER This matter is before the Court on <u>20</u> Defendants' Motion to Stay Discovery (the "Motion"). The Motion is set for a Hearing on 10/12/22 at 11:00 AM in Courtroom A 402 before Magistrate Judge Scott T. Varholak. It is FURTHER ORDERED that the Scheduling Conference set for 9/13/2022 10:30 AM is VACATED. SO ORDERED, by Magistrate Judge Scott T. Varholak on 9/9/22. Text Only Entry (stvlc3, Andrew) (Entered: 09/09/2022)
08/31/2022	<u>21</u>	MEMORANDUM regarding <u>20</u> MOTION to Stay <i>Discovery</i> filed by Cathy Franklin, Douglas County School District, Cathy (I) Franklin, <u>19</u> MOTION to Dismiss filed by Cathy Franklin, Douglas County School District, Cathy (I) Franklin. Motions referred to Magistrate Judge Scott T. Varholak. By Judge Raymond P. Moore on 8/31/2022. (Text Only Entry) (rmsec) (Entered: 08/31/2022)
08/30/2022	<u>20</u>	MOTION to Stay <i>Discovery</i> by Defendants Douglas County School District, Cathy Franklin, Cathy (I) Franklin. (Gray, Mary) (Entered: 08/30/2022)
08/30/2022	<u>19</u>	MOTION to Dismiss by Defendants Douglas County School District, Cathy Franklin, Cathy (I) Franklin. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C)(Case, Michael) (Entered: 08/30/2022)
08/29/2022	<u>18</u>	NOTICE of Entry of Appearance of <i>Michael Brent Case</i> by Michael Brent Case on behalf of All Defendants Attorney Michael Brent Case added to party Douglas County School District(pty:dft), Attorney Michael Brent Case added to party Cathy Franklin(pty:dft), Attorney Michael Brent Case added to party Cathy (I) Franklin(pty:dft) (Case, Michael) (Entered: 08/29/2022)
08/23/2022	<u>17</u>	Proposed Scheduling Order by Plaintiff Corey McNellis. (Kontnik, Spencer) (Entered: 08/23/2022)
08/02/2022	<u>16</u>	MINUTE ORDER: With the assignment of this matter, the parties are advised that throughout this case they are expected to be familiar and comply with not only the Local Rules of this District, but also Judge Raymond P. Moore's Civil Practice Standards, which may be found at: http://www.cod.uscourts.gov/JudicialOfficers/ActiveArticleIIIJudges/HonRaymondPMoore.aspx . SO ORDERED by Judge Raymond P. Moore on 8/2/2022. (Text Only Entry) (rmsec) (Entered: 08/02/2022)
08/02/2022	<u>15</u>	ORDER REFERRING CASE to Magistrate Judge Scott T. Varholak. Pursuant to 28 U.S.C. § 636(b)(1)(A) and (B) and Fed. R. Civ. P. 72(a) and (b), this case is referred to the assigned United States Magistrate Judge to (1) convene a scheduling conference under Fed. R. Civ. P. 16(b) and enter a scheduling order meeting the requirements of D.C.COLO.LCivR 16.2, (2) conduct such status conferences and issue such orders necessary for compliance with the scheduling order, including amendments or modifications of the scheduling order upon a showing of good cause, (3) hear and determine pretrial matters, including discovery and other non-dispositive motions, (4) conduct a pretrial conference and enter a pretrial order, and (5) conduct hearings, including evidentiary hearings, and submit proposed findings of fact and recommendations for rulings on dispositive motions. Court sponsored alternative dispute resolution is governed by D.C.COLO.LCivR 16.6. On the recommendation or informal request of the magistrate judge or on the request of the parties by motion, this court may direct the parties to engage in an early neutral evaluation, a settlement conference, or another alternative dispute resolution proceeding. By Judge Raymond P. Moore on 8/2/2022. (Text Only Entry) (rmsec) (Entered: 08/02/2022)
08/01/2022	<u>14</u>	CASE REASSIGNED pursuant to <u>13</u> Consent to Jurisdiction of Magistrate Judge. All parties do not consent. This case is randomly reassigned to Judge Raymond P. Moore and drawn to Scott T. Varholak. All future pleadings should be designated as 22-cv-01636-RM. (Text Only Entry) (csarr,) (Entered: 08/01/2022)
07/29/2022	<u>13</u>	CONSENT to Jurisdiction of Magistrate Judge by Defendants Douglas County School District, Cathy Franklin, Cathy (I) Franklin All parties do not consent.. (Gray, Mary) (Entered: 07/29/2022)

07/12/2022	<u>12</u>	NOTICE of Entry of Appearance by Morgan Elizabeth Hamrick on behalf of Corey McNellisAttorney Morgan Elizabeth Hamrick added to party Corey McNellis(pty:pla) (Hamrick, Morgan) (Entered: 07/12/2022)
07/12/2022	<u>11</u>	NOTICE of Entry of Appearance by Matthew Louis Fenicle on behalf of Corey McNellisAttorney Matthew Louis Fenicle added to party Corey McNellis(pty:pla) (Fenicle, Matthew) (Entered: 07/12/2022)
07/07/2022	<u>10</u>	NOTICE of Entry of Appearance by Austin Murray Cohen on behalf of Corey McNellisAttorney Austin Murray Cohen added to party Corey McNellis(pty:pla) (Cohen, Austin) (Entered: 07/07/2022)
07/06/2022	<u>9</u>	NOTICE of Entry of Appearance by Scott Alexander Goodstein on behalf of All Defendants Attorney Scott Alexander Goodstein added to party Douglas County School District(pty:dft), Attorney Scott Alexander Goodstein added to party Cathy Franklin(pty:dft), Attorney Scott Alexander Goodstein added to party Cathy (I) Franklin(pty:dft) (Goodstein, Scott) (Entered: 07/06/2022)
07/06/2022	<u>8</u>	WAIVER OF SERVICE Returned Executed by Douglas County School District, Cathy (I) Franklin, Cathy Franklin. All Defendants. (Gray, Mary) (Entered: 07/06/2022)
07/06/2022	<u>7</u>	NOTICE of Entry of Appearance by Mary Barham Gray on behalf of All Defendants Attorney Mary Barham Gray added to party Douglas County School District(pty:dft), Attorney Mary Barham Gray added to party Cathy Franklin(pty:dft), Attorney Mary Barham Gray added to party Cathy (I) Franklin(pty:dft) (Gray, Mary) (Entered: 07/06/2022)
07/06/2022	<u>6</u>	ORDER SETTING DEADLINE FOR FILING ELECTION CONCERNING CONSENT/NON-CONSENT TO MAGISTRATE JURISDICTION FORM AND SETTING SCHEDULING CONFERENCE by Magistrate Judge Scott T. Varholak on 6 July 2022. Consent Form due by 8/30/2022. Proposed Scheduling Order due 9/6/2022. Scheduling Conference set for 9/13/2022 10:30 AM in Courtroom A 402 before Magistrate Judge Scott T. Varholak. (cmadr,) (Entered: 07/06/2022)
07/06/2022	<u>5</u>	Magistrate Judge consent form issued pursuant to D.C.COLO.LCivR 40.1, direct assignment of civil actions to full time magistrate judges. (athom,) (Entered: 07/06/2022)
07/06/2022	<u>4</u>	MEMORANDUM RETURNING CASE by Senior Judge Blackburn. This case is randomly reassigned to Magistrate Judge Scott T. Varholak. All future pleadings should be designated as 22-cv-01636-STV. (athom,) (Entered: 07/06/2022)
07/01/2022	<u>3</u>	Magistrate Judge consent form issued pursuant to 28 U.S.C. 636(c). No Summons Issued. (norlin,) (Entered: 07/01/2022)
07/01/2022	<u>2</u>	Case assigned to Judge Robert E. Blackburn and drawn to Magistrate Judge S. Kato Crews. Text Only Entry (norlin,) (Entered: 07/01/2022)
07/01/2022	<u>1</u>	COMPLAINT against Douglas County School District, Cathy Franklin (Filing fee \$ 402,Receipt Number ACODC-8534760)Attorney Spencer J. Kontnik added to party COREY MCNELLIS(pty:pla), filed by COREY MCNELLIS. (Attachments: # <u>1</u> Civil Cover Sheet)(Kontnik, Spencer) (Entered: 07/01/2022)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:22-cv-1636-RM-STV

COREY MCNELLIS,

Plaintiff,

v.

DOUGLAS COUNTY SCHOOL DISTRICT,

Defendant.

NOTICE OF APPEAL

Notice is hereby given that Plaintiff, Corey McNellis, in the above captioned case, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the August 28, 2023 Order on the Motion to Dismiss granting Defendant's Motion to Dismiss and entering a final judgment in favor of the Defendant. *See* ECF 53-54.

Respectfully submitted on September 27, 2023.

KONTNIK | COHEN, LLC

s/ Spencer J. Kontnik

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2023, a true and correct copy of the foregoing was filed using the Court's CM/ECF System which will automatically serve a copy on all counsel of record.

s/ Kylee R. Dickinson
Kylee R. Dickinson

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 22-cv-01636-RM-STV

COREY MCNELLIS,

Plaintiff,

v.

DOUGLAS COUNTY SCHOOL DISTRICT,

Defendant.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order (Doc. 53) by Judge Raymond P. Moore, entered August 28, 2023, it is

ORDERED that Defendant's Motion to Dismiss (Doc. 34) is GRANTED. It is FURTHER ORDERED that this case is closed.

Dated this 28th day of August, 2023.

FOR THE COURT:
JEFFREY P. COLWELL

By: s/J. Dynes, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Civil Action No. 22-cv-01636-RM-STV

COREY MCNELLIS,

Plaintiff,

v.

DOUGLAS COUNTY SCHOOL DISTRICT,

Defendant.

ORDER

This employment dispute is before the Court on Defendant’s Motion to Dismiss (ECF No. 34), which has been fully briefed (ECF Nos. 37, 38). For the reasons below, the Motion is granted.

I. LEGAL STANDARD

To defeat a motion to dismiss, the complaint must allege a “plausible” right to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007). The plaintiff’s “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Id.* at 555. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court must accept as true all well-pleaded factual allegations in the complaint, view those allegations in the light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff’s favor.

Brokers' Choice of Am., Inc. v. NBC Universal, Inc., 757 F.3d 1125, 1136 (10th Cir. 2014); *Mink v. Knox*, 613 F.3d 995, 1000 (10th Cir. 2010). However, conclusory allegations are insufficient, *Cory v. Allstate Ins.*, 583 F.3d 1240, 1244 (10th Cir. 2009), and courts “are not bound to accept as true a legal conclusion couched as a factual allegation,” *Twombly*, 550 U.S. at 555 (quotation omitted).

II. BACKGROUND

Plaintiff worked at Ponderosa High School, a public school overseen and operated by Defendant, for fourteen years. (ECF No. 24, ¶¶ 7, 17.) At the time he was terminated in October 2020, he had been promoted to the positions of Athletic Director and Assistant Principal, and his child was attending the school. (*Id.* at ¶¶ 39, 47.) In his capacity as Assistant Principal, Plaintiff was part of the Administrative Team—comprised of the Principal, Tim Ottmann, and other Assistant Principals—which met weekly to discuss issues regarding extracurricular activities. (*Id.* at ¶¶ 41, 42.)

On October 2, 2020, Ponderosa’s Theatre Director, Kayla Diaz, sent an email to Ponderosa staff about an upcoming school play, *The Laramie Project*. (*Id.* at ¶¶ 50, 53.) The email¹ explained: “*The Laramie Project* is the true story of the impact of a hate crime in a small town, told through interviews with community members and translated into a script.” (ECF No. 19-2 at 1.) It further stated: “In 1998, Matthew Shepard, a gay college student, was murdered on the outskirts of Laramie, Wyoming. His death sparked outrage throughout the nation, as well as controversy. There were many contesting opinions and arguments, but in the end, what matters

¹ On a motion to dismiss, “[c]ourts are permitted to review documents referred to in the complaint if the documents are central to the plaintiff’s claim and the parties do not dispute the documents’ authenticity.” *Toone v. Wells Fargo Bank, N.A.*, 716 F.3d 516, 521 (10th Cir. 2013) (quotation omitted). Thus, the Court may consider the email exchange prompted by Diaz’s email without converting the Motion into a motion for summary judgment.

to our show is how it affected the Laramie community.” (*Id.*) And it included this disclaimer: “Due to language and the content discussed in the show (there is no violence shown, only discussed) this is not a family-friendly show. We are advertising ‘For mature audiences’ and I would generally recommend high school age and up.” (*Id.* at 2.) Due to the COVID pandemic, the show was to be live-streamed. (*Id.* at 1.) The email was sent on a Friday afternoon. (*Id.* at 1.)

Several staff members responded to the email Friday evening and Saturday morning. The responses were generally supportive, and some suggested that the show would complement Ponderosa’s anti-bullying program. For example, one recipient responded, “Thank you so for much for deciding to do a show that so closely connects to Ponderosa High School’s core values of kindness, empathy, and respect.” (*Id.* at 2.) Another responded, “As a history teacher I’m glad to hear that our students are engaging with important historical events across subject areas.” (*Id.* at 3.)

Plaintiff responded by sending three emails on Friday evening and another one on Saturday morning, stating as follows:

Thanks Kayla, I appreciate the email and I really do admire the hard work that you do. As a Dad of a student here and also as an employee in the school, what is my recourse if I disagree with the production? Was this a heads up to see if everyone is cool?

* * *

As a christian I would love to collaborate with your project. Please let me know if the love that Jesus can provide will help your play.

* * *

For the record, all of administration does not agree with me on this. I am totally solo. Good night Mustangs!

* * *

I understand people support this. Forgive me for having a different viewpoint and the audacity to publicly share it.

(*Id.* at 2, 4, 5, 7.) The emails had the same signature block:

Corey McNellis
Athletic Director/Assistant Principal
Ponderosa High School
303-387-4100

(*Id.*)

The emails were shared with Defendant’s Human Resources Director, Cathy Franklin; the Director of Schools, Daniel Winsor; and Mr. Ottmann. (ECF No. 24, ¶ 66.) On Saturday, Mr. Winsor called Plaintiff and told him he needed to stay home on Monday because of his “religious comments.” (*Id.* at ¶¶ 67, 70.)

The following Monday, Ms. Franklin, Mr. Winsor, and Mr. Ottmann called Plaintiff for a virtual meeting. (*Id.* at ¶ 77.) Plaintiff was informed that he was being placed on leave and investigated due to his religious comments. (*Id.* at ¶¶ 80, 81.) While on leave, Plaintiff complained to Mr. Ottmann and several coworkers that he was being investigated based on his Christian beliefs. (*Id.* at ¶¶ 95, 96.) As part of its investigation, Defendant received a complaint from a teacher claiming Plaintiff was part of a “good ole boys club” that included other male teachers and administrators, including Mr. Ottmann. (*Id.* at ¶ 101.) Defendant also uncovered an email indicating Plaintiff had complained “as a parent” about Ponderosa’s communications regarding its COVID safety protocols. (*Id.* at ¶ 106.)

On October 29, 2020, Defendant terminated Plaintiff’s employment, citing his emails regarding *The Laramie Project* as the reason for his termination. (*Id.* at ¶¶ 113, 114.)

In his Amended Complaint, Plaintiff alleges that he was discriminated and retaliated against because he is a Christian and that he was fired in retaliation for exercising his First Amendment rights. He asserts claims for (1) discrimination in violation of Title VII; (2) retaliation in violation of Title VII; (3) discrimination in violation of the Colorado Anti-Discrimination Act (“CADA”); (4) retaliation in violation of CADA; and (5) retaliation under 42 U.S.C. § 1983 for exercising his right to free speech under the First Amendment.

III. ANALYSIS

Defendant has moved to dismiss each of Plaintiff’s claims.

A. First Amendment Retaliation Claim

A public employee’s First Amendment claim is assessed using the five-prong *Garcetti/Pickering* test. *Roberts v. Winder*, 16 F.4th 1367, 1381 (10th Cir. 2021) (citing *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). That test requires the Court to determine whether

(1) the speech was made pursuant to the employee’s official duties, (2) the speech was made on a matter of public concern, (3) the government’s interests as an employer in promoting efficient public service outweigh a plaintiff’s free speech interests, (4) the speech was a motivating factor in the adverse employment action, and (5) the same employment decision would have been made without the protected speech.

Id. The first three prongs are issues of law to be resolved by the Court, while the last two are ordinarily for the trier of fact. *Rohrbough v. Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 745 (10th Cir. 2010).

Defendant contends that Plaintiff failed to plead sufficient facts to establish the first, second, and fourth prongs of the test, and the Court agrees.

1. Speech Made Pursuant to the Employee’s Official Duties

“The Tenth Circuit’s decisions addressing the first step of the *Garcetti/Pickering* analysis have taken a broad view of the meaning of speech that is pursuant to an employee’s official duties.” *Id.* at 746 (quotation omitted). “[I]f an employee engages in speech during the course of performing an official duty and the speech reasonably contributes to or facilitates the employee’s performance of the official duty, the speech is made pursuant to the employee’s official duties.” *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1203 (10th Cir. 2007). Included in this category is speech relating to tasks within an employee’s employment responsibilities as well as speech that is generally consistent with the type of activities the employee was paid to do. *See id.* However, “[t]he ultimate question is whether the employee speaks as a citizen or instead as a government employee—an individual acting in his or her professional capacity.” *Id.* (quotation omitted). Thus, not all speech about an employee’s work or that occurs at work is made pursuant to the employee’s official duties. *Id.* at 1204. Courts “must take a practical view of all the facts and circumstances surrounding the speech and the employment relationship.” *Id.*

Here, Plaintiff expressed his concerns about *The Laramie Project* “as an employee” in emails that were responses to a staff email sent by Ms. Diaz. (ECF No. 19-2 at 2.) The Complaint does not contain allegations demonstrating or suggesting that Plaintiff would have been aware of the show—at least at the time of the speech at issue—were it not for his status as a Ponderosa staff member. Plaintiff’s emails were sent from his district email address and listed his positions of Athletic Director and Assistant Principal in the signature portion, and Plaintiff does not allege that anyone besides Ponderosa staff were the intended recipients of his emails. Thus, this is not a case involving speech in the form of social media posts or statements to news

outlets. *Cf. Cowden v. Bd. of Governors*, 622 F. Supp. 3d 1019, 1031-33 (D. Colo. 2022). The circumstances suggest that commenting on issues related to the show with other Ponderosa staff members is generally consistent with the types of activities Plaintiff was paid to do, particularly as a member of the Administrative Team. These factors all weigh in favor of finding Plaintiff’s emails were made pursuant to his official duties.

On the other hand, Plaintiff points out that he also expressed his concerns “[a]s a Dad of a student here.” (ECF No. 19-2 at 2.) However, there is no allegation that other parents of Ponderosa students were included as recipients of Ms. Diaz’s email, which included a letter addressed, “Dear Staff.” (*Id.* at 1.) In the absence of allegations showing that he would have been included in the initial email or had access to this specific email exchange but for his role as an employee, the Court is not persuaded that Plaintiff’s reference to his parental status suffices to establish that he was speaking as a private citizen rather than a public employee.

See Rohrbough, 596 F.3d at 747 (noting that “the employee’s chosen audience” and “chosen method of disseminating speech” are appropriately considered when assessing whether speech falls within the scope of the employee’s official duties).

Nor does Plaintiff’s additional comment that “all of administration does not agree with me on this. I am totally solo” mean that his emails were not made pursuant to his official duties. (ECF No. 19-2 at 5.) Indeed, it could reasonably be interpreted to mean that he was speaking as an administrator, albeit one without the full backing of the Administrative Team. While the comment might also suggest that other Ponderosa employees did not necessarily agree with Plaintiff’s viewpoint on presenting *The Laramie Project* at the school, in the context of the ongoing exchange of emails among Ponderosa staff members, it does not demonstrate that

Plaintiff was speaking solely as a private citizen.

Finally, the fact that the emails were sent “after hours” does not move the needle here. *Cf. Brammer-Hoelter*, 492 F.3d at 1205 (concluding that speech that occurred outside the school, after hours, and with ordinary citizens and parents was not within the scope of the plaintiffs’ official duties as teachers). Employees commonly read and send work-related emails outside of work hours, and Plaintiff has not alleged that it was remarkable or unusual that Ponderosa employees responded to Ms. Diaz’s email “after hours” or that Ponderosa staff members—members of the Administrative Team included—did not regularly discuss work issues via email. And again, the absence of any indication that other parents or other members of the public were included in the email exchange reinforces the notion that the initial email and staff members’ responses to it were sent pursuant to the employees’ official duties.

Therefore, the Court finds Plaintiff has not alleged facts that would satisfy the first prong of the *Garcetti/Pickering* test.

2. Speech Was Made on a Matter of Public Concern

Regarding the second prong of the test, “[m]atters of concern are those of interest to the community, whether for social, political, or other reasons.” *Id.* (quotation omitted). “In determining whether speech pertains to a matter of public concern, the court may consider the motive of the speaker and whether the speech is calculated to disclose misconduct or merely deals with personal disputes and grievances unrelated to the public’s interest.” *Id.* (quotation omitted).

The fact that *The Laramie Project* itself gives rise to controversy and certainly addresses matters of public concern does not mean Plaintiff’s emails about it necessarily rise to the same

level. *See, e.g., Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 368 (4th Cir. 1998) (finding high school drama teacher’s selection of play did not present a matter of public concern). Plaintiff’s professed disagreement with the play, both as a parent and as a Christian, is a matter of personal, rather than public concern. Similarly, Plaintiff’s professed interest in collaborating with the show is not akin to matters such as elections, illegal conduct by government officials, or restrictions on freedom that have been held to be matters of public concern. *See id.* at 1206. Rather, it is a matter that “does not directly affect the community at large” and may aptly be considered “internal in scope and personal in nature.” *Bunger v. Univ. of Okla.*, 95 F.3d 987, 992 (10th Cir. 1996). As a result, the Court finds that Plaintiff’s emails do not address a matter of public concern.

3. Speech Was a Motivating Factor in the Adverse Employment Action

Regarding the fourth prong of the *Garcetti/Pickering* test, the Complaint lacks factual allegations that would establish that Plaintiff’s emails were a motivating factor in his firing. Although Plaintiff makes the conclusory assertion that “Defendant directly cited [his] emails regarding The Laramie Project as the reason for his termination” (ECF No. 24, ¶ 114), there are no specific allegations as to how the decision was made, or even by whom it was made. Conclusory allegations are insufficient to survive dismissal. *Cory*, 583 F.3d at 1244. Plaintiff’s allegations, taken as true, establish that his emails about *The Laramie Project* prompted Defendant to suspend Plaintiff and begin an investigation into his conduct at Ponderosa. And they establish that Mr. Ottmann, Ms. Franklin, and Mr. Winsor were primarily responsible for the decision to fire him. But it does not follow that simply because these individuals knew about the emails, his firing was “substantially motivated by” the emails as opposed to other

information that might have been gleaned from the investigation. Although the Complaint neglects to recite or describe Defendant’s stated reasons for firing him, that does not mean the Court is required to accept Plaintiff’s conclusory assertion as to the basis for his termination. Therefore, the Court finds the absence of factual allegations that would establish the fourth prong of the *Garcetti/Pickering* test provides another reason for dismissing Plaintiff’s First Amendment retaliation claim.

To the extent Plaintiff contends that the investigation itself was retaliatory, he has not cited any authority for the proposition that a mere investigation can amount to an adverse employment action for the purpose of stating a retaliation claim. Nor does the Complaint contain allegations showing that the investigation amounted to “substantial harassment and abuse” that would support such a claim. *Brammer-Hoelter*, 492 F.3d at 1208.

Accordingly, the Complaint fails to state a First Amendment retaliation claim.

B. Title VII and CADA Discrimination Claims

Because Colorado and federal law apply the same standards to discrimination claims, Plaintiff’s Title VII and CADA claims rise or fall together. *See Johnson v. Weld Cnty.*, 594 F.3d 1202, 1219 n.11 (10th Cir. 2010). A plaintiff proves such a claim either by direct evidence of discrimination or by following the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Khalik v. United Air Lines*, 671 F.3d 1188, 1192 (10th Cir. 2012). To set forth a prima facie case of discrimination, Plaintiff must establish that (1) he is a member of a protected class, (2) he suffered an adverse employment action, (3) he qualified for the position at issue, and (4) he was treated less favorably than others not in the protected class. *See id.* If the plaintiff establishes a prima facie case of discrimination, then the burden shifts to the

defendant to produce a legitimate, non-discriminatory reason for the adverse employment action. *Id.* Once the defendant does so, the burden shifts back to the plaintiff to show that the plaintiff's protected status was a determinative factor in the employment decision or that the employer's explanation is a pretext for discrimination. *Id.* The Court finds Plaintiff has failed to plead a prima facie case, so the rest of the burden-shifting framework does not come into play.

Plaintiff's discrimination claims are premised on his protected status as a Christian; therefore, to establish the fourth prong of his prima facie case he needed to plead that he was treated less favorably than non-Christians at Ponderosa or in the school district. Though he alleges in a conclusory fashion that other faculty and administrators engaged in conduct similar to his—such as being part of a “good ole boys club” and complaining about COVID safety protocols—without being investigated, placed on leave, or disciplined, nowhere does he allege that these individuals were non-Christians. Indeed, he fails to plead any facts about the religious beliefs of anyone associated with this case besides himself. Nor does he allege that the conduct of employees that he considers were similarly situated to him was more egregious or even as egregious as his. Although Plaintiff alleges that Mr. Ottmann, Ms. Franklin, and Mr. Winsor were the ones primarily responsible for firing him and that they knew about his emails concerning *The Laramie Project*, that does not amount to proof of religious discrimination. Plaintiff's argument to the contrary ignores the possibility that—consistent with the allegations in the Complaint—these individuals could also be Christians who might even have disagreed with Ms. Diaz's decision to perform *The Laramie Project* themselves while also believing that Plaintiff's comments were unprofessional and that, coupled with other conduct gleaned from the investigation, his termination was warranted. In any event, the allegations fall well short of

establishing the Plaintiff was treated less favorably than non-Christians.

In short, the Court finds Plaintiff's allegations have not nudged his discrimination claims across the line from conceivable to plausible, and therefore they must be dismissed.

See Twombly, 550 U.S. at 570.

C. Title VII and CADA Retaliation Claims

To state a prima facie Title VII or CADA retaliation claim, Plaintiff must show that (1) he engaged in protected opposition to discrimination, (2) a reasonable employee would have found the challenged action materially adverse, and (3) a causal connection existed between the protected activity and the materially adverse action. *See Bekkem v. Wilkie*, 915 F.3d 1258, 1267 (10th Cir. 2019). Again, the Court finds Plaintiff has failed to set forth allegations establishing a prima facie case.

First, Plaintiff's emails about *The Laramie Project* cannot be considered protected opposition to discrimination for purposes of stating a retaliation claim. Plaintiff does not argue otherwise. Second, while his complaints to Mr. Ottmann and other coworkers about the investigation and his suspension might be considered protected opposition to discrimination, there are no allegations showing a causal connection between those complaints and Plaintiff's firing. Plaintiff's conclusory allegations to the contrary are devoid of factual support.

Finally, Plaintiff's reliance on the letter² from Mr. Ottmann written after he retired as principal is misplaced. While the letter explains that Plaintiff's emails were the "catalyst" for his firing, nowhere does it state or imply that Plaintiff's firing was causally related to his opposition

² The letter is referred to in the Complaint, and Defendant does not dispute its authenticity; therefore, the Court considers it here. *See Toone*, 716 F.3d at 521.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Clerk of Court

Jane K. Castro
Chief Deputy Clerk

September 28, 2023

Mr. Austin M Cohen
Mr. Matthew Fenicle
Mr. Spencer J Kontnik
Kontnik Cohen
201 Steele Street, Suite 210
Denver, CO 80206

RE: 23-1306, McNellis v. Douglas County School District
Dist/Ag docket: 1:22-CV-01636-RM-STV

Dear Counsel:

Your appeal has been docketed, and the appeal number is above.

Within 14 days from the date of this letter, Appellant's counsel must electronically file:

- **An entry of appearance and certificate of interested parties** per 10th Cir. R. 46.1(A) and (D).
- **A docketing statement** per 10th Cir. R. 3.4.
- **A transcript order form or notice that no transcript is necessary** per 10th Cir. R. 10.2. This form must be filed in **both** the district court and this court.

In addition, all counselled entities that are required to file a Federal Rule of Appellate Procedure 26.1 disclosure statement must do so **within 14 days of the date of this letter**. All parties must refer to Federal Rule of Appellate Procedure 26.1 and Tenth Circuit Rule 26.1 for applicable disclosure requirements. All parties required to file a disclosure statement must do so even if there is nothing to disclose. Rule 26.1 disclosure statements must be promptly updated as necessary to keep them current.

Also within 14 days, Appellee's counsel must electronically file an entry of appearance and certificate of interested parties. **Attorneys that do not enter an appearance within the specified time frame will be removed from the service list.**

The [Federal Rules of Appellate Procedure](#), the [Tenth Circuit Rules](#), and [forms](#) for the aforementioned filings are on the court's [website](#). The Clerk's Office has also created a

Appellate Case: 23-1306 Document: 010110928394 Date Filed: 09/28/2023 Page: 2

set of [quick reference guides](#) and [checklists](#) that highlight procedural requirements for appeals filed in this court.

Please contact this office if you have questions.

Sincerely,



Christopher M. Wolpert
Clerk of Court

cc: Michael Brent Case
Scott Alexander Goodstein

CMW/lg

Kylee Dickinson

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U.S. District Court - District of Colorado

District of Colorado

Notice of Electronic Filing

The following transaction was entered on 10/13/2023 at 3:47 PM MDT and filed on 10/13/2023

Case Name: McNellis v. Douglas County School District

Case Number: [1:22-cv-01636-RM-STV](#)

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WARNING: CASE CLOSED on 08/28/2023

Document Number: 60(No document attached)

Docket Text:

LETTER TO USCA and all counsel certifying the record is complete as to [56] Notice of Appeal filed by Corey McNellis. A transcript order form was filed stating that a transcript is not necessary. (Appeal No. 23-1306) Text Only Entry. (jtorr,)

1:22-cv-01636-RM-STV Notice has been electronically mailed to:

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