IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Patti Hidalgo Menders et al., Plaintiffs, v. Loudoun County School Board, Defendant.	Case No. 1:21-cv-00669

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendant Loudoun County School Board ("LCSB") mischaracterizes this action as revolving entirely around a single bias incident reporting form LCSB used as part of its Bias Incident Reporting System ("Bias System"). But, as Plaintiffs demonstrated in their motion for summary judgment, LCSB's Bias System involves much more than a single form. *See* Dkt. No. 86.

LCSB's Bias System does not simply target actual discrimination, intimidation, or harassment. LCSB encourages students to report each other for "bias incidents," which include what LCSB calls "microaggressions." Under LCSB's extremely broad policies, students should report statements that they might subjectively find offensive to a "trusted adult" at school. Example "microaggressions" include statements like "white privilege does not exist" and "I believe in a colorblind society." LCSB's Bias System policies have the obvious effect of chilling student speech, and Plaintiffs have provided evidence that LCSB's policies did, in fact, have that effect.

Further, the Court should reject LCSB's argument that Plaintiffs' case is moot simply because LCSB asserts that it discontinued the use of a form used as part of its Bias System. The Bias System itself still exists, and the policies that chill student speech are still being enforced. Thus, Plaintiffs continue to be harmed by LCSB's Bias System, and their claims are not moot.

For these reasons, the Court should deny Defendant's motion for summary judgment ("Motion").

STATEMENT OF UNDISPUTED FACTS

A. LCSB developed and implemented its Bias System policies.

Around June 23, 2020, LCSB published its "Action Plan to Combat Systemic Racism," which outlines a complex set of initiatives to push a divisive and controversial new ideology

across its schools. First Am. Compl. ("FAC") ¶ 24; Decl. of Emily Rae ("Rae Decl.") Ex. A. (LCSB000395–452) [Dkt. No. 86-3]; *see also* Ex. I (LCSB000367–94) at LCSB000386 (third-party report recommending in June 2019 that LCSB "establish clear policies with built-in accountability for addressing racially motivated acts and speech") [Dkt. No. 86-11]. Those initiatives include prohibiting the "wearing/flying of flags, images, or symbols on [Loudoun County Public Schools ("LCPS")] property that represent racist or hateful ideology," FAC ¶ 26; Rae Decl. Ex. A at LCSB000423 [Dkt. No. 86-3], "[f]inaliz[ing] the Protocol for Responding to Racial Slurs and Hate Speech in Schools," *id.* at LCSB000425, and "consider[ing] the potential renaming of the Loudoun County High School mascot, the Raiders." *Id.* at LCSB000432.

As Part of LCSB's Action Plan, it developed the "Student Equity Ambassador" ("SEA") program. FAC ¶ 28; Rae Decl. Ex. B (LCSB001869–72) [Dkt. No. 86-4]. The SEA program is a formal office the school endows with particular authority to speak on behalf of the student body. FAC ¶¶ 29, 31, 44; Rae Decl. Ex. B at LCSB001870 [Dkt. No. 86-4]. Each school principal selects two to three students to serve in the SEA program. FAC ¶ 28; Rae Decl. Ex. B at LCSB001870 [Dkt. No. 86-4]. Students are selected based on particular criteria, and they serve as a liaison collaborating with the district-wide Supervisor of Equity during regularly occurring student "Share, Speak-up, Speak-out" meetings. FAC ¶ 31; Rae Decl. Ex. B at LCSB001870 [Dkt. No. 86-4]. A LCSB high school's "Equity Team" describes these meetings and the program generally as "a forum to amplify the voice of Students of Color and those who have experienced or witnessed injustices, marginalization, or discrimination." FAC ¶ 58; Rae Decl. Ex. C (LCSB002059) [Dkt. No. 86-5].

Alongside the SEA Program, LCSB also implemented the Bias System, which encourages students to report "bias incidents," either directly to a school administrator or teacher, or

anonymously to SEA using a "bias reporting form." FAC ¶ 56; Rae Decl. Ex. D at LCSB004571 [Dkt. No. 86-6], Ex. E (LCSB000535–37) [Dkt. No. 86-7]. As part of the fight against bias incidents, Student Equity Ambassadors work to identify "microaggressions" within their school. FAC ¶ 50 Rae Decl. Ex. F (PLAINTIFFS000467–99) at PLAINTIFFS000472, 77 [Dkt. No. 86-8]. A PowerPoint presentation delivered at a LCSB meeting explained that "[m]icroaggressions are defined as the everyday, subtle, intentional—and often unintentional—interactions or behaviors that communicate some sort of bias toward historically marginalized groups." FAC ¶ 51; Rae Decl. Ex. F at PLAINTIFFS000477 [Dkt. No. 86-8]. Some examples of "microaggressions" identified in this presentation include "denial[s] of racial reality," such as "I don't think that white privilege exists," and asserting the value of "colorblindness," which sees people as individuals rather than members of a race. FAC ¶ 52; Rae Decl. Ex. F at PLAINTIFFS000478, 81 [Dkt. No. 86-8].

Another component of the Bias System involved LCSB distributing a form to parents and students to report incidents of "bias" anonymously. FAC ¶ 47; Rae Decl. Ex. D (LCSB004571) [Dkt. No. 86-6], Ex. E (LCSB000535–37) [Dkt. No. 86-7]. The form included check boxes for the "Type of Bias Incident" being reported, including "Harassment or Intimidation," "Racial Slur," "Offensive Language, Teasing or Taunting Language/Verbal Exchange," "Exclusion or victim of lack of inclusivity," "Gender Identity and Expression," "Ability Status," "Religious Practices," and "Sexual Orientation." FAC ¶ 49; Rae Decl. Ex. E at LCSB000536 [Dkt. No. 86-7]. The LCSB equity director further explained that a "bias incident" is an "act of discrimination, harassment, [or] intimidation directed against any person or group that appears to be intentional and motivated by prejudice or bias." FAC ¶ 53; Rae Decl. Ex. E at LCSB000535 [Dkt. No. 86-7]. The equity director continued: "Such incidents are usually associated with negative feelings

and beliefs about another's race, ethnicity, national origin, religion, gender, gender identity, sexual orientation, age, social class, political affiliation, or disability." *Id.*

The form stated LCSB will investigate "bias incidents" if the person submitting the form provides his or her name and indicates on the form that they would like school administrators to investigate the "particular incident" they are reporting. FAC ¶ 48; Rae Decl. Ex. E at LCSB000536 [Dkt. No. 86-7]. Also, as part of its Action Plan, LCSB developed the "LCPS Protocol for Responding to Racial Slurs and Hate Speech in Schools." FAC ¶ 56; Rae Decl. Ex. J (LCSB001075–97) at LCSB001082 [Dkt. No. 86-12]. In addition to the bias reporting form, LCSB emphasized that, under its Bias System, "[s]tudents should still report discipline incidents to a trusted adult or members of the administrative team." FAC ¶ 56; Rae Decl. Ex. D at LCSB004571 [Dkt. No. 86-6]. The incidents reported on the bias reporting form or through other means were used in the "Share, Speak-up, Speak-out" meetings with the Student Equity Ambassadors. FAC ¶ 47; Rae Decl. Ex. D at LCSB004571 [Dkt. No. 86-6]. Notably, nothing about the form or the Bias System generally limits its application to only on-campus speech; students can report incidents involving other students for off-campus speech as well. FAC ¶ 54; *see generally* Rae Decl. Ex. E (LCSB000535–37) [Dkt. No. 86-7].

B. LCSB's Bias System policies chilled Plaintiffs' speech.

The Plaintiffs are parents of children attending schools governed by the LCSB ("parents"). The parents raise their children to be active, engaged citizens in their community and country. FAC ¶ 62; Declaration of Patti Hidalgo Menders ("Menders Decl.") ¶ 10 [Dkt. No. 86-13]; Declaration of Scott Mineo ("Mineo Decl.") ¶ 10 [Dkt. No. 86-14]; Declaration of Jane Doe #2 ("Doe #2 Decl.") ¶ 10 [Dkt. No. 86-15]. The parents encourage and teach their children to share their views with their peers. *Id.* Plaintiffs are therefore concerned that, if their children share their

views about political or social issues, including those touching on religion, race, and human sexuality, they will be reported and investigated for bias incidents. FAC ¶¶ 60–65; Menders Decl. ¶¶ 11–12 [Dkt. No. 86-13]; Mineo Decl. ¶¶ 11–12 [Dkt. No. 86-14]; Doe #2 Decl. ¶¶ 11–12 [Dkt. No. 86-15].

The parents and children fear such a report, investigation, or public disclosure of the children's personal political views could negatively impact their standing in the school community and ruin the child Plaintiffs' college or career prospects. FAC ¶ 65; Menders Decl. ¶ 12 [Dkt. No. 86-13]; Mineo Decl. ¶ 12 [Dkt. No. 86-14]; Doe #2 Decl. ¶ 12 [Dkt. No. 86-15]. They are aware that in other school settings nationwide, "bias incident" response or disciplinary systems have been invoked against students based on similarly worded standards for sharing their political or religious views. FAC ¶ 64; Menders Decl. ¶ 13 [Dkt. No. 86-13]; Mineo Decl. ¶ 13 [Dkt. No. 86-14]; Doe #2 Decl. ¶ 13 [Dkt. No. 86-15].

As demonstrated at much greater length in the Plaintiffs' motion to proceed anonymously, the environment in Loudoun County surrounding hot-button political issues like Critical Race Theory ("CRT") is intense. *See* Dkt. Nos. 7-1, 22.

Given that Plaintiffs' views conflict with LCPS's definition of "social justice" and may provoke a "heckler's veto" by school administrators or students who disagree with their views (therefore chilling Plaintiffs' speech), Plaintiffs challenge the Bias System on First Amendment overbreadth grounds (Counts IV and V).

This Court previously granted Defendant's motion to dismiss. On appeal, the Fourth Circuit affirmed this Court's decision as to Counts I (Fourteenth Amendment race discrimination), II (First Amendment viewpoint discrimination), and III (Equal Protection Clause viewpoint discrimination), but vacated dismissal and remanded as to Counts IV (First and Fourteenth

Amendment content-based speech restrictions) and V (First and Fourteenth Amendment viewpoint discrimination) of Plaintiffs' FAC, finding Plaintiffs' allegations sufficiently showed "that the bias reporting system caused the parents' children to experience a non-speculative and objectively reasonable chilling effect on their speech," such that Plaintiffs had standing to proceed with these claims. *Menders v. Loudoun Cnty. Sch. Bd.*, 65 F.4th 157, 165 (4th Cir. 2023).

LEGAL STANDARD

Summary judgment is appropriate if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986); *Evans v. Techs. Apps. & Serv. Co.*, 80 F.3d 954, 958–59 (4th Cir. 1996). The party seeking summary judgment has the initial burden to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986).

To defeat a properly supported motion for summary judgment, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 247–48. Whether a fact is considered "material" is determined by the substantive law, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248. On a motion for summary judgment, the facts shall be viewed, and all reasonable inferences drawn, in the light most

favorable to the non-moving party. *Zenith*, 475 U.S. at 255; *see also Lettieri v. Equant Inc.*, 478 F.3d 640, 642 (4th Cir. 2007).

ARGUMENT

LCSB attempts to distract the Court by zooming in on facts that are irrelevant and focusing on law that does not apply. Plaintiffs' case is not about a single form LCSB used as part of its larger Bias System, and it's not about whether Plaintiffs were "disciplined or even investigated as a result of the bias reporting form." Motion at 10. Rather, this case is about how LCSB's Bias System policies pose a real and ongoing threat that Plaintiffs will be disciplined or investigated based on the subject matter of their constitutionally protected speech. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (holding the Constitution protects student speech that does not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school"); *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021) ("[S]chools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'").

Moreover, even if the form were the sole means by which LCSB implemented its Bias System, LCSB would still not be entitled to summary judgment because—contrary to LCSB's argument—LCSB's voluntary cessation of its practice cannot moot Plaintiffs' claims.

As the undisputed evidence illustrates, this threat has chilled Plaintiffs' speech and forced them to either self-censor or potentially face LCSB's consequences. For these reasons, the Court should deny LCSB's Motion.

A. Plaintiffs have established that LCSB's Bias System policies are violating Plaintiffs' First Amendment right to free speech.

Contrary to how LCSB frames the relief Plaintiffs seek, Plaintiffs are not merely alleging a

"*past* restriction or infringement on protected speech." Motion at 9–10 (emphasis in original). Plaintiffs have been clear that LCSB's Bias System has and will continue to harm Plaintiffs and restrict their speech because the Bias System targets students for "microaggressions."

1. LCSB's Bias System deters students of ordinary firmness from exercising their First Amendment rights.

The chilling effect LCSB's Bias System policies have on Plaintiffs' speech is objectively reasonable,[1] and Plaintiffs have established that they were deterred from specific and intended acts of expression. *See Abbott v. Pastides*, 900 F.3d 160, 169 (4th Cir. 2018). Further, LCSB's characterization of Plaintiffs' claims as a challenge to the "existence of a mechanism for students to submit complaints," Motion at 13, is incorrect: Plaintiffs aren't challenging the "mechanism" for submitting complaints. They are challenging the overbroad Bias System policies that encourage students to report their peers for speech that LCSB may deem a "microaggression."

LCSB relies heavily on the *Speech First, Inc. v. Sands* decision, but that reliance is misplaced. 69 F.4th 184 (4th Cir. 2023). *Sands* involved students at Virginia Polytechnic Institute and State University[2] ("Virginia Tech") who argued that several of Virginia Tech's policies were unconstitutional. *Id.* at 188. Under a set of facts that are different from the facts in

[1] A broad speech code, such as the Bias System here, violates the First Amendment when it is "likely to deter a person of ordinary firmness from the exercise of First Amendment rights." *Cooksey v. Futrell*, 721 F.3d 226, 235–36 (4th Cir. 2013). Moreover, a First Amendment overbreadth claim does not require a showing that the Bias System caused students to cease speech activities altogether. *Id.* In the case of middle- and high-school students, the test isn't whether the speech code would deter an adult of "ordinary firmness" from speaking; it is whether a middle- or high-school student of "ordinary firmness" would be deterred. *Crozier v. Westside Cmty. Sch. Dist.*, 973 F.3d 882, 891 (8th Cir. 2020). Indeed, the Supreme Court has held that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressures in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

[2] That the Plaintiffs in this case are middle and high school students and not college students, like the plaintiffs in *Sands*, means they are even more susceptible to self-censorship and chilled speech when authority figures (i.e., LCSB and school administrators) threaten to discipline or investigate "microaggressions." *See Crozier*, 973 F.3d at 891; *Lee*, 505 U.S. at 592.

this case, the District Court in *Sands* denied the plaintiff's motion for a preliminary injunction. *Id.* On appeal, the Fourth Circuit recognized that "[w]hen reviewing the denial of a preliminary injunction, an appellate court must credit the district court's factual findings unless clearly erroneous" and affirmed the District Court's factual findings on that basis. *Id.* at 191. This Court is not constrained by the *Sands* decision because it is reviewing the factual record in the first instance.

Further, the Fourth Circuit's decision against the *Sands* plaintiffs and its decision reversing dismissal of Plaintiffs' claims at issue in this case were issued only a month apart, which indicates that the two decisions are consistent with each other. Indeed, *Sands* cited the *Menders* decision multiple times, both for the proposition that the procedural posture of a case is an important consideration when deciding school speech cases, *id.* at 191 n.4, and for the proposition that plaintiffs must have standing to sue in school speech cases. *Id.* at 192 n.7. The Fourth Circuit has already determined that Plaintiffs in this case, unlike the plaintiffs in *Sands*, have alleged facts that confer standing. *Menders*, 65 F.4th at 165. Given that the Fourth Circuit recognized the facts in this case do more to evidence a First Amendment violation claim than the facts presented in *Sands*, this Court should, too.

Here, the undisputed facts show that in June 2020, LCSB created the Bias System to "combat systemic racism." LCSB contemporaneously developed the SEA Program, part of which entailed collecting reports of bias incidents to discuss during "Share, Speak-up, Speak-out" meetings with the Student Equity Ambassadors. FAC ¶ 47; Rae Decl. Ex. C at LCSB002059 [Dkt. No. 86-5], Ex. H at LCSB00471 [Dkt. No. 86-10]; *see generally* Ex. F (PLAINTIFFS000467–99) [Dkt. No. 86-8]. The Bias System also included creating and distributing a form to parents and students to capture incidents of bias in an anonymous manner. FAC ¶ 47; Rae Decl. Ex. D (LCSB004571)

[Dkt. No. 86-6], Ex. E (LCSB000535–37) [Dkt. No. 86-7]. The LCSB equity director further explained that a "bias incident" is an "act of discrimination, harassment, [or] intimidation directed against any person or group that appears to be intentional and motivated by prejudice or bias." FAC ¶ 53; *see* Rae Decl. Ex. D (LCSB004571) [Dkt. 86-6].

While preventing discrimination, harassment, or intimidation is important, LCSB's policies in practice do not narrowly target cases of *real* discrimination and harassment. *See Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 260–61 (4th Cir. 2003) (reversing lower court's denial of a preliminary injunction regarding a school policy prohibiting clothing with references to any weapons because the policy was "unconstitutionally overbroad"). Rather, LCSB's policies are so broad that they prohibit students from speaking about controversial political issues, such as CRT or the belief that people should be judged by the content of their character rather than the color of their skin.

There are multiple ways in which "bias incidents" can be reported and ultimately investigated. One way is if a student reports an incident using the bias form, provides his or her name, and indicates on the form that they would like school administrators to investigate the incident they are reporting. FAC ¶ 48; Rae Decl. Ex. D (LCSB004571) [Dkt. No. 86-6]. But LCSB has indicated its preference that students directly "report discipline incidents to a trusted adult or members of the administrative team." *Id.* Nothing about the form—or the Bias System generally—limits its application to only on-campus speech; students can report incidents involving other students for off-campus speech as well. FAC ¶ 54; *see generally* Rae Decl. Ex. E (LCSB000535–37) [Dkt. No. 86-7].

Included within the realm of speech that LCSB encourages students to report are "microaggressions," which include "the everyday, subtle, intentional—and often unintentional—

interactions or behaviors that communicate some sort of bias toward historically marginalized groups." FAC ¶ 51; Rae Decl. Ex. F at LCSB000477 [Dkt. No. 86-8]. These "microaggressions" can include "denial[s] of racial reality" (such as believing not all members of a certain race are either oppressed or oppressors) and opining that society should be "colorblind" (valuing individuals' character more than their race or appearance). FAC ¶ 52; Rae Decl. Ex. F at LCSB000478, 81 [Dkt. No. 86-8]. But what LCSB calls "microaggressions," the Supreme Court calls "constitutionally protected speech." *See Tinker*, 393 U.S. at 509.

The parent Plaintiffs have submitted declarations on behalf of themselves and their children stating that their children have the "desire to speak freely about [their] views within the LCPS community on 'social justice,' CRT, race, gender identity, and other controversial political issues," but have concerns that sharing their views on this subject will result in their speech being "reported as a 'bias incident,'" that will cause LCSB to "investigate, publicly disclose, or even discipline" their children and "negatively impact [their] standing in the school community or even ruin [their] college or career prospects." *See* Menders Decl. ¶¶ 10, 12 [Dkt. No. 86-13]; Mineo Decl. ¶¶ 10, 12 [Dkt. No. 86-14]; Doe #2 Decl., ¶¶ 10, 12 [Dkt. No. 86-15].

Further, contrary to LCSB's arguments, Motion at 12–15, the Fourth Circuit's decision in *Abbott* does not warrant judgment in LCSB's favor. In *Abbott*, a university *expressly allowed* students to engage in speech others deemed "racist" and "offensive" and *defended* their right to do so after others complained. 900 F.3d at 164–65. Here, in contrast, LCSB is *threatening* to *investigate* students who would engage in speech that offends others. The students in *Abbott* had no reason to believe they would be investigated or punished for their speech because the university had already protected their right to engage in that speech. The students here, however, have every reason to believe that they could be investigated and punished for their speech.

Plaintiffs here would like to be able to speak freely about controversial topics—like the students in *Abbott* were permitted to speak about controversial topics—but LCSB's policies force them to self-censor. Indeed, *Abbott* acknowledged that facts similar to the facts in this case would likely warrant a different result. *Id.* at 170 ("Had this case played out differently—had the University informed Abbott that it had determined that an investigation of the Free Speech Event *was* warranted; and then instructed him *not* to display swastikas or 'wetback' signs or other controversial material at future events; and then warned him that it would scrutinize future events to ensure that they conformed to [the policies]—then, we agree, a student of 'ordinary firmness' might well be deterred from engaging in similar speech activities." (emphasis in original)).

LCSB's policies are so overbroad that they encompass and prohibit speech regarding controversial political issues. LCSB's policies are still in effect, and the threat that LCSB may enforce them against Plaintiffs if they say something LCSB deems politically incorrect constantly lingers. Plaintiffs submitted declarations stating that they want to be able to discuss political issues, but are chilled from doing so. Menders Decl. ¶¶ 10–12; Mineo Decl. ¶¶ 10–12; Doe #2 Decl. ¶¶ 10–12. Therefore, unlike the plaintiffs in *Abbott*, Plaintiffs here have presented the necessary evidence that LCSB's Bias System policies unconstitutionally chill Plaintiffs' speech.

LCSB's reliance on *Reyes v. City of Lynchburg*, 300 F.3d 449, 455 n.8 (4th Cir. 2002), is also misplaced. *See* Motion at 15–16. In *Reyes,* the plaintiff challenged a parade ordinance that was a "time, place, and manner restriction[] . . . [that was] content neutral." *Id.* at 454. Reyes argued that his speech was chilled after he was indicted and stood trial under the ordinance. *Id.* at 455 n.8. The court rejected that argument because the ordinance had since been found unconstitutional, and because Reyes alleged that he had been chilled from speaking at an event

that occurred on March 13, 1998—three days *after* the ordinance he challenged was *repealed*. *Id.* Further, a court had already held the ordinance in question to be unconstitutional, and he had been found not guilty for allegedly violating it in the past. "Under [those] facts," the court found his chilled-speech claim to have "no merit." *Id.* Also, Reyes could not recover for his past prosecution under the repealed ordinance because he had been acquitted and accorded due process. *Id.*

None of the legal issues that arose in *Reyes* exist here. Unlike the plaintiff in *Reyes*, Plaintiffs here *are* alleging content-based restrictions and viewpoint discrimination. Unlike the *Reyes* plaintiff, Plaintiffs here *do* have reason to believe the policies they challenge could be enforced against them in the future, as discussed further below. And, unlike the *Reyes* plaintiff, Plaintiffs here are not seeking to recover for a past prosecution under a since-repealed ordinance. Therefore, *Reyes* is inapposite and should not inform the Court's ruling in this case.

2. LCSB's Bias System policies have deterred Plaintiffs from voicing their political views that differ from LCSB's views.

Plaintiffs have established that LCSB's Bias System has chilled their speech—that is, they have identified "specific expression in which they intended to engage but were deterred by the existence of" LCSB's Bias System policies. *See* Motion at 14. Unlike the plaintiff in *Abbott*, who only established that a "reasonable person *could* have engaged in self-censorship," 900 F.3d at 171, Plaintiffs here have shown that LCSB "actually caused . . . First Amendment harm . . . by [showing] that [LCSB's Bias System policies] deterred . . . specific intended act[s] of expression protected by the First Amendment" as the *Abbott* decision requires. *Id.* (emphasis added).

Further, unlike the plaintiff in *Reyes*, who was "assured that the parade ordinance would not be enforced against him in the future," Motion at 16, Plaintiffs here have received no such assurance. *See Reyes*, 300 F.3d at 455 n.8. LCSB's alleged "assurance" that it won't use a

particular bias reporting *form* in the future does nothing to ensure that LCSB won't continue to enforce its Bias System policies.

As explained in Section A.1. above, the undisputed evidence shows that Plaintiffs desire to speak about controversial political topics that constitute constitutionally protected speech, that LCSB's Bias System policies encourage students to report instances of "microaggressions" to school administrators and thus chill that speech, and that Plaintiffs have been forced to self-censor since these policies were implemented. *See* Menders Decl. ¶¶ 10–12 [Dkt. No. 86-13]; Mineo Decl. ¶¶ 10–12 [Dkt. No. 86-14]; Doe #2 Decl., ¶¶ 10–12 [Dkt. No. 86-15].

LCSB's Motion should be denied.

B. Plaintiffs' claims are not moot.

1. LCSB is still enforcing its Bias System policies.

LCSB's statement that it does not intend to "reinstate or replace the [bias reporting] form with any similar reporting form or any other mechanism" misses the mark. Motion at 7. Plaintiffs' FAC does not merely criticize LCSB's bias reporting ***form***; it criticizes LCSB's entire bias reporting ***system***. FAC ¶¶ 97–112 (using the phrases "bias reporting system," "bias response system," and "bias incidents" 13 times, but referencing the phrase "bias reporting form" 0 times). LCSB's declaration that it will not use its original bias reporting form does not establish that it has abandoned its "bias reporting system." Indeed, even if LCSB were to submit a declaration to that effect, such a declaration would not suffice because Fourth Circuit precedent requires an "'unconditional and irrevocable' agreement that prohibits [the government] from returning to the challenged conduct." *Porter v. Clark*, 852 F.3d 358, 364 (4th Cir. 2017). Moreover, it is public knowledge that that LCSB's Bias System is still in effect. *See* Scott Gelman, *How Loudon Co.*

schools are responding to rise in hate incidents, WTOP News (June 10, 2023, 9:18 AM).[3] As recently as last month, LCSB's Equity Committee claimed it had recorded 861 "incidents [allegedly] involving hate speech or racial slurs" in the 2022-2023 school year. *Id.*

2. LCSB's choice to discontinue using its bias reporting form falls under the "voluntary cessation" exception to mootness.

Even if discontinuing the use of a single form utilized in LCSB's larger Bias System were enough to moot Plaintiffs claims (not so), LCSB still fails to meet the high threshold required under the voluntary cessation exception to mootness.

"It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal quotation marks omitted). The voluntary cessation exception to mootness serves to prevent "a manipulative litigant from immunizing itself from suit indefinitely, altering its behavior long enough to secure a dismissal and then reinstating it immediately after." *Porter*, 852 F.3d at 364.

"[A] defendant claiming that its voluntary compliance moots a case bears the *formidable burden* of showing that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (emphasis added). This heavy burden can only be met in cases where, for example, a defendant "enters into an 'unconditional and irrevocable' agreement that prohibits it from returning to the challenged conduct." *Id.*

LCSB claims that Plaintiffs' claims are moot because LCSB purportedly discontinued the use of the bias reporting form at issue "in the summer of 2021." Dkt. Nos. 68-1 ¶¶ 13, 71 at 3. Curiously, LCSB made no mention of this change while this case was pending before the Fourth

[3] *Available at* https://wtop.com/loudoun-county/2023/06/how-loudoun-co-schools-are-responding-to-rise-in-hate-incidents.

Circuit, even though cases may be dismissed for mootness at that stage. *See WRAL-TV v. News & Observer Pub. Co. (Capitol Broad. Co.)*, 19 F.4th 385, 390–91 (4th Cir. 2021). LCSB's assertion that there is "no intent to reinstate or replace the bias reporting form with any similar reporting form or any other mechanism" at this late stage of the litigation does not change the analysis. Dkt. No. 68-1 ¶ 13. Because LCSB "retains the authority and capacity" to reinstate the bias reporting form or related policies, it is still subject to the voluntary cessation exception to the mootness doctrine. *Porter*, 852 F.3d at 364.

LCSB "has not put forth enough evidence to satisfy its burden to show that its voluntary cessation makes it 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Speech First, Inc. v. Schlissel*, 939 F.3d 756,770 (6th Cir. 2019) (quoting *Friends of the Earth*, 528 U.S. at 189); *see also Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020) (finding a university's decision to change the language of certain policies related to its bias reporting program did not moot plaintiff's First Amendment claims); Pls.' Mem. of Law ISO Pls.' Mot. for Summ. J. [Dkt No. 86] at 19–22. Thus, this Court should find Plaintiffs' remaining claims are not moot.

CONCLUSION

Because Plaintiffs have established that LCSB is still enforcing its Bias System policies and harming Plaintiffs by chilling their speech, Plaintiffs' claims are not moot and Defendant's motion for summary judgment should be denied.

Dated: August 14, 2023

Respectfully Submitted,

/s/ *Emily Rae*
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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2023, I E-Filed the foregoing through the Court's ECF system, which will send a copy to:

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