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' REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs' motion for summary judgment is supported by law and ample evidence showing that the Loudon County School Board's ("LCSB") Bias Incident Reporting System ("Bias System") violates the First Amendment by chilling Plaintiffs' speech.

In LCSB's Opposition to Plaintiffs' Motion for Summary Judgment ("Opp."), LCSB raises several arguments premised on misunderstandings of law and mischaracterizations of the record. But the facts here are simple.

In 2020, LCSB developed its Bias System in response to a third-party "equity assessment" as a way to "combat systemic racism." Because LCSB's Bias System policies are impermissibly vague and overbroad, the System in practice does not simply target actual discrimination, intimidation, or harassment. Instead, it serves to encourage students to report on each other and threatens to punish students just for speaking their minds on controversial issues.

There is no genuine issue of material fact in this case. LCSB does not dispute that its Bias System policies that Plaintiffs challenge are still in effect (with the exception of a single bias incident reporting form). LCSB does not dispute that, under its various Bias System policies, students may be punished for ambiguous infractions such as committing a "microaggression." And LCSB does not dispute that Plaintiffs have self-censored in response to LCSB's policies.

As a matter of law, Plaintiffs are entitled to summary judgment.

II. ARGUMENT

LCSB unconvincingly attempts to act surprised that this case involves First Amendment overbreadth claims.[1] Opp. at 3. However, as LCSB knows, this is not new information. Indeed,

[1] Plaintiffs never limited their overbreadth claims to either an as-applied claim or a facial overbreadth claim. However, as LCSB notes, because both theories require a showing Plaintiffs' self-censorship is "objectively reasonable" and LCSB's Bias System policies are "likely to deter

LCSB repeatedly acknowledged in its Fourth Circuit Appellee Brief that Plaintiffs assert overbreadth claims in Counts IV and V of Plaintiffs' First Amended Complaint ("FAC"). Br. of Appellee Loudoun Cnty. Sch. Bd. at 1, 7, 31, *Menders v. Loudoun Cnty. Sch. Bd.*, 65 F.4th 157 (4th Cir. 2023) (No. 22-1168) ("In Counts IV and V, the Parents assert a [sic] First Amendment overbreadth claims . . . ."). The law supports protecting Plaintiffs' free speech rights and prohibiting government entities from enforcing policies that chill free speech, and Plaintiffs have supported their First Amendment violation allegations with evidence.

Further, as Plaintiffs have thoroughly shown in both their motion for summary judgment and in opposing LCSB's motion for summary judgment, Plaintiffs' claims are not moot.

A. LCSB's Bias System is likely to deter a person of ordinary firmness from exercising their First Amendment rights, chilled Plaintiffs' speech, and caused Plaintiffs to self-censor in a manner that is objectively reasonable.

Plaintiffs are entitled to summary judgment because LCSB's overbroad and vague Bias System policies have violated and will continue to violate Plaintiffs' First Amendment rights by chilling their speech and reasonably causing them to self-censor. LCSB's reliance on the *Abbott*, *Morrison*, *Reyes*, *Rock for Life-UMBC*, and *Sands* decisions is misplaced because those cases either don't speak to the merits of this action, do not involve threats of future enforcement as this case does, or are otherwise inapposite. Further, the Supreme Court and Fourth Circuit alike have ruled repeatedly that protecting students' constitutionally permissible speech in schools is of the utmost importance—these rulings are relevant. Finally, Plaintiffs have met their evidentiary burden to support their First Amendment claims. Therefore, the Court should grant summary judgment in Plaintiffs' favor.

---

a person of ordinary firmness from the exercise of First Amendment rights," Opp. at 3 n.4, as Plaintiffs have shown here, Plaintiffs discuss their overbreadth claims in tandem.

1. The *Morrison*, *Rock for Life-UMBC*, and *Sands* rulings are inapplicable; *Abbott* and *Reyes* do not change the analysis.

LCSB relies heavily on *Rock for Life-UMBC v. Hrabowski*, 411 F. App'x 541 (4th Cir. 2010) and *Morrison v. Bd. of Educ.*, 521 F.3d 602 (6th Cir. 2008) to argue the merits of Plaintiffs' First Amendment claims. However, neither of those decisions apply here because the holdings in both relate solely to whether the plaintiffs in those cases had standing.[2] *Rock for Life-UMBC*, 411 F. App'x at 549 ("The plaintiffs' mere allegations of a chilling effect, absent any substantiating action taken by UMBC, *cannot establish their standing* to challenge the constitutionality of a now-defunct speech regulation." (emphasis added)); *Morrison*, 521 F.3d at 608 ("Because we conclude that Morrison *lacks standing* to pursue his claim of chilled speech, we affirm the district court's grant of summary judgment to the Board." (emphasis added)).

In this case, the Fourth Circuit has already found that Plaintiffs have properly alleged their speech is being chilled and have standing to pursue their First Amendment claims. *Menders*, 65 F.4th at 165. And the evidence Plaintiffs have submitted, namely sworn declarations from the Plaintiff parents, supports Plaintiffs' allegations. *See* Declaration of Patti Hidalgo Menders ("Menders Decl.") ¶¶ 10–12 [Dkt. No. 86-13]; Declaration of Scott Mineo ("Mineo Decl.") ¶¶ 10–12 [Dkt. No. 86-14]; Declaration of Jane Doe #2 ("Doe #2 Decl.") ¶¶ 10–12 [Dkt. No. 86-15]. Therefore, the *Rock for Life-UMBC*, *Morrison*, and *Sands* rulings have no bearing here on that basis alone.

The *Abbott v. Pastides*, 900 F.3d 160 (4th Cir. 2018) and *Reyes v. City of Lynchburg*, 300

[2] As discussed in Plaintiffs' Opposition to Defendant's Motion for Summary Judgment ("Pls.' Opp."), *Speech First v. Sands*, 69 F.4th 184 (4th Cir. 2023) does not apply for the same reason—the holding in that case revolved around whether the plaintiff had standing. *See* Pls.' Opp. at 8–9 [Dkt. No. 93]. 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.

F.3d 449 (4th Cir. 2002) rulings also do not support LCSB's position.

Once again, LCSB mischaracterizes *Abbott*'s application to this case, *see* Opp. at 6, because the central issue in *Abbott* was whether the plaintiffs' speech over a brief period was chilled when there was no ongoing threat of future action against the student plaintiffs. Here, there is an ongoing threat that Plaintiffs will be disciplined or investigated because of their constitutionally protected speech.

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 in the future[3] 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, 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.

Further, the holding in *Reyes* was grounded in the fact that the plaintiff there alleged that he had been chilled from speaking at an event that occurred on March 13, 1998—but the ordinance he challenged had been repealed three days earlier, on March 10. 300 F.3d at 455 n.8. And, while

[3] Further, like in *Abbott* and *Reyes*, the challenged conduct/policies in *Rock for Life-UMBC* and *Morrison* also related to past instances of chilling when there was no "credible threat of enforcement in the future" because the policies at issue had been revised. 411 Fed. App'x at 548–49; *see also* 521 F.3d at 610 (involving a former policy that had since been revised). Plaintiffs here are not merely seeking relief for past wrongs—they are seeking relief to ensure LCSB is not permitted to continue to harm Plaintiffs and violate their First Amendment rights.

the plaintiff in *Reyes* "failed to establish that he was deterred from engaging in any specific intended act of expression" in the past, Opp. at 13, Plaintiffs here have shown that they continue to be deterred from speaking about controversial political topics since LCSB implemented its Bias System policies. 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 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. Unlike the plaintiffs in *Abbott*, *Morrison*, *Reyes*, *Rock for Life-UMBC*, and *Sands*, Plaintiffs here have presented the necessary evidence that LCSB's Bias System policies both have chilled, and will continue to unconstitutionally chill, Plaintiffs' speech, and their motion for summary judgment should be granted on that basis.

2. Landmark Supreme Court and Fourth Circuit law concerning the importance of student speech rights is highly relevant.

LCSB attempts to characterize Supreme Court and Fourth Circuit precedent that forms the bedrock of students' First Amendment rights in schools as "irrelevant." Opp. at 10. However, in determining whether LCSB violated Plaintiffs' First Amendment rights in this case, this Court should consider not only case law specifically addressing policies that chill speech and invoke self-censorship, but also Supreme Court and Fourth Circuit precedent that speaks to how these Courts esteem student speech in schools generally. It is within this framework that this Court must weigh the importance of Plaintiffs' right to free speech against LCSB's interest in maintaining "appropriate discipline in the operation of" its schools. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

The speech at issue in this case is protected by the Constitution. While Plaintiffs

acknowledge that 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).

LCSB may fear a disturbance that may result from unpopular political speech, but that does not give it carte blanche to silence that speech under a broad Bias System speech code that vaguely prohibits "hate speech, hate crimes . . . [or] racial insults" when those terms could mean anything. Rae Decl., Ex. H at LCSB000459 [Dkt. No. 86-10]; *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.'").

Indeed, "microaggressions," which LCSB seeks to combat, fit within this broad categorical range of prohibited speech. Such "microaggressions" include "the everyday, subtle, intentional—and often unintentional—interactions or behaviors that communicate some sort of bias toward historically marginalized groups,"—for example, "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 ¶¶ 51–52; Rae Decl. Ex. F at LCSB000478, 81 [Dkt. No. 86-8].

These landmark decisions that define the scope of constitutionally protected student speech are relevant to this Court's ruling.

3. Plaintiffs have met their evidentiary burden to support their First Amendment claims.

Plaintiffs have met their evidentiary burden in support of their motion for summary

judgment; LCSB's arguments to the contrary fail for four reasons. ***First***, Plaintiffs have shown that LCSB's Bias System comprises more than simply the "Share, Speak Up, Speak Out" form. ***Second***, Plaintiffs have shown that LCSB's "Protocol for Responding to Racial Slurs and Hate Speech in Schools" is a component of LCSB's Bias System. ***Third***, Plaintiffs' declarations are not defective—rather, these declarations properly evidence that Plaintiffs' self-censorship in response to LCSB's Bias System is objectively reasonable. ***Fourth***, the evidence supports Plaintiffs' facial overbreadth claim.

First, LCSB continues to frame this dispute as focused only on LCSB's "Share, Speak Up, Speak Out" meetings and corresponding bias incident reporting form. But, as LCSB's own documents illustrate, the Bias System this action challenges encompasses all of LCSB's "policies or protocols for addressing racial incidents, including but not limited to the Student Code of Conduct, Policy 7560 Professional Conduct, and the Protocol for Responding to Racial Slurs and Hate Speech in Schools." Rae Decl., Ex. A at LCSB000412 [Dkt. No. 86-3]. Indeed, Plaintiffs' FAC is explicit—it 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).

As part of its "Comprehensive Equity Plan," LCSB focused on "Four Primary Recommendations," including "defining and condemning White Supremacy, hate speech, hate crimes, and other racially motivated acts of violence" and "addressing racially motivated acts and creat[ing] proactive leadership measures to address the student use of racial insults." Rae Decl., Ex. H at LCSB000459 [Dkt. No. 86-10]. However, LCSB failed to define "hate speech, hate crimes . . . [or] racial insults." That these terms are indisputably vague and ambiguous and

encompass constitutionally protected speech is exactly why Plaintiffs brought this action challenging LCSB's Bias System policies in the first place.

It does not matter that some of these policies, which are subsets of the broader Bias System, exist "entirely separate from, and never subject to, the Share, Speak Up, Speak Out form." *See* Opp. at 16. According to LCSB's Action Plans to Combat System Racism ("Equity Action Plans"), in creating its Bias System, LCSB set out to revise various policies, including the "Student Dress Code," "Student Rights and Responsibilities Handbook," and "Employee Handbook." Rae Decl., Ex. A at LCSB000400, 02 [Dkt. No. 86-3]. And, based on publicly available LCSB documents, Plaintiffs are aware that LCSB didn't only contemplate making these revisions in its Equity Action Plan; LCSB did, indeed, implement these policy changes. *See* Pls.' Mot. for Judicial Notice (filed concurrently herewith) Exs. B,[4] C[5] (compare 2017 version of student dress code policy with 2021 version adopted in accordance with LCSB's Equity Action Plans).

LCSB's Bias System policies are distinct from LCSB's general student conduct or disciplinary policies, which existed prior to LCSB's 2019 equity assessment and the policies that were adopted in 2020 in conjunction with the equity assessment.

Second, the Court should reject LCSB's attempt to separate its Protocol for Responding to Racial Slurs and Hate Speech in Schools from its Bias System. *See* Opp. at 15-16.

As explained above, the Bias System includes all of LCSB's policies that were created or revised due to LCSB's equity assessment that began in 2019. *See generally* Rae Decl. Ex. I

[4] *Available at* https://www.lcps.org/cms/lib/VA01000195/Centricity/Domain/4891/StudentDressCode-Policy8270.pdf.
[5] *Available at* https://www.lcps.org/cms/lib/VA01000195/Centricity/Domain/33551/Dress Code 8270 - 2021.pdf.

(LCSB000367–394) [Dkt. No. 86-11]. As of June 2020, LCSB's Equity Action Plans specifically included and referenced "policies or protocols for addressing racial incidents, including but not limited to the Student Code of Conduct, Policy 7560 Professional Conduct, and the Protocol for Responding to Racial Slurs and Hate Speech in Schools." Rae Decl., Ex. A at LCSB000412 [Dkt. No. 86-3].

LCSB's attempt to now boil its Bias System down to a single facet—namely, the "Share, Speak Up, Speak Out" form—is disingenuous. This is especially true when the Equity Leads Coaching Institute materials, which were disseminated only a few months later in September 2020 in response to LCSB's equity assessment and subsequent Equity Action Plans, focused on LCSB's "Protocol for Responding to Racial Slurs and Hate Speech in Schools." Rae Decl. Ex. J at LCSB001081-84 [Dkt. No. 86-12].

Third, the declarations of Menders, Mineo, and Jane Doe #2 contain their impressions and observations of their children and their community, and as such are admissible evidence. Menders, Mineo, and Jane Doe #2 have personal knowledge of their own views, desires, and interactions with both their children and the Loudoun County Community.

"In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be *inferable from circumstances*." Fed. R. Evid. 803, Advisory Committee Notes (emphasis added).

LCSB claims that "[n]one of the declarations explain how Menders, Mineo, or Jane Doe #2 know what their children's actual concerns were about sharing their views." Opp. at 17. However, by the very nature of their parental role and as members of the Loudoun County community, they have had ample opportunities to observe, perceive, and interact with their

children, as well as to observe, perceive, and interact with fellow members of the Loudoun County community. It is reasonable that—as primary caregivers to their children—Menders, Mineo, and Jane Doe #2 have more personal knowledge of their children than anyone else.

"The proponent of the evidence bears the burden to establish personal knowledge but '[t]his standard is not difficult to meet.'" *S.E.S. ex. rel. J.M.S. v. Galena Unified Sch. Dist. No. 499*, 446 F. Supp. 3d 743, 757 (D. Kan. 2020) (quoting *United States v. Gutierrez de Lopez*, 761 F.3d 1123, 1132 (10th Cir. 2014)). "Testimony should not be excluded for lack of personal knowledge unless no reasonable juror could believe that the witness had the ability and opportunity to perceive the event that he testifies about." *United States v. Hickey*, 917 F.2d 901, 904 (6th Cir. 1990); *see also Gutierrez de Lopez*, 761 F.3d at 1132 ("A court should exclude testimony for lack of personal knowledge only if in the proper exercise of the court's discretion it finds that the witness could not have actually perceived or observed that which he testifies to." (internal citations and quotation marks omitted)).

Further, "courts have been very liberal in admitting witnesses' testimony [about] another's state of mind if the witness has had sufficient opportunity to observe the accused so as to draw a rational conclusion about the intent of the accused." *United States v. Hoffner*, 777 F.2d 1423, 1425 (10th Cir. 1985). Indeed, courts have recognized that parents' statements of their personal observations of their children's behavior and mental states may be admissible evidence. *See, e.g.*, *United States v. Farley*, 992 F.2d 1122, 1125 (10th Cir. 1993); *Sanchez v. Brokop*, 398 F. Supp. 2d 1177, 1185 (D.N.M. 2005).

The *Sanchez* decision is particularly instructive. There, the court discussed the admissibility of statements made by the victim's mother, including recollections of statements made by the victim to the mother and mother's observations of her daughter, emphasizing that "the majority

of this testimony, based on Ms. Sanchez's observations of her daughter was certainly not hearsay and was admissible." 398 F. Supp. 2d at 1191. Additionally, statements made by the victim to her mother were admissible under the residual exception to the hearsay rule (Federal Rule of Evidence 807) or "as evidence of then existing mental, emotional, or physical condition" under Federal Rule of Evidence 803(3). *Id.* at 1192.

Fourth, Plaintiffs have presented evidence that supports their facial overbreadth claim. Like the plaintiff in *Newsom*, Plaintiffs here have "identified specific language in [LCSB's Bias System policies] that [i]s overbroad, and demonstrated that the [policies] lack[] 'any cogent limiting construction.'" Opp. at 28 (quoting *Newsom*, 354 F.3d at 260).

Indeed, Plaintiffs specifically quoted language from LCSB's "policies or protocols for addressing racial incidents, including but not limited to the Student Code of Conduct, Policy 7560 Professional Conduct, and the Protocol for Responding to Racial Slurs and Hate Speech in Schools," Rae Decl., Ex. A at LCSB000412 [Dkt. No. 86-3], that illustrates just how overbroad LCSB's Bias System policies are. *See supra* at 6–8.

Plaintiffs have submitted ample undisputed evidence to substantiate their claims. The Court should therefore grant summary judgment in Plaintiffs' favor.

B. Plaintiffs' claims are not moot.

LCSB continues to conflate its bias reporting form with its Bias System. Contrary to LCSB's assertion, Plaintiffs here have a "legally cognizable interest in injunctive [and] declaratory relief" because "the relief ordered" *would have* a "practical impact on [Plaintiffs'] rights" and *would* "redress the injuries originally asserted." *See* Opp. at 19. Plaintiffs have submitted admissible evidence showing that LCSB's Bias System policies are still actively in place.

Further, even if the Bias System only included the bias incident reporting form (it includes much more than just the form), LCSB's voluntary decision to discontinue the use of its bias

reporting form for the time being would still not permit it to escape liability. Plaintiffs' claims are not moot.[6]

1. Plaintiffs have provided admissible undisputed evidence proving LCSB is still enforcing its Bias System policies notwithstanding whether it still employs its bias incident reporting form.

LCSB's "Share, Speak Up, Speak Out" form does not "form[] the entire basis of Counts IV and V." *See* Opp. at 20. Contrary to LCSB's claim, the "mechanism" that Plaintiffs challenge is not related to "creating a bias reporting form." Rather, Plaintiffs challenge the mechanism LCSB utilizes to chill students' protected speech—namely, its Bias System policies generally.

Here, Plaintiffs have proffered evidence both obtained through the discovery process and from public sources that may be judicially noticed—such as an online newspaper article and publicly-available school policies—which are directly relevant to refuting LCSB's claims and prove LCSB's Bias System is ongoing.[7] *See* Pls.' Mot. for Judicial Notice; Fed. R. Evid. 201;

---

[6] LCSB argues that "Plaintiffs merely attempt to explain why their [claims] are NOT moot. However, Plaintiffs offer neither argument nor evidence that would entitle them to summary judgment." Opp. at 20 n.10. That is not true: Plaintiffs have submitted both arguments and evidence to substantiate their claims. *See, e.g.*, Pls.' Mem. of Law ISO Pls.' Mot. for Summ. J. ("Pls.' MSJ Memo") at 8–11. Plaintiffs take LCSB to mean that Plaintiffs cannot meet the additional factors for injunctive relief beyond success on the merits. *See* LCSB's Mem. ISO Mot. for Summ. J. at 9 n.6 ("Plaintiffs have not and cannot establish irreparable harm, lack of an adequate remedy at law, that the balance of hardship tips in their favor, or that the public interest would be served by such relief."). But in a First Amendment case, these additional factors collapse into the merits. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Likewise, "monetary damages are inadequate to compensate for the loss of First Amendment freedoms." *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011). The balance of hardships also favors Plaintiffs, because state actors are "in no way harmed by issuance of an injunction that prevents the state from enforcing unconstitutional restrictions." *Id.* at 302–03. And "upholding constitutional rights is in the public interest." *Id.* at 303. Once Plaintiffs establish a violation of their First Amendment rights, as they have done here, they are entitled summary judgment and a permanent injunction.

[7] *See* Pls.' MSJ Memo at 18, 18 n.4 (citing Scott Gelman, *How Loudon Co. schools are responding to rise in hate incidents*, WTOP News (June 10, 2023, 9:18 AM), *available at* https://wtop.com/loudoun-county/2023/06/how-loudoun-co-schools-are-responding-to-rise-in-hate-incidents).

Caldwell v. Univ. of N.M. Bd. of Regents, No. CIV 20-0003 JB/JFR, 2023 U.S. Dist. LEXIS 111305, *119 n.28 (D.N.M. June 28, 2023) (finding courts may take judicial notice of a school's student policies contained on the school's official website).

Because LCSB has not submitted any competing evidence that raises a dispute as to any genuine issue of material fact—i.e., that LCSB is not still actively enforcing its Bias System—Plaintiffs are entitled to summary judgment.

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

LCSB's arguments about the standard for voluntary cessation in *Porter v. Clark*, 852 F.3d 358 (4th Cir. 2017) and *Telco Commc'ns, Inc. v. Carbaugh*, 885 F.2d 1225 (4th Cir. 1989) does it no good because it has not even purported to cease the challenged conduct and, instead, continues to defend those aspects in which it isn't currently engaged.[8] This is not a situation where there is "no reasonable expectation that the alleged violation will recur"—the alleged violations are still occurring—nor have "interim events [] completely and irrevocably eradicated the effects of the alleged violation." Opp. at 22 (quoting *Telco*, 885 F.2d at 1231). Indeed, Plaintiffs cited a report from just two months ago about LCSB's continued policing of bias incidents, Pls.' MSJ Memo at 18,[9] and LCSB's website still lists at least one student dress code policy (which LCSB revised from an older version to its current state in conjunction with implementing its Bias System) as active. *See* Pls.' Mot. for Judicial Notice Ex. C. Nor has LCSB argued it has stopped enforcing any of its other policies that comprise its Bias System, with the exception of a single bias reporting form.

[8] LCSB argues the voluntary cessation exception does not apply to Plaintiffs' requests for injunctive and declaratory relief. Even if that were true—which it isn't, LCSB does not argue that Plaintiffs' request for nominal damages is moot.

[9] *See* Gelman, *supra*.

The cases LCSB relies on to claim it is not subject to the voluntary cessation exception to mootness are distinguishable. In *Grutzmacher v. Howard Cty.*, 851 F.3d 332, 349 (4th Cir. 2017), the County had expressly repealed the challenged social media policy, replaced it with a new policy that removed the offending provisions, and swore under oath it was not going to institute the new policy. Here, LCSB has not ended its Bias System; it simply discontinued one form used to implement it. And in *Roberts v. Engelke*, No. 7:20CV00484, 2022 U.S. Dist. LEXIS 44578, at *10 (W.D. Va. Mar. 14, 2022), the prison had expressly changed its challenged policy to accommodate a Muslim inmate's Ramadan fast, so there was simply no relief left to provide.

Further, while *Speech First, Inc. v. Sands*, No. 7:21-cv-00203, 2021 U.S. Dist. LEXIS 181057, at *59 (W.D. Va. Sept. 21, 2021) did involve a type of unconditional and irrevocable agreement, in that case the University didn't just rewrite the policy; the Board of Visitors also adopted the change by formal resolution. The present case involves no such rewriting of the Bias System policies nor a formal adoption of such revised policies.

Similarly, in *Stone v. Trump*, 400 F. Supp. 3d 317, 337 (D. Md. 2019), the challenged memorandum had likewise been explicitly revoked and replaced with a different operative policy, which is not the case here. Finally, *Michael T. v. Crouch*, 344 F. Supp. 3d 856, 868 (S.D. W. Va. 2018) involved a state revising its disability benefits algorithm after the plaintiffs won a preliminary injunction, and there was no real possibility the state would reimplement the old formula that had already lost once in court. LCSB, by contrast, has not disclaimed its interest in rooting out bias. Rather, by its own admission, it has simply discontinued one form used to collect data that LCSB apparently still collects by other methods (given it is still tracking instances of race-related incidents). If the defendant in *Michael T.* had kept the challenged

algorithm, but changed how it gathered the data that went into it, that case would not have been moot because the harm the plaintiffs complained of there would still have existed (just as the harm Plaintiffs complain of in this case still exists).

Further, for the reasons discussed above, *Reyes* does not apply because that case, unlike this case, involved a challenge to an ordinance that a city repealed before the speech event that the plaintiff wanted to attend was scheduled to occur. 300 F.3d at 452. Repealing an ordinance, which would render a claim that the ordinance violated the Constitution moot, is not equal to abandoning use of a form when the larger violative system of which that form is a part still exists.

Finally, the Fifth and Sixth Circuit mootness analyses in similar contexts—which consider whether a public school's decision to revise policy language (1) included a controlling statement of future intention; (2) had suspicious timing; and (3) was notwithstanding the school's continued defense of the original policy—are instructive.[10] *See Speech First, Inc. v. Fenves*, 979 F.3d 319, 328 (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); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 769–70 (6th Cir. 2019) (same).

First, LCSB's failure to make any statement of its future intentions regarding its Bias System as a whole, let alone a *controlling statement*, favors Plaintiffs.

Second, LCSB's suspicious timing regarding its discontinued use of the bias incident

[10] LCSB mischaracterizes the Fourth Circuit's analysis related to the mootness doctrine. The *Sands* court never discussed mootness or even cited to the Fifth and Sixth Circuit *Speech First* decisions on the issue of mootness. Therefore, the Fourth Circuit has expressed no opinion regarding those courts' application of the mootness standard. Indeed, LCSB even cites to the *Sands* lower court decision to show that analyzing mootness using this three-factor test is proper. *See* Opp. at 26.

reporting form also favors Plaintiffs. Further, LCSB misunderstands Plaintiffs' argument when it says, "The School Board stopped using the form in June 2021, not immediately after the Fourth Circuit issued its remand of this case, evidently when Plaintiffs became aware of its cessation." Opp. at 26. That misses the point: LCSB chose to inform this Court and Plaintiffs of its decision to stop using the form only after the Fourth Circuit's decision. As Plaintiffs have explained, LCSB's timing is indeed suspicious. *See* Pls.' MSJ Memo at 20–21.

Third, LCSB's continued defense of the bias reporting form (while not abandoning its Bias System generally) throughout this litigation favors Plaintiffs as well.

For these reasons, this Court should find LCSB's actions fall within the voluntary cessation exception to mootness and grant summary judgment in Plaintiffs' favor.

III. CONCLUSION

Because there is no genuine issue as to any material fact, this Court should (1) find that LCSB's enforcement of its Bias System policies has chilled Plaintiffs' speech in violation of their First and Fourteenth Amendment rights; (2) reject LCSB's argument that Plaintiffs' claims are moot; and (3) enter summary judgment in Plaintiffs' favor.

Dated: August 21, 2023

Respectfully Submitted,

/s/ *Emily Rae*
Emily Rae, Esq. (admitted *pro hac vice*)
Reilly Stephens, Esq. (admitted *pro hac vice*)
Liberty Justice Center
440 N. Wells Street, Suite 200
Chicago, IL60654
(312) 637-2280 (main number)
(312) 263-7702 (facsimile)
erae@ljc.org
rstephens@ljc.org
Attorneys for Plaintiffs

/s/ Anthony J. Tamburro
Anthony J. Tamburro (VSB No. 96539)

SETLIFF LAW, P.C.
4940 Dominion Boulevard
Glen Allen, VA 23060
(804) 377-1260 (main number)
(804) 377-1280 (facsimile)
atamburro@setlifflaw.com
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2023, I E-Filed the foregoing through the Court's ECF system, which will send a copy to:

Stacy Haney, Esq.
Andrew Selman, Esq.
HANEY PHINYOWATTANACHIP PLLC
9201 Arboretum Parkway, Suite 160
Richmond, VA 23236
Shaney@haneyphinyo.com
Aselman@haneyphinyo.com
Attorneys for Defendant Loudon County School Board

/s/ *Anthony J. Tamburro*
Anthony J. Tamburro (VSB No. 96539)
SETLIFF LAW, P.C.
4940 Dominion Boulevard
Glen Allen, VA 23060
(804) 377-1260 (main number)
(804) 377-1280 (facsimile)
atamburro@setlifflaw.com
Attorneys for Plaintiffs