UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

PATTI H. MENDERS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:21-cv-669-AJT-TCB
	)	
LOUDOUN COUNTY SCHOOL BOARD,	)	
	)	
Defendant.	)	

DEFENDANT LOUDOUN COUNTY SCHOOL BOARD'S
REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The Loudoun County School Board ("School Board") states as follows in reply to Plaintiffs' Opposition to Defendant's Motion for Summary Judgment ("Plaintiffs' Opposition") [ECF No. 93], and in support of its Motion for Summary Judgment [ECF No. 87].

Introduction

To stave off the dismissal of their case as moot, Plaintiffs spent a significant portion of their Opposition trying to convince this Court that their case is not limited to the now-defunct "Share, Speak Up, Speak Out: Bias Reporting form" ("Share, Speak Up, Speak Out form"), but rather, it is broader and encompasses a "Bias System." See generally Plaintiffs' Opposition. As demonstrated below and in the School Board's Memorandum in Opposition of Plaintiffs' Motion for Summary Judgment ("School Board's Opposition") [ECF No. 94], no such "Bias System" exists. And because the School Board voluntarily stopped using the Share, Speak Up, Speak Out form in 2021, Plaintiffs' facial overbreadth claim and claims for declaratory and injunctive relief are moot.

Even assuming, for the sake of argument, that a "Bias System" exists, the remaining claims fail for the same fundamental reason: the School Board never took **any action**—much

less **unconstitutional action**—against Plaintiffs or any other student through a "Bias System." Accordingly, both the as-applied claim and facial overbreadth claim rest entirely on a "subjective chill" theory that is insufficient to establish a First Amendment violation. See, e.g., Rock for Life-UMBC v. Hrabowski, 411 F. App'x 541, 549 (4th Cir. 2010); Abbott v. Pastides, 900 F.3d 168, 176 (4th Cir. 2018). Moreover, Plaintiffs' facial overbreadth claim fails for the independent reason that Plaintiffs have no evidence to establish such a claim. For these reasons, the School Board is entitled to summary judgment.

Standard of Review

It is well settled that "[t]he party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but 'must come forward with specific facts showing that there is a genuine issue for trial.'" Emmett v. Johnson, 532 F.3d 291, 297 (4th Cir. 2008) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–88 (1986)). The nonmoving party must respond "by affidavits or otherwise and present specific facts from which a jury could reasonably find for either side." Montgomery v. Johnson, No. 7:05-cv-00131, 2007 WL 1960601, at *1 (W.D. Va. July 5, 2007) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256–57 (1986)). It is not enough to respond "with conclusory allegations [in] an affidavit." Lujan v. Nat'l Wildlife Fed'n., 497 U.S. 871, 888–89 (1990). Nor can the nonmoving party "create a genuine issue of material fact through mere speculation or the building of one inference upon another." Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985). Plaintiffs have not come forward with any evidence showing that there is a genuine issue for trial. Accordingly, the School Board is entitled to summary judgment on Plaintiffs' remaining claims.

Argument

I. Plaintiffs' facial overbreadth challenge and requests for declaratory and injunctive relief are moot because the School Board stopped using the Share, Speak Up, Speak Out form in 2021.

A. Plaintiffs offer no evidence that a "Bias System" ever existed, or currently exists.

In an attempt to show that a "Bias System" exists, Plaintiffs repeatedly mischaracterize the evidence. Moreover, even if the evidence is what Plaintiffs say it is, such evidence does not support their conclusion that a "Bias System" exists. In support of their contention that a "Bias System" exists, Plaintiffs rely on the following: (1) a May 13, 2021, email from Geri Fiore to unidentified recipients at Woodgrove High School, Plaintiffs' Memorandum in Support of Motion for Summary Judgement ("Plaintiffs' Memo in Support") [ECF No. 86] and Exhibit D ("Fiore email") attached thereto [ECF No. 86-6]; (2) Plaintiffs' own declarations, Declaration of Patti Hidalgo Menders ("Menders Decl.") [ECF No. 86-13], Declaration of Scott Mineo ("Mineo Decl.") [ECF No. 86-14], and Declaration of Jane Doe #2 ("Jane Doe #2 Decl.") [ECF No. 86-15]; and (3) a presentation made by the Lightridge High School staff to the School Board on May 11, 2021, Plaintiffs' Memo in Support and Exhibit F ("Lightridge Presentation") attached thereto [ECF No. 86-8]. Each will be taken in turn.[1]

First, Plaintiffs rely the Fiore email for the proposition that "the Bias System . . . encourages students to report 'bias incidents,' either directly to a school administrator or teacher, or anonymously to SEA using a 'bias reporting form.'" See Plaintiffs' Opposition, at p. 2. But

[1] Despite mentioning it repeatedly in their Memorandum in Support of Summary Judgment, at pp. 2, 4, and their Opposition, at pp. 2, 4, Plaintiffs' do not identify the LCPS Protocol for Responding to Racial Slurs and Hate Speech in Schools ("Protocol") as evidence of a "Bias System," nor could they. For the reasons stated in the School Board's Opposition, at I.C.2., the Protocol was always completely separate from the Share, Speak Up, Speak Out form, and has no bearing on Plaintiffs' claims.

the Fiore email does not encourage any students to report "bias incidents" through the "bias reporting form." To the contrary, the Fiore email expressly states that, "This opportunity is **not** for reporting incidents, but to share your stories…." See Fiore email, at LCSB 004571 (emphasis added). Importantly, however, the Fiore email does not establish the existence of a "Bias System," because it relates only to a "bias reporting form." Plaintiffs also cite the Fiore email for the proposition that "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." See Plaintiffs' Opposition, at p. 4 (emphasis added). Again, Plaintiffs' assertions are unsupported by the Fiore email. There was no "other means" for sharing a bias incident other than the Share, Speak Up, Speak Out form, and nothing in the Fiore email shows otherwise.

Second, Plaintiffs rely on their declarations and their argument in Section A.1. of their Opposition to argue that "LCSB's Bias System policies encourage students to report instances of 'microaggressions' to school administrators and thus chill that speech." See Plaintiffs' Opposition, at p. 14. But Plaintiffs' self-serving citation to their own declarations cannot support Plaintiffs' assertion, and in any event, Plaintiffs' declarations never mention "microaggressions" at all. Indeed, there is no evidence of "Bias System policies," nor is there any evidence that the School Board encouraged students to report "microaggressions" to anyone, much less to school administrators.

Finally, Plaintiffs cite to the Lightridge Presentation for the proposition that students are encouraged to report "microaggressions" to further bolster their claim that there was a "Bias System." See Plaintiffs' Opposition, at p. 3 ("Student Equity Ambassadors work to identify '[m]icroaggressions' within their school"); and p. 10 ("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'"). Plaintiffs misrepresent the Lightridge Presentation. In the Lightridge Presentation, staff shared their success with student engagement in their inaugural school year, which noted a student-led presentation on responding to microaggressions in the classroom. See Lightridge Presentation, at PLAINTIFFS000472. Nothing in the Lightridge Presentation encourages students to report "microaggressions." See generally Lightridge Presentation. Nor does any of the content of the Lightridge Presentation make any reference to the Share, Speak Up, Speak Out form, or otherwise explain the existence of a "Bias System." Thus, contrary to what the Plaintiffs' claim about the Lightridge Presentation, it does not support their claims.

Plaintiffs not only try to stack one inference on top of another, but also ask the Court to draw incorrect inferences that are inconsistent with the evidence on which Plaintiffs rely in their effort to avoid summary judgment in favor of the School Board. There is, however, no evidence of any "Bias System." Rather, Plaintiffs' claims are and have always been about the Share, Speak Up, Speak Out form. See, e.g., Plaintiffs' Opposition, at p. 2 ("LCSB also implemented the "Bias System" which encourages students to report 'bias incidents' . . . using a '**bias reporting form**.'") (citing Plaintiffs' Memo in Support and Exhibit E ("Share, Speak Up, Speak Out form") attached thereto [ECF No. 86-7]) (emphasis added); id. at p. 3 ("Another component of the Bias System involved LCSB distributing a **form** to parents and students to report incidents of 'bias' anonymously.") (citing the Share, Speak Up, Speak Out form) (emphasis added); id. at p. 4 ("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.") (citing the Share, Speak Up, Speak Out

form) (emphasis added); id. at p. 4 ("Notably, nothing about the **form** or the Bias System generally limits its application to only on-campus speech . . ."") (citing the Share, Speak Up, Speak Out form) (emphasis added); id. at p. 9 ("The Bias System also included creating and distributing a **form** to parents and students to capture incidents of bias in an anonymous manner.") (citing the Share, Speak Up, Speak Out form) (emphasis added).

B. Because the School Board voluntarily stopped using the Share, Speak Up, Speak Out form in 2021, and because the School Board has not and will not replace it with any similar form or any other mechanism in the future, Plaintiffs' facial overbreadth claim and claims for declaratory and injunctive relief are moot.

As explained in the School Board's Memorandum in Opposition of Plaintiffs' Motion for Summary Judgment, the School Board has stopped using the Share, Speak Up, Speak Out form for reasons completely unrelated to this litigation, and there is no plan to revive it. See School Board's Opposition, at pp. 18–27. The School Board has offered a controlling statement of its intentions not to use the Share, Speak Up, Speak Out form in the future, through the declaration of Dr. Ashley F. Ellis, the School Board's Chief Academic Officer, who oversees the Office of Equity. See School Board's Opposition and Exhibit A ("Ellis Decl.") attached thereto [ECF No. 94-1].

Plaintiffs again cite to non-binding authorities, and argue that the School Board "has not put forth enough evidence to satisfy its burden . . ." regarding the voluntary cessation exception to the mootness doctrine. See Plaintiffs' Opposition, at p. 16 (quoting Speech First, Inc. v. Schlissel, 939 F.3d 756, 770 (6th Cir. 2019)). As the Fourth Circuit held in Reyes v. City of Lynchburg, however, a discontinued law or regulation does not present a live case or controversy when there is no reasonable expectation that it will be revived. 300 F.3d 449, 453 (2002). Plaintiffs offer no evidence whatsoever to support their assertion that the Share, Speak Up, Speak Out form would be revived.

As explained in Argument Section I.A., supra, Plaintiffs' claims challenge only the Share, Speak Up, Speak Out form. As the School Board's evidence shows, the Share, Speak Up, Speak Out form was discontinued, has not been used for over two years, and will not be used in the future. See School Board's Memorandum in Support of Motion for Summary Judgment ("School Board's Memo in Support") [ECF No. 88] and Exhibit E ("Spurlock Decl.") attached thereto [ECF No. 88-5]; Ellis Decl. Any claim for injunctive or declaratory relief is therefore moot.

II. Count IV and Count V fail regardless whether the claim is about a "Bias System" or just the Share, Speak Up, Speak Out form.

Both the as-applied claim and facial overbreadth claim fail because Plaintiffs' self-censorship was not objectively reasonable.[2] As demonstrated in the School Board's Memo in Opposition, at pp. 4–6, to prevail, Plaintiffs must put forth the evidence that the School Board took some overt enforcement or disciplinary action against them . Citing Rock for Life-UMBC, 411 F. App'x at 549; Morrison v. Bd. of Educ., 521 F.3d 602, 609–10 (6th Cir. 2007); Abbott, 900 F.3d at 168–71; Speech First, Inc. v. Sands, 69 F.4th 184, 189–93 (4th Cir. 2023). Plaintiffs have not done so, and both counts fail for this reason. Moreover, Plaintiffs' facial overbreadth claim also fails for the independent reason that there is no evidence to support the claim.

A. There is no evidence that the School Board has ever taken any action to implement a "Bias System" against Plaintiff.

Plaintiffs' remaining claims fail because there is no evidence that the School Board took **any action** against them or any other student related to a "Bias System," or the Share, Speak Up,

[2] The relevant inquiry for both an as-applied claim and a facial overbreadth claim is the same. Compare Abbott, 900 F.3d at 169 (an as-applied constitutional theory is cognizable "only if it is 'objectively reasonable'—that is, if the challenged government action is 'likely to deter a person of ordinary firmness from the exercise of First Amendment rights.'") (citations omitted) with id. at 176 (a facial overbreadth claim requires a sufficient showing of self-censorship, establishing a chilling effect on their free expression that is "objectively reasonable.").

Speak Out form. Plaintiffs contend that the following constitutes the evidence that form the basis of their case:

> [T]he 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.

Plaintiffs' Opposition, at p. 14 (citations omitted).

Notably absent, however, is any assertion or citation to any evidence that the School Board took some overt action against Plaintiffs. The absence of some action by the School Board is fatal to Plaintiffs' case.[3] See, e.g., Rock for Life-UMBC, 411 F. App'x at 459 (holding that for a chill to be objectively reasonable, there must be "**some specific action** on the part of the defendant…") (citation omitted) (emphasis added); Morrison, 521 F.3d at 610 ("**Absent a concrete act** on the part of the Board, [plaintiff's] allegations fall squarely within the ambit of

[3] In Plaintiffs' Opposition, at p. 12, Plaintiffs attempt to distinguish Abbott by claiming that the students in Abbott "were permitted to speak about controversial topics." This distinction is disingenuous, at best, because Plaintiffs did not actually speak about any topic in this case. Moreover, Plaintiffs cite to the following passage from Abbott, for the proposition that if the facts of this case were similar to the court's hypothetical, it would warrant the dismissal of their remaining claims:

> 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 STAF 6.24—then, we agree, a student of "ordinary firmness" might well be deterred from engaging in similar speech activities.

900 F.3d at 170 (emphasis original).

What Plaintiffs fail to realize is this hypothetical posed by the Abbott court actually supports the School Board's position. Indeed, like the university in Abbott, the School Board has never informed Plaintiffs that they would be investigated for anything, or expressly told them not to engage in certain speech.

'subjective chill' that the Supreme Court definitively rejected….") (citing Laird v. Tatum, 408 U.S. 1 (1972)) (emphasis added); Sands, 69 F.4th at 193–95 (holding that there was no "credible threat of enforcement" even though the Bias Intervention and Response Team (BIRT) extended an invitation to both the complainant and respondent to meet voluntarily to discuss the complaint and has had reported a complaint as a code of conduct violation, because BIRT lacked disciplinary authority).

1. The declarations of Menders, Mineo, and Jane Doe #2 purporting to assert a chilling effect on RM, AM, or Jane Doe #5 are insufficient to support Plaintiffs claims, and Plaintiffs offer no other evidence.

As explained in the School Board's Memo in Opposition, at pp. 16–18, Plaintiffs' declarations do not demonstrate personal knowledge of any chill visited upon the speech of R.M., A.M., or Jane Doe #5. In their Opposition, Plaintiffs again repeatedly refer to the same two paragraphs of their declarations to substantiate their children's "self-censorship" and "fear." See Plaintiffs' Opposition, at pp. 5, 14. This evidence, in any form, would be inadmissible at trial and, therefore, is insufficient during summary judgment as well. See Fed. R. Civ. P. 56(c)(2);(4).

Moreover, Plaintiffs' declarations regarding the subjective fears R.M., A.M., or Jane Doe #5, are beside the point. The pertinent standard here is an **objective** one. See Abbott, 900 F.3d, at 169. The subjective "self-censorship" and "fear" of R.M., A.M., and Jane Doe #5, do not advance Plaintiffs' case because, unlike the plaintiff in Abbott, none of the students in this case were ever personally subjected to any concrete action taken by the School Board. Nothing in the record explains why R.M., A.M., or Jane Doe #5 would have chilled their speech at all, much less why a student of "ordinary firmness" would have done so. Simply put, Plaintiffs' have not and cannot point to any evidence to show that a student of "ordinary firmness" would have been

deterred from expressing the views that Plaintiffs were ostensibly chilled from expressing. See Abbott, 900 F.3d at 171.

2. The declarations of Menders, Mineo, and Jane Doe #2 purporting to show that RM, AM, or Jane Doe #5 were deterred from any specific, intended acts of expression are insufficient to support their claims.

Because Plaintiffs seek nominal damages, they must also establish that they were "deterred from some specific, intended act of expression." Abbott, 900 F.3d at 169.

Here, Plaintiffs' declarations do no more than identify the "views" of their children in vague, non-specific terms. For example, the copy-and-paste declarations of Menders, Mineo, and Jane Doe #2, each state that "[m]y child and myself have the desire to speak freely about our views within the LCPS community on 'social justice,' CRT, race, gender identity, and other controversial political issues," Menders Decl., at ¶ 10; Mineo Decl., at ¶ 10; Jane Doe #2 Decl., at ¶ 10. But the declarations contain no explanation about **what their views are** on "CRT, race, gender identify, and other controversial political issues." See also Menders Decl., at ¶ 12; Mineo Decl., at ¶ 12; Jane Doe #2 Decl., at ¶ 12 (stating that "[m]y child and myself are concerned that if [they] share[] [their] views on CRT, race, gender identity, and other controversial political issues freely, that [their] speech will be reported as a 'bias incident,'" but not explaining **what those specific views are**); Menders Decl., at ¶ 12; Mineo Decl., at ¶ 12; Jane Doe #2 Decl., at ¶ 12 (stating"[w]e are concerned that LCPS will investigate, publicly disclose, and or even discipline [them] if [they] share[] [their] views and that this will negatively impact [their] standing in the school community or even ruin [their] college or career prospects," but again, not identifying **Plaintiffs' actual views**). Even if Plaintiffs had identified their specific views on any of these topics, however, their claims would still fail because they have not identified any specific speech or expression they allegedly wanted to make regarding their unspecified views.

B. There is no evidence to support a facial overbreadth claim.

As highlighted in the School Board's Memo in Opposition, at p. 3, "overbreadth" or "overbroad" is nowhere to be found in the First Amended Complaint. But even if Plaintiffs could recast their claims as a facial overbreadth challenge at this late stage, there is no evidence to support such a claim. To prevail, Plaintiffs must demonstrate "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984) (citations omitted).

Similar to their as applied challenge, which fails because there was never any threat of enforcement against Plaintiffs, Plaintiffs' facial overbreadth claim fails because they have not and cannot produce any evidence that there is a "realistic danger" that the Share, Speak Up, Speak Out form could compromise the First Amendment rights of any third parties not before the court. Indeed, Plaintiffs own exhibits demonstrate that the Share, Speak Up, Speak Out form was limited to a single avenue for anonymously sharing student experiences of "bias incidents," and nothing more. See Plaintiffs' Memo in Support and Exhibit A ("Action Plans") attached thereto [ECF No. 86-3], at LCSB 000412 ("[T]he tools used to highlight student voice may inform, not supersede, LCPS 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."); Fiore email ("This opportunity is not for reporting incidents, but to share your stories in order to provide information to the LCPS Equity Office that will be used at the Share, Speak Up, Speak Out sessions with Student Equity Ambassadors, as well as inform next steps for professional learning and support for school staff."); Share, Speak Up, Speak Out form, at LCSB 000535 ("Stories of bias shared through this

platform will be used in an anonymous manner for the Share, Speak Up, Speak Out sessions with Student Equity Ambassadors."). For these reasons and the reasons articulated in the School Board's Opposition, at pp. 27–28, Plaintiffs' facial overbreadth claim must fail.

WHEREFORE, Defendant Loudoun County School Board respectfully requests that this Court enter an Order granting its motion for summary judgment on Plaintiffs' claims and awarding it such further relief as the Court deems appropriate.

Respectfully submitted,

/s/ R. Matthew Black

Stacy L. Haney (VSB 71054)
Pakapon Phinyowattanachip (VSB 80799)
R. Matthew Black (VSB 94663)
HANEY PHINYOWATTANACHIP PLLC
9201 Arboretum Pkwy, Suite 160
Richmond, Virginia 23236
Tel: (804) 500-0310
Fax: (804) 500-0309
shaney@haneyphinyo.com
pakaponp@haneyphinyo.com
mblack@haneyphinyo.com

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 2023, I have electronically filed the foregoing using the Court's CM/ECF system, which will automatically send email notification of such filing to counsel of record as follows:

Daniel Suhr
Reilly Stephens
Emily Rae
Anthony Tamburro
LIBERTY JUSTICE CENTER
208 South LaSalle Street, Suite 1690
Chicago, IL 60603
Tel: (312) 263-7668
Fax: (312) 263-7702
dsuhr@libertyjusticecenter.org
rstephens@libertyjusticecenter.org
erae@libertyjusticecenter.org
atamburro@setlifflaw.com
Counsel for Plaintiffs

/s/ *R. Matthew Black*
Stacy L. Haney (VSB 71054)
Pakapon Phinyowattanachip (VSB 80799)
R. Matthew Black (VSB 94663)
HANEY PHINYOWATTANACHIP PLLC
9201 Arboretum Pkwy, Suite 160
Richmond, VA 23236
Tel: (804) 500-0301
Fax: (804) 500-0309
shaney@haneyphinyo.com
pakaponp@haneyphinyo.com
mblack@haneyphinyo.com
Counsel for Loudoun County School Board