IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BLUEFIELD DIVISION

FREEDOM FROM RELIGION FOUNDATION, INC., et al.,

Plaintiffs,

vs.

MERCER COUNTY BOARD OF EDUCATION, et al.,

Defendants.

Civil Action No. 1:17-cv-00642

Hon. David A. Faber

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Introduction

Following the decision of the Fourth Circuit Court of Appeals reversing this Court's dismissal of Plaintiffs' case, Defendants filed a second motion to dismiss. Defendants' motion—like their earlier petition for rehearing filed with the Fourth Circuit—alleges that "Board Memo # 171," concerning the challenged Bible in the Schools (BITS) program, moots this case once and for all. Doubtful of the credibility of Defendants' stated intentions regarding the BITS program in light of prior statements and "dubious" arguments regarding their future plans for BITS, Plaintiffs requested the opportunity to conduct limited discovery on the factual issues related to Defendants' mootness defense. Having completed the limited discovery granted by this Court, Plaintiffs can now respond to Defendants' motion.

Plaintiffs' discovery reveals that much like Defendants' prior "suspension" of BITS, their more recent "termination" of the program is nothing more than an attempt to thwart judicial review of its constitutionality. Deposition testimony and document productions make clear that

the Board's acceptance of Board Memo # 171 is nothing more than a calculated action designed to moot the case by giving the false, superficial impression that BITS has been abandoned, when in reality, there is no meaningful obstacle to its eventual reimplementation. This takeaway is bolstered by additional evidence adduced in discovery that demonstrates neither Plaintiffs nor the courts confronting the prior "suspension" of BITS were aware of the full duplicity involved in Defendants' earlier attempts to end this case.

Defendants' actions surrounding the prior suspension of BITS conclusively establish their reluctance to take definitive action ending the program. Although Defendants previously represented that the first-through-eighth grade BITS program was "suspended" and would not return, Defendant has continuously offered bible elective courses to middle school students since the suspension. Those courses were developed during the year that Defendants represented BITS was being "reviewed" by a committee of educators, community members, and religious leaders. That committee's review of BITS lasted less than two hours before it concluded that BITS is not appropriate. Meanwhile, a separate committee worked to prepare curriculum without Board involvement so that an eighth-grade bible course could be offered the year following the suspension of BITS, insuring that there would be no break in the offering of bible classes to Mercer County middle school students. This full story regarding the BITS "suspension" shows that the Fourth Circuit's suspicion regarding Defendants' intentions was well-founded.

The actions surrounding the more recent "termination" of BITS show more of the same. Board Memo # 171 was narrowly passed by 3-2 vote at a work session of the Board. Although the Board is prohibited from taking official action at work sessions, it took up the BITS resolution in that setting rather than the public meetings that occurred 13 days before and 5 days after the January 3, 2019 work session. The Board voted on Memo # 171 without advising the

public that it planned to act on BITS in a meeting in which no official action should have been taken and through a process that did not provide an opportunity for the public to comment. Moreover, the actual resolution embodied in Board Memo # 171 lacks the weight of a Board policy and will pose no impediment to the return of BITS or the development of elementary bible classes under a different name.

The Fourth Circuit's voluntary cessation doctrine prevents this sort of manipulation from being rewarded with case dismissal. All of the circumstances surrounding the "suspension" and "termination" of BITS prevent Defendants from bearing their heavy burden the doctrine requires. And because Board Memo # 171 is not a Board *policy* and will not prevent Mercer County Schools from reimplementing BITS, Defendants' attempts to characterize it as a "legislative repeal" sufficient to moot the case meet the same fate. Under applicable mootness law, the Court must deny Defendants' Rule 12(b)(1) motion and allow this case to finally move forward on the merits.

In addition to their mootness argument, Defendants raise failure-to-state-a-claim challenges to several of Plaintiffs' claims, including their Section 1983 claim against Mercer County Schools and the individual claims against Defendant Akers. As discussed below, the robust factual allegations of Plaintiffs' First Amended Complaint and the alleged decades-long history of BITS are more than sufficient to satisfy Plaintiffs' pleading obligations as to these claims. Finally, Defendants raise a frivolous statute of limitations argument that continues to mischaracterize the nature of Plaintiffs' *ongoing* injuries alleged in the Complaint. Based upon the Fourth Circuit's prior characterization of Plaintiffs' injuries, Defendants' statute of limitations argument can easily be dismissed.

Plaintiffs' Amended Complaint

I. Defendants have administered the Bible in the Schools program for decades.

For over 75 years, public schools in Mercer County provided bible instruction to their students. Plaintiffs' First Amended Complaint ("FAC") ¶ 18. The Mercer County Board of Education (the "Board") administered the "Bible in the Schools" from 1986 until its "suspension" in response to this litigation. FAC ¶ 22. BITS classes instilled religious teachings in elementary and middle school students. FAC ¶ 26. When the Complaint in this case was filed, BITS classes were being taught in 15 elementary schools, one intermediate school, and three middle schools in Mercer County. FAC ¶ 25.[1]

The Board is responsible for adopting policies that govern Mercer County Schools ("MCS") and provide it with authority over the BITS program. FAC ¶ 90. By policy and practice, the Board approved of the BITS program for students in first through eighth grade. FAC ¶ 93. The Board and MCS employed the BITS teachers who taught the classes. FAC ¶ 94. The Board also maintains a number of general policies which governed its oversight of its programs, such as the BITS program, including policies regarding employing teachers and providing in-service training to teachers and other personnel and adopting learning texts or textbooks for each subject for a period of five years upon the recommendation of the Superintendent. FAC ¶¶ 91-92. MCS also provided written lessons to all itinerant bible teachers, to which these instructors had to adhere unless minor revisions were approved at least two weeks before the teaching of a particular lesson. FAC ¶ 25.

[1] The Amended Complaint sets forth additional details regarding the Bible in the Schools program, which, given the nature of Defendants' arguments in their motion to dismiss, are not relevant to the Court's resolution of the pending motion. *See* FAC ¶¶ 53-54, 57-62, 64, 68-89.

Defendant Deborah Akers, the Superintendent of MCS, has the primary duties of implementing MCS's policies and programs. FAC ¶¶ 14, 98. Defendant Akers has created policies supporting and implementing the BITS program for approximately 25 years. FAC ¶ 97. In overseeing the BITS program, Defendant Akers has coerced students into receiving religious instruction and has worked in concert with school principals to administer religious instruction to students. FAC ¶¶ 98, 106.

Post-Complaint Developments

I. In response to this litigation, the Board "suspended" BITS to conduct a year-long "review" of the program.

The BITS program was "suspended" by Board vote at the Board's May 23, 2017 regular meeting. May 23, 2017 Board Meeting Minutes (Exhibit "A") (MCBOE 000236-251); Board Memo #344 (Exhibit "B") (MCBOE 000235). The Board enacted the suspension by adopting a memorandum prepared by Defendant Akers, which became "Board Memo 344." Exhibit B. According to "Board Memo #344," the BITS program was "suspended" to allow for a "thorough review" of the program. *Id.* (suggesting that the "thorough review" being recommended would require "at least a year" to complete). The indefinite "suspension" of the BITS program was linked to the need for a program "review" without any explanation as to why a "suspension" of the program would be necessary for the "thorough review" to occur. Exhibit A (MCBOE 000242). The suspension was to last until the "thorough review" was completed. Exhibit B.

Although Board Memo #344 attempts to link the "thorough review" of BITS to the Board's approval of a bible-based high school curriculum, surrounding facts demonstrate the review was undertaken in response to this litigation. The Board has admitted there was no comprehensive review of BITS being considered prior to the filing of the lawsuit. Deposition of

Deborah Akers ("Akers Dep.")[2] (Exhibit "C") 82:9-83:5. Indeed, Defendant Akers's comments about the lawsuit suggest Defendants did not see a problem with BITS. *See Deal v. Mercer County Bd. of Educ.*, 911 F.3d 183, 192 (4th Cir. 2018) (reviewing statements that Defendants were "still vigorously contesting" the lawsuit and "fighting" to retain BITS). The lack of any prior plan to review the program is also unsurprising given the decades-long history of the program. *See Id.* at 192 (finding the assertion that the suspension of BITS was part of a "regular review process" to be "dubious" in light of "the program's uninterrupted, decades-long history").

Moreover, the timing of the suspension portrays it as a litigation tactic. The "suspension" occurred 11 days after Plaintiffs filed their opposition to Defendants' original Motion to Dismiss (ECF No. 28) and just two days before Defendants filed their reply brief in support of their motion (ECF No. 30). In their reply, Defendants' referred the Court to the "suspension" of BITS in a futile attempt to bolster their standing argument. ECF No. 30, 4-5. The uncertain outcome of this purported "review" was argued as another point in Defendants' favor as to the speculative nature of future BITS curriculum. *Id.* Eventually, Defendants would use these "factual developments" to argue that Plaintiffs' claims were unripe and moot. *See Deal v. Mercer County Board of Education*, 911 F.3d at 191-92.

II. The "review" of the BITS program was performed by school personnel, community members, and religious leaders who were part of the Bible in the Schools Advisory Committee.

Board Memo # 344 recommended that the year-long "review" process include "community members," "religious leaders," and "teachers." Exhibit B. Defendant Akers took the Board's approval of Board Memo # 344 to be an acceptance of her proposed makeup of the

[2] Defendant Akers was deposed on September 25, 2019 as the designated representative for the Board, pursuant to a Rule 30(b)(6) Deposition Notice. Akers Dep.

committee, and she instructed Pupil Services Director Amanda Aliff to form a committee within these parameters. Akers Dep. 33:4-24; Deposition of Amanda Aliff ("Aliff Dep.") (Exhibit "D") 27:13-17. Aliff reached out to these "stakeholders" (parents, community members, teachers, administrators) and organized the committee consistent with these parameters. Akers Dep. 35:20-23; Aliff Dep. 25:14-17; 27:13-22. The committee was referred to as the "Bible in the Schools Advisory Committee" ("BITS Advisory Committee") and was tasked with evaluating the BITS program "to see if there was any way to deliver the curriculum in an appropriate manner." Aliff Dep. 12:4-13; *see* Akers Dep. 39:20-23.

A draft letter for potential members of the BITS Advisory Committee sheds light on Defendants' understanding of the purpose of the committee and how the committee was presented to potential members. Akers Dep. 39:15-19. The letter invites recipients to serve on the BITS Advisory Committee, explains the reasons for the creation of the committee, and advertises that members can help MCS "maintain the Bible in the Schools program":

> To improve our program, curriculum, and delivery strategies, we have deemed it necessary to create this advisory committee. We believe it is critical that representatives from all facets of our community including a diverse group of religious leaders, community leaders, parents, students, and school staff have the opportunity to provide input and service on this committee in order for it to be effective. You have been recommended as a person with respected knowledge and experience, and as one who will make a valuable contribution to this committee. By serving on this committee, *you have opportunity to guide Mercer County Schools in our efforts to maintain the Bible in the Schools program*, while also insuring we are in compliance with constitutional standards.

June 6, 2017 Letter (Exhibit "E") (MCBOE 000047) (emphasis added).[3]

[3] Akers, on behalf of the Board, and Aliff gave conflicting testimony regarding this letter. Akers unequivocally testified that the Bible in the Schools Advisory Committee was the committee tasked with reviewing the BITS program. Akers Dep. 39:20-23. In contrast, when presented with the draft letter, Aliff testified that the draft letter was addressed to a committee formed for the purpose of creating a new bible-based curriculum for middle school (grades 6-8). Aliff Dep. 32:23-33:2. As the representative of the Board, Akers's

III. Within weeks, the BITS Advisory Committee concluded the BITS program was inappropriate.

After two meetings, the BITS Advisory Committee determined that BITS was inappropriate and that the committee lacked the expertise to revamp the program to make it appropriate. Aliff Dep. 28:2-16; 30:3-17; Akers Dep. 36:9-14. The committee met in the Mercer County Schools central office building conference room. Aliff Dep. 40:2-8. The conclusion that BITS was inappropriate was reached in the committee's second meeting, which followed an initial meeting in which the committee simply reviewed the task with which it was presented. Aliff Dep. 38:6-19; *see* Akers Dep. 36:3-37:18. Neither meeting lasted more than an hour. Aliff Dep. 40:9-11.

After the committee concluded its review, Aliff met with Defendant Akers and conveyed the findings of the committee. Aliff Dep. 38:20-39:11. This ended the work of the BITS Advisory Committee. Aliff Dep. 30:12-17.

IV. Despite the BITS Advisory Committee's swift completion of its review, the Board took no action on the BITS program for approximately 18 months.

Although BITS was originally suspended pending the outcome of the "review," the Board took no immediate action following Aliff's meeting with Defendant Akers. The only other aspects of a "review" Defendants have testified occurred were (1) Defendant Akers's personal review of BITS and (2) unspecified discussions between the Board and counsel. Akers Dep. 58:24-59:7; *see also* Defendants' Responses to Plaintiffs' First Set of Interrogatories (Exhibit

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testimony—and the resulting implication that members of the committee reviewing BITS were told they had the opportunity to help in the "efforts to maintain the [BITS] program"—should govern for purposes of this Motion. Even if Aliff's testimony is given weight, it is equally damning to the issue of mootness; it suggests that the committee designing a purportedly new curriculum for the middle school was attempting to salvage the BITS program under the guise of a class with a different name.

"F"), Interrogatory No. 2. However, board member Paul Hodges testified he was not involved in any review of BITS. Deposition of Elijah Paul Hodges ("Hodges Dep.") (Exhibit "G") 18:20-24. Akers's personal review included her consideration of specific BITS curriculum, including those portions of the curriculum highlighted in the complaint in this case. Akers Dep. 79:14-24. The Board does not recall when it discussed BITS with counsel, Akers Dep. 39:8-11, but in discovery responses, they state that that the Board did not discuss BITS between May 23, 2017 and the Board's January 3, 2019 work session. Exhibit F, Interrogatory No. 4.[4]

V. Soon after the Fourth Circuit found Plaintiffs have standing to challenge the BITS program, the Board improperly approved Board Memo # 171 at a work session.

On December 17, 2018, the Fourth Circuit issued its Opinion reversing this Court's dismissal of the case by finding Plaintiffs have standing and that Defendants' "suspension" of BITS did not moot the case or render it unripe. *See Deal v. Mercer County Board of Education*, 911 F.3d at 191-92. The Board met four days later at a previously-scheduled special session meeting. December 21, 2018 Board Meeting Minutes (Exhibit "H"). Although Defendants have represented they did not discuss BITS at this meeting, the December 21, 2018 Board meeting minutes reflect a discussion of litigation in executive session, and Hodges testified that MCS had no other ongoing litigation at the time. *See* Exhibit, 9; Hodges Dep. 29:2-13. The Board's representative testified that she did not know whether it was this litigation that was discussed in executive session. Akers Dep. 50:7-12. It is clear, however, that no action was taken regarding BITS during the public portion of this meeting. *See* Exhibit H.

[4] Although the June 13, 2017 meeting is also identified, those minutes reflect that the discussion consisted of public comment and a response by Defendant Akers but no discussion between the Board and counsel.

Two weeks later, the Board held a work session on January 3, 2019. January 3, 2019 Work Session Press Release (Exhibit "I") (MCBOE 000223); January 3, 2019 Work Session Agenda (Exhibit "J") (MCBOE 000224). Although a regular meeting was scheduled for January 8, 2019, at the work session, the Board took official action to "approve" Board Memo # 171, a resolution regarding BITS, by a narrow 3-2 vote. January 3, 2019 Work Session Minutes (Exhibit "K"); Hodges Dep. 30:4-8 (January 8, 2019 meeting date would have been known as of December 21, 2018 meeting). Board Memo # 171 states the intention of the (3-2) majority of the Board regarding the future of BITS:

> WHEREAS, the Board of Mercer County Schools (MCS) suspended the Bible in the Schools (BITS) program on May 23, 2017, pending a review of its curriculum; and,
>
> WHEREAS, the Board of MCS, on May 24, 2017 initiated a thorough review of its options concerning the BITS program, to last at least a year, including evaluating of other curricula, gauging community interest, and interviewing key stakeholders; and,
>
> WHEREAS, the Board of MCS terminated the employment contracts of all BITS teachers for the 2017-2018 school year as of April 11, 2017, and did not extend any contracts to BITS teachers for the 2018-2019 school year, while its thorough review was pending; and,
>
> WHEREAS, the Board of MCS did not offer the BITS program at the elementary level during the school years 2017-2018 and 2018-2019 (including to the present); and,
>
> WHERAS, as a result of the review of the BITS program, it is clear to the Board of MCS that the BITS program is no longer compatible with the educational mission of MCS;
>
> THEREFORE, We, the Board of Mercer County Schools, hereby RESOLVE that its schools will never offer or employ the BITS program in any of its schools.
>
> Further RESOLVED: MCS does not now or in the future intend to offer a Bible elective curriculum in any of its elementary schools (interesting note that this is speak as if Board policy and not the intent of the present board).
>
> Further RESOLVED: MCS will not now or in the future employ teachers for the purpose of teaching a Bible elective curriculum in any of its elementary schools.

Board Memo # 171 (Exhibit "L") (MCBOE 000226-27). While Board Memo #171 indicates a three-member majority of the Board views BITS as incompatible with MCS's educational

mission, the Board will not answer whether it continues to believe BITS is constitutional. Hodges Dep. 23:4-10; Akers Dep. 29:3-31:20.

Many of the circumstances surrounding Board Memo # 171 remain unclear. The Board was unable to explain when or how the work session came to be scheduled. Akers 52:2-17. The Board was unable to produce evidence to demonstrate that the public was made aware of the work session. Exhibit F, Request for Production No. 5; Supplemental Response to Interrogatories (Exhibit "M"); *see also* Akers Dep. 77:10-78:14 (apart from testifying about the typical process that involves the distribution of documents to the media, the Board was not able to testify that Board Memo # 171 was distributed to the media prior to the January 3, 2019 work session). The Board does not know when Board Memo # 171 was drafted. Akers Dep. 71:10-21. Nor does it know when the draft memo was first shared with the Board. Akers Dep. at 54:15-23, 71:10-21; *see also* Hodges Dep. 34:1-4. The Board will not disclose who drafted Board Memo # 171. Akers Dep. 81:13-82:2; Hodges Dep. 34:5-10. Although the action regarding BITS was taken based upon its incompatibility with MCS's educational mission, Defendants have not explained how BITS *became* incompatible with the educational mission of MCS other than to testify that "the feeling was it just was not appropriate." Akers Dep. 62:13-17; *see also* Hodges Dep. (explaining that Mr. Hodges has *always* believed that BITS was inappropriate).

The vote on Board Memo # 171 was improper because it occurred at a work session, where the Board is prohibited from taking official action. Work sessions are designed to discuss upcoming business, and the Board may not hold votes or take official action. Hodges Dep. 6:16-23; Akers Dep. 9:5-17. Yet the press release and agenda for the January 3, 2019 work session never identified that BITS was an agenda item and only generically referenced "New Business – Board Resolution." Exhibit I; Exhibit J. The Board does not recall whether any members of the

public were present for the Board vote on Board Memo # 171 (Akers Dep. 68:19-69:5; Hodges Dep. 40:9-11), but Mr. Hodges believes it would have been more likely than not that members of the public would have attended the January 3, 2019 work session had it been made clear that the Board would be taking action on the BITS program. Hodges Dep. 41:6-12.

VI. Because Board Memo # 171 is not Board policy, the Board was able to accept it without public notice and opportunity for comment, the Board is not prohibited from reimplementing BITS, and the memo may be ignored, rescinded, or amended without any formal process.

A Board memo is different than a Board policy. Akers Dep. 13:24-14:3. The adoption and amendment of Board policies are governed by Board policies and require adherence to a variety of rules designed to ensure public involvement in the policymaking process. Akers Dep. 14:4-15:11; Board Policy A-3 – Policy Development, Enactment and Revisions (Exhibit "N"); *see also* Hodges Dep. 8:15-9:22. For adoption and amendment of policy, Board Policy A-3 requires a "first reading" of a proposed policy followed by an allotment of time for public comment, a "second reading" in open session in a meeting wherein the second reading is reflected on the agenda, and board vote only after the first and second reading process. Exhibit N, Sections 3.1-3.6; *see also* Akers Dep. 14:4-11. All Board policies are maintained in a policy manual available online and in hard copy at the MCS central office. Akers Dep. 15:17-21.

Board memos, on the other hand, are not governed by any formal process. Akers Dep. 14:19-15:7. They constitute a statement of the present view of a Board at a particular time or Board action on a specific issue at a particular time. Hodges Dep. 8:10-14. As nothing more than a present view or action of the Board, there is no process for amending Board memos because a Board is not bound by its memos. Akers Dep. 68:4-9. There is no formal process for a Board to consider prior memos in deciding to act, and Board memos are only maintained in the central office for a limited period of time. Akers Dep. 15:22-17:23.

Because Board Memo # 171 is not a Board policy, the Board was able to vote on the memo without prior disclosure to and input from members of the public. As a mere memo, Board Memo # 171 does not legally preclude the Board from reintroducing BITS. Hodges Dep. 44:8-15; Akers Dep. 66:2-67:5. The Board has not discussed adopting a policy prohibiting the adoption of bible-based curriculum in elementary schools. Akers 67:18-22. To enact such a prohibition as policy would require notice and opportunity for public comment. Akers 67:18-68:18.

VII. Board Memo # 171 was relied upon by Defendants in their Petition for Rehearing before the Fourth Circuit Court of Appeals.

On December 21, 2018—four days after the Fourth Circuit Court of Appeals decision reversing this Court's dismissal of the case and remanding for further proceedings and on the same day as its first scheduled board meeting following this decision—Defendants moved the Fourth Circuit for additional time in which to file a petition for panel rehearing. ECF No. 73. Following the grant of their motion, on January 14, 2019, Defendants filed their Petition for Panel Rehearing. In Section B. of the argument in their petition, Defendants argued that Plaintiffs' challenge to the BITS program was moot, specifically quoting Board Memo # 171. ECF No. 76-1, 14-15. Defendants' argued that Board Memo # 171 addressed the Fourth Circuit's concerns regarding the insufficiency of the "suspension" of BITS as a case-mooting event, contending that Board Memo # 171 makes it "absolutely" clear BITS will never return. *Id.* at 15. Defendants concluded their argument by requesting the Court to "rehear the appeal to address whether [Plaintiffs'] claims for forward-looking relief are now moot." *Id.*

VIII. Board Memo # 171 was not made a part of the minutes from the January 3, 2019 work session and was not uploaded to the Board website until weeks after its adoption.

Although the Board usually includes a portion of the text of a Board memo and at times includes the full text of a memo in its minutes, it did not include the body of Board Memo # 171 in its minutes from the January 3, 2019 work session. Akers Dep. 17:24-18:2; 75:4-76:1. The minutes from the January 3, 2019 work session were not reviewed and voted upon in the Board's next meeting (the regular meeting on January 8, 2019) but were instead voted upon in the Board's January 22, 2019 regular session meeting. *Compare* January 8, 2019 Board Meeting Minutes (Exhibit "O") *with* January 22, 2019 Board Meeting Minutes (Exhibit "P").

In discovery on mootness, Defendants produced documents reflecting that Board Memo # 171 was not immediately uploaded to the MCS website. On February 10, 2019, Mercer County citizen Lynn White requested a copy of Board Memo # 171 based upon seeing reference to it in the minutes from the January 3, 2019 work session. February 10, 2019 Email from Lynn White (Exhibit "Q") (MCBOE 000219). Having not heard back three days later, Ms. White directed her request to Board member Paul Hodges. *Id.* Ms. White eventually received a copy of Board Memo # 171 on February 18, 2019. *Id.* After receiving the memo, Ms. White urged Mr. Hodges to consider amending the minutes from the January 3, 2019 meeting to include the text of Board Memo # 171. *Id.* To date, the minutes have not been amended. *See* Exhibit K.

IX. After "suspending" BITS, Mercer County Schools improperly created a bible elective for middle school students without obtaining Board approval, which it currently offers middle school students.

At the same time the BITS Advisory Committee was formed to review the legality of BITS, Aliff formed another committee that was charged with creating an elective bible program for middle school students. Akers Dep. 34:15-35:7, 39:24-40:9; Aliff Dep. 24:23-1. Defendant

Akers directed Aliff to move forward with this process so that a bible-based elective could be offered to eighth grade students. Aliff 33:24-34:6; Akers Dep. 39:24-40:9. The plan was for the committee to first design the eighth grade curriculum and then modify that curriculum so that it could be offered to seventh and sixth grade students as well. Aliff Dep. 34:11-19.

The committee created the eighth grade curriculum just months after the formation of the committee, in time for the nine-week elective to be offered to students the next school year (2017-2018). Aliff 34:20-24; 35:1-4. The "diverse committee" was comprised of district personnel, community members, and parents. Aliff Dep. 36:3-20. The course-creation process involved meetings of the committee, construction of lesson plans by committee members, and review of the lesson plans by the committee. Aliff Dep. 35:20-36:9. The committee reviewed lesson plans to make sure that the content could be characterized as either English literacy or history. Aliff Dep. 35:20-36:9. Aliff could not recall the committee considering board policies or memos in putting together the course. Aliff 37:17-38:1. Defendant Akers testified she was never made aware of how the committee developed the curriculum (Akers Dep. 45:20-23). Nonetheless, the eighth grade course has been modified for use by seventh and sixth grade, and all middle school grades now offer a nine-week elective course based upon the bible. Aliff Dep. 35:1-4, 43:11-16; Akers Dep. 40:15-20.

While the Board maintains a formal policy regarding course curriculum, the committee that created these bible-based middle school courses did not comply with it. The Board's curriculum policy requires submittal of a defined proposal to the Assistant Superintendent at least sixty (60) days before the beginning of a semester and submission to the Board for approval. Board Policy I-30 – Curriculum Expansion (Exhibit "R"); *see also* Akers Dep. 19:1-22. But the Board has never been presented with the curriculum for the middle school courses

and has never voted on the curricula or taken any of the other steps called for in the Board's curriculum policy. Aliff Dep. 41:12-15, 42:-1-7; Hodges Dep. 24:18-20; Akers Dep. 40:21-42:7.

The new middle school bible courses share several connections with BITS. Like BITS, the middle school bible electives use the bible as a textbook. Aliff Dep. 42:22-24. Aliff does not know if the same bibles used for BITS are currently being used for the middle school bible classes. Aliff Dep. 43:1-3. A BITS representative previously asked if the BITS bibles should be maintained in schools "for the duration of the lawsuit." Aliff May 12, 2017 Emails with Nancy Shrewsbury (Exhibit "S") (MCBOE 000002). Individuals previously involved with BITS were on the committee for the creation of the middle school curricula or were involved in the process by Aliff. June/July 2017 Aliff Emails (Exhibit "T") (MCBOE 000015-20) (including Nancy Shrewsbury in the elective course development); Akers Dep. 83:6-10 (identifying Ms. Shrewsbury as a former BITS teacher); March/April 2018 Aliff Emails (Exhibit "U") (MCBOE 000220-221) (communications between Aliff and Wayne Pelts regarding bible courses and BITS); Akers Dep. 44:17:22 (identifying Mr. Pelts as a member of the BITS community group). In addition, MCS has hired at least one itinerant teacher to teach the courses. Akers Dep. 47:24-48:4.

Standard of Review

The pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure inform the analysis of what is required to survive a Rule 12(b)(6) motion and control Defendants' 12(b)(6) challenges. Rule 8(a) requires "a short plain statement . . . that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To meet this standard in the context of a Rule 12(b)(6) motion, a plaintiff must allege facts that demonstrate her claim is "facially plausible." *Wag More Dogs, Ltd. Liability Corp. v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012). A plaintiff meets this standard

by pleading "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (*citing Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Because Defendants' mootness argument raises a "factual challenge," the pleadings' allegations are regarded as "mere evidence on the issue," and evidence outside of the pleadings may be considered. *Richmond, Fredericksburg & Potomac R. Co. v. U.S.*, 945 F.2d 765, 768 (4th Cir. 1991). The standard for a factual challenge aligns with the standard for considering a summary judgment decision: facts beyond the pleadings are needed to set forth the existence of a genuine issue of material fact. *Id.* (citation omitted). Under this standard, "the moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.* (citations omitted).

Argument

I. The Fourth Circuit has already determined that Board Memo # 171 does not moot this case.

The Fourth Circuit already considered Defendants' mootness arguments—both before and after the Board's acceptance of Board Memo # 171—and determined that the case is not moot. At oral argument, Defendants argued that the "suspension" of BITS mooted the case. The Fourth Circuit found this mootness argument to be "meritless." *Deal*, 911 F.3d at 191. Defendants then presented the Fourth Circuit with Board Memo # 171 in their Petition for Panel Rehearing, contending that the contents of Board Memo # 171 made it absolutely clear BITS would not return. In support of this argument, Defendants directed the court to authority requiring it to consider the newly-raised mootness issue even though their argument on the basis of Board Memo # 171 was not before the Fourth Circuit in the original appeal. ECF No. 76-1, 9.

In response, the Fourth Circuit denied the request for panel rehearing and issued its mandate to this court. ECF Nos. 78, 79.

The Fourth Circuit's issuance of its mandate, in spite of Defendants' mootness argument, forecloses consideration of mootness by this Court where Defendants rely upon the same facts that were presented to the Fourth Circuit. The mandate of the Fourth Circuit "is controlling as to matters within its compass," and "lower courts may not consider questions that the mandate has laid to rest." *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414-415 (4th Cir. 2005) (internal quotations and citations omitted). This includes matters impliedly disposed of on appeal. *Id.* at 414. Because its jurisdiction to rule upon Defendants' request for rehearing and issue a mandate to this Court depended upon the presence of a live controversy, the Fourth Circuit mandate clearly implies that Board Memo # 171 did not moot this case. *See Church of Scientology of Cal. v. U.S.*, 506 U.S. 9, 12 (1992) ("[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed."); *See also, U.S. v. Hardy*, 545 F.3d 280, 283 (4th Cir. 2008) ("[t]his case-or-controversy requirement subsists through *all* stages of federal judicial proceedings, trial and appellate.") *quoting Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). Thus, even though the mootness issue is not expressly addressed in the Fourth Circuit's denial of Defendants' rehearing request, the court's implied determination that it had jurisdiction to issue its mandate forecloses this Court from now considering whether Board Memo # 171 moots this case.

II. Board Memo # 171 does not moot this case because it fails to clearly establish BITS will never return and does not have the force necessary to constitute legislative repeal.[5]

Even if this Court considers Defendants' mootness defense, it must conclude as the Fourth Circuit impliedly did that Board Memo # 171 does not moot the case. The memo is insufficient to satisfy Defendants' "heavy burden" under the voluntary cessation doctrine. Rather, it represents another strategic litigation decision undertaken by Defendants following an adverse ruling. This conduct is precisely the sort of manipulation the voluntary cessation doctrine was designed to guard against. Since the Board memo—as little more than the statement of the present view of three-fifths of the current Board—poses no legal obstacle to prevent Mercer County Schools from reimplementing BITS, the "legislative repeal" jurisprudence Defendants lean on so heavily has no bearing on this case. Thus, Plaintiffs' claims for injunctive relief must go forward.

A. Defendants must meet a heavy burden to demonstrate this case is moot through their alleged voluntary cessation of BITS.

The mootness doctrine ensures that a case remains "live" throughout its life. *Pashby v. Delia*, 709 F.3d 307, 316 (4th Cir. 2013). To prove a case has become moot in the voluntary cessation context, defendants bear the "heavy burden of persuading" a court that "subsequent events [make] it *absolutely clear* that the allegedly wrongful behavior could not reasonably be

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[5] Because Plaintiffs' claims for injunctive relief are not moot, the Court need not resolve wither Plaintiffs' claim for nominal damages, standing alone, prevents the case from becoming moot. If the Court encounters this issue, Fourth Circuit precedent requires that it hold Plaintiffs' claim for nominal damages prevents the case from becoming moot, even if Plaintiffs' injunctive relief claims are no longer live. *Mellen v. Bunting*, 327 F.3d 355, 365 (4th Cir. 2003); *American Humanist Assoc'n v. Greenville Sch. Dist.*, 652 Fed.Appx. at 232; *Rendelman v. Rouse*, 569 F.3d 182, 187 (4th Cir. 2009) (holding that if a plaintiff's claim for injunctive relief becomes moot, the action is not moot if she may still be entitled to nominal damages).

expected to recur." *Wall*, 741 F.3d 492, 497 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000)). The doctrine imposes this burden 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 v. Clarke*, 852 F.3d 358, 364 (4th Cir. 2017).

With respect to purported changes in practices or policies, a defendant fails to meet the heavy burden under the voluntary cessation doctrine where it "retains the authority and capacity to repeat an alleged harm." *Id.* at 364-65 (quoting *Wall*, 741 F.3d at 497). As observed by the Fourth Circuit, courts have been particularly unwilling to find a defendant has met its burden where its "reluctant decision to change a policy reflects a desire to return to the old ways." *Porter*, 852 F.3d at 365 (internal quotations and citations omitted). A defendant must typically "unambiguously terminate the challenged practice" to satisfy its voluntary cessation burden. *Id.* (internal quotations, symbols, and citations omitted).

B. Because they maintain middle school bible courses, Defendants have not actually ceased the conduct giving rise to Plaintiffs' claims.

The Court need not analyze whether Defendants have met this heavy burden under the voluntary cessation doctrine because they have not actually ceased the conduct giving raise to Plaintiffs' FAC. Despite previously representing to this Court and the Fourth Circuit that the BITS "suspension" was a case-mooting event, Defendants have consistently maintained bible classes in sixth through eighth grades since that time. Coincident with the "suspension" at the end of the 2016-2017 school year, Defendant Akers instructed Aliff to create "new" middle school bible courses through a committee including non-educators, at least two of whom were directly involved with BITS. According to Defendants, Aliff and the committee she formed

succeeded in preparing an eighth grade bible course before the start of the next school year (2017-2018). Today, bible courses are taught to sixth and seventh grade students as well.

Defendants cannot credibly allege voluntary cessation of the BITS program in light of the continuous presence of these middle school bible courses. The FAC challenges the first-through-eighth-grade BITS classes. Bible classes have remained in several of those grades. While Defendants have claimed that the classes are different, no curricula have been provided. What is known is that both the BITS classes and the present-day middle school bible courses use the bible as textbooks. In addition, MCS has hired at least one itinerant teacher to lead the current middle school classes, the same type of teacher who previously taught BITS classes. Because Defendants have not actually ceased a significant portion of the conduct giving rise to Plaintiffs' claims, the Court need not even consider whether Defendants have met their voluntary cessation burden; there has been no cessation of bible instruction.

C. In reviewing whether Defendants have met their burden to show this case is moot, the Court must consider facts surrounding the alleged voluntary cessation of BITS.

If the Court concludes Defendants' conduct constitutes voluntary cessation, the facts and circumstances surrounding this conduct must be considered. The Fourth Circuit's prior consideration of mootness in this case demonstrates these circumstances and the credibility of statements surrounding Defendants' claims of cessation must be examined. *See Deal v. Mercer County Board of Education*, 911 F.3d 183, 191-92 (4th Cir. 2018). The Fourth Circuit compared the Mercer County Parties' claims that BITS had been suspended and their counsel's claims that the program would not return against other factual evidence in the record, including contradictory statements of the Mercer County Parties that they were "still vigorously contesting" the lawsuit. *Id.* Passing on the credibility of the various contentions of the Mercer

County Parties related to voluntary cessation, the Fourth Circuit found certain contentions "dubious" and others to be "undercut" by surrounding evidence. *Id.*

This is consistent with the myriad federal courts that have weighed the factual circumstances surrounding a dubious claim of cessation. For instance, many courts have found that the heavy burden imposed by the voluntary cessation doctrine is not met where the cessation of conduct occurs in response to an adverse court ruling. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000); *Ne. Fla. Chapter of Associated Gen. Contractors of Am. V. City of Jacksonville*, 508 U.S. 656, 661-62 (1993); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1126 (9th Cir. 2011). Other courts have found the timing of cessation to be material, even where it is not in direct response to an adverse ruling. *Burns v. PA Dep't of Correction*, 544 F.3d 279, 284 (3d Cir. 2008) ("[T]he Department of Corrections' assurances were provided exceedingly late in the game. This by no means establishes that it would resume pursuit of the assessment at the conclusion of litigation. But we are more skeptical of voluntary changes that have been made *long after litigation has commenced*.") (emphasis added); *see also Harrell v. The Fla. Bar*, 608 F.3d 1241, 1266 (11th Cir. 2010) (asserting that the "timing and content" of a voluntary decision to cease challenged conduct are critical to the mootness question). Concealment of the reasoning surrounding the cessation of challenged conduct can also be relevant to the analysis. *See Harrell*, 608 F.3d at 1267 ("First of all, the Board acted in secrecy, meeting behind closed doors and, notably, failing to disclose any basis for its decision. As a result, we have no idea whether the Board's decision was "well-reasoned" and therefore likely to endure.").

D. The facts and circumstances surrounding the Board's acceptance of Board Memo # 171 show that it is a litigation tactic and not clear cessation of unconstitutional conduct.

All of the above hallmarks of a sham "cessation" are present here. Defendants' conduct reeks of gamesmanship aimed to end this litigation without addressing its merits, while maintaining the ability to offer BITS in the future. The Board has refused to act until an adverse ruling or briefing schedule demands it—even where it requires a shirking of its obligation to hold public meetings. Meanwhile, MCS has circumvented Board policy to maintain Bible classes in its middle schools so that it can engage in conduct at the heart of Plaintiffs' allegations, all while maintaining that BITS is gone for good.

Under these facts and circumstances, Defendants cannot satisfy their heavy voluntary-cessation burden. Defendants' conduct signals the possible and desired return of BITS. Little weight can be given to the Board's latest incremental action on the BITS program given the timing of the Board's narrow acceptance of Board Memo # 171 and the lack of meaningful deliberation and reasoning to support the decision—outside of litigation strategy. This is especially true in light of the statements and actions throughout this litigation that signal a desire to maintain (or return) and defend the BITS program. Board Memo # 171 does not present an impediment to returning BITS classes given the demonstrated ability of the MCS central office to circumvent Board involvement in creating new curricula. Where, as here, the challenged conduct could easily be returned, the Fourth Circuit's voluntary cessation jurisprudence ensures manipulative defendants will not benefit from a finding of mootness.

1. The timing of and reasoning behind Board Memo # 171 reveal its acceptance to be a mere litigation tactic.

Within the context of the voluntary cessation doctrine, the timing of the Board's acceptance of Board Memo # 171 is significant for two reasons: the Board action was undertaken

in response to an adverse court ruling and occurred relatively "late" in the litigation. Because attempts to alter challenged conduct in these circumstances cut against a finding of mootness, *Ne. Fla Chapter of Associated Gen. Contractors of Am.*, 508 U.S. at 661; *Burns*, 544 F.3d at 284, the timing of the Board's action bears close examination.

The events of late December 2018 and early January 2019 demonstrate that Board Memo # 171 was accepted in response to the Fourth Circuit's December 17, 2018 Opinion. The Board met at a regularly-scheduled meeting just four days after the Fourth Circuit's decision, which reversed this Court's dismissal of Plaintiffs' claims. The Board was unable to definitively testify whether this litigation, which had not been discussed for more than 18 months, was discussed in that meeting. But on the same day, Defendants requested additional time to file their petition for rehearing with the Fourth Circuit. ECF No. 73. Although the Board had a regularly-scheduled *public voting* meeting set for January 8, 2019, a work session was scheduled for January 3, 2019 without explanation. Even though the Board is not permitted to conduct official business during work sessions, it accepted Board Memo # 171 in the January 3, 2019 work session and soon thereafter relied upon the document to support its petition for rehearing with the Fourth Circuit. ECF No. 76-1.

While deponents failed to provide a reason the memo on a sensitive issue of community interest was accepted at an unscheduled work session, this timing reveals Defendants held strategic motivations for taking these actions. By the January 3, 2019 meeting, eighteen months had passed since the Board last discussed the litigation and since the committee created to review BITS had reported to Defendant Akers on its findings. Had Defendants been motivated by the unconstitutionality of BITS—instead of the Fourth Circuit's adverse ruling—they would have taken action on BITS much sooner. By waiting so long after the findings of the committee to

take action, Defendants appear to have hoped that the Fourth Circuit would dismiss this case, allowing Defendants to continue BITS in spite of the earlier report from the BITS Advisory Committee that the program is inappropriate.

The implication that Defendants were strategically motivated in accepting Board Memo # 171 is also reinforced by Defendants' own prior conduct in this case. Defendants' initial "suspension" of the BITS program came in the middle of briefing on its original motion to dismiss. The "suspension" occurred between the filing of Plaintiffs' opposition to its motion and Defendants' own reply brief, which leaned heavily on the factual development in an attempt to bolster its justiciability arguments. Ultimately, Defendants never explained why BITS needed to be "suspended" for Defendants to conduct their "review" of the program and instead characterized the purported "review" as routine, a characterization the Fourth Circuit described as "dubious." This prior similar conduct and Defendants strained rationale for the "suspension" of BITS shows a pattern of manipulation in the form of official action taken in an attempt to improve litigation position only after briefing or court decisions necessitate such conduct.

The timing of the Board's acceptance of Board Memo # 171 is also significant because it occurred late in this litigation in two important respects. First, as discussed above, approximately 18 months had passed since the Defendant-created BITS Advisory Committee concluded BITS was inappropriate, suggesting that the Board was motivated solely by the Fourth Circuit's remand of this case. Second, the Board vote occurred only after Defendants had defended the litigation—and the constitutionality of BITS—for nearly two years both before this Court and the Fourth Circuit (and eventually the Supreme Court of the United States). Had Defendants truly been motivated to put an end to BITS once and for all and attempt to dismiss this litigation in the process, they would have acted sooner. These circumstances demonstrate Defendants'

reluctance to take their action against BITS any further than their purported indefinite suspension. And this reluctance points to Defendants' desire to see BITS one day return.

The lack of any meaningful deliberation and reasoning by the Board in reaching its decision to accept Board Memo # 171 provides further support for this conclusion. The facts of this case demonstrate that the acceptance of Board Memo # 171 was not the result of the gradual, public, and deliberative process spelled out in the Board's own policies. Although the BITS Advisory Committee reported to Defendant Akers soon after the committee was formed, the Board did not discuss BITS for approximately 18 months. Moreover, the stated reasoning for accepting Board Memo # 171—that BITS *is no longer* compatible with MCS's educational mission—lacks credibility: the BITS program and MCS's educational mission have remained constant for years. Unsurprisingly, the board representative was not able to explain what changed for BITS to suddenly become incompatible with MCS's mission statement in December 2018, nearly two years after the litigation was filed and one and one-half years after MCS's own committee concluded its review.

The suspicion and secrecy surrounding the Board's January 3, 2019 meeting and Board Memo # 171 also suggests that the opinions embodied in the memo were not the subject of meaningful deliberation and reasoning by the Board. Defendants' counsel has refused to permit witnesses to testify as to who was responsible for drafting Board Memo # 171, suggesting that its words are motivated more by enhancing Defendants' litigation position than by embodying the deliberations of the elected Board members. Moreover, despite Defendants' long-term investment in this litigation and the very public nature of this dispute, the Board did not seek input from the public at the January 3, 2019 meeting. Instead, the Board acted to disguise its public vote on BITS. It generically buried a nonspecific resolution and memo on the agenda of a

work session where no official action can be taken, instead of placing it on the agenda for the voting meeting set to occur a mere five days later. The Board also appears to have delaed public notice of the memo even after the fact—waiting to adopt minutes from the meeting, choosing not to include any of the text of Board Memo # 171 in the minutes that were eventually adopted, and delaying the posting of the memo to the Board website. As noted by the Eleventh Circuit, in such surreptitious circumstances, it is difficult, if not impossible, to evaluate the reasoning of the Board. *See Harrell*, 608 F.3d at 1267.

2. Defendants expressed and implied interest in maintaining the BITS program cut against the weight the Court should give Board Memo # 171.

This more recent conduct surrounding Board Memo # 171 occurred against the backdrop of prior conduct that casts doubt on Defendants' representation of voluntary cessation. In response to this litigation, Defendant Akers emphasized that Defendants were "still vigorously contesting" the lawsuit and "fighting" to retain BITS. These public comments factored into the Fourth Circuit's conclusion that Defendants' statements surrounding the purported suspension of BITS were dubious. *Deal*, 911 F.3d at 191. As a result discovery on the issue of mootness, Plaintiffs now possess additional evidence casting doubt on the actions the Board took early on in this case.

Specifically, the actions of Amanda Aliff, who was directed by Defendant Akers following the "suspension" of BITS, underscore Defendants' desire to retain BITS. In the process of assembling the committee of "stakeholders" that would review BITS, Aliff drafted a letter informing those individuals that they were being given the opportunity to "guide Mercer County Schools in [its] efforts to maintain the Bible in the Schools program." Exhibit E. At the same time, Aliff formed a committee to develop bible-based elective courses in the middle school, which included among its members a former BITS teacher and an individual involved in

the BITS community group. These courses were ultimately created and offered to students without any involvement by the Board. The facts surrounding these committees amplify the doubts the Fourth Circuit expressed based upon Defendants' public statements and conduct preceding Board Memo # 171.

In addition, the implication that Defendants will continue to defend the constitutionality of BITS further mars the credibility of any claims of cessation. Such an implication arises from two sources. First, Defendants' counsel refused to allow witnesses to answer whether Defendants believe that BITS is constitutional. Second, the language of Board Memo # 171 carefully avoids discussing the legality of BITS, instead declaring only that the program is inconsistent with MCS's educational mission. Although Board Memo # 171 appears to lean heavily on the BITS Advisory Committee's review (that involved less than two hours of meetings), statements in the memo itself do not align with the conclusions of the committee: the BITS Advisory Committee examined the appropriateness of BITS, not its compatibility with the MCS mission statement. From these facts, the Court should conclude Defendants continue to defend the constitutionality of BITS, and weight this position in evaluating the credibility of Defendants' contentions that BITS is gone for good.

3. The ease with which Defendants could reimplement elementary bible classes or the BITS program shows that this case is not moot.

The facts adduced during discovery further demonstrate that neither existing board policy regarding curriculum creation nor Board Memo # 171 will impede Defendants' ability to reimplement bible classes in MCS elementary schools. Given that Defendants and MCS central office personnel (and the community members involved) circumvented formal Board policy to create the curricula for Defendants' middle school bible courses, the less authoritative contents of Board Memo # 171 are unlikely to prevent the same sort of conduct. Considering Defendants'

desire to return BITS to MCS, the ease with which Defendants can accomplish this objective further cuts against a finding of mootness.

The creation and implementation of curricula for middle school bible courses was handled within the MCS central office and without any Board involvement. Despite the existence of a curriculum policy requiring presentation of a formal policy to the MCS assistant superintendent before submission of that proposal to the Board, the middle school bible classes appear to have been developed without the involvement of either. If the middle school classes are not an actual continuation of the BITS program, they are a rogue program unauthorized by the Board and prepared in contravention of Board policy. The creation of such bible-based curricula came from a committee comprised in part of non-certificated community leaders, including at least one former BITS teacher and a BITS community group member. Even if the existence of these classes does not conclusively resolve the mootness issue, the development and existence of these courses weigh against a finding of voluntary cessation sufficient to moot this case.

The presence of these classes in grades in which BITS courses were previously offered underscores Defendants' desire to see BITS return and shows how easily such a return can be accomplished. The creation of alternative middle school bible courses immediately after the BITS "suspension" confirms the Defendants' desire to see bible instruction remain in its schools—under the BITS banner or otherwise. Moreover, the willingness of Defendant Akers to coordinate the creation and implementation of these courses without regard for existing Board policy that ensures curriculum is considered by properly qualified individuals and the Board members demonstrates that Board policy will not make it less likely that BITS will return.

Nor will Board Memo # 171, which carries less weight than Board Policy I-30. Board memos constitute little more than a statement of the present position of the board members

voting in favor of them. As such, there is (1) no formal process required for adopting memos; (2) no requirement of advanced public notice of the contents of a memo to be voted upon; (3) no opportunity for public comment; (4) no formal process for the Board to consider past memos before acting; and (5) no formal process for maintaining a permanent records of all memos. As seen in the minutes from the January 3, 2019 work session, the Board is also free to omit the text of memos from Board minutes themselves. Given these legislative attributes, Board Memo # 171 stops well short of making it "absolutely clear" it will prevent BITS from returning, especially in light of Defendants' demonstrated history of ignoring existing policy in developing and implementing bible courses.

E. Board Memo # 171 does not amount to "legislative repeal" of BITS.

The legislative repeal cases heavily relied upon by Defendants do not govern the Court's analysis of the effect of Board Memo # 171 on Plaintiffs' challenge to the decades-long practice embodied in the BITS program. Legislative repeal cases are limited to situations in which a plaintiff raises a challenge to formal *policy or statute* and subsequent official government action rescinds or amends the *challenged policy or statute*. *See e.g., Grutzmacher v. Howard Cnty.*, 851 F.3d 332, 349 (4th Cir. 2017) (plaintiff's challenged social media policy and defendant's adopted revised social medial policy); *Doe v. Shalala*, 122 F. App'x 600, 602 (4th Cir. 2004) (a case can be mooted where a legislature amends, repeals, or allows to expire "*the challenged law*") (emphasis added); *Brooks v. Vasser*, 462 F.3d 341, 348 (4th Cir. 2006) ("When a legislature amends or repeals a statute, a case challenging *the prior law* can become moot.") (citation omitted). Because Plaintiffs challenge a *practice* that is not embodied in a single MCS policy and Board Memo # 171 lacks the force of a policy or statute, these cases are inapplicable.

As the Board testified, board resolutions, such as Board Memo # 171, differ from Board policies in a number of material ways. Most significantly, board policies are "long-ranging," have broad application, and govern the operation of schools, Hodges Dep. 7:713; 8:10-14, whereas resolutions are a statement of a particular board on a specific situation and do not bind future action. *Id.*; Akers Dep. 66:24-67:5. As a result, the procedures for enactment vary: enactment of Board policy requires adherence to a rigorous procedure that ensures notice to and involvement of interested citizens, but board resolutions, like Board Memo # 171, can be enacted with few formalities and no advanced notice to the public. Similarly, the maintenance of policies and resolutions is different: policies are maintained permanently in a policy manual, while resolutions and memos are retained for a limited amount of time and are not considered as part of any formal process prior to Board action.

These informalities in the resolution process allowed the Board to accept Board Memo # 171 under suspicious circumstances at the January 3, 2019 work session. With no requirements guaranteeing transparency and public involvement, the Board accepted Board Memo # 171 without providing notice that it planned to act on BITS, without receiving public comment on its planned action, and without deliberation on the subject in view of interested citizens. Instead, the Board improperly voted on the item in a meeting advertised as a work session, just two weeks after the Fourth Circuit's decision. Given the way in which the matter was handled, it is no surprise the Board has never considered adopting a formal policy prohibiting the sort of instruction embodied in the BITS program.

Even such a wide-ranging *policy* would likely fall short of the level required to demonstrate "legislative repeal" because Plaintiffs challenge the decades-long *practice* of administering BITS. Whereas challenges to a specific policy may be mooted by government

action on *the challenged policy*, Defendants in this case would be hard pressed to enact a single policy that would make it absolutely clear that the conduct challenged by Plaintiffs would never return. More than any one particular policy, Plaintiffs in this case are challenging the more than 80-year practice of the implementation of the BITS program and the offering of its classes to elementary and middle school students. Given that this practice is at the heart of this case and a variety of Board policies combine to allow the Board, MCS, and Defendant Akers to implement the BITS program, effective legislative repeal—even if Defendants took the proper legislative steps—is unlikely.

In addition, Defendants' disregard of Board policy in the creation and implementation of middle school bible courses following the "suspension" of BITS casts doubt on whether the adoption of a Board policy could ever moot this case. The development of those classes demonstrates that Mercer County Board policy is not respected by MCS officials and may not be enough to show with clarity that BITS will never return. But because Defendants have not enacted any relevant Board policy and have no intention of doing so, the Court need not consider whether some hypothetical Board policy could moot this case.

The Board's actual conduct is neither legislative repeal nor the sort of voluntary cessation necessary to moot a case. Defendants' argument to the contrary is based entirely on the assumption that Board Memo # 171 constitutes "legislative repeal." They have done little to explain why Board Memo # 171 constitutes legislative repeal and even less to explain how they have satisfied their "heavy burden" under the voluntary cessation doctrine if the memo does not rise to that level. In contrast, the facts and circumstances highlighted in this brief clearly demonstrate that Defendants cannot meet their heavy burden in this case. Thus, Defendants' motion to dismiss for mootness should be denied.

III. Defendant Mercer County Schools is subject to liability under 42 U.S.C. § 1983

Plaintiffs' municipal liability claim against Mercer County Schools may go forward on two bases. First, Plaintiffs aver MCS is liable because of Mercer County Schools' (i.e., the municipality's) own policy, practice, or custom of administering the BITS program for more than 30 years (in its current form). Second, Plaintiffs aver acts of the Board related to the administration of BITS through which MCS may be liable because the Board is a "final policymaker" of MCS. Both theories support the imposition of municipal liability against MCS.

A municipality may be directly liable where its own practice or custom cause the injury alleged by a plaintiff. *Monell v. Dep't of Soc. Servs. Of City of New York,* 436 U.S. 658, 690-91 (1978). A custom arises where a practice "is so persistent and widespread and so permanent and well settled as to constitute a custom or usage with the force of law." *Carter v. Morris,* 164 F.3d 215, 218 (4th Cir. 1999) (citing and quoting *Monell*, 436 U.S. at 691). Where liability is premised upon the existence of a custom that is alleged to have caused a plaintiff's injury, the plaintiff need not also allege that the actions of a final policymaker played a part in causing the injury. s*ee Barrett v. Board of Educ. of Johnston County, N.C.*, 590 F. App'x. 208, 210 (4th Cir. 2014) (municipal liability may be premised upon municipal policy, municipal custom, *or* the decisions of a final policymaker).

A municipality may be also liable for the acts of its final policymakers. While Defendants acknowledge the Board is a final policymaker of MCS, they misapprehend municipal liability jurisprudence in arguing that *only the Board*, as a final policymaker, may be liable. As discussed above, MCS may be liable to Plaintiffs where its own customs caused them injury. Separately, courts routinely hold government entities liable for customs and practices sanctioned by their final policymakers. *See, e.g., Hall v. Marion Sch. Dist. No. 2,* 31 F.3d 183, 196 (4th Cir. 1994) (**(**"Since the [School] Board is the final policymaker in this area of the District's business, we find

that the District may be held liable for the act of the Board....”). Thus, Plaintiffs’ claims against MCS may also proceed where the actions of the Board, as a final policymaker of MCS, are alleged to have caused Plaintiffs injury.

The allegations of the FAC set forth facts supporting Plaintiffs’ claims of municipal liability against MCS on the basis of both MCS custom and the actions of the Board, as a final policymaker. Plaintiffs’ § 1983 claims are based upon the pervasive BITS program, which has been offered by MCS for nearly 80 years. Whether MCS’s widespread custom and practice of administering this religious program throughout its schools or the specific actions of the Board and other final policymakers, Plaintiffs have pled viable claims against MCS. At a high level, it is impossible to imagine how the decades-long history of BITS does not amount to the sort of practice and custom that is actionable under § 1983. Beyond this longstanding custom and practice, Plaintiffs’ complaint contains specific allegations supporting their claims. Among the many allegations in the First Amended Complaint, Plaintiffs allege that Mercer County Schools administers a program that provides bible classes to elementary and middle school students in 19 public schools throughout Mercer County. FAC ¶¶ 1, 25; Dkt. No. 21. Mercer County Schools provides written lessons to itinerant bible teachers, which cover topics such as creationism, the biblical crucifixion of Jesus, and the Ten Commandments. FAC ¶¶ 53, 55, 74-76, 81-82. The Board and Mercer County Schools employ itinerant Bible in the Schools teachers who teach young children Christianity. FAC ¶¶ 94-95. In light of these allegations, Plaintiffs have adequately alleged widespread customs and practices and specific actions of final policymakers supporting their § 1983 claims.

IV. The FAC contains allegations sufficient to support Plaintiffs' claims against Defendant Akers.

As the Supreme Court has held, "to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *see also Hafer v. Melo*, 502 U.S. 21, 25 (1991). The Fourth Circuit has expressly noted that "Section 1983 permits individual capacity suits against state officers for damages arising from official acts." *Lizzi v. Alexander*, 255 F.3d 128, 137 (4th Cir. 2001) (citing *Hafer*, 502 U.S. at 23).

As to Plaintiffs' claims against Defendant Akers, the FAC alleges facts that meet this standard. Plaintiffs allege more than bad actions of one or a few low-level employees, which would necessitate a showing of the failure to act by a supervisor. The FAC contains claims based upon the long-established BITS practice, which impacts some 4,000 students annually. *See* FAC ¶ 24-25. Regarding Defendant Akers, the FAC contains allegations that Defendant Akers was directly involved in running the program *for decades*. The FAC properly alleges actions by Defendant Akers, which go far beyond her failure to act in a supervisory capacity of particular employees. Thus, contrary to Defendant Akers's argument, Plaintiffs' claims against her go beyond the allegation that she is liable to Plaintiffs only on a theory of supervisor liability: she is alleged to have the key executive function over the decades-long BITS program at the heart of this litigation.

The allegations regarding the individual acts of Defendant Akers are well supported given her performance of this role. As superintendent of Mercer County Schools, Akers has the primary duties of implementing the school system's policies and programs. FAC ¶ 96. The FAC alleges that Akers has created policies supporting and implementing the Bible in the Schools program for approximately 25 years. FAC ¶ 97. The Bible in the Schools program instills

religious teachings in elementary and middle school students and is designed to encourage students to follow Christian teachings. FAC ¶ 26. In implementing the Bible in the Schools program, Plaintiffs allege Akers has, on her own and in concert with school principals, administered religious instruction to students and coerced students into receiving that instruction. FAC ¶¶ 98, 106. Because the administration of this program is the source of the harm alleged by Plaintiffs, FAC ¶¶ 34-50, 114, 116, these allegations assert a plausible claim against Defendant Akers.

V. FRCP 12(g)(2) bars Defendant Akers's qualified immunity defense.

The qualified immunity defense raised by Defendant Akers in the pending motion to dismiss must be denied because it was not raised in Defendant Akers's prior Rule 12 motion. *Compare* ECF No. 80, 12-18 *with* ECF Nos. 25-26. Because the Federal Rules of Civil Procedure require the raising of all potential defenses or objections in a party's first motion to dismiss, Defendants are foreclosed from asserting this new defense at this stage. Fed. R. Civ. P. 12(g)(2).

Rule 12(g)(2) of the Federal Rules of Civil Procedure prohibits parties from making a motion under Rule 12 that raises "a defense or objection that was available to the party but omitted from its earlier motion." While Rule 12(h)(2) of the Federal Rules of Civil Procedure allows a missed 12(b)(6) defense to be raised in a later filing, it does not allow a previously-omitted Rule 12(b) defense to be raised in a subsequent Rule 12(b) filing. *See also English v. Dyke*, 23 F.3d 1086, 1090–91 (6th Cir. 1994) ("[Failure to state a claim] may be brought in a subsequent pleading, motion for judgment on the pleadings, or at trial on the merits."). Thus, Rule 12(g)(2) prevents Defendant Akers from raising all Rule 12(b) defenses she did not previously raise in her original motion to dismiss.

The qualified immunity defense being asserted by Defendant Akers in the pending motion to dismiss is a new Rule 12 defense. The current qualified immunity defense argues that Defendant Akers is entitled to immunity because the rights at issue were not clearly established at the time the case arose. ECF No. 80, 12-18. In contrast, Defendant Akers's original motion to dismiss raised a different qualified immunity defense in a footnote. ECF No. 26, 17-18 n.15. The qualified immunity defense raised there was coupled with Akers's argument that the FAC lacks specific allegations regarding actions she took to cause Plaintiffs injury (a separate defense she also raises in the current motion): "Dr. Akers is also entitled to qualified immunity *because Plaintiffs failed to plead sufficient facts showing that she violated their rights*. ECF No. 26, 17-18, n.15 (internal quotations and citations omitted). Because this failure to state a claim argument was not raised in Defendant Akers's earlier motion to dismiss, the Court need not consider the defense at this stage.

VI. Defendant Akers is not entitled to qualified immunity.

Even if Defendant Akers's affirmative qualified immunity defense is considered, her motion to dismiss must be denied. Plaintiffs' FAC plausibly alleges a First Amendment violation. More significantly for purposes of qualified immunity, the First Amendment right at issue in the FAC—the right to be free from state-run religious instruction in public schools—has been well-established for decades. As Plaintiffs need allege no more at this stage, Defendant Akers cannot establish she is entitled to qualified immunity.

A. Qualified immunity is only available to public officials demonstrating that a plaintiff has brought facially-deficient claim.

The qualified immunity defense asserted by Defendant Akers involves a two-prong inquiry. To overcome a qualified immunity defense a plaintiff must plausibly allege (1) the violation of a constitutional right that is (2) clearly established at the time of the alleged

violation. *Owens v. Baltimore City State's Attorney's Office*, 767 F.3d 379, 395–96 (4th Cir. 2014) (quoting *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)). Thus, in this case, the FAC must include averments demonstrating that Plaintiffs' clearly-established First Amendment rights were violated by the conduct alleged.

At the motion to dismiss stage, Plaintiffs need only allege facts that make the satisfaction of these two elements *plausible* on the face of the FAC. *Owens*, 767 F.3d at 396 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (emphasis in original). In the context of this qualified immunity analysis at this stage of the litigation, the Court must view the facts related to qualified immunity in the light most favorable to plaintiffs. *Tobey v. Jones*, 706 F.3d 379, 388 (4th Cir. 2013). With this standard in mind, the Fourth Circuit has recognized that the qualified immunity defense at the Rule 12 stage "faces a formidable hurdle" and "is usually not successful." *Owens*, 767 F.3d at 396 (quoting *Field Day, LLC v. Cty. of Suffolk*, 463 F.3d 167, 191–92 (2d Cir. 2006)).

B. The FAC sufficiently alleges that Defendant Akers violated the Establishment Clause and First Amendment rights of Plaintiffs.

The FAC satisfies the first prong of the qualified immunity analysis because it outlines a program of religious instruction implemented by Defendant Akers that violates the basic tenets of the Establishment Clause of the First Amendment. The FAC alleges that the Bible in the Schools program instills religious teachings in elementary and middle school students. FAC ¶ 26. It further alleges that the Bible in the Schools classes are designed to encourage students to follow Christian teachings. FAC ¶ 27. As to Defendant Akers, the complaint alleges that she, on her own and in concert with school principals, administered religious instruction to students and coerced students into receiving that instruction. FAC ¶¶ 98, 106. As stated in the FAC, "This practice violates longstanding United States Supreme Court precedent, including *McCollum v.*

Board of Education, 333 U.S. 203 (1948)." FAC ¶ 115; *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963).

C. Plaintiffs First Amendment rights to be free from religious instruction in the public school setting have been well established for decades.

In resolving the second prong of the qualified immunity analysis, the court must examine whether the alleged conduct "would contravene clearly established rights of which a reasonable person would have known." *Ridpath*, 447 F.3d at 320 (citing *Mellen v. Bunting*, 327 F.3d 355, 365 (4th Cir. 2003)). To meet this mark, "the unlawfulness [of government conduct] must be apparent" "in the light of pre-existing law." *Thompson v. Commonwealth of Virginia*, 878 F.3d 89, 98 (4th Cir. 2017) (citations omitted). However, a plaintiff need not point to a case on all fours with the case at hand: "a 'general constitutional rule . . . may apply with obvious clarity . . . even though the very action in question has not previously been held unlawful.'" *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730 (2002)); *see also Hunter v. Town of Mocksville, N. Carolina*, 789 F.3d 389, 401 (4th Cir. 2015) ("To ring the 'clearly established' bell, there need not exist a case on all fours with the facts at hand…'Rather, the unlawfulness must be apparent in light of pre-existing law.'") (citations omitted).

At the time the FAC was filed, Supreme Court case law had long held that public school employees may not direct students in religious instruction. In 1948, the Supreme Court established that conducting religious instruction classes in public schools during the school day violates the Establishment Clause. *McCollum*, 333 U.S. at 210-11. The Court has reached similar conclusions in other cases. *See Lee v. Weisman*, 505 U.S. 577 (1992); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963). And in 2000, the Court reinforced that the right to be free from religious coercion in public schools is clear: "It is beyond dispute that, at a

minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 302. Against this backdrop, Defendant Akers cannot maintain her qualified immunity defense.

Given their striking similarities to this case, the facts in *McCollum* are particularly instructive as to the well-established nature of the First Amendment rights at issue in this case. In *McCollum,* members of religious groups formed an association called the Champaign Council on Religious Education. 333 U.S. at 208. The association obtained permission from the Board of Education to offer religious classes for students in grades four to nine. *Id.* The classes included students whose parents signed printed permission cards and were privately funded. *Id.* ("The council employed the religious teachers at no expense to the school authorities, but the instructors were subject to the approval and supervision of the superintendent of schools.") They "were held weekly, thirty minutes for the lower grades, forty-five minutes for the higher" in the "regular classrooms of the school building." *Id* at 208-09. The Court also commented on the lack of options for students who did not participate: "[s]tudents who did not choose to take the religious instruction were not released from public school duties; they were required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies." *Id.*

Defendant Akers has run the Bible in the Schools program in the same manner as the program at issue in *McCollum,* down to the specific timing of the classes (30 minutes for elementary school students and 45 minutes for middle school students). FAC ¶ 61. The only significant difference between the program in *McCollum* and that under Defendant Akers is the fact that she and Mercer County Schools target even younger students: Bible in the Schools

classes begin in first grade and continue through eighth grade. FAC ¶ 93. Unlike in Mercer County, the classes in *McCollum* were also separated between Protestant, Catholic and Jewish instructors. *Id.* at 208–09. In all other significant respects, the programs are materially the same.

In *McCollum*, these facts amounted to "the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education." *Id.* at 209. The Court made clear such a program was unconstitutional: a school system may not be used "to aid religious groups to spread their faith . . . it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson v. Board of Education*." *Id.* at 210.

Thus, the BITS program Defendant Akers has implemented in Mercer County Schools for decades—like the program at issue in *McCollum*—violates the clearly established rights of public school students and parents. The District Court for the Eastern District of Tennessee reached the same conclusion in a similar case: "*This is not a close case. Since 1948, it has been very clear* that the First Amendment does not permit the State to use its public school system to 'aid any or all religious faiths or sects in the dissemination of their doctrines.'" *Doe v. Porter*, 188 F. Supp. 2d 904, 914 (E.D. Tenn. 2002), *aff'd*, 370 F.3d 558 (6th Cir. 2004), (citing *McCollum*, 333 U.S. at 211 (emphasis added)).

Beyond the direct holding of *McCollum*, which is determinative of the program at issue in this case, the Supreme Court has announced another "general constitutional rule" that should "apply with obvious clarity" to situations like the one facing the Court here. The Court has made it abundantly clear that public schools and their employees may not push religion on impressionable school children. *See Santa Fe*, 530 U.S. 290; *Lee*, 505 U.S. 577; *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980); *Schempp*, 374 U.S. 203;

Engel v. Vitale, 370 U.S. 421 (1962). In the context of this general constitutional rule, the Fourth Circuit has recognized that the young age of elementary school students makes them especially susceptible to Establishment Clause violations. *See Mellen v. Bunting*, 327 F.3d 355, 371 (4th Cir. 2003) (citing *Lee*, 505 U.S. at 594 (comparing college students to grade school children who are particularly "susceptible to pressure from their peers toward conformity.")); *Peck v. Upshur Cty. Bd. of Educ.*, 155 F.3d 274, 288 n.1 (4th Cir. 1998) (permitting distribution policy in secondary schools but holding "the School Board's policy is unconstitutional to the extent that it allows the display of Bibles and other religious material in the elementary schools.").

Defendant Akers's reliance on the proposition that "teaching biblical or religious curricula are not *per se* unconstitutional" has no bearing on the BITS program that so closely aligns with prior curricula that have been struck down. ECF No. 80, 15. The selective quotations and cases relied upon by Akers pertain to objective instruction about religion, which is included as "part of a secular program of education." *See Stone*, 449 U.S. at 42; *Schempp*, 374 U.S. at 225. Given the standard of review at this motion to dismiss stage, the Court must consider the Bible in the Schools program based upon the allegations in the FAC and in the light most favorable to Plaintiffs.

Under this standard, the BITS Program is nearly identical to the program at issue in *McCollum* and far from a program of objective instruction about religion. BITS classes are taught as separate classes to elementary and middle school students. The classes are not being used "in an appropriate study of history, civilizations, ethics, comparative religion or the like." *Stone*, 449 U.S. at 42. The BITS program is designed to encourage students to follow Christian teachings. FAC ¶ 27. The learning objectives for the New Testament curriculum, among other religious objectives, include harmonizing gospel accounts about the life and death of Jesus. FAC

¶ 60. The lessons are similar to what a child might hear in a church's Sunday school. FAC ¶ 67. The first BITS lesson instructs students to follow the directions and warnings that are given in the bible, including warnings from Jesus. FAC ¶¶ 71-72. BITS lessons include teaching students creationism, to follow the Ten Commandments, and the biblical resurrection of Jesus. See FAC ¶¶ 68-89. The BITS program at issue in the FAC falls squarely within the category of programs that the Supreme Court has clearly established are unconstitutional.

In light of the similarities between BITS and those programs of public school religious instruction that have long been held unconstitutional, the Court cannot dismiss the FAC on the basis of qualified immunity at this stage of the case. Reading the FAC in the light most favorable to Plaintiffs, the First Amendment rights of Plaintiffs to be free from this sort of instruction are indeed well established. Because Plaintiffs have also alleged a First Amendment injury caused by the BITS program that has been administered by Defendant Akers for years, Defendant Akers's motion must be denied.

VII. Plaintiffs' claims are not barred by the statute of limitations.

Defendants' statute of limitations defense is frivolous.[6] The Fourth Circuit has already recognized in this case that the FAC alleges two forms of injuries that were *ongoing* at the time the case was filed. *Deal*, 911 F.3d at 188 (holding Plaintiffs allege two "actual, ongoing injuries: (1) near-daily avoidance of contact with an alleged state-sponsored religious exercise, and (2) enduring feelings of marginalization and exclusion resulting therefrom"). Just as Defendants' failed to understand Plaintiffs' ongoing injuries when they persisted in arguing that Plaintiffs

[6] Defendants statute of limitations defense is also barred by Rule 12(g)(2) of the Federal Rules of Civil Procedure because it was not raised in their prior Rule 12 motion. ECF Nos. 25-26. *See Flame S.A. v. Indus. Carriers, Inc.*, 24 F. Supp. 3d 513, 517 (E.D. Va. 2014) (denying a second motion to dismiss based on a statute of limitations defense)

lacked standing, their misconception of the nature of Plaintiffs' injuries now presents itself in the form of this newly-raised statute of limitations argument. Defendants' statute of limitations arguments fail because Plaintiffs have alleged ongoing injuries, meaning that there was *no delay* between Plaintiffs' injuries and their filing of the FAC.[7]

Conclusion

In considering whether Plaintiffs' claims are moot, the Court must review the facts and circumstances surrounding Defendants' actions to determine whether the heavy voluntary-cessation burden has been met. This review does not begin with Defendants' improper Board vote on January 3, 2019. Defendants' comments at the outset of this case regarding their desire to fight to retain BITS, their conduct surrounding the earlier BITS "suspension," and their implementation of middle school bible courses must all be considered in the Court's analysis. With these prior events in mind, and taking into account the authoritative impotence of Board Memo # 171 and the secrecy surrounding its adoption, the Court should comfortably conclude that this case is not moot. Under these facts, it is far from clear that BITS will never return, and where this is the conclusion, Fourth Circuit jurisprudence dictates that Plaintiffs still have live claims for injunctive relief. Accordingly, Defendants Rule 12(b)(1) motion must be denied.

The Court must also deny Defendants' 12(b)(6) arguments. Plaintiffs' FAC includes

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[7] Even many of the *past* injuries alleged by Plaintiffs occurred within two years of the filing of the FAC. FAC ¶¶ 34, 41, 42, 44, 45, 48, 50 (alleging harms occurring within two years of the date of filing). Moreover, setting aside the fact that Plaintiffs' injuries are ongoing, as recognized by the Fourth Circuit, the alleged acts of Defendants constitute "continuing violations" because they stem from a fixed and continuing practice. *Nat'l Advert. Co. v. City of Raleigh*, 947 F.2d 1158, 1166–67 (4th Cir. 1991) (citing *Perez v. Laredo Junior College*, 706 F.2d 731, 733 (5th Cir.1983), *cert. denied*, 464 U.S. 1042 (1984)). Under the continuing-violation doctrine the limitations period begins anew with each violation. *Id*. at 1167.

numerous specific allegations against the various Defendants in this case. These allegations specify actionable conduct on the part of each of the Defendants giving rise to the harms alleged by Plaintiffs. According the FAC the weight it is due at this stage of the proceedings, each of Defendants' arguments in favor of dismissal fails.

Respectfully submitted,

/s/ Marcus B. Schneider, Esquire

Marcus B. Schneider, Esquire
W.V. I.D. No. 12814
STEELE SCHNEIDER
420 Fort Duquesne Blvd., Suite 500
Pittsburgh, PA 15222
(412) 235-7682
(412) 235-7693 (Fax)
marcschneider@steeleschneider.com

Patrick C. Elliott, Esquire
Christopher C. Line, Esquire
Freedom From Religion Foundation
PO Box 750
Madison, WI 53701
608-256-8900
patrick@ffrf.org
chris@ffrf.org
*Visiting attorneys

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2019, the foregoing **MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic case filing system and constitutes service of this filing under Rule 5(b)(2)(E) of the Federal Rules of Civil Procedure. Parties may access this filing through the Court's ECF system.

/s/ Marcus B. Schneider, Esquire
Marcus B. Schneider, Esquire