

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

Civil Action No. 1:23-cv-2769-SKC-MDB

J.R., a minor, by and through his mother and general guardian, EDEN HOPE
RODRIGUEZ
Plaintiff,

v.

HARRISON SCHOOL DISTRICT TWO, *et al.*,
Defendants.

**PLAINTIFF’S OPPOSITION TO SCHOOL DISTRICT’S MOTION TO
RECONSIDER ORDER DENYING DEFENSE OF MOOTNESS [ECF 122,
FILED MAY 5, 2025]**

INTRODUCTION

The issue on this motion is whether Harrison School District 2’s purported revision to its dress code, undertaken for the express purpose of voluntarily mooted one of Plaintiff’s First Amendment claims, strips this Court of jurisdiction over the claim, even though the change to the official “controlling” rules was never communicated to students and staff, and even though the District has done nothing to address lingering effects of the “old” policy (which is not even “old,” but is actually still in force to this day). The Court previously denied the District’s mootness defense. It did so correctly. Yet the District now seeks reconsideration of that ruling on the basis that the Court supposedly “misunderst[ood] the underlying jurisdictional facts.” ECF No. 122 (“Mot.”) at 1. Not so. As explained below, the facts all point in one direction: the Court retains jurisdiction over Plaintiff’s injunctive and declaratory relief claims and should deny the motion to reconsider.

BACKGROUND

Since at least as far back as 2013, Harrison School District 2 has enforced a Code of Conduct that incorporates standards of dress for students. ECF No. 43 (“First Amended Complaint” or “FAC”) ¶ 27; *id.* Ex. 3 (Harrison School Dist. 2 Code of Conduct 2023-2024) at 7. The Code is easily accessible on the District’s homepage under the heading “Families” --> “Code of Conduct.” Declaration of Nicole Grunewald, attached hereto (“Grunewald Decl.”) ¶¶ 3, 5, 7.¹ Individual schools within the District also publish versions of the Code, or portions of the Code, including provisions governing student dress. Grunewald Decl. Exhibs. 2 to 7.

In its motion, the District states that in addition to the Code of Conduct, it also maintains a “separately published” document that counts as the “controlling” official dress code. Mot. at 7. That document is identified as Policy JICA. *Id.* While the District says that Policy JICA is “publicly available on the School District’s website,” Mot. at 5 (referring to <https://www.hsd2.org/>), that is not true. Policy JICA cannot be found anywhere on the District’s website. Grunewald Decl. ¶¶ 13-15. Instead, it is located on a separate off-site document clearinghouse, at the following URL: <https://go.boarddocs.com/co/hsd2/Board.nsf/Public>. *Id.* ¶ 16. The clearinghouse is not directly linked from the District homepage. *Id.* ¶ 17. Instead, from the homepage, a well-informed user must first navigate to “Our District” --> “Leadership.” *Id.* ¶¶ 17(a) & (b). From that page, a user must then click on a

¹ Where, as here, a defendant brings a factual attack against subject matter jurisdiction, the court has wide discretion to consider matters outside the pleadings to “resolve disputed jurisdictional facts.” *Baker v. USD 229 Blue Valley*, 979 F.3d 866, 872 (10th Cir. 2020) (cleaned up).

button labeled “Board of Education.” *Id.* ¶ 17(c). From the resulting page, a user must then click on the second of nine bulleted links under the heading “Board Resources,” which takes the user to go.boarddocs.com. *Id.* ¶ 17(d). On go.boarddocs.com, a user savvy enough to do so can navigate through three nested levels of Board of Education materials to find Policy JICA. *Id.* ¶¶ 18(a)–(c).

Underscoring just how difficult it would be for a student or parent to find what the District refers to as the “controlling” policy, even a direct search for the term “dress code” on the District’s website does not actually yield Policy JICA. *Id.* ¶¶ 4, 9-12. Instead, the Code of Conduct is featured as a search result. *Id.* ¶¶ 10-12. Even worse, an exceptionally-well-informed student or parent who happened to know that the allegedly “controlling” policy was given code JICA would still not be able to find that document on the District’s website. *Id.* ¶ 14. A search for the term “JICA” yields zero results. *Id.*

Be that as it may, all versions of Policy JICA have consistently stated as a general proposition that clothing containing expression “deemed disruptive or potentially disruptive to the classroom environment or to the maintenance of a safe and orderly school,” is unacceptable. FAC Ex. 1 at 1; Mot. Ex. A at 1. Until it was changed in December 2023 in response to this lawsuit, Policy JICA also flatly prohibited any expression on clothing or accessories that in any way “refer[red] to weapons.” FAC ¶ 27-29, Ex. 1 at 1. Separately, the student-facing Code of Conduct also includes a general ban on “disruptive” clothing. FAC Ex. 3 at 7 (dress code prevents “unnecessary disruption”). The Code also has long included a flat ban on

any expression on clothing or accessories that “[r]efer[s] . . . to weapons.” FAC Exhib. 3 at 7; Mot. Ex. B at 10. In this litigation, the ban is referred to as the “Reference to Weapons Policy.”

In his Fourth Claim for Relief, Plaintiff brought a facial overbreadth challenge to the Reference to Weapons Policy. FAC ¶¶ 206-25. The policy had been a long-time feature of the Harrison School District 2 rules, and had been applied numerous times to punish and chill students’ protected speech, including core political speech supportive of Second Amendment rights. *Id.* ¶¶ 52-53, 66-67, 220. Shortly after the complaint was filed in this matter, a District committee held an unannounced, closed-session meeting, during which it amended Policy JICA to remove the Reference to Weapons prohibition. *Id.* ¶¶ 156-161; ECF No. 53-1 at 25-30 (“Birhanzel Decl.”) ¶¶ 5-6. The District has admitted in its Answer that it took this action specifically in an attempt to moot Plaintiff’s claims. *Compare* FAC ¶¶ 157 (“This was a clear attempt to moot the fourth claim for relief in this lawsuit, which sets forth a facial challenge to the Reference to Weapons Policy as constitutionally overbroad”) & 158 (“The School District took this action to attempt to deprive this Court of jurisdiction over the claim”) *with* ECF No. 116 (“HSD2 Answer”) ¶¶ 157 (“The School District Defendants **admit the allegations in Paragraph 157. . .**”) (emphasis added), 158 (“The School District Defendants **admit the [relevant] part of the allegations in Paragraph 158 . . .**”) (emphasis added). Sure enough, in February 2024, the District moved to dismiss Plaintiff’s facial challenge on mootness grounds. ECF No. 53.

But while it was strategically leveraging its behind-the-scenes moves in the context of this federal lawsuit, the District did not take steps to *implement* the “change” where it mattered most—at the level of students and staff. First, as the District now acknowledges, it left in place a flat dress code ban on depictions of, or references to, weapons in its student-facing Code of Conduct for both the 2023-24 and 2024-25 school years. Mot. at 5-6 (as of mid-April 2025, “the Code of Conduct had not yet been revised to reflect the School District’s [December 2023] changes to its dress code policy.”). Indeed, it was not until after April 18, 2025, when the Court itself highlighted the stark contrast between what the District was saying in this litigation and what it was saying to the school community, ECF No. 108 at 19-22, that the District finally changed the student-facing Code, Mot. at 6, ***more than sixteen months after it purportedly made a change that mooted Plaintiffs claim.***

Even worse, a quick perusal of public-facing materials reveals that ***even to this day***, several District schools continue to publish the “old” dress code standard, and continue to flatly ban references to weapons. Grunewald Decl. Exhibs. 2 to 7 (screenshots of dress code pages for District schools Aspire Online Academy, Career Readiness Academy, Carmel Community School, Fox Meadow Middle School, Panorama Middle School & Stratton Meadows Elementary School).

Despite all this, the District nevertheless moves to reconsider the Court’s April 18, 2025 denial of the District’s motion to dismiss based on a mootness defense. In its ruling, the Court appropriately noted that the public-facing Code of

Conduct continued to ban clothing or accessories that referred to weapons, in sharp contradiction to the purported revisions to Policy JICA. ECF No. 108 at 21 (the public-facing policy “raises serious questions about whether the District’s purported revisions were genuine.”). The essence of the District’s argument is that (1) the student-facing Code of Conduct should be disregarded because the “controlling” rule has always been Policy JICA; (2) the District committed a mere “oversight” by maintaining public-facing rules prohibiting references to weapons, while representing to the Court that there was no such ban; (3) the Court should trust the District when it pledges that it has permanently and completely renounced its old ways.

This argument should be rejected for two independent reasons. First, the District has failed to carry its heavy burden of proving that there is no reasonable likelihood that the complained-of conduct will recur if Plaintiff’s claim is dismissed as moot. Second, the District has done nothing to eradicate the effects of its prior policy (if it is a “prior” policy at all).

ARGUMENT

I. Legal Standards

A claim becomes moot during litigation only if interim events render it “*impossible* for a court to grant any effectual relief whatever to the prevailing party.” *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012) (emphasis added; quotation omitted). “[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” *Ellis v. B’hood of R.R., Airline & Steamship Clerks, Freight Handlers, Express & Station Emp’ees*, 466 U.S.

435, 442 (1984). Accordingly, it is well settled that a government defendant’s “voluntary cessation of a challenged practice does not [automatically] deprive a federal court of its power to determine the legality of the practice.” *City of Mesquite v. Alladin’s Castle, Inc.*, 455 U.S. 283, 289 (1982). Voluntary cessation will only moot a claim for relief if the defendant proves two things: (1) “it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,” *W. Va. v. EPA*, 597 U.S. 697, 720 (2022) (cleaned up); and (2) “interim relief or events have completely and irrevocably eradicated the effects of the alleged violations.” *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631 (1979). Moreover, “a defendant’s corrective actions that do not fully comport with the relief sought are also insufficient.” *Prison Legal News v. Fed. Bureau of Prisons*, 944 F.3d 868, 881 (10th Cir. 2019) (cleaned up).

The party asserting voluntary mootness—here the District—bears the burdens of proof and persuasion. *Browne v. City of Grand Junction, CO*, 85 F. Supp. 3d 1249, 1255-56 (D. Colo. 2015); *see also W. Va v. EPA*, 597 U.S. at 719 (“[T]he government, not petitioners, bears the burden to establish that a once-live case has become moot.”). And the defendant must prove *all* elements of voluntary mootness, not just some. *Davis*, 440 U.S. at 631 (“When *both* conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.” (emphasis added)). The government’s burden is “formidable.” *FBI v.*

Fikre, 601 U.S. 234, 243 (2024); *see also Prison Legal News*, 944 F.3d at 881 (describing burden as “formidable,” “stringent,” and “heavy”).

II. Plaintiff’s Fourth Claim for Relief Raising a Facial Challenge to the Reference to Weapons Policy is not Moot.

A. The District Has Not Carried its Burden on Prong I: It is Far From Clear that its Constitutional Violations Will not Recur.

In a January 31, 2024 declaration, District Superintendent Birhanzel averred that shortly after this lawsuit was filed, the District Executive Leadership Team “decided via consensus to amend . . . policy [JICA] in order to avoid legal challenges.” Birhanzel Decl. ¶ 5; *see also* ECF No. 116 (HSD2 Answer) ¶¶ 157-58 (directly admitting that the amendment was intended to moot Plaintiff’s claim). Superintendent Birhanzel further stated that the District “has no intention to reimpose a dress code ban on displaying or referencing weapons at school.” Birhanzel Decl. ¶ 6. Nevertheless, as outlined above, the District *did in fact continue to maintain such a dress code ban* in its student-facing Code of Conduct for *sixteen more months*, until called out by the Court for its inconsistency. And, *even to this day*, several District schools continue to ban such expression.

It hardly needs argument to conclude from these facts that the District has failed to carry its heavy burden on the first prong of the voluntary mootness doctrine. Neither Plaintiff, nor the Court is required to accept the District’s self-serving assertions that its course of conduct was nothing more than a regrettable “oversight.” Mot. at 6. Nor is there anything in the record to back up the notion that Policy JICA is “controlling” in any meaningful sense. While the District now highlights boilerplate language in the Code of Conduct indicating that it “may not

be able to keep pace with changes to school policy over the lifetime of the document and that the code will not be reprinted after every modification to school policy,” *id.*, that hardly matters. First, the Code of Conduct *was reissued* for the 2024-25 school year, many months after the December 2023 revisions to Policy JICA; yet the Code continued to flatly ban protected speech. But even more important, the whole idea that it was incumbent on students, parents, and staff to check for inconsistencies between what was plainly stated in the Code of Conduct versus other “controlling” official policies like Policy JICA, tucked away on a Board of Education document clearinghouse, can easily support an inference of less-than-good faith on the District’s part. At best, what appears to have happened is that District leadership cynically sought to rid itself of Plaintiff’s First Amendment challenge through an expedient “amendment” to an official “controlling” document, and promptly forgot to tell anyone with operational authority over students about the change. At worst, the District consciously sought to have its cake and eat it too: mooting out Plaintiff’s claim, while simultaneously ensuring that *the facts on the ground for students and staff did not change at all.*

Moreover, Defendants’ intentions aside, there is no indication in the record that in the many months following the purported revision to the “controlling” rules, students or families seeking guidance on appropriate dress would have disregarded the public-facing Code of Conduct, and instead dutifully searched through the go.boarddocs.com website just to confirm, only then noticing and finding the official “controlling” JICA policy, along with the concomitant lawyerly statement that that

source prevailed over the Code of Conduct. Indeed, it appears that in considering the District's motion to dismiss, the Court did exactly what a reasonable student would do if looking for dress code information: search the District's website, which would have led to the Code of Conduct, not to Policy JICA. Grunewald Decl. ¶¶ 9-14. Just like a student would do, the Court found a version of the rules that prohibited references to weapons. ECF No. 108 at 21. Neither the Court nor a student could be faulted for not then discovering through deep internet sleuthing that the "real" policy was not on the District's website at all, but was hosted on the go.boarddocs.com site, under several layers of navigation.

Nor is there any indication that staff at District schools were aware of the purported change to Policy JICA. Indeed, given that several district schools' websites *even today* continue to state a flat ban on clothing that includes expression referring to weapons, all evidence is to the contrary. As the court held under indistinguishable circumstances in *Lopez v. Candaele*, "This case is . . . not mooted by Defendants' recent revelation that [a challenged] Policy was supposedly repealed in 2007. [T]he Policy continues to appear on the District's and LACC's websites. Thus, Plaintiff, and other students and employees, can reasonably believe they are subject to the Policy and experience a chilling effect." No. CV 09-0995-GHK (FFMx), 2009 WL 10698502, at *2 (C.D. Cal. July 10, 2009) (internal citation omitted), *rev'd on other grounds*, 630 F.3d 775 (9th Cir. 2010).

On top of all that, as alleged in the complaint, there are other indicia that the District's purported rescission of the Reference to Weapons Policy in December 2023

was merely a temporary strategic response to litigation. *See* FAC ¶¶ 159(a)-(d) (highlighting that the purported change to Policy JICA may have violated Colorado open meetings laws, that it was undertaken in a hasty and rushed manner in the immediate aftermath of litigation, and that the Reference to Weapons Policy had been a long-standing key pillar of the District’s student codes). It is *the District’s burden* to show that there is “no reasonable expectation that the alleged violation will recur.” The District has failed to carry that burden and the Court should not reconsider its ruling.

B. The District Has Not Carried its Burden on Prong 2: It Has Done Nothing to “Completely and Irrevocably Eradicate” the Effects of the “Prior” Policy

Even if the District had carried its heavy burden on Prong 1 (which it has not), Plaintiff’s Fourth claim for relief would still not be moot. That is because, as the Supreme Court has made clear, voluntary cessation of unconstitutional conduct will moot a claim only if *both prongs* of the voluntary mootness test are met. *See, e.g., Davis*, 440 U.S. at 631. In other words, if there exist lingering effects of the “prior” policy that could be remediated through equitable relief, the claim may continue. That test is easily met here.

(1) *The Chilling Effects Caused by the “Prior” Reference to Weapons Policy Remain Unresolved.*

First, it is well settled that to meet the eradication prong, a government defendant bears the burden of showing that any “chilling effects caused by [the repealed policy] no longer exist.” *Charles v. Daley*, 749 F.2d 452, 458 (7th Cir. 1984). This rule makes perfect sense, given that an expressive chilling effect is, by its very nature, a continuing injury—by threatening punishment for protected

speech, an unconstitutional government policy or practice puts potential speakers in a position to self-censor to avoid harm. *See Dombrowski v. Pfister*, 380 U.S. 479, 486-89 (1965). That is, of course, what happened here. FAC ¶ 53 (“It is likely that students attending District schools, including The Vanguard School and other charter schools, have been chilled in the exercise of their First Amendment rights to freedom of expression by fear of punishment under the Reference to Weapons Policy.”).

Those internal psychological effects do not disappear automatically on their own. If, for example, students in a school district are aware for years that speech in favor of Second Amendment rights may be met with disciplinary consequences, their tendency to self-censor to avoid those consequences will remain, unless and until there is a *credible, public repudiation* of school authorities’ prior system of censorship. Especially where, as here, the government’s supposed “cessation” of its prior censorship *is kept a secret*, and there are no affirmative efforts to reassure potential speakers that they are now free to express themselves, it is easy to see that there exist significant lingering “effects” of the prior policy that can and should be redressed by judicial intervention.

Indeed, allowing a government defendant to voluntarily moot a claim based on the chilling effects of an unconstitutional policy or practice would create perverse incentives wholly unknown to the law. Once a government agency has successfully cowed a speaker through threats of punitive consequences, the agency could then cease its threats, shielding itself from judicial review while the chilling effect of its

past conduct continues to silence the expression of disfavored views. This is not, and cannot be, the law.

There is more work to be done to address the lingering effects of the District’s “prior” reference to weapons policy. Accordingly, Plaintiff’s Fourth Claim for Relief is not moot. *See, e.g., Eagle Point Educ. Ass’n v. Jackson Co. Sch. Dist. No. 9*, No. 12-cv-00846-CL, 2013 WL 3348357, at *5 (D. Oreg., July 1, 2013) (“[T]he second element of the voluntary cessation exception has not been satisfied. . . . [P]laintiffs here have alleged that the District’s policies operated to limit their right to speech. Thus, the fact that the board rescinded the complained of polic[i]es has not irrevocably eradicated the effects of the alleged violations.”).

(2) *Injunctive Relief to Expunge Unlawfully-Entered Disciplinary Records Remains Viable.*

Second, it is also well settled that a claim seeking expungement of records reflecting discipline imposed under a prior policy, allegedly in violation of the First Amendment, remains viable after repeal of the policy. *See, e.g. Flint v. Dennison*, 488 F.3d 816, 824 (9th Cir. 2007) (“[W]e retain the ability to grant relief in a legally significant way—to wit, ordering the expungement from Flint’s record all evidence of his . . . censure [under allegedly mooted policy]”); *cf. Fikre v. FBI*, 904 F.3d 1033, 1040 (9th Cir. 2018) (where a voluntarily-discontinued practice left a residue of “stigmatiz[ation]” affecting the plaintiff, the government failed to carry its burden on the eradication prong). In its motion to dismiss the complaint, the District did not contest that a request for expungement of disciplinary records would present a live case or controversy, defeating mootness even after the alleged rescission of the

Reference to Weapons policy. ECF No. 53 at 24-25. Instead, the District simply represented that it had no authority over any disciplinary records related to Plaintiff personally. *Id.* at 25 n.7. This misses the mark for the simple reason that Plaintiff's facial overbreadth challenge is not limited to seeking relief for himself personally, but also extends to vindicating the rights of third parties whose rights have been violated under the overbroad policy. *See, e.g., Frank v. Lee*, 84 F.4th 1119, 1151 (10th Cir. 2023) ("The overbreadth doctrine enables persons who are themselves unharmed by the defect in a statute nevertheless to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.") (cleaned up); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *cf. Prison Legal News*, 944 F.3d at 883 (rejecting claim that request for broad injunctive relief defeated voluntary mootness because the injunctive relief was sought "absent a facial challenge").

As alleged in the complaint, given the length of time the policy has been in place, it is highly likely that other students have been disciplined for violating the Reference to Weapons policy in violation of the First Amendment. FAC ¶ 52. Without proof that it has expunged those students' disciplinary records, the District has not carried its burden of showing that the effects of its prior policy have been completely and irrevocably eradicated. For this reason alone, Plaintiff's Fourth Claim for Relief is not moot.²

² In its motion to reconsider, the District seems to suggest that the Court's alleged "misunderstanding of the underlying jurisdictional facts" concerning the

CONCLUSION

The Court should deny the District's Motion to Reconsider. In the event the Court is inclined to grant any part of any the District's motion, Plaintiff further requests leave to conduct discovery into the facts underlying the claim of mootness, including deposing the individuals responsible for the purported repeal of the Reference to Weapons Policy, deposing the individuals responsible for failing to make the repeal publicly available on the District's website, conducting discovery into disciplinary records related to the former policy and their expungement, conducting third party discovery into any lingering chill on Second-Amendment related speech caused by the prior policy, and similar issues.

effective repeal (or not) of the Reference to Weapons Policy justifies reconsideration of the mootness defense as applied to both Plaintiff's facial overbreadth challenge to the Reference to Weapons Policy set forth in the Fourth Claim for Relief *and* a separate claim seeking an injunction to prohibit enforcement of an as-applied decision barring Plaintiff from displaying specific patches, including the Gadsden Flag, on his backpack as set forth in Plaintiff's Third Claim for Relief. FAC ¶¶ 197-205. There is no plausible argument that the alleged repeal of the Reference to Weapons Policy somehow mooted Plaintiff's Third Claim (as opposed to his Fourth Claim). The Third Claim for relief centers on Defendants' decision to ban Plaintiff from displaying the Gadsden Flag and variations of the Gadsden Flag. The Flag does not include any references to, or images of, weapons. Accordingly, the decision to ban it, quite obviously, had absolutely nothing to do with the Reference to Weapons Policy. Instead, as detailed in the FAC, the decision to ban the Gadsden Flag was taken, at least in part, pursuant to a District policy, announced shortly before the start of the 2023-24 school year by Defendant Claudio, to ban the Gadsden Flag and other expression and symbols that the District associates with conservative points of view. *Id.* ¶¶ 34-41, 108-109, 180. As the "Dress Code Policy Update" presentation by Defendant Claudio attached to the complaint makes plain, these decisions were not related to any ban on expression related to weapons. *Id.* Ex. 11. Accordingly, even if the Court were to reconsider its ruling on mootness in the context of Plaintiff's facial challenge set forth in the Fourth Claim, there is absolutely no basis (and the District does not point to any) to reconsider the Third Claim.

**CERTIFICATION REGARDING THE USE OF ARTIFICIAL
INTELLIGENCE (AI) FOR DRAFTING**

Undersigned counsel hereby certifies that no portion of this filing was drafted
by AI.

DATED this 6th day of June 2025.

Respectfully submitted,

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