

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TYLER CHASE HARPER, a minor, by
and through his parents, RON and
CHERYL HARPER,

Plaintiff,

v.

POWAY UNIFIED SCHOOL
DISTRICT; et al.,

Defendants.

Civil No. 04CV1103 JAH(POR)

**ORDER DENYING PLAINTIFF'S
MOTION FOR
RECONSIDERATION
[DOCS. # 161, 162]**

INTRODUCTION

Now pending before the Court is the motion by plaintiff Kelsie K. Harper¹ (hereinafter "plaintiff") for reconsideration of this Court's prior grant of summary judgment in favor of defendants, and denial of plaintiff's own summary judgment motion, as to her first and second causes of action contained in the second amended complaint. The motion has been fully briefed by the parties. After a careful consideration of the pleadings and relevant exhibits submitted, and for the reasons set forth below, this Court DENIES plaintiff's motion in its entirety.

¹ The original complaint was filed by Tyler Chase Harper while he was a student at Poway High School but has since graduated from that school. Kelsie K. Harper, Tyler Chase Harper's younger sister who is currently a student at Poway High School, was added as a plaintiff in the second amended complaint. Tyler Chase Harper was subsequently dismissed as a plaintiff based on this Court's finding that his claims became moot when he graduated from Poway High School. Therefore, the only remaining plaintiff is Kelsie K. Harper, suing through her parents Ron and Cheryl Harper.

BACKGROUND²

1
2 The instant complaint, initially filed on June 2, 2004, stems from an incident that
3 occurred in April 2004, during which Tyler Chase Harper (hereinafter “Harper”), Kelsie K.
4 Harper’s older brother, was detained at Poway High School when he wore a t-shirt bearing the
5 words “Homosexuality is shameful. Romans 1:27” on the front and “Be ashamed. Our school
6 has embraced what God has condemned” on the back. The complaint alleged defendants
7 violated Harper’s constitutional rights, including his rights to free speech and free exercise of
8 religion under the First Amendment. On November 4, 2004, this Court granted in part and
9 denied in part defendants’ motion to dismiss the complaint and denied plaintiff’s motion for
10 preliminary injunction. See Harper v. Poway Unified School District (“Harper I”), 345
11 F.Supp.2d 1096 (S.D.Cal. 2004). An amended complaint was filed on November 17, 2004,
12 but was subsequently dismissed. Plaintiff’s second amended complaint, the operative pleading
13 here, was filed on November 4, 2005, and added Kelsie K. Harper as a plaintiff.

14 The parties then filed cross-motions for summary judgment. Prior to the filing of the
15 parties’ opposition briefs to the cross motions, the Ninth Circuit, on April 20, 2006, affirmed
16 this Court’s order denying plaintiffs’ motion for preliminary injunction. See Harper v. Poway
17 Unified School District (“Harper II”), 445 F.3d 1166 (9th Cir. 2006). After the summary
18 judgment motions were fully briefed and oral argument was entertained, the Court issued an
19 order, filed on January 24, 2007, dismissing Tyler Chase Harper as a plaintiff, denying
20 plaintiff’s summary judgment motion in full and granting in part and denying in part
21 defendant’s summary judgment motion. See Doc. # 142. Judgment was entered on February 6,
22 2007. Plaintiff filed an appeal of this Court’s January 24, 2007 order. Doc. # 145.

23 On March 5, 2007, the United States Supreme Court vacated the Ninth Circuit’s
24 April 20, 2006 decision in Harper II, which affirmed the denial of plaintiff’s preliminary
25 injunction motion, on the grounds that the Ninth Circuit’s April 20, 2006 decision was
26 rendered moot by this Court’s summary judgment order filed on January 24, 2007. See Harper

27
28 ² Because this Court has previously set forth a detailed factual history of the events surrounding this case
and the parties are clearly well-versed in those facts, this Court presents only a brief procedural background here.

1 ex rel. Harper v. Poway Unified School Dist., 127 S.Ct. 1484 (2007). Plaintiff subsequently
2 requested that this Court indicate its willingness to entertain a motion for reconsideration, a
3 prerequisite required before plaintiff could seek a limited remand from the Ninth Circuit giving
4 this Court's jurisdiction to hear and decide plaintiff's proposed motion for reconsideration. *See*
5 Docs. # 151, 152. Thereafter, this Court indicated its willingness to entertain plaintiff's
6 reconsideration motion, *see* Doc. # 154, and, on May 29, 2007, the Ninth Circuit issued an
7 order remanding this case to this Court for the limited purpose of considering plaintiff's motion
8 for reconsideration. *See* Doc. # 159.

9 Plaintiff filed her reconsideration motion on June 22, 2007, and, at this Court's
10 direction, filed a supplement to her motion on July 20, 2007. *See* Docs. # 161, 162.
11 Defendants filed an opposition to plaintiff's motion on August 10, 2007. *See* Doc. # 167. The
12 ACLU Foundation of San Diego & Imperial Counties submitted, on August 10, 2007, an
13 application to file a brief as *amicus curiae*, which this Court granted on August 27, 2007. *See*
14 Docs. # 168, 171, 173. Plaintiff filed a reply to defendants' opposition on August 17, 2007.
15 *See* Doc. # 169. The motion was thereafter taken under submission without oral argument.
16 *See* Doc. # 171; CivLR 7.1(d.1).

17 DISCUSSION

18 Plaintiff seeks, pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure,
19 reconsideration of this Court's denial of her motion for summary judgment, and grant of
20 defendants' motion for summary judgment on her first and second causes of action.³ This
21 Court, in denying plaintiff's motion for summary judgment and granting defendant's cross-
22 motion for summary judgment on these two causes of action based its decision, for the most
23 part, on the Ninth Circuit's now vacated decision which contained findings this Court
24 considered to be law of the case. *See* Doc. # 142.

25 //

26 //

27
28 ³ The parties agree that plaintiff has met the threshold requirements for seeking reconsideration under Rule 60(b)(5). *See* Doc. # 162 at 1; Doc. # 167 at 1; *see also* Fed.R.Civ.P. 60(b). This Court also agrees. Therefore, this Court deems it unnecessary to address the threshold requirements.

1 I. Summary Judgment Legal Standard

2 The legal standard applied to summary judgment motions has not changed in any
3 significant way since this Court's January 24, 2007 order was filed. As this Court previously
4 explained, Federal Rule of Civil Procedure 56 empowers the Court to enter summary judgment
5 on factually unsupported claims or defenses, and is appropriate if the "pleadings, depositions,
6 answers to interrogatories, and admissions on file, together with the affidavits, if any, show that
7 there is no genuine issue as to any material fact and that the moving party is entitled to
8 judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317,
9 325, 327 (1986). A fact is material when it affects the outcome of the case and is determined
10 by the substantive law governing the claim or defense. Anderson v. Liberty Lobby, Inc., 477
11 U.S. 242, 248 (1986); ; Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997); T.W. Electrical
12 Service, Inc. v. Pacific Electrical Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). When
13 ruling on a summary judgment motion, the Court must examine all the evidence in the light
14 most favorable to the non-moving party. Celotex, 477 U.S. at 325. The Court cannot engage
15 in credibility determinations, weighing of evidence, or drawing of legitimate inferences from the
16 facts; these functions are for the jury. Anderson, 477 U.S. at 255.

17 The party moving for summary judgment bears the initial burden of establishing an
18 absence of a genuine issue of material fact either by (1) presenting evidence to negate an
19 essential element of the non-moving party's case; or (2) showing that the non-moving party has
20 failed to sufficiently establish an essential element to the non-moving party's case. Celotex, 477
21 U.S. at 322-23. Where the party moving for summary judgment does not bear the burden of
22 proof at trial, the party may show that no genuine issue of material fact exists "by pointing out
23 through argument[] the absence of evidence to support the plaintiff's claims." Devereaux v.
24 Abbey, 263 F.3d 1070, 1076 (9th Cir. 2001)(*en banc*). A moving party without the burden of
25 proof at trial is not required to produce evidence showing the absence of a genuine issue of
26 material fact, nor is it required to offer evidence negating the non-moving party's claim. Lujan
27 v. National Wildlife Fed'n, 497 U.S. 871, 885 (1990); United Steelworkers v. Phelps Dodge
28 Corp., 865 F.2d 1539, 1542 (9th Cir. 1989).

1 However, where the moving party bears the burden of proof at trial, the moving party
2 must present compelling evidence in order to obtain summary judgment in its favor. United
3 States v. One Residential Property at 8110 E. Mohave, 229 F.Supp.2d 1046, 1047 (S.D.Cal.
4 2002)(citing Torres Vargas v. Santiago Cummings, 149 F.3d 29, 35 (1st Cir. 1998). Failure
5 to meet this burden results in denial of the motion and the Court need not consider the non-
6 moving party's evidence. Id. at 1048.

7 Once the moving party meets the requirements of Rule 56, the burden shifts to the party
8 resisting the motion, who "must set forth specific facts showing that there is a genuine issue for
9 trial" but "[t]he mere existence of a scintilla of evidence in support of the non-moving party's
10 position is not sufficient" to meet the burden and cannot oppose a properly supported summary
11 judgment motion by "rest[ing] on mere allegations or denials of his pleadings." Anderson, 477
12 U.S. at 252, 256. Without specific facts to support the conclusion, a bald assertion of the
13 "ultimate fact" is insufficient. See Schneider v. TRW, Inc., 938 F.2d 986, 990-91 (9th Cir.
14 1991). Genuine factual issues must exist that "can be resolved only by a finder of fact because
15 they may reasonably be resolved in favor of either party." Id. at 250. If the non-moving party
16 fails to make a sufficient showing of an element of its case, the moving party is entitled to
17 judgment as a matter of law. Celotex, 477 U.S. at 325.

18 Cross-motions for summary judgment do not necessarily permit the judge to render
19 judgment in favor of one side of the other; the Court must consider each motion separately "on
20 its own merits" to determine whether any genuine issue of material fact exists. Fair Housing
21 Council of Riverside County, Inc. v. Riverside Two, 249 F.3d 1132, 1136 (9th Cir. 2001);
22 Starsky v. Williams, 512 F.2d 109, 112 (9th Cir. 1975). When evaluating cross-motions for
23 summary judgment, the court must analyze whether the record demonstrates the existence of
24 genuine issues of material fact, both in cases where both parties assert that no material factual
25 issues exist, as well as where the parties dispute the facts. See Fair Housing Council of Riverside
26 County, 249 F.3d at 1136 (citing Chevron USA, Inc. v. Cayetano, 224 F.3d 1030, 1037 & n.5
27 (9th Cir. 2000)).

28 //

1 **2. Analysis**

2 Plaintiff moves for reconsideration of this Court's decision on the parties' cross-motions
3 for summary judgment concerning (A) her first cause of action based on free speech and (B) her
4 second cause of action based on free exercise of religion.

5 **A. Freedom of Speech**

6 In determining that plaintiff had failed to demonstrate a likelihood of success on the
7 merits of plaintiff's free speech claim, this Court, in its order denying plaintiff's motion for
8 preliminary injunction relied upon the holding in Tinker v. Des Moines Indep. Cmty. Sch.
9 Dist., 393 U.S. 503 (1969). Under Tinker, a school may censor speech if the speech
10 "materially disrupts classwork or involves substantial disorder or invasion of the rights of
11 others." Id., 393 U.S. at 513. Although this Court found that the evidence of record was
12 sufficient to allow school officials to "reasonably ... forecast substantial disruption of or material
13 interference with school activities," Harper I, 345 F.Supp.2d at 1120, the Ninth Circuit, also
14 relying upon Tinker, based its affirmation of this Court's ruling⁴ instead "on a different
15 provision-that schools may prohibit speech that 'intrudes upon ... the rights of other students.'"⁵
16 Harper II, 445 F.3d at 1175. In so doing, the Ninth Circuit found that "the School's restriction
17 of Harper's right to carry messages on his T-shirt was permissible under Tinker" because
18 "harassment on the basis of sexual orientation adversely affects the rights of public high school
19 students" and because the T-shirt worn by Harper fell under the category of T-shirts "that
20 flaunt demeaning slogans, phrases or aphorisms relating to a core characteristic of particularly
21 vulnerable students ... that may cause them significant injury." Id. at 1181-82. The Ninth
22 Circuit determined there was no likelihood of success on the merits of plaintiff's free speech
23

24 ⁴ As previously noted, the United States Supreme Court vacated and remanded the Ninth Circuit's
25 affirmation decision as moot. *See Harper ex rel. Harper*, 127 S.Ct. 1484. "[A]t minimum, a vacated opinion still
26 carries informational and perhaps even persuasive or precedential value." DHX, Inc. v. Allianz AGF MAT, Ltd.,
425 F.3d 1169, 1176 (2005)(internal citations omitted). Therefore, despite its mootness, this Court may still rely
upon the Ninth Circuit's reasoning as persuasive authority.

27 ⁵ This Court is mindful that it is faced with a unique situation here, in that it is privy to the Ninth Circuit's
28 views on the issues presented in this motion before its own opinion is issued. Thus, this Court must balance its
own views with those views the Ninth Circuit has already articulated, anticipating that the Ninth Circuit's views
will likely be reaffirmed.

1 claim because the wearing of the T-shirt at issue “colli[des] with the rights of other students’
2 in the most fundamental way,” explaining that:

3 [p]ublic school students who may be injured by verbal assaults on the basis of a
4 core identifying characteristic such as race, religion, or sexual orientation, have a
5 right to be free from such attacks while on school campuses. As Tinker clearly
6 states, students have the right to ‘be secure and to be let alone.’ Being secure
7 involves not only freedom from physical assaults but from psychological attacks
8 that cause young people to question their self-worth and their rightful place in
9 society. The ‘right be let alone’ has been recognized by the Supreme Court, of
10 course, as ‘the most comprehensive of rights and the right most valued by civilized
11 men.’

12 Harper II, 445 F.3d at 1178 (quoting Tinker, 393 U.S. at 508). The court further found that
13 “a school has the right to teach civic responsibility and tolerance as part of its basic educational
14 mission; it need not as a quid pro quo permit hateful and injurious speech that runs counter to
15 that mission.” Id. at 1186.

16 Plaintiff, in her moving papers, urges this Court to decline to follow the Ninth Circuit’s
17 reasoning in its now vacated opinion because its articulated standard is “overly-broad [and]
18 viewpoint discriminatory” and because implementation of such a standard would “categorically
19 remove[] certain viewpoints from the reach of First Amendment protection on campus.” Doc.
20 # 162 at 3. Plaintiff contends the standard articulated by the Ninth Circuit⁶ is “inherently
21 vague and provides an unworkable guideline for public school officials” because it attempts to
22 distinguish between “offensive” and “derogatory or demeaning” speech which cannot be
23 distinguished and because it limits the restriction to remarks directed at “minority status” or
24 “chore characteristics” which are simply not definable. Id. at 4-5. This Court does not agree
25 with plaintiff’s contention that the decision was in error.

26 The rationale behind the Ninth Circuit’s affirmation allowing the school district to

27 ⁶ Defendants, in their opposition, do not specifically address the Ninth Circuit’s opinion which relied
28 substantially upon Tinker’s “rights of others” prong, instead focusing on the Supreme Court’s decision in Morse
v. Frederick, 127 S.Ct. 2618 (2007). See Doc. # 167. Based on this lack of argument, plaintiff claims, in reply,
that defendants have abandoned their argument in support of applying Tinker’s “rights of others” prong. See Doc.
169 at 1-2 & n.2. However, although defendants do not specifically discuss the applicability of re-applying the
Ninth Circuit’s reasoning under Tinker’s “rights of others” prong, defendants claim that the Morse decision
implicitly included the prong when it set “new legal guidelines” because it took “into account the ‘rights of others’
to be free from injury” by giving schools the right to restrict injurious speech as long as there is a compelling
government interest of national importance to do so. See Doc. # 167 at 11-12. Therefore, this Court construes
defendants’ arguments as implicitly supporting the Ninth Circuit’s reasoning. Accordingly, plaintiff’s abandonment
contention fails.

1 restrict the speech at issue is based on the premise that schools must insulate vulnerable
2 students from harmful speech at school. *See Harper II*, 445 F.3d at 1178. The United States
3 Supreme Court recently affirmed that such insulation is constitutional. *See Morse v. Frederick*,
4 127 S.Ct. 2618 (2007). In *Morse*, the student plaintiff was suspended after he refused the
5 principal's direction to take down a banner reading "BONG HiTS 4 JESUS" which had been
6 unfurled at a school-sanctioned and school-supervised event. *Id.*, 127 S.Ct. at 2622-23. The
7 Supreme Court determined a school could, consistent with the First Amendment, restrict
8 student speech that reasonably could be interpreted as advocating illegal drug use. *Id.* at 2624.
9 After reviewing *Tinker*, along with other the Supreme Court cases addressing student speech,⁷
10 the *Morse* Court found the speech at issue there could properly be restricted due to a strong
11 government interest in restricting such speech. *Id.*, 127 S.Ct. at 2628.

12 In her supplemental brief,⁸ plaintiff contends that the decision in *Morse* is not relevant
13 to the issues in the instant case because *Morse* carved out a "very narrow" exception to the
14 school speech standard outlined in *Tinker* which does not apply here. Doc. # 165 at 1.
15 Defendants claim that the reasoning in *Morse* actually supports defendants' contrary position.
16 *See* Doc. # 167 at 6. Defendants posit that the *Morse* holding "stands for the proposition that
17 the well-being of students is of the utmost importance ... [a]nd where there is a strong, perhaps
18 compelling government interest in restricting a particular viewpoint⁹ because the speech may

20 ⁷ The other cases discussed in *Morse* included, *inter alia*, *Bethel School Dist. No. 403 v. Fraser*, 478 U.S.
21 675 (1986) and *Hazelwood School Dist.v. Kuhlmeier*, 484 U.S. 260 (1988). *Morse*, 127 S.Ct. at 2628.

22 ⁸ Because the *Morse* decision was issued after plaintiff's reconsideration motion was filed, this Court
23 directed plaintiff to file a supplemental brief addressing the applicability of that case to the facts here. *See* Doc.
164.

24 ⁹ Plaintiff argues that the Ninth Circuit's reasoning "categorically removed certain viewpoints from the
25 reach of First Amendment protection on campus." Doc. # 162 at 3. Defendants point out, in opposition, that after
26 plaintiff's renewed reconsideration motion was filed, the Supreme Court, in *Morse*, 127 S.Ct. 2618, determined
27 that a particular viewpoint can properly be restricted at school if there is a compelling government interest in doing
28 so and, thus, arguments regarding restriction of particular viewpoints can no longer be made. Doc. # 167 at 5.
Plaintiff argues that its viewpoint discrimination argument has not been invalidated *per se* by the *Morse* decision,
disagreeing that the Supreme Court, in *Morse*, intended to make a "sweeping change in First Amendment
jurisprudence" by invalidating all viewpoint discrimination arguments. However, this Court construes defendants
as simply claiming plaintiff's viewpoint discrimination argument here must necessarily fail because there is a
compelling government interest in restricting it and not that all viewpoint discrimination arguments must fail. *See*
Doc. # 169 at 5; Doc. # 167 at 5. Therefore, this Court finds plaintiff's argument unavailing.

1 harm children, a school may take steps to restrict the speech [due to] its unique setting.” Id.
2 at 5. Defendants assert that, given the Morse ruling, it follows that steps may also be properly
3 taken to restrict the speech at issue here. Id. at 6. Although this Court’s review of Morse
4 reveals that the majority made it clear its decision is limited to speech concerning illegal drug
5 use, *see id.*, 127 S.Ct. at 2628-29, this Court agrees with defendants that the reasoning
6 presented in Morse lends support for a finding that the speech at issue in the instant case may
7 properly be restricted by school officials if it is considered harmful.

8 The Ninth Circuit, in its now vacated opinion, determined the speech at bar was properly
9 restricted based on the harm it might cause to homosexual students due to its demeaning
10 nature. *See Harper II*, 445 F.3d at 1180-81. The Ninth Circuit opined that the issue of
11 whether the speech is harmful due to its demeaning nature “hardly seem[s] like [a] question[]
12 reasonably subject to dispute.” Harper II, 445 F.3d at 1180 (quoting Jespersen v. Harrah’s
13 Operating Co., Inc., 444 F.3d 1104, 1117 (9th Cir. 2006 (Kozinski, J., dissenting))). This
14 Court finds the Ninth Circuit’s opinion in Harper II persuasive.

15 In this Court’s view, a school’s interest in protecting homosexual students from
16 harassment is a legitimate pedagogical concern that allows a school to restrict speech expressing
17 damaging statements about sexual orientation and limiting students to expressing their views
18 in a positive manner. There is no doubt in this Court’s mind that the phrase “Homosexuality
19 is shameful” is disparaging of, and emotionally and psychologically damaging to, homosexual
20 students and students in the midst of developing their sexual orientation in a ninth through
21 twelfth grade, public school setting. Additionally, contrary to argument by plaintiff and *amicus*
22 *curiae*, the substantial disruption test set forth in Tinker is not absolute. Morse, 127 S.Ct.
23 at 2626-27. The Supreme Court cases cannot be read to have abandoned Tinker’s “rights of
24 others to be left alone” prong under the guise of religion and free speech protections afforded
25 by the First Amendment. Morse, rather, affirms that school officials have a duty to protect
26 students, as young as fourteen and fifteen years of age, from degrading acts or expressions that
27 promote injury to the student’s physical, emotional or psychological well-being and
28 development which, in turn, adversely impacts the school’s mission to educate them.

1 Therefore, this Court finds that, based on the entire record presented, the district
2 properly restricted Harper's negative speech for the legitimate pedagogical concern of promoting
3 tolerance and respect for differences among students. This Court finds its prior grant of
4 summary judgment in favor of defendants on this issue is not in error. Accordingly, plaintiff's
5 motion for reconsideration on her free speech claim is DENIED.

6 **B. Free Exercise of Religion**

7 In denying plaintiff's preliminary injunction motion, this Court determined that, because
8 plaintiff's free speech claim lacked merit, plaintiff's free exercise claim could not be deemed a
9 "hybrid" claim, which requires that a law burdening both the free exercise of religion and
10 another constitutionally protected right, such as free speech, must be subject to a strict scrutiny
11 analysis as opposed to a rational basis test. See Harper I, 345 F.Supp.2d at 1120-21 (citing,
12 *inter alia*, Employment Div. Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 881
13 (1990)). This Court thus found plaintiff's free exercise claim failed under a rational basis test.
14 Id. The Ninth Circuit, in affirming this Court's decision on preliminary injunction, did not
15 apply a rational basis test to the facts here but, instead, determined that it "need not decide
16 whether [plaintiff's] free exercise claim is properly deemed a 'hybrid' claim," because, whether
17 or not the claim is hybrid, defendants' actions survive a strict scrutiny analysis. Harper II, 445
18 F.3d at 1188 (citing Sherbert v. Werner, 374 U.S. 398, 402-03 (1963)). The Ninth Circuit
19 explained that:

20 [b]ecause there is no evidence that the School's restriction on Harper's wearing
21 of his T-shirt substantially burdened a religious practice or belief, and because the
22 School has a compelling interest in providing a proper educational environment
23 for its students and because its actions were narrowly tailored to achieve that end,
it would appear the district court did not abuse its discretion in finding that
Harper failed to demonstrate a likelihood of success on the merits as to his free
exercise of religion claim.

24 Id. at 1189 (footnote omitted). Specifically, the Ninth Circuit determined the record contains
25 "no evidence the School 'compell[ed] affirmation of a repugnant belief,' 'penalize[d] or
26 discriminate[d] against [plaintiff] because [she] hold[s] religious views abhorrent to the
27 authorities,' or 'condition[ed] the availability of benefits upon [her] willingness to violate a
28 cardinal principle of [her] religious faith.'" Id. at 1188 (quoting Sherbert, 374 U.S. at 402,

1 406). The Ninth Circuit further found, based on the record presented, that the School did not
 2 “lend its power to one or the other side in controversies over religious authority or dogma,’ or
 3 ‘punish the expression of a religious doctrine its believes to be false.’” Id. (quoting Smith, 494
 4 U.S. at 877).

5 In addition, after reviewing plaintiff’s allegations of a violation of her right to free
 6 exercise of religion based on statements made by a deputy sheriff and a school official¹⁰ to Tyler
 7 Chase Harper while he was detained at school, the court found “[t]he record ... does not
 8 support Harper’s claim that the School violated his free exercise right by ‘attempting to change’
 9 his religious views,” noting that “[t]here is no evidence here that the school officials’ comments
 10 were associated with a religious, as opposed to a secular, purpose” and that “[t]heir affidavits
 11 demonstrate that the School acted in order to maintain a secure and healthy learning
 12 environment for all its students, not to advance religion.” Id. at 1190.

13 On reconsideration, plaintiff presents no new or additional arguments or evidence to
 14 contradict these prior findings. *See* Doc. # 162 at 13-15; Doc. # 169 at 8-9. Defendants
 15 contend that the record still clearly reflects defendants’ “acts did not substantially burden
 16 religion, and were narrowly tailored to serve a compelling government interest.” Doc. # 167
 17 at 12. This Court agrees with defendants. In this Court’s view, the record contains no
 18 evidence to support a finding that defendants’ acts fail to be sufficient under a strict scrutiny
 19 analysis. Therefore, whether or not Sherbert applies, this Court finds plaintiff’s free exercise
 20 claim fails as a matter of law.¹¹ Accordingly, plaintiff’s motion for reconsideration of this
 21 Court’s prior grant of summary judgment in favor of defendants and denial of plaintiff’s own
 22 motion for summary judgment on her free exercise of religion claim is DENIED.

23 //

24 //

25
 26 ¹⁰ These allegations concern statements made to plaintiff Tyler Chase Harper by Detective Sheriff Norman
 Hubbert and Assistant Vice Principal Giles. *See* Sec.Am.Compl. ¶¶ 52, 56-58; Harper II, 445 F.3d at 1172-73.

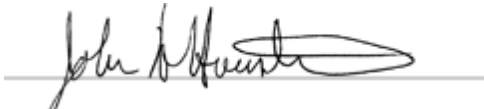
27
 28 ¹¹ However, because this Court finds plaintiff’s free speech claim fails as a matter of law, plaintiff’s free
 exercise claim cannot be considered a hybrid claim and, thus, defendants’ acts need only meet a rational basis test.
See Smith, 494 U.S. at 881. This Court again finds, as it found previously, that defendants’ acts clearly are
 rationally related a legitimate pedagogical concern. *See* Harper II, 345 F.Supp.2d at 1120-21.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION AND ORDER

Based on the foregoing, IT IS HEREBY ORDERED that plaintiff's motion for reconsideration [docs. # 161, 162] is **DENIED** in its entirety.

Dated: February 11, 2008



JOHN A. HOUSTON
United States District Judge