UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

TIMOTHY ALLEN MORRISON, II by and through his next friends, TIMOTHY MORRISON and MARY MORRISON; TIMOTHY and MARY MORRISON; BRIAN NOLEN; and DEBORA JONES

Plaintiffs

v.

BOARD OF EDUCATION OF BOYD COUNTY, KENTUCKY

Defendants

SARAH ALCORN, WILLIAM CARTER, DAVID FANNIN, LIBBY FUGETT, TYLER McCLELLAND, and JANE DOE

Intervenor-Defendants

Civil Action No. 05-38-DLB

ELECTRONICALLY FILED

INTERVENOR-DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

James D. Esseks
Sharon M. McGowan
Lesbian & Gay Rights Project
ACLU Foundation
125 Broad Street
New York, NY 10004

David A. Friedman
ACLU of Kentucky Foundation, Inc.
2400 National City Tower
101 S. Fifth Street
Louisville, KY 40202

Tamara Lange*
Lesbian & Gay Rights Project
ACLU Foundation
1663 Mission St., Ste. 460
San Francisco, CA 94103

Lili S. Lutgens
ACLU of Kentucky Foundation, Inc.
315 Guthrie Street, Suite 300
Louisville, KY 40202

* Motion for Admission *Pro Hac Vice* forthcoming.

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INTRODUCTION

Plaintiffs seek to enjoin Defendant Board of Education of Boyd County, Kentucky ("Board"), from requiring them to attend anti-harassment training and from enforcing the harassment policy delineated in the Board's Student Code of Conduct. Plaintiffs assert that the harassment policy and training program violate their constitutional rights under the First and Fourteenth Amendments.

Intervenor-Defendants (hereinafter "Intervenors") consist of former students at Boyd County High School and the mother of children in the Boyd County School District. After over a year of litigation with the Board, the student Intervenors entered into a consent decree that required the Board to implement anti-harassment training and to adopt policies to protect students from harassment because of their real or perceived sexual orientation and gender identity. As parties to this agreement, the student Intervenors are greatly troubled that students may be allowed to opt out of the anti-harassment training. Although Plaintiffs frame their request as limited to the individuals named in this lawsuit, any decision requiring the Board to permit students to opt out of the anti-harassment trainings will amount to a ruling that the Board may not, in fact, conduct "mandatory" student trainings, as required by the consent decree. Moreover, allowing students to opt out of the anti-harassment trainings will rob these programs of their ability to change the environment of harassment that led to the consent decree in the first place. Intervenor Jane Doe, while not a party to the earlier lawsuit, likewise fears for the safety of her children if the training program's effectiveness is diluted, and wants to see that appropriate anti-harassment policies are enforced.

Although the Board has not always lived up to its responsibility to ensure the safety of students who are, or are perceived to be, lesbian, gay, bisexual or transgender (LGBT), the Board has a clear constitutional duty to promote the security, well-being and educational opportunities of all students in its charge. The Board has authority under both the laws of Kentucky and the U.S. Constitution to implement policies and programs designed to prevent substantial disorder or material disruption of the educational environment, and to regulate behavior at school that invades the rights of others. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). Intervenors agree with Plaintiffs, however, that the Board's Student Code of Conduct does not currently comport with the Constitution. This policy can, and should, be amended to make clear that only speech that is disruptive or invades the rights of others will be restricted. The fact that the Board's current policy does not satisfy the Constitution does not change the fact that the Board is required to adopt and enforce policies that ensure the safety of all students. The Board simply needs to go back to the drawing board and write a policy that will withstand constitutional scrutiny.

Likewise, Intervenors agree with Plaintiffs that the anti-harassment training video contains statements that either prohibit or, at a minimum, chill constitutionally protected speech. Those portions of the video training should be excised. Beyond that, however, Plaintiffs do not have a free exercise right to opt out of an anti-harassment training program simply because it presents ideas and opinions with which they disagree. The school has the authority to develop curricular materials explaining that students are expected to treat each other with respect and dignity. Mere exposure to these ideas does not require students to disavow any sincerely held religious beliefs or affirm beliefs

antithetical to their religious convictions. Therefore, mandatory attendance at this training does not violate their constitutional rights.

Similarly, Plaintiffs' substantive parental rights under the Due Process Clause do not entitle them to prescribe what the school can and cannot teach children in Boyd County. If parents wish to have their children educated in a manner consistent with their faith, the Constitution bestows upon them the right to send their children to religious schools or to home-school their children. The Constitution does not give parents the right to dictate a public school's curricular choices, or to opt out of selected portions of the curriculum with which they disagree.

Finally, Plaintiffs' Equal Protection challenge adds nothing to the analysis. The Board's policies subject students to discipline based on the content of their speech, rather than their identity as speakers. Accordingly, Plaintiffs' claim sounds in the First Amendment, rather than the Equal Protection Clause.

"There is no constitutional right to be a bully." *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002). The Board has the right to discipline students when their conduct creates a material disruption to the learning environment or invades the rights of others. The Board's current policies, however, reach beyond the kinds of speech that *Tinker* allows school officials to regulate. Similarly, in their effort to protect the safety and well-being of students, the Board has strayed into constitutionally suspect waters by telling students in the training video that they risk discipline for engaging in speech protected by the First Amendment. Accordingly, this Court should grant Plaintiffs' motion in part, but should also provide clear instruction to the Board as

to how it may continue to protect the safety of students through constitutionally sound anti-harassment policies and training programs.

STATEMENT OF THE CASE

Boyd County High School ("BCHS") has a well-documented history of harassment and discrimination against students who either are, or are perceived to be, lesbian, gay, bisexual or transgender.[1] The numerous acts of overt homophobia and the use of anti-gay epithets include:

- In October 2002, students in a BCHS English class stated that "they needed to take all the fucking faggots out in the back woods and kill them."
- In January 2003, during a basketball game, students used megaphones to chant "faggot-kisser," "GSA" and "fag-lover" at one of the students attempting to establish the GSA.
- Students would call out "homo," "fag," and "queer" at a gay student as he walked in the hallway between classes.
- During a lunchtime observance of the National Day of Silence in 2002 by BCHS students, other students threw things at them and used anti-gay epithets.
- One student dropped out of BCHS because of harassment based on sexual orientation, and another student dropped out because of both anti-gay harassment at school as well as problems at home.

258 F. Supp. 2d 667, 670-71 & n.1 (E.D. Ky. 2003).

As a result, in early 2002, a group of BCHS students circulated a petition to create a Gay Straight Alliance ("GSA") club, in the hope of "provid[ing] students with a safe haven to talk about anti-gay harassment and to work together to promote tolerance,

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[1] The facts regarding the Boyd County High School Gay Straight Alliance litigation are drawn primarily from this Court's opinion on the students' motion for preliminary injunction. *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County, Ky.*, 258 F. Supp. 2d 667 (E.D. Ky. 2003) ("BCHS GSA litigation").

understanding and acceptance of one another regardless of sexual orientation." *Id.* at 670. Their efforts to form this club were met with tremendous hostility from other students and members of the community. *Id.* at 671-72. As a result, Principal Johnson asked the students to postpone submitting their application.

The passage of time, however, did not quell the controversy. For example, when the students' application was finally approved at a public meeting held on October 28, 2002, "the reaction from GSA opponents was acrimonious," and the crowd became openly hostile. *Id.* at 673. As Principal Johnson explained:

> The crowd directly confronted the GSA supporters "with facial expressions, hand gestures . . . some very uncivil body language. . . people were using loud voices and angry voices, and, again, beginning to point . . . it took some effort just to calm the meeting down and get through it and get out of there . . . that was the first time that I stared into the face of someone that I thought would hurt someone involved in this issue if given the opportunity. That was alarming to me and frightening and disheartening."

Id. (quoting Principal Johnson).[2]

Two days later, when the GSA was scheduled to meet for the first time, a group of students congregated outside the school to protest, and shouted at students as they walked in that they were "supporting faggots" if they went inside. *Id.* at 674. Then, on November 4, 2002, approximately one-half of the BCHS student body was absent from school to protest the decision to allow the GSA to meet. *Id.* Throughout that month, the

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[2] Others present at this meeting shared Principal Johnson's concern. Board Member Teresa Cornette explained that she was "appalled" at the reaction of the group. 258 F. Supp. 2d at 673 ("There was nothing but hatred in that room and ignorance showed by moms and dads and grandparents. . . . It was horrible. And I literally left that meeting with a fear of what was going to happen in our school the next few days.").

GSA's faculty advisor received threatening notes from students and her car was vandalized. *Id.*

Boyd County School District Superintendent Capehart ultimately responded to these events by "banning" all non-curricular clubs for the 2002-2003 school year. *Id.* at 675. He told the GSA's faculty advisor that the group could no longer meet at BCHS, but could continue to operate off-campus. Notwithstanding the purported "suspension" of all non-curricular clubs, certain groups continued to meet at BCHS during non-instructional time. *Id.* at 676. Consequently, the members of the GSA sued and sought preliminary injunctive relief. On April 18, 2003, this Court issued a decision holding that Plaintiffs had demonstrated a likelihood of success on the merits of their claim that the Board had violated the Equal Access Act by denying the GSA the same access to school facilities that had been given to other non-curricular student groups. *Id.* at 693.

On February 10, 2004, the GSA plaintiffs and Boyd County entered into a Consent Decree, settling the GSA litigation.[3] The Consent Decree provided that the GSA would be permitted to meet at BCHS on the same terms as other non-curricular clubs. The Consent Decree also obligated the District to conduct mandatory staff training and age-appropriate student trainings on issues pertaining to sexual orientation and gender identity harassment. Finally, the District agreed to amend its policies, including the Student Code of Conduct, to reflect that harassment and discrimination based on actual or perceived sexual orientation or gender identity was prohibited, and agreed to hire Compliance Coordinators to report and investigate all claims of harassment and

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[3] Attached as Exhibit A.

discrimination, including but not limited to discrimination or harassment on the basis of sexual orientation or gender identity.

The Board has since added "sexual orientation and gender identity" to the policies and documents identified in the Consent Decree,[4] and has hired Compliance Coordinators. In early August 2004, the District conducted a staff training, which discussed, among other things, harassment against students who are, or are perceived to be, LGBT. In early November 2004, the District played a videotape, lasting approximately one hour, to the students in Boyd County Middle School and Boyd County High School, which discussed, among other things, the fact that the Student Code of Conduct prohibits harassment and discrimination on the basis of real or perceived sexual orientation and gender identity.[5] According to news reports, a significant number of students in the District failed to attend the mandatory student training.[6] Plaintiff Timothy

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[4] With the exception of the addition of "sexual orientation" and "gender identity" to the Board's policies, Intervenors have played no role in the drafting or formulation of the Board's harassment policies.

[5] Counsel for the student Intervenors played no role in the preparation of the training videos, and were only provided with copies of the videos on the Saturday prior to the Monday on which the training sessions took place at Boyd County Middle School and High School. After Plaintiffs filed their motion for preliminary injunction, the Board provided Intervenors' counsel with an unofficial transcripts of the videos. In these proceedings, Intervenors focus only on those portions of the video challenged by Plaintiffs. The independent question of whether the trainings conducted by the Board in November 2004 satisfy the Board's obligations under the Consent Decree will be presented to the Court in the context of proceedings that the Plaintiffs in the BCHS GSA litigation will initiate to enforce the Consent Decree.

[6] *View Homosexual Film or School Faces Lawsuit*, WorldNetDaily, Nov. 28, 2004, *available at* <www.wnd.com/news/article.asp?ARTICLE_ID=41667> (last viewed April 18, 2005) ("District figures show 105 of 730 middle school students opted out of the training video and 145 of 971 high school students did likewise. On the day scheduled for training, 324 students didn't show up for school.").

Morrison was among those students who did not attend the training. Plaintiffs allege that Timothy received an unexcused absence for that day. Affidavit of Mary Morrison ¶ 11.

ARGUMENT

I. STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF

When considering a motion for preliminary injunction, a court must assess (1) the plaintiffs' likelihood of success on the merits; (2) the risk of irreparable harm to the plaintiffs; (3) whether granting the injunction will cause substantial harm to others; and (4) the public interest. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County,* 274 F.3d 377, 400 (6th Cir. 2001).

In a case like this, involving both the constitutional rights of the Plaintiffs and the constitutional rights of other students, the irreparable harm, balance of harms and public interest prongs of the analysis all drop away, leaving only the likelihood of success on the merits. As the Third Circuit explained,

> A student whose protected expression is stifled suffers an injury that cannot be undone. And if the school is unable to enforce a policy it needs to provide education and to maintain discipline, the disruption of education or the invasion of other students' rights cannot be reversed. Both kinds of injuries are substantial. Thus, neither the irreparability of the injuries nor the balance of the injuries modifies the outcome in any significant way. Finally, the public interest demands respect for both constitutional rights and effective education.

Sypniewski, 307 F.3d at 258.

Accordingly, the question for the Court is whether Plaintiffs can demonstrate a likelihood of success on the merits.

II. THE BOARD CURRENTLY PROSCRIBES MORE SPEECH THAN THE CONSTITUTION PERMITS.

A. Challenged Provisions

Student Code of Conduct. The Code of Conduct for Boyd County High School contains a provision explaining its rules regarding "Harassment/Hate Crimes," which provides:

> Harassment/Hate Crimes (Refer to Harassment Section): Harassment/discrimination is intimidation by threats of or actual physical violence; the creation by whatever means, of a climate of hostility or intimidation, or the use of language, conduct, or symbols in a manner as to be commonly understood to convey hatred, contempt, or prejudice or to have the effect of insulting or stigmatizing an individual.

Plaintiffs have challenged the portion of this policy that prohibits "the use of language . . . in such a manner as to be commonly understood to . . . have the effect of insulting or stigmatizing an individual." *See* Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 1, 2 [Docket No. 9] ("Pl. PI Memo"); *see also* Plaintiffs' Memorandum in Opposition to Intervenor-Defendants' Motion to Intervene at 4-5 [Docket No. 18] ("Pl. Interv. Opp. Memo") (noting that their First Amendment objection to the harassment policy is limited to the provision prohibiting students from using language that has the effect of "stigmatizing" or "insulting" other students).

Training Video: The training video begins by explaining to students that the trainers are going to talk about the problems that bullying, name-calling and hatred can cause. The video then discusses many ways in which students are different, and provides a few vignettes from students who have experienced harassment or bullying in school. Towards the end of the video, the trainer states that students who disagree with

something about another student (such as his/her sexual orientation) do not have "permission" to point it out to them. The trainer also states that they are not "required" to tell other students when they think that something about that student is wrong. The trainer in the video then reads the language from the Student Code of Conduct about harassment, including the restriction on speech that is "insulting" and "stigmatizing." Plaintiffs assert that these statements in the video chill their exercise of their constitutional right to express their beliefs about homosexuality.

B. Standard of Review on Speech Restrictions in Public Schools

The Supreme Court has offered three paradigms for assessing the constitutionality of regulations on speech in the school context. The proper standard of review hinges on who is the speaker and whether the school is the sponsor, or simply the location, of the speech.

1. <u>Government Speech</u>. First, when the government is the speaker, it may choose the viewpoint it wishes to espouse. The most common examples of government speech in this context are schools' curricular choices. *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 833 (1995) ("[W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."); *Edwards v. Calif. Univ. of Penn.*, 156 F.3d 488, 491 (3d Cir. 1998) (the First Amendment "does not place restrictions on a public [school's] ability to control its curriculum," because the

government is the speaker). The only limits on what schools can teach are found in the Establishment Clause and the Equal Protection Clause.

2. School-Sponsored Speech. Speech of private individuals that is school-sponsored and reasonably would be thought to be approved by the school triggers the analysis delineated in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). School-sponsored speech can arise during a school assembly or in a school-sponsored student newspaper. In the context of school-sponsored speech, "a school need not tolerate student speech that is inconsistent with its basic educational mission." *Id.* at 266. Rather, schools may exercise "editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.

3. Non-School-Sponsored Speech. Finally, when students engage in private non-curricular expression at school, such as hallway conversation, they are entitled to the full protection of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Under this standard, a school may restrict student speech only where the school has a specific and significant fear of disruption of the educational environment or intrusion upon the rights of other students. *Id.* at 508. An "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* As the Court explained,

> Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom--this kind of openness--that is the basis of our national strength

> and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Id. at 508-09 (internal citation omitted).

Similarly, a school may not single out speech for disfavored treatment simply because it disagrees with the viewpoint expressed by the student. When something about the speech other than its viewpoint becomes disruptive or invasive of the rights of others, however, schools have the constitutional authority to act. "Students cannot hide behind the First Amendment to protect their 'right' to abuse and intimidate other students at school." *Sypniewski*, 307 F.3d at 264. When the prerequisites of *Tinker* have been satisfied, a school may take steps to preserve the educational environment or protect the rights of other students without violating the Constitution.

At the same time, a school need not wait until disorder actually occurs or the rights of others have been invaded in order to act. *Melton v. Young*, 465 F.2d 1332, 1335 (6th Cir. 1972) ("Surely those charged with providing a place and atmosphere for educating young Americans should not have to fashion their disciplinary rules only after good order has been at least once demolished.") (internal quotation and citation omitted).

A school may also require students to conduct themselves in a civil and respectful manner. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 646 (1999) ("[T]he nature of the State's power over public schoolchildren is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults. On more than one occasion, this Court has recognized the importance of school officials' comprehensive authority . . . , consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.") (citing, *inter alia*, *Tinker*); *see also Bethel*

School District No. 403 v. Fraser, 478 U.S. 675, 683 (1986) ("Indeed, the 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the 'work of the schools.'") (citing *Tinker*).

In fact, a school has a constitutional obligation to provide an environment where all students have an equal opportunity to access public education. *See, e.g., Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137-38 (9th Cir. 2003) (holding that clearly established law requires schools to protect all students from peer harassment, regardless of sexual orientation); *Nabozny v. Podlesny*, 92 F.3d 446, 453-58 (7th Cir. 1996) (accord). What a school may not do, however, is restrict speech simply because others might disagree with the speaker's message. *Tinker*, 393 U.S. at 509 (a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" is an insufficient justification for restriction on student speech).

4. <u>Additional Concerns – Overbreadth and Vagueness.</u> Like other forms of government regulation, school disciplinary policies that limit speech may be struck down as overbroad if they reach a substantial amount of expression that is protected by the Constitution. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002) (a law "is unconstitutional on its face if it prohibits a substantial amount of protected expression") (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)); *Sypniewski*, 307 F.3d at 259 (accord). Recognizing that invalidating a statute as overbroad is "strong medicine," courts apply this doctrine "sparingly and only as a last resort" when no "limiting

construction has been or could be placed on the challenged statute." *Broadrick*, 413 U.S. at 613; *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) ("Before declaring [a school policy] unconstitutional, however, we must first determine whether it is susceptible to a reasonable limiting construction: 'the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'") (quoting *Stretton v. Disciplinary Bd. of Supreme Court of Penn.*, 944 F.2d 137, 144 (3d Cir. 1991)).

Courts have also recognized, however, that schools are different than the outside world, and have examined overbreadth challenges through the lens of *Tinker*:

> Because of the duties and responsibilities of the public elementary and secondary schools, the overbreadth doctrine warrants a more hesitant application in this setting than in other contexts. There are important reasons for this. First, *Tinker* acknowledges what common sense tells us: a much broader "plainly legitimate" area of speech can be regulated at school than outside school. Speech that disrupts education, causes disorder, or inappropriate interferes with other students' rights may be proscribed or regulated. . . . In the public school setting, the First Amendment protects the nondisruptive expression of ideas. It does not erect a shield that handicaps the proper functioning of the public schools . . . . Also the demands of public secondary and elementary school discipline are such that it is inappropriate to expect the same level of precision in drafting school disciplinary policies as is expected of legislative bodies crafting criminal restrictions.

Sypniewski, 307 F.3d at 259-60; *see also Saxe,*240 F.3d at 215 (relying on *Tinker* when determining whether school speech regulations were unconstitutionally overbroad). Therefore, in the school setting, a disiplinary policy that proscribes more speech than allowed by *Tinker* is by definition constitutionally overbroad.

Similarly, although courts are less demanding with respect to school disciplinary codes, schools must draft regulations with sufficient specificity so as to give students adequate notice as to what speech will subject them to punishment. *Sypniewski*, 240 F.3d at 266. "'[W]ithout 'fair notice' of [a] regulation's reach, . . . [students] will steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.'" *Id.* (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)). A policy is not unconstitutionally vague simply because terms are not susceptible to an authoritative definition. *See U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 578-79 (1973) (noting that "there are limitations in the English language with respect to being both specific and manageably brief," and rejecting vagueness challenge to regulations that were "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest"). Consequently, to survive a vagueness challenge, a school disciplinary code need only require students to conform their conduct to "comprehensible normative standard." *Sypniewski*, 240 F.3d at 266 (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)).

C. The Student Code of Conduct Currently Proscribes Constitutionally Protected Speech and Therefore Violates the First Amendment.

Plaintiffs have challenged the Board's restriction on speech that is "insulting" or "stigmatizing."[7] The Board's Code of Conduct regulates non-school-sponsored student

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[7] At times, courts have used the term "insulting" to describe the subset of speech known as "fighting words," which do not warrant First Amendment protection. *Chaplinksy v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by

speech, which is subject to the *Tinker* standard. Numerous courts have reiterated that schools may not prohibit speech just because other potential listeners might react negatively. *See, e.g., Saxe*, 240 F.3d at 217 ("[I]t is certainly not enough that the speech is merely offensive to some listener."); *Doe v. Univ. of Michigan*, 721 F. Supp. 852, 863 (E.D. Mich. 1989) (school may not restrict speech "simply because it was found to be offensive, even gravely so, by large numbers of people"). Because the harassment provision in the Student Code of Conduct contains none of the limitations required by *Tinker*, it can be read to prohibit speech protected by the First Amendment, thus rendering it unconstitutionally overbroad.

The Student Code of Conduct explicitly refers readers to the Board's "Harassment Policy." The harassment policy provides in relevant part:

> Harassment/Discrimination is unlawful behavior based on race, color, national origin, age, religion, sex actual or perceived sexual orientation or gender identity, or disability that is sufficiently severe, pervasive, or objectively offensive that it adversely affects a student's education or creates a hostile or abusive educational environment.
>
> The provisions in this policy shall not be interpreted as applying to speech otherwise protected under the state or federal constitutions where the speech does not otherwise materially or substantially disrupt the educational process, as defined by policy 09.426, or where it does not violate provisions of policy 09.422.

Boyd County School District Policy/Procedure Manual, Policy No. 09.42811.[8] By regulating only that speech that "is sufficiently severe, pervasive, or objectively offensive

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their very utterance inflict injury or tend to incite to an immediate breach of the peace."). Even assuming that the Board intended to use "insulting" in this limited way, the average high school or middle school student would not know that "insulting" had anything other than its ordinary meaning, and might well be chilled from expressing his or her views.

[8] Attached as Exhibit B.

that it adversely affects a student's education or creates a hostile or abusive educational environment," the Board brings itself into compliance with *Tinker*.

When viewed in this larger context, the Code of Conduct could be construed, consistent with overbreadth jurisprudence, to reach no more conduct than *Tinker* allows. Asking students to check a cross-reference to a different board policy, however, does not sufficiently cure the constitutional problem. Students are likely to rely exclusively upon their Code of Conduct when determining whether they will engage in certain behavior. Therefore, to resolve fully the constitutional infirmity identified by Plaintiffs, the Board would have to incorporate this limiting language into whatever document will be distributed to the student body and to redistribute the revised portion of the Code of Conduct. For example, a Code of Conduct drafted with these restrictions in mind could read:

> Harassment/discrimination is intimidation by threats of or actual physical violence; it is also conduct, including but not limited to the use of language, conduct, or symbols in a manner as to be commonly understood to convey hatred, contempt, or prejudice or to have the effect of insulting or stigmatizing an individual, that is sufficiently severe, pervasive, or objectively offensive that it adversely affects a student's education or creates a climate of hostility or intimidation.

As noted above, a school can require students to conduct themselves in a civil and respectful manner. *See Davis*, 526 U.S. at 646; *Fraser*, 478 U.S. at 683. It cannot, however, restrict speech simply because some might disagree with the speaker's message. This important distinction is the key to any constitutional harassment policy.

Intervenors agree, however, that, without limiting and clarifying language consistent with *Tinker*, the Student Code of Conduct as currently written prohibits constitutionally protected speech and thereby violates the First Amendment. The

appropriate remedy in this case is an order declaring the existing provision unconstitutional and directing the Board to revise and redistribute the Code of Conduct or otherwise to notify students that the unconstitutional restriction in the existing Code is no longer in force.

D. The Training Video Chills Constitutionally Protected Speech.

By reiterating the restrictions on speech currently contained in the Student Code of Conduct, the video either prohibits or chills constitutionally protected speech. These portions of the video should certainly be removed.

The video also states that students do not have "permission" to express their views about the ways in which students may be different. Such a statement either is, or could reasonably be construed as, a blanket prohibition on constitutionally protected speech, which is simply beyond the Board's power.[9] The Board may censor student speech if it meets the *Tinker* standard, but because the video does not explain that limitation, it sweeps too broadly.

Finally, the video also suggests that students should not engage in constitutionally protected speech by saying that students are not "required" to share their opposing views. Schools can and certainly should encourage students to treat each other with respect, and, as part of general civility training, a school can certainly tell students that it is not necessarily polite or appropriate to express any and every thought that one might have about another person. But whereas the government is entitled to share its views through its curricular choices, the government should not be in the business of telling students

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[9] By contrast, a school, as part of its educational mission, may certainly teach students that there are polite and civilized ways to express their differences of opinion to one another.

what they “should” or “should not” say. Accordingly, in any future training program, statements to this effect should be avoided.

E. A Determination That the Board Has Violated Plaintiffs’ Free Speech Rights Resolves Plaintiffs’ Speech-Based Free Exercise Claims.

To the extent that the Student Code of Conduct prohibits expression beyond what is permitted by *Tinker*, Plaintiffs’ speech rights are unconstitutionally burdened. The government has no rational, let alone compelling, reason to prohibit speech in schools, religious or otherwise, that is not disruptive or that does not interfere with the rights of others. Likewise, because a reasonable student might refrain from engaging in some constitutionally protected speech because of the statements in the anti-harassment training video, Plaintiffs have demonstrated that their First Amendment rights have been chilled. The fact that some of the restricted speech may be religious speech does not change the analysis.[10]

[10] As explained earlier, although a school may not restrict speech because of its religious content, a school retains the right under *Tinker* to restrict speech despite its religious content. For example, a school may intervene where one student repeatedly engages in targeted speech that is disruptive and unwelcome. *See, e.g., Sypniewski*, 307 F.3d at 264 (“Students cannot hide behind the First Amendment to protect their ‘right’ to abuse and intimidate other students at school.”). At that point, however, the school is regulating speech not out of any disapproval for the message being communicated but rather because the speech (regardless of viewpoint) interferes with the rights of other students. Moreover, in those circumstances, the school has a compelling state interest in ensuring equal educational opportunities for all students that justify a narrowly-tailored restriction on an individual’s religious exercise.

III. REQUIRING STUDENTS TO ATTEND AN ANTI-HARASSMENT TRAINING THAT TEACHES STUDENTS TO TREAT OTHERS WITH RESPECT REGARDLESS OF SEXUAL ORIENTATION DOES NOT VIOLATE PLAINTIFFS' FREE EXERCISE RIGHTS

A. Standard of Review for Free Exercise Claims

After *Employment Division v. Smith*, 494 U.S. 872 (1990), a religiously neutral policy that incidentally burdens a person's free exercise rights is constitutional so long as the policy has a legitimate government purpose. *Id.* at 882-83. Closer scrutiny may be appropriate, however, when government action burdens both the free exercise right and some other constitutional liberty. *Id.* at 881 ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as the freedom of speech and of the press.").

B. Schools May Require Students to Participate in Elements of the Curriculum Where They Will Be Exposed to Views Contrary to Their Religious Beliefs.

Even if the training video were altered to eliminate the specific free speech violations discussed above, Plaintiffs would still object to the anti-harassment training on religious grounds. Plaintiffs assert that, because the video contains statements with which they disagree, the Board should be required to let them opt out of the anti-harassment training. *See* Pl. PI Memo at 28 ("The Parents simply want to opt their children out of the mandatory training classes, so that their children will not be subjected to government indoctrination directly contrary to their ideological and religious beliefs."). At this point, however, Plaintiffs step beyond what the Constitution requires. Merely exposing students to ideas does not violate the Free Exercise Clause. Because the Board

does not require Plaintiffs to affirm beliefs inconsistent with their religious convictions, or to disavow their religious convictions, the Board is not required to provide an opt out from the anti-harassment training.

In *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987), the Sixth Circuit rejected a student's free exercise challenge to the use of a particular reader that included views contrary to her religious beliefs. The *Mozert* court ruled that there was no burden on the student's free exercise rights because there was "no proof that any plaintiff student was ever called upon to say or do anything that required the student to affirm or deny a religious belief or to engage or refrain from engaging in any act either required or forbidden by the student's religious convictions." *Id.* at 1064. Similarly, in *Fleischfresser v. Directors of School District 200*, 15 F.3d 680 (7th Cir. 1994), the Seventh Circuit described any free exercise burden stemming from the school's use of a particular reading series as "minimal" because its use did not "compel the parents or children to do or refrain from doing anything of a religious nature. Thus, no coercion exists, and the parents' free exercise of their religion is not substantially burdened." *Id.* at 690.

Plaintiffs have insisted, however, that the element of compulsion or "indoctrination," which the courts found lacking in *Mozert* and *Fleischfresser*, is present in this case. But once the unconstitutional portions of the video – those that prohibit students from expressing their sincerely held religious beliefs outside of the training – are removed, there is no basis for arguing that Plaintiffs are somehow compelled to act or speak (or refrain from doing so) in a manner that conflicts with their religion. At that point, Plaintiffs' only objection lies with being required to attend the anti-harassment

training. Specifically, they object to the fact that, as part of this training video, they are forced to listen to statements in the video suggesting something other than what their religion tells them to be true about homosexuality. *See* Pl. PI Memo at 28 ("The Parents believe that homosexuality is harmful to society, immoral, against God's Will, and that those who are homosexual can change through a personal relationship with Jesus Christ."). This is not the kind of "burden," however, against which the Free Exercise Clause protects.

As part of the school's curriculum, the training video is government speech. *See Rosenberger*, 515 U.S. at 833; *see also supra* Section II.B.1. Many curricular choices made by public school administrators potentially conflict with a student's religious beliefs. Considering the rich diversity of religious belief in this country, it has always been difficult for schools to avoid all controversy in this arena. As Justice Jackson noted over fifty years ago:

> Authorities list 256 separate and substantial religious bodies to exist in continental United States. Each of them, through the suit of some discontented but unpenalized and untaxed representative, has as good a right as the plaintiff to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.

McCollum v. Bd. of Educ., 333 U.S. 203, 235 (1948) (Jackson, J., concurring).

For this reason, it is unreasonable to suggest that Boyd County should alter its speech (through its curricular choices) to avoid any conflict with the religious views of particular students, and simply incorrect as a legal matter to argue that it must. To the

contrary, the Establishment Clause affirmatively prohibits schools from catering their curricula to the religious beliefs of a particular group. *See Epperson v. State of Arkansas*, 393 U.S. 97, 106 (1968) ("There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.").

Many parents choose to educate their children in an environment where they will be exposed only to ideas and values consistent with their religious beliefs. The Constitution protects this choice. Parents have a clearly defined constitutional right to send their children to religiously-affiliated schools or to home-school their children. *See, e.g., Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925). Once parents decide to access the public education system, however, they no longer have the right to exercise that amount of control. *Mozert*, 827 F.2d at 1067 ("The parents in the present case want their children to acquire all the skills required to live in modern society. They also want to have them excused from exposure to some ideas they find offensive. Tennessee offers two options to accommodate this latter desire. The plaintiff parents can either send their children to church schools or private schools, as many of them have done, or teach them at home.").[11]

While the Free Exercise Clause does not require school districts to allow students to opt out of classes discussing sensitive topics, such as sexual education, some districts

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[11] Plaintiffs do not appear to suggest that exposure for one hour to a videotape expressing views with which they may disagree would threaten their entire "way of life," as did the compulsory education law for the Amish in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *See Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (rejecting claim that one-time compulsory attendance at an AIDS education program threatened plaintiffs' "entire way of life," and thus distinguishing *Yoder*). *See also* discussion *infra* Section IV.

choose to do so voluntarily. As this Court is well aware, however, this case does not exist in a vacuum. The Board is obligated by the Constitution's Equal Protection Clause to take steps to prevent further harassment against students who are, or are perceived to be, lesbian, gay, bisexual or transgender. The Board has chosen to comply with that obligation, in part, by agreeing to conduct the trainings required by the Consent Decree – i.e., mandatory student trainings that the Board agreed in prior litigation were necessary to address the widespread problem of anti-LGBT harassment that has existed in its schools.

But even putting the Consent Decree aside, the Board (or indeed any school district) could decide for myriad reasons to require all students to attend anti-harassment training. The Boyd County School District, like all schools, has an interest in minimizing disruption and preventing harassment before it occurs, so as to ensure the success of its educational mission and to promote calm and order throughout the day. *See, e.g., Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749, 754 (5th Cir. 1966) ("The proper operation of public school systems is one of the highest and most fundamental responsibilities of the state.") (cited with approval by *Tinker*); *Phillips v. Anderson County Sch. Dist. Five*, 987 F. Supp. 488, 493 (D.S.C. 1997) ("Nor can it be reasonably contended that arguments or fights which occur immediately before or after a class have no disruptive effect upon the teaching and learning process during actual class time."). As a result, Boyd County has a compelling interest in communicating to students, through the one-hour training video, the expectation that they will treat each other with civility and respect while on school grounds and at school functions. *Fleischfresser*, 15 F.3d at 690 (a state's interest in providing public education "is at the apex of the function

of government”); *cf. Fraser*, 478 U.S. at 681 (describing the “role and purpose of the American public school system” as “prepar[ing] pupils for citizenship in the Republic” and “inculcat[ing] the habits and manners of civility as values in themselves conducive to happiness as indispensable to the practice of self-government in the community and the nation”) (internal quotation and citation omitted).

A student does not have the right to opt out of parts of the curriculum where the school expresses a view with which the student disagrees, even when the disagreement stems from the student’s religious beliefs. If this were true, students would have the same right to opt out of history class, literature class or science class as they do from curricular programs like the anti-harassment training.[12] Giving students the ability to pick and choose the ideas to which they will be exposed is antithetical to the purpose of public education, or education in general. *Cf. Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.”) (internal quotation omitted). Secondary education in particular is a time where students are exposed to a broad range of ideas and given the opportunity to decide for themselves what rings most true. The government’s compelling interest in providing students with a “well-rounded” and “quality” education justifies its use of a

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[12] Jewish and Muslim students, for example, may have sincere and religiously-based views about the nature of the conflict in the Middle East that are incompatible with the presentation offered by the history or current events teacher. Likewise, the Court is undoubtedly well aware of religious-based objections to the teaching of evolution in science class. *See, e.g., Freiler v. Tangipahoa Parish Bd. of Educ.*, 975 F. Supp. 819, 824 (E.D. La. 1997) (noting concern of board members with teaching of evolution as fact because many students in school district believed in Biblical version of creation).

standard curriculum for all students without providing opt outs. *Fleischfresser*, 15 F.3d at 690 (noting that schools' use of a standard reading series is permissible exercise of "government function of providing quality public school education"); *see also Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998) (parents home-schooling children for religious reasons found to have no right to demand public schools educate their children part-time).

In addition to undermining the school's legitimate pedagogical interest in exposing students to a broad range of ideas, allowing students to opt out of classes whenever there was a risk that they would be exposed to an idea with which they disagree would cause a practical crisis of administration for school officials:

> If the opt-out remedy were implemented, teachers in all grades would have to either avoid the students discussing objectionable materials contained in the Holt readers in non-reading classes or dismiss appellee students from class whenever such material is discussed. To do this the teachers would have to determine what is objectionable to appellees. This would either require that appellees review all teaching materials or that teachers review appellees' extensive testimony. If the teachers concluded certain material fell in the objectionable classification but nonetheless considered it appropriate to have the students discuss this material, they would have to dismiss appellee students from these classes. The dismissal of appellee students from the classes would result in substantial disruption to the public schools.

Mozert, 827 F.2d at 1072 (Kennedy, J., concurring). But even assuming that such disruption would be minimal, the government nevertheless has the right to expose students to ideas about civility and proper conduct, as long as it does not require students to affirm or to renounce ideas that conflict with sincerely held religious beliefs. *Id.* at 1069 (reiterating that mere exposure to offensive views does not amount to the "critical

element of compulsion to affirm or deny a religious belief or to engage or refrain from engaging in a practice forbidden or required in the exercise of a plaintiff's religion").

Courts have repeatedly affirmed that "governmental actions that merely offend or cast doubt on religious beliefs do not on that account violate free exercise." *Id.* at 1068 (quoting *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1534 (9th Cir. 1985)); *see also Myers v. Loudoun County Sch. Bd.*, 251 F. Supp. 2d 1262, 1272 (E.D. Va. 2003) ("Courts have refused to recognize that schools must shelter students from curricular messages to which the students have a religious objection."). There are sound practical, as well as legal, reasons for such a rule: "Were the free exercise clause violated whenever governmental activity is offensive to or at variance with sincerely held religious precepts, virtually no governmental program would be constitutionally possible." *Mozert*, 827 F.2d at 1068 (quoting *Grove*, 753 F.2d at 1542).

As long as students are not required to affirm or renounce their sincerely held beliefs, or to act in a manner that is contrary to those beliefs, there is no violation of the Free Exercise Clause.

IV. REQUIRING STUDENTS TO ATTEND BOYD COUNTY'S ANTI-HARASSMENT TRAINING DOES NOT VIOLATE PLAINTIFFS' PARENTAL RIGHTS.

Parents have a fundamental right to direct the ideological and religious upbringing of their children. *Pierce*, 268 U.S. at 535; *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923). Plaintiffs are simply incorrect, however, when they say that right gives them the ability to veto, or to exempt their children from, elements in the public school curriculum with which they disagree.

As the Sixth Circuit recently reiterated, the rights of parents to control the education of their children does not amount to a parental right to micromanage the administration and curricular choices of a public school:

> The critical point is this: While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or . . . a dress code, these issues of public education are generally committed to the control of state and local authorities.

Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395-96 (6th Cir. 2005) (internal quotation omitted).

Wisconsin v. Yoder, 406 U.S. 205 (1972), provides no support to the contrary. In *Yoder*, the Supreme Court held that Amish parents need not send their children to school past the eighth grade. *Id.* at 234. As the Sixth Circuit noted in *Mozert*, the holding of *Yoder* has been limited to the unique circumstance faced by the Amish who have a 300-year history of living separately from the larger community. 827 F.2d at 1067 (discussing *Yoder*). "The parents in *Yoder* were required to send their children to some school that prepared them for life in the outside world, or face official sanctions. The parents in the present case want their children to acquire all the skills required to live in modern society." *Id*. Accordingly, having chosen to live in the modern world, Plaintiffs cannot rely on *Yoder* to shield their children from modern views with which they may disagree.

As discussed *supra* with regard to Plaintiffs' free exercise claims, parents are always free to send their children to private religious schools. *Yoder* simply does not

apply to the educational desires of parents from religious groups who choose to send their children to public schools and whose children live in the mainstream culture. *Id*. As a consequence, Plaintiff parents, like the parents in Mozert, have no right to opt their children out of the offending educational content.

Plaintiff's reliance on *Pierce* and *Meyer* is similarly misplaced. In *Pierce*, the Supreme Court held that a state could not forbid parents from sending children to private school. 268 U.S. at 534-35. And in *Meyer*, the Supreme Court held that a state could not prohibit a parent from teaching a child German. 262 U.S. at 403. But courts have recognized that claims like those presented here are significantly different. For example, in *Brown v. Hot, Sexy, and Safer Productions,* a group of parents brought suit alleging that an AIDS education course taught at their children's school violated their fundamental right to direct the religious upbringing of their children. 68 F.3d 525, 532-34 (1st Cir. 1995). Like the plaintiffs in this case, the plaintiff parents in *Brown* relied upon *Meyer* and *Pierce* in support of their argument. *Id.* at 533. The First Circuit noted, however, that *Meyer* and *Pierce* stand for a much less ambitious proposition:

> The *Meyer* and *Pierce* cases, we think, evince the principle that the state cannot prevent parents from choosing a specific educational program – whether it be religious instruction at a private school or instruction in a foreign language. That is, the state does not have the power to "standardize its children" or "foster a homogenous people" by completely foreclosing the opportunity of individuals and groups to choose a different path of education. We do not think, however, that this freedom encompasses a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their child. We think it is fundamentally different for the state to say to a parent "You can't teach your child German or send him to a parochial school," than for the parent to say to the state, "You can't teach my child subjects that are morally offensive to me." The first instance involves the state

> proscribing parents from educating their children, while the second involves parents prescribing what the state shall teach their children.

68 F.3d at 533-34 (internal citations omitted).

The *Brown* court also expressed a concern similar to the one raised by Judge Kennedy in *Mozert* about the administrative difficulties that schools would face if opt outs were required:

> If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described in *Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools.

Id. at 534.

Similarly, in *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003), a father brought suit under the Fourteenth Amendment after the school system refused to excuse his son from mandatory health education, which he found objectionable on religious grounds. 332 F.3d at 136-38. After agreeing with the analysis of *Meyer* and *Pierce* offered in *Brown*, the Second Circuit then explained why the more recent decision in *Troxel v. Granville*, 530 U.S. 57 (2000), did not provide any additional support for a parental rights challenge to a school curriculum:

> [T]here is nothing in *Troxel* that would lead us to conclude from the Court's recognition of a parental right in what the plurality called "the care, custody, and control" of a child with respect to visitation rights that parents have a *fundamental* right to the upbringing and education of the child that includes the right to tell public schools what to teach or what not to teach him or her.

332 F.3d at 142 (emphasis in original). Ultimately, the court in *Leebaert* found that the school's mandatory health training requirement was rationally related to the legitimate educational goal of teaching children about health, which was all that the school was required to prove. *Id.* at 143.

Similarly, Plaintiffs have no constitutional right to opt their children out of the Board's anti-harassment training. Parents have the right to decide whether to send their children to public schools, but once this decision is made, they do not have the right to dictate a school's curricular choices or to pick and choose which lessons a student will attend. *See Swanson*, 135 F.3d at 700 ("We see no difference of constitutional dimension between picking and choosing one class your child will not attend, and picking and choosing three, four, or five classes your child will not attend. The right to direct one's child's education does not protect either alternative.").

Under any level of scrutiny,[13] Plaintiffs have no parental right to demand an exemption for their children from a one-hour curricular program designed to ensure the safety of all students in the Boyd County Middle and High Schools.

V. RESOLUTION OF PLAINTIFFS' FIRST AMENDMENT CLAIMS DISPOSES OF THEIR EQUAL PROTECTION CLAIM.

Plaintiffs' Equal Protection claim rests on the fact that they are being singled out on the basis of their expression, which implicates the exercise of a fundamental right of free speech. In cases such as this, courts generally treat "equal protection" claims as free

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[13] Although heightened scrutiny does not apply, Plaintiffs' parental rights claim would fail even under that level of review. The Board's mandatory one-hour anti-harassment training is narrowly tailored to meet its compelling interest in maintaining order and safety within its schools and preventing a violation of the Equal Protection Clause. *See, e.g., Flores,* 324 F.3d at 1137-38 (failure to protect students from harassment can violate Equal Protection Clause); *Nabozny*, 92 F.3d at 453-58 (accord).

speech claims. In *West v. Derby Unified School District No. 260*, 206 F.3d 1358 (10th Cir. 2000), the Tenth Circuit Court of Appeals considered the argument of a middle school student that his school was discriminating against him based upon his desire to express beliefs with which the school disagreed. *Id.* at 1365. The court held:

> The district court properly noted that the question of whether a legitimate government interest supports the school district's content-based restriction is essentially an inquiry into whether the restriction violates T.W.'s First Amendment free speech right. Thus T.W.'s equal protection claim is more properly considered together with his First Amendment challenge.

Id. (citations omitted).

Plaintiffs do not suggest that the policies violate the Equal Protection Clause by, for example, penalizing speech differently based on the identity of the speaker. Therefore, the First Amendment provides the structure for considering Plaintiffs' claims, rather than the Equal Protection Clause. Accordingly, Intervenors simply refer the Court back to those arguments.

CONCLUSION

The Board's Student Code of Conduct is currently inconsistent with the Constitution's guarantee of Free Speech. With some additional language drawn from other Board policies, however, the Code of Conduct can be brought into compliance with the Constitution, thus ensuring that students can engage in all speech, whether religious or secular, that does not disrupt the educational environment or interfere with the rights of others. Similarly, the portions of the Board's anti-harassment video that prohibit or chill the exercise of constitutional rights can and should be deleted.

Plaintiffs' assertion that they are constitutionally entitled to an opt out from the anti-harassment trainings, however, is meritless. The importance of anti-harassment policies and programs in the country's public schools cannot be overstated. Anti-harassment training and non-discrimination policies are essential tools for teaching students civility, respect and common courtesy. They are also vital to preserving an educational environment where all students are able to learn. In this case, where the history of harassment against students who are, or are perceived to be, lesbian, gay, bisexual or transgender is so egregious, such policies are particularly important. For this reason, in rendering its decision on Plaintiffs' motion, the Court should leave no doubt that schools can, in fact, craft harassment policies and programs that comply with the various commands of the Constitution.

Plaintiffs' rights can be vindicated without jeopardizing the safety of students in Boyd County and beyond. Intervenors urge the Court to do so.

Respectfully submitted,

s/ David A. Friedman
General Counsel
ACLU of Kentucky Foundation, Inc.
2400 National City Tower
101 S. Fifth Street
Louisville, KY 40202
(502) 589-1001
dfriedman@ffgklaw.com

James D. Esseks
Sharon M. McGowan
Lesbian & Gay Rights Project
ACLU Foundation
125 Broad Street
New York, NY 10004
(212) 549-2627
(212) 549-2650 (fax)
jesseks@aclu.org
smcgowan@aclu.org

(continued)

Tamara Lange*
Lesbian & Gay Rights Project
ACLU Foundation
1663 Mission St., Ste. 460
San Francisco, CA 94103
(415) 621-2493 x361
(415) 255-8437 (fax)
tlange@aclu.org

Lili S. Lutgens
ACLU of Kentucky Foundation, Inc.
315 Guthrie Street, Suite 300
Louisville, KY 40202
(502) 581-9746
(502) 589-9687 (fax)
lili@aclu-ky.org

Attorneys for Intervenor-Defendants

Dated: April 28, 2005

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* Motion for Admission *Pro Hac Vice* forthcoming.

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2005, I electronically filed this document with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following:

John F. Billings

I further certify that I have mailed this document and the notice of electronic filing by first class mail, on April 28, 2005, to the following non-CM/ECF participants:

Attorneys for Plaintiffs

Joseph Platt
P.O. Box 53896
Cincinnati, OH 45253

Benjamin W. Bull
Alliance Defense Fund
15333 N. Pima Road, Suite 165
Scottsdale, AZ 85260

Kevin Theriot
Alliance Defense Fund
Midwest Regional Service Center
15660 W. 135th Street
Olathe, KS 66062

Attorneys for Defendant Boyd County

Winter R. Huff
Law Offices of John G. Prather
P.O. Box 616
Somerset, KY 42502-0616

Kimberly McCann
Vanantwerp, Monge, Jones
& Edwards, LLP
P.O. Box 1111
Ashland, KY 41101-1111

s/ David A. Friedman
General Counsel
ACLU of Kentucky Foundation
2400 National City Tower
101 S. Fifth Street
Louisville, KY 40202
(502) 589-1001
dfriedman@ffgklaw.com