APPEAL NO. 06-5380/5406/5407

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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-Appellants

v.

SARAH ALCORN, WILLIAM CARTER, DAVID FANNIN, LIBBY FUGETT, TYLER MCCLELLAND, AND JANE DOE,
Intervenors-Appellants

BOARD OF EDUCATION OF BOYD COUNTY, KENTUCKY
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY, ASHLAND DIVISION
CIVIL CASE NO. 05-38-HRW
(HONORABLE DAVID L. BUNNING)

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I. INTRODUCTION

The District Court failed to address Plaintiffs' nominal damages claim against the District's Speech policies that were in force during the 2004-2005 school year ("District's Speech Policies"). The two reasons the District gave for refusing to rule – that Plaintiffs did not make the claim and that Plaintiffs failed to prove the amount of their nominal damages claim – are utterly without support in fact or law. It is not surprising then, that the Defendant refused to address these two points head on. Rather, it argued that the District Court was correct in refusing to rule on the claim because (1) Plaintiffs would lose on the merits of such a claim, (2) Plaintiffs suffered no actual injury, and (3) the Defendant is entitled to qualified immunity against any nominal damages claim.

The District is wrong on all three counts. The District's Speech Policies were unconstitutional because they prohibited negative speech about homosexual behavior, and were thus viewpoint based. Students were told repetitively during an officially sanctioned District diversity training session that students did not have permission to tell anyone else that homosexuality was wrong. The students were specifically instructed that even if they believed homosexuality was wrong, "[t]here is no permission for you to point it out to them." (RE 50, Plaintiffs' Motion, Ex. C, JA 509-

510; Ex. D, JA 536). In the Codes of Conduct for both the High School and the Middle School,[1] students were warned not to engage in any speech that could be considered insulting. The message to students was clear and unambiguous – if you say anything insulting or negative about the homosexual lifestyle, you are violating District policy.[2]

The District attempts to sidestep the clear message of the video and the Codes of Conduct by pointing to a disclaimer. The disclaimer, which is in some Board policies but not in the High School Code of Conduct, says that its harassment policies should not be interpreted to violate the First Amendment. Such a disclaimer is highly ineffectual in real life, and does not save the unconstitutional Speech Policies. When students are told specifically that they do not have permission to say that homosexual behavior is wrong, they will not think that they do have such a right based on some language hidden in a Board policy that no student is ever likely to read, let alone understand.

The District's allegation that no actual injury occurred is also

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[1] The Middle School Planner and the High School Code of Conduct will jointly be referred to as "Codes of Conduct."

[2] Plaintiffs believe that the Speech Policies are very clear in that they prohibit negative speech on homosexual behavior. Plaintiffs base this argument primarily on the District's own admissions and the content of the District-approved video. However, to the extent that the District has attempted to create a dispute of fact concerning their policy, this case should be remanded for trial on that issue.

contradicted by the uncontroverted evidence that Plaintiff Timothy Morrison refrained from speaking because of the Speech Policies. Students were told that if they violated the Speech Policy, they would be punished, including suspension and possibly being reported to the Sheriff's Office and the State Police. Chilled speech is an actual injury, and confers standing.

Finally, the District is not entitled to immunity. The District is not an arm of the state for purposes of the Eleventh Amendment.

II. THE SPEECH POLICIES WERE UNCONSTITUTIONAL.

The District contends that Plaintiffs have taken its Speech Policies out of context and that its policies do not prohibit student speech stating that homosexuality is wrong or that homosexuals can change. To the contrary, when the District Speech policies are viewed from the perspective of a high school or a middle school student, the message was loud and clear that students could not say anything critical of homosexual behavior.[3]

A. The Codes Of Conduct And The Training Video Constitute District Policy.

The District's prohibition against students saying that homosexuals can change, or that homosexual behavior is wrong, was articulated clearly

[3] In addition, because the court granted the District's Motion for Summary Judgment, all facts must be viewed in the light most favorable to Plaintiffs. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)(in considering such a motion, the court must view the evidence and draw all reasonable inferences in favor of the nonmoving party).

and often in the transcript of the District-approved Training. During the Training, the speaker in the video said,

> But here is the kicker, just because you believe, just because you don't like them, just because you disagree with them, just because you believe they are wrong, whole heartedly, absolutely, they are wrong. ***Just because you believe that does not give you permission to say anything about it.*** It doesn't require that you do anything. You just respect, you just exist, you continue, you leave it alone. ***There is no permission for you to point it out to them.***

(RE 50, Plaintiffs' Motion, Ex. C, JA 509-510; Ex. D, JA 536)(emphasis added). The speaker later added:

> Humans get confused about that all the time. Regardless of age, regardless of experience, regardless of job, regardless of family, regardless of beliefs, human beings get confused. And we think that it's our job to tell other people they're wrong, or to tell other people "I don't like you," and to make faces and to exclude, and to make little mice [sic] groups and keep other people out because they're different. Okay. Groups and difference can't be avoided. Like, dislike, disagreement, can't be avoided. ***It's what you do about it that makes it wrong.*** Its when you act against someone. It's when you call them a name. ***It's when you say you're wrong***. Okay so they're wrong. Nothing else is needed. ***You don't need to point out that they're wrong***. ... You let the other person exist as they are. It's not your job to try to change them, and ***its not your job to let them know that you believe that they are wrong.***

Id. (emphasis added). The instructor then repeated the policy that such speech will not be tolerated at school. *See id.*

The instructor also informed the students to "consult your Code of Conduct" to answer any questions. The instructor then read from the Code

of Conduct, stating that speech that could "have the effect of insulting or stigmatizing an individual" was not permitted. (RE 50, Plaintiffs' Motion, Ex. C, JA 513; Ex. D, JA 539). The instructor then stated that the "consequences here have a fairly wide range", with "a possibility of Court Referral and local law enforcement agency notified ...." *Id.*[4]

The Codes of Conduct and Training statements establish a "policy" for purposes of Section 1983 liability. "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Meyers v. Cincinnati*, 14 F.3d 1115, 1117-18 (6th 1994) (citing *Monell v. Dept. of Social Services of New York*, 436 U.S. 658, 690 (1978)); *Berry v. Detroit*, 25 F.3d 1342, 1345-46 (6th Cir. 1994) (concluding that there need not be a formal policy for there to be an unconstitutional custom that amounts to a

[4] Intervenors suggest that the consequence of being turned over to the police would occur only if there was a terroristic threat. *See* Intervenors' Brief, 15. The Intervenors misread the transcript and the Codes of Conduct. In the video, the instructor said that violations of the policy could result in "one to five days suspension for this act, there is also a possibility of Court Referral and local law enforcement agency notified, either the Kentucky State Police or the Sheriff's Department. These are part of the range of consequences that could come along with this activity. *Also* with terroristic threatening you do have the possibility of *once again* being referred to the local law enforcement." (RE 50, Plaintiffs' Motion, Ex. C, JA 513; Ex. D, JA 539)(emphasis added). Consequently, referral to the police is a consequence for violating the harassment policy and for committing terroristic threats.

policy for section 1983 liability). The Codes of Conduct were the only written policies given to the students to follow. (RE 57, Aff. Of Timothy Allen Morrison II ("Student Aff.") at ¶ 11, JA 626).

Furthermore, the contents of the Training constitute the District's policy under *Monell.* The transcript was approved by the District. (RE 50, Plaintiffs' Motion, Exhibit E, JA 542-543). The District admitted that it was the final policy maker for the contents of the video transcript. (RE 50, SOF ¶¶ 6 and 16, JA 585, 587). In response to the question of "Please identify who was the final decision maker and/or policy making authority for writing, approving, and teaching the curriculum and/or other material used (such as videotapes) in the training ....", the District responded "The Boyd County Board of Education, and its staff and agents." *Id.* (parenthetical in original).

A policy does not have to be written in order to hold a municipality liable under § 1983. A municipality can be sued under § 1983 for a constitutional deprivation pursuant to a governmental custom, even if it has not been formally approved through the municipality's official decision-making channels. *See Monell*, 436 U.S. at 658.

> [A]lthough the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983

> "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision-making channels.

Monell, 436 US at 690-91, n. 56. Consequently, whether through written policy or custom, the Codes of Conduct and the contents of the District-approved Training are policies attributable to the District for purposes of section 1983 liability.

The District argues that some of the statements in the video were that of an independent psychologist, and not the District. *See* District's Brief, 25-27. This argument is a red-herring, and at best, a dispute of fact. It doesn't matter who the speakers in the video were. The relevant fact is that the Defendant approved the transcript for the video and admitted that they were the final policy maker for its contents. (RE 50, Plaintiffs' Motion, Ex. E, JA 542-543). In addition, the video was shown as part of a mandatory diversity training where all students were required to attend. In this context, the message communicated to students was clear – *District* policy does not give students permission to say that homosexuality is wrong.

The District has attempted to retract its own answers to the Complaint where it admitted that District policies prohibit a student from telling another that homosexuality is wrong, or that it can be changed. *See* District's Brief, 13; *see also* (RE 61, District's Answer, ¶ 3(admitting the allegations in

paragraph 3 of the Complaint ("School District policies and practice prohibit students from telling someone who is a homosexual that they believe homosexuality is wrong.")); ¶ 9 (admitting the allegations in paragraph 19 of the Complaint ("This training states that School District policy prohibits any student from telling another student that they believe homosexuality is 'wrong' or contrary to their values or beliefs.")) JA 37, 38).

Intervenors argue that these were not admissions, but rather, a generic statement that the transcripts speak for themselves. *See* Intervenors' Brief, 15. If this were true, then the District should have denied the allegations, not admitted them. The District was in possession of the transcripts and the video. They had every opportunity to watch the video and read the transcript before answering the Complaint. Under Federal Rule of Civil Procedure 8(b), the Defendant has an obligation to admit or deny Plaintiffs' claims in good faith. Because the Defendant had possession of the transcripts, *was the final policy maker for the contents in the transcripts*, and did not deny the allegations, they were admitted.

Plaintiffs have the right to rely on the Defendant's admission. *See Freedom National Bank v. Northern Ill Corp.*, 202 F.2d 601, 605 (7th Cir. 1953) ("That which a defendant admits in his answer is binding upon him until he withdraws the admission by a proper amended or supplemental

pleading" and that the Defendant "was under no duty to adduce evidence to prove the $4,000 valuation by the court."); *see also Romero Reyes v. Marine Enterprises, Inc.*, 494 F.2d 866, 868 (2nd Cir. 1974)(quoting *Freedom Nat. Bank*). The District's attempt to change its answers should be seen as what it is – creative lawyering to get around an admission once it realized the ramifications of its policies.

Not only do the District's answers speak for themselves, but the Codes of Conduct and the District-approved Training contradict the District's late attempt to distance itself from its policies that chill speech. According to the transcript, students were told that if they believed that the homosexual lifestyle is wrong, ***"[t]here is no permission for you to point it out to them."*** (RE 50, Plaintiffs' Motion, Ex. C, JA 509-510; Ex. D, JA 536)(emphasis added).

Moreover, the testimony of the student plaintiff in this case indicates that he believed that school policy prohibited him from stating that homosexuality is wrong. (RE 57, Student Aff. at ¶ 11, JA 626). He witnessed a student being punished for being critical of homosexuality. (RE 57, Student Aff. at ¶ 8, JA 526).

At a minimum, the District's new position on its Speech Policies creates a material question of fact, and should not have been ruled in a

motion for summary judgment. *See* Fed.R.Civ.P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)(in considering such a motion, the court must view the evidence and draw all reasonable inferences in favor of the nonmoving party).

B. The District's Policies Restricted Speech On Homosexual Behavior Based On Viewpoint and Violate *Tinker*.

The District can only restrict speech that is likely to lead to a material disruption in school or invade the rights of others. *Tinker v. Des Moines Independent Comm. School Dist.,* 393 U.S. 503 (1969). The District's policies go well beyond that, and prohibit student speech stating that homosexuality is wrong, or that homosexuals can change, or any other insulting statement about homosexual behavior, whether or not such speech would likely lead to a material disruption or invade the rights of others. Such policies are viewpoint based and censor more speech than is constitutionally permitted. *See Gooding v. Wilson*, 405 U.S. 518 (1972) (applying overbreadth to pure speech); *Saxe v. State College Area School Dist.*, 240 F.3d 200 (3rd Cir. 2001)(applying overbreadth to regulation of student speech).

Intervenors argue that the District's Speech Policies are unconstitutional, but not because of viewpoint. Rather, the Intervenors argue that the District's Speech Policies are unconstitutionally overbroad.

While Plaintiffs certainly agree that the Policies are overbroad, Intervenors have misunderstood Plaintiffs' viewpoint based argument. The District's Speech Policies prohibited students from saying that homosexual behavior was wrong. But students could speak favorably about homosexual behavior. Because the District only prohibited speech negative about homosexual behavior, it was viewpoint based and unconstitutional. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992)(striking down ordinance that only prohibited "fighting words" that insulted, or provoked violence "on the basis of race, color, creed, religion or gender.")[5]

The District argues that because some students expressed disagreement with the Training in a comment card that this is proof that the District's policies do not prohibit negative comments about homosexuality. *See* District's Brief, 9. The District's arguments are flawed. The comment cards were anonymous. In addition, very few of the cards contained criticisms of homosexuality. Most of them contained critiques of the

[5] Plaintiffs also claim that the Speech Policies violate the Equal Protection Clause, under which the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *See Hansen v. Ann Arbor Public Schools,* 293 F. Supp.2d 780, 807 (E.D.Mich. 2003). The District did not respond to this argument separately, but rather argued that because their policy does not discriminate based on viewpoint, there is no equal protection violation. *See* District Brief, 37. Because the District's policies do exclude those holding certain views, it has violated the Equal Protection Clause.

Training. In any event, there is a significant difference between student speech among students and the school inviting a student to critique the Training. Just because a student could anonymously critique the Training does not mean that students could tell others that homosexuality is morally wrong, and that homosexuals can change.

The District cites *West v. Derby Unified School District*, 206 F.3d 1358 (10th Cir. 2000) for the proposition that it can restrict speech when the school can forecast disruption based on the speech. The District misses the point. Of course a school can restrict speech when it can reasonably forecast disruption – that was the holding of *Tinker*. *But it must do so in a viewpoint neutral manner.* In *West*, the school had a history of racial tensions. Thus, it adopted a "Racial Harassment and Intimidation" policy which prohibited racial harassment and intimidation by name calling, and the wearing and possession of items depicting racial hatred and prejudice, among other things. But importantly, the policy was viewpoint neutral. The policy prohibited both "Aryan Nation White Supremacy" and "Black Power" clothing and material. In fact, it prohibited all "hate groups" clothing and materials, not just anti-white or ant-black items. *See id.* at 1361.

The District argues that under *Tinker*, certain viewpoints of student speech may be prohibited if it would violate the rights of other students, or is

disruptive. *See* District's Brief, 31 (citing *Tinker*, 393 U.S. at 511 and *Muller by Muller v. Jefferson Lighthouse School*, 98 F.3d 1530, 1538 (7th Cir. 1996). The District has misrepresented the holding of these cases.[6] In *Tinker*, the Supreme Court struck down a viewpoint-based speech restriction on wearing armbands protesting the Vietnam War. The Court did say, "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." *Id.* at 511. The Court did not hold, as the District suggests, that schools can engage in viewpoint-based speech restrictions when it is necessary to avoid material and substantial disruption. Rather, it just stated, in dicta, that it is clear that *without such proof*, viewpoint-based speech restrictions are "clearly" unconstitutional.

The Sixth Circuit has already rejected the District's interpretation of *Tinker*. In *Castorina v. Madison County School Board*, 246 F.3d 536 (6th Cir. 2001), high school students were suspended for wearing a t-shirt depicting the Confederate flag. The court found that such censorship was viewpoint-based, and in violation of the First Amendment, because students

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[6] *Muller* did not even involve a viewpoint based speech analysis. Rather, the court analyzed the speech restrictions as a prior restraint on speech, a content-based speech restriction, and a "time place and manner" speech restriction. *See* 98 F.3d at 1540, 1542, 1543.

were permitted to wear other racially divisive t-shirts. The court stated that "the school's refusal to bar the wearing of this apparel [Malcolm X shirts] along with the Confederate flag gives the appearance of a targeted ban, something that the Supreme Court has routinely struck down as a violation of the First Amendment." *Id.* at 541. The court noted that even if there had been a history of racial violence, the school could not engage in viewpoint discrimination. *See id.* at 543-44.

However, even under the District's flawed reading of *Tinker*, the District is not justified in restricting all negative speech about homosexual behavior. The District would have to show that such a restriction was *necessary* to avoid *material* and *substantial* interference with schoolwork or discipline. The District's overlybroad policy bans all negative and insulting speech about homosexual behavior, not just such speech that necessarily will result in a material and substantial disruption of school.

The District cited *Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006) for the proposition that the school can restrict speech that interferes "with the rights of other students to be secure and to be let alone." *See* District's Brief, 29. However, the United States Supreme Court recently granted certiorari in that case, dismissed it as moot, and vacated the Ninth Circuit's opinion. *See id*, cert. granted, judgment vacated by *Harper*

v. Poway Unified School District, __ S.Ct. __, 2007 WL 632768 (U.S. Mar. 5, 2007). Thus it is no longer good law and should not be relied upon. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

The District cited *Governor Wentworth Regional School District v. Henrickson*, 421 F.Supp.2d 410 (D.NH. 2006), for the proposition that when there is a history of violence at the school because of certain speech, the school is permitted to place restrictions on that speech. *See* District's Brief, 32. This case is not applicable to our case. This case did not involve a ban on certain viewpoints of speech. It did not involve terms that were overlybroad or terms that were used out of their normal everyday meaning. Of course schools can restrict speech when it can reasonably forecast material disruption based on the speech. But what it cannot do is censor speech based on its viewpoint.

In addition, the District's claim of a history of disruption has been exaggerated and does not hold up under the facts. During the 2003-2004 school year, there were 20 incidents of alleged harassment within the Boyd County High School. (RE 48, District's Motion for Summary Judgment, Exhibit G, JA 368). Only two of these incidents were based on homosexual behavior. However, there were four incidents of sexual harassment, eight incidents of verbal harassment, and two incidents of racial harassment. At

the Middle School, there were a total of four incidents of alleged harassment during the 2003-2004 school year. *Id.* Only one was based on homosexual behavior, but no evidence was found to substantiate the claim. However, there was an incident of general bullying, an incident of harassment based on national origin, and one incident of sexual touching.

During the 2004-2005 school year, there were 39 claims of harassment at the High School. *See id.* Of these, only three were based on homosexual behavior. To the contrary, there were ten incidents of sexual harassment, 16 incidents of verbal threats, and two incidents of racial harassment. In the Middle School for the 2004-2005 school year, there were 24 incidents of harassment. Of these, there were four incidents of harassment based on homosexual behavior, 14 claims of sexual harassment, and one claim of racial harassment.

Whether or not there is a history of disruption, the District may not suppress speech based on viewpoint. That is exactly what has happened in this case. The Speech Policies are unconstitutional because they only suppress speech that it *negative* or *insulting* to homosexuals, and not speech that is pro-homosexual.

III. A DISCLAIMER, SUCH AS IN POLICY 9.42811, DOES NOT ABSOLVE THE CONSTITUTIONAL INFIRMITIES IN THE SPEECH POLICIES.

The District cannot correct speech policies that impermissibly chill constitutionally protected speech simply by adding a disclaimer in the policy that it does not limit speech "otherwise protected under the state or federal constitutions." Such a disclaimer does not put students on notice of what speech is prohibited or allowed.

In *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975), the court struck down a school speech policy as unconstitutionally vague and overbroad. The policy in that case permitted speech on school property "as long as it is not obscene or libelous and as long as the distribution of said literature does not reasonably lead the principal to forecast substantial disruption of or material interference with school activities." *Id.* at 381. In essence, the speech policy was a codification of the *Tinker* standard. Nevertheless, the court struck it down as vague and overbroad. "A crucial flaw exists in this directive since it gives no guidance whatsoever as to what amounts to a 'substantial disruption of or material interference with' school activities and equally fatal, it fails to detail the criteria by which an administrator might reasonably predict the occurrence of such a disruption."

If repeating a constitutional standard on speech regulations, such as the *Tinker* standard, does not put a student on notice as to what speech is prohibited, then surely a disclaimer that the regulation does not limit speech

"otherwise protected under the state or federal constitutions" fails to put a student on notice as to what is prohibited.

The disclaimer in this case is all the more ineffective as it is not found in the High School Code of Conduct. The Student Plaintiff in this case has testified that the only policies he is aware of are in the Code of Conduct. (RE 57, Student Aff. at ¶11, JA 626). Moreover, he has no idea what speech is or is not prohibited by state or federal constitutions, and is not aware of any other student who has this type of knowledge. *Id.* at ¶¶12-13. It is absurd to argue that a student, upon reading the Code of Conduct and after being told specifically that he "does not have permission to tell a homosexual person that it is wrong," would think that he could engage in such speech. Plaintiffs did not understand this. The Intervenors did not buy it. Neither should this Court.

The District claims that the Middle School Planner permits an investigation by a compliance coordinator, and thus any investigation will clear speech that was not prohibited by Board policy. *See* District's Brief, 7. Even if this were relevant, this would not apply to the High School Code of Conduct. But when speech is being chilled due to an unconstitutional speech policy that threatens suspension and referral to the police, it is

constitutionally irrelevant if the person is found to not violate the policy. The damage has already been done.

IV. PLAINTIFFS HAVE STANDING TO CHALLENGE THE SPEECH POLICIES.

Defendant argues that Plaintiffs must show injury in fact arising from the challenged action of the defendant, which is redressable by a favorable decision. *See* District's Brief, 20. Plaintiffs meet this standard. Chilled speech is an actual injury sufficient to confer standing when the speech was chilled pursuant to a speech policy that threatened punishment, and a nominal damages award will redress the injury.

"[O]ne does not have to await the consummation of threatened injury" in order to suffer an actual injury to their free speech rights. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *see also Steffel v. Thompson*, 415 U.S. 452, 459 (1974)("[I]t is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights"); *American-Arab Anti-Discrimination Committee v. Thornburgh*, 970 F.2d 501, 508 (9th Cir. 1992)("It is not necessary that [a plaintiff] currently be subject to the challenged provisions in order to have standing; nor need [he] actually commit the forbidden provisions"). Rather, a plaintiff has suffered an actual injury when his speech was chilled due to "state action"

that threatened punishment if he spoke in a certain way. *See PETA v. Rasmussen*, 298 F.3d 1198 (10th Cir. 2002)(plaintiffs had standing to seek retrospective relief because they suffered an injury in fact to their constitutionally protected right to free speech when the defendants threatened them with arrest if they did not cease their speech).

Plaintiff Timothy Morrison refrained from criticizing homosexual behavior at school because he feared punishment under the Speech Policies (RE 50, Plaintiffs' Motion, Ex. H, JA 561); (RE 57, Plaintiffs' Notice, Affidavit, JA 626). Although Plaintiff Timothy Morrison had an ideological and sincerely held religious belief that homosexual behavior is harmful to those who practice it and to society as a whole, and that he must inform others that such behavior is harmful and wrong, he refrained from speaking *because the Speech Policies prohibited him from doing so. See id.*

The Defendant has failed to offer any evidence rebutting Timothy Morrison's affidavit that he suppressed his speech. Such suppression was entirely reasonable considering the severe penalties for violating the Speech Policies. The consequence for violating the High School Code included the possibility of a five day suspension and referral to the Kentucky State Police or the Sheriff's Department. (RE 50, Plaintiffs' Motion, Ex. A, JA 452).

The District's Speech Policies thus created Plaintiff's injury, and he is entitled to nominal damages.[7]

An award of nominal damages will redress Plaintiff's harm. *See Blau v. Fort Thomas Public School Dist.,* 401 F.3d 381 (6th Cir. 2005)(holding that a free speech claim against a school dress policy was not moot because of damages claim); *Comm. for the First Amendment v. Campbell,* 962 F.2d 1517, 1526 (10th Cir.1992) (finding that while adoption of a new policy mooted claims for injunctive relief, "the district court erred in dismissing the nominal damages claim which relates to past (not future) conduct"); *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1257 (10th Cir.2004) (injunctive relief could no longer redress the injury and the "capable of repetition, yet evading review" doctrine did not apply, but plaintiff's nominal damages claim saved action from mootness); *see also Blau*, 401 F.3d at 387 (citing *Utah Animal Rights Coalition* favorably).

Blau is directly on point. There, the school district adopted a dress policy. The plaintiffs were students at the school and challenged the dress policy on First Amendment grounds because they wanted to wear clothes not

[7] At a minimum, whether Plaintiff reasonably suppressed his speech is an issue of fact that should be resolved in Plaintiff's favor as this case was dismissed at the Summary Judgment stage. However, because the Defendant offered no evidence contradicting Plaintiff's affidavit, it is entirely appropriate for this Court to conclude that Plaintiff's speech was indeed reasonably suppressed.

permitted under the policy. During the lawsuit, the plaintiffs graduated and no longer were subject to the dress policy. Nevertheless, the Court ruled that the plaintiffs had standing for their nominal damages claim *based on the time in which they were under the policy* when they suppressed their speech. *Id.* at 387. In the same way, Plaintiffs have standing to pursue a nominal damages claim against the Speech Policies that suppressed their speech.

The District argues that the Student Plaintiff did not attend the Mandatory Diversity Training, and so was not harmed by the statements made during the Training. *See* District's Brief, 14. Even though the Student Plaintiff did not attend the Training, his parents attended a pre-screening of the Training and informed their son of what was said. (RE 50, Exhibit H to Plaintiffs' Motion for Summary Judgment, JA 561); (RE 57, Student Affidavit, JA 626). And in fact, a review of the transcript of the Training proves that the District informed the students that they could not say that homosexual behavior was wrong, or anything negative about homosexual behavior. (RE 50, SOF, ¶¶ 7-9, JA 585-586). It is irrelevant that the Student Plaintiff did not attend the training. His parents did. They then accurately

reported to him what the District said in the training. And as a result, the Student Plaintiff's speech was silenced.[8]

V. DEFENDANT IS NOT ENTITLED TO QUALIFIED IMMUNITY.

School districts in Kentucky are not arms of the state for purposes of Section 1983 litigation and thus are not entitled to Eleventh Amendment Immunity. Although there is oversight by the state, a local school board in Kentucky retains substantial control over the operation of its district, including raising local funds. Thus, local school boards in Kentucky are not merely state agencies. *See Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274, 280 (1977), *Cunningham v. Grayson*, 541 F.2d 538, 543 (6th Cir.1976); *Blackburn v. Boyd County Board of Education*, 749 F.Supp. 159 (E.D. Ky. 1990).

The District relies on *Clevinger v. Board of Education of Pike County, Kentucky*, 789 S.W.2d 5, 10-11 (Ky.1990), in which the Kentucky Supreme Court reaffirmed that local school boards in Kentucky are entitled to state law sovereign immunity. The court appeared to interpret the United States Supreme Court decision in *Will v. Michigan Dep't of State Police*, 491 U.S.

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[8] It would be a different matter altogether if the Parents had misrepresented the contents of the video. But in fact, the transcript supplied by the District confirms that the video did state that students did not have the permission to say that homosexuality is wrong. (RE 50, Plaintiffs' Motion, Ex. C, JA 509-510; Ex. D, JA 536).

58 (1989), as holding that local government units protected by state sovereign immunity are not "persons" under § 1983.

However, the United States Supreme Court has rejected the Kentucky court's view of *Will*. *See Howlett v. Rose*, 496 U.S. 356 (1990). The Court held that state law sovereign immunity does not, alone, operate to preclude a federal civil rights complaint from being heard. "A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise...." *Id.* The Court confirmed that the issue is one to be determined by federal law. *Id.*

The Sixth Circuit has utilized a method of analysis adopted from the Third Circuit for determining whether a governmental entity, particularly an educational institution, is an "arm of the state" for Eleventh Amendment immunity purposes:

> [L]ocal law and decisions defining the status and nature of the agency involved in its relation to the sovereign are factors to be considered, but only one of a number that are of significance. Among the other factors, no one of which is conclusive, perhaps the most important is whether, in the event plaintiff prevails, the payment of the judgment will have to be made out of the state treasury; significant here also is whether the agency has the funds or the power to satisfy the judgment. Other relevant factors are whether the agency is performing a governmental or proprietary function; whether it has been separately incorporated; the degree of autonomy over its operations; whether it has the power to sue and be sued and to enter into contracts; whether its property is immune from state

> taxation, and whether the sovereign has immunized itself from responsibility for the agency's operations.

Hall v. Medical College of Ohio at Toledo, 742 F.2d 299, 302 (6th Cir.1984) (quoting *Blake v. Kline*, 612 F.2d 718, 722 (3rd Cir.1979)). The *Hall* court noted, albeit in dictum, that "[m]unicipalities, counties and other political subdivisions (e.g. public school districts) do not partake of the state's Eleventh Amendment immunity." 742 F.2d at 301 (emphasis added).

In *Cunningham*, the court analyzed some of these factors and concluded that the Jefferson County, Kentucky Board of Education [JCBE] was not the "state" or its alter ego. "JCBE, 'a body politic and corporate with perpetual succession,' inter alia may sue and be sued, contract, purchase, receive, hold and sell property, and issue bonds, establish curriculum and employment standards, and, most importantly, levy school taxes through the county fiscal court." *Cunningham*, 541 F.2d at 543. Kentucky schools continue to retain these powers. *See Blackburn v. Boyd County Board of Education*, 749 F. Supp. 159 (E.D. Ky. 1990).

In addition, the Kentucky legislature mandates that "[e]ach school district shall be under the management and control of a board of education." KRS 160.160 (emphasis added). The *Cunningham* court relied on the powers enumerated in this statute. Such powers have been relied upon elsewhere to find local boards to be autonomous bodies. *Minton v. St.*

Bernard Parish School Board, 803 F.2d 129, 131-32 (5th Cir.1986). In *Minton*, the court found that Louisiana's local school boards "exercise a great deal of discretion in performing their functions and addressing their innately local concerns...." *Id.*

The Kentucky legislature has, likewise, set up local school boards to address "innately local concerns." At KRS 160.290, local boards, are given "general control and management" of the public schools within each district. The statute goes on to list powers such as establishing schools, providing courses and services, controlling and managing funds, appointment of officers, agents, and employees. *See, e.g.*, KRS 160.460 (levy of school taxes), 160.530 (use of school money), 162.010 (title to school property), 162.060 (plans for school buildings); 702 KAR 4:050 (facilities), 4:090 (property disposal), 3:020 (bond issue approval). The underlying theme in all of these statutes and regulations is that the actual decision is made by the local school board, not the state.

It is the local boards which hold the substantial decision-making authority in regard to the local concerns for which they are established. Although the state does establish guiding rules and policies for the "efficient" administration of the public schools, "being a steward of state education policy does not make the school district an alter ego of the state."

Fay v. South Colonie Central School Dist., 802 F.2d 21, 27 (2nd Cir.1986) (refusing Eleventh Amendment immunity for New York school boards); *Rosa R. v. Connelly*, 889 F.2d 435, 437 (2nd Cir.1989) (quoting *Fay* and finding Connecticut school boards are not state agencies).

The *Hall* analysis cites whether the judgment will have to be paid out of the state treasury as "perhaps the most important" factor. 742 F.2d at 302. Here, Plaintiff is only seeking nominal damages and the District offered no evidence that such an award could not be paid out of its local funds, but instead, would be paid out of the state treasury.

VI. CONCLUSION

The District's Speech Policies were viewpoint based as they prohibited negative speech on homosexual behavior, while permitting favorable speech about homosexual behavior. These policies threatened severe punishment if such speech occurred – from suspension to contacting the State police. Plaintiff Timothy Morrison was injured by the Speech Policies as he was prevented from speaking out against homosexual behavior, even though he had a ideological and religious belief to share such information with others.

The District tried to argue that its speech policies did not prohibit negative speech about homosexual behavior. But its arguments are

contradicted by its previous admissions and by the transcript of the District-approved video. Nevertheless, this case was decided at the Summary Judgment stage, and all factual disputes must be resolved in favor of Plaintiff. Plaintiff is entitled to nominal damages as his speech was unconstitutionally restricted by the Speech Policies.

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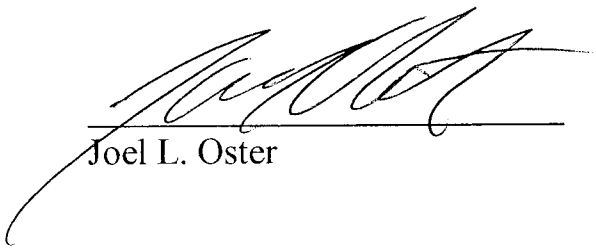
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), I certify the foregoing Appellants' Brief is proportionally spaced, has a typeface of 14 points or more, and contains 6,668 as calculated by Microsoft Word, exclusive of the Corporate Disclosure Statement, Table of Contents, Table of Authorities, Request for Oral Argument, and Certificate of Compliance.

Dated: March 8, 2007



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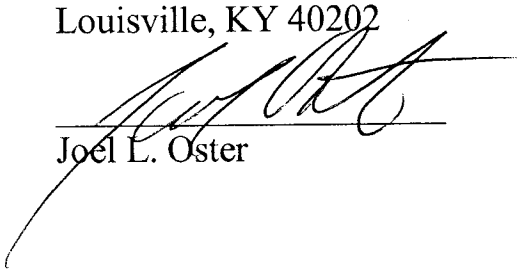

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