UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

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<tr><td>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</td><td>)
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Civil Action No. 05-38-DLB

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INTERVENORS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Intervenors file this Reply Memorandum in Support of their Motion for Summary Judgment to address briefly points raised by Plaintiffs Timothy Allen Morrison II, et al. ("Plaintiffs"), and Defendants Board of Education of Boyd County, et al. ("Defendants" or "Board"), in their prior briefs.

ARGUMENT

I. THE BOARD'S OBJECTION TO INTERVENORS' DISCUSSION OF THE CONSTITUTIONALITY OF THE BOARD'S 2004-2005 HARASSMENT POLICIES IS WITHOUT MERIT.

Although Defendants have presented multiple arguments as to why Intervenors are precluded from addressing the constitutionality of the 2004-2005 harassment policies, none of them has merit.

Intervenors have already addressed the question of standing in their Memorandum in Response to Motions for Summary Judgment. (Rec. Doc. 55 at 4). The Board's objections based on waiver and/or estoppel are similarly misplaced. First, Intervenor Jane Doe was not a party to the prior proceedings, *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County, Kentucky*, Civ. Action No. 03-17-DLB (E.D. Ky.) ("*GSA* litigation"). Therefore, she cannot have waived her ability to object to the harassment policies by not doing so in that prior proceeding and the Board has no other basis for asserting that she is otherwise estopped from presenting her arguments to the Court to ensure that the First Amendment rights of her children, who are or will be students at Boyd County Middle School or High School, are respected.

Second, the remaining Intervenors, who were plaintiffs in the *GSA* litigation, have similarly not waived their ability to address the constitutionality of the Board's 2004-

2005 harassment policies because those policies were not at issue in the prior litigation, and these Intervenors had no obligation to challenge them as part of that case. Intervenors presented all claims that arose from the factual situation they faced at the time. Their complaint asserted that the Board's refusal to allow the GSA to meet violated the Equal Access Act and the First Amendment, and that the Board's refusal to protect students from harassment and discrimination on the basis of their real or perceived sexual orientation and gender identity violated their right to equal protection of the law guaranteed by the Fourteenth Amendment. One of Intervenors' specific grievances with the Board was the Board's failure to protect students from harassment based on their actual or perceived sexual orientation and gender identity. While this failure was reflected in the fact that the Board's harassment policy did not address such harassment at all, Intervenors' claims in the *GSA* litigation did not focus on the terms of the Board's anti-harassment policies and did not allege any constitutional deficiencies in those policies themselves. Because the constitutionality of the harassment policy was not adjudicated in the *GSA* litigation, Intervenors are not precluded from addressing the issue here.

To the extent the Board implicitly relies on the doctrine of "claim preclusion," it applies only

> in the presence of the following four elements: (1) where the prior decision was a final decision on the merits; (2) where the present action is between the same parties or their privies as those to the prior action; (3) where the claim in a present action should have been litigated in the prior action; and (4) where an identity exists between the prior and present actions.

Mitchell v. Chapman, 343 F.3d 811, 819 (6th Cir. 2003). None of the necessary elements are present here. First, this Court's decision on the *GSA* plaintiffs' motion for

preliminary injunctive relief on their Equal Access Act claim was not a final decision on the merits. Second, additional parties (*i.e.*, Jane Doe) are present in this case. Third, as explained above, the question of the constitutionality of the harassment policy was neither presented in the *GSA* litigation nor required to be. Finally, there is no identity between the prior case, which involved (a) violations of the Equal Access Act and the Constitution stemming from the Board's decision not to allow students to form a Gay Straight Alliance club and (b) the violation of students' rights to equal protection of the laws because of their real or perceived sexual orientation and gender identity, and the present matter, which presents a facial challenge to the Board's harassment policy and its mandatory attendance requirement for the anti-harassment training. Therefore, the Board's suggestion that Intervenors are precluded from presenting their arguments regarding the constitutionality of the 2004-2005 harassment policies should be rejected.

Finally, as "full participant[s] in the lawsuit," Intervenors are permitted to address all of Plaintiffs' objections to the Fall 2004 anti-harassment training in order to defend Intervenors' interest with respect to the continuation of those trainings. *Alvarado v. J.C. Penney Co.*, 997 F.2d 803, 805 (10th Cir. 1993) ("Having been permitted to become a party in order to better protect his or her interests, an intervenor is allowed to set up his or her own affirmative cause or defense appropriate to the case and the intervention."). Intervenors became part of this lawsuit in order to help ensure that the Board conducts an effective anti-harassment training, both because of their interest in enforcing the terms of the Consent Decree in the *GSA* litigation and because of Jane Doe's interest in ensuring a non-discriminatory school environment for her children. Addressing the constitutionality of the Board's harassment policies is a necessary part of addressing challenges to the

constitutionality of the anti-harassment training because the Board decided to include a discussion of these policies in the Fall 2004 student training video. Moreover, Intervenors engage this issue because, in their view, it is imperative that the Court identify any unconstitutional elements of the Fall 2004 training with specificity in order to ensure, to the greatest extent possible, that future anti-harassment trainings will be constitutionally sound and immune to challenge. Therefore, Intervenors are within their rights to seek declaratory judgment on this important issue. *Id.* (allowing intervenors to "request[ ] *a declaratory judgment of sorts* to resolve the ultimate issue" of liability) (emphasis added).

Due to the simultaneous briefing schedule, Intervenors could not be certain that Plaintiffs intended to move for summary judgment on their First Amendment claims regarding the 2004-2005 harassment policies, or that they would properly frame the legal analysis. Because the issue was amenable to resolution as a matter of law, Intervenors moved for summary judgment in favor of Plaintiffs with respect to those claims, and for summary judgment in favor of Defendants with respect to all other claims, in order to promote an efficient resolution of this case.

The Board is correct that, to date, Intervenors have filed only an Answer in Intervention, and have not filed a Complaint in Intervention asserting First Amendment claims regarding the 2004-2005 harassment policies. Intervenors have not done so primarily because a declaratory judgment in favor of Plaintiffs with respect to the constitutionality of the 2004-2005 harassment policies would provide Intervenors with all of the relief that they seek with respect to that claim.

Regardless of the fact that Intervenors did not file an Answer in Intervention, the Board has been on notice of Intervenors' position on its harassment policies since Intervenors filed their brief in response to Plaintiffs' motion for a preliminary injunction at the very beginning of this case. Where a party has "adequate notice of the claim[ ] being asserted against [it]" by an intervening party, courts have been willing to rule on the intervening party's motion for summary judgment even in the face of technical deficiencies in the pleadings. *Id.* at 805 (granting intervenor's motion for summary judgment against original defendant even though it had not yet brought a claim for indemnification against intervenor and intervenor had not filed complaint-in-intervention against defendant); *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985) (granting plaintiff's motion for summary judgment against intervenor-defendant even though plaintiff's complaint had not been amended to include a claim against intervenor).[1] Because both the Court and the Board have received ample notice of Intervenors' position, the Court may (and should) address Intervenors' arguments on the merits. *Alvarado*, 997 F.2d at 805 ("The [district] court had been sufficiently apprised of the nature of the intervenor's claims and interests to rule.").

Should the Court deem it necessary, however, Intervenors can file a Complaint in Intervention without delay to remedy any procedural defects that may exist. The Board would suffer no prejudice should the Court permit Intervenors to do so, as Intervenors' position has been clear for over nine months, and would not require any additional

[1] By failing to object to Intervenors' motion to intervene, the Board has waived the right to argue against Intervenors' full participation in the litigation. *Alvarado v. J.C. Penney Co.*, 768 F. Supp. 769, 774 (D. Kan. 1991), *aff'd*, 997 F.2d 803 (10th Cir. 1993).

discovery. At a minimum, the Court should consider Intervenors' arguments regarding the constitutionality of the 2004-2005 harassment policies as argument *amici curiae*.

II. THE BOARD HAS A COMPELLING INTEREST IN PROTECTING STUDENTS FROM DISCRIMINATION BASED ON THEIR REAL OR PERCEIVED SEXUAL ORIENTATION AND GENDER IDENTITY, AND THE TRAININGS ARE A NARROWLY TAILORED METHOD OF PROMOTING THAT INTEREST.

Plaintiffs present the astounding argument that the Board does not have a compelling interest in preventing harassment on the basis of real or perceived sexual orientation. *See* Plaintiffs' Response to the Cross Motions for Summary Judgment by the Board of Education of Boyd County, Kentucky and the Intervenors at 21 (Rec. Doc. 56). These statements are not only incorrect as a matter of law, but also completely antithetical to the constitutional guarantee that all students have equal access to educational opportunities.

As this Court explicitly found in its decision in the *GSA* litigation, "[a]nti-gay harassment, homophobia, and use of anti-gay epithets have been and continue to be a serious problem" in the Boyd County School District. 258 F. Supp. 2d 667, 670 (E.D. Ky. 2003). The fact that there are also reports of other types of discrimination in Boyd County – including sexual harassment and racial discrimination – is irrelevant to the question of whether the Board has a compelling interest in tackling discrimination against and harassment of students who are, or are perceived to be, lesbian, gay, bisexual or transgender (LGBT).

Schools have a compelling interest in ensuring that <u>all</u> students are free from harassment and discrimination. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507, 513 (1969) (school's compelling interest in preventing invasion of other

students' rights can justify restriction of student speech); *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 259 n.15 (3d Cir. 2002) ("schools have a 'compelling interest in having an undisrupted school session conducive to the students' learning'") (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972)); *id.* at 264 ("Intimidation of one student by another, including intimidation by name calling, is the kind of behavior school authorities are expected to control or prevent."). In fact, the Consent Decree explicitly recognizes that the Board has a compelling interest in addressing other forms of harassment and discrimination, and authorizes the Board to incorporate those topics into whatever training it chooses to develop, so long as it devotes sixty minutes to the problem of anti-LGBT harassment. *See* Consent Decree § III.C ("Defendants are free to address topics relating to general diversity or other kinds of discrimination or harassment in these trainings . . . ."). The *GSA* plaintiffs, however, filed suit with this Court to address anti-LGBT harassment and discrimination by Boyd County school officials and students, and secured a remedy that was consistent with the harm that they suffered.

The harassment statistics compiled by the Board and relied upon by Plaintiffs neither establish that anti-LGBT harassment is no longer a problem in the Boyd County schools nor undermine the Board's compelling interest in addressing such harassment. To the contrary, by settling the *GSA* litigation with a Consent Decree that involved a multi-year program of staff and student anti-harassment training, the Board acknowledged the severity of the problem of anti-LGBT harassment in its schools. Moreover, in light of the fact that the *GSA* litigation revealed apathy and, in some cases, overt hostility from teachers and school administrators to whom harassment was reported,

this Court should be hesitant to accept the Board's statistics regarding reported claims of harassment as conclusive with regard to the question of the prevalence of anti-LGBT harassment. More revealing than these statistics is the fact that the Gay Straight Alliance has been defunct for the last two academic years, which reflects students' unwillingness to subject themselves to the abuse that the *GSA* plaintiffs experienced. *See* Supplemental Declaration of Sharon M. McGowan, Exhibit 1 (list of official student groups for 2005-2006 academic year fails to include Gay Straight Alliance); 258 F. Supp. 2d at 670 n.1 (noting that students taunted *GSA* plaintiff Reese at a basketball game by using a megaphone to chant "faggot-kisser," "GSA" and "fag-lover"). Likewise, the hostility of Plaintiffs toward the mere discussion of the equal worth and dignity of LGBT students indicates that the culture in Boyd County has changed little, if at all, since the Court issued its decision in the *GSA* litigation.

Intervenors believe that the Board can and should conduct anti-harassment trainings to address problems of sexual, racial or other forms of harassment that exists in the Boyd County schools. It is unfortunate that the Board has apparently developed only a program addressing anti-LGBT harassment, and did so only in response to litigation and the threat of monetary liability. Nevertheless, the Court should leave no doubt that, as a general matter, schools have a compelling interest in preventing harassment of students who are, or are perceived to be, lesbian, gay, bisexual and transgender, and, in this specific case, the Board's interest is particularly compelling due to the demonstrated history of abuse directed at those students. Moreover, the Court should find that compulsory attendance at an anti-harassment training program that specifically discusses

discrimination based on real or perceived sexual orientation is a narrowly-tailored measure for promoting that interest.

III. THE BOARD DID NOT VIOLATE THE FREE EXERCISE CLAUSE BY REQUIRING STUDENTS TO ATTEND THE FALL 2004 ANTI-HARASSMENT TRAINING BECAUSE NO STUDENT WAS REQUIRED TO AFFIRM OR RENOUNCE ANY PARTICULAR SET OF BELIEFS AS PART OF THE TRAINING.

As noted above, the Board's mandatory attendance requirement at an anti-harassment training can satisfy even strict scrutiny. Under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), however, this case does not warrant heightened scrutiny. The mandatory attendance policy is a facially neutral rule that applies to all students irrespective of their religious beliefs. There is simply no evidence in the record to indicate that the "unexcused absence" students received for failing to attend the anti-harassment training program due to religious objections was any different than the "unexcused absence" that students received for failing to attend the training for non-religious reasons (or no reason at all). There is also no evidence in the record to suggest that the Board applied its excused absence policy in a discriminatory manner against religious students.[2] Specifically, there is no evidence in

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[2] If anything, the record indicates that an unusually high number of students received excused absences on that date. According to Defendant's records, the average attendance rate at the Boyd County Middle School is 95%, and is 93% at the High School. Defendants' Response in Opposition to Motion for Preliminary Injunction ("Def PI Opp. Br.") Exh. I (Rec. Doc. 27). On the date the training was held, however, 59 Middle School students (8%) received an excused absence (along with 209 students who had unexcused absences). At the High School, 155 students (16%) received an excused absence (along with 308 students who had unexcused absences). *Id.* Overall, 37% of Boyd County Middle School students and 48% of Boyd County High School students were absent for the anti-harassment training. *Id.* While not significant in the context of this litigation, Intervenors note that the attendance percentages included in the Board's chart for the day of the Fall 2004 training are an incorrect calculation of the raw attendance data provided by the Board.

the record indicating that any of the Plaintiffs asked for and were denied an excused absence in the sense contemplated by the Board's excused absence policy. *See* Intervenors' Memorandum in Response to Motions for Summary Judgment at 11 (Rec. Doc. 55). Rather, all students who avoided the training due solely to their objection to the training's content were given unexcused absences. Accordingly, as a religiously neutral and generally applicable policy, the mandatory attendance requirement is subject to rational basis review.

Even under the pre-*Smith* analysis used in *Mozert*, the Sixth Circuit found that simply requiring students to read and discuss viewpoints contrary to their religious beliefs did not burden their constitutional right of free exercise. *Mozert v. Hawkins County Bd. of Educ.,* 827 F.2d 1058, 1070 (6th Cir. 1987). Government action that does not burden a constitutional right need only survive rational basis review. *Id.*

Nevertheless, Plaintiffs attempt to ratchet up the level of scrutiny applicable to their Free Exercise challenge by arguing that the Board's 2004-2005 unconstitutionally overbroad harassment policies, which were restated in the Fall 2004 training video, somehow render the mandatory attendance requirement a violation of their free exercise rights. The question of whether students can be prevented from engaging in constitutionally protected speech about homosexuality or any other topic is primarily a free speech question, with free exercise implications for some. The question of whether a student's free exercise rights are violated by being required to listen to a sixty-minute lesson about the equal worth and dignity of their fellow lesbian, gay, bisexual and transgender students, however, is a question that has been answered by *Mozert*.

The mandatory attendance requirement does not violate the Free Exercise Clause simply because some statements in the training were inconsistent with the First Amendment's guarantees of free speech. No student should be told by the school that he or she can be punished for engaging in constitutionally protected speech. On the other hand, all students can be required to sit through a lesson that contains statements that may conflict with their religious beliefs. *Id.* at 1066.

Plaintiffs also attempt to fashion a "compelled speech" argument, by insisting that the speech-restrictive statements by the trainer in the Fall 2004 video intimidated them into affirming, through their silence, views that were contrary to their religious beliefs, thus crossing the line articulated in *Mozert*. Essentially, Plaintiffs present a two-pronged argument: (1) being forced to listen to the anti-harassment video and (2) being subject to an anti-harassment policy that, by its terms, appears to prohibit students from speaking out in opposition to statements in the video, when combined, violated their free exercise rights. As Intervenors have reiterated on numerous occasions, the second prong, standing alone, violates the First Amendment. But the first prong, standing alone, does not.

The Sixth Circuit's rulings in *Mozert* and in *Spence v. Bailey*, 465 F.2d 797 (6th Cir. 1972), in particular, demonstrate why Plaintiffs' free exercise claim is untenable.[3] In *Spence*, state law required students to complete a physical education course or, as an alternative, participate in the Reserve Officers Training Corps program. The school that Spence attended, however, did not offer physical education classes for male students,

[3] In this brief, Intervenors focus on Plaintiffs' free exercise objection to the anti-harassment training, and refer the Court to the arguments presented in Intervenors' Memorandum in Support of Motion for Summary Judgment as to why students' free speech rights are not violated when they are required to sit quietly in a classroom and listen to lessons taught from a perspective or relaying information with which they may disagree. (Rec. Doc. 49 at 32-34).

leaving ROTC as the only alternative. The ROTC program required students not only to study material prepared by the U.S. Army but also to perform military drills, complete marksmanship and firearms instruction, execute other military tactics and wear military uniforms once each week. *Id.* at 798. The student objected to being "subjected to combat training for the purpose of being prepared to enter into war," because doing so would require him to act contrary to his religious beliefs. *Id.* at 798 n.1. As the Sixth Circuit explained, the constitutional violation in that case stemmed from what was being asked of the student. Specifically, the Constitution prevented the State from forcing students to choose between engaging in military training in contravention of their religious beliefs and receiving their high school diploma. *Id.* at 800 ("the State may not put its citizens to such a Hobson's choice").

In contrast, the Sixth Circuit in *Mozert* ruled that a school could require a student to "read[ ] and discuss[ ] assigned materials" even though the materials included discussions of mental telepathy and other supernatural phenomena that were inconsistent with the student's religious beliefs. 827 F.2d at 1064. The challenged lesson plan in *Mozert*, the court explained,

> did not compel [students] "to declare a belief," "communicate by word and sign [their] acceptance" of the ideas presented, or make an "affirmation of a belief and an attitude of mind." In [*Board of Education v.*] *Barnette* the unconstitutional burden consisted of compulsion either to do an act that violated the plaintiff's religious convictions or communicate an acceptance of a particular idea or affirm a belief. No similar compulsion exists in the present case.

Id. at 1066.

The *Mozert* court specifically rejected plaintiffs' argument that the class participation requirement supplied the element of compulsion, noting that "there is no

proof in the record that any plaintiff student was required to engage in role play, make up magic chants, read aloud or engage in the activity of haggling," which plaintiffs found offensive on religious grounds. *Id.* "Being exposed to other students performing these acts might be offensive to plaintiffs," the Court observed, "but it does not constitute the compulsion described in the Supreme Court cases, where the objector was required to affirm or deny a religious belief or engage in or refrain from engaging in a practice contrary to sincerely held religious beliefs." *Id.* Ultimately, the Sixth Circuit ruled that a requirement "that students read the assigned materials and attend reading classes, in the absence of a showing that this participation entailed affirmation or denial of a religious belief, or performance or non-performance of a religious exercise or practice, does not place an unconstitutional burden on the student's free exercise of religion." *Id.* at 1065.[4]

The record in this case reveals that, like *Mozert* and unlike *Spence*, students had only to sit in their seats and watch a sixty-minute video. Once the video concluded, students were given the opportunity to comment about the training video anonymously, and even students who expressed disagreement with the video received credit for attending the training. Students were not required to take an exam or write an essay that required them to disavow their religious convictions in order to get a passing grade.[5]

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[4] In her concurrence, Judge Kennedy agreed that there was no burden on the student's free exercise rights, but also noted that, even assuming that use of a mandatory reading series did amount to a constitutionally-cognizable burden, the school's actions were justified by compelling state interests. *Mozert*, 827 F.2d at 1070-73 (Kennedy, J., concurring).

[5] Although the Board has chosen to implement a non-interactive lesson plan to satisfy its obligations under the Consent Decree, *Mozert* leaves no doubt that the Board could conduct a training that required students to discuss issues of sexual orientation and gender identity without violating students' free exercise rights. 827 F.2d at 1064. Similarly, the Board could require students to complete an assignment that asked them to articulate the main themes of an anti-harassment training or to explain why it is important

Most importantly for purposes of the free exercise analysis, no student was required to take any action or make any statement, written or oral, either avowing specific views about sexual orientation and/or gender identity, or disavowing his or her sincerely held religious beliefs in order to get credit for satisfying this curricular requirement. *Id.* at 1069 ("If the Hawkins County schools had required the plaintiff students either to believe or say they believe that 'all religions are merely different roads to God,' this would be a different case."). Accordingly, mandatory attendance at the anti-harassment training did not burden Plaintiffs' constitutional rights, notwithstanding the fact that the training contained statements with which they disagreed.

CONCLUSION

For the foregoing reasons, the Court should grant Intervenors' motion for summary judgment.

Respectfully submitted,

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(cont'd)

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to stop harassment and discrimination on the basis of sexual orientation and gender identity. As long as the Board does not require students to disavow their religious beliefs as part of an anti-harassment training, the Board retains broad discretion with respect to the format of the training. *Id.* at 1071 (Kennedy, J., concurring) (reiterating that public schools are charged with "inculcat[ing] the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation," and that "public school officials have considerable discretion in structuring their curriculum to achieve these results").

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Dated: January 20, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2006, 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:

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I further certify that I have mailed this document and the notice of electronic filing by first class mail, on January 20, 2006, to the following non-CM/ECF participants:

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