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.	)	Civil Action No. 05-38-DLB
BOARD OF EDUCATION OF BOYD COUNTY, KENTUCKY Defendants	)	**ELECTRONICALLY FILED**
SARAH ALCORN, WILLIAM CARTER, DAVID FANNIN, LIBBY FUGETT, TYLER McCLELLAND, and JANE DOE Intervenor-Defendants	)	

MEMORANDUM IN SUPPORT OF INTERVENOR-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

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 of Education of Boyd County, Kentucky ("Board"), the student Intervenors entered into a consent decree that required the Board to implement anti-harassment policies and mandatory trainings to protect students from discrimination and abuse because of their real or perceived sexual orientation and gender identity.

Plaintiffs in this case are students and parents who object to many of the ideas discussed in the anti-harassment training conducted by the Board in November 2004. Plaintiffs assert that the Constitution requires the Board to allow students who object to the training to opt out without consequence. Plaintiffs have also alleged that the Board's 2004-2005 anti-harassment policies, which have since been changed, violated their rights under the First and Fourteenth Amendments.

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 of course apply to other students as well, and 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.

As parties to the consent decree, Intervenors are greatly troubled that students may be allowed to opt out of the anti-harassment training. 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. *See* Affidavit of Jane Doe filed in Support of Motion for Protective Order. (Rec. Doc. 12)

The Board has the 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). By prohibiting speech that has the "the effect of insulting or stigmatizing an individual," however, Defendant's 2004-2005 harassment policies proscribed more speech than constitutionally permissible. Likewise, the Fall 2004 student training video, which reiterated this unconstitutional speech restriction, also ran afoul of the Constitution's guarantee of free speech. Consequently, Intervenors agree that summary judgment for the Plaintiffs with respect to their First Amendment claim is appropriate. Because the Board's 2004-2005 policies subjected students to discipline based on the content of their speech, rather than their identity as speakers, however, Plaintiffs' claim sounds in the First Amendment, rather than the Equal Protection Clause.

Plaintiffs do not, however, 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. Schools have the authority to develop curricular materials containing secular discussions of sexual orientation and gender identity, and to teach students that they should treat each other with respect and dignity, so long as students are not required to disavow their sincerely held religious beliefs or affirm beliefs antithetical to their

religious convictions. The Constitution also permitted the Board both to require all students to attend the anti-harassment training and to penalize those who did not. The fact that students may hear statements during this training with which they or their parents may disagree violates neither the Free Exercise Clause nor the First Amendment's prohibition against government-compelled speech.

Finally, the Due Process Clause neither entitles parents to prescribe what a school may and may not teach children in Boyd County nor gives them the right to opt their children out of selected portions of the curriculum with which they disagree. If parents wish to have their children educated in a manner wholly consistent with their faith, the Constitution bestows upon them the right to send their children to religious schools or to home-school their children.

"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 2004-2005 policies, however, reached 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 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. Requiring all students to attend an anti-harassment video that contained statements with which some students may disagree, however, did not violate the Constitution.

Accordingly, this Court should grant partial summary judgment to Plaintiffs on their First Amendment claim but should grant partial summary judgment to Defendant with respect to Plaintiffs' free exercise, compelled speech and parent rights claims.

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

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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").

haven to talk about anti-gay harassment and to work together to promote tolerance, 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 (hereinafter "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 Board to conduct mandatory staff training and age-appropriate student trainings on issues pertaining to sexual orientation and gender identity harassment. Finally, the Board agreed to amend its harassment policies 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] *See* Intervenors' Response to Plaintiffs' Motion for Preliminary Injunction ("Intervenors' PI Br."), Exh. A. (Rec. Doc. 26)

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

Prior to the 2004-2005 academic year, the Board added "sexual orientation and gender identity" to the policies and documents identified in the Consent Decree,[4] and hired Compliance Coordinators. In early November 2004, the Board conducted an anti-harassment training for the students at Boyd County Middle School and Boyd County High School. The training consisted of a videotape, 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] *See* Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction ("Def PI Opp. Br."), Exh. C (transcript of Middle School and High School videos) (Rec. Doc. 27). At the conclusion of the video, students were asked to provide comments (anonymously) about the program. *Id.* at Exh. D.

According to the Board's attendance records, only 63% of students at Boyd County Middle School and 52% of Boyd County High School students actually watched the training video. *Id.* at Exh. I. Those who did not attend, including Plaintiff Timothy Morrison, received an unexcused absence. *See* Affidavit of William Capehart ("Capehart Aff.") filed in Support of Def. PI. Opp. Br. at ¶ 2; *see also* Affidavit of Mary Morrison

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[4] With the exception of the addition of "sexual orientation" and "gender identity" to the Board's policies, Intervenors played no role in the drafting or formulation of the harassment policies in place during the 2004-2005 school year.

[5] As the Court is aware, counsel for the student Intervenors played no role in the preparation of the Fall 2004 training videos. The independent question of whether the trainings conducted by the Board in Fall 2004 satisfied the Board's obligations under the Consent Decree has been presented to the Court in the context of proceedings brought by Plaintiffs to enforce the Consent Decree.

("Morrison Aff.") filed in Support of Plaintiffs' Motion for Preliminary Injunction ("Pl. PI Br.") at ¶ 11. (Rec. Doc. 9)

In February 2005, Plaintiffs filed this lawsuit, which asserted four claims: (1) violation of the freedom of speech under the First Amendment on the grounds of (a) viewpoint discrimination, (b) overbreadth, (c) vagueness, and (d) compelled speech; (2) violation of the Due Process Clause due to (a) the harassment policies' vagueness and (b) the Board's failure to "allow parents to opt their children out of diversity training, even if it violates their ideological, moral and sincerely held religious beliefs;" (3) violation of the Equal Protection Clause for "treating Plaintiffs and other students and parents differently . . . on the basis of the content of their speech and viewpoint, as well as their ideological, moral and religious beliefs;" and (4) violation of the Free Exercise Clause for "requiring students to undergo mandatory diversity training that attempts to change their ideological, moral and religious beliefs." Plaintiffs sought declaratory and injunctive relief and damages from the Board for its actions during the 2004-2005 academic year.

Plaintiffs filed a motion for a preliminary injunction on March 28, 2005. After being granted leave to intervene, Intervenors filed a brief in response to Plaintiffs' motion that supported the right of the Board to conduct a mandatory anti-harassment training, but agreed with Plaintiffs that the Fall 2004 student training contained statements that prohibited or, at a minimum, chilled speech protected by the First Amendment. Intervenors also agreed with Plaintiffs that the Board's 2004-2005 harassment policies could not pass constitutional muster.

After participating in mediation before the Court, Plaintiffs and Intervenors proposed language that they believed would bring the Board's various harassment

policies into compliance with the First Amendment. The Board has since approved and adopted the revised harassment policy and student codes of conduct as its own. *See* Declaration of Sharon M. McGowan ("McGowan Decl.") ¶ 2 & Exh. 1. As the Court is aware, the Board is also in the process of developing a new anti-harassment video for the 2005-2006 school year. *See id.* On September 29, 2005, Plaintiffs withdrew their motion for preliminary injunction. (Rec. Doc. 41) The Court directed the parties to file briefs in support of motions for summary judgment by December 15, 2005, but extended the deadline to December 20, 2005, at Plaintiffs' request. (Rec. Docs. 43, 47)

Intervenors, on this motion for summary judgment, now seek a ruling from the Court granting summary judgment for Plaintiffs on their First Amendment free speech claims-- s*ee* Claim 1 (Compl. ¶¶ 56-57, 59-60, 62) -- and granting summary judgment for Defendants on Plaintiffs' Fourteenth Amendment parental rights / substantive due process claim -- *see* Claim 2 (Compl. ¶¶ 68-69) -- their First Amendment free exercise claim -- *see* Claim 4 (Compl. ¶¶ 78-81), and their "compelled speech" claim -- *see* Claim 1 (Compl. ¶ 61).[6]

[6] Because Intervenors agree that the 2004-2005 harassment policies were unconstitutionally overbroad, Intervenors express no view in this motion on whether the policies were also unconstitutionally vague. *See* Claim 1 (Compl. ¶ 62); Claim 2 (Compl. ¶¶ 66-67). Similarly, as explained in greater detail at Section II.F, *infra*, a ruling that the harassment policies are unconstitutionally overbroad addresses any additional Free Exercise concerns that might be implicated by the policies. *See* Claim 4 (Compl. ¶¶ 75-77). To the extent that Plaintiffs' Equal Protection claim asserts that students have been singled out for punishment due to their viewpoint, *see* Claim 3 (Compl. ¶¶ 71-73), this claim is merely a restatement of their First Amendment claim and should be analyzed as such. *See* discussion at Section II.G, *infra.*

ARGUMENT

I. STANDARD FOR SUMMARY JUDGMENT

"Summary judgment is appropriate if the pleadings, answers to interrogatories, admissions, affidavits and other materials show 'that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" *Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836, 839 (E.D. Ky. 2004) (citing Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

For purposes of this motion, the only material facts, which are undisputed by the parties, are:

- The Board is obligated by the Consent Decree to conduct a "mandatory" student anti-harassment training that includes a "full hour . . . devoted to addressing harassment and discrimination on the basis of actual or perceived sexual orientation or gender identity." *See* Intervenors' PI Br., Exh. A, Section III.C. (Rec. Doc. 26).

- In November 2004, the Board conducted a mandatory training at Boyd County Middle School and High School. The middle school video ("MS video") was approximately sixty minutes in length, and the high school video ("HS video") had approximately ten minutes of additional material. Transcripts of both trainings have been included in the record. *See* Def. PI Opp. Br. Exh. C (Rec. Doc. 27).

- At the conclusion of the video, students were given the opportunity to provide comments anonymously about the video. *See* Def. PI Opp. Br. Exh. D (Rec. Doc. 27).

- Students who did not attend the training and did not have an otherwise valid excuse were charged with an unexcused absence. *See* Capehart Aff. ¶ 2 (Rec. Doc. 27); Morrison Aff. ¶ 11 (Rec. Doc. 9).

- During the 2004-2005 school year, various harassment policies were in effect. The text of the policies challenged by Plaintiffs is discussed in Section II.A. *See also* Def. PI Opp. Br. Exh. G. (Rec. Doc. 27).

II. DURING THE 2004-2005 ACADEMIC YEAR, THE BOARD PROSCRIBED MORE SPEECH THAN THE CONSTITUTION PERMITS

A. 2004-2005 Academic Year Policies

The following policies and procedures were in effect during the 2004-2005 academic year.

Harassment Policy. The Boyd County Board of Education harassment policy in effect during the 2004-2005 school year in relevant part read as follows:

> Policy 09.42811—Harassment/Discrimination
>
> Harassment/Discrimination is unlawful behavior based on race, color, national origin, age, religion, sex [stet] 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.

Student Codes of Conduct. The Boyd County High School Code of Conduct ("BCHS Code") contained a provision explaining its rules regarding "Harassment/Hate Crimes," which provided:

> 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.[7]

[7] The High School Code of Conduct also included another definition of harassment: "Harassment/ discrimination is unlawful behavior based on race, color, national origin, age, religion, sexual [sic] 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

The Boyd County Middle School Planner ("BCMS Planner") contained a provision regarding "Harassment/Hazing" that included the same restriction on speech that "has the effect" of "insulting" or "stigmatizing" another student, which was found in the Boyd County High School Student Code of Conduct.

B. Fall 2004 Training Video

Pursuant to its obligation under the Consent Decree, in November 2004, the Board dedicated a class period for the Middle School and High School to an anti-harassment training, which consisted of a video lasting approximately one hour. (Rec. Doc. 27 at Exh. C) (transcripts). The video began by explaining to students that the trainers were going to talk about the problems that bullying, name-calling and hatred can cause. The video then discussed many ways in which students are different, and provided a few vignettes from students who have experienced harassment or bullying in school. Towards the end of the video, the trainer stated that students who disagree with something about another student (such as his/her sexual orientation) did not have "permission" to point it out to them. MS Video at 22; HS Video at 29. (Rec. Doc. 27 at Exh. C) The trainer also stated that students are not "required" to tell a classmate when they think that something about the other student is wrong. MS Video at 22; HS Video at 30. (Rec. Doc. 27 at Exh. C) The trainer in the video then read the language from the BCHS Code about harassment, including the restriction on speech that is "insulting" and "stigmatizing." MS Video at 25; HS Video at 33. (Rec. Doc. 27 at Exh. C) Plaintiffs assert that these statements in the video chilled their exercise of their constitutional right to express their beliefs about homosexuality.

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environment." *See* Def. PI Opp. Br., Exh. G (2004-2005 Boyd County High School Code of Conduct) at 3. (Rec. Doc. 27)

C. 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. Government Speech. 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

(internal quotations omitted). 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).

A school may not single out speech for disfavored treatment simply because it disagrees with the viewpoint expressed by the student. But when something about the speech other than its viewpoint becomes disruptive or invasive of the rights of others, 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 Sch. Dist. 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. Additional Concerns – Overbreadth and Vagueness. 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, 244 (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 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 inappropriately 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 disciplinary 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 a "comprehensible normative standard." *Sypniewski*, 307 F.3d at 266 (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)).

D. The Board's 2004-2005 BCHS Code and BCMS Planner Proscribed Constitutionally Protected Speech and Therefore Violated the First Amendment

Restrictions on non-school-sponsored student speech are governed by the *Tinker* analysis. Under the *Tinker* standard, schools may not prohibit students' 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"). By restricting non-school-sponsored student speech that might "insult" or "stigmatize" another student, the BCHS Code and the BCMS Planner prohibited more speech than *Tinker* allows.[8]

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[8] At times, courts have used the term "insulting" to describe the subset of speech known as "fighting words," which do not receive 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 their very utterance inflict injury or tend to incite to an immediate breach of the peace.").

Both the BCHS Code and the BCMS Planner explicitly referred readers to the Board's harassment policy, which was far more consistent with *Tinker* in that it only regulated harassing speech that was "sufficiently severe, pervasive, or objectively offensive that it adversely affect[ed] a student's education or create[d] a hostile or abusive educational environment." Asking students to check a cross-reference to a different board policy, however, does not cure the constitutional defects contained in the challenged provisions. High school students, for example, are likely to rely exclusively upon their Code of Conduct when determining whether they will engage in certain behavior.

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.

In August 2005, the Board amended the BCHS Code and the BCMS Planner to rectify the constitutional defects identified by Plaintiffs and Intervenors.[9] Nevertheless, Plaintiffs are entitled to summary judgment on their claim that the harassment policies contained in the 2004-2005 BCHS Code of Conduct and the BCMS Planner violated the First Amendment.

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.

[9] While Intervenors did not take the position that the 2004-2005 Harassment Policy (Policy 09.42811) was necessarily unconstitutional as written, they, along with Plaintiffs, proposed revisions to the harassment policy as well as the BCHS Code and the BCMS Planner designed to ensure maximum consistency with the *Tinker* standard. The Board adopted these revisions in August 2005. *See* McGowan Decl. Exh.1. Consequently, any claim by Plaintiffs for prospective relief from the Board's 2004-2005 policies is now moot.

E. The Fall 2004 Training Video Chilled Constitutionally Protected Speech

By reiterating the restrictions on speech contained in the 2004-2005 BCHS Code, the Fall 2004 training video told students that engaging in constitutionally protected speech might subject them to punishment. *See* MS Video at 25; HS Video at 33 (Rec. Doc. 27) Such statements violate students' constitutional rights, and must be excised from any future training.

The video also stated that students do not have "permission" to express their views about the ways in which students may be different. *See* MS Video at 22; HS Video at 29. (Rec. Doc. 27) 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.[10] The Board may censor student speech if it meets the *Tinker* standard, but because the video did not explain that limitation, it swept too broadly.

Finally, the video also suggested that students should not engage in constitutionally protected speech by saying that students are not "required" to share their opposing views. *See* MS Video at 22; HS Video at 30 (Rec. Doc. 27). Schools can and certainly should encourage students to treat each other with respect, and, as part of general civility training, a school can 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 what they "should" or

[10] 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.

"should not" say. Accordingly, in any future training program, unconstitutional statements such as these must be avoided.

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

Plaintiffs have also styled their First Amendment claim as a Free Exercise violation. *See* Compl. ¶ 76 ("[Defendant's] policies . . . burden the Plaintiffs' right to speak about their personal religious beliefs."); *id.* at ¶ 77 ("Defendant discriminates against religious persons because they condition access to an important government benefit upon students self-censoring any speech that may be considered insulting or stigmatizing, or that states homosexuality is wrong.").

As discussed above, because the harassment policies contained in the BCHS Code and the BCMS Planner prohibited expression beyond what is permitted by *Tinker*, they unconstitutionally burdened Plaintiffs' speech rights. The government has no rational, let alone compelling, reason to prohibit speech in schools, whether 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 the video chilled their First Amendment rights.

The fact that some of the restricted speech may be religious speech does not change the analysis.[11] All students, religious or otherwise, are entitled to relief from an

[11] 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. Specifically, a school may intervene where one student repeatedly engages in targeted speech that is disruptive and unwelcome, regardless of what the speaker's motivation may be. *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

unconstitutional speech code. Accordingly, a ruling based on Plaintiffs' free speech claim would fully resolve this issue and provide Plaintiffs with the relief they seek.

G. Resolution of Plaintiffs' First Amendment Claim 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 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).

Likewise, in this case, the First Amendment provides the structure for considering Plaintiffs' claims, rather than the Equal Protection Clause.

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students at school."). Similarly, it makes no difference whether one student harasses another by calling him a "sinner" or "smelly." Even assuming, for example, that religious students who believe that homosexuality is wrong feel a need to engage in unwelcome speech targeted at gay classmates, a school does not violate the Constitution's proscription against content or viewpoint discrimination when it regulates speech (regardless of viewpoint) that interferes with the rights of other students. *See Madsen v. Women's Health Ctr.*, 512 U.S. 753, 763 (1994) (holding that injunction prohibiting abortion protestors who had violated a court order from picketing outside a clinic was not viewpoint or content-based discrimination, even though those prevented from protesting all shared the same viewpoint).

III. A SCHOOL MAY REQUIRE STUDENTS TO ATTEND AN ANTI-HARASSMENT TRAINING WITHOUT VIOLATING THE FREE EXERCISE RIGHTS OF STUDENTS WHO DISAGREE WITH THE TRAINING ON RELIGIOUS GROUNDS

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. Under this standard, this case is a non-starter. The anti-harassment program is neutral with respect to religion and is not only rationally related but in fact narrowly tailored to further a government purpose that is not only legitimate but compelling – *i.e.,* ending harassment and discrimination of lesbian, gay, bisexual and transgender students.

Even if the Court were to analyze Plaintiffs' Free Exercise challenge under the pre-*Smith* standard, however, perhaps based on an argument that Plaintiffs fall under the "hybrid rights" doctrine,[12] their claim would fail. As discussed in greater detail below, courts have repeatedly held that simply being required to listen to statements in a public school classroom that are not wholly consistent with one's religious beliefs does not amount to a constitutional burden of that right. In addition, even assuming that the hybrid rights analysis were viable in this Circuit,[13] Plaintiffs cannot demonstrate that

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[12] The notion of "hybrid rights" emanates from dicta in the *Smith* opinion suggesting that closer scrutiny may be appropriate when government action burdens both the free exercise right and some other constitutional liberty. 494 U.S. 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.").

[13] The Sixth Circuit has rejected the notion that there are "hybrid rights" that warrant greater protection than stand-alone Free Exercise Claims. *Kissinger v. Bd. of Trustees of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993) ("therefore, at least until the

another constitutional right has been burdened, which is a prerequisite to triggering this analysis. *See* discussion *infra* Section V (discussing parental rights claim).

B. Schools May Teach, and Require Students to Attend, Classes That Expose Students to Views Contrary to Their Religious Beliefs

Plaintiffs assert that the Board was constitutionally required to allow students to opt out of its mandatory anti-harassment training program if students or their parents disagreed on religious grounds with statements contained in the video. *See, e.g.,* Compl. ¶ 79 (alleging that "Defendant . . . forc[es] their children to undergo mandatory diversity training even if it conflicts with the ideological, moral, and sincerely held religious beliefs of the parents and their children").[14] The Constitution requires no such thing.

The Free Exercise Clause protects students from being forced to renounce their sincerely held religious beliefs or act in a manner contrary to their beliefs in order to satisfy the curricular requirements at a public school. Merely being exposed to ideas with which they may disagree, however, does not violate the Free Exercise Clause.

The law could not be clearer on this point. 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

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Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause").

[14] *See also* Pl. PI Br. 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. . . . 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.").

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.

Turning to the undisputed facts in this case, the Fall 2004 training in no way required students to disavow their religious beliefs. Students were not required to affirm that people are born gay, that it is "good to be gay," or that being gay is better than being straight. To the contrary, students were simply required to watch a one-hour training video and then fill out a comment card at the end. Even recognizing that there may have been some statements in the training video about sexual orientation and gender identity with which Plaintiffs disagreed, being required to listen to these statements in a public school classroom is not the kind of "burden" against which the Free Exercise Clause protects.

It is helpful to compare this case with *Spence v. Bailey*, 465 F.2d 797 (6th Cir. 1972), to understand why a requirement that students watch an anti-harassment training does not violate the Free Exercise Clause. In *Spence*, the Court ruled that a student could not be prevented from receiving his diploma for failure to satisfy curricular requirements when his religious beliefs prohibited him from completing a military training (ROTC)

component of the physical education curriculum. *Id.* at 800. The *Mozert* court explained why the student in *Spence* was allowed to opt out, whereas the student in *Mozert* was not:

> In *Spence* this court upheld a conscientious objector's right not to be required to participate in his high school's ROTC program. The court found that Spence's claim resembled Sherbert's "since it compels the conscientious objector either to engage in military training contrary to his religious beliefs, or to give up his public education." It is clear that it was being compelled *to engage* in military training, not being exposed to the fact that others do so, that was found to be an unconstitutional burden.

Mozert, 827 F.2d at 1065 (emphasis in original).

There are sound practical reasons for this constitutional rule. Although this case happens to involve a training about sexual orientation and gender identity, there are many curricular choices made by public school administrators that 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).

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. Were an opt out constitutionally required, 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.[15] As Judge Kennedy explained in *Mozert*:

> 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 a broad range of ideas and viewpoints, 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

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[15] 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).

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

Finally, even if a school could alter its speech (through its curricular choices) to avoid any conflict with the religious views of particular students, it simply incorrect as a legal matter to argue that it must.[16] In fact, the Establishment Clause affirmatively prohibits schools from conforming 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.").[17]

For all of these reasons, courts have repeatedly affirmed that "governmental actions that merely offend or cast doubt on religious beliefs do not on that account violate free exercise." *Mozert,* 827 F.2d 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.

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[16] As discussed in Section II.C, as part of the school's curriculum, the training video is government speech. *Rosenberger*, 515 U.S. at 833.

[17] The Establishment Clause also prevents a school from denigrating any particular religious faith in its curriculum. For example, a federal district court recently ruled that a health education class that included statements questioning "whether churches that condemn homosexuality are on theologically solid ground" ran afoul of the Establishment Clause's requirement that the state adopt a position of neutrality among religious beliefs. *Citizens for a Responsible Curriculum v. Montgomery County Pub. Schs.*, No. Civ. A. AW-05-1194, 2005 WL 1075634 at *11 (D. Md.) (May 5, 2005). While the district court found that the plaintiffs' claim that the county's curriculum also violated the Free Speech Clause "merit[ed] future and further investigation," the district court's brief discussion of this claim did not acknowledge the different analysis triggered by government (i.e., curricular) speech as opposed to government restrictions on the expression of private opinions within (limited) public fora. *See* discussion at Section II.C, *supra*. Accordingly, while the Montgomery County case provides an example of curricular speech that violates the Establishment Clause, its analysis of other constitutional issues is too imprecise to merit any deference by this Court.

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."); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005) ("Schools cannot be expected to accommodate the personal, moral or religious concerns of every parent. Such an obligation would not only contravene the educational mission of the public schools, but also would be impossible to satisfy.").

For those parents who wish 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 their right either 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."); *Fields*, 427 F.3d at 1206 ("once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished").[18]

[18] 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

Intervenors recognize that, even though the Free Exercise Clause does not require it, some school districts allow students to opt out of classes discussing sensitive topics, such as sexual education. In this case, however, the Board is obligated by the Constitution's Equal Protection Clause to take steps to prevent harassment against students who are, or are perceived to be, lesbian, gay, bisexual or transgender.[19] Furthermore, both in an effort to comply with that obligation and in order to settle earlier litigation, the Board entered into the Consent Decree, which requires it to provide mandatory student trainings that the Board agreed 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 so as to ensure the success of its educational mission. *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

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threatened plaintiffs' "entire way of life," and thus distinguishing *Yoder*). *See also* discussion at Section V, *infra*.

[19] *See, e.g., Flores,* 324 F.3d at 1137-38 (holding that clearly established law requires schools to protect all students from peer harassment, regardless of sexual orientation); *Nabozny,* 92 F.3d at 453-58 (accord).

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 and as indispensable to the practice of self-government in the community and the nation") (internal quotation and citation omitted).

The Board might also want to require all students to attend the anti-harassment training because it believes that exposing students to a broad range of viewpoints promotes other important pedagogical goals. 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 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).

Because no student was required to renounce his or her sincerely held beliefs, or to affirm ideas or act in a manner that is contrary to those beliefs as part of the anti-

harassment training, the Board did not violate the Free Exercise Clause by requiring students to attend and penalizing those who refuse.

IV. REQUIRING STUDENTS TO LISTEN TO STATEMENTS IN THE CLASSROOM WITH WHICH THEY MAY DISAGREE DOES NOT VIOLATE THE COMPELLED SPEECH DOCTRINE

Plaintiffs also allege that, because students "are required to undergo training on controversial issues without expressing disagreement," Defendant "effectively forces the students to speak in agreement with the School District's view that homosexuality is a safe and healthy lifestyle that cannot be changed." Compl. ¶ 61. This argument is completely unmoored from any constitutional doctrine and should be rejected.[20]

In the classroom setting, students are regularly "compelled" to say things – *i.e.*, to respond when called on by the teacher or to provide answers to examination questions – in order to satisfy a curricular requirement. This does not violate the First Amendment. *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 993 (3d Cir. 1993) ("The gamut of courses in a school's curriculum necessarily reflects the value judgments of those responsible for its development, yet requiring students to study course materials, write papers on the subjects, and take the examinations is not prohibited by the First Amendment."). Under Plaintiffs'interpretation of the compelled speech doctrine, schools would even not be able to require students to sit quietly in a classroom while a lesson is taught because, in Plaintiffs' view, by requiring students' silence, schools are actually "forcing" students "to speak in agreement." Particularly in the school setting, the First

[20] While it is not clear to Intervenors that the video can reasonably be construed as teaching that "homosexuality is a safe and healthy lifestyle that cannot be changed," a school would certainly have the right to communicate this message to students. As explained in the previous section, courts have rejected the argument that simply being exposed to statements in a classroom burdens students' constitutional right to believe something different.

Amendment cannot be taken to such extremes. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972) (reiterating that public schools have a "compelling interest in having an undisrupted school session conducive to students' learning"); *cf. Settle v. Dickson County Sch. Bd.*, 53 F.3d 152, 155 (6th Cir. 1995) ("The free speech rights of students in the classroom must be limited because effective education depends not only on controlling boisterous conduct, but also on maintaining the focus of the class on the assignment in question.").

Courts have recognized that the First Amendment's protection against government-compelled speech is not violated whenever students are required to attend or participate in school programs. For example, the Third Circuit held a community service requirement was not compelled speech, even though the students claimed that their participation forced them to unwillingly communicate a message that community service was worthwhile. *Steirer*, 987 F.2d at 989. As the court explained, "[t]o the extent that there is an implicit value judgment underlying the program it is not materially different from that underlying programs that seek to discourage drug use and premature sexual activity, encourage knowledge of civics and abiding in the rule of law, and even encourage exercise and good eating habits." *Id.* at 997. *See also Steirer v. Bethlehem Area Sch. Dist.*, 789 F. Supp. 1337, 1347 n.11 (E.D. Pa. 1992) ("[U]nder the logic of plaintiffs' argument, a student's objection to attending a mandatory school trip to a museum of natural sciences would be clothed in the protections of the First Amendment because attending the trip would *a fortiori* represent an expression of belief that the study of natural sciences is a worthwhile endeavor. It is obvious that this reading of the First Amendment must be flatly rejected.").

In this case, however, the Court can simply dispose of this claim based on the undisputed facts in the record. No student was compelled to say anything during the video, which was a non-interactive lesson. As soon as the training video was over, Defendant gave students the opportunity to offer comments – positive, negative or neutral, about the training. *See* Def PI Opp. Br. Exh. D. (Rec. Doc. 27) The video itself also encouraged students to talk to the Compliance Coordinators, their guidance counselors and their parents about the video. *See* MS Video at 26-27; HS Video at 34 (Rec. Doc. 27)

As students were neither compelled to speak in agreement with the video nor, for that matter, compelled to stay silent once the video was over, any claim by Plaintiffs that the anti-harassment training violated the compelled speech doctrine is without merit and should be dismissed.

V. REQUIRING STUDENTS TO ATTEND BOYD COUNTY'S ANTI-HARASSMENT TRAINING, AND PENALIZING THOSE WHO DID NOT, DID NOT VIOLATE THE ADULT PLAINTIFFS' PARENTAL RIGHTS

Although 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), the parent Plaintiffs in this case are simply incorrect when they argue that this right gives them the authority 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 right 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) (emphasis in original).

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 noted by the *Mozert* court, 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 above 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, the parent Plaintiffs, 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 upbringing of their children and educate them in accord with their own views." 68 F.3d 525, 532 (1st Cir. 1995). Like the parent 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).

Like Judge Kennedy in *Mozert*, 827 F.2d at 1072, the First Circuit also expressed concern 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.

68 F.3d at 534.

The Second Circuit reached the same conclusion in a case brought by a father who sought an exemption for his son from a mandatory health education course that discussed sexual topics in a manner contrary to the father's religious beliefs. *Leebaert v. Harrington*, 332 F.3d 134, 136-38 (2d Cir. 2003). After agreeing with the analysis of *Meyer* and *Pierce* offered in *Brown*, the Second Circuit then explained why *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.

Finally, in the most recent appellate decision involving a parental rights challenge to an element of a public school curriculum, the Ninth Circuit endorsed the approach of the Sixth Circuit in *Blau* and the First Circuit in *Brown*:

> *Meyer*, *Pierce*, and their progeny evince the principle that the state cannot prevent parents from choosing a specific educational program, but they do not afford parents a right to compel public schools to follow their own idiosyncratic views as to what information the schools may dispense. . . . *Brown* and *Blau* compel the conclusion that what *Meyer-Pierce* establishes is the right of parents to be free from state interference with their choice of the educational forum itself, a choice that ordinarily determines the type of education one's child will receive.

Fields, 427 F.3d at 1206-07.

The weight of the authority on this question is insurmountable. Plaintiffs have no constitutional right under the Due Process Clause to opt their children out of the Board's anti-harassment training. As numerous courts have explained, 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."); *Fields*, 427 F.3d at 1207 ("[a] right to limit what public schools or other state actors may tell their children . . . is not encompassed within the *Meyer-Pierce* right to control their children's upbringing and education").

For the same reasons that compulsory attendance at the student anti-harassment training does not burden Plaintiffs' free exercise rights, it also does not burden the adult Plaintiffs' parental rights. Even assuming, however, that Plaintiffs could establish that requiring students to attend an anti-harassment training constituted a legally significant burden on their parental rights, the Board's mandatory one-hour anti-harassment training would still pass constitutional muster because it is narrowly tailored to meet its compelling interest in maintaining order and safety within its schools and preventing the harassment of students because of their real or perceived sexual orientation and gender identity. *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).

Accordingly, the parent Plaintiffs have no basis for demanding 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.

CONCLUSION

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.

Some of the particular harassment policies in effect during the Boyd County School District 2004-2005 academic year were constitutionally flawed. Likewise, some

of the statements contained in Defendant's Fall 2004 training video crossed the constitutional line. Defendant did not violate the Constitution, however, by requiring students to attend a mandatory anti-harassment training and by penalizing those students who failed to attend by charging them with an unexcused absence.

Accordingly, Intervenors ask the Court to grant summary judgment for Plaintiffs on their First Amendment free speech claims-- s*ee* Claim 1 (Compl. ¶¶ 56-57, 59-60, 62) – due to the unconstitutional restriction on speech contained in the BCHS Code, the BCMS Planner, and the Fall 2004 training video. Intervenors also ask the Court to grant summary judgment for Defendant on Plaintiffs' Fourteenth Amendment parental rights / substantive due process claim -- *see* Claim 2 (Compl. ¶¶ 68-69) -- their First Amendment free exercise claim -- *see* Claim 4 (Compl. ¶¶ 78-81) -- and any "compelled speech" claim included in their Complaint -- *see* Claim 1 (Compl. ¶ 61).

Respectfully submitted,

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Dated: December 20, 2005

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 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:

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I further certify that I have mailed this document and the notice of electronic filing by first class mail, on December 20, 2005, to the following non-CM/ECF participants:

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