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 RESPONSE TO MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

Intervenors file this consolidated response to the motions for summary judgment filed by Plaintiffs Timothy Allen Morrison II, et al. ("Plaintiffs"), and Defendants Board of Education of Boyd County, et al. ("Defendants" or "Board"). For the reasons articulated below, and as previously expressed in Intervenors' Memorandum in Support of Motion for Summary Judgment, this Court should grant partial summary judgment to Plaintiffs with respect to their claim that the Board's 2004-2005 harassment policies were unconstitutionally overbroad but should grant summary judgment to Defendants with respect to all other claims asserted by Plaintiffs.

OBJECTIONS TO PLAINTIFFS' STATEMENTS OF UNDISPUTED FACTS

The text of policies at issue in this case, and the content of the Fall 2004 student trainings, are included in the record and speak for themselves. Accordingly, Intervenors dispute Plaintiffs' characterizations of the policies and anti-harassment training as "undisputed facts." *See* Plaintiffs' Statement of Undisputed Facts ("Pl. SUF") ¶¶ 3, 4, 5, 9, 23, 24, 25, 26, 27. In particular, in light of the clear text of the training video, Intervenors dispute Plaintiffs' characterization as an "undisputed fact" that "School District employees and other individuals in the video attempt to change the belief system of those students who believe homosexuality is morally wrong, is a changeable behavior, and is harmful to those who practice it and society as a whole." Pl. SUF ¶ 26. In light of the evidence in the record, this "fact" is clearly not "undisputed." *See, e.g.,* Plaintiffs' Memorandum in Support of Motion for Summary Judgment ("Pl. SJ Br.") Exh. C at 34 ("with that respect also comes the school's respect for your beliefs, your religious beliefs and your sense of right and wrong").

Intervenors dispute Plaintiffs' characterization as an "undisputed fact" that the diversity training contained a "full hour . . . devoted to addressing harassment and discrimination on the basis of actual or perceived sexual orientation or gender identity." *See* Pl. SUF ¶ 17. Although the content of the training video speaks for itself, Intervenors have also lodged this objection in an enforcement proceeding as plaintiffs in *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*, Civ. Action No. 03-18 (E.D. Ky.) ("*GSA* litigation").

Intervenors dispute Plaintiffs' characterization as an "undisputed fact" that "[s]tudents were required to undergo this training without expressing any disagreement." *See* Pl. SUF ¶ 18. To the contrary, it is undisputed that, at the conclusion of the video, students were given the opportunity to provide comments (anonymously) about the program. Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction ("Def PI Opp. Br.") Exh. D. (Rec. Doc. 27)

Intervenors dispute Plaintiffs' characterization as an "undisputed fact" that "[t]his effectively forced the students to speak in agreement with the School's view that homosexuality is a safe and healthy lifestyle that cannot be changed." *See* Pl. SUF ¶ 19.

Intervenors dispute Plaintiffs' characterization as an "undisputed fact" that the Board "began requiring all high school and middle school students to undergo mandatory diversity training." Pl. SUF ¶ 20. *See also id.* ¶ 28 ("Parents are not permitted to opt their students out of the training."); *id.* ¶ 18 ("[s]tudents were required to undergo this training"). Although Intervenors agree that the Board was required by the Consent Decree to conduct "mandatory" student trainings at the Middle School and High School, the attendance figures provided by the Board indicate that students were not, in fact,

"required" to attend and that many students did, in fact, "opt out." *See* Def PI Opp. Br. Exh. I. The question of whether it is constitutionally permissible to penalize students who fail to satisfy this element of the curriculum is a legal rather than a factual question. *See also* discussion *infra* note 6.

OBJECTIONS TO DEFENDANTS' STATEMENTS OF UNDISPUTED FACTS

Intervenors dispute the Board's statement that "[t]he videotapes were shown to . . . [Intervenors] . . . prior to exhibition to the students." *See* Defendants' Memorandum in Support of Motion for Summary Judgment ("Def. SJ Br.") at 5. Counsel for the student Intervenors (most of whom are plaintiffs in the *GSA* litigation) were only provided with copies of the videos on the Saturday prior to the Monday on which the training sessions took place at Boyd County Middle School and High School. *See GSA* litigation, *Motion to Reopen Case and to Schedule Discovery and Briefing for Enforcement Proceedings*, filed July 5, 2005 ("*GSA* enforcement action"), Exhibit 1-I to McGowan Declaration (Civ. Action No. 03-18, Rec. Doc. 78) (e-mail from James Esseks to Winter Huff).

The Board asserts that "[t]he measures now objected to by these Plaintiffs and Intervenor-Defendants [i.e., the harassment policies] were designed to remedy the problem of [anti-LGBT harassment and discrimination]." Def. SJ Br. at 24. With the exception of the addition of "sexual orientation" and "gender identity" to the Board's policies, the Board did not modify their harassment policies in response to the Consent Decree in the *GSA* litigation. Likewise, as the Board acknowledged during the telephone status conference with the Court on May 18, 2005 (*see* Rec. Doc. 34), Intervenors played

no role in the drafting or formulation of the Board's harassment policies beyond calling for the inclusion of "sexual orientation" and "gender identity."

ARGUMENT

I. THE BOARD'S 2004-2005 ANTI-HARASSMENT POLICIES WERE UNCONSTITUTIONALLY OVERBROAD.

A. Intervenors Have Standing to Address the Constitutionality of the Board's 2004-2005 Harassment Policies.

Notwithstanding Defendants' suggestion to the contrary, *see* Def. SJ Br. at 6 n.5, Intervenors have standing to address the constitutional flaws of the 2004-2005 harassment policies. Intervenor Jane Doe is the mother of children in the Boyd County School District who were or would be subject to the speech restrictions contained in the challenged harassment policies. *See* Affidavit of Jane Doe filed in Support of Motion for Protective Order ¶ 1. (Rec. Doc. 12) Accordingly, she has standing to defend their constitutional interests. *See Matter of Baby K*, 832 F. Supp. 1022, 1031 (E.D. Va. 1993) ("Parents have standing to assert the constitutional rights of their minor children.") (citing *Eisenstadt v. Baird*, 405 U.S. 438, 446 n.6 (1972)). Furthermore, the student Intervenors who are signatories to the Consent Decree have an interest in ensuring that the Board has constitutionally valid and enforceable harassment policies, which was part of the relief that Intervenors secured through the settlement agreement. *See* Intervenors' Response to Plaintiffs' Motion for Preliminary Injunction ("Intervenors' PI Br."), Exh. A, §§ IV(A), XI(C). (Rec. Doc. 26) As noted previously, however, Intervenors seek only declaratory relief with respect to the 2004-2005 harassment policies and take no position on Plaintiffs' request for monetary damages.

B. The Board's 2004-2005 Harassment Policies Were Inconsistent With *Tinker* Because of Overbreadth Not Viewpoint Discrimination.

The Board's 2004-2005 harassment policies (and the anti-harassment trainings, to the extent that they reiterated the Board's harassment policies) were constitutionally flawed because of their overbreadth. By restricting speech that had the effect of "insulting" or "stigmatizing," but neither substantially and materially disrupts the educational environment nor invades the rights of others, the policies proscribed more speech than is constitutionally permissible under *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 513 (1969). Likewise, the Board crossed the constitutional line when it told students that they should not tell students who are different from themselves that they are "wrong" to be different. *See* Pl. SJ Br. Exh. C at 29 (High School video transcript); *id.* Exh. D at 22 (Middle School video transcript).

Rather than focusing on the overbreadth of these speech restrictions, Plaintiffs repeatedly characterize the Board's 2004-2005 policies as viewpoint discriminatory. Specifically, Plaintiffs claim that the policies restricted only anti-gay speech, but left pro-gay speech immune from punishment. This is neither factually accurate nor, as explained below, legally significant.

The 2004-2005 harassment policies restricted speech that had the effect of insulting or stigmatizing another student. The policies made no distinction on the basis of how the students were insulted or stigmatized – all stigmatizing or insulting speech, whether anti-gay or anti-straight, was barred under the policy. Therefore, while it is true that anti-gay statements that caused insult could be punished pursuant to this policy, pro-gay statements that insulted or stigmatized someone (presumably someone who was not gay), or anti-straight statements, could also be restricted. For example, a gay student

could decide to target a straight student with "pro-gay" statements -- "gay people are smart[er]," "gay people are [more] creative," "gay people are [more] handsome/beautiful," – that could result in the targeted student feeling insulted or stigmatized due to the insinuation that heterosexual people do not share these qualities. Similarly, a gay student could target a straight student with anti-straight comments – "straight people have no sense of style," "straight people can't dance," "straight people are just breeders" – that might also be insulting or stigmatizing. Although it may be difficult to imagine such a scenario in Boyd County, in light of the well-documented history of harassment against gay students, these examples demonstrate that the problem with the Board's policies is overbreadth and not viewpoint discrimination.

With respect to the training video, Plaintiffs repeatedly insist that the video told students that they could not tell others that they believed homosexuality was "wrong." In fact, the relevant text from the training video states:

> You're going to find people that you believe are absolutely wrong. You're going to think what are they thinking? That, that is so wrong, its obvious to everybody, but not to them. Because they believe you are wrong. You can't avoid meeting people that you believe are wrong. But here is the kicker, just because you believe, just because you don't like them, just because you disagree with them, just because you believe they are wrong, whole heartedly, absolutely, they are wrong. Just because you believe that does not give you permission to say anything about it. It doesn't require that you do anything. You just respect, you just exist, you continue, you leave it alone. There is not permission for you to point it out to them. They probably know that you disagree. Most people know that not everybody believes what they believe. Most people know that not everybody is like them. All of us know that on some levels, not everybody likes us. We all know that. It's not something that we need to have pointed out to us. And

> it's not something that you are required to point out to other people.

Pl. SJ Br. Exh. C at 29 (High School video transcript); *id.* Exh. D at 22 (Middle School video transcript).[1] While a student's homosexuality may be one way in which he or she is "different" and may be something about that student that a classmate believes is "wrong," this speech restriction does not even identify let alone single out anti-gay speech for punishment. Rather, the video simply states that a student should not point out something that is "wrong" about another student no matter what it is that the student thinks is "wrong." In other words, this restriction is neutral on its face with respect to viewpoint. The fact that some of the things that Plaintiffs would like to say (*i.e.,* gay students, who are "different" from them, are "wrong" to be gay) might fall within the sweep of the policies is evidence of the policies' overbreadth rather than viewpoint discrimination.

As an analytical matter, the fact that a school policy regulates the discussion of particular content or expression of a particular viewpoint is subsidiary to the question of whether the school can justify the restriction under the *Tinker* standard. This is because the *Tinker* standard reflects the fact that, in some circumstances, content and even viewpoint based restrictions, which would be impermissible when applied against adults, may be appropriate in the school setting.

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[1] Plaintiffs repeatedly insist that Defendants admitted that the policies and/or the training video discriminate against anti-gay viewpoints. Pl. SJ Br. at 1, 9-11, 14-18. In their Answer, however, Defendants admitted the various allegations made by Plaintiffs "only to the extent actually consistent with policies, procedures, and training materials/content in effect and in fact implemented in the Defendant school district, and denies all allegations inconsistent therewith." Answer ¶¶ 9, 11, 14. (Rec. Doc. 6) In other words, the video speaks for itself.

For example, in *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001), the Third Circuit considered a constitutional challenge to a school policy that prohibited harassment "based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics." *Id.* at 215. Even though the policy was clearly a content-based restriction on speech, the court recognized that *Tinker* – which is, at its core, a form of overbreadth analysis – provided the proper framework for analyzing the policy's constitutionality. *Id.* at 212-17. In *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243 (3d Cir. 2002), the challenged harassment policy explicitly singled out race-based speech for different treatment. Nevertheless, the court recognized that even though a "racial harassment policy is indisputably a content-based restriction on expression, and in other contexts, may well be found unconstitutional under *R.A.V.*, the public school setting is fundamentally different from other contexts. . . . [Consequently,] *Tinker* and its progeny provide the principal mode of analysis in this area." *Id.* at 267-68.

Therefore, while Plaintiffs are correct in their assessment that the Board's 2004-2005 harassment policies were constitutionally flawed, their emphasis on viewpoint discrimination is misplaced. The Board's policies run afoul of *Tinker* because they restrict more speech than constitutionally permissible or, in other words, because they are overbroad.

C. Cases Involving Viewpoint-Based Restrictions on School-Sponsored Speech Are Inapposite.

This litigation involves (a) government speech (in the form of the training video) and (b) non-school-sponsored student speech with respect to the harassment policies' speech restrictions. Consequently, Plaintiffs' citation to cases involving viewpoint

discrimination in the context of a school-sponsored forum, such as a school assembly, *see, e.g., Hansen v. Ann Arbor Pub. Schs.*, 293 F. Supp. 2d 780 (E.D. Mich. 2003), offers little of value in the context of this case.[2]

As long as it does not promote or disapprove of religion in violation of the Establishment Clause, the government generally may express whatever viewpoint it wishes when it is the speaker. *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."). This is particularly true in the context of curricular choices. *Id.; see also 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). A rule that required teachers to articulate all viewpoints on any subject addressed in the classroom would make it impractical, if not impossible, to teach a broad range of subjects.

On the other hand, when students wish to express themselves while at school, the government may not single out disfavored viewpoints for punishment, and may only restrict speech that substantially and materially disrupts the educational environment or interferes with the rights of others. The question of whether a school may only restrict school-sponsored speech in a viewpoint-neutral manner – the issue discussed in *Hansen* – is not presented here.

For all of these reasons, the Court should ground any First Amendment ruling in favor of Plaintiffs with respect to the 2004-2005 harassment policies and the speech-

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[2] Likewise, because Plaintiffs have brought a facial challenge to the Board's policies, cases involving as-applied challenges, such as *Castorina v. Madison County School Board*, 246 F.3d 536 (6th Cir. 2001), and *Chandler v. McMinnville School District*, 978 F.2d 524 (9th Cir. 1992), are also inapposite.

restrictive statements in the anti-harassment training video in the overbreadth doctrine as articulated in *Tinker*.

II. WHETHER ANALYZED USING *SMITH* OR *MOZERT*, PLAINTIFFS' FREE EXERCISE CLAIM FAILS.

Three years before the Supreme Court decided *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Sixth Circuit definitively ruled that students and parents have neither the right to demand that a public school curriculum be tailored to their religious beliefs nor the right to opt out of elements of the curriculum that may be inconsistent with their religious beliefs. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1064 (6th Cir. 1987). Anxious to distinguish this case from *Mozert*, Plaintiffs insist that this case involves "indoctrination," which they claim is *Mozert*'s "missing link." *See* Pl. SJ Br. at 29. The record, however, reveals exactly the opposite to be true. Students were required to do nothing more than listen to a sixty-minute lesson about why discrimination and harassment will not be tolerated at Boyd County Middle School or High School. They were given ample opportunity to respond to the video through the comment cards and were not penalized for expressing their disagreement with the training.[3] No student was required to adopt the values articulated in the video or otherwise renounce their religious beliefs that might be to the contrary.[4] Plaintiffs' description of the training as "indoctrination" does not have

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[3] *See* Def PI Opp. Br. Exh. D (Comment Card: "I agree with the fact that no one should be harassed, but I am a Christian. I am a firm believer in Romans I where it says that unnatural attraction is wrong. I would never harass a homosexual student. Although I do not approve at all of what they do. Homosexuality is a sin and that is my beliefs, but it is wrong to harass or bully anyone.").

[4] The fact that some students may have refrained from constitutionally protected speech due to the overbroad anti-harassment policies does not mean that a mandatory attendance requirement at an anti-harassment training violates the Free Exercise

talismanic value. *Mozert* is on all fours with this case and is fatal to Plaintiffs' free exercise claim.

Since *Mozert* was decided, the Supreme Court has ruled that generally applicable laws and policies that are neutral with respect to religion but that incidentally burden an individual's religious beliefs need only survive rational basis review. *Smith*, 494 U.S. at 882-83. If the free exercise claim in *Mozert* could not succeed under a heightened scrutiny regime, then Plaintiffs' claim certainly cannot survive the *Smith* rational basis test.

In an attempt to evade *Smith* and trigger heightened scrutiny for their Free Exercise claim, Plaintiffs argue that the Board's attendance policy is not "generally applicable" to all students because the principal has the discretion to determine what reasons will warrant an "excused," as opposed to an "unexcused" absence. Pl. SJ Br. at 31-32. This argument, however, cannot be reconciled with the actual facts in this case.

As a preliminary matter, Plaintiffs did not ask for and do not, in fact, want an "excused absence" from the mandatory training in the sense contemplated by the policy cited by Plaintiffs, because pursuant to that policy, students who missed the anti-harassment training due to an "excused" absence should have been required to view the video upon their return to school.[5] Plaintiffs, by contrast, are demanding a penalty-free

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Clause. Concerns about the chilling effects of overbroad anti-harassment policies can be (and have been) addressed by revising those policies.

[5] *See* Pl. SJ Br. Exh. B at 6; *see also* Boyd County School District Policy/Procedure Manual § 09.123 ("An excused absence or tardiness is one for which work may be made up . . . . Students receiving an excused absence under this section shall have the opportunity to make up school work missed and shall not have their class grades adversely affected for lack of class attendance or class participation due to the excused absence."), *available at* <http://policy.ksba.org/b13/> (last visited Jan. 6, 2006). *(cont'd)*

"opt out" of the training. *See, e.g.,* Plaintiffs' Motion for Summary Judgment ("Pl. SJ Mot.") at 2 ("[Plaintiffs] are entitled to a religious exemption from future mandatory diversity trainings").

But even taking Plaintiffs' argument at face value, the Court should reject their suggestion that the Board's absence policy is not, in fact, "generally applicable" to all students. After delineating particular scenarios where a student's absence will be excused (*e.g.,* illness, death in the family), the policy states that a student's absence may also be excused for "other valid reasons as determined by the Principal." This policy clearly applies to all students, and does not distinguish between requests for an excused absence that are motivated by religion and those that are secular in nature. *Compare Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 534 (1993) (law penalizing only ritualistic animal sacrifices and not other acts of animal cruelty was neither religiously-neutral because "it discriminate[d] against religiously-motivated conduct" nor generally-applicable because "prohibit[ed] conduct because it is undertaken for religious reasons"). More importantly, for purposes of the *Smith* analysis, religious reasons are not excluded from consideration by the principal. Therefore, under the *Smith* test, the absence policy is a religiously-neutral and generally applicable law.

In this case, the principals at Boyd County Middle School and High School (presumably in consultation with the Board) determined that an objection to the content of the anti-harassment video was not a "valid reason" to grant an excused absence from the training. The record contains no evidence that students with non-religiously based

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While significant in the context of the *GSA* enforcement proceedings, the fact that the Board did not require any student who missed the training – whether or not their absence was excused – to attend a make-up session is not relevant to the analysis of Plaintiffs' free exercise claim.

objections to the content of the harassment training received excused absences whereas students whose objections were religious in nature were denied excused absences. What Plaintiffs apparently find objectionable about the excused absence policy is that the school did not automatically defer to their religiously-motivated requests for an opt out.

Such even-handed treatment by the school not only is constitutionally sound but also reflects the fact that anti-harassment training is an essential element of the curriculum that should not be missed.[6] Consequently, even if the Board's actions were subject to heightened scrutiny, its mandatory attendance policy would be justified due to its compelling interest in preventing harassment and discrimination against students because of their real or perceived sexual orientation or gender identity.[7]

Finally, the fact that some parents may not have the resources to send their children to private religious schools or to home school their children does not change the constitutional analysis. *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15 (1st Cir. 2004) (rejecting Free Exercise claim stemming from fact that state-funded special education programs provided at religious school were inferior to those offered at the public school);

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[6] In Fall 2004, the Board decided to charge students who did not attend the anti-harassment training with only an unexcused absence, a penalty that had no practical effect and minimal symbolic value. As the Court is aware, Intervenors believe that the Board can and, in order to comply with the Consent Decree, must assess more stringent penalties against those students who willfully refuse to attend the training. *See generally GSA* enforcement proceedings. Although the Court need not decide what specific penalties would be appropriate in order to decide these motions for summary judgment, Intervenors respectfully submit that a ruling by this Court that appears to turn on the insignificance of the penalty for non-attendance may inadvertently invite further litigation should the Board, at a future date, implement more substantive disciplinary policies for students who refuse to attend anti-harassment training.

[7] Intervenors recognize that the Board's actions in this case were probably motivated in large part by the Consent Decree. Nevertheless, even in the absence of this obligation, the Board could require attendance at an anti-harassment training as part of a narrowly tailored effort to promote its compelling interest in student safety.

see id. at 22 ("The Supreme Court has held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."). Whether rich or poor, parents do not have the right to demand that a public school curriculum be tailored to their particular religious beliefs or to demand an "opt out" for their children whenever ideas with which they disagree are discussed.

III. THE COURT SHOULD SPECIFICALLY IDENTIFY THE CONSTITUTIONAL FLAWS IN THE 2004 TRAINING VIDEO RATHER THAN ENJOINING THE BOARD FROM SHOWING A VIDEO "SIMILAR" TO THE 2004 TRAINING.

In their motion, Plaintiffs ask the Court to enjoin the Board from using the 2004-2005 diversity training video "or similar film" in the future. Pl. SJ Br. at 2; *see also* Pl. SJ Mot. at n.1 ("reserv[ing] the right to move for permission to file an Amended Complaint to challenge the new transcript for the Diversity Training, as well as any attendance policies associated with that Training"). Granting such a request would only ensure litigation in the future about whether or not a new training video was "similar" to the old one.

Consequently, Intervenors respectfully request that the Court specifically identify the statements in the video that were constitutionally flawed so that the Board has clear guidance as it develops the training materials for the 2005-2006 academic year. Intervenors submit that the only statements that the Board should be enjoined from using in future trainings are:

> "Just because you believe that [i.e., someone is "wrong"] does not give you permission to say anything about it. It doesn't require that you do anything. You just respect, you just exist, you continue, you leave it alone. There is not permission for you to point it out to them. They probably know that you disagree. Most people know that not everybody

believes what they believe. Most people know that not everybody is like them. All of us know that on some levels, not everybody likes us. We all know that. It's not something that we need to have pointed out to us. And it's not something that you are required to point out to other people."

Pl. SJ Br. Exh. C at 29 (High School video transcript);
id. Exh. D at 22 (Middle School video transcript).

"And we [mistakenly] think that it's our job to tell other people they're wrong, or to tell other people 'I don't like you,' and to make faces and to exclude, and to make little nice groups and keep other people out because they're different. . . . It's what you do about them that makes it wrong. . . . Its [sic] when you say you're wrong. Okay so they're wrong. Nothing else is needed. You don't need to point out that they're wrong. . . . . It's not your job to try to change them, and its [sic] not your job to let them know that you believe that they are wrong."

Pl. SJ Br. Exh. C at 30 (High School video transcript);
id. Exh. D at 22 (Middle School video transcript).

Because these statements suggest that students may be disciplined for making constitutionally-protected statements, they must not appear in future trainings. The remainder of the video, including statements about gay people or homosexuality in general with which Plaintiffs disagree, is constitutionally-permissible government speech.

CONCLUSION

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

Respectfully submitted,

s/ Sharon M. McGowan

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Dated: January 9, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 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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