APPEAL NO. 06-5380/5406/5407

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY ALLEN MORRISON, II, BY AND THROUGH HIS NEXT FRIENDS, TIMOTHY MORRISON AND MARY MORRISON; TIMOTHY AND MARY MORRISON; BRIAN NOLEN; AND DEBORA JONES,
Plaintiffs-Appellants

v.

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

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

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

APPELLANTS' INITIAL BRIEF

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs are individuals, and thus do not issue stock. Consequently, Plaintiffs do not have a parent corporation or any publicly held company that owns 10% or more of its stock.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs-Appellants ("Plaintiffs") request oral argument. Plaintiffs are requesting this Court to declare that the Defendant-Appellee's ("Defendant" or "District") Speech Policies that were in force during the 2004-2005 school year were unconstitutional, and to award nominal damages. Plaintiffs contend that oral argument will assist the Court in understanding the issues and in deciding this case.

JURISDICTIONAL STATEMENT

A. JURISDICTION OF THE DISTRICT COURT.

The District Court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1343 as Plaintiffs advanced claims under the United States Constitution, particularly the First and Fourteenth Amendments, and under federal law, particularly 28 U.S.C. §§ 2201, 2202 and 42 U.S.C. §§ 1983 and 1988.

B. JURISDICTION OF THE COURT OF APPEALS.

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 as the District Court granted Defendants' Motion for Summary Judgment and dismissed the case on February 17, 2006. A timely Notice of Appeal was filed by Plaintiffs on March 14, 2006. On March 17, 2006, the District Court entered a Corrected Judgment. On March 22, 2006, Plaintiffs filed a second Notice of Appeal to include both the District Court's original February 17, 2006 Order and Judgment and its March 17, 2006 Corrected Judgment.

STATEMENT OF ISSUES

(1) Nominal damages are presumed damages that require no independent proof when a plaintiff's constitutional right has been violated. Did the District Court err when it refused to consider, let alone award, nominal damages to Plaintiffs on their constitutional claims based on the District's unconstitutional Speech Policies that were in force during the 2004-2005 school year, because Plaintiffs failed to offer independent proof of their damages?

(2) The Complaint and Plaintiffs' Motion for Summary Judgment specifically include claims for nominal damages based on the District's Speech Policies that were in force during the 2004-2005 school year. Nevertheless, the District Court refused to award nominal damages based on these policies, stating that Plaintiffs "made no specific plea." Did the Court err when it refused to consider, let alone award, nominal damages under the erroneous belief that Plaintiffs failed to make the claim?

(3) The District's Speech Policies that were in force during the 2004-2005 school year prohibited student speech that could have the effect of insulting an individual, and it prohibited

negative speech about homosexual behavior, such as speech stating that the homosexual lifestyle is wrong. Were these Speech Policies unconstitutional in that they discriminated based on viewpoint, and were overbroad and vague?

STATEMENT OF THE CASE

On February 15, 2005, Plaintiffs Timothy Allen Morrison, II, a minor by and through his next friends, Timothy and Mary Morrison; Timothy Morrison; Mary Morrison; Brian Nolen; and Debora Jones ("Plaintiffs") filed a Complaint against the Board of Education of Boyd County, Kentucky ("Defendant" or "District"), claiming that its speech policies that were in effect during the 2004-2005 school year ("Speech Policies") violated their free speech, due process, equal protection, and free exercise rights under the United States Constitution.[1] Plaintiffs sought injunctive relief, declaratory relief, and nominal damages against the Speech Policies.[2]

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[1] Plaintiffs also claimed that the Defendant's policy requiring all students to attend a mandatory diversity training program on homosexual behavior violated their constitutional rights. The District Court denied these claims. Plaintiffs are not appealing this issue. Plaintiffs are only appealing the District Court's failure to issue a declaratory judgment and to award nominal damages to Plaintiffs based on the unconstitutional Speech Policies that were in force during the 2004-2005 school year.

[2] During the mediation phase of this lawsuit, the District changed its Speech Policies. Consequently, Plaintiffs are no longer seeking injunctive relief based on the Speech Policies that were in force during the 2004-2005 school year. However, Plaintiffs are still pursing their declaratory judgment and nominal damages claim against those policies.

On April 18, 2005, Sarah Alcorn, William Carter, Jane Doe, David Fanin, Libby Fugett, and Tyler McClelland, intervened in this case ("Intervenors").[3]

On December 19, 2005, Defendant filed a Motion for Summary Judgment, arguing, among other things, that Plaintiffs' claims based on the Speech Policies should be dismissed. On December 20, 2005, Plaintiffs and Intervenors separately filed their Motions for Summary Judgment. Both Plaintiffs and Intervenors argued that Defendants' speech policies were unconstitutional. On February 17, 2006, the District Court issued its Memorandum Opinion and Order and Judgment granting Defendants' Motion for Summary Judgment. The District Court denied Plaintiffs'

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[3] The Intervenors were plaintiffs in a separate lawsuit against the District, *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*, 03-CI-17-DLB (also reported in 258 F.Supp.2d 667 (E.D. Ky 2003)). In that case, the Intervenors sought to establish a homosexual club at the high school. Pursuant to a consent decree entered in that case, the District agreed to adopt anti-harassment policies and conduct mandatory diversity training programs on homosexual issues. (RE 64, Opinion, JA 666). It is Plaintiffs' position, which is shared by the Intervenors, that the District went too far in adopting its anti-harassment policies in that the District ended up with policies that restricted more speech than is constitutionally permissible.

Motion for Summary Judgment, and denied the Intervenors' Motion for Summary Judgment as to the Speech Policies.[4]

On March 14, 2006, Plaintiffs filed a Notice of Appeal of the District Court's Order and Judgment of February 17, 2006.

On March 15, 2006, Intervenors filed a Motion to Alter Judgment, seeking clarification as to the District Court's February 17, 2006 Order. On March 17, 2006, the Court entered a Corrected Judgment, clarifying that it had granted Intervenors' Motion for Summary Judgment in part (as to training claims), and had denied it in part (as to speech claims).

On March 21, 2006, Intervenors filed a Notice of Appeal as to the District Court's February 17, 2006, Order and Judgment and its March 17, 2006 Corrected Judgment.

On March 22, 2006, Plaintiffs filed a Notice of Appeal as to the District Court's February 17, 2006 Order and Judgment and its March 17, 2006 Corrected Judgment.

STATEMENT OF THE FACTS

Defendant's Policies Restricting Student Speech

In a separate case, *Boyd County High School Gay Straight Alliance v.*

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[4] The District Court, however, did grant the Intervenors' Motion for Summary Judgment as it related to Plaintiffs' claims against compulsory attendance of the mandatory diversity training program.

Board of Education of Boyd County, 03-CI-17-DLB (also reported in 258 F.Supp.2d 667 (E.D. Ky 2003)), several Boyd County high school students wishing to start a homosexual student club sued the District based on its refusal to let them start the club.[5] (RE 64, Opinion, JA 666). Following a preliminary injunction order in favor of the students (Intervenors), both parties entered into a consent decree whereby, among other things, the District agreed to put into effect anti-harassment policies and conduct mandatory diversity training for students. (RE 64, Opinion, JA 666).

The District then adopted Codes of Conduct that regulated student speech and behavior in both the high school and the middle school. (RE 64, Opinion, JA 666-667). These Codes of Conduct, along with the student speech restrictions contained in the District approved training, constituted the Speech Policies that controlled student speech during the 2004-2005 school year, and which are the subject of this appeal.[6] (RE 50, Plaintiffs'

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[5] The student plaintiffs in that case are the same intervening students in the present case, and will be referred to as "Intervenors." Likewise, the defendant school district in this case is the same school district in the present case and will be referred to as "District" or "Defendant."

[6] Specifically, the Speech Policies regulating student speech during the 2004-2005 school year are the *Boyd County High School Code of Conduct 2004-2005*, §27, (prohibiting "the use of language … in such a manner as to be commonly understood to … have the effect of insulting or stigmatizing an individual.") (RE 50, Plaintiffs' Motion, Ex. A, JA 452); and the *Boyd County Middle School Planner 2004-2005* (prohibiting the "use of language, conduct, or symbols in such a manner as to be commonly understood to

Motion for Summary Judgment ("Plaintiffs' Motion"), Ex. A, JA 436-468; Ex.B, JA 469-480; Ex. C, JA 481-514; Ex. D, JA 515-541).

The Boyd County High School Code of Conduct 2004-2005, section 27 stated:

> 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 such manner as to be commonly understood to convey hatred, contempt, or prejudice *or to have the effect of insulting or stigmatizing an individual.*

(RE 50, Plaintiffs' Motion, Ex. A, JA 452) (emphasis added).

The consequence for violating Section 27 of the High School Code was severe, including the possibility of a five day suspension and referral to the Kentucky State Police or the Sheriff's Department. (RE 50, Plaintiffs' Motion, Ex. A, JA 452).

The Boyd County Middle School Planner 2004-2005 stated:

> Harassment/Hazing is defined as a part of Board Policy #09.42811 as verbal and/or physical behavior, which is sufficiently severe, persuasive, or objectively offensive that it adversely effects a student's education or creates a hostile or abusive educational environment. This includes intimidation by threats of or actual physical violence; the creation by whatever means of a climate of hostility or intimidation, *or the*

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convey hatred, contempt, or prejudice, or to have the effect of insulting or stigmatizing an individual.") (RE 50, Plaintiffs' Motion, Ex. B, JA 480); and the speech restrictions embodied in the *Mandatory Diversity Training* ("Diversity Training") that occurred during the 2004-2005 school year. (RE 50, Plaintiffs' Motion, Ex. C, JA 481-514 and Ex. D, JA 515-541).

> *use of language*, conduct, or symbols in such a manner as to be commonly understood to convey hatred, contempt, or prejudice, *or to have the effect of insulting or stigmatizing an individual.* This includes harassment/hazing based on race, color, religion, national original, age, political beliefs, marital status, ability or disability, sex/gender, and actual or perceived sexual orientation. Additionally, harassment/hazing may be a single incident or a series of incidents over a period of time.

(RE 50, Plaintiffs' Motion, Ex. B, JA 480) (emphasis added).

Board Policy 09.42811, which is not in the Codes of Conduct given to the students, states:

> Harassment/Discrimination is unlawful behavior based on race, color, national origin, age, religion, sex, actual or perceived sexual orientation or gender identify, 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.

(RE 64, Opinion, JA 667).

In addition to the adoption of the new Codes of Conduct, the District also began mandatory diversity training in the Fall of 2004 in compliance with the Consent Decree. (RE 64, Opinion, JA 666). The transcript for the training was approved by the District. (RE 50, Plaintiffs' Motion, Ex. E, JA 542-543). During the training, students were instructed that homosexuality

is a characteristic that cannot be changed and that it is wrong to communicate one's objection to the homosexual lifestyle to someone who is homosexual. (RE 50, Plaintiffs' Motion, Ex. C, JA 509-510; Ex. D, JA 536); (RE 6, Defendant's Answer, ¶14, JA 38). Students were instructed that District policy prohibits students from communicating to a homosexual the belief that the homosexual lifestyle is wrong. *See id.*

During the training, students were instructed:

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

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

Students were later instructed that:

> Humans get confused about that all the time. Regardless of age, regardless of experience, regardless of job, regardless of family, regardless of beliefs, human beings get confused. And we think that it's our job to tell other people they're wrong, or to tell other people "I don't like you," and to make faces and to exclude, and to make little nice groups and keep other people out because they're different. Okay. Groups and difference can't be avoided. Like, dislike, disagreement, can't be avoided. ***It's what you do about it that makes it wrong.*** It's when you act against someone. It's when you call them a name. ***It's when you say you're wrong.*** Okay so they're wrong. Nothing

> else is needed. ***You don't need to point out that they're wrong.*** ... You let the other person exist as they are. It's not your job to try to change them, and ***it's not your job to let them know that you believe that they are wrong.***

Id. (emphasis added).

The instructor in the video then repeated District policy that such speech will not be tolerated at school. (RE 50, Plaintiffs' Motion, Ex. C, JA 509-510; Ex. D, JA 536-537). Students were instructed that if they had any questions, they should "consult your Code of Conduct." *See id.*

Student Rights

Timothy Allen Morrison II (the "Student Plaintiff") was a student at Boyd County High School during the 2004-2005 school year. (RE 50, Plaintiffs' Motion, Ex. H, JA 560). He has an ideological and sincerely held religious belief that homosexuality is harmful to those who practice it, and to society as a whole. *See id.* He believes that homosexuality is a behavior that can be changed. *See id.* He also believes that he must love and care for others, including his fellow students. *See id.* He believes he must inform those who are engaged in destructive lifestyles, like homosexual behavior, that they are wrong, and they are engaging in behavior that is harmful to themselves and to society as a whole. *See id.* However, he has refrained from conveying his views on homosexuality to his classmates because District policies restricting speech prohibit him from doing so. *See id.*

Plaintiff Brian Nolen is the parent and guardian of a child that attends Boyd County Middle School, as is Plaintiff Debora Jones. (RE 1, Complaint, ¶¶ 12-13, JA 23).

District Court's Opinion

Plaintiffs filed a Motion for Summary Judgment, seeking, among other things, declaratory judgment and nominal damages on their claim that the District's Speech Policies, that were in force during the 2004-2005 school year, were unconstitutional. (RE 50, Plaintiffs' Motion, n. 2 and n. 3, JA 432-433). The District Court recognized Plaintiffs' speech claims when it stated "Plaintiffs and Intervenor-Defendants contend that policies in effect for the 2004-2005 school year suffer from constitutional infirmities in light of *Tinker* as well as problems of overbreadth and vagueness." (RE 64, Opinion, JA 671).

However, the court refused to rule on the constitutionality of Plaintiffs' speech claims. Noting that the District changed its speech policies during mediation of the case, it said, "In their current form, the written policies are consistent with *Tinker* and its progeny. Following the high court's directive, this Court is not inclined to adjudge the constitutionality of policies no longer in effect." (RE 64, Opinion, JA 672).

Later in the opinion, the District Court dismissed Plaintiffs' nominal

damage claim because Plaintiffs failed to offer proof of such damages.

> To date, Plaintiffs have failed to substantiate their claim for damages. As Defendants point out, even in response to a direct interrogatory, Plaintiffs were unable to specify the measure and amount of their alleged damages. Notably, in their dispositve motion and reply in support of the same, Plaintiffs refer only to "nominal damages." *However, even their request for nominal damages remains unsupported by any factual allegations.*

(RE 64, Opinion, JA 679-680)(emphasis added)(citations omitted).

The District Court went on to state, "The only possible basis the Court can discern for any award of damages to Plaintiffs is the limited period of time during which the Board's written policies which were constitutionally suspect. Yet, again, Plaintiffs have made no specific plea." *Id.*

SUMMARY OF THE ARGUMENT

Plaintiffs are entitled to nominal damages based on their claims that Defendants' Speech Policies that were in effect during the 2004-2005 school year were unconstitutional. The District Court's refusal to rule on Plaintiffs' nominal damages claim because they failed to offer independent evidence proving their nominal damages is contrary to the law on nominal damages. Nominal damages are, by nature, assumed damages. A plaintiff is entitled to nominal damages if he has suffered a constitutional violation. Plaintiffs do not need to offer independent evidence to prove nominal damages.

In addition, the District Court erred to the extent it ruled that Plaintiffs did not make a specific plea for nominal damages based on the Speech Policies that were in effect during the 2004-2005 school year. Both the Complaint and Plaintiffs' Motion are replete with specific requests for nominal damages and a declaratory judgment that the Speech Policies in force for the 2004-2005 school year were unconstitutional.

Finally, the Speech Policies are unconstitutional. The Speech Policies prohibit student speech that is insulting, or that is negative towards homosexual behavior. Such policies are viewpoint-based, vague, and restrict more speech than is permitted by *Tinker*.

STANDARD OF REVIEW

Constitutional and statutory interpretation questions are issues of law, which this Court has de novo review. *See Ammex, Inc. v. United States*, 367 F.3d 530, 533 (6th Cir.2004).

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO NOMINAL DAMAGES ON THEIR CLAIM THAT THE DISTRICT'S SPEECH POLICIES IN EFFECT FOR THE 2004-2005 SCHOOL YEAR WERE UNCONSTITUTIONAL.

Plaintiffs are seeking nominal damages based on the District's unconstitutional speech policies that were in force during the 2004-2005

school year. The District Court refused to consider Plaintiffs' nominal damages claim. The Court stated,

> in their dispositive motion and reply in support of the same, Plaintiffs refer only to "nominal damages." *However, even their request for nominal damages remains unsupported by any factual allegations.* The only possible basis the Court can discern for any award of damages to Plaintiffs is the limited period of time during which the Board's written policies which were constitutionally suspect. Yet, again, Plaintiffs have made no specific plea.

(RE 64, Opinion, JA 680)(emphasis added).

The District Court's reasons for not ruling on Plaintiffs' nominal damage claim are somewhat vague. It appears that the District Court ruled against Plaintiffs on the theory that Plaintiffs failed to support their claim with factual allegations as to the measure and amount of their nominal damages. The Court might also have ruled against Plaintiffs' nominal damage claim under the theory that Plaintiff did not allege a claim for nominal damages based on the Speech Policies that were in force for the 2004-2005 school year. However, both rationales are wholly unsupported by law and the record. Nominal damages are *presumed* damages when a constitutional violation occurs, and do not need independent proof. Furthermore, both the Complaint and Plaintiffs' Motion are replete with claims that the 2004-2005 Speech Policies are unconstitutional and that Plaintiffs are seeking nominal damages.

A. Nominal Damages Are Presumed When Constitutional Rights Have Been Violated, And Do Not Need To Be Independently Proven.

The District Court erred by requiring Plaintiffs to present factual evidence of nominal damages. Nominal damages are presumed when a constitutional violation has occurred. *See Carey v. Piphus*, 435 U.S. 247, 267 (1978) (where there is no proof of actual injury to the plaintiff, a civil rights litigant is still entitled to "nominal damages not to exceed one dollar"); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 (1986) (nominal damages are an appropriate means of vindicating constitutional rights, deprivation of which has not caused actual injury); *Baumgardner v. Secretary, U.S. Dept. of Housing and Urban Development*, 960 F.2d 572, 585 (6th Cir. 1992)(J. Jones, concurring)("Recent Supreme Court precedent has left untouched a court's ability to award presumed damages for civil rights violations in the absence of evidence of tangible injury."). *See also Gore v. Turner*, 563 F.2d 159, 164 (5th Cir.1977) (nominal damages are presumed from the denial of a constitutional right).

In *Carey v. Piphus*, two public school students were suspended without a hearing, and brought claims against the school for violation of their procedural due process rights. *See* 435 U.S. at 247. One student was suspended after the principal saw the student smoking marihuana. The

second student was suspended for wearing an earring, contrary to school rules that prohibited boys from wearing earrings, as it was a symbol of gang membership. In both cases, no evidence was submitted to substantiate any damages. *See id.* at 251-52 ("Plaintiffs put no evidence in the record to qualify their damages, and the record is completely devoid of any evidence which could even form the basis of a speculative inference measuring the extent of their injuries.")

Despite this, the Court held that the students were entitled to nominal damages based on the constitutional violations alone. *Id.* at 267. "Even if respondents' suspensions were justified, and even if they did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process." *Id.* at 266. The Court went on to explain:

> Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages *without proof of actual injury*, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.

Id. at 266 (emphasis added).

In *Memphis Community School Dist. v. Stachura*, 477 U.S. at 299, the Supreme Court re-enforced its holding in *Carey,* when the Court stated,

> We did approve an award of nominal damages for the deprivation of due process in *Carey*. Our discussion of that issue makes clear that nominal damages ... are the appropriate means of "vindicating" rights whose deprivation has not caused actual, provable injury.

Id. at 308 n. 11.

By dismissing Plaintiffs' nominal damages claims because they did not offer proof of such damages, the District Court misapplied the law on nominal damages. Such damages do not need to be independently proved, but are assumed when constitutional rights are violated. *See also Murray v. Board of Trustees, University of Louisville*, 659 F.2d 77 (6th Cir. 1981)(remanding First Amendment claim of wrongful determination of student newspaper editor for determination of nominal damages, even though there was insufficient proof to justify recovery of actual damages); *Lynch v. Leis*, 382 F.3d 642, 646 n. 2 (6th Cir. 2004)("a claim for nominal damages ... is normally sufficient to establish standing, defeat mootness, and grant prevailing party status for the purpose of attorney fees"); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 387 (6th Cir. 2005)(student had standing to bring facial challenge to school's dress code based on claim for damages); *Utah Animal Rights Coalition v. Salt Lake City Corporation*, 371

F.3d 1248 (10th Cir. 2004)(holding that plaintiffs had standing to bring facial challenge to city ordinance regulating permits for demonstrations based on claim for nominal damages).

B. Plaintiffs Made A Specific Plea For Nominal Damages Against the Speech Policies In Force During The 2004-2005 School Year.

If the District Court denied Plaintiffs' nominal damages claim because they failed to make a specific claim for nominal damages, it is wholly in error. The Complaint specifically states that the District's speech policies are unconstitutional, and requests nominal damages. (RE 1, Complaint ¶¶ 15 (citing to Codes of Conduct), 16, 19 (students prohibited from telling another student that homosexuality is wrong), 26 (according to District Policy, it is wrong to communicate one's objection to the homosexual lifestyle), 27 (District policy prohibits students from saying that the homosexual lifestyle is wrong), 29 (students not permitted to vocalize any opposition to the pro-homosexual beliefs), 33 (student plaintiff wants to share his viewpoints on homosexual behavior), 34 (student plaintiff's speech on homosexual behavior has been chilled due to District's Speech Policies), 48-51 (Speech Policies are unconstitutional), 55-63 (Free Speech claim), and p. 13 (Prayer for Relief (d))(seeking nominal damages), JA 3-5, 8-10, 14).

In addition, in Plaintiffs' Motion, Plaintiffs specifically sought nominal damages and a declaratory judgment that Defendants' Speech Policies were unconstitutional. Plaintiffs defined "Speech Policies" as:

> "Defendant's Speech Policies" refer to the Boyd County High School Code of Conduct 2004-2005, §27, (prohibiting "the use of language ... in such a manner as to be commonly understood to ... have the effect of insulting or stigmatizing an individual."); the Boyd County Middle School Planner 2004-2005 (prohibiting the "use of language, conduct, or symbols in such a manner as to be commonly understood to convey hatred, contempt, or prejudice, or to have the effect of insulting or stigmatizing an individual."); and the speech restrictions embodied in the Mandatory Diversity Training ("Diversity Training") that occurred during the 2004-2005 school year.

(RE 50, Plaintiffs' Motion, JA 432). Plaintiffs then stated, "Plaintiffs' Complaint sought an injunction against the Speech Policies. Since then, the District has amended its Speech Policies. However, Plaintiffs were damaged by the Speech Policies and ***seek nominal damages and a declaration that the Speech Policies were unconstitutional.***" (RE 50, Plaintiffs' Motion, JA 433)(emphasis added).

Plaintiffs then submitted over fourteen pages of argument in their summary judgment memorandum as to how the Speech Policies that were in force for the 2004-2005 school year violated their constitutional rights. (RE 50, Plaintiffs' Memorandum in Support of Motion for Summary Judgment, JA 591-604). Consequently, the District Court's suggestion that Plaintiffs

have not made a specific plea for nominal damages based on the Speech Policies that were in force for the 2004-2005 school year is wholly without support and erroneous.

II. THE DISTRICT'S SPEECH POLICIES IN FORCE FOR THE 2004-2005 SCHOOL YEAR WERE UNCONSTITUTIONAL.

Plaintiffs are focusing their constitutional challenges on three interrelated District policies that together, regulated student expression on the subject of homosexual behavior during the 2004-2005 school year. The first policy is the Boyd County High School Code of Conduct 2004-2005, §27, entitled "Harassment/Hate Crimes" which prohibited students from "the use of language ... in such a manner as to be commonly understood to ... have the effect of insulting or stigmatizing an individual." (RE 50, Plaintiffs' Motion, Ex. A, JA 452).

The second policy, the Boyd County Middle School Planner 2004-2005, was nearly identical to the High School Code of Conduct, and prohibited "use of language, conduct, or symbols in such a manner as to be commonly understood to convey hatred, contempt, or prejudice, or to have the effect of insulting or stigmatizing an individual." (RE 50, Plaintiffs' Motion, Ex. B, JA 480).

The third policy is the specific speech restrictions embodied in the Mandatory Diversity Training program ("Diversity Training") that occurred

during the 2004-2005 school year.[7] This training stated that District policy prohibits any student from telling another student that they believe homosexuality is "wrong" or contrary to their values or beliefs. (RE 50, Plaintiffs' Motion, Ex. C, JA 509-510; Ex. D, JA 536); *see also* (RE 6, Defendant's Answer, ¶ 3 (admitting the allegations in paragraph 3 of the Complaint ("School District policies and practice prohibit students from telling someone who is a homosexual that they believe homosexuality is wrong.")); ¶ 9 (admitting the allegations in paragraph 19 of the Complaint ("This training states that School District policy prohibits any student from telling another student that they believe homosexuality is "wrong" or contrary to their values or beliefs.")), JA 37, 38).

Due to the existence of these unconstitutional Speech Policies, student speech was chilled. (RE 50, Plaintiffs' Motion, Ex. H, JA 558-562).

A. Defendant's Speech Policies Prohibiting Students From Criticizing Homosexual Behavior Were Viewpoint-Based And Violated the Free Speech Clause.

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[7] Plaintiffs have not made a specific claim that they had rights to speak *during* the Diversity Training program. Rather, Plaintiffs are challenging the constitutionality of the District's Speech Policies as it was communicated through the Diversity Training program. During the program, the District communicated to the students that its policy prohibits students from telling others that homosexual behavior is wrong, during non-instructional or instructional time.

Defendant's Speech Policies only restricted ***negative*** viewpoints on homosexual behavior. They did not prohibit anyone from saying ***positive*** things about homosexual behavior. For example, while students could say that homosexuality is a valid, acceptable lifestyle, they could not say that God condemns homosexual behavior, or that homosexual behavior is a sin. *See* (RE 50, Ex. C, JA 509-510). While students could tell someone engaged in homosexual behavior that he should be proud of his sexual orientation, they could not tell him that he can change his behavior, without fear of insulting the homosexual. *See* (RE 50, Plaintiffs' Motion, Ex. A, JA 452). Plaintiffs could not share their views with a homosexual without fear of the homosexual being insulted or stigmatized. Students could not say that homosexual behavior is wrong, nor could they say anything that might be viewed as insulting to homosexuals. (RE 50, Plaintiffs' Motion, Ex. C, JA 509-510; Ex. D, JA 536).

In its Answer, Defendant admitted to the viewpoint-biased nature of its Policies. The District's policy against students saying that homosexuals can change, or that homosexual behavior is wrong, is clearly articulated in the transcript of the District-approved Training. The Training instructor then repeated the policy that such speech will not be tolerated at school, and read from the Code of Conduct that prohibits speech that has "the effect of

insulting or stigmatizing an individual." (RE 50, Plaintiffs' Motion, Ex. C, JA 509-510, 512; Ex. D, JA 536-537, 539). And just in case the students were not treating this matter with enough importance, the instructor then stated that the "consequences here have a fairly wide range", with "a possibility of Court Referral and local law enforcement agency notified ...." (RE 50, Plaintiffs' Motion, Ex. C, JA 512; Ex. D, JA 539). Consequently, students were faced with being turned over to the police if they spoke out against homosexual behavior. *See id.*

Defendant cannot place a blanket ban on certain viewpoints without violating the law regarding the free speech rights of public high school students. This legal principle has been well established since the Supreme Court's 1969 seminal ruling in *Tinker v. Des Moines Independent Comm. School Dist.*, 393 U.S. 503, 512-13 (1969). There, the Court found that a school could not prohibit students from wearing an armband protesting the Vietnam War, even though it was insulting to some of their classmates. The Court stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. Similarly, the Defendant's censorship of student speech that is critical of homosexuality is unconstitutional.

1. Student Speech is Protected by the First Amendment.

Student speech on homosexual behavior is speech protected by the First Amendment. There are three primary categories of speech that occur within the school setting: student speech, government speech, and "school-sponsored" speech. Student speech is speech that "happens to occur on the school premises." *See Tinker*, 393 U.S. at 506; *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). On the other end of the spectrum is government speech, such as a principal speaking at a school assembly. Between pure student speech and government speech is "school-sponsored" speech. School-sponsored speech is student speech that a school "affirmatively ... promotes" as opposed to speech it "tolerates." *See Hazelwood*, 484 U.S. at 270-71.

Student speech must be tolerated by the school "unless school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students.'" *Hazelwood*, 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 509). The District's Speech Policies banned *private* communications between students, and thus are subject to the *Tinker* standard. This is not a case where the Plaintiffs wanted to share their views on homosexuality in a school play, during a school assembly, or in the school newspaper. This is a case restricting the Plaintiffs' speech in the hallways, between classes, and

during lunch. Defendant's Policies prohibited students from saying anything negative about homosexuality at all times at school.

Students have the right to express themselves while at school, even if such speech is offensive to others. *See Hazelwood*, 484 U.S. at 266; *see also Castorina v. Madison County School Board,* 246 F.3d 536, 539-540 (6th Cir. 2001) (high school student's Hank Williams, Jr. T-shirt depicting confederate flag and phrase "Southern Thunder" is protected speech) (citing *Texas v. Johnson,* 491 U.S. 397, 404 (1989)); *Saxe v. State College Area School Dist.*, 240 F.3d 200, 215 (3rd Cir. 2001)(stating that no one would suggest that a school could constitutionally ban "any unwelcome verbal ... conduct which offends ... an individual").

Student speech must not be censored unless it will substantially interfere with the work of the school or impede another's rights. However, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508.

2. Defendant's Speech Policies Were Viewpoint Discriminatory.

Defendant's censorship of student speech that was critical of homosexuality was viewpoint-based, and thus unconstitutional. In this case, there is no disputing that the topic of homosexuality was a permitted subject for discussion within the school. The District permitted a student club to

meet that focuses on issues relating to homosexual behavior. *See Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*, 258 F.Supp.2d 667 (E.D. Ky 2003). The District even hosted a training program, educating students about homosexual behavior. (RE 50, Plaintiffs' Motion, Exs. C , JA 481-514 and D, JA 515-541).

While the subject of homosexuality was permitted, students were prohibited from expressing critical views of homosexual behavior, such as "homosexuality is wrong," "a homosexual can change," or that "God is against homosexuality." (RE 6, Defendant's Answer, ¶ 3, (admitting the allegations in paragraph 3 of the Complaint ("School District policies and practice prohibit students from telling someone who is a homosexual that they believe homosexuality is wrong.")); ¶ 9 (admitting the allegations in paragraph 19 of the Complaint ("This training states that School District policy prohibits any student from telling another student that they believe homosexuality is "wrong" or contrary to their values or beliefs.")), JA 37, 38).

Viewpoint discrimination is unconstitutional, irrespective of the forum. *See Good News Club v. Milford Central School,* 533 U.S. 98, 116 (2001) (even in a limited public forum, viewpoint-based speech restrictions are unconstitutional); *see also Kincaid v. Gibson,* 191 F.3d 719, 727 (6th Cir.

1999) (school officials may impose any "non-viewpoint-based restriction" on student speech.); *Hansen v. Ann Arbor Public Schools*, 293 F. Supp.2d 780, 780 (E.D.Mich. 2003)(school's restrictions on speech must be viewpoint neutral); *Rivera v. East Otero School District R-1,* 721 F. Supp. 1189, 1193 (D.Colo. 1989) ("The holding in *Tinker* did not depend upon a finding that the school was a public forum"). Thus, "whether or not a school campus is available as a public forum to others, it is clear that the students, who of course are required to be in school, have the protection of the First Amendment while they are lawfully in attendance." *Rivera,* 721 F. Supp. at 1193.

Castorina v. Madison County School Board is directly on point. *See* 246 F.3d at 536. In *Castorina*, high school students were suspended for wearing a t-shirt depicting the Confederate flag. The court found that such censorship was viewpoint-based, and in violation of the First Amendment. In finding that the censorship was viewpoint-based, the court noted that other students could wear Malcom X shirts. The court stated that "the school's refusal to bar the wearing of this apparel along with the Confederate flag gives the appearance of a targeted ban, something that the Supreme Court has routinely struck down as a violation of the First Amendment." *Id.* at 541.

In *Hansen,* a case out of the Eastern District of Michigan, the court struck down the exact type of viewpoint-based speech discrimination as is present in this case. *See* 293 F.Supp.2d at 780. The court was confronted with a school's desire to eliminate speech critical of homosexuality. For example, a high school student was given the opportunity to speak about "diversity" to her classmates at a school assembly. However, the school prohibited her from presenting one portion of her speech: "Sexuality implies an action, and there are people who have been straight, then gay, then straight again. I completely and whole-heartedly support racial diversity, but I can't accept religious and sexual ideas or actions that are wrong." *Id.* at 792. In a panel discussion that was sponsored by the school, Ms. Hansen was prohibited from expressing her view that the Bible teaches homosexuality is a sin. *Id.* at 788 n.10 and 790-91.

The court, in framing the issue, noted the irony of stifling certain viewpoints when attempting to promote diversity.

> This case presents the ironic, and unfortunate, paradox of a public high school celebrating "diversity" by refusing to permit the presentation to students of an "unwelcomed" viewpoint on the topic of homosexuality and religion, while actively promoting the competing view.... [T]he notion of sponsorship of one viewpoint to the exclusion of another hardly seems to further the school's purported objective of "celebrating diversity."

Id. at 783.

In holding that the viewpoint-based censorship of student speech on homosexuality was unconstitutional, the *Hansen* court noted that schools are not "enclaves of totalitarianism."

> In our system, state-operated schools may not be enclaves of totalitarianism... [and] students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.

Id. (quoting *Tinker*, 393 U.S. at 511).

The court noted that when a school engages in viewpoint-based speech restrictions, it climbs on a slippery slope.

> [I]f schools are permitted to stifle opposing viewpoints in the manner done here, what is to prevent school administrators in other districts where there are, perhaps groups strongly rooted in the community who are opposed to gay rights on religious (or other) grounds from holding a school forum on homosexuality and religion and refusing to permit a more gay-friendly message to be presented. And, of course, the same may be said about other politically- or religiously-charged issues. ***The point, of course, is that, no matter how well-intentioned the stated objective, once schools get into the business of actively promoting one political or religious viewpoint over another, there is no end to the mischief that can be done in the name of good intentions.***

Id. at 803 (emphasis added).

In *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989), the court rejected an argument that school officials could engage in viewpoint discrimination of student speech. *See* 888 F.2d at 1314 (holding that school

officials are required "to make decisions relating to speech which are viewpoint neutral.").

> The Board argues that *Hazelwood* does not prohibit school officials from engaging in viewpoint discrimination. We disagree.... There was no indication that the principal [in *Hazelwood*] was motivated by a disagreement with the views expressed in the articles. Although *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*, we do not believe it offers any justification for allowing educators to discriminate based on viewpoint. The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis. Without more explicit direction, we will continue to require school officials to make decisions relating to speech which are viewpoint neutral.

Id. at 1324-25 (emphasis in original)(citations omitted).

When, as in the instant case, a regulation is not viewpoint neutral, but instead is viewpoint specific, the regulation is unconstitutional per se. *See Simon and Schuster, Inc. v. Members of New York State Crime Victims Bd.,* 502 U.S. 105, 123-26 (1991) (Kennedy, J., concurring) (suggesting that First Amendment ban on content-discrimination is absolute); *see also Prince v. Jacoby,* 303 F.3d 1074, 1091-92 (9th Cir. 2002), *cert. den.,* 540 U.S. 813 (2003) (even assuming a public high school to be a closed forum, regulations on speech must be viewpoint neutral and "'[d]iscrimination against speech because of its message is presumed to be unconstitutional ... The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the

rationale for the restriction.'")(quoting *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 828-829 (1985)); *Donovan v. Punxsutawney,* 336 F.3d 211, 225-26 (3rd Cir. 1993) (high school's exclusion of student club from activity period because of its religious speech was impermissible viewpoint discrimination); and *Hills v. Scottsdale Unif. Schl. Dist.,* 329 F.3d 1044, 1052 (9th Cir. 2003) (school's prohibition on distribution of brochure advertising summer camp that offered religious classes was viewpoint discrimination).

3. Speech Stating Homosexual Behavior is Wrong Would Not Have Been Disruptive, Nor Would It Have Invaded the Rights of Others.

School officials can limit student speech only when it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[8] *Tinker,* 393 U.S. at 509. Neither of these conditions was present in this case.

i. No Disruption.

Mere concern about possible disruption is insufficient. "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508. *See also Barber v. Dearborn Public Schools,* 286 F. Supp. 2d 847, 852 (E.D.

[8] However, if a school decides to restrict speech because it will be disruptive or invade the rights of others, it must do so in a viewpoint neutral fashion. *See Castorina*, 246 F.3d at 544.

Mich. 2003) ("[S]chool officials may prohibit a particular expression of opinion if they can show that their 'action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.'" (quoting *Tinker*, 393 U.S. at 509)).

Even if there was a history of disruption at Boyd County High School regarding speech on homosexuality, the school cannot enforce a viewpoint-specific ban on certain speech. For example, in *Castorina,* students were prohibited from wearing a T-shirt depicting a confederate flag, but other students were permitted to wear Malcolm X clothing. *Castorina*, 246 F.3d at 544. The court found that "even if there has been racial violence that necessitates a ban on racially divisive symbols, the school does not have the authority to enforce a viewpoint-specific ban on [some] racially sensitive symbols and not others." *Id.* This is precisely what the Defendant did in the case at hand. Other students were permitted (and the school even encouraged them) to express their view that homosexual behavior should be endorsed by society. (RE 50, Ex. C, JA 509-510; Ex. D, JA 536-537). Only the view of homosexual behavior, which does not conform to the "orthodoxy" espoused by the school, was censored.

Concern that other students might disagree with a student's speech, or consider his views intolerant does not justify censorship. "[S]tudents benefit

when school officials provide an environment where they can openly express their diverging viewpoints and when they learn to tolerate the opinions of others. ... [M]aintaining a school community of tolerance includes the tolerance of even the most intolerant or disagreeable viewpoints." *Barber,* 286 F.Supp.2d at 858 (citing *Chambers v. Babbitt,* 145 F.Supp.2d 1068, 1073 (D. Minn. 2001)). In *Barber*, the court found that no substantial interference with discipline resulted from an Iraqi high school student wearing a T-shirt depicting President George W. Bush and the words "International Terrorist." *Id.* at 849. This was despite the fact that the United States was considering going to war against Iraq at the time, and a classmate informed a teacher he was going to "take care of [the Iraqi student] for wearing that shirt." *Id.* at 849. *See also Sypniewski v. Warren Hills Regional Board of Education,* 307 F.3d 243 (2002), *cert. den.* 538 U.S. 1033 (2003) (awarding preliminary injunction against school's ban of a Jeff Foxworthy redneck T-Shirt despite history of racial tension); *Holloman v. Harland,* 370 F.3d 1252 (11th Cir. May 28, 2004) (high school student raising clenched fist in protest of recitation of the pledge did not result in material disruption).

In *Chambers v. Babbitt,* 145 F.Supp.2d 1068 (D. Minn. 2001), the court enjoined a school from prohibiting a student from wearing a sweatshirt

with the words "Straight Pride" on the front, and a picture of a man and woman holding hands on the back. *Id.* at 1069. The court found that the sweatshirt posed no material disruption even though there had been allegations of "gay bashing" by students, and a homosexual student's car was "keyed" and urinated upon. *Id.* at 1070-72.

> Maintaining a school community of tolerance includes the tolerance of such viewpoints as expressed by "Straight Pride." While the sentiment behind the 'Straight Pride' message appears to be one of intolerance, the responsibility remains with the school and its community to maintain an environment open to diversity and to educate and support its students as they confront ideas different from their own.

Id. at 1073.

Even in *Tinker*, the court found no material disruption despite the fact that "students made hostile remarks to the children wearing armbands," *Tinker*, 393 U.S. at 508, and

> their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically "wrecked" chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstration."

Id. at 517 (Black, J., dissenting).

ii. Speech stating homosexual behavior is wrong would not have invaded the rights of others.

The rights of a student's classmates are not violated merely by being exposed to speech with which they disagree, or speech that is offensive to them. In *Boos v. Berry,* 485 U.S. 312 (1988), the Supreme Court rejected the argument that the government can restrict speech in order to protect the sensibilities of potential listeners. *Boos* considered the constitutionality of a District of Columbia statute prohibiting the display of signs that may bring a foreign government into "public odium" or "public disrepute." *Id.* at 315.

The Court observed "that in public debate our own citizens must tolerate ***insulting***, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Id.* at 322 (emphasis added)(citations and quotation marks omitted). The Court held that the prohibitions on speech were unconstitutional, rejecting the government's argument that it was justified in restricting the speech in order to comply with its international law obligation to avoid insulting foreign diplomats. *Id.* at 329. Thus, "[t]he Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it." *Saxe v. State College Area School Dist.*, 240 F.3d 200, 215 (3rd Cir. 2001).

Likewise, the District in this case cannot censor student speech on the ground that school officials have an interest in protecting other students (or teachers) from being subjected to an "insulting" or "homosexuality is wrong" remark. To the extent that District policies, or state regulations and laws require anything to the contrary, they have no effect pursuant to the Supremacy Clause. U.S. Const. art. VI, cl.2. *See Board of County Commissioners of Shelby County, Tennessee, v. Burson*, 121 F.3d 244 (6th Cir. 1997) (when state law conflicts with federal law, state law must give way).

4. Defendant's Speech Policies Were Overbroad.

Defendant's Speech Policies restricted more speech than was necessary to prevent disruption of the educational environment, and were therefore overbroad. *See Ashcroft v. Free Speech Coalition*, 533 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)); *see also Saxe v. State College Area School Dist.*, 240 F.3d 200, 215 (3rd Cir. 2001) (determining that school speech regulations were unconstitutionally overbroad).

Defendant's Speech Policies prohibited speech stating that homosexuality is "wrong" or "insulting" or "stigmatizing" speech. (RE 50,

Plaintiffs' Motion, Ex. A, JA 436-468)(RE 6, Defendants' Answer, ¶ 14, JA 38). A similar provision was struck down by the Third Circuit in *Saxe v. State College Area School District* as overbroad. The school's policy in that case prohibited "any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual" based upon their "race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics." *Id.* at 215. The plaintiffs challenged the policy because "[t]hey believe, and their religion teaches, that homosexuality is a sin. Plaintiffs further believe that they have a right to speak out about the sinful nature and harmful effects of homosexuality." *Id.* at 203. The court struck down the policy as impermissibly overbroad, stating:

> No one would suggest that a school could constitutionally ban "any unwelcome verbal ... conduct which offends ... an individual because of" some enumerated personal characteristics. Nor could the school constitutionally restrict, without more, any "unwelcome verbal ... conduct directed at the characteristics of a person's religion." The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.

Id. at 215.

Like the policy in *Saxe,* Defendant's prohibition on all speech that may be perceived as having a "wrong" or "insulting" connotation toward

sexual identity restricted much more speech than necessary to avoid disruption of the school environment. Defendant's Speech Policies were therefore impermissibly overbroad.

B. Defendant's Speech Policies Violate Plaintiffs' Equal Protection Rights by Treating Students Differently Based on Their Views.

The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985).

> The Equal Protection Clause ...[prohibits a state governmental entity from legislating] that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Reed v. Reed, 404 U.S. 71, 75-76 (1971) (citations omitted). "[C]lassifications affecting fundamental rights...are given the most exacting scrutiny." *Clark v. Jeter,* 486 U.S. 456, 461 (1988); *Hansen,* 293 F.Supp.2d at 807 (censorship of student religious viewpoint that homosexuality is wrong subject to strict scrutiny).

In *Hansen,* the court found that a school that allowed student speech in favor of homosexuality, but censored any speech to the contrary violated the Equal Protection Clause.

> Under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. *Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.*

293 F.Supp.2d at 807 (emphasis in original) (quoting *Police Dept. of City of Chicago v. Mosley,* 408 U.S. 92, 96 (1972)).

The Defendant encouraged students to express their support for homosexuality through their Mandatory Diversity Training program. However, Plaintiffs were prohibited from expressing their views that homosexual behavior is wrong. This clearly treated similarly circumstanced students differently based upon their fundamental right to free speech. This differential treatment can only be justified by a narrowly tailored compelling interest. As shown below, this is an extremely high standard that Defendant cannot meet.

C. Defendant's Speech Policies Were Impermissibly Vague in Violation of the Due Process Clause of the Fourteenth Amendment.

Under the vagueness doctrine, "laws must provide explicit standards for those who apply them." *Grayned v. City of Rockford,* 408 U.S. 104, 108

(1972). This is true even in schools. When dealing with speech restrictions, schools must draft regulations with sufficient specificity so as to give students adequate notice as to what speech will subject them to punishment. *See Sypniewski v. Warren Hills Regional Bd. of Educ.* 307 F.3d, 243, 266 (3rd Cir. 2002) ("without '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.'" (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

Defendant's prohibition of student speech that "homosexuality is wrong," or speech that is "insulting" or "stigmatizing" towards homosexuals, is unconstitutionally vague as it leaves students guessing as to what speech is permitted or prohibited. *See id.* (stating that prohibition of speech that creates "ill will" is constitutionally suspect). For example, if a student tells another student that God loves persons who engage in homosexual behavior, but wants them to stop the behavior, is this insulting or encouraging the person? If a student informs another about the health problems that those in the homosexual lifestyle face, is this stigmatizing information, or valuable insight on potential dangers?

CONCLUSION

During the 2004-2005 school year, a student did not dare speak out against homosexual behavior. They were given a Code of Conduct that specifically forbade insulting speech based on a person's sexual orientation. Then, the District instructed all students during a mandatory diversity training program that students were not to tell anyone that homosexual behavior was wrong. Students were repeatedly informed, "you can think it, but you better not say it." And then if the students' speech were not chilled enough, it was put on ice when they were instructed that any violations of the Speech Policy could result in them being turned over to the police.

It is no wonder, then, that students, such as the Plaintiff Timothy Morrison in this case, censored their own speech. Such policies violate core constitutional principles, such as viewpoint-neutrality, and suppress protected speech. Plaintiffs are entitled to nominal damages. The District Court erred when it refused to consider Plaintiffs' free speech claims, under the theory that Plaintiffs failed to offer independent proof of their damages. Nominal damages need no proof, but are assumed when your constitutional rights have been violated. In addition, the court erred in claiming that the Plaintiffs failed to make a claim for nominal damages based on the Speech Policies in force during the 2004-2005 school year. Both the Complaint and

Plaintiffs' Motion are replete with Plaintiffs' claims against the Speech Policies that were in force during the 2004-2005 school year, and contain specific requests for nominal damages.

Consequently, Plaintiffs are asking this Court to reverse the District Court's Order, and remand to the District Court with instructions to award Plaintiff nominal damages and declare that the Speech Policies in effect for the 2004-2005 school year were unconstitutional.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), I certify the foregoing Appellants' Brief is proportionally spaced, has a typeface of 14 points or more, and contains 9,641 as calculated by Microsoft Word, exclusive of the Corporate Disclosure Statement, Table of Contents, Table of Authorities, Request for Oral Argument, and Certificate of Compliance.

Dated: November 28, 2006

Joel L. Oster

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he mailed a copy of the foregoing via first class mail this 9th day of April, 2007 to the following:

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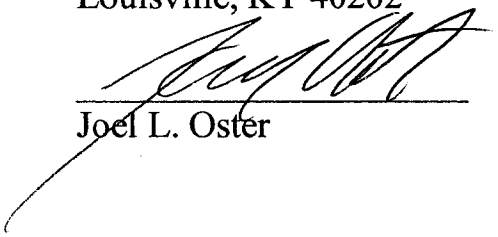

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DESIGNATION OF APPENDIX CONTENTS

Pursuant To Local Rule 30, Appellants hereby designate the following documents to be included in their appendix:

1. N/A, Current docket sheet of district court

2. RE 1, Complaint, filed on February 15, 2005

3. RE 6, Answer by Boyd County Board of Education, filed on March 14, 2005

4. RE 22, Answer by Intervener-Defendants, filed on March 18, 2005

5. RE 48, Motion for Summary Judgment by Boyd County Board of Education, filed on December 19, 2005.

6. RE 49, Motion for Summary Judgment by Intervener-Defendants, filed on December 20, 2005.

7. RE 50, Motion for Summary Judgment by Plaintiffs and Memorandum in Support, filed on December 20, 2005, which contains the following exhibits:

Exhibit A – Boyd County High School Code of Conduct 2004-2005
Exhibit B – Boyd County Middle School Planner 2004-2005
Exhibit C – Transcript for the High School Mandatory Diversity Training for school year 2004-2005
Exhibit D – Transcript for the Middle School Mandatory Diversity Training for school year 2004-2005
Exhibit E – Answers to Second Set of Interrogatories and Response to Request for Production of Documents by Defendants
Exhibit F – Affidavit of Debora Jones
Exhibit G – Supplemental Affidavit of Debora Jones
Exhibit H – Affidavit of Mary Morrison
Exhibit I – Affidavit of LeAnn Kelly
Exhibit J – Affidavit of Vickie Bailey
Exhibit K – Response to Request for Admission by Defendants

Exhibit L – Answers to Interrogatories by Defendants

8. RE 57, Notice of Filing Affidavit of Timothy Morrison, filed on January 9, 2006

9. RE 63, Notice of Filing of Board Policy and School Codes of Conduct, filed February 15, 2006

10. RE 64, Memorandum Opinion and Order, filed on February 17, 2006

11. RE 65, Judgment, filed on February 17, 2006

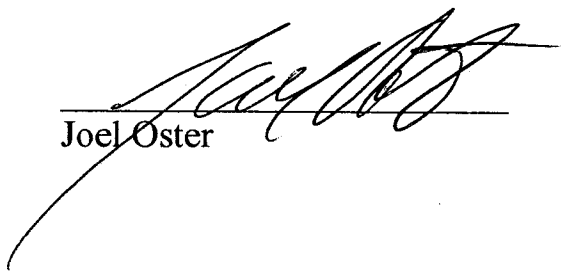
12. RE 66, Notice of Appeal, filed on March 14, 2006

13. RE 67, Motion for Entry of Corrected Judgment, filed on March 17, 2006

14. RE 68, Order Granting Intervener-Defendants' Motion for Entry of Corrected Judgment, filed on March 17, 2006

15. RE 70, Notice of Appeal by Intervener-Defendants, filed on March 21, 2006

16. RE 72, Notice of Appeal Amended by Plaintiffs, filed on March 22, 2006



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