APPEAL NOS. 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
CIVIL CASE NO. 05-38-HRW

INTERVENORS-APPELLANTS' FINAL REPLY BRIEF

David A. Friedman
ACLU of Kentucky Foundation, Inc.
2400 National City Tower
101 S. Fifth Street
Louisville, KY 40202

Sharon M. McGowan
Kenneth Y. Choe
ACLU Foundation, Lesbian Gay Bisexual Transgender Project
125 Broad Street
New York, NY 10004

Attorneys for Intervenors-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

State Statutes

INTRODUCTION

Intervenors-Appellants ("Intervenors") wholeheartedly agree with Defendant-Appellee Board of Education of Boyd County, Kentucky ("Board" or "Defendant") that anti-gay harassment is a serious problem that needs to be addressed in the Boyd County School District.[1] But the Board may not – and, in fact, need not – trounce on students' constitutional rights in order to achieve the worthy goal of keeping all students in Boyd County safe. Fortunately, the Board has amended the anti-harassment policies that previously proscribed more speech than constitutionally permissible. Nevertheless, the policy amendments have not wiped the slate wholly clean. During the 2004-2005 school year, Plaintiff Timothy

---

[1] Contrary to the Board's description of the state of affairs in Boyd County, Defendant-Appellee's Proof Brief ("Def. Br.") at 2-4, the District Court's findings of fact from the Gay Straight Alliance ("GSA") litigation make clear that the problem of anti-gay harassment and discrimination existed long before students decided to form a GSA. *Boyd County High Sch. Gay Straight Alliance v. Board of Educ.*, 258 F. Supp. 2d 667, 670-71 & n.1 (E.D. Ky. 2003). In fact, it was precisely this pattern of harassment and discrimination, and school officials' failure to address it, that students hoped to rectify by forming the club. *Id.* at 670 ("The purpose of the GSA Club is to provide students with a safe haven to talk about anti-gay harassment and to work together to promote tolerance, understanding and acceptance of one another regardless of sexual orientation."). Although the parties settled the GSA litigation prior to any adjudication of the Board's liability for the harassment of Boyd County students who were, or were perceived to be, lesbian, gay, bisexual or transgender ("LGBT"), the District Court's findings of fact make clear that such acts were part of LGBT students' day-to-day existence at Boyd County High School ("BCHS") and that BCHS teachers and officials failed to stop this harassment. *See, e.g., id.* at 671 n.1 ("On a regular basis, students call out 'homo,' 'fag,' and 'queer' behind Plaintiff McClelland's back as he walks in the hallway between classes.").

Morrison read in his student handbook that speech that was insulting or stigmatizing to others could result in discipline; after reading that policy, he stayed silent rather than risk punishment for engaging in constitutionally protected speech.

When an individual is forced to refrain from constitutionally protected expression due to a reasonable fear that he will be punished for that expression, he has suffered an injury of constitutional magnitude. Accordingly, the District Court erred in declining to adjudicate whether nominal damages for this constitutional violation were warranted. The Board's argument that the District Court was under no obligation to address the constitutionality of its prior policies and its claim that the policies were not, in fact, unconstitutional, are wholly without merit and should be rejected. Finally, the Board's assertion of Eleventh Amendment immunity from damages is not only inconsistent with well-established law in this Circuit but also has been waived by the Board's failure to raise the issue during the proceedings below.

ARGUMENT

I. PLAINTIFFS' NOMINAL DAMAGES CLAIM REQUIRED THE COURT TO ADJUDICATE WHETHER THE BOARD'S 2004-2005 ANTI-HARASSMENT POLICIES VIOLATED THE CONSTITUTION.

The fact that the Board revised its unconstitutional anti-harassment policies voluntarily rather than waiting for the Court to order it to do so did not moot this case, as the Board argues. *See* Def. Br. at 21. Rather, the Board's voluntary cessation of its unconstitutional conduct rendered moot only the claims for injunctive relief. Plaintiffs remained entitled to a ruling on their nominal damages claim, which required an assessment of whether the Board's 2004-2005 policies did, in fact, proscribe more speech than constitutionally permissible. Moreover, regardless whether a freestanding claim for declaratory relief would have survived in the wake of the Board's policy revisions, an assessment of the constitutionality of the prior anti-harassment policies is a prerequisite to resolving whether Plaintiffs are entitled to nominal damages. Accordingly, the Board is incorrect on all counts that a ruling on the constitutional issues was both "unnecessary" and "moot." *See id.* at 21.

The Board also states repeatedly that the Court need not address the constitutionality of its prior policies because no party was actually injured by those policies. This suggestion is wrong both factually and legally. First, Timothy Morrison was in fact harmed: he was forced to refrain from engaging in

constitutionally protected speech by his reasonable fear that his speech might be deemed "insulting" or "stigmatizing" to others and would thus trigger discipline. (R-57, Notice of Filing Affidavit of Timothy Morrison, in Support of Plaintiffs' Response to the Cross Motion for Summary Judgment by the Board of Education of Boyd County, Kentucky and the Intervenors, filed on January 9, 2006, at ¶ 6, JA 625 ("I have refrained from conveying my views on homosexuality to my classmates because the School District's speech policies prohibit me from doing so.")).

As a legal matter, a person who is forced to forego the exercise of a constitutional right in order to avoid governmental punishment has suffered a cognizable injury-in-fact that entitles him to seek judicial relief. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (self-censorship is a "harm that can be realized even without an actual prosecution"); *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003) (holding that plaintiff "suffered the constitutionally recognized injury of self-censorship"). As the Ninth Circuit explained, "In an effort to avoid the chilling effect of sweeping restrictions, the Supreme Court has endorsed what might be called a 'hold your tongue and challenge now' approach rather than requiring litigants to speak first and take their chances with the consequences." *Id.* at 1094 (citation omitted).

The fact that Timothy Morrison did not view the anti-harassment training video is irrelevant because he was nevertheless subject to the anti-harassment policies discussed in that video. Moreover, the characterizations of those policies in the video only reaffirmed Timothy Morrison's reasonable interpretation of the policies as proscribing speech simply because others might find what he had to say insulting or stigmatizing.[2] Yet the fact remains that the written policies standing alone were enough to trigger concern about discipline, and resulted in Timothy Morrison's reasonable decision to self-censor rather than risk punishment. Therefore, the Board is simply wrong when it argues "no harm, no foul."[3]

In the proceedings below, the Board also argued that Intervenors should not be permitted to weigh in on whether the 2004-2005 anti-harassment policies were unconstitutional because they intervened primarily to defend their interests with respect to the mandatory nature of the anti-harassment trainings. The Board does

---

[2] In their Civil Appeal Statements, Intervenors and Plaintiffs both made clear that they were challenging the constitutionality of the anti-harassment policies that were in effect during the 2004-2005 school year. Because the anti-harassment video was one place where those policies were articulated and explained to students, an analysis of the statements made in the video is properly part of this appeal. Therefore, any suggestion by the Board that the statements from the video are not properly before this Court, *see* Def. Br. at 17, is wrong.

[3] Plaintiffs do not claim standing based on the fact that the constitutionally protected speech of *others* might have been chilled by the Board's overly broad restriction. Rather, Plaintiff Timothy Morrison has standing to bring his claims based on the fact that *his own* expression was chilled due to the unconstitutional sweep of the Board's anti-harassment policies. Consequently, *Prime Media, Inc. v. City of Brentwood*, 474 F.3d 332 (6th Cir. 2007), this Court's most recent decision on standing in an overbreadth challenge, is not applicable here.

not pursue this argument on appeal. *See* Def. Br. at n.5. Nevertheless, the District Court was correct to reject the Board's argument because, as "full participant[s] in the lawsuit," Intervenors were permitted to address all of Plaintiffs' objections to the Fall 2004 anti-harassment training in order to defend Intervenors' interests in ensuring that future mandatory anti-harassment trainings would be immune from any legal challenge. *Alvarado v. J.C. Penney Co.*, 997 F.2d 803, 805 (10th Cir. 1993); *see also id.* at 805 ("Having been permitted to become a party in order to better protect his or her interests, an intervenor is allowed to set up his or her own affirmative cause or defense appropriate to the case and the intervention.").

Intervenors joined this lawsuit to help ensure that the Board conducted an anti-harassment training that would withstand judicial scrutiny, both because of their interest in enforcing the terms of the Consent Decree in the GSA litigation and because of Intervenor Jane Doe's interest in ensuring a non-discriminatory school environment for her children, who are students in the Boyd County School District. (R-26, Intervenor-Defendants' Response to Plaintiffs' Motion for Preliminary Injunction, filed on April 28, 2005, Exh. A (Consent Decree), JA 100-19). Intervenors engage this specific issue because, in their view, it is imperative that the Court identify any unconstitutional elements of the Fall 2004 training with specificity, thereby ensuring, to the greatest extent possible, that future anti-harassment trainings will be constitutionally sound and immune to challenge.

Intervenors note further that the constitutionality of the anti-harassment training hinges on the constitutionality of the Board's anti-harassment policies, because these policies were the very subject of the Fall 2004 student training video. Therefore, Intervenors are within their rights to seek adjudication of this important issue, *Alvarado*, 997 F.2d at 805 (allowing intervenors to "request[ ] a declaratory judgment of sorts to resolve the ultimate issue" of liability) (emphasis added), and support Plaintiffs' challenge to the constitutionality of the 2004-2005 anti-harassment policies.

For all of these reasons, and particularly because it was presented with a claim for nominal damages by a party who self-censored to avoid punishment pursuant to the Board's anti-harassment policies, the District Court erred in declining to rule on the constitutionality of those policies.

II. THE 2004-2005 ANTI-HARASSMENT POLICIES ARTICULATED IN THE MIDDLE SCHOOL PLANNER, HIGH SCHOOL HANDBOOK AND TRAINING VIDEO PROSCRIBED MORE SPEECH THAN CONSTITUTIONALLY PERMISSIBLE.

The Board's attempts to defend the challenged anti-harassment policies that were in effect during the 2004-2005 school year are also flawed. Neither the existence of other more carefully written policies, nor the history of harassment of, and discrimination against, LGBT students, can cure the constitutional defects in the challenged policies.

1. The Existence of Other Constitutionally Sound Policies Does Not Immunize the Board's Unconstitutional Policies from Review.

A theme that runs throughout the Board's brief is that the existence of other policies and provisions that either (1) do not contain the proscription on "insulting" and "stigmatizing" speech or (2) contain the caveats on such a restriction that *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), requires somehow provides the proper "context" for other policies that, on their face, proscribe more speech than constitutionally permissible. The Court should reject this argument.

The Court should be sensitive to the fact that the audience for these policies is middle school and high school students. It is especially incumbent upon schools to provide clear guidance when instructing students about what kinds of speech are permissible and what kinds of speech will trigger discipline. At best, the Board sent students mixed and confusing messages about the kind of speech that was off-limits at school. A student faced with mixed messages about the risk of punishment for engaging in constitutionally protected speech could reasonably choose the safer course and self-censor. It is more likely, however, that students relied upon the most user-friendly version of the Board policies – namely, the version appearing in their student handbooks and planners – and adjusted their behavior to the school's anti-harassment policy explained there. For this reason, the fact that the Board had articulated versions of its policies that properly took

into account constitutional limits on a school's ability to restrict student speech does not change the fact that it also articulated versions of these policies that went too far.

Déjà Vu of Nashville, Inc. v. Metropolitan Government, 274 F.3d 377 (6th Cir. 2001), does not further the Board's argument. In *Déjà Vu,* this Court found that the term "sexually oriented business / establishment," while overbroad when analyzed in isolation, could be given a narrowing construction because, immediately following the section of the ordinance containing the potentially overbroad term, the statute defined four types of sexually oriented businesses – bookstores, nightclubs, theaters and video stores – with constitutionally sufficient specificity. *Id.* at 388. In this case, by contrast, the challenged anti-harassment policies contained no limiting definitions, nor other qualifying language in any reasonably accessible manner, to clarify that they prohibited only a subset of "insulting" or "stigmatizing" speech.

2. <u>While the History of Harassment and Discrimination Is Relevant to Assessing Whether Speech May Be Proscribed Consistent With *Tinker*, This History Does Not Give the Board the Authority to Promulgate Sweeping Restrictions on Constitutionally Protected Speech.</u>

Intervenors agree that the history of harassment of, and discrimination against, students because of their real or perceived sexual orientation and gender identity is an important aspect of this case. Yet the Board misunderstands the

relevance of this information. Although a school certainly may take recent disruptive or harmful events into account when determining whether student speech will substantially disrupt the educational environment or invade the rights of others, such events do not give a school a blank check to proscribe any and all speech that might be "insulting" or "stigmatizing," as the Board did in this case.

The *Tinker* standard authorizes schools to censor student speech that will substantially invade the rights of others or substantially and materially disrupt the educational environment, and allows schools to make that determination within their own unique factual contexts. *Tinker*, 393 U.S. at 508-09. For this reason, the Tenth Circuit found that the *West* school officials could properly ban the display of racially divisive symbols, such as the Confederate flag, on the ground that such symbols were likely to cause substantial and material disruption. *West v. Derby Unif. Sch. Dist.*, 206 F.3d 1358, 1366-67 (10th Cir. 2000). In its decision, the court noted not only the recent history of racial violence at the school but also the connection of the Confederate flag to those events. *Id.*

In this case, by contrast, the Board cannot claim to have crafted a policy that specifically restricted certain kinds of speech that had been associated with recent disruption of the educational environment. Rather, its policy simply banned all speech that could be "insulting" or "stigmatizing" to another. Therefore, even recognizing the existence of discrimination against LGBT students in the recent

past in Boyd County, the Board's policies cannot be considered a carefully crafted response to a specific concern about disruption.

When faced with a harassment policy that, similar to the policies challenged here, proscribed speech creating "ill will," the Third Circuit explained why the negative reaction of others is insufficient to justify the restriction on speech:

> The focus of this phrase is entirely on the reaction of listeners. But by itself, an idea's generating ill will is not a sufficient basis for suppressing its expression. . . . What is required is that the school has a well-founded fear that the material at issue would substantially disrupt or interfere with the work of the school or the rights of other students. And disruption for purposes of *Tinker* must be more than "the discomfort and unpleasantness that always accompany an unpopular viewpoint." As a general matter, protecting expression that gives rise to ill will – and nothing more – is at the core of the First Amendment.

Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 264-65 (3d Cir. 2002).

Boyd County school officials certainly may take into account the history of persecution of LGBT students in deciding whether a particular student's anti-gay speech was substantially invading the rights of others or disrupting the educational environment.[4] But this case does not involve whether discipline was

[4] The Board's reliance on Judge Reinhardt's conclusion in *Harper v. Poway Unified School District,* 445 F.3d 1166, 1181 (9th Cir. 2006), that the expression of an anti-gay viewpoint is necessarily invasive of the rights of LGBT students, is misplaced for a number of reasons. *See* Def. Br. at 29-31 (discussing *Harper*). First, Intervenors respectfully submit that Judge Reinhardt's categorical approach constituted an unprecedented and radical departure from the fact-specific inquiry

constitutionally permissible in a specific case. Rather, this case involves only whether the Board can proscribe all speech that is "insulting" or "stigmatizing" simply by citing to the history of persecution of LGBT students. The case law applying *Tinker* to school harassment policies demonstrates that the Board's policy has gone too far.

III. KENTUCKY SCHOOL BOARDS ARE MUNICIPAL – NOT STATE – ENTITIES AND THUS ENJOY NO ELEVENTH AMENDMENT IMMUNITY.

The Eleventh Amendment immunizes only state level agencies and officials, not local governments, from suits for monetary damages. *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690-91 (1978). Because Kentucky school boards are local governmental entities for Eleventh Amendment purposes, the Board's immunity argument lacks merit.

In *Mount Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 280-81 (1977), the Supreme Court rejected the contention that an Ohio local school district was "to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, [rather than] as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." *Id.* at 280. The Court

---

required by *Tinker*. Second, and more importantly, *Harper* is no longer good law even in the Ninth Circuit, as the Supreme Court vacated this decision on March 5, 2007, with instructions that the case should be dismissed as moot. *Harper v. Poway Unif. Sch. Dist.*, 127 S. Ct. 1484, 2007 WL 632768 (Mem.) (March 5, 2007). Accordingly, Intervenors submit that the flawed analysis in *Harper* should not influence this Court.

articulated several factors – including the power to issue bonds and to levy some taxes – that led it to conclude that Ohio's school districts are more like counties or cities than like an arm of the state. *Id.*

After *Mt. Healthy*, this Court enumerated nine factors bearing on a governmental entity's state or municipal status. *See Hall v. Med. College of Ohio at Toledo*, 742 F.2d 299, 302 (6th Cir. 1984). The nine factors identified in *Hall* are: (1) whether the payment of a judgment will be made out of the state treasury; (2) whether the entity has the funds or power to satisfy a judgment; (3) whether the entity is separately incorporated; (4) whether the entity has the power to sue and be sued and enter into contracts; (5) the degree of the entity's autonomy over its operations; (6) whether the entity's property is immune from state taxation; (7) whether the state has immunized itself from responsibility for the entity's operations; (8) whether the entity is performing a governmental or proprietary function; and (9) the entity's characterization under state law. *Id.* at 302. Characterization under state law is a "factor[ ] to be considered, but only one of a number." *Id.* "Perhaps the most important [factor] of all," the *Hall* Court explained, is whether a judgment will be paid out of the state treasury. *Id.* at 304.

One year before *Mt. Healthy*, this Court tackled the specific question of whether a Kentucky local school district was entitled to Eleventh Amendment immunity. In *Cunningham v. Grayson*, 541 F.2d 538 (6th Cir. 1976), this Court

ruled that Kentucky local school districts were not immune from damages lawsuits under the Eleventh Amendment because they were neither the state nor its alter ego. *Id.* at 543. Although *Cunningham* predated *Mt. Healthy* and did not apply each of the factors enumerated in *Hall*, its analysis and result are wholly consistent with those later decisions. The *Cunningham* Court rejected the local school district's efforts to cloak itself in Eleventh Amendment armor because the school board is "a body politic and corporate with perpetual succession;" it may sue and be sued; it may contract, purchase, receive, hold and sell property; it may issue bonds and levy taxes; and it may establish curriculum and employment standards. *Id.* at 538.

The Board's suggestion that intervening state law developments should change the Eleventh Amendment calculus is simply incorrect. As one district court has already explained, neither the case cited by the Board here in support of its argument –*Yanero v. Davis*, 65 S.W.3d 510, 526-27 (Ky. 2001) – nor any other state law developments "alter[ ] the Eleventh Amendment analysis, nor the . . . conclusion rejecting the [Board's] argument, as the status of a governmental entity for Eleventh Amendment purposes is a question of federal law." *M.W. ex rel. T.W. v. Madison County Bd. of Educ.*, 262 F. Supp. 2d 737, 743 (E.D. Ky. 2003) (citing *Hall*, 742 F.2d at 304 (6th Cir. 1984)). Furthermore, the factors that are relevant under the federal analysis delineated in *Cunningham* remain essentially unchanged

as a matter of Kentucky state law: local school boards in Kentucky are still bodies politic with perpetual succession; they may still sue and be sued; they may still contract, purchase, receive, hold and sell property; and they may still issue bonds. Ky. Rev. Stat. § 160.160 (copy attached as Appendix A). They may still establish curriculum and employment standards. *Id.* § 160.290 (copy attached as Appendix B). And they may still levy taxes. *Id.* § 160.460 (copy attached as Appendix C). Consequently, the state law developments cited by the Board simply fail to call into question what has been recognized as "well-settled precedent within the Eastern District of Kentucky" – that "local school boards are local political subdivisions and not arms of the state." *Smith v. Floyd County Bd. of Educ.*, 401 F. Supp. 2d 789, 796 n.1 (E.D. Ky. 2005). *See also Blackburn v. Floyd County Bd. of Educ.*, 749 F. Supp. 159, 161-63 (E.D. Ky. 1990) (accord).

Finally, although there is no merit to the Board's claim of immunity, the Board has also waived its right to present this argument by failing to raise the issue during any of the proceedings in the District Court. *See Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754-63 (9th Cir. 1999) (discussing nature of Eleventh Amendment immunity, including the waiver of such immunity due to the failure to assert immunity in a timely manner).

For all of these reasons, the Board's argument that Kentucky school boards are immune from damage suits under the Eleventh Amendment is wholly without merit and this Court should reject it.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in Intervenors' opening brief, this Court should affirm in part and reverse in part the judgment below. The Court should also remand this case to the District Court with instructions (1) to declare that the anti-harassment policies in effect for the 2004-2005 school year proscribed constitutionally protected speech in violation of *Tinker*, and (2) to award Plaintiffs nominal damages.

Respectfully submitted,

Sharon M. McGowan
(Counsel of Record)
Kenneth Y. Choe
ACLU Foundation, Lesbian Gay
Bisexual Transgender Project
125 Broad Street
New York, NY 10004

David A. Friedman
ACLU of Kentucky Foundation, Inc.
2400 National City Tower
101 S. Fifth Street
Louisville, KY 40202

Attorneys for Intervenors-Appellants

Dated: April 13, 2007

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), I certify that Intervenors-Appellants' Final Reply Brief is proportionally spaced, has a typeface of 14 points or more, and contains 3,806 words, as calculated by Microsoft Word, exclusive of the Table of Contents, Table of Authorities, and Certificate of Compliance.

Dated: April 13, 2007

_____
Sharon M. McGowan

CERTIFICATE OF SERVICE

I certify that I have served this document by mailing two copies, by first class mail, on April 13, 2007, to the following:

Kevin Theriot
Joel Oster
David Laplante
Alliance Defense Fund
Midwest Regional Service Center
15192 Rosewood
Leawood, Kansas 66226

Benjamin W. Bull
Gary McCaleb
Alliance Defense Fund
15333 N. Pima Road, Suite 165
Scottsdale, AZ 85260

Winter Huff
Law Offices of John G. Prather
P. O. Box 616
Somerset, KY 42502-0616

Kimberly Scott McCann
VanAntwerp, Monge, Jones & Edwards
1544 Winchester Avenue, 5th Fl.
P. O. Box 1111
Ashland, KY 41105-1111

_____
Sharon M. McGowan