

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

BOYD COUNTY HIGH SCHOOL)
GAY STRAIGHT ALLIANCE, et al.,)
)
Plaintiffs)
)
v.)
)
BOARD OF EDUCATION OF BOYD)
COUNTY, KENTUCKY, et al.,)
)
Defendants)
_____)

Civil Action No. 03-17-DLB

**MEMORANDUM IN SUPPORT OF MOTION TO REOPEN CASE
AND TO SCHEDULE DISCOVERY AND BRIEFING
FOR ENFORCEMENT PROCEEDINGS**

Having endeavored in good faith but without success to resolve informally differences with Defendants regarding the interpretation of, and Defendants' compliance with, the Consent Decree and Order in this action ("Consent Decree"), which was filed with the Court on February 10, 2004, Plaintiffs Sarah Alcorn, William Carter, David Fannin, Libby Fuggett and Tyler McClelland ("Plaintiffs") file this motion, pursuant to Section XI.E of the Consent Decree, to reopen the case and to schedule discovery and briefing in connection with enforcement proceedings.

INTRODUCTION

In January 2003, Plaintiffs filed this lawsuit against Defendant Board of Education of Boyd County, Kentucky ("Board"). In their Complaint, Plaintiffs alleged that the Board violated the federal Equal Access Act and the First Amendment by refusing to recognize the Boyd County High School (BCHS) Gay Straight Alliance, and that the Board violated the Equal Protection Clause by "tolerating and thereby fostering a hostile environment on the basis of

sexual orientation and gender identity at BCHS and by preventing students from organizing to address harassment.”¹ Plaintiffs’ Compl. ¶ 44. [Docket No. 1]. This Court granted Plaintiffs’ motion for preliminary injunctive relief on their Equal Access Act claim. *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County, Ky.*, 258 F. Supp. 2d 667 (E.D. Ky. 2003) (“GSA litigation”) [Docket No. 28]. Subsequently, the parties entered into the Consent Decree, which settled all claims in the case. [Docket No. 74].

As part of the Consent Decree, the Board agreed to conduct mandatory staff and student trainings regarding harassment and discrimination on the basis of sexual orientation and gender identity. Based on the limited information provided by the Board or available from other sources, Plaintiffs believe that the Board has failed to comply with its obligations under the Consent Decree, including requirements that the staff training include at least three hours exclusively addressing “issues pertaining to sexual orientation and gender identity diversity, harassment and discrimination,” Section II.A.4, that the student trainings include at least one hour “devoted to addressing harassment and discrimination on the basis of actual or perceived sexual orientation or gender identity,” Section III.A, and that all of the trainings be “mandatory.” The Board has admitted already that it accepted opt out forms, which, when combined with absences due to “illness,” had the effect of permitting nearly half of the students at Boyd County Middle School and High School to avoid the trainings. *See McGowan Declaration Exh. 8* (affidavit of Boyd County Assistant Superintendent William L. Capehart) (hereinafter “McGowan Decl.”).

Although it is clear from the information already available to Plaintiffs that compliance with the terms of the Consent Decree can be obtained only with the Court’s intervention, Plaintiffs need additional discovery before they will be able to brief the Court on the critical

¹ Plaintiffs also raised comparable claims under Kentucky state law.

deficiencies in the Board's development and implementation of the 2004 trainings. *See* McGowan Decl. ¶ 10 (recounting Plaintiffs' unsuccessful attempts to conduct discovery prior to filing this motion). In particular, Plaintiffs wish to obtain the Board's responses to written discovery that already has been served and to depose the Board officials and Anti-Defamation League (ADL) employees who developed the trainings. *Id.* With respect to the requirement that the Board make the trainings mandatory, Plaintiffs wish to depose the officials responsible for the Board's decisions to accept opt out forms, to charge students who did not attend the training with an unexcused absence (rather than imposing more serious consequences), and not to schedule any make-up sessions. *Id.*

Rather than have the Board spend money on another round of trainings that do not comply with the Consent Decree and that will need to be repeated, the parties agree that their dispute should be resolved before the commencement of the 2005-2006 school year, or as soon thereafter as is convenient for the Court. Plaintiffs are prepared to move forward with discovery and briefing on an expedited basis to ensure that the Court has adequate time to consider the merits of an enforcement motion so that the trainings can occur during the Fall 2005 semester, as contemplated by the Consent Decree. Plaintiffs have served discovery requests and have attempted to develop a discovery schedule with the Board but the Board has indicated that it will not respond to outstanding written discovery or schedule depositions until this case is formally reopened for enforcement proceedings. *See* McGowan Decl. ¶ 10 (describing Plaintiffs' efforts to develop discovery schedule with Board without Court intervention).

Accordingly, Plaintiffs file this motion to reopen the case and to schedule discovery and briefing pertaining to enforcement of the Consent Decree.

CONSENT DECREE ENFORCEMENT ISSUES

I. Mandatory Staff Training

A. Consent Decree Requirements

Section II of the Consent Decree delineates the obligations of the Board with respect to the mandatory staff training program. The Consent Decree requires the Board to conduct “one full-day training for all classified, certified, and district staff in the Boyd County Middle School and High School in the fall semester in each of three successive years . . . , commencing with fall semester 2004.” Section II.A.1. With respect to the content of this training, the Consent Decree provides that

[e]ach Staff Training shall consist of a full day of training on diversity, discrimination and harassment and shall include a significant focus on issues pertaining to sexual orientation and gender identity diversity, harassment and discrimination. The parties anticipate that a significant focus on those issues will require at least three hours exclusively addressing those issues, but agree that the trainer shall determine how to structure the training to include a significant focus on such issues.

Section II.A.4.

The Consent Decree emphasizes that “[t]he goals of the Mandatory Staff Training are to increase safety, to promote a safe learning environment, and to prevent harassment and discrimination on the basis of actual or perceived sexual orientation and gender identity.” Section II.C.

B. The Board’s Fall 2004 Staff Training

The Board conducted a two-day staff training on August 2-3, 2004. In the hope of avoiding any after-the-fact disputes about whether the training satisfied the requirements of the Consent Decree, Plaintiffs requested copies of the syllabus and course materials for the staff training on July 23, 2004. *See* McGowan Decl. Exh. 1 at 3 (May 16, 2005 letter summarizing Plaintiffs’ efforts to resolve dispute regarding compliance with Consent Decree). The Board did

not respond to this request until August 2, which was the first day of the staff training. *Id.* at 3. Moreover, in its response, the Board failed to include sufficient information to allow Plaintiffs to evaluate whether the staff training satisfied the Consent Decree's requirements. *Id.*

Contrary to the Consent Decree's requirement that the training include a "significant focus" of approximately three hours on lesbian, gay, bisexual and transgender (LGBT) issues, Kaye King, a teacher in the Boyd County School District who attended the staff training, estimates that these issues constituted at most 30 minutes of the training. King Declaration ¶¶ 1, 3, 5 (hereinafter "King Decl."). Instead, the training offered generic information about bullying, such as the different forms bullying can take and where bullying can occur on school grounds. *See id.* ¶ 5. Some handouts were provided to the staff at the training, but none of them specifically addressed the ways in which students are targeted because of their sexual orientation and gender identity. *See id.* ¶ 7. One handout presented a variety of scenarios of harassment, including a few examples of sexual orientation and/or gender identity harassment, but the trainers did not discuss any of these scenarios in depth. *See id.* ¶ 8. Rather, the trainer focused on a scenario describing the practice of "rating" girls in school. *See id.*

After Plaintiffs' counsel learned about the training from Ms. King, *see id.* ¶ 9, Plaintiffs contacted the Board to express concern about the Board's failure to ensure that the content of the staff training satisfied the Consent Decree. *See McGowan Decl. Exh. 1* at 3-4. To date, however, the Board has not provided Plaintiffs with any information to suggest that Ms. King's description of the staff training is inaccurate. To the contrary, the materials that the Board recently shared with Plaintiffs simply confirm that the training was a general diversity and bullying training and did not include a significant focus on harassment and discrimination due to real or perceived sexual orientation and/or gender identity. *See McGowan Decl. Exh. 2*

(documents provided by Board in response to Plaintiffs' Request for Documents served on April 26, 2005).

Based on this information, Plaintiffs believe that the Board has not satisfied its obligations under Section II of the Consent Decree. The information that the Board provided in response to Plaintiffs' document requests leaves many important questions unanswered. In particular, in order to obtain more information about the content of the staff training (and whether any staff members were permitted to opt out of the training), Plaintiffs seek to identify through interrogatories, and then to depose, the Board officials and the ADL employees who developed and conducted the staff training.

II. Mandatory Student Training

A. Consent Decree Requirements

Section III of the Consent Decree delineates the Board's obligations with respect to the student trainings. Specifically, the Consent Decree requires that the Board conduct "a one-hour age-appropriate training session for all students in Boyd County middle and high schools on the subject of discrimination on the basis of actual or perceived sexual orientation or gender identity." Section III.A. These trainings must be mandatory and are to be conducted in the fall semester for three years, beginning with Fall 2004.

With respect to the content of the student training, the Consent Decree specifically provides that

[t]he Mandatory Student Trainings will address topics related to harassment, discrimination, and school safety, specifically focused on preventing harassment and discrimination on the basis of actual or perceived sexual orientation or gender identity. Defendants are free to address topics relating to general diversity or other kinds of discrimination or harassment in these trainings so long as a full hour is devoted to addressing harassment and discrimination on the basis of actual or perceived sexual orientation or gender identity.

Section III.C.

B. The Board's Fall 2004 Student Trainings

The Board conducted anti-harassment training sessions at the Boyd County Middle School and High School on November 8-9, 2004.² After the dispute regarding the content of the staff training sessions, Plaintiffs contacted the Board in late August 2004 and requested copies of the syllabus and course materials for the upcoming student trainings. *See* McGowan Decl. Exh. 1 at 3. The Board repeatedly refused to share any information with Plaintiffs about the upcoming trainings. *Id.* When Plaintiffs learned that the Board intended to satisfy the training requirement primarily by showing a video, Plaintiffs asked the Board for the opportunity to preview the video in the hopes of preventing any disputes beforehand. *Id.* at 4-5. The Board also ignored these requests, claiming either that the training video was still in production or that counsel for the Board did not have a copy of the video to share. *Id.* at 5. Even after the Board aired the video at a community meeting on September 21, 2004, the Board continued to resist Plaintiffs' efforts to obtain a copy of the video. *Id.* Finally, on the Friday before the Monday when the trainings were scheduled to take place, the Board mailed copies of the videos to Plaintiffs. *Id.* at 7.

Around this time, Plaintiffs also learned through news reports that parents and students were planning to evade the mandatory student training. *Id.* at 5. An organization called Defenders' Voices had prepared an opt out form specifically designed for use by parents and students in the Boyd County Middle School and High School. *Id.* Plaintiffs contacted the Board in October 2004 to express their concern about the Board's apparent intention to honor these opt out forms and to charge those students who did not attend the training with only an unexcused

² The training sessions were originally scheduled for September 27-28, 2004, but the Board rescheduled the trainings until November. Although Defendants have suggested that there was a "teacher action" scheduled for the day of the trainings, it remains unclear to Plaintiffs why the trainings were postponed, and it is notable that the delay allowed organized opposition to the trainings to develop, including a wide-spread opt out campaign.

absence, notwithstanding the parties' agreement, as reflected in the Consent Decree itself, that the trainings would be "mandatory." *Id.* at 6.

Content of Trainings. In support of this motion, Plaintiffs have provided the Court with copies of the videotapes of the student trainings at the Boyd County Middle School and High School, along with transcripts of those videos prepared by the Board. *See* McGowan Decl. Exhs. 3 & 5; *see also id.* Exhs. 4 & 6 (transcripts of videos). The Middle School video is roughly 60 minutes long. The video contains a brief segment (approximately 3 minutes long) during which a student describes being called a "faggot" repeatedly throughout the school day and how this experience made him want to drop out of school or kill himself.³ In another segment, which Plaintiffs can only assume was meant to satisfy some of the "gender identity" content requirement, the video discusses ways in which men can act "feminine" and women can act "masculine."⁴ Without explicitly discussing harassment against gay, lesbian, bisexual or transgender people, the video admonishes students to "let the other person exist as they are" even when there are things about that person that students might "believe are absolutely wrong."⁵ Finally, the video reiterates the terms of the harassment policies, including the prohibition on harassment and discrimination against students because of their real or perceived sexual orientation or gender identity.

³ This segment appears at roughly the 28 minute mark on the Middle School video, *see* McGowan Decl. Exh. 3, and the 39 minute mark on the High School video, *see* McGowan Decl. Exh. 5. *See also* McGowan Decl. Exh. 4 at 15 (Middle School video transcript) and McGowan Decl. Exh. 6 at 24 (High School video transcript).

⁴ At the 33 minute mark on the Middle School video, the trainer discusses how male football players exhibit a more "nurturing feminine softer side" when, for example, they hold a baby. McGowan Decl. Exh. 3 & Exh. 4 at 19. Likewise, the video explains that women exhibit a more "masculine approach" when, for example, they play sports. *Id.* *See also* McGowan Decl. Exh. 5 (same matter discussed at 44 minute mark) & Exh. 6 at 27. Plaintiffs respectfully submit that these segments do not count as material involving gender identity or transgender issues as contemplated by the Consent Decree. Even if this material were counted toward the one hour minimum requirement, however, this segment only constituted approximately five minutes of the video.

⁵ This segment appears at roughly the 47 minute mark on the Middle School video, *see* McGowan Decl. Exh. 3, and the 58 minute mark on the High School video, *see* McGowan Decl. Exh. 5. *See also* McGowan Decl. Exh. 4 at 21-22 (Middle School video transcript) and McGowan Decl. Exh. 6 at 28-30 (High School video transcript).

The High School video is identical to the Middle School video but contains an additional 11 minutes of material. In the additional segment, the trainer asks students to describe how they feel when they see someone across the room at a party whom they like or wish to meet. At the conclusion of this segment, the trainer states that feelings of attraction are things that “happen[] automatically,” and that “this is your sexual orientation.”⁶

On their face, the student trainings fall far short of the content requirements delineated in the Consent Decree. At best, these videos contain 10 minutes of materials that concern sexual orientation and/or gender identity.

Plaintiffs’ understanding is that, at the conclusion of these videos, there was either a brief discussion period or an opportunity for students to submit written comments on the training. To date, the Board has not suggested that this discussion period incorporated any material about sexual orientation and/or gender identity. To Plaintiffs’ knowledge, there is no evidence that any of the post-video discussion session should be counted toward the one-hour minimum requirement for LGBT content.

Although the videotapes provide ample evidence of the Board’s failure to comply with the Consent Decree’s content requirements for the student trainings, in light of the need for discovery regarding the staff training, Plaintiffs also wish to conduct limited discovery regarding the development of the student training to determine why the Fall 2004 trainings were so inadequate and what relief is necessary to ensure that the mandatory student trainings comply with the Consent Decree in the future. The documents that the Board provided in response to Plaintiffs’ Request for Documents shed little light on the matters in controversy, and the Board has resisted any further efforts at discovery by Plaintiffs. *See* McGowan Decl. ¶ 10. Accordingly, intervention by the Court has become necessary.

⁶ *See* McGowan Decl. Exh. 5 (28 min. mark of video); *see also* McGowan Decl. Exh. 6 at 16-24 (High School video

The Board's Failure to Conduct "Mandatory" Trainings. The Board has conceded already that the "mandatory" student trainings were not, in fact, mandatory. As the Board's own statements and statistics demonstrate, only 502 out of 965 Boyd County High School students attended the "mandatory" training. *See* McGowan Decl. Exh. 7.⁷ The Board honored opt out forms for 162 students. *Id.* In addition, 155 students were absent due to purported illness, and another 146 were absent for other undisclosed reasons. *Id.*

The percentage of absenteeism was roughly the same for the Middle School. Only 462 of 730 students actually attended the "mandatory" student training. *Id.* According to its own records, the Board honored opt out forms for 158 students. *Id.* In addition, 59 students were absent due to purported illness and another 51 students were absent for undisclosed reasons. *Id.*

As far as Plaintiffs know, the only penalty imposed by the Board on students who did not attend the mandatory student training was an unexcused absence. *See* McGowan Decl. Exh. 8 (affidavit of Boyd County Assistant Superintendent William L. Capehart). Although the Board was well aware of the intense community opposition to any discussion of LGBT harassment at school, Plaintiffs are unaware of any steps taken by the Board to plan for or to hold make-up training sessions for those students who were absent.

The Board's own admissions and data conclusively demonstrate that, contrary to the Consent Decree requirements, the student trainings were not mandatory. Plaintiffs have sought to conduct discovery, however, to determine the extent to which Board County school officials and staff not only permitted but also facilitated avoidance of the trainings by distributing or otherwise making available the Defenders' Voice opt out forms. Plaintiffs also need discovery to learn more about the decision not to conduct make-up training sessions and not to impose any

transcript)

⁷ The Board provided this data as part of its response to a motion for preliminary injunctive relief in *Morrison v. Board of Educ. of Boyd County, Ky.*, Civ. Action No. 05-38-DLB (E.D. Ky.).

meaningful penalty on students who failed to attend the training. The Board has refused, however, to participate in discovery regarding these matters until Plaintiffs initiated formal enforcement proceedings. *See* McGowan Decl. ¶ 10.

REQUEST FOR DISCOVERY AND BRIEFING SCHEDULE

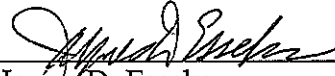
Both parties agree that their disputes regarding the adequacy of the mandatory staff and student trainings should be resolved prior to the commencement of the 2005-2006 school year, if possible, or as soon thereafter as is convenient for the Court.⁸ Although the Board has provided Plaintiffs with some documents pertaining to the issues outlined in this Motion, the Board has refused to respond to additional written discovery or to schedule depositions until the case is reopened for enforcement proceedings. *See* McGowan Decl. ¶ 10. With this Motion now pending, Plaintiffs respectfully request that the Court conduct a scheduling conference to set deadlines for discovery and briefing regarding enforcement of the Consent Decree.

CONCLUSION

Plaintiffs have attempted to work in collaboration with the Board to ensure that the terms of the Consent Decree are fulfilled to the satisfaction of all parties. Unfortunately, however, Plaintiffs' efforts have been rebuffed, and additional proceedings before this Court have become necessary. Therefore, pursuant to Section XI.E of the Consent Decree, Plaintiffs respectfully move to reopen these proceedings and request that the Court establish appropriate discovery and briefing deadlines to facilitate the Court's consideration of the parties' disputes regarding enforcement of the Consent Decree.

⁸ Plaintiffs' understanding is that the Board intends to conduct a staff training in early August. Although Plaintiffs have no information about the content of any forthcoming training, Plaintiffs submit that the Board might consider postponing its staff training until the Court has the opportunity to adjudicate whether the Fall 2004 training complied with the Consent Decree.

Respectfully submitted,



James D. Esseks
Sharon M. McGowan*
Lesbian & Gay Rights Project
ACLU Foundation
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

Lili S. Lutgens
ACLU of Kentucky Foundation, Inc.
315 Guthrie Street, Suite 300
Louisville, KY 40202

Tamara Lange
Lesbian & Gay Rights Project
ACLU Foundation
1663 Mission St., Ste. 460
San Francisco, CA 94103

July 5, 2005

* Motion for Admission *Pro Hac Vice* forthcoming.