From the Instructor

Tyler Guarneri's essay—"Love and Hate in Appalachia"—as a capstone essay for our WR 150 seminar, is as deeply researched and meticulously documented as it is gracefully argued and intelligently arranged. In this legal analysis, Tyler capably anticipates readers' needs. He knows what the reader needs to know, and he timely iterates and reiterates key aspects of the legal cases and the intricate scholarly arguments comprising his substantial body of evidence. This courageous and judicious analysis enables the author to hold fast to his critical perspective even as he dispassionately argues for the expressive rights of those who hold discriminatory and bigoted views.

— Bradley Queen

From the Writer

When researching my final paper, I wanted to write about the rights of gay students in response to the recent string of high school suicides. I stumbled upon the events in Boyd County and found that they provided a lively story that coincided with many of the legal issues affecting gay high school students. In writing the paper, I drew some inspiration from articles in legal journals, while maintaining a temporal narrative.

— Tyler Guarneri

Tyler Guarneri

Love and Hate in Appalachia: Freedom of Speech for Gay and Anti-Gay Students in Boyd County, Kentucky

Although great progress has been made for gay rights since the 1970's, personal and institutionalized homophobia continues throughout much of the nation. This is most evident in some public school districts, where harassment of actual and perceived gay students is rampant, and school policies fall short of protecting the students' rights.[1] At this local level, the debate continues on how to secure the rights and safety of GLBT students and their allies, while maintaining the rights of those who oppose homosexuality. A series of court battles in Boyd County, Kentucky highlights many of the First Amendment issues at stake. An analysis of these cases reveals that federal policies are adequate for balancing the opposing freedom of speech interests of gay and anti-gay students. However, the federal government is not omniscient, and cannot protect every student. Therefore, it is ultimately up to each school district to create fair policies that follow federal guidelines.

Boyd County is a small rural county nestled between the Ohio and Big Sandy rivers in the Appalachian foothills of Eastern Kentucky. But the calm of this idyllic setting has been shattered by the screech of a megaphone chanting "faggot-kisser" and "fag-lover" at a high school basketball game.[2] Boyd County School District has seen the spillover from a vicious and outspoken group of homophobic citizens. The district has struggled with blatant harassment of actual and perceived gay students. One student

declared in English class that "they needed to take all the fucking faggots out in the back woods and kill them."[3] At least two students dropped out of school because of anti-gay bullying.[4] Some students and school officials have struggled to curb this harassment, but they have been met with heated opposition. This tension sparked a series of court battles that highlight a pivotal question facing schools across the country. How can a school secure the rights and safety of gay students while maintaining the rights of those who oppose homosexuality? In this essay, I will examine *Boyd County High School GSA v. Board of Ed. of Boyd County* and the surrounding incidents and case law to determine how a school district might protect gay students' rights to free speech under federal law. I will next study *Morrison v. Board of Ed. of Boyd County* to understand a school district's responsibilities towards anti-gay students. Finally, anti-discrimination law will be analyzed in terms of how it applies to the protection of gay students. This paper will conclude that, if a school district follows federal and constitutional law, the rights and safety of both gay and anti-gay students will be preserved.

A group of Boyd County High School students, discontented with the culture of hatred in their school, began a petition to form a Gay-Straight Alliance (GSA) in January of 2002. The stated goal of the proposed GSA was to "provide students with a safe haven to talk about anti-gay harassment and to work together to promote tolerance, understanding and acceptance."[5] However, the mere petition resulted in a severe backlash by students opposed to same-sex relationships. Some of these anti-GSA students wore shirts to school that read "Adam and Eve, not Adam and Steve."[6] In March of that year, and again in September, gay and allied students submitted applications for the formation of the GSA. Both applications were denied. In late September, the American Civil Liberties Union (ACLU) of Kentucky sent the Board of Education a letter regarding the legal issues of their rejection of the GSA. James Esseks of the ACLU stated that "if the students want to start a GSA at a public school, they have every legal right to do so."[7]

The legal authority to form the GSA stems from both the First Amendment and the Equal Access Act. The First Amendment guarantees freedom of speech, and the Supreme Court has ruled that students retain this right in public schools in *Tinker v. Des Moines* (1969). Justice Fortas,

writing for the majority, famously stated, "It could hardly be argued that students and teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[8] The Court ruled that a school can only restrict student speech that would "materially and substantially disrupt the work and discipline of the school."[9] The Supreme Court is especially defensive of student speech when it involves optional, noncurricular activities.[10]

The Equal Access Act was passed by Congress in 1984 to give students a tool to defend their First Amendment rights. The Act forbids public high schools from denying access to a noncurricular club "based on the religious, political, philosophical, or other content of the speech" at the club. There are three important exceptions built into the Act. First, the school must have a "limited public forum" to be protected by the law. The Act defines a "limited public forum" to include any school that allows at least one noncurricular club. Second, like Tinker, the law excludes substantially disruptive clubs from its protection. Third, the Act only guarantees equal access to school resources for noncurricular clubs.[11]

When the Act was passed, its focus was to protect religious clubs that were being banned in schools throughout the country. While affirming the constitutionality of the Act in *Board of Ed. of Westside Community Schools v. Mergens* (1990), Justice Kennedy predicted that, in the future, "clubs of a more controversial character may have access to student life."[12] This prediction proved true in 1999 when the District Court of Utah ruled that the Board of Education of Salt Lake City must allow a GSA.[13] Several other GSA cases followed, with almost all courts granting GSAs access to school facilities under the Equal Access Act.[14] The law makes it incredibly clear; a school with a limited open forum *must* give equal access to facilities to non-disruptive GSAs.

This openness to GSAs, needless to say, has seen great opposition. The American Family Association of Pennsylvania argues that GSAs should be prohibited, since "encourag[ing] a dangerous lifestyle is irresponsible."[15] Matthew Hilton argues that a school should try to circumvent the law by teaching a "morally based civic virtue" curriculum. A GSA, he argues, would be directly related and opposed to this curriculum, and could be banned.[16] Indeed, the District Court for Northern Texas affirmed the banning of a GSA, in part, because it conflicted with the school's

abstinence policy.[17] This court ruled that the GSA created an "interference with [the school district's] educational mission and function in that it contravene[d] [the school district's] abstinence-only policies."[18]

Sarah Orman argues against the legality of the Texas district court's ruling: "[The GSA's] stated goals are . . . primarily to discuss sexual identity and political activism rather than actual sexual conduct."[19] Banning the club on these grounds contradicts both the Equal Access Act and the First Amendment. In a broader sense, declaring a GSA curricular, as was suggested by Hilton and implemented in Texas, has wide and disastrous consequences. Surely, many social conservatives would object to a Bible Club being banned because its discussions about creationism contradict a school's teachings on evolution. Despite the American Family Association and other gay opponents' concerns, there is simply no legal standing to ban GSAs by labeling them curricular. A GSA can only be prohibited if the club is disruptive or if all noncurricular clubs are banned.

The Boyd County School District attempted to utilize these exact loopholes to ban the GSA there. On October 28, after the ACLU reminded the school district of its legal obligation under the Equal Access Act, the Board of Education briefly approved the GSA.[20] Opposition to the GSA exploded over the next few weeks. On October 30, about one hundred of the high school's 937 students staged a protest against the GSA outside of the school. Protesters shouted at students entering the building, "If you go inside, you're supporting faggots."[21] On November 4, about half of the student population skipped school in protest.[22] The principal feared that open violence would occur over the issue.[23] It is important to note that no GSA member was accused of provoking any of the anti-GSA students.

On December 20, in response to this opposition, the Board of Education banned *all* noncurricular clubs.[24] "It is truly shameful that the School Board has decided to sacrifice the needs of all its students rather than permit this group of students to meet to address issues of tolerance and diversity," said James Esseks of the ACLU. "This decision is frightfully similar to the days when many cities chose to shut down public swimming pools rather than let African Americans use them."[25] The school, despite its ban, allowed certain other clubs to continue using its facilities,

including Drama Club, Bible Club, Executive Club and Beta Club. In order to do so, it labeled these clubs as curricular.[26]

The GSA filed suit against the Board of Education in the Federal District Court for Eastern Kentucky. They reasoned that the school was in violation of the Equal Access Act since the GSA was not given the same resources as the clubs that were allowed to continue after the ban. The Board of Education argued that it was not in violation of the Act for two reasons. First, they claimed that only curricular clubs were using school resources, so the school was not required to permit noncurricular clubs under the Equal Access Act. Second, the Board claimed that the GSA caused major disruptions to the school, so its ban was permitted by the Act and by *Tinker*.

With respect to the first claim, Judge Bunning, who presided over the case, deferred to *Mergens*, which defined "noncurricular clubs" to include all clubs that do not *directly* relate to the body of courses taught by the school.[27] Judge Bunning reasoned that Drama Club, Bible Club, Executives Club and Beta Club are not directly related to the curriculum, so they are noncurricular. The Board was therefore compelled by the Equal Access Act to provide the GSA equal access to school resources unless the club could be found disruptive.[28]

Although there is no question that the GSA's existence did cause a significant disruption in the school, members of the GSA did not cause these disruptions. All of the incidents were devised by opponents of the club. In effect, the opponents were attempting to put a heckler's veto on the alliance's formation. Judge Bunning paralleled *Tinker* when deciding this claim. The Des Moines School District argued in *Tinker* that students could not wear black armbands to school, since other students made hostile remarks to those in armbands. The Supreme Court disagreed. "Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . ."[29] So, Judge Bunning reasoned, a heckler's veto could not be used to justify prohibition of the GSA.[30]

Taking into account these arguments, the district court granted an injunction requiring the Board of Education to give the GSA equal access to facilities.[31] Following the ruling, the Board signed a consent decree with

the GSA, promising, among other things, to give the club equal access to school resources, to implement a mandatory one-hour anti-harassment training session for students and to prohibit harassment or discrimination based on actual or perceived sexual orientation or gender identity.[32] These new policies, nevertheless, did not end the controversy in Boyd County. They only secured a momentary victory for GLBT students, before one anti-gay student, Timothy Morrison, filed suit against the Board of Education raising a whole new set of First Amendment issues. Did the new training and harassment policies violate Morrison's freedom of speech?

Morrison has "sincerely held religious beliefs that homosexuality is harmful to those who practice it and harmful to society as a whole."[33] He believes that it is his duty to inform gay men and women that they are harming themselves and society. In this Federal District Court case, *Morrison v. Board of Ed. of Boyd County* (2006), he argued that the anti-harassment policy and the anti-harassment training both violated his freedom of speech.

As quoted in Morrison's case, the Boyd County School District Code of Conduct during the 2004–2005 school year stated:

> Harassment/Discrimination is unlawful behavior based on . . . perceived sexual orientation or gender identity. . . .
>
> 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.[34]

The school district policy called for up to a five day suspension and police referrals for offenders. Morrison argued that the policy infringed on his First Amendment right to freedom of speech, since it caused him to adjust the content of his speech for fear of punishment. There is no question that the rule changed the content of the plaintiff's speech; that was its intent. However, *Tinker* allows for restricting freedom of speech in public schools if the speech is "materially and substantially" disruptive.[35] We can see that the school code is tailored to meet the *Tinker* criteria, specifically permitting non-disruptive speech, so the code is constitutional. Nonetheless, Morrison and the Board reached an agreement regarding this claim

prior to the district court's decision, so the judge did not comment on the constitutionality of the code of conduct.

For anti-harassment training, the school district had adopted a one-hour video. Morrison stated that this video only permitted positive statements about homosexuality and banned critical viewpoints. This content-based restriction, he asserted, is constitutionally impermissible.[36] Judge Bunning, presiding over the case, found this argument legally unfounded. The video in question was not student speech; it was school-sponsored speech. This type of speech is governed by *Hazelwood School District v. Kuhlmeier* (1988). This case ruled that although pure student speech is protected under the First Amendment, a school "may refuse to lend its name . . . to student expression" when it is sponsoring speech, as long as the editorial control is "reasonably related to legitimate pedagogical concerns."[37] The only pure student speech that occurred during these training sessions was anonymous evaluations of the video. These evaluations were not censored.[38]

Finding Morrison's free-speech claims unfounded, Judge Bunning ruled against the plaintiff. Morrison appealed the decision to the Court of Appeals for the 6th Circuit in *Morrison v. Board of Ed. of Boyd County* (2007). Morrison withdrew his claims regarding the anti-harassment training in the appeal, but he claimed that the district judge did not evaluate a damages claim regarding the code of conduct. The plaintiff requested financial compensation from the Board of Education for chilling his speech during the 2004–2005 school year.[39]

Judge Moore, writing the opinion for the case, deferred to a three-prong test derived from *Lujan v. Defenders of Wildlife* (1992) to determine whether the plaintiff had standing to file suit against the school district for damages. The first prong of the test, which is the most relevant to the First Amendment issues in the case, states that the plaintiff must have "suffered an 'injury-in-fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual' or 'imminent,' not 'conjectural' or 'hypothetical.'"[40] The Court of Appeals for the 6th Circuit cited three cases from its sister circuits in arguing that a chill of speech can constitute an injury-in-fact.[41] So Judge Moore argued that the plaintiff could have a successful claim if he could prove that "an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continu-

ing to engage in [First Amendment-protected] conduct."[42] Since Morrison did not address this in his case, the Court of Appeals remanded the case back to the district court for further deliberation.

Before the case returned to the district court, however, the Board of Education petitioned the Court of Appeals to revisit its decision. In a new decision, *Morrison v. Board of Ed. of Boyd County* (2008), Judge Cook cited *Laird v. Tatum,* a 1973 Supreme Court case. In *Laird*, respondents filed a class action lawsuit against the Department of the Army, claiming that the Army's surveillance of legal actions chilled their speech.[43] The Court decided that, since the chilling arose only from the respondents perception of the Army's policies, the chill was subjective, which does not constitute an injury-in-fact.[44] The Court of Appeals argued that this same situation occurred at Boyd County High School and overturned its original decision. Morrison subjectively interpreted the code of conduct to be chilling of his speech, but no concrete actions were taken against him.[45] Judge Cook stated rather bluntly, "This is a case about nothing . . . Morrison lacks standing to pursue his claim of chilled speech."[46] So, the Court of Appeals denied the plaintiff damages.

Lujan and *Laird* have implications for both GLBT students and their opponents. As was seen with Morrison's appeal, damage claims regarding chilled speech are largely up to the discretion of the courts. Judge Moore found that Morrison's chilled speech claim could constitute injury-in-fact, while Judge Cook did not. Both were able to find precedents to support their own decisions. Clearly, this affects gay opponents who seek compensation for being restricted by anti-harassment codes. It is very possible that a school conduct code, unlike Boyd County's, could be unconstitutionally broad and not follow *Tinker.* In this situation, legitimate and non-disruptive speech could be chilled, which should justify compensation. But the opposing precedents of *Lujan* and *Laird* make the decision unpredictable. GLBT students and their allies on school staffs are also affected by the uncertainty caused by *Lujan* and *Laird*'s vagueness. Some school districts, most famously Anoka-Hennepin school district in Minnesota, ban staff from addressing sexual orientation and gender identity issues.[47] A recent bill that passed the Tennessee state senate attempts to impose a similar ban in all public elementary and middle schools in the

state.[48] If these policies are found unconstitutional, because of *Lujan* and *Laird,* it is unclear whether teachers and students would be able to seek damages.

On a broader scale, the question remains on how to balance the safety of GLBT students with the First Amendment rights of anti-gay students. The current anti-harassment policy of the Boyd County School District seems to be a good compromise. Gay students are protected from harassment, and gay opponents are free to voice their opinions in a non-disruptive and non-abusive manner. But, surely, not every school district in the country has reached this balance. Anoka-Hennepin School District, which bans teachers from mentioning sexual orientation, has seen seven teen suicides over the past two years. At least four of these students were bullied for being gay or being perceived to be gay. The Justice Department is investigating the school district for a civil rights complaint based on "allegations of . . . peer-on-peer harassment based on not conforming to gender stereotypes."[49]

But, does the Federal Government have a role to play in finding this balance of rights and safety in public schools? Although *Tinker* gives the Federal Government the authority to protect speech in public schools, it does not address safety issues. Traditionally, school safety has been a local and state issue, but some legal scholars argue that federal anti-harassment codes should be extended to protect GLBT youth.

Title IX of the 1972 Education Amendments states, "No person in the United States shall, on the basis of sex . . . be subjected to discrimination under any educational program.[50] This code has traditionally been used to enforce anti-harassment codes in schools based solely on gender. The Obama Administration, however, has recently reinterpreted the law more broadly. In a letter to colleagues, the Department of Education stated, "Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including GLBT students, from sex discrimination." The letter argues that anti-gay harassment usually includes sex discrimination, and it uses the example of a gay teen who was called anti-gay slurs because he did not conform to gender stereotypes. This type of harassment is now governed by Title IX.[51]

This is exactly the reinterpretation called for by several legal scholars.[52] Yet, while the Obama administration has the authority to enforce

the law in this way, a school district that is prosecuted under this law could still appeal to a federal court. It would then be up to the judicial system to agree with the newly interpreted definition of the law, or to strike it down. Hopefully, the courts would allow the reinterpretation to stand, for some states and school districts, such as Anoka-Hennepin and formerly Boyd County, have shown unwillingness to confront the problem at the local level. Thus, federal intervention would seem to be necessary to govern school policies and to protect GLBT youth.

Despite some flaws, federal policies give a good legal framework for protecting the rights of GLBT and anti-gay students. The Equal Access Act gives gay students wishing to form a GSA the legal right to do so. *Tinker v. Des Moines* allows all students, regardless of sexual orientation, religion and political disposition, to speak freely about gay rights issues within the bounds of non-disruptiveness. The Obama Administration's reinterpretation of Title IX helps to protect actual and perceived gay students from harassment. Ultimately, however, the Federal Government cannot be expected to govern the policies of every school district in the country. It is primarily up to the school district to ensure the rights and safety of its students. The Boyd County School District showed that schools can handle the situation disastrously. By shutting down all clubs, the school infringed on the rights of gay students and their allies, while escalating the conflict. However, it eventually permitted the GSA, created and enforced a fair anti-harassment policy, and introduced anti-bullying training. In doing so, the board reversed some of the damage it caused. And by fighting for its policies in court, the school district demonstrated a new commitment to balancing gay and anti-gay students' safety and First Amendment rights. Other school districts should look at the successes and failures of the Boyd County Board of Education as an example in setting their own policies. If the kids of Appalachia can learn to love, not hate, then teenagers in Minnesota, Utah, Texas and the rest of the United States can as well.

Notes

1. Eisemann, "Protecting the Kids in the Hall," 125–6.
2. Boyd County High School GSA v. Board of Ed. of Boyd County, 258 F. Supp. 2d 667, (Dist. Court, ED Kentucky, 2003), 693.
3. Ibid.
4. Ibid., 670.
5. Ibid.
6. Ibid., 671.
7. ACLU, "ACLU Tells School Council It Must Allow:." [page?]
8. Tinker v. Des Moines, 393 US 503, (1969), 506.
9. Ibid., 513.
10. Riener, "Pride and Prejudice," 617–8.
11. Equal Access Act, 20 U.S.C. §4071 (1984).
12. Board of Ed. of Westside Community Schools v. Mergens, 496 US 226, (1990), 259.
13. East High GSA v. Board of Ed. of Salt Lake City, 30 F. Supp. 2d 1356, (Dist. Court, D Utah, 1998), 1357.
14. See Colin v. Orange Unified School District, 83 F. Supp. 3d 1135, (Dist. Court, CD Calif., 2000), White County High School PRIDE v. White County School District, No. 2:06-CV-29-WCO, (Dist. Court, ND Ga., 2006).
15. American Family Association, "News Release: What a Joke!" [page?]
16. Hilton, "Options for Local School Districts," 17.
17. Caudillo v. Lubbock Independent School District, 311 F. Supp. 2d 550, (Dist. Court, ND Texas, 2004), 560.
18. Ibid., 568.
19. Orman, "'Being Gay in Lubbock,'" 241.
20. Boyd County HS GSA, 673.
21. Ibid., 674
22. Ibid.
23. Ibid.
24. Ibid.
25. ACLU, "ACLU Blasts KY Board of Ed's Decision." [page?]
26. Boyd County HS GSA, 676.
27. Mergens, 239.
28. Boyd County HS GSA, 682–3.
29. Tinker, 508.
30. Boyd County HS GSA, 689.
31. Ibid., 693.
32. US District Court Eastern District of Kentucky Ashland Division, Consent Decree and Order.

33. Morrison v. Board of Ed. of Boyd County, 419 F. Supp. 2d 937, (Dist. Court, ED Kentucky, 2006), 940.
34. Ibid., 939.
35. Tinker, 513.
36. Morrison, (2006), 942.
37. Hazelwood School District v. Kuhlmeier, 484 US 260, (1988), 272–3.
38. Morrison, (2006), 943.
39. Morrison v. Board of Ed. of Boyd County, 507 F.3d 494, (6th Cir., 2007), Sec. IB.
40. Lujan v. Defenders of Wildlife, 504 US 555, (1992), 560.
41. Morrison, (2007), Sec. IIIA2a, citing White v. Lee, 227 F.3d 1214 (9th Cir., 2000), National Commodity & Barter Ass'n v. Archer, 31 F.3d 1521 (10th Cir., 1994), and Howard Gault Co. v. Texas Rural Legal Aid, Inc., 848 F.2d 544 (5th Cir., 1988).
42. Morrison, (2007), Sec. IIIB, citing Thaddeus-X v. Blatter, 175 F.3d 378, 394 (6th Cir. 1999).
43. Laird v. Tatum, 408 US 1, (1973), 2–3.
44. Ibid., 13–4.
45. Morrison v. Board of Ed. of Boyd County, 521 F. 3d 602, (6th Cir., 2008), Sec. IIIA.
46. Ibid., Sec. III.
47. Harlow and Probst, "Minnesota school district investigated."
48. Shahid, "'Don't say gay' bill passes."
49. Harlow and Probst, "Minnesota school district investigated." [page?]
50. Educational Amendments of 1972, 20 U.S.C. §1681-8, (1972).
51. US Dept. of Ed., Letter to Colleagues.
52. See Eisenmann, "Protecting the Kids in the Hall;" Mayes, "Confronting Same-Sex, Student-to-Student Sexual Harassment;" and Schaffner, "Approaching the New Millennium with Mixed Blessings."

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