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## Federally Recognized Rights of LGBTQ Students to Form Gay-Straight Alliance Organizations (GSAs)

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CARDOZO LAW REVIEW  
*de•novo*

FEDERALLY RECOGNIZED RIGHTS OF LGBTQ  
STUDENTS TO FORM GAY-STRAIGHT ALLIANCE  
ORGANIZATIONS (GSAs)

*Jerry Foxhoven*<sup>†</sup>

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INTRODUCTION

The rights of LGBTQ<sup>1</sup> persons have become emerging topics of

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<sup>1</sup> Lesbian, Gay, Bisexual, Transgendered and Questioning.

both political and social discussions for the past decade, resulting in debates on federal and state levels.<sup>2</sup> The issue has even become a litmus test for presidential candidates.<sup>3</sup> As one court recently noted, “it must surely be beyond question at this moment in the nation’s history that the subject of sexual orientation and the legal status of those in the LGBT Community is at the forefront of public debate . . . .”<sup>4</sup> LGBTQ individuals have been recognized as “an identifiable minority subjected to discrimination in our society.”<sup>5</sup>

School youth are often subjected to “cruel, inhuman, and prejudiced treatment by others” while they struggle to discover who they are as individuals.<sup>6</sup> This is particularly true of LGBTQ students. According to one survey, 81.9% of LGBTQ students report being verbally harassed because of their sexual orientation, 38.3% report being physically harassed because of their sexual orientation, and 18.3% report being physically assaulted because of their sexual orientation in school.<sup>7</sup> The systematic abuse of LGBTQ youth has significant developmental consequences. Researchers have found that “[a]mong teenage victims of anti-gay discrimination, 75% experience a decline in academic performance, 39% have truancy problems, and 28% drop out of school.”<sup>8</sup> The rate for attempted suicide among gay students has been identified to be more than six times the rate of straight students in one state.<sup>9</sup> As a result, courts have recently begun to acknowledge that the “significantly higher reports of depression and suicide” found among LGBTQ youth is likely caused by the discrimination these students experience in their own schools.<sup>10</sup>

An attempt to change attitudes about LGBTQ students has been led by students themselves, who have begun to take an active role by forming alliances between LGBTQ and heterosexual students, providing an open discussion of topics such as sexual orientation.<sup>11</sup> To

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<sup>2</sup> Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 104, 523 F.3d 668, 678 (7th Cir. 2008).

<sup>3</sup> *Id.*

<sup>4</sup> Carver Middle School Gay-Straight Alliance v. School Board of Lake County, Fla., \_\_\_ F.Supp.2d \_\_\_ (C.D. Fla. 2014), 2014 WL 89072.

<sup>5</sup> Nabozny v. Podlesny, 92 F.3d 446, 457 (7th Cir. 1996).

<sup>6</sup> Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1176 (9th Cir. 2006).

<sup>7</sup> THE 2011 NATIONAL SCHOOL CLIMATE SURVEY, JOSEPH G. KOSCIW, PH.D, ET AL., GAY, LESBIAN & STRAIGHT EDUCATION NETWORK (2012), available at <http://glsen.org/sites/default/files/2011%20National%20School%20Climate%20Survey%20Full%20Report.pdf>.

<sup>8</sup> See Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1179 (9th Cir. 2006) (citing Courtney Weiner, Note, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX*, 37 COLUM. HUM. RTS. L. REV., 189, 225 (2005).

<sup>9</sup> Colin ex rel. Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135, 1151 (C.D. Cal. 2000) (citing John Ritter, *Gay Students Stake Their Ground*, USA TODAY, Jan. 18, 2000, at 2A).

<sup>10</sup> Chambers v. Babbitt, 145 F. Supp. 2d 1068, 1073 (D. Minn. 2001).

<sup>11</sup> Nuxoll ex rel. Nuxoll v. Indian Sch. Dist., 523 F.3d 668, 678 (7th Cir. 2008).

increase tolerance and to reduce the harassment of LGBTQ students in schools, students across the country have formed Gay-Straight Alliances (GSAs). The stated purpose of a GSA 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.”<sup>12</sup> As of 2008, there were over 700 GSA-like student groups in schools across the United States.<sup>13</sup> Unfortunately, a reactionary “use of anti-gay epithets, homophobic comments, and other forms of ‘gay bashing’ has become [and remains] a serious problem” in America’s schools.<sup>14</sup>

Even though parents have the primary duty to teach their children to be tolerant and accepting citizens, courts have found that GSAs can be an effective tool in reducing hate crimes against LGBTQ students.<sup>15</sup> In fact, the need for recognition of a GSA in order to end discrimination in schools based on sexual orientation was found to be so important that one court noted: “As any concerned parent would understand, this case may involve the protection of life itself.”<sup>16</sup>

Not surprisingly, courts have played a critical role in the development of GSAs. The purpose of this article is to explore the various avenues that have been used in the federal courts to ensure the right to organize Gay Straight Alliances (GSAs), and to detail the use of the federal courts by students who assert the right to express contrary views on sexual orientation issues.

#### A. APPLICATION OF THE EQUAL ACCESS ACT

In 1981, the United States Supreme Court held that a state university could not single out religious groups or prevent them from meeting if the university makes its facilities generally available for use by registered student groups.<sup>17</sup> Congress extended this holding to public high schools by passing the Equal Access Act three years later.<sup>18</sup>

While the Act was intended to permit religious speech in schools, it also provided equal rights of free speech to GSAs.<sup>19</sup> The Equal

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<sup>12</sup> *Boyd Cnty. High Sch. v. Bd. of Educ. Boyd*, 258 F. Supp. 2d 667, 670 (E.D. Ky. 2003).

<sup>13</sup> *Gonzalez v. Sch. Bd. of Okeechobee Co.*, 571 F. Supp. 2d 1257, 1264 (S.D. Fla. 2008).

<sup>14</sup> *Doe v. Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d 809, 816 n.2 (S.D. Iowa 2004).

<sup>15</sup> *Boyd Cnty. High Sch. v. Bd. of Educ. Boyd*, 258 F. Supp. 2d 667, 692 (E.D. Ky. 2003).

<sup>16</sup> *See* *Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1151 (C.D. Cal. 2000).

<sup>17</sup> *See* *Widmar v. Vincent*, 454 U.S. 263 (1981).

<sup>18</sup> 20 U.S.C. § 4071, *Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1142 (C.D. Cal. 2000). The Act specifically applies to “secondary schools” and is thus inapplicable to middle schools. *Carver Middle School Gay-Straight Alliance v. School Board of Lake County, Fla.*, \_\_\_ F.Supp.2d \_\_\_ (C.D. Fla. 2014), 2014 WL 89072.

<sup>19</sup> *Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1142 (C.D. Cal.

Access Act provides:

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.<sup>20</sup>

The Act also states: “A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on the school premises during noninstructional time.”<sup>21</sup>

The United States Supreme Court, in *Westside Community Board of Education v. Mergens*,<sup>22</sup> defined the terms “noncurriculum related student group” broadly by holding that the terms refer to “any student group that does not *directly* relate to the body of courses offered by the school.”<sup>23</sup> The *Mergens* court went on to say:

In our view, a student group directly relates to a school’s curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.<sup>24</sup>

Application of the Equal Access Act has made it very difficult for school boards and school authorities to prevent the recognition and formation of GSAs. One court has gone so far as to hold that a school district would have to give up federal funding in order to avoid application of the Act.<sup>25</sup> One school, in order to attempt to avoid application of the Equal Access Act, stated in a formal written policy that it was their “express decision not to allow a limited open forum as defined by the Equal Access Act” for its student organizations.<sup>26</sup> The *Mergens* decision directed courts to look to a school’s practice rather than merely accepting its stated policy.<sup>27</sup> As a result, courts must examine the record of the “actual practices” of a student group in order to make a qualitative determination as to curriculum-relatedness.<sup>28</sup>

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2000).

<sup>20</sup> 20 U.S.C. § 4071(a) (2006).

<sup>21</sup> 20 U.S.C. § 4071(b) (2006).

<sup>22</sup> 496 U.S. 226 (1990).

<sup>23</sup> *Id.* at 239.

<sup>24</sup> *Id.* at 239–40.

<sup>25</sup> *Boyd Cnty. High Sch. v. Bd. of Educ. Boyd*, 258 F. Supp. 2d 667, 681 (E.D. Ky. 2003).

<sup>26</sup> *E. High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166, 1168 (D. Utah 1999).

<sup>27</sup> *Westside Cmty. Bd. of Educ. v. Mergens*, 496 U.S. 226, 246 (1990).

<sup>28</sup> *Id.* at 240; *Straights & Gays for Equal. v. Osseo Area Schs. – Dist. No. 279*, 471 F.3d 908,

A “noncurriculum related student group” may not be denied “equal access to any other group on the basis of the content of the group’s speech” by schools.<sup>29</sup> Once a limited open forum is created, a school not only must provide some of the avenues of communication to all groups, but must also provide equal access to the same avenues of communication—such as providing for group meetings—across all noncurriculum related groups.<sup>30</sup> Because the Equal Access Act requires equal access and recognition to a GSA, no additional restriction can be placed upon the GSA that is “not uniformly applied to all noncurricular student groups.”<sup>31</sup>

Courts will not allow school authorities to avoid the application of the Equal Access Act by “[b]urying their heads in the sand and willfully ignoring student groups” who are meeting on school property.<sup>32</sup> As a result, school authorities cannot avoid application of the Act by claiming that it did not know that other noncurriculum related groups were operating at the school.<sup>33</sup> Schools cannot even claim that any group meetings that make the act applicable are against school rules, since courts have held that a schools is, in fact, allowing groups access, making the Act applicable, whenever it “knows or should know that the group is violating administration rules” by meeting, and “take[s] no action to prevent further meetings.”<sup>34</sup>

The federal courts have recognized that school boards may be uncomfortable about the discussions in which students will participate when a GSA is created, but have held that such feelings do not allow a violation of the Equal Access Act:

The Board Members may be uncomfortable about students discussing sexual orientation and how all students need to accept each other, whether gay or straight. As in *Tinker*, however, when the school administration was uncomfortable with students wearing symbols of protest against the Vietnam War, Defendants can not [sic] censor the students’ speech to avoid discussions on campus that cause them discomfort or represent an unpopular viewpoint.<sup>35</sup>

In fact, interpreting the Equal Access Act differently for Christian groups than for GSAs would make the courts “[c]omplicit in the

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912 (8th Cir. 2006); *Boyd*, 258 F. Supp. 2d at 685; *E. High Gay/Straight Alliance*, 81 F. Supp. 2d at 1180.

<sup>29</sup> *Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1145-46 (C.D. Cal. 2000).

<sup>30</sup> *Straights & Gays for Equal. v. Osseo Area Schs. – Dist. No. 279*, 471 F.3d 908, 911 (8th Cir. 2006).

<sup>31</sup> *Gonzalez v. Sch. Bd. of Okeechobee Co.*, 571 F. Supp. 2d 1257, 1267 (S.D. Fla. 2008).

<sup>32</sup> *Boyd Cnty. High Sch. v. Bd. of Educ. Boyd*, 258 F. Supp. 2d 667, 686 (E.D. Ky. 2003).

<sup>33</sup> *Id.* at 685.

<sup>34</sup> *Id.* at 686.

<sup>35</sup> *Colin*, 83 F. Supp. 2d at 1149; *Boyd*, 258 F. Supp. 2d at 691.

discrimination against students who want to raise awareness about homophobia and discuss how to deal with harassment directed towards gay youth.”<sup>36</sup>

One attempt made by a school district to deny equal access to a GSA was to claim that the existence of a GSA would be in direct contravention of the school’s “abstinence only” policy.<sup>37</sup> This argument was rejected on two grounds: first, that the message of gay tolerance does not conflict with an abstinence-only policy,<sup>38</sup> and second, that allowing message-based exceptions would defeat the entire purpose of the Equal Access Act.<sup>39</sup> Another court has rejected the idea that recognition of a GSA would promote premature sexualization of students.<sup>40</sup> One court has held that, at least as to younger, middle-school aged students (ages 12-14), it is reasonable for a school board to prohibit the formation of a GSA in order to “distance the school and its pupils from a debate best left to more mature educational levels.”<sup>41</sup>

#### B. EXCEPTIONS TO THE EQUAL ACCESS ACT

Few exceptions exist to the application of the Equal Access Act, or, as one court stated: “There are few limits to the types of student groups that are permitted to meet once the EAA [Equal Access Act] is triggered.”<sup>42</sup> One of those exceptions prohibits an outside group’s ability to “direct, conduct, control, or regularly attend activities” of the group.<sup>43</sup> However, it is clear that merely using a name suggested by an outside (e.g. national) group and receiving emotional support from that outside group does not exempt a GSA from use of the Equal Access Act when the formation and control of the group is student-initiated.<sup>44</sup>

Another exception permitted under the Equal Access Act is that schools can limit the speech of students and student groups when necessary to “maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure the

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<sup>36</sup> *Colin*, 83 F. Supp. 2d at 1149.

<sup>37</sup> *See Gay-Straight Alliance v. Sch. Bd. of Nassau*, 602 F. Supp. 2d 1233, 1236 (M.D. Fla. 2009).

<sup>38</sup> *Id.* at 1237; *see also*, *Gonzalez v. Sch. Bd. of Okeechobee Co.*, 571 F. Supp. 2d 1257, 1265 (S.D. Fla. 2008). For *contra*, *see Caudillo v. Lubbock Ind., Sch. Dist.*, 311 F.Supp2d 550 (N.D. Tex. 2004).

<sup>39</sup> *Gay-Straight Alliance*, 602 F. Supp. 2d at 1237-388.

<sup>40</sup> *See Gonzalez*, 571 F. Supp. 2d at 1266-67.

<sup>41</sup> *Carver Middle School Gay-Straight Alliance v. School Board of Lake County, Fla.*, \_\_\_ F.Supp.2d \_\_\_ (C.D. Fla. 2014), 2014 WL 89072.

<sup>42</sup> *Gonzalez*, 571 F. Supp. 2d. at 1262.

<sup>43</sup> 20 U.S.C. § 4071(c)(5).

<sup>44</sup> *See Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1146 (C.D. Cal. 2000).

attendance of students at meetings is voluntary.”<sup>45</sup> This means that the meetings of the group cannot “materially and substantially interfere with the orderly conduct of educational activities within the school.”<sup>46</sup> Since the entire purpose of the organization is “to avoid the disruptions that take place when students are harassed due to sexual orientation,” most courts have refused to find that the formation of a GSA would materially and substantially interfere with the orderly instruction of students.<sup>47</sup>

It is important to note that school authorities cannot deny equal access to a group because people opposing the group cause disruption, but, rather, must show that the disruption is caused by the group’s own disruptive activities.<sup>48</sup> However, courts have struggled in the application of this rule. In one case, a school board voted to ban all clubs at a high school in response to a disruption that occurred in response to the formation of a GSA club by opponents of the GSA.<sup>49</sup> The federal court invalidated the across-the-board ban because it refused to accept a “heckler’s veto” exception to the Equal Access Act.<sup>50</sup> However, another court has held that school districts are “caught in a conundrum” fearing subjection to liability for failing to protect LGBTQ students from assaults and denial of groups to meet on school premises.<sup>51</sup> That court held: “[A] school that chooses to prevent activities that invite harassment, safety problems, and lawsuits has chosen the wiser of the two possibilities.”<sup>52</sup>

### C. USING THE FIRST AMENDMENT TO PROTECT GSAS

In addition to application of the Equal Access Act, courts have used First Amendment analysis to review attempts by school authorities to prohibit or restrict GSA activities in schools. Over forty years ago, the United States Supreme Court, in *Tinker v. Des Moines Independent Community School District*,<sup>53</sup> held that the free speech rights of students in a school setting had been a long-standing doctrine of the court.<sup>54</sup> The

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<sup>45</sup> 20 U.S.C. § 4071(f).

<sup>46</sup> 20 U.S.C. § 4071(c)(4).

<sup>47</sup> *Colin*, 83 F. Supp. 2d at 1146. For *contra*, see *Caudillo v. Lubbock Ind., Sch. Dist.*, 311 F. Supp. 2d 550, 568 (N.D. Tex. 2004).

<sup>48</sup> *Boyd Cnty. High Sch. v. Bd. of Educ. of Boyd*, 258 F. Supp. 2d 667, 690 (E.D. Ky. 2003).

<sup>49</sup> *Id.* at 675.

<sup>50</sup> *Id.* at 689.

<sup>51</sup> *Caudillo v. Lubbock Ind., Sch. Dist.*, 311 F. Supp. 2d 550, 568 (N.D. Tex. 2004).

<sup>52</sup> *Id.* at 569.

<sup>53</sup> 393 U.S. 503 (1969).

<sup>54</sup> *Id.* at 513–14. As Justice Fortas, writing for the majority, noted:

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either



*Tinker* court, in upholding the right of public school students to wear black armbands in protest against the Vietnam War,<sup>55</sup> made clear that a student's First Amendment rights do not evaporate at the school door, and that schools must demonstrate "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" in order to control a student's freedom of expression.<sup>56</sup> At least one court has held that the purpose of a GSA (meeting as a group to discuss matters pertaining to sexual orientation and building trust with heterosexual students) "sounds in the political speech addressed in *Tinker*."<sup>57</sup> Another court characterized the very purpose of a GSA as "but another example of the associational activity unequivocally singled out for protection in the very 'core' of association cases decided by the Supreme Court."<sup>58</sup>

#### D. USING THE FIRST AMENDMENT TO PROTECT STUDENT ANTI-GAY EXPRESSION IN SCHOOLS

Some students have attempted to use the First Amendment to support their "right" to brandish anti-gay sentiments in a school setting. One example arose, in 2003, when a California high school allowed its GSA group to hold a school-wide "Day of Silence."<sup>59</sup> The court described the event as follows:

On the "Day of Silence," participating students wore duct tape over their mouths to symbolize the silencing effect of intolerance upon gays and lesbians; these students would not speak in class except through a designated representative. Some students wore black T-shirts that said "National Day of Silence" and contained a purple square with a yellow equal sign in the middle. The Gay-Straight Alliance, with the permission of the School, also put up several posters promoting awareness of harassment on the basis of sexual orientation.<sup>60</sup>

In response, a group of heterosexual students organized and held a "Straight-Pride Day" during which they wore T-shirts displaying

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students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.

*Id.* at 506.

<sup>55</sup> *Id.* at 504.

<sup>56</sup> *Id.* at 509 (1969); *Gonzalez v. Sch. Bd. of Okeechobee Cnty.*, 571 F. Supp. 2d 1257, 1269 (S.D. Fla. 2008).

<sup>57</sup> *Gonzalez*, 571 F. Supp. 2d at 1269.

<sup>58</sup> *Gay Students Org. v. Bonner*, 509 F.2d 652, 660 (1st Cir. 1974).

<sup>59</sup> *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171 (9th Cir. 2006).

<sup>60</sup> *Id.* at 1171 n.3.

derogatory remarks toward Gays.<sup>61</sup> One student wore a T-shirt containing the handwritten message “BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED” and “HOMOSEXUALITY IS SHAMEFUL ‘Romans 1:27.’”<sup>62</sup> The student was asked to remove the shirt, but refused to do so.<sup>63</sup> The student then brought an action against school authorities alleging, among other things, that the school violated his constitutional right to free speech.<sup>64</sup> The court found that school authorities had the right to restrict the student’s First Amendment rights because the “wearing of his T-shirt ‘collides with the rights of other students’ in the most fundamental way.”<sup>65</sup> The court reasoned: “Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.”<sup>66</sup> Because the First Amendment requires that limitations on student speech must be “narrow and applied with sensitivity,” the court limited the holding “to instances of derogatory and injurious remarks directed at students’ minority status such as race, religion, and sexual orientation.”<sup>67</sup>

The extent of the anti-gay speech appears to affect the application of the First Amendment protections accorded to such speech. A “Day of Silence” was conducted at the Neuqua Valley High School in Naperville, Illinois.<sup>68</sup> After the event, students who disapproved of homosexuality organized a “Day of Truth.”<sup>69</sup> One student wore a T-shirt on the “Day of Truth” that said “My Day of Silence, Straight Alliance” on the front and “Be Happy, Not Gay” on the back.<sup>70</sup> The student sued the school district claiming that the rule prohibiting him from wearing the T-shirt violated his First Amendment Rights.<sup>71</sup> The court held that the phrase, “Be Happy, Not Gay” was only “tepidly negative” and, as such, would only have a “slight tendency to provoke such incidents” of harassment.<sup>72</sup> The same case returned to the same court three years later.<sup>73</sup> In 2011, the same court similarly held that “a school that permits advocacy of the rights of homosexual students

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<sup>61</sup> *Id.* at 1171.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1172.

<sup>64</sup> *Id.*

<sup>65</sup> *Harper*, 445 F.3d at 1178, *quoting in part* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 1183.

<sup>68</sup> *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist.*, 523 F.3d 668 (7th Cir. 2008).

<sup>69</sup> *Id.* at 670.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 676.

<sup>73</sup> *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874 (7th Cir. 2011).

cannot be allowed to stifle criticism of homosexuality.”<sup>74</sup> Again, the court held that the wording “Be Happy, Not Gay,” was mild and did not constitute “fighting words,” which are accorded a lesser degree of First Amendment protection.<sup>75</sup> The court also held that the student did not exhibit any violence and, as such, prohibiting the speech because of a negative response to the message would impermissibly allow a “heckler’s veto” of free speech.<sup>76</sup>

#### CONCLUSION

There is no question that the social debate about the rights to be accorded to LGBTQ citizens continues in this country.<sup>77</sup> Some courts have compared the debate over the rights of LGBTQ persons to the political disagreements that once existed concerning racial and religious equality.<sup>78</sup> Courts have recognized, however, that promoting tolerance and understanding is important to the provision of a quality education to LGBTQ students:

Such disagreements may justify social or political debate, but they do not justify students in high schools or elementary schools assaulting their fellow students with demeaning statements: by calling gay students shameful, by labeling black students inferior or by wearing T-shirts saying that Jews are doomed to Hell. Perhaps our dissenting colleague believes that one can condemn homosexuality without condemning homosexuals. If so, he is wrong. To say that homosexuality is shameful is to say, necessarily, that gays and lesbians are shameful. There are numerous locations and opportunities available to those who wish to advance such an argument. It is not necessary to do so by directly condemning, to their faces, young students trying to obtain a fair and full education in our public schools.<sup>79</sup>

Although, as one court explained, it is primarily the responsibility of parents and communities to create an environment of tolerance and respect in the public schools, when the parents and community fail to create that environment, the federal courts will not hesitate to act:

Finally, it is difficult for this Court to understand why all parties to this lawsuit and the members of the Woodbury community, including its parents, schools, student councils, and community

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<sup>74</sup> *Id.* at 876.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 879.

<sup>77</sup> See *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist.*, 523 F.3d 668, 678 (7th Cir. 2008).

<sup>78</sup> See *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1181 (9th Cir. 2006).

<sup>79</sup> *Id.*

leaders, have relinquished their responsibility to a federal court to create parameters of behavior for its schools and its youth . . . [I]t will always remain the privilege and responsibility of the parents and citizens of Woodbury to raise and nurture its children into decent and caring human beings who treat people with dignity, respect, kindness, and equality. Messages of hatred, bias, and intolerance should not be a part of any child's upbringing. The great men and women who have brought this country to where it is, while having a vision of the constitutional vigilance that must be maintained to preserve a civilized and democratic society, have always valued, first and foremost, kindness and compassion and a keen understanding that all people are considered equal under the law regardless of their race, religion, culture, sexual orientation, or gender.<sup>80</sup>

It is not surprising that victims of harassment and prejudice will continue to seek federal remedies to protect the rights of LGBTQ students to organize into GSAs to promote tolerance and understanding when parents and communities relinquish that authority.

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<sup>80</sup> *Chambers v. Babbitt*, 145 F. Supp. 2d 1068, 1073-74 (D. Minn. 2001).