East High v. Board of Education

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION Civil No. 2:98-CV-193J

JUDGMENT AND ORDER OF DISMISSAL

EAST HIGH GAY/STRAIGHT ALLIANCE an unincorporated association; IVY FOX, a minor, by and through her mother arid next friend, KAY KOSOW FOX; KEYSHA BARNES, a minor by and through her fatlier and next friend, JAMES BARNES; and LEAH FARREL, by and through her mother and next friend, KELLY FOGARTY, Plaintiffs,

vs.

BOARD OF EDUCATION OF SALT LAKE CITY SCHOOL DISTRICT, a body corporate of the State of Utah; DARLINE ROBLES, Superintendent of Salt Lake City School District, in her official capacity; and CYNTHIA SEIDEL. Assistant Superintendent, in her official capacity.
Defendants.

On November 5, 1999, this court held the Final Pretrial Conference. Stephen C. Clark, Jon W. Davidson and Kathryn D. Kendall appeared on behalf of the plaintiffs; Dan R. Larsen and Elizabeth King, Assistant Utah Attorneys General, appeared on behalf of the defendants. Counsel addressed the two issues remaining in this case as outlined in this court's Memorandum Opinion and Order, filed October 6, 1999; (1) whether an unwritten policy exists barring plaintiffs from expressing "gay-positive" viewpoints on matters germane to the permissible subject matter of the defendants' existing forum for curriculum-related student groups; and (2) if such a policy exists, whether it denies plaintiffs the freedom of expression guaranteed by the First and Fourteenth Amendments.[(1)]

Plaintiffs' counsel argued that the existence of the unwritten policy was demonstrated by the Salt Lake City School District's denial earlier this year of an application by a group named the Rainbow Club to meet at East High School as a curriculum-related student group. Defendants responded that no such unwritten policy exists. To the contrary, defendants represented through counsel that District policy guarantees free expression of "gay-positive" viewpoints on matters germane to the permissible subject matter of the existing forum for curriculum-related student groups. Counsel asserts that the District's policy conforms to written standards of conduct established by the Utah Professional Practices Advisory Commission. Those standards mandate that a professional educator in Utah "shall . . not exclude a student from participating in any program, [or] deny or grant any benefit to any student on the basis of race, color, creed, sex, national origin, . . . or sexual orientation" and "may not engage in a course of conduct that would encourage a student to develop a prejudice on these grounds or any others;" and that a professional educator "shall. . . not harass or discriminate against a student or co-worker on the basis

of . . . sexual orientation[.]" Utah Administrative Code R686-l03-6(E), R686-103-7(H) (1999). Those standards also forbid interference "with the legitimate exercise of political and civil rights and responsibilities of . . . a student acting consistently with law and district and school policies." *Id*. R686-103-7(I).

In order to determine whether an actual case or controversy exists on these remaining issues, the Court requested plaintiffs' counsel to identify any evidence, including the names, dates and events, that supports a claim that a student has been prohibited from expressing a particular viewpoint on a subject matter during an actual curricular-related student group meeting. Plaintiffs' counsel pointed to several instances in which students refrained from expressing gay-positive viewpoints out of fear that such expression would not be deemed "appropriate." Although plaintiffs' counsel gave examples of discouraged student speech in a variety of contexts, none of the examples involved gay-positive views actually expressed during a student group meeting. No one, it appears, has been reprimanded, disciplined, suspended, or expelled for expressing a "gay-positive" viewpoint on any subject.[(2)]

This court need not decide whether the denial of the Rainbow Club's application to meet as a curriculum-related student group comported with what the District now so emphatically declares to be its policy.[(3)]

The Rainbow Club is not here.

The question here is the existence of a policy.

The Rainbow Club's application is not part of this lawsuit except insofar as its denial may support an inference that an unwritten policy exists barring expression of gay-positive viewpoints within the existing forum. Absent more tangible evidence of the existence of such a policy, however, that inference does not suffice to sustain the assertion.

The District's resounding affirmation that "gay-positive" viewpoints may be freely expressed in curriculum-related student groups, coupled with the fact that no student has been reprimanded or punished for expression of "gay positive" views, dispels any contrary inference that an unwritten policy now exists forbidding expression of "gay-positive" views.

It rnay well be true that in individual instances, student expression of particular viewpoints has genuinely been chilled by apprehensions rooted in someone's "understanding" of what may be deemed appropriate and what rnay not. Nevertheless, individualized "understandings" alone cannot overcome the District's clear, express and unequivocal statement of policy forbidding discrimination against viewpoints within the existing forum, including discrimination against "gay positive" viewpoints. Nor rnay individualized "understandings" alone suffice to create a justiciable case or controversy, or confer standing upon plaintiffs to further prosecute their claims.[(4)]

From the outset, plaintiffs have sought declaratory and injunctive relief, prospective in nature, vindicating their rights to free expression of gay-positive viewpoints. Rather than dwelling on past wrongs, plaintiffs have sought to define what should happen in student groups "from now on "--looking to the future, not the past.[(5)]

Whether plaintiffs have standing or this court has continuing jurisdiction of their claims thus depends upon an evaluation of probable future events.

The future anticipated by the District's unequivocal policy ensuring free expression of student viewpoints does not differ dramatically from the future envisioned by plaintiffs' prayer for relief. Plaintiffs sought protection for "gay-supportive expression within student group activities," and "the application of established, clear, content-neutral, unbiased, non-arbitrary criteria that are consistently applied to all student groups using or seeking to use" the existing forum. (Second Amended Complaint, at 21.) Plaintiffs sought injunctive relief to ensure a viewpoint-neutral forum. In light of the District's affirmations made in open court and on the record, one may expect the District to maintain a viewpoint-neutral forum, even without an injunction.

If nothing else, plaintiffs' Second Claim for Relief exacted the defendants' reaffirmation that as a matter of District policy, gay-positive viewpoints as to matters relevant to the school curriculum may be freely expressed in the existing forum at East and West High Schools. That being so, the risk that plaintiffs will actually suffer immediate and irreparable harm justifying an injunction now seems minimal. Absent such imminent "injury in fact," it appears that plaintiffs lack standing to further pursue their claims for affirmative relief against the Salt Lake City School District and its administrators under the First and Fourteenth Amendments.

Absent significant probative evidence that the alleged unwritten policy forbidding expression of gay-positive views exists--directly contrary to the policy articulated by the District in open court-no case or controversy remains. As a consequence, this court lacks the subject-matter jurisdiction required to consider further declaratory or injunctive relief on plaintiffs' Second Claim for Relief.

Therefore,

IT IS ORDERED, ADJUDGED and DECREEDthat

(1) as to Plaintiffs' First Claim for Relief, declaratory relief is GRANTED in conformity with this court's Memorandum Opinion and Order entered October 6, 1999, holding that the defendants had violated the Equal Access Act, 20 U.S.C. 4071-4072, at East High School during the 1997-98 school year, in favor of plaintiffs East High Gay/Straight Alliance, Ivy Fox and Keysha Barnes; declaratory and injunctive relief is otherwise DENIED; and

(2) as to Plaintiffs' Second Claim for Relief, the Second Amended Complaint is DISMISSED for want of an existing case or controversy.

DATED this 30 day of November, 1999.

BY THE COURT
BRUCE S. JENKINS
United States Senior District Judge

NOTES 1. In their objection to defendants' proposed form of order, plaintiffs request nominal damages based upon their First Claim for Relief. It is symbolic aiid academic. As to the First Claim for Relief, no one specifically asked for money damages. (See Second Amended Complaint at 20.) The relief sought--declaratory relief--was granted.

2 In *Tinker v. Des Moines School District*, 393 U.S. 5()3 (1969), there was little question concerning official policy or official action because Mary Beth Tinker was suspended from school for expressing her views opposing U.S. involvement in Vietnam, as were others. *See also* Peter Irons, *The Courage of Their Convictions* 233-252 (1988).

3 Defendant Seidel's personal observation that "sexual orientation is not the proper organizing subject matter of a curriciurn-related club" may reflect an overly narrow perception of "gay -positive" viewpoints. As eloquently outlined in plaintiffs' Pretrial Memorandum, "gay-positive" viewpoints " may span a wide range of topical subject matter, and it would be naive at best to assume that expression of such views necassarily would involve the advocacy or even the description of particular sexual behavior or practices. Plaintiffs' viewpoints know no such nairow constraints. Concerns about discussion of human sexuality in the public school setting have little bearing upon a discussion of the role of gay and lesbian persons in the Holocaust, or the orientation of various historical or literary figures and its impact upon their lives and work.

4 Those whose expression is "chilled" by the existence of an overbroad or unduly vague statute cannot be expected to adjudicate their own rights, lacking by definition the willingness to disobey the law. In addition, such deterred persons may not have standing to obtain affirmative relief, since the hypothetical "chilling effect" of the mere existence of an overbroad or vague law does not by itself constitute the sort of "injury-in-fact" which confers standing.
Laurence H. Tribe, *American Constitutional Law* 1 2-32 at 1035 (2d ed. 1988) (citing *Laird v. Tatum* 408 U.S. 1, 13-16 (1972)) (footnotes omitted).

5 The specific relief sought in the Second Amended Complaint is declaratory and injunctive in nature, except for "compensatory damage"... , in at least a nominal amount," on plaintiffs' Second Claim for Relief. (Seoond Amended Complaint at 20-21.) Plaintiffs also ask for attomeys' fees and "such further and different relief as this Court deems just and appropriate." (*Id*. at 22.) *See also* Fed. R. Civ. P.54(c).