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Finding a Third Way: The Use of Public Engagement and ADR to Bring School Communities Together for the Safety of Gay Students

David S. Doty, J.D., Ph.D.*

Schools aren’t dealing well at all with gay harassment.¹

In his provocative book, The Death of Common Sense, attorney Philip K. Howard makes an important point regarding America’s dependence on the law. He states:

We should stop looking to law to provide the final answer. Law should articulate goals, award subsidies, allocate presumptions, and provide mechanisms for resolving disagreements, but law should almost never provide the final answer. Life is too complex. Our public goals are too complex. Hard rules make sense only when protocol—as with the rules of a game or with speed limits—is more important than getting something done. When accomplishment or understanding is important, we have no choice: Law can’t think, and so law must be entrusted to humans and they must take responsibility for their interpretation of it.²

Perhaps nowhere does Howard’s opinion resonate more than in American public education. Superintendents, principals, teachers and elected board members now labor beneath a crushing weight of voluminous statutes and court decisions that attempt to carve out rules for the

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¹ John Ritter, Gay Students Stake Their Ground, USA TODAY, Jan. 18, 2000, at 1A (quoting Anthony Scariano).

administration of everything from school lunch to special education. Yet because public schools, and the communities in which they are situated, are so diverse and so complex, the law's influence upon them is often limited and of questionable value.

In fact, court edicts may do more to prolong school conflict than to resolve it. As David Tyack, a Stanford University education professor, has explained:

While the increased use of law in settling educational disputes has led to important victories for justly aggrieved groups and individuals, it has not come without costs. It has increased the fragmentation and factionalism that recently have come to characterize the politics of education. It has placed a responsibility in the hands of judges—not always wisely exercised in view of the limited range of legal remedies—to decide complex educational questions. Because the adversarial method characteristic of legal debate and decisions lacks the element of compromise that is common in other modes of political action, it has often worked to polarize opinions and exacerbate differences. Thus recourse to the courts has signaled a breakdown of other forms of persuasion and a loss of trust that competing groups can bridge their differences or blunt the sharp edges of discord.3

Tyack's 1982 observation appears prophetic today, especially in light of recent controversies that have erupted over the legal rights of gay and lesbian students. Almost without fail, these controversies are being shoved in the direction of federal judges and juries instead of being discussed civilly in local forums where "other forms of persuasion" can be used to forge consensus on the issues.

This paper proposes that, with courageous and compassionate leadership, schools can earn the trust of stakeholders and can build consensus among competing groups in order to protect gay and lesbian students from school violence. Part I provides an overview of the serious dilemma confronting schools that attempt to address the needs of gay students strictly within a legal framework. Part II summarizes the recent experience of the Modesto City Schools, which undertook a unique policy process to address a protracted dispute over the district's efforts to protect gay students from harassment. Part III explores the features of public engagement and alternative dispute resolution ("ADR") utilized by Modesto officials to resolve the dispute successfully. The paper concludes by suggesting that unless or until school leaders actively search for ways to

create a united public on the issues facing gay and lesbian students, they will continue to face lawsuits, bitter community divisions and escalating school violence based on fear, bigotry and hatred.

I. DAMNED IF THEY DO, DAMNED IF THEY DON'T: SCHOOL BOARDS CAUGHT IN THE MIDDLE BY CONFLICTING LEGAL DEMANDS

Given the wide spectrum of court and legislative authority to which they must adhere, schools often feel caught between a legal “rock and a hard place” when confronted with issues involving gay students. On the one hand, public schools have a clear mandate to intervene whenever gay or lesbian students complain of student-on-student sexual harassment. At the same time, schools are increasingly being forced to recognize the First Amendment rights of gay and lesbian students to freely speak on topics related to sexual orientation. On the other hand, because school officials must also respect parental rights, the First Amendment’s Religion Clauses and student due process, their ability to focus on the concerns of gay students is often hampered. Negotiating these waters can be difficult indeed.

A. THE LEGAL OBLIGATION OF SCHOOLS TO PROTECT THE SAFETY AND SPEECH OF GAY STUDENTS

Under legal authority that has rapidly developed over the past ten years, schools now must take reasonable steps to eliminate student-to-student sexual harassment, and must diligently guard the speech rights of students, even if their speech is on unpopular topics involving homosexuality.

1. School Boards Face Monetary Damages Under Title IX if They Fail to Properly Address Student-to-Student Sexual Harassment

Title IX of the federal Education Amendments of 1972 states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance....” Interpreting this mandate, the Supreme Court unanimously ruled, in Franklin v. Gwinnett County Public Schools, that Title IX gives a public school student sexually harassed by a teacher the right to pursue money damages against the school district employing the teacher. However, this decision left open the question of whether, or under what circumstances, Title IX permitted students to obtain a similar remedy if they were sexually harassed by other students.

Following a series of widely divergent opinions on this issue, the Supreme Court finally settled the matter in *Davis v. Monroe County Board of Education*. Writing for a divided Court (five to four), Justice O'Connor's opinion held that public schools receiving federal funds may be

held liable in damages [under Title IX]... where they are deliberately indifferent to [peer] sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.

Importantly, *Davis* dealt with male-to-female peer sexual harassment, and thus it may not stand for the proposition that gay and lesbian students have Title IX rights to be free from same-sex harassment. Because the Court has rejected the application of Title VII agency principles to Title IX, one cannot presume that same-sex harassment is prohibited “gender-oriented conduct” under Title IX the same as it is under Title VII.

However, at least one lower federal court has ruled that Title IX does encompass same-sex, student-on-student harassment, and it seems likely that other courts will follow, for several reasons. First, the *Davis* Court relied in part on a Title VII case, *Oncale v. Sundowner Offshore Services, Inc.* in which the Court held that employees may sue their employers for objectively offensive same-sex harassment. Although it did not specifically address gay students, the *Davis* Court quoted with approval its reasoning from *Oncale*, implying that any type of sexual harassment is actionable if it meets a “totality of circumstances” test. The Court noted: “Whether gender-oriented conduct rises to the level of actionable

6. See, e.g., Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949 (4th Cir. 1997) (recognizing student’s right to bring damages action under Title IX for peer sexual harassment), vacated and District Court decision aff’d en banc, 169 F.3d 820 (4th Cir. 1999); Oona, R.-S. v. McCaffrey, 143 F.3d 473, 478 (9th Cir. 1998) (dismissing administrator’s qualified immunity claim and allowing Title IX student-to-student harassment claim to proceed on grounds that Title IX duty to prevent such harassment was clearly established by 1992-93); Doe v. University of Ill., 138 F.3d 653, 666-68 (7th Cir. 1998) (allowing private damages action under Title IX for school’s inadequate response to known student-to-student sexual harassment); Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1400-06 (11th Cir. 1997) (dismissing student’s Title IX damages claim against school board); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1008, 1012-16 (5th Cir. 1996), cert. denied, 519 U.S. 861 (1996) (rejecting private damages action for student-to-student harassment under Title IX).
8. Id. at 650.
12. 523 U.S. 75.
harassment' . . . 'depends on a constellation of surrounding circumstances, expectations, and relationships,' including but not limited to, the ages of the harasser and the victim and the number of individuals involved.”

Second, the Court cited with approval Title IX policy guidelines on sexual harassment promulgated by the U.S. Department of Education’s Office of Civil Rights (“OCR”). These guidelines, issued by the OCR to help school districts properly respond to student sexual harassment complaints, clearly state the agency’s position that schools violate the law if they tolerate same-sex harassment or sexual harassment that specifically targets gay and lesbian students:

Title IX protects any “person” from sex discrimination; accordingly both male and female students are protected from sexual harassment engaged in by a school’s employees, other students, or third parties. Moreover, Title IX prohibits sexual harassment regardless of the sex of the harasser, i.e., even if the harasser and the person being harassed are members of the same sex. An example would be a campaign of sexually explicit graffiti directed at a particular girl by other girls.

Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students may constitute sexual harassment prohibited by Title IX. For example, if students heckle another student with comments based on the student’s sexual orientation (e.g., “gay students are not welcome at this table in the cafeteria”), but their actions or language do not involve sexual conduct, their actions would not be sexual harassment covered by Title IX. On the other hand, harassing conduct of a sexual nature directed toward gay or lesbian students (e.g., if a male student or a group of male students targets a lesbian student for physical sexual advances) may create a sexually hostile environment and, therefore, may be prohibited by Title IX. It should be noted that some State and local laws may prohibit discrimination on the basis of sexual orientation. Also, under certain circumstances, courts may permit redress for harassment on the basis of sexual orientation under other Federal legal authority.

Similarly, a guide jointly produced by the OCR and the National Association of Attorneys General\textsuperscript{17} encourages school districts to at least contemplate policies prohibiting harassment on the basis of sexual orientation. The guide states in part:

Some state and local laws may prohibit discrimination on the basis of sexual orientation. . . . School districts should consult appropriate state and local officials and legal counsel regarding the extent of their responsibility to address harassment of students based on sexual orientation.

Harassment and criminal conduct based on actual or perceived sexual orientation has been recognized as a significant problem in many schools. School officials should consider whether adopting specific statements or policies regarding harassment based on sexual orientation will help to protect students from violence and damaging behavior of this sort.\textsuperscript{18}


In addition to facing sex discrimination claims under Title IX, school districts and school officials who fail to intervene when gay students complain of sexual harassment may also face liability under the Equal Protection Clause of the Fourteenth Amendment. The case upon which gay students will stake their Equal Protection claims is \textit{Nabozny v. Podlesny}.\textsuperscript{19}

Jamie Nabozny, an openly gay teenager, began experiencing harassment from fellow students in his Ashland, Wisconsin public school in the seventh-grade. According to the court, Nabozny's classmates "regularly referred to him as 'faggot,' and subjected him to various forms of physical abuse, including striking and spitting on him."\textsuperscript{20} Despite Nabozny's repeated complaints to school counselors and administrators, minimal discipline, if any, was imposed on the perpetrators of the harassment, and Nabozny continued to be the target of abuse throughout his seventh- and eighth-grade years.

One of the worst incidents occurred when two male students grabbed Nabozny in a science classroom, pushed him to the floor, and performed a mock rape on Nabozny in front of an audience of twenty other students. Nabozny alleged that when he reported this assault to the school principal,
Mary Podlesny, she told him that “boys will be boys” and that if he was “going to be so openly gay,” he should “expect” such behavior from his classmates.  

Nabozny’s mistreatment escalated when he began attending Ashland High School in the ninth-grade. One day early in the year while Nabozny was using a urinal in the restroom, a male classmate struck Nabozny in the back of the legs, causing him to fall into the urinal, at the same time another student began urinating on Nabozny. Yet even though Nabozny and his parents complained about this incident and other incidents of harassment to school administrators, no disciplinary action was taken with the perpetrators. In the meantime, Nabozny attempted suicide for the second time since the seventh-grade.

The events that led to litigation are best described by the Seventh Circuit. Detailing the horrific harassment by students and callous inaction by school officials that Nabozny confronted, the court stated:

In tenth grade, Nabozny fared no better. Nabozny’s parents moved, forcing Nabozny to rely on the school bus to take him to school. Students on the bus regularly used epithets, such as “fag” and “queer,” to refer to Nabozny. Some students even pelted Nabozny with dangerous objects such as steel nuts and bolts. When Nabozny’s parents complained to the school, school officials changed Nabozny’s assigned seat and moved him to the front of the bus. The harassment continued. Ms. Hanson, a school guidance counselor, lobbied the school’s administration to take more aggressive action to no avail. The worst was yet to come, however. One morning when Nabozny arrived early to school, he went to the library to study. The library was not yet open, so Nabozny sat down in the hallway. Minutes later he was met by a group of eight boys led by Stephen Huntley. Huntley began kicking Nabozny in the stomach, and continued to do so for five to ten minutes while the other students looked on laughing. Nabozny reported the incident to Hanson, who referred him to the school’s “police liaison” Dan Crawford. Nabozny told Crawford that he wanted to press charges, but Crawford dissuaded him. Crawford promised to speak to the offending boys instead. Meanwhile, at Crawford’s behest, Nabozny reported the incident to [Assistant Principal] Blauert. Blauert, the school official supposedly in charge of disciplining, laughed and told Nabozny that Nabozny deserved such treatment because he is gay. Weeks later Nabozny collapsed from internal bleeding that resulted from Huntley’s beating. Nabozny’s parents and counselor Hanson repeatedly

21. *Id.*

22. *See id.* at 452.
urged [Principal] Davis and Blauert to take action to protect Nabozny. Each time aggressive action was promised. And, each time nothing was done. 23

Interestingly, the Ashland School District had a well-defined policy prohibiting all forms of sex discrimination, including student-to-student sexual harassment. Nabozny’s main claim, therefore, was that school officials denied him equal protection of the law by failing to enforce the policy based on his gender and sexual orientation. 24

Ruling in Nabozny’s favor, the court first found that he had stated a claim for gender-based discrimination based on his allegation that school officials dismissed the importance of the assaults committed against him because both perpetrator and victim were males. The court was especially concerned about the district’s cavalier attitude toward the mock rape to which Nabozny was subjected; it stated curtly: “We find it impossible to believe that a female lodging a similar complaint would have received the same response.” 25

The court then went on to find that Nabozny had stated a claim for discrimination on the basis of sexual orientation. While it sidestepped the issue of whether homosexuals are a suspect or quasi-suspect class, which would have led to more rigorous scrutiny of the district’s actions, the court did conclude that homosexuals are an “identifiable minority subjected to discrimination in our society.” 26 Thus, the court analyzed whether the district could articulate a rational basis for the disparate treatment Nabozny had received. Emphasizing the district’s inability to do so, the court noted:

Under rational basis review there is no constitutional violation if “there is any reasonably conceivable state of facts” that would provide a rational basis for the government’s conduct. We are unable to garner any rational basis for permitting one student to assault another based on the victim’s sexual orientation, and the defendants do not offer us one. 27

As a result of the Seventh Circuit’s decision, Nabozny’s lawsuit was remanded back to U.S. District Court in Wisconsin for a trial. On November 19, 1996, a federal jury reached a verdict that absolved the school district of liability but held the three named school administrators (Mary Podlesny, the junior high principal; William Davis, the high school principal; and Thomas Blauert, the high school assistant principal) liable for violating Nabozny’s civil rights. Shortly after the verdict was returned, the Ashland School District agreed to pay Nabozny $900,000 in damages,

23. Id.
24. See id. at 453.
25. Id. at 454-55.
26. Id. at 457 (footnote omitted).
27. Id. at 458 (citations omitted) (emphasis added).
plus up to $62,000 for medical expenses, to settle the case.\textsuperscript{28}

Since the \textit{Nabozny} ruling, other gay and lesbian students have sought to obtain similar redress for harassment. For example, in November 1998, the Kent (Washington) School District agreed to pay $40,000 to a former student who claimed that school officials failed to stop the anti-gay harassment he suffered at the hands of classmates.\textsuperscript{29} Shortly thereafter, gay and lesbian students in the Morgan Hill (California) School District filed suit against the district, alleging that they experienced "pervasive, severe, and unwelcome" verbal and physical anti-homosexual harassment on a regular basis and that despite their knowledge of such harassment, school officials "repeatedly failed to take appropriate and necessary measures to stop [it]."\textsuperscript{30}

3. School Officials May be Liable for Infringing Upon the Free Speech Rights of Gay and Lesbian Students

Finally, gay and lesbian students possess significant speech rights that must be respected by school officials in most cases, even when the students engage in speech on controversial topics. In an interesting twist, gay and lesbian students have begun relying on the provisions of the Equal Access Act,\textsuperscript{31} a law designed to protect student religious speech in public schools, to gain recognition for both curriculum and noncurriculum related clubs that discuss issues important to homosexuals.\textsuperscript{32} Given the broad language in the Act, students appear to have the upper hand when such clubs are denied by school districts based on the content of the student speech, at least where districts have established a "limited open forum" by permitting other noncurriculum related student clubs. The Act provides in part:

(a) 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,

\begin{footnotesize}
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\item[28.] See Linda Jacobson, \textit{Gay Student to Get Nearly $1 Million in Settlement}, \textit{EDUC. WK.}, Nov. 27, 1996, at 7.
\end{itemize}
\end{footnotesize}
philosophical, or other content of the speech at such meetings.

(b) 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 school premises during noninstructional time.³³

Reinforcing the fact that the Act protects a broad range of speech beyond that which is purely religious, one federal court recently observed:

When Congress passed the Equal Access Act, it “made a matter once left to the discretion of local school officials the subject of comprehensive regulation by federal law.” As Justice Kennedy pointed out, “one of the consequences of the statute, as we now interpret it, is that clubs of a most controversial character might have access to the student life of high schools that in the past have given official recognition only to clubs of a more conventional kind.” It’s true that when courts enforce the Act, they remove control from local school boards; “(t)his decision, however, was for Congress to make, subject to constitutional limitations.” Due to the First Amendment, Congress passed an “Equal Access Act” when it wanted to permit religious speech on school campuses. It did not pass a “Religious Speech Access Act” or an “Access for All Students Except Gay Students Act” because to do so would be unconstitutional.³⁴

Because school boards ostensibly “maintain their traditional latitude to determine appropriate subjects of instruction,” they can choose to “structure [their] course offerings and existing student groups to avoid the Act’s obligations.”³⁵ In other words, school boards can maintain a closed forum within secondary schools by recognizing and supporting only student clubs that are specifically connected to the curriculum.

However, some school districts have discovered that, while it sounds good in theory, in reality this approach does not guarantee their authority to reject Gay-Straight Alliances or other clubs formed by gay and lesbian students. First, unless the school board approaches each student club “surgically,”³⁶ it may find itself on the losing end of litigation for imperfectly and inconsistently applying a ban on all noncurriculum related student groups.³⁷

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33. 20 U.S.C. § 4071(a)-(b) (emphasis added).
Second, creative gay and lesbian students may be able to make a winning legal argument that their student clubs deserve to be recognized even if the district has properly closed the forum, on the grounds that gay-positive issues belong in the curriculum. In *East High School PRISM Club v. Seidel*, gay students were able to do just that, convincing a federal judge that the subject matter of their proposed club, PRISM ("People Recognizing Important Social Movements"), was actually taught or would soon be taught in regular courses offered at the school (U.S. History, American Government and Sociology), and therefore must be recognized as a curriculum-related student group permitted by the school board’s policy.

Furthermore, school boards may be limited in their ability to restrict the speech of gay and lesbian students, whether inside or outside the student club context, on the grounds that it would “materially and substantially interfere with the orderly conduct of educational activities within the school.” It is well established that school officials cannot justify suppression of student speech by the “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”

One federal court recently applied this principle to a school board’s decision refusing to recognize a Gay-Straight Alliance Club under the Equal Access Act. Ruling in favor of the gay and lesbian students seeking to form the club, the court stated:

(D. Utah 1999) (holding in part that school district, even though it adopted a “closed forum” policy in 1996 prohibiting all noncurriculum related student groups, had created a “limited open forum” during the 1997-98 school year by permitting the Improvement Council of East, a noncurricular student group, to meet on school premises during noninstructional time).

38. 95 F. Supp. 2d 1239 (D. Utah 2000).
39. See id. at 1242.
40. See id. at 1251 (citing *Mergens*, 496 U.S. at 239-40.) The Supreme Court, in its decision upholding the constitutionality of the Equal Access Act explained in dictum its definition of the term “noncurriculum related student group” in the Act; the Court essentially defined “noncurriculum related” by defining what it believed to be “curriculum related;”

[W]e think that the term “noncurriculum related student group” is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school. 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.

*Mergens*, 496 U.S. at 239-40.
42. *Tinker*, 393 U.S. at 509.
The reason for the First Amendment’s ban on official censorship is because in a free society we rely on the “marketplace of ideas.” See Abrams v. United States, 250 U.S. 616, 630, 40 S. Ct. 17, 63 L. Ed. 1173 (1919) (Holmes, J., dissenting). Though the state education system has the awesome responsibility of inculcating moral and political values, that does not permit educators to act as “thought police” inhibiting all discussion that is not approved by, and in accord with the official position of, the state. The danger is that public education could transform schools into “enclaves of totalitarianism” and convert students into “closed-circuit recipients of only that which the State chooses to communicate.” Tinker, 393 U.S. at 511, 89 S. Ct. 733. Though it may educate many of Orange’s students, the Orange Unified School District must not become an Orwellian “guardianship of the public mind,” Thomas v. Collins, 323 U.S. 516, 545, 65 S. Ct. 315, 89 L. Ed. 430 (1945) (Jackson, J., concurring), that can “strangle the free mind at its source.” Barnette, 319 U.S. at 637, 63 S. Ct. 1178.

B. THE LEGAL OBLIGATION OF SCHOOLS TO RESPECT PARENTAL RIGHTS, FIRST AMENDMENT RELIGIOUS FREEDOMS AND STUDENT DUE PROCESS

If school officials had only to worry about Title IX and the Equal Access Act, their decisions regarding gay and lesbian students would certainly be simpler to implement. Yet boards of education will never discover true simplicity in this arena. Due to pressing concerns about parental rights, religious freedoms and student due process, issues involving the safety and speech of gay students are some of the most complex in public education.

1. School Officials Cannot Dismiss Parental Rights

The subject of parental rights and their reach in public schools has been widely discussed over the past several years. Academic interest in the

44. Colin, 83 F. Supp. 2d at 1141; see also East High Gay/Straight Alliance v. Board of Educ., 81 F. Supp. 2d at 1169 (D. Utah 1999) (“The First Amendment draws not distinctions among ideas and does not prefer one viewpoint over another. As scholar Harry Kalven, Jr. suggests, ‘In America there is no heresy, no blasphemy,’ and Americans share in a consensus that the state may not suppress an idea or opinion simply because it is, or is believed to be, false. The First Amendment strictly limits any conduct by government that seeks to control or restrict the content of human expression, or to favor or condemn a particular opinion or point of view.”).

topic has increased, because it has become a hot public policy issue. With respect to legislative action, it is significant that one of the eight national education goals established by Congress in 1994 addresses parental participation, stating:

A. By the year 2000, every school will promote partnerships that will increase parental involvement and participation in promoting the social, emotional, and academic growth of children.

B. The objectives for this Goal are that—

(i) every State will develop policies to assist local schools and local educational agencies to establish programs for increasing partnerships that respond to the varying needs of parents and the home, including parents of children who are disadvantaged or bilingual, or parents of children with disabilities;

(ii) every school will actively engage parents and families in a partnership which supports the academic work of children at home and shared educational decision-making at school;

(iii) and parents and families will help to ensure that schools are adequately supported and will hold schools and teachers to high standards of accountability.  

Relying in part on this statute, as well as their concerns about perceived campaigns by school boards to undermine “family values,” parents across the country have lobbied hard to get Congress and state legislatures to pass additional legislation strengthening their clout with public school and other government officials.  

In addition, parents have begun to file “parental rights” lawsuits against school districts, alleging that school officials have deprived them of their parental authority by doing everything from administering standardized tests to distributing condoms. Parents base such claims on the holdings

48. See Triplett v. Livingston County Bd. of Educ., 967 S.W.2d 25, 27 (Ky. Ct. App. 1998) (dismissing claims that high school exit exams required by the Kentucky Instructional Results Information System violated parents’ First and Fourteenth Amendment rights).
of two Supreme Court cases, *Meyer v. Nebraska*,\(^5^0\) and *Pierce v. Society of Sisters*,\(^5^1\) which established that parents have a liberty interest, under the Fourteenth Amendment, to direct the instruction and upbringing of their children.

The *Meyer* Court struck down a Nebraska state law prohibiting the public schools from instructing students in German and other foreign languages, finding that the law arbitrarily interfered with the "right of parents" to obtain such instruction for their children.\(^5^2\) Reasoning that the Fourteenth Amendment's Due Process Clause protects more than just physical liberty, the Court stated in part:

> While this Court has not attempted to define with exactness the liberty [guaranteed by the due process clause of the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, *to establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.\(^5^3\)

The *Pierce* Court struck down an Oregon compulsory education statute that required all children in the state to attend public schools, thus precluding parents, by threat of criminal penalty, from sending their children to parochial schools. Citing its previous decision in *Meyer*, the Court reasoned:

> [W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. *The child is not the mere creature of the*

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50. 262 U.S. 390 (1923).
51. 268 U.S. 510 (1925).
52. 262 U.S. at 400.
53. *Id.* at 399 (emphasis added).
State; those who nurture him and direct his destiny have the right,
coupled with the high duty, to recognize and prepare him for
additional obligations.  

Perhaps the best demonstration of how these principles come into play
around issues of human sexuality in schools is the case of Brown v. Hot,
Sexy & Safer Productions, Inc. The plaintiffs in Brown were two
Chelmsford (Massachusetts) High School students, Jason Mesiti and
Shannon Silva, together with their respective parents. On April 8, 1992,
when both students were fifteen years old, they attended a mandatory,
school-wide AIDS awareness assembly. The assembly was conducted by
Suzi Landolphi and the corporation she owned, Hot, Sexy, and Safer, Inc.

Mesiti and Silva alleged that Landolphi’s program subjected the
students to a ninety-minute barrage of sexually explicit monologues and
skits that humiliated and intimidated them. Specifically, they alleged that
Landolphi:

1) told the students that they were going to have a “group sexual
experience, with audience participation”; 2) used profane, lewd and
lascivious language to describe body parts and excretory functions;
3) advocated and approved oral sex, masturbation, homosexual
sexual activity, and condom use during promiscuous premarital
sex; 4) simulated masturbation; 5) characterized the loose pants
worn by one minor as “erection wear”; 6) referred to being in
“deep sh-” after anal sex; 7) had a male minor lick an oversized
condom with her, after which she had a female minor pull it over
the male minor’s entire head and blow it up; 8) encouraged a male
minor to display his “orgasm face” with her for the camera; 9)
informed a male minor that he was not having enough orgasms; 10)
closely inspected a minor and told him he had a “nice butt”; and
11) made eighteen references to orgasms, six references to male
genitals, and eight references to female genitals.

The court ultimately dismissed the students’ Title IX sexual harassment
claims, as well as the parents’ claims that school officials violated their
privacy right to direct the upbringing of their children. Drawing an
interesting distinction between a parent’s right to send her child to a school
of her choice and a parent’s right to shield her child from objectionable
curriculum if the parent chooses a public school, the court stated:

The Meyer and Pierce cases, we think, evince the principle that the
state cannot prevent parents from choosing a specific educational
program—whether it be religious instruction at a private school or

54. 268 U.S. at 534-35 (emphasis added).
56. Id. at 529.
instruction in a foreign language. That is, the state does not have the power to “standardize its children” or “foster a homogenous people” by completely foreclosing the opportunity of individuals and groups to choose a different path of education. We do not think, however, that this freedom encompasses a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children. We think it is fundamentally different for the state to say to a parent, “You can’t teach your child German or send him to a parochial school,” than for the parent to say to the state, “You can’t teach my child subjects that are morally offensive to me.” The first instance involves the state proscribing parents from educating their children, while the second involves parents prescribing what the state shall teach their children. If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school’s choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by Meyer and Pierce do not encompass a broad-based right to restrict the flow of information in the public schools.57

Although the school defendants in Brown won, school officials should view the decision with a healthy dose of caution for a number of reasons. First, parental rights appear to be gaining credibility as courts continue to reiterate their importance. The Second Circuit recently emphasized: “‘Choices about marriage, family life, and the upbringing of children are among associational rights [the Supreme] Court has ranked as ‘of basic importance in our society,’... rights sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect.’”58

Second, it may be disingenuous for school officials to argue that “mere exposure” to sexually explicit material offensive to the values of children and parents does not violate parental privacy rights. Schools now go to great lengths to protect students from accessing sexually charged information on the Internet;59 why should school assemblies be any

57. Brown, 68 F.3d at 533-34.
59. See Tomas A. Lipinski, New Life for Pico: Filtering and Other Responses to Controversial Materials in School Network Environments, 134 EDUC. L. REP. 1 (June 24,
different? One author has observed:

In the eyes of a parent with strong religious values or other moral values—particularly values that are at odds with popular American culture—exposure to material that conflicts with those values might be a serious threat. To such a parent, it’s not “mere” exposure but possibly a form of indoctrination that could be as threatening, say, as violent and commercially exploitative children’s cartoons and violent and sexually graphic prime-time shows on television.  

Third, it may be inaccurate to suggest that students in attendance at school presentations on sexuality, whether conducted from a heterosexual or homosexual perspective, are purely passive. In order to engage students and deliver meaningful messages on serious sexual topics, some educators, like those in Brown, will attempt to tap into adolescent humor and permit students to be active participants in the presentation. When schools deliver such presentations on controversial subjects, particularly those dealing with “safe sex” or homosexuality, without parental notification or consultation, they may find themselves accused of trampling on parents’ constitutional rights.

2. Schools Must Protect the First Amendment Religious Freedom Rights of Students and Parents

Religious concerns can surface in two different, but related, ways when school policies about gay students are discussed. Under the First Amendment’s Establishment Clause, school officials are required to remain neutral regarding religion and do nothing that has the primary effect of either advancing or inhibiting religion. Establishment Clause litigation in public schools usually involves claims that school officials, by sponsoring prayers, Bible readings or other religious activities, impermissibly advance some form of Judeo-Christian beliefs. However, in recent years Christian

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61. See Jennifer Toomer-Cook, Gay Presentation at East Revives Rift, DESERET NEWS, Apr. 13, 1999, at B1 (reporting that after high school cultural assembly at which slide-show presentation was given by school’s Gay-Straight Alliance, “dozens of parents said the slide show was gay propaganda and indoctrination that was illegally shown to their children without their consent”); Andy Samuelson, Principal Apologizes for AIDS Assembly, L.A.TIMES (visited Feb. 26, 1999) <http://www.latimes.com/HOME.html> (reporting that three dozen parents complained when a high school staged an assembly on HIV/AIDS prevention, including a skit with frank talk about oral and anal sex, without notifying them and without giving them an opportunity to pull their children from the event as required by California State Board of Education regulations).


parents and their advocacy groups have become increasingly assertive, and lawsuits now often involve allegations that school districts demonstrate hostility to religion by establishing secular viewpoints in violation of the First Amendment. On the one hand, Establishment Clause concerns can become a point of contention vis-à-vis student sexual orientation because religious parents may push school boards to develop curriculum and provide students with information about “reparative therapy,” “transformational ministry,” and other approaches with religious underpinnings designed to help students “overcome” homosexual tendencies. On the other hand, because many conservative parents view homosexuality as not only antithetical to, but also subversive of, their religious beliefs, they may rely on the Establishment Clause to attack any efforts by school districts to use curriculum focusing on homosexuality, even where such efforts are initiated as part of attempts to create more welcoming, inclusive school environments for gay and lesbian students. This is especially true if parents perceive that school officials are promoting a gay-positive agenda that sanctions adolescent participation in homosexual sex.

("GLSEN") at Tufts University in Boston, in which various workshops encouraged teachers to incorporate gay-positive curriculum in their classrooms and instructed students how to perform graphic sex acts. Even though the seminar was conducted on a weekend, at a university venue not affiliated with public schools, parents felt the program was tied to public education given that the program was sponsored by the state department of education and provided professional development, or continuing education, credit for classroom teachers who attended.

The second way that religious concerns may become part of the equation when schools are dealing with gay students is that religious students and their parents may raise Free Exercise claims. With the Supreme Court's decision in City of Boerne v. Flores striking down the Religious Freedom Restoration Act, the general rule in Free Exercise cases today states that a "law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." It would thus appear that religious students and parents would ordinarily have difficulty raising successful Free Exercise challenges to curriculum dealing with sexual orientation, particularly if the students' compulsory attendance in classes involving such curriculum is a neutral requirement generally applicable to all students in the school.

Yet if parents combine parental rights claims with Free Exercise claims, effectively creating a "hybrid" claim that involves "the Free Exercise Clause in conjunction with other constitutional protections," they may be able to force schools to articulate a compelling interest before proceeding with certain curricula and student programs. Some courts have found improper coercion, and concomitant Free Exercise violations, with seemingly innocuous classroom activities such as constructing clay images of Hindu gods and cloth Guatemalan worry dolls and may be equally receptive to allegations that school programs pushing acceptance of "gay lifestyles" place substantial pressure on students to violate their religious beliefs.

72. See Brown v. Hot, Sexy & Safer Prod., Inc., 68 F.3d 525, 539 (1st Cir. 1995).
3. Schools Must Respect Student Due Process in Disciplinary Proceedings

Finally, it is by no means simple for school officials to eliminate peer sexual harassment of gay and lesbian students by disciplining the perpetrators, and school officials that do not tread carefully risk litigation instigated by the accused. To begin with, the Supreme Court has imposed specific constraints on the manner in which school officials impose suspensions of ten days or less. At a minimum, students facing a short-term suspension must "be given some kind of notice and afforded some kind of hearing."75 More specifically, a student facing a temporary suspension must "be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."76

In addition, students facing long-term suspensions or expulsions may be entitled to more comprehensive due process protections. While courts have emphasized that expulsion hearings "'need not take the form of a judicial or quasi-judicial trial,'"77 they have nonetheless indicated that schools need to provide a higher level of due process to students who, because of expulsion, face the deprivation of their state constitutional property right to an education. For example, one court observed that expulsion hearings must include the following minimum components:

(1) the student must be advised of the charges against him; (2) the student must be informed of the nature of the evidence against him; (3) the student must be given an opportunity to be heard in his own defense; (4) the student must not be punished except on the basis of substantial evidence; (5) the student must be permitted the assistance of a lawyer in major disciplinary hearings; (6) the student must be permitted to confront and to cross-examine the witnesses against him; and (7) the student has the right to an impartial tribunal.78

Perhaps most importantly, the Individuals with Disabilities Education Act ("IDEA")79 severely constrains the ability of schools to discipline students who may engage in sexual harassment of gay and lesbian students due to behavior disorders. Justice Kennedy, in his dissenting opinion in Davis v. Monroe County Board of Education,80 explained the practical

76. Id. at 581.
challenges posed by this law as follows:

"Disability," as defined in the Act, includes "serious emotional disturbance," ... which the [Department of Education], in turn, has defined as a "condition exhibiting ... over a long period of time and to a marked degree that adversely affects a child's educational performance" an "inability to build or maintain satisfactory interpersonal relationships with peers and teachers" or "[i]nappropriate types of behavior or feelings under normal circumstances." If, as the majority would have us believe, the behavior that constitutes actionable peer sexual harassment so deviates from the normal teasing and jostling of adolescence that it puts schools on clear notice of potential liability, then a student who engages in such harassment may have at least a colorable claim of severe emotional disturbance within the meaning of IDEA. When imposing disciplinary sanction on a student harasser who might assert a colorable IDEA claim, the school must navigate a complex web of statutory provisions and DOE regulations that significantly limit its discretion.

II. I AM MY BROTHER'S KEEPER: THE EXPERIENCE OF THE MODESTO CITY SCHOOLS

In October 1996, the Modesto City Schools, a 31,000 student urban school district in California's Central Valley, became embroiled in this swirling vortex of law due to a heated conflict that erupted over the district's plans to address the safety concerns of gay and lesbian students. Importantly, however, the district did not get sucked under and drown. By undertaking a unique policy process based on the principles of public engagement and alternative dispute resolution (ADR), the district was able to resolve the conflict without litigation and unite the community in a courageous effort to protect students and improve education.

81. Id. at 1665-66 (citations omitted).
82. The description of the events herein is based on doctoral research conducted by the author during the summer of 1998. In addition to reviewing press reports, district papers and a variety of other written documentation, the author spent the week of June 22-26, 1998 in Modesto conducting extensive interviews with twenty-four individuals involved with the conflict and policy process. With the exception of Superintendent James Enochs and Associate Superintendent Sharon Burnis, who granted permission for their names to be included in the author's works, pseudonyms have been used to protect the privacy of these individuals. All quotations from interviews, district proceedings and other sources are derived from the author's dissertation. See David S. Doty, The Use of Public Engagement, Negotiated Policy Processes, and Mediation to Build Consensus on Religious Issues in Public Education (1999) (unpublished Ph.D. dissertation, Brigham Young University (Provo, Utah)) (on file with author).
A. CONCERNS ABOUT THE SAFETY OF GAY AND LESBIAN STUDENTS

In August 1996, at the prompting of several parents and teachers who were concerned about the harassment and abuse being heaped upon gay students in Modesto schools, Associate Superintendent for Administrative and Pupil Services, Sharon Burnis, arranged a meeting with Superintendent of Schools James Enochs so that he could hear the concerns for himself. Superintendent Enochs concedes that he initially approached the meeting with a somewhat cavalier attitude; he states: "I went in with the same freight most people of my generation carry. I had a tolerance for gay jokes."

However, the meeting did not have to progress very far before the superintendent began to experience a change of heart. As he watched the parents weep openly and heard them describe the daily gauntlet of jeers, sexually graphic epithets and insults and physical abuse their gay children endured because of their sexual orientations, Superintendent Enochs carefully confronted his own prejudices and realized that he could not turn a blind eye to the problem. Describing his reaction to this meeting, he explains:

You'd have to have a heart of stone not to be moved by what those parents told us that day. I was ashamed by my past behaviors and attitudes. I can't imagine the pain of sending my child off to school every morning knowing his books might be thrown about, his gym clothes torn, that he would be shoved, pushed and insulted day after day. I can't imagine going to school and facing that sort of thing on a daily basis. I knew that I wouldn't be superintendent of a district where that kind of thing was going on and being tolerated.

Therefore, Superintendent Enochs made a personal commitment to pursue corrective action, even though the teachers and parents present at the meeting did not demand any specific intervention other than an assurance that all schools would be safe for all students. What he could not have foreseen was the road down which he was heading, a road that would plunge the district into a maelstrom of values-related conflict that culminated in a dispute over not just the rights of gay students, but also those of religious students and their parents.

B. ORIGINS OF THE CONFLICT: THE GLSEN CONFERENCE

Following the positive meeting with Superintendent Enochs, Associate Superintendent Burnis obtained his approval to send a team of district teachers and administrators to a Bay Area conference sponsored by the Gay, Lesbian, Straight Education Network ("GLSEN"). The conference, titled the "West Coast Conference on Gay, Lesbian, Bisexual and Transgender Issues in Education," but also billed as a "United in Diversity"
conference, was scheduled as a full-day event on October 26, 1996.

Unfortunately, before the district had even finalized the list of staff who would attend, word of the event spread throughout the conservative religious community in Modesto, and parents and clergy began attacking the district’s plans. These attacks came to a head at the school board’s October 14, 1996 meeting, where over 100 people packed the small board room to register their objections.

Defending his approval of the conference, Superintendent Enochs told the audience in part:

That [safety] is what all this is about. We are asking three or four people at each high school—a nurse, a counselor, an administrator and a teacher—to attend workshops on how to protect these children, how to insure them a safe and stable place to learn, and how to keep them in school.

Our staff has attended workshops on substance abuse, minority student issues, gangs, and sex education. We send them because understanding is an important prerequisite to dealing with any issue.

Nevertheless, many in the audience could not be persuaded and spoke up vehemently against the conference, complaining that the district was spending taxpayer money to educate staff about how to advocate the “gay lifestyle.” One parent, for example, stated: “This is a conference to promote homosexual activism.” Others called the superintendent’s reasoning a ruse, claiming that the conference brochure did “not say one word about safety.”

Many of the protesters wove a thread of religious, parental and moral values into their arguments. Members of Modesto churches, the Reverend Lou Sheldon of the Southern California-based Traditional Values Coalition, and even students made it known that they were the ones facing discrimination because they were being excluded from school district discussions on a subject, human sexuality, that impacted their core beliefs. In fact, some accused the district of caring more about gay students than about students of religious faith; one student who spoke at the meeting said: “I’ve been harassed by people and by teachers and discriminated against because I’m a Christian. Are you going to pay [to send staff] to a conference for us?”

C. THE BATTLE LINES HARDEN

Notwithstanding the vociferous community opposition, the Board of Education wanted to gain additional information about the issues involving gay students, and therefore decided to send a team of thirty-one educators to participate in the conference. At that point, the conflict began to escalate
as the result of four important developments.

1. A Media Frenzy

First, local media sensationalized the dispute by publishing a series of headlines, articles and editorials that appeared to focus more on the negative viewpoints of objectors than the positive intentions of the district. Local newspapers subjected Modesto residents to a barrage of provocative headlines such as “School Workers to Go to Gay Educators Forum,” “Gay Workshop Sparks Protest to School Board,” and “Student Sick-Out Planned Over Gay Forum.”

2. The GLSEN Video

Second, an ugly war of words began when religious parents became aware that the district had purchased seven copies of a fifty-four dollar video produced by GLSEN titled *Teaching Respect for All*. The district purchased the video, described in its promotional materials as “a video on why teachers, administrators, parents and schools need to care about issues of sexual orientation,” to use with school board members, district-level administrators and a small committee that had been formed to identify ways of addressing the safety concerns that had been raised with the superintendent.

However, the video became the center of controversy after a representative of the Traditional Values Coalition selected certain portions of the video, spliced them together out of context on a blank tape, and then took the edited video to a meeting of the Greater Modesto Ministerial Association, asserting that the video denigrated religion and families. Explaining the outcome of this meeting, a youth pastor in Modesto states: “A holy war erupted. Someone got hold of a four-minute clip of one of the videos . . . and they played it at our Wednesday night prayer meeting. And we were off and running. Sending letters to [the superintendent], spreading the word in churches.”

3. Letters of Protest from Modesto Clergy

A third significant event in the conflict occurred when several Modesto clergy wrote personal letters to Superintendent Enochs, excoriating him and the school board for offending the religious beliefs of families and ignoring the Christian values of the community. In his strongly worded rebuttal to the concerns expressed in these letters, Superintendent Enochs wrote in part:

While it is your primary mission to elevate people, to make them better than their darker natures tempt them to be, so, to, do the schools have a role within certain traditional and legal bounds. After forty years in education, I believe I know unequivocally that my responsibility as Superintendent includes teaching respect for
differences in a pluralistic society based on democratic principles.

And that is what this is about; nothing more, nothing less. Our goal is to develop some clearly stated principles of toleration for and acceptance of differences among students to be coupled with consequences already clearly stated in our student conduct codes for those who act out their intolerance. Now unless there has been some radical revisionism in hermeneutics that I’ve missed, this squares pretty well, if not with the Old Testament, certainly with the New (with the possible exception of the Jewish question in Luke and Paul’s problem with women in the church).

4. Closed-Door Policy Deliberations

Finally, the conflict intensified as a result of the district’s initial approach to policy discussions. Shortly after the initial August meeting with Superintendent Enochs, Associate Superintendent Burnis began meeting with a small group of parents, teachers and gay students to explore ideas about new policy that might be needed. According to Ms. Burnis, this small group was deliberately designed to be exclusive; the district wanted to create a non-threatening forum in which gay students could express their feelings and did not want to complicate the process by inviting people to participate who might be hostile to the students’ concerns. However, the decision to exclude conservative Christian parents and staff only served to exacerbate their already strong feelings of anger and distrust regarding the district’s agenda.

D. A NEW SAFE SCHOOL POLICY: THE CONFLICT AT FEVER PITCH

Despite all of the conflict and opposition, district leadership forged ahead and presented important new policy language to the board of education in March 1997. The policy draft, titled Principles of Tolerance, Respect, and Dignity to Ensure a Safe School Environment (“Principles”), stated:

Prejudice is a disease to which a pluralistic society is always exposed. We can guard against prejudice by remembering that a community which consists of many groups can only operate effectively when the members of all of them are treated equally.... – Oscar Handlin

IN ORDER TO ACHIEVE THEIR EDUCATIONAL POTENTIAL, ALL STUDENTS HAVE A RIGHT TO ATTEND SCHOOL AND PARTICIPATE IN EDUCATIONAL PROGRAMS AND ACTIVITIES:

... Where tolerance, respect, and dignity is a standard set by the
Board of Education, supported by the Superintendent, and practiced and enforced by every principal, classroom teacher, and all other District staff.

... Free from discrimination and harassment based on race, religion, ethnic background or national origin, language, gender, sexual orientation, economic status, physical or mental disabilities, or other special needs.

... In which the total school environment is free from verbal or physical intimidation or harassment, including sexual harassment; vulgar or abusive language; derogatory ethnic, racial, or sexual slurs or conduct; or acts of violence.

... In which differences are accepted, and the dignity and worth of all individuals are respected.

Shortly before the board meeting at which this policy was to be considered, the dispute between members of Modesto's religious community and the district flared again. First, a handful of religious parents and clergy personally contacted Associate Superintendent Burnis to request that the entire policy be scrapped, or in the alternative, that the last line, stating that "differences" will be "accepted," be eliminated. Based on the outpouring of concern, both Ms. Burnis and Superintendent Enochs agreed to the latter demand.

Unfortunately, this accommodation was insufficient to completely pacify the anger of the religious community. On March 16, 1997, a week before the school board meeting at which the policy draft was to be discussed by the board, an anonymous flier titled "Action Alert" was handed out to the congregation at one of Modesto's largest churches and subsequently faxed to other churches for distribution to their membership. The flier, which included the text of the proposed policy for parishioners' review stated:

**History:**

On 10/26/96, Modesto City Schools sent teachers and administrators to the United in Diversity conference, at the expense of the school district. The conference was sponsored by the Gay, Lesbian, and Straight Teachers [sic] Network, and the Bay Area Network of Gay and Lesbian Educators.

On 12/16/96 Modesto City Schools [sic] Board voted 6 to 1 to retain a video entitled *Teaching Respect for All* for sensitivity training for administrators and teachers. The video makes no
mention of the fact that homosexual students can be offered, and may even desire, counseling to help them out of that lifestyle. The implication is that homosexuality should be affirmed in all cases.

Current Concern:

On Monday, 3/24/97 Modesto City Schools will vote to adopt the policy entitled “PRINCIPLES OF TOLERANCE, RESPECT, AND DIGNITY TO ENSURE A SAFE SCHOOL ENVIRONMENT.” Teachers who have disagreed with advocating homosexuality as an alternative lifestyle have been denied input on this policy.

If this policy is passed, any teacher with a differing viewpoint can be considered “intolerant,” or guilty of discrimination or sexual harassment.

If this policy is passed and the school district decides to bring in curriculum that advocates homosexuality, on campus gay counselors, or mandatory homosexual advocacy training for teachers, those who oppose the planned agenda would be guilty of discrimination and intolerance.

Modesto City Schools has a [sic] obligation to represent the values of the community at large. If you as a community member feel that your values are not being represented then you must speak out.

What You Can Do:

On the back is a copy of the proposed policy and a list of the current board members and their phone numbers. Please call each board member and express your disagreement with this policy. If you can’t reach them call the district’s office phone number and leave a message for each member.

If you write to each board member, be sure your letter will arrive before the night of Monday, March 24, when they will vote.

Consider asking for an alternative statement that allows for counseling to help students commit to abstinence, and counseling for help out of the homosexual lifestyle if they so desire.

Each person in America should have the freedom to express their [sic] values. Please help protect the rights of teachers, staff members, and students who disagree with homosexual advocacy.
among high school students.

In large part because of this flier, approximately one hundred conservative Christians from Modesto again packed the district office for the school board meeting on March 24, 1997; those who could not fit in the small board room held a candlelight vigil outside on the grounds. Even though the “acceptance” language had been deleted from the final draft, those in opposition objected to the term “sexual orientation” in the list of areas to be protected from harassment, emphasizing that their objections were grounded in their religious and parental values. Furthermore, and perhaps more importantly, protesters asked the board not to pass the policy because school staff and community members with opposing viewpoints had not been allowed to participate in the policy’s formulation. Claiming that the policy was flawed because only those who supported the policy direction were allowed on the drafting committee, the protesters demanded that the policy be shelved until broader input could be received.

Undeterred, however, the board voted to approve the Principles policy and immediately move forward with an implementation plan to guarantee that the Principles would be integrated into every school in the district. At the same time, hearing the opinion expressed by people of faith that their participation in the policy process had been unduly limited, and recognizing that the policy was worthless without community support for its enforcement, the board agreed at the March 24, 1997 meeting that the implementation plan would be developed by a ninety-member District/Community Safe Schools Project Committee “with broad based representation from staff, students, and the community.” In agreeing to expand the scope of participation, the board and the district, with direction from Associate Superintendent Burnis, specifically committed to include “most religious points of view” represented in greater Modesto.

E. POLICY IMPLEMENTATION: LEADERSHIP AND ADR

Following the March 1997 board meeting, a fascinating chain of events unfolded, which ended with a remarkable resolution to the festering dispute.

1. Listening Over Breakfast

Frustrated with the opposition to what he felt was a legitimate policy direction, Superintendent Enochs initiated the process of resolution by going to reputable religious leaders in the community to see if he could discover what was behind the emotion and anger being directed at the school board. At a breakfast meeting with two prominent religious leaders, the president of the Greater Modesto Ministerial Association and a pastor of one of the local Baptist congregations, Superintendent Enochs was able to “clear the air” about the religious community’s grievances and obtain ministerial support for what he was trying to accomplish.
2. The District/Community Safe Schools Project Committee

At approximately the same time, the ninety-member District/Community Safe Schools Project Committee, under the direction of Associate Superintendent Burnis, who chaired the Committee, began to hold meetings. In selecting the members of this Committee, Ms. Burnis did not use any formal process. Rather, she tried to find staff and community members who both represented the groups the Principles aimed to protect (i.e., people from organizations advocating for or assisting racial and ethnic minorities, women, gays and lesbians, the poor, the disabled and local churches), and who were interested in serving on the Committee. Ms. Burnis also designated specific administrators and staff from each of the district’s secondary schools to serve on the Committee.

Upon selecting the Committee’s membership, Ms. Burnis then divided the ninety-member Committee into three subcommittees: Curriculum, Staff Development and Student Support Services. She also appointed two high school principals to each subcommittee and requested them to chair and facilitate the subcommittee meetings.

Despite all of Ms. Burnis’s hard work, these subcommittees, which met two or three times prior to the end of the 1996-97 school year, did not initially make good progress in resolving the issues within their various areas of responsibility. Several factors contributed to this lack of progress. First, many of the participants felt that the high school principals were not very successful facilitators of the meetings and did not appear to have genuine commitment to the process.

Second, the subcommittees quickly broke down into heated arguments over the language in the Principles policy; many of the participants representing religious viewpoints wanted to revisit the policy and give the input they felt they had been denied prior to the board’s adoption of the policy at its March 24, 1997 meeting. At the same time, there was concern expressed by some Committee members that, even with subcommittees, the process had been over-corrected with respect to inclusion. One participant joked that the Committee was “the mother of all committees” and wondered how the district could foster meaningful dialogue with so many people without patronizing the participants, especially given the fact that there was not a strong history of political organizing and effective group process within the district.

Third, and perhaps most importantly, the emotion of the previous six months of conflict spilled over into the subcommittee meetings, with many people exhibiting feelings of fear and distrust. Commenting on the atmosphere at the meetings, one of the local youth ministers who participated noted that all of the participants were “peering at each other over their shields.”

Indeed, the open skepticism evident among the various community factions hindered open dialogue and any semblance of productive policy
work. One participant, Shelly, noted that nearly everyone was overly concerned about confidentiality, school staff were uptight about how their various schools were being perceived and portrayed and district officials were reluctant to confront the hard issues, particularly regarding gay students, head on. There was, she observed, "too much talk in generalities."

3. Breaking the Impasse with an Outside Neutral

A breakthrough came in July 1997, when Superintendent Enochs and a small group of staff, parents and religious leaders, went to a conference on the First Amendment and schools titled "Finding Common Ground: Living with Our Deepest Differences." This conference, presented by Dr. Charles Haynes of the Freedom Forum on the First Amendment, profoundly impressed the group, particularly Superintendent Enochs. In a later report to the board, he stated: "All participants agreed the speakers were outstanding and could play an important role in assisting the Modesto school community in finding 'common ground' as the District addresses significant issues."

Subsequently, the superintendent informed Ms. Burnis and the subcommittees that he wanted their work halted until he could arrange for Dr. Haynes to come to the District and address the Committee as a whole. When they received this directive, some Committee members took umbrage, not only because they felt they had made some progress that was now being shut down, but also because they viewed this decision by the superintendent as a diversionary tactic.

James, for example, one of the Baptist youth ministers on the Committee, wondered if the arrival of Dr. Haynes was a "Trojan horse" that was intended more to pacify the feelings of Christian parents than to address the substance of their concerns. On the other hand, a staff member, Shelly, speculated that a day with Dr. Haynes might take the district down a theoretical path that would not resolve the hard, practical issues surrounding the harassment of gay and lesbian students.

However, Superintendent Enochs stood firm and proceeded to invite Dr. Haynes to speak to the entire Safe Schools Project Committee on October 11, 1997. Attempting to establish a neutral, nonconfrontational climate, the district scheduled the meeting on a Saturday at the local gas and electric company. Nevertheless, everyone was still "divided up" when the meeting began.

Dr. Haynes did several key things to improve the situation and break down barriers. First, he gave fundamentalist Christians on the Committee a way to agree with the policy's general purpose. At one point during the discussion, the student representative to the board of education, who was gay, said to the group: "If you could get people to stop using hate language and physical violence, you'd be dealing with 95% of the problem."
Haynes proceeded to ask the audience: “Is there anyone in the room who disagrees?” When no one expressed disagreement, the dialogue began to open up. Indeed, once people concurred that no student should be harassed, belittled, abused or violated for any reason, they realized they had found a small piece of common ground upon which they could begin building a broader consensus.

Second, Dr. Haynes helped the group deal with the difficult issues of language in the Principles policy. Specifically, he facilitated an open exchange about the word “tolerance,” and led the group to discover that in reality, all parties were uncomfortable with the word for different reasons. Religious conservatives were uncomfortable with the word because to them it implied that they had to “accept” lifestyles or viewpoints with which they disagreed on moral grounds. Gay students, minorities and others disliked the word because it implied domination and subjugation, as in “I will tolerate you so I don’t have to deal with you or recognize you.” Once the group recognized their shared concern on this point, they agreed to work together to alter the language in the Principles in a way they could all support.

Third, Dr. Haynes helped the Committee establish some basic ground rules for their future meetings. At a follow-up meeting of the whole Committee on October 28, 1997, the Committee adopted the “Safe Schools Project Ground Rules,” which were:

**RIGHTS**

Religious liberty, or freedom of conscience, is a precious, fundamental and inalienable right. A society is only as just and free as it is respectful of this right for its smallest minorities and least popular communities.

**RESPONSIBILITIES**

Central to the notion of the common good, and of greater importance each day because of the increase of pluralism, is the recognition that religious liberty is a universal right joined to a universal duty to respect that right. Rights are best guarded when each person and group guards for all others those rights they wish guarded for themselves.

**RESPECT**

Conflict and debate are vital to democracy. Yet if controversies about religion and politics are to reflect the highest wisdom of the First Amendment and advance the best interest of the disputants and the nation, then how we debate, and not only what we debate,
is critical.

F. FORGING A CONSENSUS POLICY

Following this pivotal session with Dr. Haynes, the full Committee and the subcommittees went back to work. First, the full Committee met on October 28, 1997, to formally adopt the ground rules and to make revisions to the Principles’ policy language. With respect to the latter, the Committee members unanimously agreed, after spending hours discussing options, to change the title of the policy from Principles of Tolerance, Respect, and Dignity to Ensure a Safe School Environment to Principles of Rights, Responsibilities, and Respect to Ensure a Safe School Environment and to make several other wording changes in the policy text.

Subsequently, several additional meetings were held over the next two months as follows: The Student Support Services Subcommittee met on Tuesday, November 5, 1997; the Curriculum Subcommittee met on Wednesday, November 6, 1997; the Staff Development Subcommittee met on Thursday, November 7, 1997; the Student Support Services Subcommittee met on Tuesday, November 18, 1997; the Curriculum Subcommittee met on Wednesday, November 19, 1997; the Staff Development Subcommittee met on Thursday, November 20, 1997; and the full Safe Schools Project Committee met on Tuesday, December 2, 1997.

In a change from the initial process, each of these meetings was facilitated by district employees who were perceived as neutral and who had extensive experience, both within and without the district, in mediation, facilitation and other forms of group conflict resolution. Seeing the need for more productive meetings, these facilitators held comprehensive planning sessions prior to each subcommittee meeting for the purpose of steering, organizing and leading the various groups. Moreover, the facilitators played a crucial role in improving communication and collaboration among Committee participants; they kept and distributed detailed minutes of each subcommittee meeting so all Committee members were informed about the direction being pursued in each area.

By January 1998, the Committee’s work was ready to take to the board of education for ratification. In a memorandum presented to the board at its regular meeting on January 20, 1998, Superintendent Enochs described the process in detail and then explained the results as follows:

OUTCOME

1. After hours of discussion in meetings, the guidelines and standards for implementing the “Principles of Rights, Responsibilities, and Respect to Ensure a Safe School Environment” were unanimously approved by each of the three
Sub-Committees: Curriculum, Staff Development, and Student Support Services.

2. On December 2, 1997, after review of each of the sub-committee recommendations, the full Safe Schools Project Committee approved all recommendations presented to the Board of Education in this agenda item.

3. The three sub-committees and the full Committee reach unanimity despite the divergent viewpoints of Committee members.

4. Participants agreed that the workshop by Dr. Charles Haynes provided the framework which enabled the Committee to reach, not only consensus, but unanimity. Dr. Haynes’ message was of great help as the Committee began the process of trying to find “common ground,” rather than focusing on that which might divide them.

5. Two common themes that emerged through all discussions and became the basis of guideline development were:

   (A) The importance of teaching civic responsibility; and,

   (B) Insuring parents the right to make decisions about their children’s activities at school.

The superintendent then explained each part of the Committee’s work and recommended that the board adopt it in its entirety. First, Superintendent Enochs discussed the revised Principles’ policy language, which had been revised to read:

**PRINCIPLES OF RIGHTS, RESPONSIBILITIES, AND RESPECT TO ENSURE A SAFE SCHOOL ENVIRONMENT**

“Rights are best guarded and responsibilities best exercised when each person and group guards for all others those rights they wish guarded for themselves . . . A society is only as just and free as it is respectful of this right for its smallest minorities and least popular communities.” –Charles C. Haynes, Ph.D.

**IN ORDER TO ACHIEVE THEIR EDUCATIONAL POTENTIAL, ALL STUDENTS HAVE A RIGHT TO ATTEND SCHOOL AND PARTICIPATE IN EDUCATIONAL PROGRAMS AND ACTIVITIES:**
Where respect for the rights of others is a standard set by the Board of Education, and where the Superintendent and each principal, classroom teacher, District staff member, and student takes responsibility for safeguarding those rights.

Free from discrimination and harassment based on race, religion, ethnic background or national origin, language, gender, sexual orientation, economic status, physical or developmental disabilities, or other special needs.

In which the total school environment is free from verbal or physical intimidation or harassment, including sexual harassment; vulgar or abusive language; derogatory ethnic, racial, or sexual slurs or conduct; or acts of violence.

In which the dignity and worth of all individuals are respected.

Next, Superintendent Enochs explained the specific implementation guidelines that each subcommittee had developed to ensure that the Principles would be integrated into the educational fabric of the district. The Curriculum Subcommittee Guidelines stated:

1. **Insure that curriculum includes the following components:**

   Contributions in history from our diverse society.

   Fundamental democratic principles of American founding documents, especially those rights contained in the First Amendment, and the expansion of these rights throughout American history.

   Develop an understanding and respect for the similarity and diversity of our community.

   The development of critical thinking skills, communication skills, cooperation skills, and conflict resolution skills.

2. **Establish a Modesto Character Education Strategy Team to:**

   Identify and define the core values.

   Develop an action plan to communicate with community and staff.

   Examine the variety of existing programs.
Develop an action plan to integrate core values into Modesto courses/classes.

Guidelines developed by the Staff Development Subcommittee stated:

3. **Content of Staff Development**

Training shall prepare all staff for implementing the “Principles of Rights, Responsibilities, and Respect to Ensure a Safe School Environment.”

Components of the training shall include:

- Knowledge of the fundamental democratic principles of the founding documents of the United States of America and how to apply these principles in a school setting.

- Understanding of the legal issues, Board policies, and administrative regulations as they relate to discrimination and harassment.

- Awareness of how discrimination and harassment affect the emotional well-being of students and impair their educational performance.

- Knowledge and understanding of the diversity of the school community.

- Knowledge and skills to create a safe and secure classroom and school environment in which the dignity and worth of all students are respected.

4. **Staff Development Team**

Create a Modesto City Schools strategy team to:

- Develop District-wide program activities.

- Select and approve presenters for District-wide programs.

- Develop an action plan for long-term, comprehensive staff development to ensure on-going implementation of the “Principles of Rights, Responsibilities, and Respect to Ensure a Safe School Environment.”

Finally, the Student Support Services Subcommittee Guidelines provided:
1. Students may be referred to services by school staff, parents, other students, or self-referral.

2. Parent/guardian permission is required for students to participate in all student support groups, as well as individual counseling or intervention programs provided by contracted agencies. Parent permission is not required for students 18 years of age or older. Also a minor 12 years of age or older may give consent to counseling related to drug or alcohol problems (Family Code Sections 6920, 6929).

3. All services will be confidential based on Education Code provisions and applicable professional standards.

4. Parent/guardian permission is required for students to participate in school-sponsored clubs.

5. A standard District parent/guardian permission slip shall include the name of the club or support group. Permission slips for generic support groups shall include examples of topics which may be discussed.


7. All Modesto sponsored support services will be provided by Modesto certificated or classified staff or Board of Education-approved contracted agency staff.

8. All contracted agency staff will have appropriate education and/or training relating to the service provided.

9. Fingerprinting is required for all service providers.

Given this review, the unanimous endorsement of the Committee and the specific recommendation of Superintendent Enochs to adopt the Committee's work in its entirety, the board proceeded to adopt the new Principles policy, as well as all of the implementation guidelines developed by the subcommittees.
III. FINDING THE THIRD WAY: THE ESSENTIAL ELEMENTS OF MODESTO'S SUCCESS

Participants on the District/Community Safe Schools Project Committee overwhelmingly agree that the policy process undertaken by the Modesto City Schools, while long and tedious, was well worth the effort. Representative of observations made by many Committee members are the comments of Rosalie, a special education teacher who later became the district’s character education coordinator. During the public comment period of the board’s January 20, 1998 meeting, Rosalie stated:

When I first began serving on the Safe Schools Project Committee, I foresaw “committee work” but with an interesting twist. The work would still involve federal laws, state laws, conduct codes and student expectations. But this time, the result would be predicated on standardized testing and academic curriculum, but on the district’s commitment to an, as yet, abstract ideal.

From the beginning, although well-intentioned and dedicated, we were in trouble. When the goal is an implementation plan of a theoretical concept, there is a plethora of interpretations as to its literal application.

Fortunately, Dr. Haynes shared his experience, insight and expertise with us. He eloquently reminded us that democracy’s underlying strength, as well as its greatest challenge, was to ensure every individual a voice while simultaneously avoiding anarchy and chaos. It’s a delicate balance, yet it has always defined us as Americans and we, quite clearly, would not have it any other way. After spending that afternoon with him, we were then able as a committee, to first; agree on process, and second; use that process for reaching consensus regarding our specific tasks.

As the full committee debated one evening for literally hours over the revisions of the Principles statement, I personally became very frustrated. I was thinking that we were laboring so tediously over simple semantics. But then I realized, it was precisely the language of the statement that articulated and guarded the integrity of our actual mission. If we didn’t choose the language thoughtfully, we wouldn’t and couldn’t capture the essence of the policy.

So, we continued to struggle, not just for the perfect words, but for the perfect sequence of the words, and during this time we listened carefully to each others’ consciences. Finally, hours later, when we were satisfied and had reached agreement, we had literally
changed only *ELEVEN* words. But it was no longer "just semantics." What had evolved was a crisply defined Modesto City Schools' statement of intent.

Now, when I think of the people in the room that evening, I regard them as individuals so *completely* resolute in their purpose, that regardless of how tired they were or how late it became, would [sic] not sign off on a document they felt was eleven words shy of perfection. That's not bad company to keep.

As meetings proceeded through the months with the staff development subcommittee, we continued to practice the mutually accepted ground rules. The group vigilantly reviewed both intent and language as we developed content and strategies for the education of staff.

Interestingly enough, ... we became a microcosm of the community we hoped to build throughout the district. Individual opinions were expressed, concerns were addressed, many questions were debated and students' opinions were offered and incorporated. Ultimately, the members' unanimous vote of approval for the guidelines was testimony to the fact that the philosophy of the policy we're refining tonight can and does work.

It benefits and empowers the *individual* as well as the *group*, the *minority* as well as the *majority*, the *inconversant* as well as the *erudite*, the *less strong* as well as the *most able*.

As a special education teacher, I've often witnessed the human devastation that results from a seemingly trivial comment or unkind attitude. And though deliberate exclusion can be subtle, its *effects* never are.

The climate in which we educate all of our young people, must only allow for mutual respect and dignified treatment. And the model for that climate originates with adults—in the family, the schools and the community.

Such perceptions, combined with the legal headaches schools may face if they fail to address the concerns of gay and lesbian students in an appropriate manner, would seem to provide powerful incentives for schools to pattern policy processes after Modesto. While a comprehensive discussion of every nuance of the district's ADR process is beyond the scope of this paper, the key elements contributing to the project's success deserve exploration.
A. PUBLIC ENGAGEMENT: LAYING THE GROUNDWORK FOR CONSENSUS

Some authors have suggested that effective civil dialogue does not take place in schools because, due to what they perceive as constant and unwarranted criticism, educators have lost confidence in the public’s ability to work constructively with them.\textsuperscript{83} Ironically, however, the reluctance of educators to involve key stakeholders, including parents, in school decision making only reinforces patron frustration and public hostility toward schools. One author writes:

On the basis of what we have heard from teachers and administrators, I think other obstacles to a better relationship between citizens and schools grow out of the unhappy experiences these educators have had with what they see as “the public.” Educators complain that they are often captives of externally imposed reforms, with little or no voice. They are wary, and not without reason. Battered by interest groups, administrators become quite guarded, saying, in effect, “You can’t just pull a group of people together from the community to tell educators what to do.” They worry that citizens want to be involved in what they see as staff and faculty decisions. Educators also frequently equate the public with parents. And, while involving parents is essential, they are only a third of the citizenry.

In light of these feelings, it’s no wonder that those trying to change schools sometimes give what one reporter described as lip service to public involvement. It’s no wonder that reforms often fail, divided within by disputes between educators and other key actors and besieged without by angry interest groups. It’s no wonder that, when educators talk about public engagement or community involvement, all they mean is using more effective ways of telling people what’s good for them.\textsuperscript{84}

To overcome this negative cycle, and to counter what has been called “a disturbing—and in some cases growing—gulf between the public and its schools,”\textsuperscript{85} school districts around the United States have begun to experiment with something called “public engagement.” Because it is an umbrella term used to describe a host of different processes and projects, “public engagement” is not easily defined with precision. Perhaps the best analysis of the concept to date is a 1998 report issued by the Annenberg

\textsuperscript{83} See, e.g., Ann Bradley, Divided We Stand: What has Come Between the Public and its Schools?, EDUC. WK., Nov. 6, 1996, at 31; David Mathews, Is There a Public for Public Schools? (1996).

\textsuperscript{84} Mathews, supra note 83, at 4-5.

After conducting detailed research of one hundred seventy-four active school public engagement projects across the United States, the Institute compiled a report identifying five common characteristics of successful public engagement initiatives, all of which were present in the Modesto policy process.

First, effective public engagement is rooted in an "inclusive and dialogue-driven process." The Annenberg report states:

School and citizen's initiatives advocate and promote conversation and decision making that genuinely involve all constituencies in the community in school-related issues. Meetings are held in multiple languages and non-traditional sites, creating a "safe space" such as church basements or living rooms where dialogue can be an effective antidote to the sometimes uncivil and caustic discourse around school change. Many develop creative strategies for reaching parents who need to be involved but choose not to be. They train local parents about their rights, how to exercise them, and how to reach out to the educators in their schools. Educators listen more attentively and interact more effectively with community members, especially to those who have traditionally felt excluded or unwelcome in schools for reasons of race, class or culture.

Although Modesto officials did not hold meetings in multiple languages, they did hold important meetings at non-traditional neutral sites, such as the local gas and electric company, in an effort to establish an inclusive and civil environment for dialogue. More importantly, they made a real effort to listen attentively and interact with a broad range of community members, especially some, like gay and lesbian students, who had felt excluded or unwelcome in the schools.

Second, successful public engagement initiatives involve "dedication to making real improvements in schools." The Annenberg report explains:

Public engagement efforts seek meaningful and long-term change in schools and districts. Some focus directly on curricular and other institutional change in schools. They include healthy amounts of dialogue but always move to action. Well-developed initiatives create consensus around what schools should teach and what children should learn, a process which participants expect will lead either directly or indirectly to improved student

86. See ANNENBERG INSTITUTE FOR SCHOOL REFORM, REASONS FOR HOPE, VOICES FOR CHANGE I (1998).
87. Id. at 20.
88. Id. at 20-21.
89. Id. at 21.
achievement. Importantly, while Modesto school officials originally focused only on the narrow issue of how to protect gay and lesbian students from harassment, they eventually broadened their vision to look at how harassment of all types could affect student achievement. Therefore, the Safe Schools Project Committee was concerned not with simple window dressing changes in the policy language, but with substantive changes in curriculum, student services and staff development that needed to occur in order to improve the learning environment for all students.

Third, meaningful public engagement in education entails a “commitment to creating dynamic partnerships.” Specifically, the Annenberg report states:

Public engagement everywhere is a two- or multi-way conversation that brings parents, community members, educators, business people, and others to the table and enables them to play meaningful roles in discussions and decisions that affect schools and children. Together, representatives from all these groups work to share responsibility for the health and effectiveness of their public schools.

The Modesto policy process was clearly consistent with this principle. The one hundred fifteen person District/Community Safe Schools Project Committee was a multi-way conversation that not only sought, but expected, the active participation of individuals from all sectors of the Modesto community, from gays and lesbians to local churches to the police to the NAACP. Yet the representation and involvement of these different groups and individuals on the Committee would not have happened without leadership at the district. Associate Superintendent Burnis, who chaired the Committee, noted that she and her staff made a conscious effort to ensure that the Committee’s participants reflected the racial, ethnic, religious and socioeconomic diversity in Modesto.

Certainly one important outcome of this inclusive process was that everyone involved was able to speak and be heard. More importantly, however, Committee members developed a sense of shared responsibility for addressing the needs and concerns of all students, including those who are gay and lesbian. For example, one of the youth pastors in Modesto discovered, and documented for future reference, a list of several things he thought churches should know in order to facilitate better partnerships between the religious community and schools. Among other things, he noted that churches and pastors should “choose access over confrontation.”

90. Id.
91. Id.
92. Id.
"become a proven partner and stakeholder," "be involved in a variety of school issues, not just issues concerning sexuality," "be deliberate about encouraging and complimenting school people instead of always criticizing them," "give people the benefit of the doubt and assume their motives are right," "publicly own their responsibility for the shape schools are in and for the hostility and distrust that exists between churches and schools" and "view themselves as pastors to the city and not just to their congregations."

Likewise, another Modesto youth minister who participated on the Committee learned that Christian people and churches need to take a hard look at themselves and how they are perceived by poor, minority and homosexual youth. While his rhetoric at the beginning of the Modesto controversy had been strident, the process allowed him to establish trust with school officials, which led him later to tell school officials: "From now on, when I come to the District, I'm coming to help."

Fourth, successful public engagement involves "sincere efforts to find common ground." The Annenberg report notes:

Engagement initiatives work to establish common ground and then move toward broad consensus around school-related issues. They aim to broaden and deepen the conversations about these issues that occur in the larger community—whether in supermarket aisles, the pages of the newspaper, the local Kiwanis club, or city hall—and increase community capacity to frame options that can work even when the choices are difficult.93

As discussed in more detail below, the fact that all one hundred fifteen members of the District/Community Safe Schools Policy Committee were able to reach unanimous agreement on policy language and policy implementation guidelines underscores the Committee’s focus on obtaining “broad consensus.” Because of the school district’s efforts to solicit and reflect on the perspectives of people throughout Modesto, it was able to deepen the conversations about values, families, discrimination, respect and a number of other topics that were occurring in the larger community.

Fifth, and finally, true public engagement establishes an “atmosphere of candor and mutual trust.”94 Elaborating, the Annenberg report observes:

Participants in effective public engagement efforts attempt to listen to and understand viewpoints that are not their own and to speak truthfully about the conditions of schools. Accurate information is made available in a timely manner to all stakeholders. For engagement to succeed, all participants must act with compassion and integrity.95

93. Id.
94. Id.
95. Id.
This principle was key to Modesto’s success. First, while Superintendent Enochs admittedly entered the August 1996 meeting with parents and students somewhat callous to the concerns of gay students, he was willing to listen, confront his prejudices and act in a compassionate manner to address the situation. Furthermore, although the superintendent acknowledged that it is a real challenge to keep the religious community informed of every policy, program or initiative that might need input from religious individuals and organizations, because such communication is “not the first thing that comes to mind,” he and all of his administrative staff earned high praise from Committee members for their candor and sincerity in providing essential information.

For example, Kathy, a Christian parent who was elected to the Modesto school board in the midst of the policy process, complimented district officials and staff for “very often” being “very helpful” concerning her requests for information, beginning with her requests to review information about the GLSEN conference, continuing with her requests to view the GLSEN video and ending with her requests to be kept informed of the policies that the Committee and subcommittees were considering. She specifically commended Ms. Burnis and the various subcommittee chairs for compiling accurate, timely information on what each subcommittee was doing, noting that “no one was working in isolation.”

Similarly, James, one of the youth ministers, praised Ms. Burnis for her honesty, forthrightness and integrity with respect to sharing information. James recalled that Ms. Burnis was “very open” with information he requested, and that “everything” he asked for was given to him.

Compassion was also a key ingredient of the process. The cardinal rule for all Committee discussions, particularly after Dr. Haynes’ presentation to the Committee in October 1997, was that all members had to respect one another. To reinforce this rule, exercises were conducted to help participants think beyond their own concerns. In one, Committee members were asked to voluntarily share with the group a personal account of harassment or humiliation they had experienced as adolescents. Sharing these deeply personal experiences, Committee members began to realize how much they all had in common, and that they all shared an interest, regardless of their religious or moral viewpoints about homosexuality, in protecting students from ridicule and abuse.

B. REACHING CONSENSUS: DECIDING WHEN TO END THE PROCESS

Beyond establishing a framework for policy negotiations based on the principles of public engagement, Modesto’s success can be traced to the Committee’s insistence that consensus be reached before policy revisions were forwarded to the board of education. The meaning of consensus was never precisely defined by the Committee, but according to participants, they clearly were striving for unanimity, not only among individuals, but
among the various subcommittees, so that the board of education could act decisively upon receiving the Committee's recommendations.

This approach to consensus was pivotal to the outcome of Modesto's policy process and is consistent with the rich research on decisional rules in public policy dispute resolution. An analysis of this research suggests that rules of decision can be structured which will not only protect the rights of all parties to the negotiation, but which will also be effective in securing the parties' long-term commitment to each other and the school system.

1. What is "Consensus?"

According to Jones, "'Consensus' seems to be the magic word these days when government officials, the public, and private business interests try to resolve such thorny issues as the siting of hazardous waste disposal facilities, prisons, group homes, and many other controversial issues." However, definitions of consensus vary widely.

For example, Jones states that consensus is a process of making decisions without voting that "'stresses the cooperative development of a decision with group members working together rather than competing against each other.'" Other scholars view consensus more as an outcome, yet are equivocal about its actual meaning. Harter epitomizes this uncertainty by stating:

Does it mean unanimity; no "reasonable" dissent; concurrent majorities, in which a majority of each interest agrees; a substantial majority of those present; a simple majority; or some other calculation? Even the words used to describe the process are unhelpful. The definition of consensus in *Webster's Third International Unabridged Dictionary* includes: "group solidarity in sentiment and belief;" "general agreement: unanimity, accord;" "collective opinion: the judgment arrived at by most of those concerned."

What constitutes "consensus" is one of the most difficult and complex questions in regulatory negotiation. Yet, consensus is an essential ingredient of reaching an agreement. The willingness of some parties to participate at all may depend on how consensus is defined. Moreover, it influences both the internal dynamics of the groups and the deference to which the agreement is entitled. Although sound arguments support each of several definitions, there are also arguments against each. Hence, consensus probably will remain a controversial subject, at least until some experience is

97. *Id.* (citation omitted).
gained in negotiating regulations.

Ultimately, whether a consensus exists must be determined more by fingertip feel than by any sort of mathematical calculation. One negotiator has stated that if you have to count votes, you do not have a consensus. Rather, like pornography, consensus is hard to define, but you know it when you see it. Unfortunately, this uncertainty raises some difficult questions. Can procedures be developed to ensure that the committee has reached consensus? Who decides whether a consensus has been reached? 98

2. Majority Approaches to Consensus

Under a more traditional notion of consensus, which defines it in terms of agreement among most parties concerned, a school policy committee might decide to define consensus in terms of majority rule principles. For example, Harter describes the concept of “concurrent majorities,” in which the committee requires the concurrence of all represented interests rather than the absolute agreement of each individual representative:

[T]he members of the negotiating group are identified by interest and caucuses are formed. Each caucus of the group must then support the decision. Each individual member of the negotiating group, however, need not agree specifically. This process would mitigate the disruptive effect of an ideologue because others that share a similar interest would not be persuaded by that person’s position and would agree with the proposed action. 99

A slightly different version of this concept is one in which policy committees define consensus on the basis of “substantial majority.” Under this type of rule, some form of super majority of the group, “such as two-thirds, three-fourths, or all but one individual” would be required to support any proposed action in order for it to be recommended as policy. 100 Recognizing that such a rule, strictly applied, may result in challenges to the result from out-voted minorities, Harter states: “[T]his process might be better if the ground rules also provided that at least one representative of each interest must support the proposal. That requirement would make clear that each interest, rather than each individual, retained its power by being able to veto a proposal.” 101

99. Id. at 96-97.
100. Id. at 97.
101. Id.
3. Rule of Unanimity

Technically, all versions of "majority rule" policymaking are suspect if the constitutional rights of minorities are at issue; courts, as well as scholars, have indicated that minority rights cannot be bargained away through democratic votes or settlements. Consequently, it may behoove school districts like Modesto to seek unanimity in the policy process in order to fend off minority unrest over the outcome. Indeed, some scholars have suggested that, particularly in the deliberations of lawmaking bodies like legislatures and school boards, a rule of unanimity can help "overcome the barrier of strategic voting and institutional structure."  

Insisting on unanimity does present some disadvantages for the policy process, not the least of which is the reality that under a unanimous decision rule, the intransigence of ideologues can be rewarded; each single participant will recognize that he or she has the power to prevent agreement simply by holding on to extreme positions. Thus, given the potential for actual veto, as well as the possibility that parties might threaten veto to gain strategic advantage, a rule of unanimity may end up producing a policy that reflects the "lowest common denominator, rather than a fair accommodation of the competing interests." In fact, Harter has observed that requiring unanimity in negotiated policy processes is equivalent to "giving each party a loaded gun." 

Another potential disadvantage of a rule of unanimity is that the likelihood of attaining unanimity depends on the size of the policy committee conducting negotiations; as the number of parties increases, unanimity becomes more difficult to achieve. Research into the outcome of juries operating under an imposed rule of unanimity, for example, has shown "that impasse becomes more frequent, and deliberations take longer, in larger groups." 

On the other hand, the potential advantages of unanimity seem to outweigh the disadvantages. First, a requirement of unanimity may encourage maximum participation in the policy process; as Harter notes, "parties may not agree to participate in a negotiation process if they think that their interests could be disregarded and a regulation proposed over their dissent."
Second, a rule of unanimity addresses concerns over power imbalances that may exist among committee participants. Harter explains: "Requiring unanimity ensures that no interest will be outvoted. Thus, when an agreement emerges from the negotiations, there can be no doubt that a particular interest agreed to it. Requiring unanimity, therefore, preserves the essential element of power."12

Third, a unanimity rule fosters cooperation and creative problem solving among participants. Describing how a rule of unanimity worked in federal legislative negotiations over the Central Utah Project ("CUP"), Melling writes: "Rather than seeking proposals to create a majority coalition, the parties sought solutions that everyone could support. Therefore, the negotiation environment fostered brainstorming and compromise, not strategic behavior and splintered coalitions. Ultimately, the parties discovered subtle alternatives that ‘enlarged the pie.’"13 Explaining this phenomenon in more general terms, Harter states:

The unanimity requirement . . . puts pressure on the negotiators to make good faith compromises in their efforts to reach an agreement. If a party knows that an agreement will be reached, even over its dissent, it can maintain a hard line and refuse to compromise. The dissenting party may continue to posture on behalf of its interest group if it believes that placing itself at a distance from the regulation is politically expedient. Unanimity requires each party at the negotiation table to take responsibility for an agreement. Because the party may not want to frustrate the committee by holding out, he may modify his position.14

Fourth, a unanimous decision rule may play an important role in fashioning a stable and long-term agreement, thereby promoting, creating or preserving the parties’ relationships and capacity to work together.15 For example, Melling observed in the context of the CUP negotiations:

Since all parties participated in crafting the solution, they all worked for its passage. Significantly, the parties agreed not to sabotage the bill with floor amendments, eliminating a fear that often clouds legislative negotiations. In addition, because the parties left the process satisfied with their result, they have continued to consult each other, identifying and solving potential problems before they arise.16

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112. Id.
113. Melling, supra note 104, at 1696.
114. Harter, supra note 98, at 95.
115. See Melling, supra note 104, at 1696.
116. Id.
4. "Win-win" v. "All give"

Even a rule of unanimity, however, may not be exactly the right fit for other school systems looking to create successful policy processes, particularly those dealing with emotion-laden religious, moral and sexual issues. Unanimity implies absolute agreement with, and unequivocal support for, each and every portion of a policy recommendation, a concept with which some, if not many, participants may feel uncomfortable. This is especially true when gay and lesbian students are at the center of the discussion, given the wide range of beliefs, feelings, opinions and political persuasions stakeholders will bring to the process.

School officials may also have difficulty meshing the concept of unanimity with popular theories of collaborative negotiation. Whether they describe such negotiation as "win-win,"117 "mutual gain"118 or "all gain,"119 the underlying premise of many negotiation scholars is that consensus is reached only when all parties benefit or take something away from the process that satisfies their own needs.

The "win-win" model has substantial applicability in the business context, and in many public policy arenas, where the primary purpose of developing policy is to clarify the rules or relationships between adults of varied interests. In such contexts, each representative participates in the negotiations not necessarily with the desire of achieving complete victory, but at least with any eye toward getting something of value out of the process.

However, in the context of public education, the proper beneficiaries of a negotiated policy process are not adults with special interests, or even the adult community as a whole, but children within the school system. Thus, one must question whether it is proper to design policy negotiations like Modesto's, even those that are "collaborative," with the intent of securing mutual "wins" or "gains" for the adult negotiators.

Perhaps a better model for successful school policy negotiations is one that relies on a "rule of convergence," that is, a rule that expects all participants to place students at the center of their thinking, and come together to contribute their talents and expertise to the policy discussions. Under such a rule, participants would be focused on giving of themselves for the benefit of children, rather than on taking something for their own gain or the collective gain of adults in the community.

In a policy process governed by such a rule, participants would be asked at the outset of negotiations to acknowledge their widely discordant backgrounds and perspectives. Thus, participants would not be expected to

118. ROGER FISHER & WILLIAM URY, GETTING TO YES 73 (1981).
pledge their iron-clad support for every word, phrase, idea or philosophy contained in the committee’s final policy recommendations. Such an approach would honor freedom of conscience for all participants, a crucial matter because on matters of “ultimate moral authority,” which arguably are involved with all disputes over gay and lesbian students, “full agreement of all members of the community may not be achieved.”

At the same time, participants would be instructed, and hopefully come to realize, that they share a broad “trusteeship and sense of commonwealth” regarding the education of the community’s children. Motivated by such recognition, participants might agree not to submit any policy recommendation to the board of education unless or until they could substantially reconcile their divergent viewpoints and support the policy proposal as a whole, if not every specific detail contained therein. In fact, the concept of convergence recognizes that not all participants on a policy committee will see eye to eye on every single issue or word in the final policy. The idea is that stakeholders attempting to converge would see that failure to reconcile personal agendas in favor of the best interests of students could lead to a weakened or divided school system in which all children suffer.

At least under this type of rule, the ability to dissent would be preserved, which may encourage more open dialogue of difficult issues and concerns. Discussing the importance of dissent, even in “unanimous rule” processes, Harter writes:

[Unanimity “weighs” the strength of dissent. A party that is not completely happy with an agreement would file a dissent if permitted to do so. Under rules requiring unanimity, that party would be asked whether the dissent is strong enough to block agreement. A party faced with that situation frequently would agree that his adverse views are not sufficiently strong to stop the overall agreement.]

Put another way, if policy negotiations are “conducted in a manner that acknowledges the moral status of the dissenters’ position, . . . it may be possible to develop approaches that allow the majority’s position to be implemented while nevertheless retaining the integrity of dissenting views.”

In sum, an expectation that “all contribute” rather than “all gain” has the potential to effect a positive philosophical shift in school policy forums, allowing sensitive issues, like those involving gay and lesbian students, to

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121. DAVID TYACK & ELISABETH HANSOT, MANAGERS OF VIRTUE 261 (1982).
122. Harter, supra note 98, at 95.
123. Id.
be addressed in a productive way. Within such a construct, participants needing to register objections or dissenting opinions as a matter of principle may be more likely to "converge" and concur with the whole, knowing that they had the opportunity to help shape the dialogue and give something of value to the community's children, even if only on a single policy point.

In other words, although they may not completely agree with every detail of the policy proposal, and may have failed to "win" as many concessions as they desired, conscientious objectors will hopefully still join hands with their fellow negotiators in a show of good faith for students. Theoretically, under an "all give" rule, each participant in policy negotiations will be able to look at the final proposal and see his or her imprint on the language and philosophy of the policy recommendation.

C. MEDIATORS AND OTHER NEUTRALS

Perhaps the most critical decision that Superintendent Enochs and the Modesto school board made was to bring the policy process to a halt in the summer of 1997 and to restructure it in the fall with the help of skilled neutrals. Even by that point, Associate Superintendent Burnis and several key staff appointed by her had already played crucial roles as convenors and facilitators to get the policy process off the ground.124

However, with the process stalled at the end of the 1996-97 school year, the attendance by Superintendent Enochs at a First Amendment seminar by Dr. Charles Haynes was serendipitous, for it was Dr. Haynes who provided the Committee with some much needed focus and civic ground rules. Through his appearance before the Committee on October 11, 1997, Dr. Haynes accomplished two important tasks that might have been impossible had he not been a skilled orator and neutral.

1. Ground Rules for Civil Dialogue

Shortly after Dr. Haynes addressed the Committee on October 11, 1997, the full Committee met again on October 28, 1997 and agreed that all meetings from that point forward would be governed by three principles, based on Dr. Haynes' "3 Rs."125 Dr. Haynes' insistence that the Committee develop ground rules based on the "3 Rs" is consistent with research on public policy conflict resolution indicating that ground rules are essential to the success of negotiations.

LeBaron and Castarphen, for example, discuss the importance of ground rules in public policy dialogues over abortion. They note: "Typical

124. For an excellent overview of the purposes and roles of convenors and facilitators in consensus policy processes, see Chris Carlson, Convening, in THE CONSENSUS BUILDING HANDBOOK 169 (Lawrence Susskind et al. eds., 1999), and Michael L. Poirier Elliott, The Role of Facilitators, Mediators, and Other Consensus Building Practitioners, in THE CONSENSUS BUILDING HANDBOOK 199 (Lawrence Susskind et al. eds., 1999).
ground rules include respectful speech and behavior toward all in attendance, speaking for oneself, an expressed desire to understand and be understood, a pledge to refrain from attempts to convert or convince, and confidentiality, meaning that no names will be ascribed to anything that is said during the workshop. 126

Similarly, Cormick explains that ground rules are essential because some participants in the policy process may either have no experience negotiating in such a forum or may have experienced negotiation in other contexts much more adversarial and combative than the environment needed for effective public policy deliberation. He writes:

[N]egotiators in complex public policy disputes do not have the luxury of assuming many of the process provisions that are a matter of common practice in labor-management and other regularized negotiating forums. As a rule of thumb, the less experienced the negotiators, the more important it is that they agree on the process to be followed.

A protocol spelling out the need for negotiators to deal civilly with one another and avoid personal attacks and criticisms may seem trite and almost insulting. It will seldom have to be enforced, but it does provide a level of comfort at the outset and a handle for dealing with such problems should they arise.

Another protocol may focus on the need to follow a decision-making process where the participants jointly seek to define the problem and generate mutually acceptable solutions rather than merely pursuing positions and demands. This provision may be most necessary in situations where one or more of the parties has experience in other negotiating forums (such as some labor-management negotiations, where the emphasis is on opposing demands and compromises are between entrenched positions). Complex public issue negotiations provide both the necessity and opportunity for finding innovative solutions that are possible when all the interests work together to find a consensus. 127

The bottom line, according to Harter, is that participants need to be reminded at the beginning of negotiations, and periodically throughout the process, that "their purpose is to reach a mutually acceptable agreement when possible, not to seek victory for their positions." 128 Some basic

128. Harter, supra note 98, at 83.
ground rules Harter proposes to make agreement possible are the following, developed by the National Coal Policy Project:

Data should not be withheld from the other side. Delaying tactics should not be used. Tactics should not be used to mislead. Motives should not be impugned lightly. Dogmatism should be avoided. Extremism should be countered forcefully . . . but not in kind. Integrity should be given first priority.129

In short, establishing ground rules such as those developed by the Safe Schools Project Committee with the assistance of Dr. Haynes not only minimizes participant posturing and grandstanding,130 but also assists in resolving the acrimony that inevitably results when participants do engage in such tactics. Fisher and Ury point out: “Failing to deal with others sensitively as human beings prone to human reactions can be disastrous for a negotiation. Whatever else you are doing at any point during a negotiation, from preparation to follow-up, it is worth asking yourself: ‘Am I paying enough attention to the people problem?’”131

2. Breaking the Impasse by Re-framing the Issues

Beyond helping the Committee with the “people problem,” Dr. Haynes also performed the key task of addressing the “issue problem.” Up until the day Dr. Haynes spoke in Modesto, the Committee remained severely fractured due to its exclusive focus on issues of sexual orientation. Committee members simply were unable to move beyond narrow, self-centered attacks on one another that served no other purpose than the assertion of their own moral agendas. Because he was able to help end this bickering, Dr. Haynes, even though he was enlisted more as an educator than a mediator per se, in essence did conduct mediation as classically defined:

Mediation is negotiation assisted by a third party. Negotiations often run up against roadblocks that a mediator can help remove. A mediator may be able to move the negotiations beyond name-calling by encouraging the disputants to vent their emotions and acknowledge the other’s perspective. A mediator can help parties move past a deadlock over positions by getting them to identify their underlying interests and develop creative solutions that satisfy those interests. Where each side is reluctant to propose a compromise out of fear of appearing weak, the mediator can make such a proposal. Mediators are thus well placed to shift the focus

129. Id.
from rights or power to interests. Mediation can serve as a safety net to keep a dispute from escalating to a rights procedure, such as litigation, or to a power procedure, such as a strike.\textsuperscript{132}

Dr. Haynes was able to redirect the negotiations primarily by educating the parties about freedom of conscience principles protected by the First Amendment. In so doing, Dr. Haynes performed two critical functions.

First, he succeeded in helping Committee participants understand the underpinnings of the Constitution generally, and the First Amendment specifically, by reviewing with them the origins of religious freedom in the colonies and the concern that early American leaders had about factions.\textsuperscript{133} Such education was necessary, because without it, Committee members may not have been able to move from discussion about rights to discussion about interests, a distinction explained by Howard:

Rights are not the language of democracy. Compromise is what democracy is about. Rights are the language of freedom, and are absolute because their role is to protect our liberty. By using the absolute power of freedom to accomplish reforms of democracy, we have undermined democracy and diminished our freedom.\textsuperscript{134}

Second, Dr. Haynes was able to recast the issues in a manner that was workable for all stakeholders at the table. Mathews explains that "[w]ho names the problems in a community and the names that are chosen—even the language that is used—are critically important."\textsuperscript{135} Thus, Dr. Haynes helped Committee members address their concerns over policy terms like "tolerance" and "acceptance" and frame the issues in a broad context, one dealing with each person's rights to live peaceably and enjoy freedom of conscience, rather than in a narrow context focused solely on issues of sexual orientation. Following Dr. Haynes' intervention, the Committee discovered the following reality articulated by Stephen Carter:

The common objection that Americans cannot agree on values is not only false, it is dangerous nonsense. True, we have trouble on such issues as abortion (although even there, . . . our differences tend to be exaggerated). But on the basics, our agreement is broad. Samuel Rabinove of the American Jewish Committee has argued that the values our public institutions (including our schools) reinforce should be consensus values—those shared across religious traditions. This is not as hard to accomplish as one might think.

\textsuperscript{132} William B. Ury et al., Designing an Effective Dispute Resolution System, 4 \textit{Negotiation J.} 413, 420 (1988).
\textsuperscript{133} \textit{See Alexander Hamilton \textit{et al.}, The Federalist Papers} 77-84 (Clinton Rossiter ed. 1961).
\textsuperscript{134} \textit{Howard, supra} note 2, at 168.
\textsuperscript{135} \textit{Mathews, supra} note 83, at 32.
Some very basic values—the Golden Rule, for example, and an ethic of loving one's neighbor—are common to every major American religious group. If we cannot agree on such basic truths as these, we will in years to come be unable to resolve the moral crisis threatening our nation.

As it turns out, more than 90 percent of American adults do agree on an American Core—not only on the rules I mentioned but on such notions as respect for others, persistence, compassion, and fairness. It is not that hard to work out such a Core. And if we can't do it, we are not a nation—or at least, we cannot expect to be a successful one.

IV. CONCLUSION

Given that gay and lesbian students are "coming out" at earlier ages and that nearly every issue involving homosexuality is now hotly debated in the public arena, disputes in schools are unlikely to disappear in the foreseeable future. Indeed, if recent events serve as reliable indicators, the number and type of school conflicts involving gay and lesbian students may be on the rise.

As pointed out in Part II of this paper, schools cannot afford to stand idly by and do nothing in the face of complaints about sexual harassment of gay and lesbian students; such harassment is becoming well documented in

138. See Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279, 1284 n.3 (D. Utah 1998) (noting that "the recent public debate concerning the sexual orientation of a candidate for Utah state legislature supports a conclusion that, in Utah at least, questions on this topic are almost always construed as matters of public concern.").
139. See, e.g., Amber Arellano, Gay Issues an Emotional Topic, DETROIT FREE PRESS (visited Dec. 28, 1999) <http://www.freep.com/news/locway/skul28_19991228.html> (reporting on controversy over harassment of, and support for, gay students in Michigan schools); Amy Argetsinger, Harassment Policy Under Attack, WASH. POST, Oct. 27, 1999, at B9 (reporting on dispute between gay rights groups and conservatives over policy proposed by the Maryland State Board of Education); Shelby Oppel, Pinellas School Splits on Support for Gays, ST. PETERSBURG TIMES (visited Mar. 24, 1999) <http://www.sptimes.com/News/32499/TampaBay/Pinellas_school_split.html> (reporting on action by a divided school board to approve a policy protecting gay and lesbian students from harassment); John Ritter, Gay Students Stake Their Ground, USA TODAY, Jan. 18, 2000, at 1A (reporting on controversies over student clubs for gay students); Idea for Gay-Straight Club Turns Into Debate on Sex, DESERET NEWS, Apr. 4, 2000, at A5 (same); Barbara Whitaker, School Board, Facing Suit, Agrees to Recognize Gay Club, N.Y. TIMES, Sept. 7, 2000, at A16 (same); Laura Parker & Guillermo X. Garcia, Boy Scout Troops Lose Funds, Meeting Places, USA TODAY, Oct. 10, 2000, at 1A (reporting on actions by school officials to ban or limit access by Scout troops to school facilities); Darragh Johnson, Scouts' Use of Schools Under Attack, WASH. POST, Oct. 4, 2000, at A1 (same).
schools across the country, and school officials ignore it at their legal peril, particularly in the wake of the Nabozny and Davis decisions.

At the same time, in order to ensure successful implementation of anti-harassment policies, student clubs and other programs for gay and lesbian students, school officials must garner support from all stakeholders in the community, including those representing religious and politically conservative viewpoints. Indeed, school officials must recognize that every citizen, regardless of religious faith or lack thereof, deserves an opportunity to contribute his or her ideas to the debates shaping educational policy. Expounding on this concept, Carter proposes that in a democracy with integrity, "everybody gets to play:"

A politics of integrity does not draw arbitrary boundaries around the public square, screening out some citizens whose political views have been formed in ways of which various elites disapprove. A particular problem of our age has been the astonishing effort to craft a vision of public life in which America's religious traditions play no important roles, by ruling out of bounds political (and sometimes moral) arguments that rest on explicitly religious bases. Nowadays, one hears quite commonly the argument that it is morally wrong—perhaps even constitutionally wrong, a violation of the Establishment Clause of the First Amendment—for you to try to "impose" on me your religiously based moral understanding.

When I make this point, as I often do, in lecturing about politics and religion, I often get an answer that goes something like this: "But nobody can reason with these religionists. They say that So-and-so is God's will, and what can you say in return?" I am always saddened by this answer, because, as a professor at a university, I run into many closed-minded people, and few of them need divine command as an excuse. But nobody tries to ban them from public debate for their closed-mindedness. Besides, this vision of how

140. See, e.g., SAFE SCHOOLS COALITION, UNDERSTANDING ANTI-GAY HARASSMENT AND VIOLENCE IN SCHOOLS (1999) (report on the five-year anti-violence research project of the Safe Schools Coalition of Washington State, noting that 146 incidents of sexual orientation harassment were reported to the Project); Rebecca Jones, I Don't Feel Safe Here Anymore, AM. SCH. BD. J., Nov. 1999 (visited Nov. 9, 1999) <http://www.asbj.com/current/coverstory.html> (discussing several recent incidents of anti-gay harassment in public schools); LAMBDA LEGAL DEFENSE & EDUCATION FUND, STOPPING THE ANTI-GAY ABUSE OF STUDENTS IN PUBLIC HIGH SCHOOLS 1 (1998) (citing studies from Massachusetts and Vermont finding that gay students are much more likely than other students to miss school, be threatened at school or attempt suicide).


142. CARTER, supra note 136, at 215.
religious people reason is a caricature. That there are some who cannot be reached by reason is doubtless true. The notion that most religious people are that way seems to me a quite unfounded insult.\textsuperscript{143}

The reality is that with courageous leadership, careful planning and genuine commitment to the improvement of public schools for all students, education officials can forge common ground on issues involving gay and lesbian students.\textsuperscript{144} Building such consensus is certainly necessary to avoid divisive and costly litigation, which almost always takes its toll on school communities. More importantly, the process of uniting the community may be crucial to the maintenance of public education in the United States. As Tyack and Hansot note:

When we urge the reformulation of a community of commitment to public education we are not simply advocating that old ideas be warmed over and served up as a new consensus. When we talk of coherence of purpose, we are not denying the worth of pluralism or the necessity of conflict of values and interests. When we ask leaders to help to generate a new public philosophy of education, we are not looking for authoritative philosopher-kings. Quite the opposite: we believe that the new debate over purpose must recognize new conditions, diversity of interests and cultures, and the need for broad participation. But without the creation of a stronger community of commitment we fear the atrophy of a critical institution through which Americans have continuously debated and shaped their future.\textsuperscript{145}

Hopefully more school districts will follow Modesto's lead and seek to find the "third side"\textsuperscript{146} as they strive to resolve conflicts over protection of gay and lesbian students through local policy processes and mediation, rather than abdicating their leadership and decision making authority to the courts. Districts that do so will find their gay and lesbian students safer, their communities more supportive and the business of education more rewarding.

\textsuperscript{143} Id. at 215-16.
\textsuperscript{144} See David S. Doty, Public Enragement or Public Engagement?, EDUC. Wk., Mar. 1, 2000, at 72.
\textsuperscript{145} TYACK \& HANSOT, supra note 3, at 259.
\textsuperscript{146} WILLIAM URY, THE THIRD SIDE (2000).