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COMMENT

APPROACHING LGBTQ STUDENTS' ABILITY TO ACCESS
LGBTQ WEBSITES IN PUBLIC SCHOOLS FROM A FIRST
AMENDMENT AND PUBLIC POLICY PERSPECTIVE

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The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.¹

INTRODUCTION

John lived in a rural town, had questions about his sexuality, and feared asking his mother about the topic. One day, John tried learning more about sexuality on a computer at school by trying to access websites that discussed sexuality and lesbian, gay, bisexual, transgender or questioning (LGBTQ)² issues. His school's Internet filtering system,³ however, blocked access to these websites. In fact, John later learned his local school board required abstinence only sex education and told teachers to not discuss or teach any issues that surrounded sexuality or LGBTQ issues. Frustrated, John continued to question his own sexuality, and his questions consumed his mind. After fully understanding his sexuality and building up the courage, John came out⁴ to his parents and they decided to sue John's school for violating John's First Amendment rights.

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1. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

2. Many do not include “questioning” within the LGBT abbreviation and instead use ‘Q’ to represent “queer”; however, I use the ‘Q’ to represent “questioning” because many adolescents are discovering their true gender identity, sexual orientation and sexuality during their high school years. However, throughout this paper “LGB” (lesbian, gay, bi-sexual) or “LGBT” (lesbian, gay, bi-sexual, transgender) may be used instead of “LGBTQ”, which is done because the cited study or quote used that given abbreviation when discussing its data. I use the acronym the study used hoping to accurately portray the cited study. Still, adolescence is “typically the time in which individuals begin the process of identity formation.” Beth Kivel & Douglas Kleiber, *Leisure in the Identity Formation of Lesbian/Gay Youth: Personal, but Not Social*, 22 LEISURE SCI. 215, 216 (2000). Thus, I use LGBTQ for my analysis because it is the best acronym to fully encapsulate public school students who are at different stages of their gender identities, sexual orientation identities or sexual identities but may seek out information on these subjects on the Internet through their schools' computers.

3. Internet filters are software tools that allow network administrators to monitor web content viewed by certain individuals on a particular computer or network. In a public school, school administrators often use Internet filters to protect kids from viewing inappropriate material on the Internet and to grant access to web sites students may visit. SAFETY & SECURITY CENTER, <http://www.microsoft.com/security/resources/internetfilters-whatis.aspx> (last visited Nov. 7, 2012).

4. “Coming out” short for “coming out of the closet” is a term that describes when an individual uses a speech act to assert the speaker's sexual orientation or gender identity, and this act brings the person into a new self. By coming out, the individual alters his or her own social reality because she or he begins to establish a community who recognizes the person's sexual orientation or gender identity. Deborah A. Chirrey, *I hereby come out': What sort of speech act is coming out?*, 7 J. SOCIOLINGUISTICS 24, 25 (2003). This act is momentous and involves individuals disclosing their “innermost sexual desires and feelings in the presentation of their public personae.” *Id.* at 35.

Jane Doe went to Camdenton High School in rural Missouri.⁵ She wanted to access a website on LGBT issues but knew her school's Internet filter system blocked all websites expressing a positive viewpoint toward LGBT individuals.⁶ Jane could have, however, accessed many websites at her school that expressed negative views toward LGBT individuals.⁷ Additionally, Jane could have sent an e-mail to her school's superintendent requesting permission to access a specific LGBT website or used her school Internet user-name to put in a request each time she wanted to access a blocked website.⁸

Teenagers' inability to access websites that discuss sexuality and LGBTQ issues at their schools is not an issue to be taken lightly. Today, youth use the Internet to find information on mental health, birth control, pregnancy, drugs and alcohol, and sexually transmitted infections (STIs).⁹ Similarly, LGBTQ youth rely on the Internet to find information on same-sex attraction and sexual health.¹⁰ In one focus group, a youth said, "I went to Google and typed in 'how do I know if I'm gay?'"¹¹ Another teenager stated, "I just read and looked at things [online]. It helped me realize I was not alone. I wasn't bad or wrong or sick. I am just human. It helped me come to terms with who I was and am today."¹² In fact, almost half of the LGBTQ youth who are not "out" of the closet at school still access and use online LGBTQ communities that address LGBTQ youth issues.¹³

Rural LGBTQ students receive the highest levels of anti-LGBT language and victimization,¹⁴ and are less likely than their urban or suburban counterparts to have access to LGBT-related information through the Internet

5. Parents, Families and Friends of Lesbians and Gays Inc., v. Camdenton R-III Sch. Dist., 853 F. Supp. 2d 888, 890 (W.D. Mo. 2012). See GEN. INFO., <http://www.camdentoncity.com/info.htm#General> (last visited Nov. 8, 2012), stating Camden County, in Missouri, has a population of 37,051.

6. *Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d at 890.

7. *Id.* at 892.

8. *Id.* at 891.

9. The Henry Kaiser Family Foundation, *Generation Rx.com How Young People Use the Internet for Health Information*, 2 (Dec. 2001), <http://kaiserfamilyfoundation.files.wordpress.com/2001/11/3202-genrx-report.pdf>.

10. Lynne Hillier, Kimberly J. Mitchell & Michele L. Ybarra, *The Internet As a Safety Net: Findings From a Series of Online Focus Groups with LGB and Non-LGB Young People in the United States*, 9 J. LGBT YOUTH 225, 241 (2012).

11. *Id.* at 240.

12. *Id.*

13. Human Rights Campaign, *Growing Up LGBT in America* 9 (2012), available at <http://www.hrc.org/files/assets/resources/NCOD-Youth-Report.pdf>.

14. Joseph G. Kosciw, Emily A. Greytak, Elizabeth M. Diaz & Mark J. Bartkiewicz, The Gay, Lesbian and Straight Education Network, *The 2009 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools* 106 (2009), available at <http://glsen.org/sites/default/files/2009%20National%20School%20Climate%20Survey%20Full%20Report.pdf>.

using school computers.¹⁵ In addition, with only 50 percent of rural Americans having access to broadband Internet services at home,¹⁶ rural students may be less likely to access information on LGBTQ youth issues at home.

In 1996, Congress started a federal funding program known as E-Rate, a program designed to offset telecommunication and Internet costs for schools and libraries.¹⁷ E-Rate was implemented to ensure equitable access to the Internet for rural, urban and suburban areas, and for poor and rich students.¹⁸ After E-Rate's implementation and since 2005, nearly 100 percent of public schools have access to the Internet.¹⁹ High schools have increasingly used the Internet to aid classroom instruction and to grant student access to the Internet in school libraries and computer labs.²⁰

Yet, as high school students gained unfettered access to the Internet, Congress grew concerned with students' ability to access pornography on the Internet through a public school or library computer.²¹ In 2000, President Clinton signed into law the Children's Internet Protection Act (CIPA).²² CIPA "requires that schools and public libraries receiving federal support adopt and implement 'technology protection' measures on all modem-equipped computers as a condition of receiving federal funds."²³ CIPA is designed to prevent students from using school computers to access visual depictions that

15. See *id.* at 107, stating that only 34.8% of the rural students surveyed were able to access LGBTQ-related information through the Internet using school computers. The sample size for this study was 7,261 students. *Id.* at xvi. Rural students composed 24.9% of this population or 1,808 students. *Id.* at 11. Thus, of the 1,808 rural students only 629 (1,808 x 34.8%) of them were able to access LGBTQ-related information through the Internet using school computers.

16. John Horrigan, Federal Communications Commission, *Broadband Adoption and Use in America* 39 (Feb. 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296442A1.pdf.

17. Euna Park, Hansa Sinha & Jing Chong, *Beyond Access: An Analysis of the Influence of the E-Rate Program in Bridging the Digital Divide in American Schools*, in 6 J. INFO. TECH. EDUC. 387, 387 (2007).

18. *Id.*

19. John Wells, Laurie Lewis & Bernard Greene, U.S. Dep't of Educ. Nat'l Ctr. for Educ. Statistics, *Internet Access in U.S. Public Schools and Classrooms: 1994-2005* 4 (Nov. 2006), available at <http://nces.ed.gov/pubs2007/2007020.pdf>.

20. Kelly Rodden, *The Children's Internet Protection Act in Public Schools: The Government Stepping on Parents' Toes?*, 71 FORDHAM L. REV. 2141, 2141 (2003).

21. See generally, Consortium for School Networking, *Making Progress: Rethinking State and School District Policies Concerning Mobile Technologies and Social Media* (Apr. 2012), available at http://www.aasa.org/uploadedFiles/Resources/MakingProgress_Doc.pdf; Federal Communications Commission, *Consumer Guide Children's Internet Protection Act (CIPA)* (Feb. 1, 2013), available at <http://transition.fcc.gov/cgb/consumerfacts/cipa.pdf>.

22. JASON CIANCOTTO & SEAN CAHILL, *LGBT YOUTH IN AMERICA'S SCHOOLS* 123 (The University of Michigan Press 2012).

23. Kathleen Conn, *Protecting Children From Internet Harm (Again): Will the Children's Internet Protection Act Survive Judicial Scrutiny?*, 153 ED. LAW. REP. 469, 473 (2001).

are obscene, child pornography, or harmful to minors.²⁴ Schools often restrict websites that discuss sex education or gender issues, even though CIPA does not cover these websites.²⁵ In an attempt to comply with CIPA, some public schools restrict the most well-known positive LGBTQ websites and online resources that are vital to the LGBTQ youth.²⁶

The inability of public high school students to access LGBTQ websites has profound implications and raises First Amendment questions. This Note addresses First Amendment issues surrounding public schools' use of Internet filters to deny their students access to LGBTQ websites through the Internet on public school computers. It specifically discusses the question: to what extent, if any, can a public school use Internet filters to block their students from accessing LGBTQ websites through the school's computers and Internet.

Part I of this Note discusses the LGBTQ teenage realities in public schools with particular emphasis on how these students fall behind in education and face increased mental health problems because of bullying. Part II outlines the case law behind the First Amendment's Free Speech Clause. This part includes

24. *Parents, Families and Friends of Lesbians and Gays Inc., v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888, 891 (W.D. Mo. 2012); Children's Internet Protection Act, 47 U.S.C. § 254(h)(6)(B)(i) (2006).

25. See generally Electronic Frontier Foundation, *Internet Blocking in Public Schools A Study on Internet Access in Educational Institutions* 1-2 (2003), https://www.eff.org/sites/default/files/filenode/net_block_report.pdf (stating that "schools that implement Internet blocking software even with the least restricting setting will block at a minimum tens of thousands of Web pages inappropriately." In contrast, if a school uses an Internet filter at its most restrictive setting then it will block 70 percent or more of the web sites in one search result); CIANCOTTO, *supra* note 22, at 124 (stating a national LGBTQ organization found approximately 20 percent of LGBTQ youth advocacy sites were blocked when using software purchased by public schools); *Filtering Software: Better, but still fallible*, CONSUMER REPORTS, June, 2005, at 36-37 (explaining popular Internet filters block websites discussing health issues, sex education, civil rights, politics and that "[m]ost unwarranted blocking occurred with sites featuring sex education or gender-related issues").

26. See Complaint 9-23, *Parents, Families and Friends of Lesbians and Gays Inc., v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888 (W.D. Mo. 2012) (2:11-cv-04212) stating the school's Internet filter blocked: PFLAG, DignityUSA, Matthew Shepard Foundation, Campus Pride, Affirmation, The Ali Forney Center, Claiming the Blessing, The Center for Lesbian and Gay Studies in Religion and Ministry, Day of Silence, International Day Against Homophobia and Transphobia, Evangelicals Concerned, Catholic Lesbians, Don't Ask, Don't Tell, Don't Pursue: A digital law project of the Robert Crown Law Library at Stanford Law School, Equality Federation, Equality Forum, Equality Matters, Families Like Ours, Family Equality Council, Four Freedoms Democratic Club, Freedom to Marry, Gill Foundation, The Gay & Lesbian Alliance Against Defamation, Gay & Lesbian Advocates & Defenders, GLBT Historical Society, Gay, Lesbian, & Straight Education Network, GOproud, Gay-Straight Alliance Network, Human Rights Campaign, International Gay & Lesbian Human Rights Commission, Immigration Equality, Lambda Legal, Lesbian Health & Research Center, Marriage Equality USA, National Center for Lesbian Rights, National Gay and Lesbian Task Force, NOH8 Campaign, LGBT@NYPL: The New York Public Library's LGBT collection, ONE National Gay & Lesbian Archives, Pride At Work Action Center, The Safe Schools Coalition, Servicemembers Legal Defense Network, Stonewall Democrats, Straight for Equality, The Trevor Project, Transgender Law & Policy Institute, which are all positive LGBTQ websites, do not contain pornography, and are fully appropriate under CIPA.

a detailed discussion of what the First Amendment does and does not protect, when the government may regulate speech, rights with respect to public school students, and access to the Internet in public places. Part III discusses how John and Jane Doe's situations fit into current First Amendment case law. It will also discuss how a court's understanding of the concept of heteronormativity²⁷ could alter its view of John's case. Finally, Part III advocates that courts should embrace public policy reasons to ensure public school students access to LGBTQ websites in school. This access provides a way for LGBTQ students to reach informative websites they may not otherwise be able to access.

I. LGBTQ STUDENTS' REALITY IN PUBLIC SCHOOLS

LGBTQ students negotiate daily teenage life stresses while often coping with a family and school system that might not be empathetic to LGBTQ youth.²⁸ LGBTQ students often have a brutal high school experience and harassed LGBTQ youth maintain lower grade point averages than students who do not experience harassment.²⁹ Since LGBTQ students' daily life has a direct impact on how they perform and why they turn to LGBTQ websites, it is important to fully understand these teens. This includes the number of LGBTQ students in the United States, how they experience additional stresses in high school, and how schools can shape policies that create a more positive environment for all students.

A. *The Numbers Add Up*

In 2011 the United States saw a rash of suicides among LGBTQ teens.³⁰ A high LGBTQ suicide rate is common, with LGBTQ teens and adults "almost twice as likely as heterosexuals to report a suicide attempt in the past year."³¹ Though the national media reported the suicides, individuals may wonder how

27. Samuel A. Chambers, *Telepistemology of the Closet; or, The Queer Politics of Six Feet Under*, in 26 J. AM. CULTURE 24, 26 (March 2003) (stating, "Heteronormativity means, quite simply, that heterosexuality is the norm— in culture, in society, in politics. . . Heteronormativity emphasizes the extent to which everyone, straight or queer, will be judged, measured, probed, and evaluated from the perspective of the heterosexual norm. It means that *everyone and everything is judged from the perspective of straight.*").

28. Gerald P. Mallon, *It's Like Opening Pandora's Box: Addressing the Needs of Gay and Lesbian Adolescents Within Educational Systems*, in UNDERSTANDING INDIVIDUAL DIFFERENCES HIGHLIGHTS FROM THE NATIONAL SYMPOSIUM ON WHAT EDUCATORS SHOULD KNOW ABOUT ADOLESCENTS WHO ARE GAY, LESBIAN, OR BISEXUAL 1, 1 (Feb. 1996).

29. RICHARD FOSSEY, TODD A. DEMITCHELL & SUZANNE ECKES, EDUCATION LAW ASSOCIATION, SEXUAL ORIENTATION, PUBLIC SCHOOLS, AND THE LAW 1 (2007).

30. Elizabeth Flock, *Eric James Borges, gay teen who made 'It Gets Better' video, commits suicide*, THE WASHINGTON POST (Jan. 13, 2012, 5:11 PM), http://www.washingtonpost.com/blogs/blogpost/post/eric-james-borges-gay-teen-who-made-it-gets-better-video-commits-suicide/2012/01/13/gIQAbAfywP_blog.html.

31. U.S. Surgeon General & National Action Alliance for Suicide Prevention, *2012 National Strategy for Suicide Prevention: Goals and Objectives for Action* 121 (2012), <http://www.surgeongeneral.gov/library/reports/national-strategy-suicide-prevention/full-report.pdf>.

many LGBTQ students there actually are in U.S. public schools. Answering this question is dependent on how the study defined and determined sexual orientation, reported sexual experiences, fantasies or actual romantic expressions, and whether it is by the participant's self-identification.³² Though LGBT youth are coming out at an earlier age than in the past, with some coming out as young as twelve-years-old and many out by the age of fifteen,³³ LGBTQ teenagers still go through six stages called the "Cass Stages."³⁴ The Cass Stages recognize individuals go through different stages in the developmental process as they discover and identify as a LGBTQ individual.³⁵ If, for example, a study tries to quantify LGBTQ youth, it may have numbers that are under-representative depending on which Cass Stage the participating individuals are in.

In 1989, an estimated 10 percent of adolescents in the United States, three million total, were LGBTQ.³⁶ The 1996 National Longitudinal Study of Adolescent Health, which was composed of more than 12,000 youth, however, found that 6 percent of participants between the ages of thirteen and eighteen reported same-sex attraction.³⁷ A 1999 Safe Schools Coalition of Washington State review of eight studies found that 4 to 5 percent of secondary school teens identified as LGB, engaged in same-sex sexual activity, or experienced same-sex sexual attraction.³⁸ The 2001 Massachusetts Youth Risk Behavior Survey stated that 5 percent of its respondents self-identified as LGB or had same-sex sexual experience.³⁹ Comparatively, the 2011 Vermont Youth Risk Behavior Survey found that 1 percent of its surveyed high school students reported themselves as gay or lesbian, 4 percent as bisexual, and 3 percent as

32. Sarah Holmes & Sean Cahill, *School Experiences of Gay, Lesbian, Bisexual and Transgender Youth*, 1 J. GAY & LESBIAN ISSUES IN EDUC. 53, 54 (2004).

33. CIANCOTTO, *supra* note 22, at 4.

34. See generally Vivienne C. Cass, *Homosexuality Formation: A Theoretical Model*, 4 J. HOMOSEXUALITY 219-235 (1979). In this groundbreaking article, Cass proposed that sexual identity is acquired through a developmental process and there are six stages an individual goes through to acquire a homosexual identity. The six stages are: identity confusion, identity comparison, identity tolerance, identity acceptance, identity pride and identity synthesis. See *Sexual Identity: The Case Model*, MULTICULTURAL.USF.EDU, http://multicultural.usf.edu/pdf/safezone/support_identity.pdf (last visited Nov. 1, 2012) for a synopsis of the six-stage model and what an individual goes through at each stage.

35. See generally Suzanne Degges-White, Barbara Rice & Jane E. Myers, *Revisiting Cass' Theory of Sexual Identity Formation: A Study of Lesbian Development*, in 22 J. MENTAL HEALTH COUNSELING 318, 318-331 (2000) (concluding through its own study of lesbians, that today some lesbians fit the Cass' model very closely).

36. Robert W. Deisher, *Adolescent homosexuality: Preface*, in 17 J. HOMOSEXUALITY xiii, xiii-xv (1989).

37. CIANCOTTO, *supra* note 22, at 13.

38. Beth Reis & Elizabeth Saewyc, *Eighty-Three Thousand Youth: Selected Findings of Eight Population-Based Studies as they pertain to anti-gay harassment and the safety and well-being of sexual minority students*, SAFE SCHOOLS COALITION OF WASHINGTON 3 (May 1999), available at <http://www.safeschoolscoalition.org/83000youth.pdf>.

39. CIANCOTTO, *supra* note 22, at 13.

questioning.⁴⁰ Though it is hard to exactly quantify how many public high school students are LGBTQ, these studies indicate that out of 15 million U.S. students in grades seventh through twelfth, approximately 1.3 million⁴¹ to 2.5 million⁴² may identify as LGBTQ.

B. LGBTQ Students' Experiences and Stresses In High School

Many LGBT students do not come out to their families or at school because they are afraid of their families' reactions, fear they will be treated differently or judged at school, or even bullied.⁴³ Regardless of whether an LGBTQ student is out or in the closet, these youth negotiate daily teenage life stresses and cope with family and school systems historically apathetic to LGBTQ youth.⁴⁴ In a 1996 study, only 11 percent of gay and lesbian youth experienced supportive responses after coming out to their parents.⁴⁵ The study found that 20 percent of the mothers and 28 percent of the fathers were rejecting or completely intolerant.⁴⁶ One student's story exemplified the emotions and fear many LGBTQ students have in high school:

"Derek Henkle, a gay student[. . .] was a victim of harassment in the Nevada public school system, [and w]hile at school, Derek reported being shoved against lockers, spit on, and punched in the face. During one episode of harassment, a lasso was thrown around his neck, and the harasser threatened to drag him behind a pickup truck. After Derek escaped from the student, a teacher laughed at Derek because he was so upset."⁴⁷

This student went on to express his fear not only from fellow students, but also from a high school teacher,⁴⁸ a common experience for many LGBTQ high school students. In fact, in a two-year survey, three-fourths of participants stated their high school teachers had negative attitudes toward homosexuality.⁴⁹ Eighty percent of the participants stated that few to none of their teachers viewed homosexuality as an acceptable lifestyle.⁵⁰ In 2009 nearly two-thirds of

40. Harry Chen & Armando Vilaseca, *The 2011 Vermont Youth Risk Behavior Survey*, VT. DEP'T OF HEALTH 63 (2011), http://healthvermont.gov/research/yrbs/2011/documents/2011_YRBS_statewide_report_with_cover.pdf.

41. CIANCOTTO, *supra* note 22, at 14; Holmes, *supra* note 32, at 55.

42. PETER DEWITT, DIGNITY FOR ALL SAFEGUARDING LGBT STUDENTS 17 (2012) [*hereinafter* DIGNITY FOR ALL].

43. Human Rights Campaign, *Growing Up LGBT in America* 6 - 11 (2012), available at <http://www.hrc.org/files/assets/resources/NCOD-Youth-Report.pdf>.

44. Mallon, *supra* note 28, at 1.

45. CIANCOTTO, *supra* note 22, at 33.

46. *Id.*

47. FOSSEY, *supra* note 29, at 1 (citing *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001)).

48. *See generally*, FOSSEY, *supra* note 29, at 1 (citing *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001)).

49. HILDA F. BESNER & CHARLOTTE I. SPUNGIN, *GAY & LESBIAN STUDENTS: UNDERSTANDING THEIR NEEDS* 97 (Taylor & Francis Publishers 1995).

50. *Id.*

students heard homophobic remarks from school employees,⁵¹ suggesting that school personnel's disregard toward LGBTQ students continues.

LGBT youth who have not disclosed their sexual orientation to their school peers or school staff have higher levels of depression than LGBT students who have come out to their peers and school staff.⁵² Those that do come out to their parents and teachers may be physically and emotionally sound, however daily life in school is often physically and mentally exhausting and brutal. In a 2009 study, nearly nine out of ten of surveyed students heard "gay" used in a negative way.⁵³ Nearly three-fourths of students reported hearing derogatory and homophobic comments, such as "faggot" or "dyke."⁵⁴ Similarly, almost half of LGBTQ students are verbally harassed at school because they are LGBTQ,⁵⁵ and 37⁵⁶ to 47 percent of all surveyed students were physically harassed at school because of their actual or perceived sexual orientation.⁵⁷

When harassed by peers, LGBTQ youth have significantly higher mental health problems, truancy, depression, and drug issues than their heterosexual peers.⁵⁸ Harassment by peers has a real effect on LGBTQ youth. One study found a statistically significant relationship between verbal, physical and sexual harassment and mental health issues.⁵⁹ Harassed LGBTQ youth maintain lower grades than students who experience less harassment, and 28 percent of the students who experienced harassment dropped out of school.⁶⁰ Furthermore, LGBTQ youth attempt suicide at rates higher than their heterosexual peers,⁶¹ a likely result of the added pressure, harassment, and depression.

51. Kosciw, *supra* note 14, at 15.

52. *Id.* at 51.

53. *Id.* at 16.

54. *Id.*

55. CIANCOTTO, *supra* note 22, at 45.

56. FOSSEY, *supra* note 29, at 2 (stating 37 percent of students were physically harassed because of their sexual orientation).

57. Kosciw, *supra* note 14, at 26 (stating 46.9 percent of LGBT students were physically harassed).

58. Holmes, *supra* note 32, at 57 (stating "Such [anti-gay harassment] abuse can have devastating effects on the children targeted, including higher rates of suicidal ideation and attempted suicide, higher truancy and drop-out rates, substance abuse and running away from home. In a 1999 Massachusetts study, almost 49 percent of lesbian, gay and bisexual students said they had considered suicide during the previous year.").

59. CIANCOTTO, *supra* note 22, at 52.

60. FOSSEY, *supra* note 29, at 1.

61. Steven A. Safren & Richard G. Heimberg, *Depression, Hopelessness, Suicidality, and Related Factors in Sexual Minority and Heterosexual Adolescents*, 67 J. CONSULTING & CLINICAL PSYCHOL. 859, 859-866 (1999) (reporting that 30 percent of LGB youth versus 13 percent of heterosexual youth had attempted suicide); Robert Garofalo, R. Cameron Wolf, Lawrence S. Wissow, Elizabeth R. Woods & Elizabeth Goodman, *Sexual Orientation and Risk of Suicide Attempts Among a Representative Sample of Youth*, 53 ARCHIVES PEDIATRIC & ADOLESCENT MED. 487, 487-493 (1999) (finding that LGBTQ high school students were 3.4 times as likely to have attempted suicide within the last 12 months as their heterosexual peers).

C. School Policies Alter LGBTQ Students' Self-Image and Truancy Rates

School policies can greatly alter LGBTQ students' experiences. Their attendance rates improve when specific anti-harassment policies are in place, when teachers intervene in anti-gay bullying, and when information and support related to sexual orientation and gender identity are available.⁶² School administrators set the tone, culture, and attitude for the school population. An accepting administrator creates a greater air of openness and acceptance toward LGBT students.⁶³ One study illustrated a school's effect on their LGBTQ students, finding that LGBTQ students with access to a Gay Straight Alliance (GSA) group and supportive teaching staff are likely to miss fewer days of school than LGBTQ students without these resources.⁶⁴

Schools unwilling to take a public stance on perceived "controversial" topics, such as anti-bullying or LGBTQ-inclusive policies, should create opportunities for their students to access LGBTQ information and resources online. In 2012, only 30 percent of students were able to access information on LGBT history, people or events on school Internet.⁶⁵ In rural areas specifically, only 22 percent of students had access to LGBT resources via school Internet.⁶⁶

II. MAKING SENSE OF FIRST AMENDMENT PROTECTIONS

First and foremost, the "First Amendment [to the United States Constitution] means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."⁶⁷ The First Amendment was originally only applied to restrict the Federal Government.⁶⁸ In 1925 the United States Supreme Court ruled the Fourteenth Amendment to the Constitution applies the First Amendment's Free Speech Clause to the States.⁶⁹

If the First Amendment does not protect an individual's particular words and expressions, those words and expressions may be narrowly regulated or restricted by the government.⁷⁰ Thus, the first step in any First Amendment analysis is to determine whether the First Amendment protects an individual's restricted or prohibited speech.⁷¹

62. CIANCOTTO, *supra* note 22, at 35.

63. DIGNITY FOR ALL, *supra* note 42, at 17.

64. FOSSEY, *supra* note 29, at 9.

65. CIANCOTTO, *supra* note 22, at 93.

66. *Id.*

67. *Police Dep't. of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

68. U.S. CONST. amend. I.

69. *See Gitlow v. People of N.Y.*, 268 U.S. 652 (1925).

70. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

71. Beattie I. Butler, *Muzzling Leviathan: Limiting State Powers of Speech and Expression*, 5 KAN. J.L. & PUB. POL'Y 153, 156 (Winter 1996).

A. *Speech Not Protected By The First Amendment*

The United States Supreme Court established speech that is categorically not protected by the First Amendment including obscene or lewd materials, libelous words and fighting words.⁷² In *Miller v. California* the Court created a test to determine whether speech is obscene.⁷³ The three-part test was developed to help lower courts determine whether a given speech or expression is obscene, rendering the speech unprotected by the First Amendment and subject to regulation.⁷⁴ The *Miller* Court cautioned, however, that courts must remain sensitive to any infringement on genuinely serious literary, artistic, political or scientific expression.⁷⁵ The Supreme Court also ruled that child pornography is unprotected under the First Amendment, regardless of whether it is obscene.⁷⁶ The Supreme Court cautioned that States banning child pornography must adequately define it in applicable laws.⁷⁷

B. *Speech and Expressive Activities That May be Regulated*

If the government restricts protected speech, such restriction must be justified by a compelling governmental interest and must be narrowly tailored to achieve that end.⁷⁸ The U.S. Supreme Court recognizes three categories of regulations on speech: content neutral, content based, and viewpoint based.⁷⁹ The Court created tests for content-neutral and content-based determinations.⁸⁰ Viewpoint discrimination by a state actor, however, is regarded as necessarily violating the First Amendment, a right the Court considers one of the United States' most cherished constitutional rights.⁸¹ The government cannot silence

72. *Chaplinsky*, 315 U.S., at 572.

73. *Miller v. California*, 413 U.S. 15, 39 (1973) (explaining that the *Miller* test has three parts: Whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest," whether "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," and "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.").

74. *See id.* (explaining that previous courts have struggled to maintain a true definition for obscene and adopting a the *Miller* test, which has three parts: Whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest," whether "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," and "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.").

75. *Id.* at 23.

76. *See New York v. Ferber*, 458 U.S. 747 (1982).

77. *New York v. Ferber*, 458 U.S. 747, 764 (1982).

78. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

79. Dan V. Kozlowski, *Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine*, 13 COMM. L. & POL'Y 131, 131 (2008).

80. *Id.*

81. *Parents, Families and Friends of Lesbians and Gays Inc., v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888, 902 (W.D. Mo. 2012).

one viewpoint to enhance another.⁸² “Viewpoint discrimination exists (1) when the government discriminates against offensive, unpopular or disfavored views, or (2) when a competing perspective has been removed from a forum or debate.”⁸³

“The First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.”⁸⁴ As a general matter, “the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”⁸⁵ The Supreme Court has only narrowly approved content-based regulation.⁸⁶

The government, however, can restrict certain speech or expression if it meets the “content neutral” standard.⁸⁷ For content neutrality, the principal inquiry is whether the government adopted a regulation of speech because of disagreement with the message it conveys.⁸⁸ Content neutral regulations are constitutional if they are “justified without reference to the content of the regulated speech.”⁸⁹ A regulation of expressive activity is content neutral even if it has incidental effect on some speakers or messages but not others, and if it serves some purpose unrelated to the content of regulated speech.⁹⁰

C. *A Fractured Idea: A Student’s Right to Receive Information*

In *Board of Education, Island Trees Union Free School Dis. No. 26 v. Steven A. Pico*, the Supreme Court, in seven fractured opinions, discussed a school board’s authority to remove books from the libraries of their schools.⁹¹

82. See *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) stating that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed ‘to secure the widest possible dissemination of information from diverse and antagonistic sources’ and ‘to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”

83. Kozlowski, *supra* note 79, at 178.

84. *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 537 (1980).

85. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (holding a municipality could not exempt labor picketing from a general prohibition on picketing at a school even though the ban would have reached both pro- and anti-union demonstrations).

86. See *Greer v. Spock*, 424 U.S. 828, 839 (1976) (holding the Federal Government could prohibit partisan political speech on a military base); *Lehman v. Shaker Heights*, 418 U.S. 298, 303-04 (1978) (stating a city transit system did not have to allow partisan political advertising for commercial advertising on its vehicles).

87. See *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (stating that regulation of the time, place, or manner of protected speech could be narrowly regulated to serve the government’s legitimate, content-neutral interests).

88. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984); see also *Ward*, 491 U.S. at 791.

89. *Clark*, 468 U.S. at 295.

90. *Ward*, 491 U.S. at 791.

91. *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 857 (1982).

In *Pico* the board of education removed books from its high school and junior high libraries because it alleged the books were “anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy.”⁹² A school board has the broad ability to manage school affairs,⁹³ however, the Court recognized there are constitutional limits on the State’s ability to control the curriculum and classroom.⁹⁴

The *Pico* school board attempted to rationalize its book removal decision with its “duty to inculcate community values,” but the Court decided this emphasis was misplaced.⁹⁵ The *Pico* school board attempted to extend their “absolute discretion beyond the compulsory environment of the classroom” into the school’s library, where students could voluntarily inquiry and read any book.⁹⁶ The constitutionality of the school board’s decision to remove a book from its libraries depends upon the motivation behind the school board’s actions.⁹⁷ The *Pico* board exercised its discretion “in a narrowly partisan or political manner,”⁹⁸ and a school board cannot remove books because it disagrees with the ideas within the book.⁹⁹ If, however, the school board removed the books because of education reasons, then removal may have been permissible.¹⁰⁰ *Pico* only addressed a school board’s decision to *remove* books from its libraries.¹⁰¹ *Pico*, though, did not affect the local school board’s authority to determine what content could be *added* to the school’s libraries.¹⁰²

Notably, *Pico* was distinguished from other cases analyzing a school board’s authority over its curriculum because the *Pico* library books were optional reading rather than required reading.¹⁰³ The Court emphasized a school library is a “principal locus” of freedom for students to “always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.”¹⁰⁴ The Court elevated the library to such a level that it would seem antithetical to

92. *Id.* at 853.

93. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (noting a state has the power to “prescribe a curriculum for institutions which it supports”); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (affirming the state can regulate all of its schools); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (reaffirming that public education in the U.S. “is committed to the control of state and local authorities”).

94. *See e.g., Meyer*, 262 U.S. at 403 (striking down a state law that forbade teaching of foreign languages in public schools); *Epperson*, 393 U.S. at 103 (holding that a state law that prohibited teaching Darwinian theory of evolution in public schools as unconstitutional); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (recognizing that a “State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge”).

95. *Pico*, 457 U.S. at 869.

96. *Id.*

97. *Id.* at 871.

98. *Id.* at 870.

99. *Id.* at 871.

100. *Id.*

101. *Id.* at 871-72.

102. *Id.*

103. *Id.* at 869.

104. *Id.*

the goals of public education to remove a book and disrupt “a place dedicated to quiet, to knowledge, and to beauty.”¹⁰⁵

D. Public School Students’ First Amendment Rights In Schools

Tinker v. Des Moines Independent Community School Dis. established students do not shed their “constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁰⁶ In *Tinker*, several students wore armbands inside the school during class time to protest the Vietnam War.¹⁰⁷ The Court ruled the students’ expression was “closely akin to ‘pure speech’.”¹⁰⁸ It stated that in order for the school to justify prohibition of a particular expression (viewpoint discrimination), the state must show the action was caused by “something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”¹⁰⁹ The Court reasoned that students retain their First Amendment rights in school and can exercise these rights if they do so “without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others.”¹¹⁰

After *Tinker*, courts widely accept that neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹¹¹ Though neither students nor teachers shed their speech rights, students, in particular, do not have unfettered rights in school.¹¹² First Amendment case law for students in public school has developed four relevant questions for courts to consider:

- a. Does the student speech pose a substantial and material disruption to the school,¹¹³ or
- b. Is the student speech vulgar and lewd speech such that it undermines the school’s educational mission,¹¹⁴ or
- c. Is the speech part of a school sponsored function, but causes the principal to have legitimate pedagogical concerns,¹¹⁵ or
- d. Is the student’s speech advocating for illicit drug use?¹¹⁶

If a student’s speech falls under one of these four questions, a court may allow the public school to restrict the student’s speech; though any restriction

105. *Id.* at 868 (citing *Brown v. Louisiana*, 383 U.S. 131, 142 (1966)).

106. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969).

107. *Id.* at 514.

108. *See, e.g., id.* at 505.

109. *Id.* at 509.

110. *Id.* at 513.

111. *Id.* at 506.

112. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

113. *See Tinker*, 393 U.S. at 511.

114. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

115. *See Kuhlmeier*, 484 U.S. at 273.

116. *See Morse v. Frederick*, 551 U.S. 393, 410 (2007).

still must be narrowly tailored to achieve the end.¹¹⁷ In contrast, if schools are depriving students of First Amendment freedoms, then such deprivation “unquestionably constitutes irreparable injury”¹¹⁸ and students are entitled to legal remedies.

After *Tinker*, the Supreme Court further defined and restricted when students in public schools may exercise their First Amendment rights. In *Bethel Sch. Dist. No. 403 v. Fraser*, a high school student was suspended for giving a lewd speech that contained non-obscene sexual innuendos when nominating his friend for student body vice president.¹¹⁹ The *Fraser* Court ruled that the school was within its permissible authority in imposing sanctions upon Fraser, holding the First Amendment does not protect “vulgar and lewd speech” that undermines the “school’s basic educational mission.”¹²⁰ The Court stated neither an assembly nor a classroom is a place for sexually explicit monologues directed at unsuspecting teenage students.¹²¹ *Fraser* showed both the Court’s willingness to meticulously examine a student’s speech or expression, and its continued to disallowance of the First Amendment as a protector for lewd or sexually explicit speech. Moreover, the Court solidified the fact that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”¹²²

In *Hazelwood Sch. Dist. v. Kuhlmeier*, the Court ruled that the high school paper published by students in journalism class did not qualify as a “public forum.”¹²³ School officials retained the right to impose reasonable restrictions on the student speech in school newspapers.¹²⁴ *Kuhlmeier* found the high school principal’s decision to remove two pages discussing student pregnancy did not violate students’ speech rights.¹²⁵ The pages were removed on the ground that they unfairly impinged on privacy rights of pregnant students and others.¹²⁶ Agreeing with the principal’s decision, the Court held a school must retain authority over speech that is “ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.”¹²⁷

Then in 2007, the Supreme Court examined whether the First Amendment protects a student advocating illegal drug use.¹²⁸ In *Morse v. Frederick*, the student unveiled a banner off campus during a school-sanctioned event, which

117. See *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

118. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

119. *Fraser*, 478 U.S. at 678.

120. *Id.* at 685.

121. *Id.*

122. *Id.* at 682.

123. See e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267-68 (1988).

124. *Id.* at 261.

125. *Id.* at 274.

126. *Id.*

127. *Id.* at 271.

128. See *Morse v. Frederick*, 551 U.S. 393, 409-10 (2007).

read “BONG HiTS 4 JESUS.”¹²⁹ Morse, the student, was suspended because of this banner.¹³⁰ The Supreme Court stated Morse’s banner constituted a school-sponsored event and his banner was promoting illegal drug use.¹³¹ Accordingly, the Court held that the First Amendment does not require schools to tolerate student expression that advocates illegal drug use while at school events.¹³² The Court found that this type of speech is particularly dangerous for teenagers.¹³³

E. The Forum Matters

The type of restrictions that can be placed on protected speech depends on the forum in which individuals engage in speech.¹³⁴ There are three categories of forums: (1) traditional, or “quintessentially” public,¹³⁵ (2) limited public,¹³⁶ and (3) nonpublic.¹³⁷

A traditional public forum is for the free exchange of ideas.¹³⁸ “Speakers can be excluded from a public forum when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.”¹³⁹ Restrictions to access of a public forum for expression must be minimal, because the purpose of that forum is the free exchange of ideas.¹⁴⁰ In a nonpublic forum, government may control access by restricting identifiable subjects or speakers if the restriction is reasonable and viewpoint neutral.¹⁴¹

An Internet access system in a library is neither a traditional nor a limited public forum.¹⁴² “Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as distinctions drawn are reasonable in light of the purpose served by the forum and viewpoint neutral.”¹⁴³ The government violates the First Amendment, however, when it denies access to a

129. *Id.* at 397.

130. *Id.* at 398.

131. *Id.* at 410.

132. *Id.*

133. *Id.*

134. *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

135. *Perry Educ. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 45 (1983) (holding a traditional public forum is a forum which “by long tradition or by governmental fiat [has] been devoted to assembly and debate. . .”).

136. *Id.* (stating a limited public forum is a one that is “generally open to the public even if [the state] was not required to create the forum in the first place.”).

137. *Id.* at 46; *see also*, GEOFFREY R. STONE ET. AL., *THE FIRST AMENDMENT* 286 (1999); G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U.ILL. L. REV. 949, 950–51.

138. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)

139. *Id.*

140. *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 63 F.3d 581, 587 (7th Cir. 1995).

141. *Id.*

142. *United States v. American Library Ass’n*, 539 U.S. 194, 205 (2003).

143. *Cornelius*, 473 U.S. at 806.

speaker because the viewpoint he or she espouses is on an “otherwise includible subject.”¹⁴⁴

It is important to note the Children’s Internet Protection Act (CIPA) only requires schools to use “‘technology protection’ measures on modem–equipped computers as a condition of receiving federal funds.”¹⁴⁵ The technology is meant to protect children using school computers from viewing visual depictions that are obscene, child pornography, or harmful to minors.¹⁴⁶ The fact there is regulation of speech to protect children from exposure to sexually explicit material does not foreclose inquiry into its validity under the First Amendment.¹⁴⁷ In 2001, a lawsuit challenged CIPA’s constitutionality.¹⁴⁸

In *United States v. American Library Association (ALA)*, the Supreme Court stated that First Amendment public-forum principles, which would have required the Court to apply strict scrutiny, did not apply because Internet access in a public library is neither a traditional nor a limited public forum.¹⁴⁹ The Court analyzed the traditional role libraries assume and noted that libraries historically do not include pornography within its collection.¹⁵⁰ Additionally, the Court stated a library’s primary purpose is to help the public obtain appropriate material for educational and informational purposes.¹⁵¹ The Supreme Court, in two analogous contexts, held “the Government has broad discretion to make content-based judgments in deciding what private speech to make available to the public.”¹⁵² Some courts read *ALA* to say that if a school or library decides to exclude all resources on a certain *subject* by employing an Internet filter or book filter, then the standard articulated in *ALA* should be used.¹⁵³ Specifically, the intention and effect of a library’s decision “controls the analysis, and not the medium of the resource nor whether the decision can be characterized as an addition or removal.”¹⁵⁴ Seemingly, the test is whether the library’s removal of certain subject matter was appropriate “in fulfill[ing] [its] traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes.”¹⁵⁵

144. *Id.*

145. Kathleen Conn, *Protecting Children From Internet Harm (Again): Will the Children’s Internet Protection Act Survive Judicial Scrutiny?*, 153 EDUC. L. REP. 469, 473 (2001).

146. 47 U.S.C. § 254(h)(6)(B) (2006).

147. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 875 (1997).

148. *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194 (2003).

149. *Id.* at 205.

150. *Id.* at 212.

151. *Id.* at 196.

152. *Id.* at 195.

153. *Parents, Families and Friends of Lesbians and Gays Inc., v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888, 901 (W.D. Mo. 2012).

154. *Id.* at 901.

155. *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 212 (2003).

III. A COURT'S DILEMMA – RESOLVING JOHN AND JANE'S INABILITY TO ACCESS LGBTQ WEB SITES WHILE AT SCHOOL

Courts often follow the maxim, “[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.”¹⁵⁶ Yet, Jane Doe and John both had a problem at their schools – they were unable to access LGBTQ websites while using their schools’ computers, and both decided to take their issues to court. Though both students were unable to access the LGBTQ websites, the schools’ probable underlying reasons to block the websites result in starkly different constitutional analyses.

A. *John’s Problem – A School’s Politically Motivated Decision Guised As A Curriculum Choice*

John is a hypothetical person, but his situation is not out of the realm of possibility. His inability to access any information on sexuality on the Internet through his school’s computer was his school board’s policy decision, or their attempt to comply with a state statute. Typically, there are three types of statutes or school board policies that restrict discussion of LGBTQ issues within a public school’s curriculum: (1) bans on the topic of LGBTQ issues, (2) bans on teachers’ expressions that being gay, lesbian, or transgender is acceptable, or (3) requirements that teachers emphasize that life as a gay, lesbian or transgender person is unacceptable.¹⁵⁷

Authors have argued that school boards that decide to not educate students on same-sex sexual education violate students’ First Amendment rights to receive information.¹⁵⁸ One federal appeals court noted there is no strong consensus regarding the application of the First Amendment to school board’s selection of curricular materials.¹⁵⁹ This is an important issue, however, this Note assumes John’s school did not violate the Constitution when the school board decided to avoid the issue of sexuality completely; however, in *supra* Part III.A.i. it is argued that it is not practically possible to exclude all websites discussing sexuality or issues relating to LGBTQ individuals. John’s predicament hinges on whether the Internet is part of his school’s curriculum and whether John tried to access the LGBTQ websites in a classroom or his school library.

156. Pratt v. Indep. Sch. Dist. No. 831, Forest Lake, Minn., 670 F.2d 771, 779 (1982).

157. Nancy Tenney, *The Constitutional Imperative of Reality in Public School Curricula: Untruths About Homosexuality as a Violation of the First Amendment*, 60 BROOK L. REV. 1599, 1642-43 (1995).

158. *See id.* at 1641-42 (stating that anti-gay slant to public school curriculum violate students’ First Amendment right to receive information); Sarah Conrey, *Hey, What About Me? Why Sexual Education Classes Shouldn’t Keep Ignoring LGBTQ Students*, 23 HASTINGS WOMEN’S L.J. 85, 102 (2012) (discussing, in part, how parents might use the First Amendment to challenge districts for not discussing LGBTQ issues in sexual education classes).

159. Chiras v. Miller, 432 F.3d 606, 616 (5th Cir. 2005).

The *Pico* plurality emphasized the voluntary nature of the school's library and of the reading material within.¹⁶⁰ *Pico* noted that if students were required to read the removed materials, then the school district would have been choosing its curriculum and the books' removal may have been justified.¹⁶¹ If applying *Pico*, it is necessary to determine if it was a mandatory activity for John to access the Internet.

John's attempt to discover and learn more about sexuality was a voluntary inquiry on his own part and not a mandatory activity. In fact, his inquiry was the direct opposite of the school's sexual-education curriculum. Still, John's inability to access this information on the Internet in a *classroom* would seem to reflect the "school's curriculum [which] necessarily reflect[s] the value judgments of those responsible for its development. . . [and] is not prohibited by the First Amendment."¹⁶² The analysis and analogies become convoluted and complex, though, if John attempted to learn more about LGBTQ issues through the Internet on a school's computer in a *library*.

If John went to his school's library and logged onto a computer for the sole purpose of finding websites discussing sexuality and LGBTQ issues, his experience is analogous to a student wandering into a library doing optional, rather than required, reading. Moreover, the Internet itself has been compared to a "vast library,"¹⁶³ and that blocking images from a website would be "analogous to taking a book out of a library."¹⁶⁴ A court deciding John's case would need to determine if the particular website John tried to access is part of a school's curriculum even though John tried to access the website in a school library, without being required to do so for a class. If it is part of the school's curriculum, is the school's blocking of websites more analogous to choosing not to add certain ideas or viewpoints to its curriculum *or* is it more analogous to a school's decision to remove certain books from its library?

Ultimately, "the First Amendment precludes local authorities from imposing a 'pall of orthodoxy' on classroom instruction which implicates the state in the propagation of a particular religious or ideological viewpoint."¹⁶⁵ John's inability to access websites discussing sexuality could be analogous to a school adding a new library (the Internet) with lots of books (websites), and then deciding to remove certain books (websites). Still, a court evaluating John's case would need to determine if his school removed the sexuality websites in a "narrowly partisan or political manner"¹⁶⁶ because the school disagreed with the ideas and views within the websites.

160. Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 869 (1982).

161. *Id.*

162. *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1012 (9th Cir. 2000).

163. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 853 (1997).

164. *Bowler v. Hudson*, 514 F. Supp. 2d 168, 180 (D. Mass. 2007).

165. *Pratt v. Indep. Sch. Dist. No. 831, Forest Lake, Minn.*, 670 F.2d 771, 776 (1982).

166. Bd. of Educ., *Island Trees Union Free Sch. Dis. No. 26 v. Pico*, 457 U.S. 853, 870 (1982).

i. Analyzing LGBTQ Issues In a Heteronormative Society

At the heart of this problem is the tension between deferring to state and local school board authority to best educate children, and courts' responsibilities of ensuring the State does not violate students' First Amendment rights. Moreover, it is important to remember that appellate level courts would review findings of "constitutional facts" *de novo*.¹⁶⁷ Reviewing facts *de novo* means an "appellate court must make an independent examination of the whole record."¹⁶⁸ Since all court levels will make an independent examination of the facts in a case similar to John's or Jane's, it is important for the tensions and paradoxes of these situations be exposed.

Without a doubt, a public school has a difficult task. The school must educate America's youth, ensure safety within the school, and "walk a tight rope between competing constitutional demands made by parents, students, teachers and the school [districts'] other constituents."¹⁶⁹ Whether a school is able to "exclude all resources on the *subject* of LGBT issues, whether by employing an Internet filter or by book selection or removal,"¹⁷⁰ has implications for a court's legal analysis. If a school is able to exclude this subject, then the standard articulated in *ALA* should be employed. If, however, a school district cannot exclude all resources on the subject of LGBT issues, but still restricts access to LGBT material, then it is likely the school is preferring a certain viewpoint and its decision should be viewed from the exacting scrutiny of *Pico* and *Pratt*.

In John's case, the school may be able to limit John's access to LGBTQ websites if the school excluded all resources on the *subject* of sexuality. Yet, this is the first paradox a court would have to resolve. It is unlikely a school could restrict the subject of sexuality from its curriculum. For example, John's school mandates abstinence-only sexual education, promoting no sexual relations until marriage. By teaching abstinence only, John's school is implicitly preferring one view of homosexuality – mainly that its gay students should never have homosexual sex, even as adults, because currently most states do not recognize gay marriage¹⁷¹ and are explicitly exploring sexuality from the confines of heterosexuality.

167. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984) ("Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold.")

168. *Don's Porta Signs, Inc. v. Clearwater*, 829 F.2d 1051, 1053 n.9 (11th Cir. 1987).

169. *Parker v. Hurley*, 514 F.3d 87, 107 (1st Cir. 2008).

170. *Parents, Families and Friends of Lesbians and Gays Inc., v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888, 901 (W.D. Mo. 2012).

171. Though in *United States v. Windsor*, 133 S.Ct. 2675 (2013) (Docket No. 12-307) the U.S. Supreme Court ruled that the federal Defense of Marriage Act is unconstitutional, the decision did not say there was a constitutional right for gays and lesbians to marry, and states still determine whether a marriage between same-sex individuals is valid. Currently, there are 36 states that ban marriage between same-sex individuals completely. *Where Gay Marriage Stands In All 50 States*, MSN NEWS, <http://news.msn.com/us/where-gay-marriage-stands-in-all-50-states> (last visited September 5, 2013).

Additionally, a court should give pause to the notion that a school could “exclude all resources on the *subject* of LGBT issues.”¹⁷² For Derek Henkle¹⁷³, the previously mentioned gay student, the “issue” was harassment and teacher indifference.¹⁷⁴ In fact, many websites that Jane Doe was unable to access involved more than just LGBT issues. Many dealt with gender and human equality,¹⁷⁵ or happiness and individual potential.¹⁷⁶ For a school to argue that it has no stance on LGBTQ issues or does not deal with LGBTQ issues within its curriculum underestimates a LGBTQ student’s high school experience and needs. A gay high school student, for example, may not only be interested in learning about same-sex sex, but also on how to deal with bullying in high school, or depression. Though a LGBTQ student may access information about these issues from a “LGBTQ” website, LGBTQ students’ issues cannot be reduced just to “the subject of LGBT issues.” Their issues are often issues heterosexual high school students also face. Thus, for a high school to exclude all resources on the *subject* of LGBT issues, the school must exclude categories so broad, such as bullying, that the helpfulness of the school’s curriculum and Internet would be significantly reduced.

ii. In the School’s Defense

John’s school board may be in a state where school boards are elected and their decision could have been politically motivated.¹⁷⁷ Nonetheless, the school could offer compelling arguments on why its decision was constitutional. First, while it is unlikely the school would argue all websites discussing sexuality were obscene materials, child pornography, or contained fighting words,¹⁷⁸ the school may argue it blocked websites discussing sexuality in order to comply with CIPA. This argument is likely without merit. CIPA requires schools to block visual depictions that are obscene, child pornography or harmful to

172. *Camdenton*, 853 F. Supp. 2d at 901.

173. *See supra Part I-B*.

174. *See* RICHARD FOSSEY, TODD DEMITCHELL & SUZANNE ECKES, *SEXUAL ORIENTATION, PUBLIC SCHOOLS, AND THE LAW* 1 (Educ. Law Assoc. ed., 2007) (citing *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001)).

175. E.g., *About*, NOH8 CAMPAIGN, <http://www.noh8campaign.com/article/about> (2012).

176. *What is the It Gets Better Project?*, IT GETS BETTER PROJECT, <http://www.itgetsbetter.org/pages/about-it-gets-better-project/> (last visited February 25, 2013).

177. For a list of how local school board members are selected see <http://www.nsba.org/SchoolLaw/Issues/Governance/electionschart.pdf>.

178. A school and its technology experts would most likely perform a quick Internet search and find many Web sites discuss sexuality and cannot fit into an unprotected category such as child pornography. For an example of a website discussing sexuality from a psychological view see: <http://www.apa.org/topics/sexuality/index.aspx>.

minors.¹⁷⁹ John's school could have used a more advanced Internet filter to block only those images.

Second, the school may try to regulate access to all LGBTQ websites using the justification from *Fraser* that the speech is "plainly offensive" or that the websites are "sexually explicit, indecent, or lewd speech."¹⁸⁰ This argument may apply to some websites, but a school cannot argue that all LGBTQ websites exhibit such speech. Furthermore, it is unlikely that a court would accept the notion that the school blocked these online resources because the school was safeguarding the students from "speech that can be reasonably regarded as encouraging illegal drug use," as discussed in *Morse*.¹⁸¹

John's school board may rightly want to avoid the issue of sexuality because it views the issue as controversial in its district and wants to inculcate its students with a heteronormative view of society. The school district may argue that a reasonable person would view access to certain websites as speech that bears the imprimatur of the school. This "imprimatur of the school" argument would implicate the *Hazelwood* standard, and forcing John's school to allow access to websites that discuss sexuality would be inconsistent with the school's basic educational mission.¹⁸² Moreover, the school is retaining a viewpoint-neutral restriction¹⁸³ – it is restricting all websites on sexuality and not just ones on homosexuality. Also, the school is restricting students' access to the Internet, which is a limited public forum, so regulation thereof can be based on subject matter.¹⁸⁴

A court may be most persuaded to allow the school's blocking of all sexuality and LGBTQ websites if John's school argues its case is similar to *ALA*. The *PFLAG* court, in fact, stated it would use the *ALA* standard "if the Court were examining a decision by Camdenton [school district] to exclude all resources on the *subject* of LGBT issues."¹⁸⁵ Under the *ALA* standard, John's school would show that removing the entire subject matter of sexuality from the Internet at school was reasonable and appropriate "in fulfill[ing] [the school's] traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes."¹⁸⁶

John's case illustrates complexities the Internet poses to courts when determining what is the appropriate amount of discretion to yield to local schools while simultaneously ensuring students' First Amendment rights. John's case is distinct from *ALA* because *ALA* involved the community library

179. Children's Internet Protection Act, 47 U.S.C. § 254(h)(6)(B)(i) (2006); Parents, Families and Friends of Lesbians and Gays Inc., v. Camdenton R-III Sch. Dist., 853 F. Supp. 2d 888, 891 (W.D. Mo. 2012).

180. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683-84 (1986).

181. Morse v. Frederick, 551 U.S. 393, 397 (2007).

182. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

183. See *supra*, Part II.B for a discussion on viewpoint-neutral restrictions.

184. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985).

185. Parents, Families and Friends of Lesbians and Gays Inc., v. Camdenton R-III Sch. Dist., 853 F. Supp. 2d 888, 901 (W.D. Mo. 2012).

186. United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 196 (2003).

denying access to pornography on its computers, a subject matter traditionally not included in public libraries.¹⁸⁷ It can hardly be said, however, that libraries' "traditional role" would not include obtaining books and material on sexuality. Given *Pico*'s emphasis on the special nature of a school's library, and though a school may be afforded the ability to limit discussions of sexuality within its school curriculum, it seems unlikely a court would allow a school to block all websites discussing sexuality. After all, "[n]otwithstanding the power and discretion accorded them, school boards do not have an absolute right to remove materials from the curriculum."¹⁸⁸

B. Jane's Inability To Access LGBTQ Web Sites Constitutes Viewpoint Discrimination

Jane's situation requires a different analysis than John's case because it is clear her school district, Camdenton, was purposefully discriminating against pro-LGBTQ viewpoints.¹⁸⁹ The Camdenton district blocked websites that expressed positive views of LGBTQ individuals while simultaneously allowing access to web pages that had a negative view of such individuals.¹⁹⁰

Jane's inability to access these positive LGBTQ websites is similar to *Pico*. Camdenton, in essence, was trying to "prescribe what shall be orthodox in matters of opinion,"¹⁹¹ and this purpose goes against several precedents.¹⁹² Specifically, in *West Virginia Board of Education v. Barnette*, the Supreme Court stated:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."¹⁹³

Moreover, when local authorities exclude a book because of an ideological viewpoint, courts often determine that a valid First Amendment claim exists.¹⁹⁴

When reviewing Camdenton school district's actions, the court found that the school board wanted to discourage access to "websites saying it's okay to

187. *Id.*

188. *Pratt v. Indep. Sch. Dis. No. 831, Forest Lake, Minn.*, 670 F.2d 771, 776 (1982).

189. *Camdenton*, 853 F. Supp. 2d at 893.

190. *Id.* at 892.

191. *Id.* at 901.

192. *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (stating "the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom"); *Epperson v. Arkansas*, 393 U.S. 97, 104-105 (1968) (reaffirming a school can not "cast a pall of orthodoxy over the classroom").

193. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

194. *Pratt v. Indep. Sch. Dist. No. 831, Forest Lake, Minn.*, 670 F.2d 771, 776 (1982).

be gay.”¹⁹⁵ In fact, even after the school’s superintendent received a letter of complaint from the American Civil Liberties Union (ACLU) about Camdenton’s Internet filtering system, the superintendent still took no steps to ensure positive LGBT information would be available on the school’s computers through the Internet.¹⁹⁶ By allowing access to websites that held only a negative view on LGBTQ issues, the school was discriminating against a positive LGBTQ view.

Though Jane’s school did not present this argument, the Camdenton district could have argued that it declined to allow access to pro-LGBTQ Web sites for legitimate pedagogical reasons, such as concerns about the accuracy of the websites. The school board would have relied on the accepted position that the First Amendment does not prohibit a school from removing books from its libraries if the books contain factual inaccuracies,¹⁹⁷ and by extension, the First Amendment should not protect websites that contain factual inaccuracies. Yet, a scrupulous court would analyze Camdenton’s school board minutes and understand Camdenton removed the websites not because of any real or perceived factual inaccuracies, but because it intended to deny school children access to points-of-view with which the school board officials disagreed.¹⁹⁸

C. *Solving John’s Inability To Access Important Web Sites By Embracing and Acknowledging Public Policy Reasons Including Legitimate Pedagogical and Safety Concerns for LGBTQ Public School Students*

i. A Court’s Decision Embraces Research That Shows The Effects Harassment has on LGBTQ Students

This section analyzes *Harper v. Poway United School Dist.* not for its precedential value, but because the case highlights how a court combined recent data on LGBTQ teenagers and past legal precedent to create a solution benefiting LGBTQ high school students.¹⁹⁹ This Ninth Circuit opinion was a split decision and was ultimately vacated, however, the order to vacate was due to procedural reasons.²⁰⁰

The Poway School District had a history of conflict over sexual orientation issues.²⁰¹ The local Gay-Straight Alliance (GSA) wanted to hold a

195. *Parents, Families and Friends of Lesbians and Gays Inc., v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888, 894 (W.D. Mo. 2012).

196. *Id.* at 893.

197. *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade Cnty Sch. Bd.*, 557 F.3d 1177, 1202 (11th Cir. 2009).

198. See *Camdenton*, 853 F. Supp. 2d at 894 where the court notes that a school board member expressed “concern with students accessing websites saying it’s okay to be gay” and that he wanted parental consent before allowing students to access these sites.

199. See generally *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1166 (9th Cir. 2006), *vacated*, 549 U.S. 1262 (2007).

200. *Poway*, 445 F.3d 1166, *vacated*, 549 U.S. 1262.

201. *Poway*, 445 F.3d at 1167.

“Day of Silence” like it had done in the previous year.²⁰² During the GSA’s previous “Day of Silence” there were a series of altercations, leading to student suspensions.²⁰³ A week after the second annual “Day of Silence,” a different group of students organized a “Straight-Pride Day.”²⁰⁴ This “Straight-Pride Day” resulted in students wearing t-shirts that expressed a negative view²⁰⁵ on homosexuality.²⁰⁶

The *Poway* court examined LGBTQ students’ psychological health, well-being, and educational development.²⁰⁷ The court was persuaded by the statistics that LGBTQ youth experience a decline in academic performance when bullied,²⁰⁸ and that gay students have difficulty concentrating in school because students fear their safety as a result of peer harassment.²⁰⁹ The *Poway* court accepted the notion that “academic underachievement, truancy, and dropout are prevalent among homosexual youth and are the probable consequences of violence and verbal physical abuse at school.”²¹⁰ Thus, it upheld the school’s prohibition of a t-shirt that condemned homosexuality.²¹¹ Importantly, the court stated there is a political disagreement regarding homosexuality in the United States.²¹² The court, however, reasoned that it was not necessary to advance an argument that homosexuality is shameful by “directly condemning, to their faces, young students trying to obtain a fair and full education in our public schools.”²¹³

202. *Id.* at 1171 n.3 (stating, “On the ‘Day of Silence,’ participating students wore duct tape over their mouths to symbolize the silencing effect of intolerance upon gays and lesbians, these students would not speak in class except through a designated representative. Some students wore black T-shirts that said ‘National Day of Silence’ and contained a purple square with a yellow equal sign in the middle.”)

203. *Id.* at 1171.

204. *Id.*

205. The T-shirt that was litigated over stated, “Homosexuality is shameful.” *Id.* at 1192.

206. *Id.* at 1171.

207. *Id.* at 1179.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 1192.

212. Though the *Poway* majority did not elaborate on the “disagreement on homosexuality,” the *Poway* dissent stated “acceptance of homosexuality is a political disagreement ad debate.” *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1167, 1197 (9th Cir. 2006) (Kozinski, J., dissenting). Yet, interestingly, in 2012, 63 percent of surveyed U.S. adults said gay relations should be legal. *U.S. Acceptance of Gay/Lesbian Relations Is the New Normal*, GALLUP (May 14, 2012), <http://www.gallup.com/poll/154634/Acceptance-Gay-Lesbian-Relations-New-Normal.aspx>.

213. *Poway*, 445 F.3d at 1181.

- ii. Using the Data on LGBTQ Students and Precedent to resolve John's inability to access any Web site on sexuality

The *Poway* decision shows a court's willingness to look at the effects of harassment on LGBTQ students and employs a novel legal concept to justify its holding.²¹⁴ The most effective route for a court to follow when deciding John's case may indeed be by relying on the vast authoritative data on LGBTQ students and their struggles in public schools.

By recognizing there are at least 1.3 million U.S. high school students who identify as LGBTQ,²¹⁵ a court should understand that allowing high schools to restrict LGBTQ websites condones the "demeaning of young gay and lesbian students in a school environment."²¹⁶ The students, by being denied access to these important LGBTQ resources, are unfairly thrown into a broader societal debate about homosexuality and gay marriage. Additionally, without access to important LGBTQ websites at school, the LGBTQ students will have to rely on other outside resources available to them, such as their local LGBTQ community center. As a result, rural students will be disproportionately affected as they lack similar resources as their urban LGBTQ counterparts.²¹⁷

Similar to *Harper*, a court needs to recognize that LGBTQ high school students like John are not seeking information from LGBTQ websites to make a political statement. Rather, they rely on the Internet to find online LGBTQ communities²¹⁸ and to find information on same-sex attraction.²¹⁹ LGBTQ students' inability to access websites discussing sexuality or LGBTQ issues has broad life consequences for these students. Without access, LGBTQ youth may continue to misunderstand their same-sex feelings, continue to remain in the closet, and increase their chances of depression.²²⁰ Lack of access could also

214. See Francisco M. Negrón, Jr., *A Foot in the Door? The Unwitting Move Towards A "New" Student Welfare Standard in Student Speech After Morse v. Frederick*, 58 AM. U. L. REV. 1221, 1228-32 (2009) (arguing *Poway* is an example of a lower court molding a new *Tinker* standard); Kevin W. Saunders, *Hate Speech in the Schools: A Potential Change in Direction*, 64 ME. L. REV. 165 (2011) (stating *Poway* is one of the few cases recognizing schools may restrict student speech if it harms other students, even if that harm is not physically violent).

215. CIANCOTTO, *supra* note 22, at 14.

216. *Poway*, 445 F.3d at 1178-79.

217. See Kosciw, *supra* note 14, at 107, stating that only 34.8% of the rural students surveyed were able to access LGBTQ-related information through the Internet using school computers. The sample size for this study was 7,261 students. *Id.* at xvi. Rural students composed 24.9% of this population or 1,808 students. *Id.* at 11. Thus, of the 1,808 rural students only 629 (1,808 x 34.8%) of them were able to access LGBTQ-related information through the Internet using school computers.

218. Human Rights Campaign, *Growing Up LGBT in America* 9 (2012), available at <http://www.hrc.org/files/assets/resources/NCOD-Youth-Report.pdf>.

219. Hillier, *supra* note 10, at 241.

220. Courtney Weiner, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX*, 37 COLUM. HUMAN. RTS. L. REV. 189, 225-26 (2005).

perpetuate LGBTQ youth having higher suicide attempt rates.²²¹ Even if a court rules a school must allow LGBTQ and sexuality websites, there is no precedent denying the school from also allowing websites with a negative view of LGBTQ people. Indeed, schools may want to do this to avoid litigation based on a perceived viewpoint discrimination against anti-LGBTQ views.

LGBTQ students face difficult situations in high school, many of which are unique to LGBTQ individuals.²²² Allowing students access to websites discussing sexuality and LGBTQ resources is a simple step to help these students through their journey. Ultimately, a court should look to LGBTQ studies showing the decline in academic performance, truancy issues, harassment of LGBTQ students, and LGBTQ students' reliance on the Internet more so than heterosexual students. These studies will help courts understand and rule appropriately that there are important public policy reasons to allow access to websites that discuss sexuality and LGBTQ Web sites.

CONCLUSION

Neither John nor Jane Doe's situation is beyond imagination. With the Internet being a ubiquitous part of the American society and an increasing recognition that LGBTQ students use online resources to discover their own sexuality and resolve internal and external conflicts, courts will likely employ First Amendment case law if students decide to litigate these issues. While some schools may use CIPA as an argument for blocking LGBTQ websites,²²³ the difficult issue for courts to resolve is how to grant schools and school boards sufficient discretion to make educational decisions while also protecting students' First Amendment rights.

By focusing on *Pico* and *ALA*, a court resolving John or Jane Does' case will have to analogize website access in public high schools to accessing books in a high school library.²²⁴ Yet, even if a court is able to analogize a school removing a website to a book being removed from its library, John's case presents a situation that may be constitutionally permitted. However, by understanding heteronormativity, John's situation seems practically impossible. Since John's inability to access important LGBTQ Web sites may be constitutionally within the school board's discretion, courts should follow the *Harper* court's lead and use data on LGBTQ students to help support justifying a decision that allows John, and students who are similarly situated, to access

221. See Elizabeth Oh, Anthony Jorm & Annemarie Wright, *Perceived Helpfulness of Websites for Mental Health Information*, 44 Soc. Psychiatry Psychiatr Epidemiol 293-99 (Apr. 1, 2009) (discussing how young people found using the Internet to access mental health information was very helpful and suggesting that online resources could often be a first starting point for teenagers who are struggling with a mental health disorder).

222. See *supra*, Part I.B. for a discussion of daily high school life for LGBTQ students.

223. See Complaint 9-23, *Parents, Families and Friends of Lesbians and Gays Inc., v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888 (W.D. Mo. 2012) (2:11-cv-04212).

224. See *supra* Part III.A. and III.B. for a discussion of how *Pico* and *ALA* apply to John and Jane's case.

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LGBTQ websites justifying its decision.²²⁵ Not only is the data widely available, it supports the persuasive argument that allowing access to LGBTQ websites is a simple, yet extremely beneficial step for LGBTQ high school students.

Combining data with legitimate pedagogical and safety concerns for LGBTQ public school students should persuade a court to adopt public policy reasons in allowing access to LGBTQ websites. In doing so, courts would continue to follow the steadfast rule that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”²²⁶

225. *See supra* Part III.C.i. for a discussion on how a court has relied data for LGBTQ teenagers to help justify its decision.

226. *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 506 (1969).