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Via Email at amie.lonas@fcstn.net and U.S. Mail

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The American Civil Liberties Union of Tennessee (ACLU-TN) has received information concerning the recent formation by students at the Franklin County High School of a gay-straight alliance or "GSA," to combat harassment and bullying of lesbian, gay, bisexual, and transgender ("LGBT") students and educate the school community about these issues. Our understanding is that the formation and continued existence of the GSA will be discussed at the February 8, 2016 School Board meeting. In anticipation of that discussion, this letter is intended to provide information and resources regarding the benefit of GSAs to the educational mission of schools as well as information regarding the federal laws that require equal treatment of GSAs by schools.

The federal Equal Access Act, 20 U.S.C. § 4071(a), requires that the school system treat such organizations the same as any other noncurricular club at your schools. Under the Equal Access Act, if a secondary school receiving federal funding allows any student group whose purpose is not directly related to the school's curriculum to meet on school grounds, it cannot deny other student groups the same access to school meeting space or avenues of communication because of the content of their proposed discussions. As a federal judge concluded in one Equal Access Act case:

The Board Members may be uncomfortable about students discussing sexual orientation and how all students need to accept each other, whether gay or straight. . . . [But] Defendants cannot censor the students' speech to avoid discussions on campus that cause them discomfort or represent an unpopular viewpoint. In order to comply with the Equal Access Act . . . members of the Gay- Straight Alliance must be permitted access to the school campus in the same way that the District provides access to all clubs, including the Christian Club and the Red Cross/Key Club.

Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135, 1148 (C.D. Cal. 2000).

Courts have consistently held the Equal Access Act protects the rights of

students to form GSAs.¹ The United States Department of Education has also issued a letter to school officials and legal guidelines affirming that under federal law, GSAs must be treated the same as other student clubs.²

Allowing the GSA club to meet is more than just a legal responsibility; it also makes sense from an educational and a safety perspective. In Tennessee, LGBT students report regularly hearing anti-LGBT remarks. A majority of LGBT students report experiencing verbal harassment and many have experienced physical harassment and assault.³ GSAs help combat verbal and physical harassment. They create a space where students can come together to share their experiences, to discuss anti-LGBT harassment they may experience from others in school, and to debate different perspectives on LGBT-related issues. Students' ability to talk openly and honestly with each other is essential to making young people aware of the harms caused by discrimination and violence. Finding a safe community space also helps students cope with these issues. "As any concerned parent would understand, [GSAs] may involve the protection of life itself." Colin, 83 F. Supp. 2d at 1150.

Here are some common ways schools have tried to block or interfere with GSAs—and why you shouldn't try them:

Refusing to approve a GSA because discussing sex is inappropriate for secondary school students and/or violates the school's abstinence education policy: In Colin v. Orange Unified School District, 83 F. Supp. 2d 1135 (C.D. Cal. 2000), the court recognized that the focus of most GSAs is not sex, but issues related to sexual orientation and how to combat unfair treatment and prejudice. The court also noted that school administrators' assumption that a GSA will discuss sex unfairly singled out the GSA based on stereotypes about LGBT individuals. Courts have also rejected the argument that GSAs conflict with school abstinence education policies. Gay-Straight Alliance of Yulee High School v. Sch. Bd of Nassau County, 602 F. Supp. 2d 1233 (M.D. Fla. 2009). As one court put it, "[The school board] has failed to demonstrate that the GSA's mission to promote tolerance towards individuals of nonheterosexual identity is inherently inconsistent with the abstinence only message [the board] has adopted." Gonzalez v. Sch. Bd. of Okeechobee County, 571 F. Supp. 2d 1257, 1264 (S.D. Fla. 2008).

Refusing to approve a GSA on the basis of morality: The Equal Access Act specifically

¹ See Straights & Gays for Equality v. Osseo Area Schls.-District No. 279, 540 F.3d 911 (8th Cir. 2008); Gay-Straight Alliance of Yulee High Sch. v. Sch. Bd of Nassau County, 602 F. Supp. 2d 1233 (M.D. Fla. 2009); Gonzalez v. Sch. Bd. of Okeechobee County, 571 F.Supp.2d 1257 (S.D. Fla. 2008); White County High Sch. Peers Rising in Diverse Educ. v. White County Sch. Dist., No. 2:06-CV-29WCO, 2006 WL 1991990 (N.D. Ga. July 14, 2006); Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County, 258 F. Supp. 2d 667 (E.D. Ky. 2003); Franklin Cent. Gay/Straight Alliance v. Franklin Township Cmty. Sch. Corp., No. IP01-1518 C-M/S, 2002 WL 32097530 (S.D. Ind. Aug. 30, 2002); Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135, 1148 (C.D. Cal. 2000); East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist., 81 F. Supp. 2d 1166 (D. Utah 1999).

² See Arne Duncan, Dear Colleague Letter, Key Policy Letters from the Education Secretary and Deputy Secretary (June 14, 2011), at <http://www2.ed.gov/policy/elsec/guid/secletter/110607.html>; see also U.S. Department of Education, Legal Guidelines Regarding the Equal Access Act and the Recognition of Student-Led Noncurricular Groups, at <http://www2.ed.gov/policy/elsec/guid/secletter/groupsguide.doc>

³ See GLSEN, School Climate in Tennessee: 2013 State Snapshot, available at <http://www.glsen.org/sites/default/files/GLSEN%202013%20Tennessee%20State%20Snapshot.pdf>

provides that a school cannot deny equal access to student activities because of the “religious, political, philosophical, or other content of the speech at such meetings.” 20 U.S.C. § 4071(a).

Refusing to approve GSA because the school doesn’t want to be viewed as “endorsing homosexuality”: Simply allowing a GSA to meet at a school does not indicate that the school approves or endorses the subject matter of the meetings. As the Supreme Court has explained, “the proposition that schools do not endorse everything they fail to censor is not complicated.” Bd. Of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 250 (1990). “Students below the college level are capable of distinguishing between State-initiated, school sponsored, or teacher led religious speech on one hand and student-initiated, student-led religious speech on the other.” Id. at 250-51.

Refusing to approve a GSA because a GSA will cause disruption or controversy: When there is disruption surrounding a GSA, school officials need to consider the *actual* cause of the disruption. If students, parents, or community members are in an uproar because they don’t like a GSA, *they* are the ones causing the disruption — not the GSA itself. Even extensive disruption in the community and school such as a rally attended by hundreds of angry community members or a boycott by half the student body is not enough to justify shutting down a GSA when the GSA members themselves are not causing the commotion. Boyd County High School Gay/Straight Alliance, 258 F. Supp. 2d 667 (E.D. Ky. 2003).

Refusing to approve a GSA because of a belief that it is being pushed on students by some outside group or organization: Although most high school clubs that address LGBT issues are referred to as GSAs, and although some national organizations have attempted to compile informal contact directories of GSAs across the U.S., GSAs remain local and student-driven. There is *no* national organization or governing body for GSAs.

Refusing to approve a GSA because you think your school does not have any noncurricular clubs: As noted above, the protections of the Equal Access Act are triggered if the school allows just one noncurricular student activity on campus. Critically, the definition of “curricular” and “noncurricular” under the Equal Access Act is a matter of *federal* law. Even if your school labels a club as “curricular,” the club could still be considered “noncurricular” under the Equal Access Act. For example, a school district in Kentucky thought that the Equal Access Act did not apply to it because, in its view, the school had no noncurricular clubs on campus. A federal judge rejected that argument and held that the school’s community service club, drama club, and class officer organizations were noncurricular under the Equal Access Act. Boyd County High Sch. Gay Straight Alliance v. Bd. Of Educ. of Boyd County, 258 F. Supp. 2d 667 (E.D. Ky. 2003).

Under the Equal Access Act, a group does not qualify as “curricular” if it is merely “related to abstract educational goals,” such as good citizenship or critical thinking. Mergens, 496 U.S. at 244. No matter how a school chooses to label the student organization, the group will be considered “noncurricular” for purposes of the Equal Access Act unless (a) “the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course”; (b) “the subject matter of the group concerns the body of courses as a whole” (e.g. an honors society based on GPA); (c) “participation in the group is required for a particular course”; (d) “participation in the group results in academic credit.” Id. at 239-40.

For example, if your school teaches swimming, a swim team or club would be considered curricular. However, a scuba diving club would be considered noncurricular, even though it involves swimming. Groups like a chess club, a stamp-collecting club, a community service or faith-based club, or a GSA are usually considered noncurricular, because what they do is not taught in any class or given academic credit. A school could not evade the requirements of the Equal Access Act simply by relabeling those clubs as "curricular."

Imposing restrictions on the GSA that don't apply to other clubs: In addition to allowing GSAs to meet on school grounds, schools must provide GSAs with "equal access to available avenues of communication as provided to other noncurriculum related groups." Straights & Gays for Equal. v. Osseo Area Sch.-Dist. No. 279, 540 F.3d 911, 914 (8th Cir. 2008). Example of unequal and unlawful treatment include: requiring a faculty advisor for the GSA but not for other groups; placing different requirements on a GSA's posters, leaflets, and announcements than it places on other groups; or not allowing the GSA to be featured in the yearbook along with other clubs. In addition, delaying action on the GSA's application for approval, voting on the approval of a GSA when other school groups are not subject to a vote prior to approval, or in any way requiring a GSA to do more than other noncurricular clubs must to be officially recognized by the school can violate the Equal Access Act.

8. Requiring a GSA to change its name: Many clubs want to use the name "Gay-Straight Alliance", although some come up with other names (one group wanted to call itself Helping Unite Gays and Straights, or "HUGS"). Whatever the name is, schools cannot require that any reference to sexual orientation be removed, because doing so would impermissibly affect the focus and goals of the club. For example, courts have specifically ruled that a school cannot tell a GSA to remove the term "gay" from its name. Colin, 83 F. Supp. 2d at 1147-48; Gay-Straight Alliance of Yulee High Sch. v. Sch. Bd. of Nassau County, 602 F. Supp. 2d 1233 (M.D. Fla. 2009).

We hope this letter has given you a firm understanding of why schools should allow students to form GSAs and how you can remain in compliance with the Equal Access Act. Many resources are available in your community to help you learn more about your legal duties under the Equal Access Act. ACLU-TN can provide information about gay-straight alliances and direct you to other groups that are working to promote non-discriminatory school environments for all students. You can also learn more by visiting the ACLU's website at <http://www.aclu.org/safeschools>.

Please do not hesitate to contact us if you have any questions about this letter or if we can be of any assistance to you. We can be reached at [REDACTED]

Sincerely,



Thomas H. Castelli
Legal Director