December 14, 2022

Dear Principal or Superintendent:

You are being given this letter because students at your school or a school in your district are interested in forming a student organization to combat harassment and bullying of lesbian, gay, bisexual, transgender, queer, and questioning ("LGBTQ") students and educate the school community about these issues, or because they have concerns about their existing club being treated differently from other student clubs. Clubs like this are often called "GSAs," usually meaning gender and sexuality alliance or gay-straight alliance. Regardless of the name, the Equal Access Act of 1984 requires that you treat such organizations the same as any other noncurricular club at your school. *See* 20 U.S.C. § 4071(a).

Under the Equal Access Act, if a secondary school[1] 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).

See also Satanic Temple, Inc. v. Saucon Valley School District, 671 F. Supp. 3d 555, 559 (E.D. Pa. 2023) (requiring school district to permit after school club to meet notwithstanding the club's controversial name and viewpoint). Courts have consistently held the Equal Access Act protects the rights of students to form GSAs.[2]

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[1] When a middle school provides secondary education, it can be subject to the Equal Access Act. *Carver Middle Sch. Gay-Straight Alliance v. Sch. Bd. of Lake Cty., Fla.*, 842 F.3d 1324, 1333 (11th Cir. 2016) (finding Carver Middle School provided secondary education because it offered at least one course through which students could obtain high school credit, therefore making it subject to the Equal Access Act).

[2] *See Pendleton Heights Gay-Straight Alliance v. S. Madison Cty. Sch. Corp.*, 577 F. Supp. 3d. 927 (S.D. Ind. 2021); *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* 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).

Allowing the GSA club to meet is more than just your legal responsibility—it also makes sense from an educational and a safety perspective. GSAs help combat verbal and physical harassment and create spaces where students can come together to share their experiences, discuss anti-LGBTQ harassment they may experience at school, and debate different perspectives on LGBTQ-related issues. Being able 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 they still violate the law:

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

2. Refusing to approve GSA because the school does not want to be viewed as "endorsing homosexuality": Simply allowing a GSA to meet at a school doesn't 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.

3. 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. *Id.* at 1148. The court also noted that school administrators' assumption that a GSA will discuss sex unfairly singled out the GSA based on stereotypes about LGBTQ individuals. *Id.* 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 non-heterosexual 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).

4. 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 a "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" under the Equal Access Act if it is merely it "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.

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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 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."

5. Refusing to approve a GSA because it is "student-initiated" and not "school-sponsored": It makes no difference under the federal Equal Access Act whether a school has labeled a GSA a "student-initiated" club. Courts have rejected the distinction between "school-sponsored" and "student-initiated" clubs in this context and held that "student-initiated" clubs have the right "to publicize their events on an equal basis with other officially recognized school clubs." *See Prince*, 303 F.3d at 1086-87 (citing *Mergens*, 496 U.S. at 247) (holding that a school violated the Equal Access Act by prohibiting Christian club, which was approved as "student sponsored" or "student initiated" group, from using public address system to announce meetings).

6. Refusing to approve a GSA because of fears that 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 at 692.

7. 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 LGBTQ issues are referred to as GSAs, and although some national organizations (e.g. GLSEN and GSA Network) 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.

8. Imposing restrictions on the GSA that do not 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 non-curriculum related groups." *Straights & Gays for Equal. v. Osseo Area Sch.-Dist. No. 279*, 540 F.3d 911, 914 (8th Cir. 2008). Examples of unequal and unlawful differential 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; and 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.

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9. Requiring a GSA to change its name: Many clubs want to use the name "Gender and Sexuality Alliance" or "Gay-Straight Alliance," although some come up with other names (for example, one group wanted to call itself Helping Unite Gays and Straights, or "HUGS"). Whatever the name is, schools can't 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 school cannot tell a GSA to remove the term "gay" from its name. *Colín*, 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. Your local ACLU affiliate 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.

Please contact the ACLU if you have any questions about this letter or wish to discuss it further. We can be reached at helplgbtq@aclu.org.

Sincerely,

James D. Esseks
Director
ACLU LGBTQ & HIV Project

Students and parents: Feel free to use this letter as an advocacy tool in your school.