IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

WHITE COUNTY HIGH SCHOOL PEERS RISING IN DIVERSE EDUCATION, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. __________
WHITE COUNTY SCHOOL DISTRICT, et al.,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

Gay students at White County High School ("WCHS") have long suffered severe and pervasive harassment because of their sexual orientation at the hands of their peers and even their teachers. Despite the fact that this harassment has undermined the very mission of WCHS – to provide an educational environment in which all students have a full and fair opportunity to learn – Defendants White County School District ("WCSD"), Paul Shaw, Bryan Dorsey, and Sandy Bales ("Defendants") have long turned a blind eye to it.

In the context of this indifference to the plight of gay students at WCHS, Plaintiffs Kerry Pacer, Lindsay Pacer, Charlene Hammersen, and Kimber Gould, among other students, have sought to form Plaintiff WCHS Peers Rising in Diverse

Education ("PRIDE"), a type of non-curricular group commonly known as a gay-straight alliance ("GSA").[1] As a GSA, PRIDE is intended, among other things, to provide a safe setting within the school environment for gay students.

Disregarding the acute need for a GSA at WCHS and defying Plaintiffs' statutory right to a non-curricular group and constitutional right to expressive association, Defendants have gone to extraordinary lengths to thwart PRIDE's formation and thereby suppress PRIDE's viewpoint. Indeed, despite the significant educational value of extracurricular activities, Defendants have gone so far as to purport to prohibit all non-curricular groups from meeting in order to prohibit PRIDE from meeting.

It has come to light that Defendants do not in fact prohibit all non-curricular groups from meeting. To the contrary, Defendants have permitted numerous other non-curricular groups to meet. Accordingly, under the Equal Access Act ("EAA") and the federal and state constitutions, Defendants must permit PRIDE to meet, and to do so, at a minimum, on terms equal to those on which any other non-curricular group has met during the 05-06 school year.

[1] Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135, 1139 (C.D. Cal. 2000) (noting that there were approximately 600 high school GSAs at that time).

FACTUAL BACKGROUND[2]

A. The Parties

Kerry, Lindsay, Charlene, and Kimber are WCHS students, where Kerry is a senior, Charlene and Kimber are juniors, and Lindsay is a sophomore. K. Pacer Decl. ("KP") ¶ 2; C. Hammersen Decl. ("CH") ¶ 2; K. Gould Decl. ("KG") ¶ 2; V. V. Compl. ¶ 10. Along with other students, they have sought to form PRIDE, a GSA. KP ¶ 4; CH ¶ 3; KG ¶ 4.

WCSD is a school district in White County, Georgia. V. Compl. ¶ 13. Shaw is the WCSD superintendent. Id. ¶ 14. WCHS, a constituent of WCSD, is a public secondary school that receives federal financial assistance. Id. ¶ 13. Dorsey is the WCHS principal, and Bales is a WCHS assistant principal. Id. ¶¶ 15-16. The WCSD school board has formally delegated final decisionmaking authority over matters concerning WCHS non-curricular groups to Dorsey. E. Littrell Decl. ("EL") Ex. D. At all times relevant hereto, Defendants acted under color of state law. V. Compl. ¶ 3.

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[2] "At the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is appropriate given the character and objectives of the injunctive proceeding." Levi Strauss & Co. v. Sunrise Int'l Trading, Inc., 51 F.3d 982, 985 (11th Cir. 1995) (quotation omitted).

B. The Acute Need for a GSA at WCHS

Defendants have long been deliberately indifferent to severe and pervasive peer-on-peer and even teacher-on-student harassment based on sexual orientation. KP ¶ 4; CH ¶ 3; KG ¶ 3; A. Sherman Decl. ("AS") ¶ 3; C. Buchel Decl. ("CB") ¶ 3; R. Dunlap Decl. ("RD") ¶ 14; see also V. Compl. ¶¶ 60-80. As a GSA, PRIDE is intended, among other things, to provide a safe setting within the school environment for gay students. KP Ex. B.

C. The 04-05 School Year: Defendants Refuse to Permit the GSA to Meet on Terms Equal to Those on Which Other Non-Curricular Groups Meet

In January of 2005, Kerry met with Dorsey and requested permission to hang posters opposing anti-gay harassment. KP ¶ 6. Dorsey denied the request. Id. The following day, Kerry met with Dorsey and requested recognition of a GSA.[3] KP ¶ 7. Dorsey required Kerry to submit a written explanation of her reasons for requesting recognition of the GSA, a requirement that was not imposed on other non-curricular groups. Id. Kerry submitted the required explanation, but Dorsey refused to recognize the GSA and discouraged Kerry from pursuing the matter further. Id.

In the weeks that followed, Kerry and other students repeatedly met with

[3] Although there was no formal policy setting forth the process by which WCHS recognized non-curricular groups, WCHS did in fact recognize non-curricular groups at that time. Compl. ¶ 18.

Shaw, Dorsey, and Bales, provided them with information about their obligations under the EAA, and requested recognition of the GSA. KP ¶¶ 8-10; AS ¶¶ 6-7. Shaw, Dorsey, and Bales, however, repeatedly refused to recognize the GSA and discouraged the students from pursuing the matter further. Id.

Shaw eventually required Kerry to submit a list of prospective student members, the name of a prospective faculty advisor, a proposed set of bylaws, and a proposed mission statement to Dorsey – a requirement that was not uniformly imposed on other non-curricular groups. KP ¶ 11. Kerry submitted the required information to Dorsey, but Dorsey refused to recognize the GSA. Id.

In the months that followed, Shaw and Dorsey made numerous public statements conveying their reluctance to recognize the GSA. KP ¶¶ 12-15; AS ¶ 8; S. Pacer Decl. ("SP") ¶¶ 2-3. Dorsey and Bales refused to grant another request to recognize the GSA. KP ¶ 16; AS ¶ 9. And, unlike other non-curricular groups, the GSA was subjected to approval by the WCSD school board. SP ¶¶ 3-4.

After months of delay – a delay that was not experienced by other non-curricular groups – the GSA was permitted to meet, but only if Bales was present – a requirement that was not imposed on other non-curricular groups. KP ¶ 19; AS ¶ 12. The GSA had an opportunity to meet only three times before the end of the school year. KP ¶ 20; AS ¶ 13.

D. The 05-06 School Year: Defendants Purport to Prohibit All Non-Curricular Groups From Meeting

The following school year, Defendants purported to shut down all non-curricular groups and in fact shut down the GSA.[4] KP ¶ 22; AS ¶ 15. Defendants did not shut down the GSA for any reason other than the purported prohibition on all non-curricular groups. Id. Defendants' actions were motivated by their continuing desire to suppress the GSA's viewpoint. KP ¶ 23; SP ¶ 6.

Notwithstanding the purported prohibition on all non-curricular groups, during the 05-06 school year, Defendants have recognized each of the following non-curricular groups and permitted each to meet, engage in activities, use school resources, and otherwise enjoy school privileges on school premises during non-instructional time: Prayer Group; Beta Club; Student Council; Dance Team; Shooting Club; Youth Advisory Council ("YAC"); and Family, Career, and Community Leaders of America ("FCCLA").[5] KP ¶¶ 25-28, 33-34; CH ¶¶ 5-7, 9, 11; KG ¶¶ 6-8, 10, 12; AS ¶¶ 16-17; CB ¶¶ 5-7; RD ¶¶ 5-7; EL Exs. F-H, J.

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[4] Defendants maintain no express standards for ascertaining which student groups are curricular and which are non-curricular. SP ¶ 5; EL Ex. A.

[5] Although Plaintiffs do not focus on them at this time, Defendants have also recognized additional non-curricular groups and permitted them to meet, engage in activities, use school resources, and otherwise enjoy school privileges on school premises during non-instructional time, including the following: Cheerleading Team; Tennis Team; Wrestling Team; Golf Team; and Swimming Team.

Because Defendants have not permitted the GSA to meet during the 2005-06 school year, Plaintiffs have been greatly hampered in their ability to come together to express themselves in the pursuit of their common cause: eradicating anti-gay harassment at WCHS. V. Compl. ¶ 49. Ironically, this comes at a time when the problem that they have sought to redress has been exacerbated by the fact that Defendants' continuing desire to suppress the GSA's viewpoint has sent a message to other students and teachers that discrimination against gay students at WCHS is acceptable. Id.

ARGUMENT

The Court should grant the requested preliminary injunctive relief because Plaintiffs have established each of the following:

> (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction [is] not granted; (3) that the threatened injury to the plaintiff outweighs the harm an injunction may cause the defendant; and (4) that granting the injunction would not disserve the public interest.

Teper v. Miller, 82 F.3d 989, 992 n.3 (11th Cir. 1996) (citation omitted).[6]

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[6] See also Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981) ("[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing.") (citation omitted); Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc., 304 F.3d 1167, 1172 (11th Cir. 2002) ("[W]hether to grant a preliminary injunction requires a

I. THERE IS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

A. Plaintiffs Are Substantially Likely to Succeed Under the EAA

1. The statutory right to a non-curricular group under the EAA

The EAA provides as follows:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a). It defines the term "limited open forum" as follows: "A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b). Thus, "if a public secondary school allows only one 'noncurriculum related student group' to meet, the Act's obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time." Bd. of Educ. v. Mergens, 496 U.S.

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delicate balancing of the probabilities of ultimate success with the consequences of immediate irreparable injury.") (quotation omitted).

226, 236 (1990).[7]

The mandate of the EAA is an expansive one. As the Supreme Court has recognized, "Congress[] inten[ded] to provide a low threshold for triggering the Act's requirements." Id. at 240.[8]

The breadth of the term "meeting." The EAA broadly defines the term "meeting:" "The term 'meeting' includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum." 20 U.S.C. § 4072(3). In other words, the EAA is not concerned only with the terms on which a school permits non-curricular groups to meet. It is also concerned with the terms on which a school recognizes non-curricular groups and permits them to engage in activities, use school resources, and otherwise enjoy school privileges. Mergens, 496 U.S. at 247 ("Although the school apparently permits respondents to meet informally after school, respondents seek equal access in the form of official recognition by the school. Official recognition allows student clubs to be part of the student activities program and

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[7] See also id. at 259 (Kennedy, J., concurring) ("[O]ne of the consequences of the statute, as we now interpret it, is that clubs of a most controversial nature might have access to the student life of high schools that in the past have given official recognition only to clubs of a more conventional kind.") (citation omitted).

[8] See also id. at 239 ("A broad reading of the Act would be consistent with the views of those who sought to end discrimination by allowing students to meet and discuss religion before and after classes.").

carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair . . . . [W]e hold that [the school's] denial of [the students'] request to form a Christian club denies them 'equal access' under the Act.") (citations omitted).

Complementing the expansive definition of the term "meeting" is the expansive prohibition on differential treatment. Under the EAA, a school may *neither* "deny equal access to," *nor* "[deny] a fair opportunity to," *nor* otherwise "discriminate against" a non-curricular group. 20 U.S.C. § 4071(a). Thus, under the EAA, where a school recognizes one non-curricular group or permits it to engage in activities, use school resources, or otherwise enjoy school privileges, it must do likewise for all other non-curricular groups. For example, where a school permits one non-curricular group to use its public address system, bulletin boards, or website to publicize a meeting, it must permit all other non-curricular groups to do likewise.

<u>The breadth of the term "student group."</u> By its terms, the EAA is not concerned only with non-curricular groups that are denominated as "clubs." Nor is it concerned only with non-curricular groups that are initiated by students. Nor is it concerned only with non-curricular groups that seek primarily to engage in speech. Rather, it is concerned with *all* non-curricular groups, regardless of how

they are denominated, how they are initiated, or what they seek primarily to do. Colin, 83 F. Supp. 2d at 1145-46 ("Once a school recognizes *any* [non-curricular] group, it has created a limited open forum.") (emphasis added).[9]

The breadth of the term "noncurriculum related." In Mergens, after a careful assessment of the statutory text and the legislative history of the EAA, the Supreme Court concluded that the term "noncurriculum related student groups" "is best interpreted broadly" to include all student groups that do *not* satisfy one or more of following four criteria: (1) "the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course;" (2) "the subject matter of the group concerns the body of courses as a whole;" (3) "participation in the group is required for a particular course;" or (4) "participation in the group results in academic credit." Mergens, 496 U.S. at 239-40.

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[9] See also Mergens, 496 U.S. at 241-43 (rejecting a narrow conception of the student groups with which the EAA is concerned that extended only to advocacy groups); Pope v. E. Brunswick Bd. of Educ., 12 F.3d 1244, 1250-51 (3d Cir. 1993) ("A limitation to student-initiated groups defeats the broader purpose of the statute. A school with many faculty-initiated student groups can largely preempt demand for student-initiated groups. The result could be an open forum for mainstream interests and views, all sponsored by the faculty, with minority views excluded because of faculty hostility or indifference . . . . We therefore conclude that student initiation of clubs and other groups is not a requirement for triggering the EAA.") (quotation and footnote omitted); Van Schoick v. Saddleback Valley Unified Sch. Dist., 104 Cal. Rptr. 2d 562, 569 (Cal. Ct. App. 2001) ("[The school] argue[s] even if [it] is deemed to be a limited open forum, the FCA is not entitled to protection under the FEAA because the group was not student initiated . . . . We disagree.").

Schools bear the burden of proving that recognized student groups are curricular. Pope, 12 F.3d at 1252 ("The burden of showing that a group is directly related to the curriculum rests on the school district.") (citation omitted).[10] Moreover, in this regard, courts owe schools no particular deference. Mergens, 496 U.S. at 240 ("[S]uch determinations would be subject to factual findings well within the competence of trial courts to make.").[11]

Furthermore, in proving that the subject matter of a recognized student group is in fact taught or in fact will soon be taught in a regularly offered course, or that the subject matter of the group in fact concerns the body of courses as a whole, a school may not simply point to the *purported* subject matter of the group as evinced, for example, by the subject matter of its by-laws. Rather, the school must point to the *actual* subject matter of the group as evinced, for example, by the subject matter of its meetings. E. High Gay/Straight Alliance v. Bd. of Educ., 81 F. Supp. 2d 1166, 1180 (D. Utah 1999) ("The court must examine the record of the

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[10] See also Mergens, 496 U.S. at 240 ("[U]nless a school could show that groups such as a chess club, a stamp collecting club, or a community service club fell within our description of groups that directly relate to the curriculum, such groups would be 'noncurriculum related student groups' for purposes of the Act.").

[11] See also id. at 245 ("Complete deference to the school district would render the Act meaningless because school boards could circumvent the Act's requirements simply by asserting that all student groups are curriculum related.") (quotation omitted).

student groups' *actual activities* as well as their stated purposes in order to make a qualitative determination as to curriculum-relatedness.") (emphasis added).[12] Moreover, a school may not simply claim ignorance of the actual subject matter of the group.[13]

Similarly, in proving that the subject matter of a recognized student group in fact concerns the body of courses as a whole, a school must prove that it "has more than just a tangential or attenuated relationship to courses offered by the school." Mergens, 496 U.S. at 238. In addition, "a student group that is 'curriculum related' must at least have a more direct relationship to the curriculum than a religious or political club would have." Id.[14] These are the safeguards against the self-

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[12] See also Mergens, 496 U.S. at 246 ("[O]ur definition of 'noncurriculum related student activities' looks to a school's actual practice rather than its stated policy."); Donovan, 336 F.3d at 224 ("Just as putting a 'Horse' sign around a cow's neck does not make a bovine equine, a school's decision that a free-wheeling activity period constitutes actual classroom instructional time does not make it so."); Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 857 (2d Cir. 1996) ("[T]o the extent that [a religious club] engages in social and community activities that are not integral to a sectarian religious experience, it is in danger of becoming merely a religious affinity group practicing social exclusion.").

[13] See Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ., 258 F. Supp. 2d 667, 685-86 (E.D. Ky. 2003) ("Regardless of [the school's] purported lack of knowledge of these meetings, the EAA does not permit schools to use their lack of knowledge as a defense . . . . Given the conspicuous location and number of the meetings, the court finds [the school] either knew or should have known the meetings were occurring.").

[14] See also Colin, 83 F. Supp. 2d at 1146; Pope, 12 F.3d at 1253-54.

defeating construction of the EAA identified by the Supreme Court in Mergens:

> To the extent that [the school] contend[s] that 'curriculum related' means anything remotely related to abstract educational goals . . . we reject that argument. To define 'curriculum related' in a way that results in almost no schools having limited open fora, or in a way that permits schools to evade the Act by strategically describing existing student groups, would render the Act merely hortatory . . . . Allowing such a broad interpretation of 'curriculum-related' would make that Act meaningless. A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal.

Mergens, 496 U.S. at 244-45. Accordingly, in Mergens, the Supreme Court rejected the school's generalized arguments that its recognized student groups were curricular because they variously "further[ed] the School's overall goal of developing effective citizens by requiring student members to contribute to their fellow students" (student orientation club), "advance[d] the goals of the School's political science classes by providing an understanding and appreciation of government processes" (student government clubs), "further[ed] one of the essential goals of the Physical Education Department – enabling students to develop lifelong recreational interests" (scuba diving club), "supplement[ed] math and science courses because [they] enhance[d] students' ability to engage in critical thought process" (chess club), and "promote[d] effective citizenship, a critical goal of the [school] curriculum, specifically the Social Studies Department"

(community service clubs). Id. at 244.[15]

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The case law confirms that the mandate of the EAA is an expansive one.[16] Moreover, the case law confirms that the mandate of the EAA applies equally to the type of non-curricular group at issue in this case – the GSA.[17] In sum, where a school permits even one non-curricular (broadly defined) group (broadly defined) to meet (broadly defined) on school premises during non-instructional time, it must permit all other non-curricular groups (including GSAs) to do so, too, and to do so on equal terms.

2. Defendants are violating Plaintiffs' statutory right to a non-curricular group under the EAA

PRIDE is a non-curricular group that has sought to meet on school premises during non-instructional time on terms equal to those on which other non-

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[15] See also Pope, 12 F.3d at 1252.

[16] Mergens, 496 U.S. 226 (1990) (Christian club); Donovan, 336 F.3d 211 (3d Cir. 2003) (Bible club); Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002) (Bible club); Ceniceros, 106 F.3d 878 (9th Cir. 1997) (religious club); Hsu, 85 F.3d 839 (2d Cir. 1996) (Bible club); Pope, 12 F.3d 1244 (3d Cir. 1993) (Bible club); Garnett, 1994 WL 555397 (W.D. Wash. 1994) (religious club); Student Coalition, 633 F. Supp. 1040 (E.D. Pa. 1986) (advocacy group); Hoppock v. Twin Falls Sch. Dist. No. 411, 772 F. Supp. 1160 (D. Idaho 1991) (Christian club); Van Schoick, 104 Cal. Rptr. 2d 562 (Cal. Ct. App. 2001) (Fellowship of Christian Athletes).

[17] Boyd, 258 F. Supp. 2d 667 (E.D. Ky. 2003); Franklin, 2002 WL 32097530 (S.D. Ind. Aug. 30, 2002); Colin, 83 F. Supp. 2d 1135 (C.D. Cal. 2000); E. High, 81 F. Supp. 2d 1166 (D. Utah 1999).

curricular groups have met. KP ¶ 4; CH ¶ 3; KG ¶ 4. During the 04-05 school year, after "a pattern of delay and discrimination," Colin, 83 F. Supp. 2d at 1149, Defendants ultimately permitted PRIDE to meet on school premises during non-instructional time, albeit not on terms equal to those on which other non-curricular groups met. KP ¶¶ 6-19; AS ¶¶ 6-12. During the 05-06 school year, however, Defendants shut down PRIDE altogether. KP ¶ 22; AS ¶ 15. Defendants did not shut down PRIDE for any reason other than the purported prohibition on all non-curricular groups. Id. Thus, the sole dispute in this case at this time is whether Defendants have in fact shut down all non-curricular groups.

Defendants have not in fact shut down all non-curricular groups. To the contrary, notwithstanding the purported prohibition on all non-curricular groups, during the 05-06 school year, Defendants have openly recognized each of the following non-curricular groups and permitted each to meet, engage in activities, use school resources, and otherwise enjoy school privileges on school premises during non-instructional time.

Prayer Group. During the 05-06 school year, Defendants have recognized a Prayer Group and permitted it to meet, engage in activities, use school resources, and otherwise enjoy school privileges on school premises during non-instructional time. In particular, Defendants have permitted the Prayer Group to publicize its

meetings in ways that are not available to all other student groups, including the use of the school public address system. KP ¶ 34; CH ¶ 11; KG ¶ 10; CB ¶ 7.[18] By definition, the Prayer Group is non-curricular. See U.S. Const. amend. I; Ga. Const. art. I, § 2, ¶ 7. Prayer is not actually taught in a regularly offered course and does not concern the curriculum as a whole. Participation in the group is not required for a particular course and does not result in academic credit.

Beta Club. During the 05-06 school year, Defendants have recognized the Beta Club and permitted it to meet, engage in activities, use school resources, and otherwise enjoy school privileges on school premises during non-instructional time. CB ¶ 5. The Beta Club is non-curricular. The actual subject matter of its meetings is community service. This subject matter is not actually taught in a regularly offered course and does not concern the curriculum as a whole. Participation in the group is not required for a particular course and does not result in academic credit. CB ¶¶ 5-6; EL Ex. G.[19]

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[18] See also Boyd, 258 F. Supp. 2d at 686 ("School officials grant an offering or opportunity to a student group when they know or should know the group is violating administration rules but take no action to prevent further meetings.").

[19] See also Mergens, 496 U.S. at 246 (community service group is non-curricular); Pope, 12 F.3d at 1251-54 (community service group is non-curricular); Boyd, 258 F. Supp. 2d at 687 (Beta Club is non-curricular); Colin, 83 F. Supp. 2d at 1143 (community service group is non-curricular); Van Schoick, 104 Cal. Rptr. 2d at 568 ("[C]ommunity service clubs are, at best, only marginally related to the usual high school curriculum.").

Student Council. During the 05-06 school year, Defendants have recognized the Student Council and permitted it to meet, engage in activities, use school resources, and otherwise enjoy school privileges on school premises during non-instructional time. RD ¶ 5; KG ¶ 7. The Student Council is non-curricular. The actual subject matters of its meetings are social events and community service, not curricular planning. These subject matters are not actually taught in a regularly offered course and do not concern the curriculum as a whole. Participation in the group is not required for a particular course and does not result in academic credit. RD ¶¶ 6-7; KG ¶ 7; EL Ex. H.[20]

Dance Team. During the 05-06 school year, Defendants have recognized the Dance Team and permitted it meet, engage in activities, use school resources, and otherwise enjoy school privileges on school premises during non-instructional time. KP ¶ 33; CH ¶ 9; KG ¶ 12; EL Ex. J. The Dance Team is non-curricular. Dance is not actually taught in a regularly offered course and does not concern the curriculum as a whole. Participation in the group is not required for a particular

[20] See also Mergens, 496 U.S. at 240 ("A school's student government would generally relate directly to the curriculum to the extent that it addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses offered by the school."); Boyd, 258 F. Supp. 2d at 687 (executive councils are non-curricular).

course and does not result in academic credit. KP ¶ 33; CH ¶ 9; KG ¶ 12.[21]

Shooting Club. During the 05-06 school year, Defendants have recognized the Shooting Club and permitted it to meet, engage in activities, use school resources, and otherwise enjoy school privileges on school premises during non-instructional time. In particular, Defendants have permitted the Shooting Club to use the school public address system to publicize its meetings and to be recognized in the school yearbook. CH ¶ 6; KG ¶ 8. The Shooting Club is non-curricular. Gun-related subject matters are not actually taught in a regularly offered course and do not concern the curriculum as a whole. Participation in the group is not required for a particular course and does not result in academic credit. Id.

YAC. During the 05-06 school year, Defendants have recognized YAC and permitted it to meet, engage in activities, use school resources, and otherwise enjoy school privileges on school premises during non-instructional time. AS ¶ 16; CH ¶ 5; KG ¶ 6; EL Ex. F. YAC is non-curricular. The actual subject matter of its meetings is prevention of drug, alcohol, and tobacco use and pregnancy. This subject matter is not actually taught in a regularly offered course and does not concern the curriculum as a whole. Participation in the group is not required for a particular course and does not result in academic credit. AS ¶¶ 16-17; CH ¶ 5; KG

[21] See also Garnett, 1994 WL 555397 at *2 (dance squad is non-curricular).

¶ 6; EL Ex. F.[22]

FCCLA. During the 05-06 school year, Defendants have recognized FCCLA and permitted it to meet, engage in activities, use school resources, and otherwise enjoy school privileges on school premises during non-instructional time. KP ¶ 25; CH ¶ 7. FCCLA is non-curricular. The actual subject matters of its meetings, at which a school official is present in an advisory capacity, are socializing and other activities that are not taught in any class and that do not concern the curriculum as a whole. Accordingly, the subject matters of its meetings are not actually taught in a regularly offered course and do not concern the curriculum as a whole. Participation in the group is not required for a particular course and does not result in academic credit. KP ¶¶ 26-28; CH ¶ 7.

Because, during the 05-06 school year, Defendants have permitted even one of these non-curricular groups to meet on school premises during non-instructional time, they must permit PRIDE to do so, too, and to do so, at a minimum, on terms equal to those on which any other non-curricular group has met. Thus, Plaintiffs are substantially likely to succeed on the merits of their claim under the EAA.

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[22] See also Donovan, 336 F.3d at 221 (anti-drug and alcohol club is non-curricular); Hsu, 85 F.3d at 860 (Students Against Drunk Driving is non-curricular); Franklin, 2002 WL 32097530 at *2 (Students Against Destructive Decisions is non-curricular); Randall, 765 F. Supp. at 796 n.12 (Chemically Free Athletes Group is non-curricular).

B. Plaintiffs Are Substantially Likely to Succeed Under the Federal and State Constitutions

1. The constitutional right to expressive association under the federal and state constitutions

The First Amendment provides that a governmental actor may not "abridg[e] the freedom of speech." U.S. Const. amend. I.[23] This constitutional guarantee of free expression includes the constitutional guarantee of expressive association. Healy, 408 U.S. at 181.

It is a fundamental principle of constitutional law that viewpoint discrimination is anathema to free expression. Because "[t]here is an equality of status in the field of ideas," it is presumed that governmental action "must afford all points of view an equal opportunity to be heard." Police Dep't v. Mosley, 408

[23] See also U.S. Const. amend. XIV; Ga. Const. art. I, § 1, ¶ 5. "[T]he Georgia Constitution . . . provide[s] even broader protection than the First Amendment." Coffey v. Fayette County, 610 S.E.2d 41, 42 (Ga. 2005); see also Statesboro Publ'g Co., Inc. v. City of Sylvania, 516 S.E.2d 296 (Ga. 1999); State v. Miller, 398 S.E.2d 547, 550 (Ga. 1990). Among other thins, it absolutely prohibits all forms of prior restraint of speech. K. Gordon Murray Prods., Inc. v. Floyd, 125 S.E.2d 207, 213 (Ga. 1962) ("[A]ll interference [with speech] is absolutely interdicted by the [state] Constitution. This means that no interference, no matter for how short a time nor the smallness of degree, can be tolerated."); see also Fernandez v. N. Ga. Reg'l Med. Ctr., Inc., 400 S.E.2d 6, 8 (Ga. 1991); Brannon v. Am. Micro Distribs., Inc., 342 S.E.2d 301, 303 (Ga. 1986); Ga. Gazette Publ'g Co. v. Ramsey, 284 S.E.2d 386, 387 (Ga. 1981); Pittman v. Cohn Cmties., Inc., 239 S.E.2d 526, 528 (Ga. 1977); Singer Mfg. Co. v. Domestic Sewing Mach. Co., 49 Ga. 70, 73 (Ga. 1873). Refusal to recognize a non-curricular group is a form of prior restraint of speech. Healy v. James, 408 U.S. 169, 184 (1972).

U.S. 92, 96 (1972) (quotation and footnote omitted). Accordingly, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (citation omitted). This constitutional proscription on viewpoint discrimination is no less obligatory where a governmental actor seeks to deny access to a limited public forum – *i.e.*, a forum "reserv[ed] . . . for certain groups or for the discussion of certain topics," id. at 829 – to an expressive association based on its viewpoint. Id. at 829-30.[24]

This fundamental principle of constitutional law is equally applicable in the school setting. As the Supreme Court famously held, "[i]t can hardly be argued that . . . students . . . shed their constitutional rights to freedom or speech or expression at the schoolhouse gate." Tinker v. Des Moines Indep. Cmty. Sch.

[24] See also Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-07 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392-93 (1993). Where a speaker fulfills the requirements for access to a limited public forum, the governmental actor bears the "heavy" burden of proving that denial of access is not viewpoint discriminatory. Healy, 408 U.S. at 184. To satisfy its burden, the governmental actor may not point to the fact that some may find the speaker's viewpoint disagreeable: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989) (citations omitted); see also Terminiello v. City of Chicago, 337 U.S. 1, 4-5 (1949).

Dist., 393 U.S. 503, 506 (1969). Indeed, the case law confirms that, where schools establish limited public forums by permitting even one non-curricular group to meet, students are protected from viewpoint discrimination in the exercise of their constitutional right to expressive association to form other non-curricular groups.[25] More specifically, the case law confirms that, where schools establish limited public forums by permitting even one non-curricular group to meet, students are protected from viewpoint discrimination in the exercise of their constitutional right to expressive association to form the type of non-curricular group at issue in this case – the GSA.[26] In sum, where a school establishes a limited public forum by permitting even one non-curricular group to meet, it may not discriminate among non-curricular groups based on their viewpoints.

2. Defendants are violating Plaintiffs' constitutional right to expressive association under the federal and state constitutions

Defendants have permitted non-curricular groups to meet. See § I.A.2. supra. In doing so, they have opened a limited public forum to which they may not deny access to any other non-curricular group based on its viewpoint.

Defendants' actions have been specifically motivated by their continuing

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[25] Donovan, 336 F.3d 211 (3d Cir. 2003) (Bible club); Prince, 303 F.3d 1074 (9th Cir. 2002) (Bible club); see also Healey, 408 U.S. 169 (1972) (advocacy group).
[26] E. High Sch. PRISM Club v. Seidel, 95 F. Supp. 2d 1239 (D. Utah 2000); see also Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543 (11th Cir. 1997).

desire to suppress PRIDE's viewpoint. KP ¶ 23; SP ¶ 6.[27] During the 04-05 school year, Defendants, at first, refused to permit PRIDE to meet at all. KP ¶¶ 6-16; AS ¶¶ 6-9. After considerable delay, Defendants, in the end, permitted PRIDE to meet, but not on terms equal to those on which other non-curricular groups met. KP ¶ 19; AS ¶12. During the course of the delay, Defendants made numerous public statements conveying their disapproval of PRIDE's viewpoint. KP ¶¶ 12-15; AS ¶ 8; SP ¶¶ 2-3; EL Ex. E. During the 05-06 school year, Defendants shut down PRIDE altogether. KP ¶ 22; AS ¶ 15. Defendants did not shut down PRIDE for any reason other than the purported prohibition on all non-curricular groups. Id. That Defendants have not in fact shut down all non-curricular groups confirms that the purported prohibition on all non-curricular groups is mere pretext for suppressing PRIDE's viewpoint. This conclusion is supported by the fact that Defendants maintain no express standards for ascertaining which student groups are curricular and which are non-curricular. SP ¶ 5; EL Ex. A.[28]

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[27] See also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 811 (1985) ("The existence of reasonable grounds . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination.") (citations omitted).

[28] See also Seidel, 95 F. Supp. 2d at 1244 ("[A]n absence of express standards makes it far too easy for officials to use 'post hoc rationalizations' and 'shifting or illegitimate criteria' to justify their behavior, and thus make it difficult for courts to determine whether an official has engaged in viewpoint discrimination.") (quoting City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 758 (1988)).

That said, even if it were true that Defendants' actions have not been specifically motivated by their continuing desire to suppress PRIDE's viewpoint, it would be enough that Defendants have granted even one non-curricular group's viewpoint the opportunity to be expressed in their limited public forum but denied PRIDE's viewpoint the same opportunity.

Thus, Plaintiffs are substantially likely to succeed on the merits of their claims under the federal and state constitutions.

II. THERE IS A SUBSTANTIAL THREAT OF IRREPARABLE INJURY IF THE REQUESTED PRELIMINARY INJUNCTIVE RELIEF IS NOT GRANTED

As the Supreme Court has long held, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976) (citation and footnote omitted).[29] Courts have similarly held that the deprivation of the statutory rights guaranteed by the EAA is an irreparable injury: "The EAA protects free speech

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[29] See also Bennett v. Hendrix, 423 F.3d 1247, 1254 (11th Cir. 2005); N.E. Fla. Ch. of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990); Newman v. City of E. Point, 181 F. Supp. 2d 1374, 1381 (N.D. Ga. 2002); NAF v. MARTA, 112 F. Supp. 2d 1320, 1328 (N.D. Ga. 2000); Atlanta J. & Const. v. City of Atlanta Dep't of Aviation, 6 F. Supp. 2d 1359, 1366 (N.D. Ga. 1998); ACLU of Ga. v. Miller, 977 F. Supp. 1228, 1235 (N.D. Ga. 1997); Tillman v. Miller, 917 F. Supp. 799, 801 (N.D. Ga. 1995); Smith v. Turner, 764 F. Supp. 632, 642 (N.D. Ga. 1991); Chabad-Lubavitch of Ga. v. Harris, 752 F. Supp. 1063, 1066 (N.D. Ga. 1990).

rights . . . . [T]he Act protects ‘expressive liberties,’ and we therefore take guidance from the Supreme Court’s oft-quoted statement that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” Hsu, 85 F.3d at 872 (quotation omitted).[30]

In this case, Plaintiffs are not suffering merely threatened injury; they are suffering actual irreparable injury. With every passing day that Defendants deprive Plaintiffs of the constitutional right to expressive association guaranteed by the First Amendment and the statutory rights guaranteed by the EAA, Plaintiffs suffer injury for which they cannot be made whole. V. Compl. ¶¶ 98, 104, 110.[31]

III. THE THREATENED INJURY TO PLAINTIFFS OUTWEIGHS THE HARM THAT THE REQUESTED PRELIMINARY INJUNCTIVE RELIEF MAY CAUSE DEFENDANTS

The deprivation of the constitutional right to free expression is an especially acute injury. See § II. supra. The constitutional dimension to the ongoing injury in this case alone weighs heavily in favor of Plaintiffs.[32]

Even more dispositively, the requested preliminary injunctive relief would cause Defendants no harm at all. The requested preliminary injunctive relief

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[30] See also Boyd, 258 F. Supp. 2d at 692; Colin, 83 F. Supp. 2d at 1149.

[31] See also Boyd, 258 F. Supp. 2d at 692; Colin, 83 F. Supp. 2d at 1150.

[32] Newman, 181 F. Supp. 2d at 1381; NAF, 112 F. Supp. 2d at 1328; Atlanta J. & Const., 6 F. Supp. 2d at 1366; ACLU of Ga., 977 F. Supp. at 1235.

would not compel Defendants to do anything beyond passive accommodation. It would compel Defendants only to permit PRIDE and other non-curricular groups to meet, and to do so on equal terms. In doing so, it would compel Defendants to do nothing beyond what thousands of other school districts and their officials do with regard to non-curricular clubs, what they themselves did during the 04-05 school year with regard to non-curricular clubs, and indeed what they themselves have continued to do during the 05-06 school year with regard to non-curricular clubs.[33]

If anything, the requested preliminary injunctive relief would further Defendants' interests. Because PRIDE is intended, among other things, to empower its members to seek to eradicate anti-gay harassment at WCHS, the requested preliminary injunctive relief could reduce Defendants' exposure to additional liability for deliberate indifference to such harassment. Moreover, given the significant educational value of extracurricular activities, the requested preliminary injunctive relief would allow Defendants to provide a more optimal educational environment for their students. In sum, the actual injury to Plaintiffs vastly outweighs any harm that the requested preliminary injunctive relief might

[33] The only "harm" to which Defendants may point is societal disagreement with PRIDE's viewpoint. This "harm," however, is not a constitutionally cognizable harm. Johnson, 491 U.S. at 414.

cause Defendants.[34]

IV. GRANTING THE REQUESTED PRELIMINARY INJUNCTIVE RELIEF WOULD NOT DISSERVE THE PUBLIC INTEREST

The public interest is always furthered where the constitutional right to free expression is safeguarded. "No long string of citations is necessary to find that the public interest weighs in favor of having access to a free flow of constitutionally protected speech." ACLU of Ga., 977 F. Supp. at 1235 (quotation omitted).[35]

Moreover, anti-gay harassment in schools is a serious problem.[36] Indeed, it is a documented problem at WCHS. KP ¶ 4; CH ¶ 3; KG ¶ 3; AS ¶ 3; CB ¶ 3; RD ¶ 14; see also V. Compl. ¶¶ 60-80. This harassment undermines the very mission of WCHS – to provide an educational environment in which all students have a full and fair opportunity to learn. EL Ex. K. The requested preliminary injunctive relief would further the public interest because PRIDE is intended, among other things, to empower its members to seek to eradicate anti-gay harassment at WCHS.

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[34] See Boyd, 258 F. Supp. 2d at 692; Seidel, 95 F. Supp. 2d at 1251; Colin, 83 F. Supp. 2d at 1150; see also KP ¶ 20; AS ¶ 13 (PRIDE meetings caused no disruption); Boyd, 258 F. Supp. 2d at 692; Colin, 83 F. Supp. 2d at 1146.

[35] See also Suntrust Bank v. Houghton Mifflin Co., 268 F.2d 1257, 1276 (11th Cir. 2001); Newman, 181 F. Supp. 2d at 1381; NAF, 112 F. Supp. 2d at 1328; Atlanta J. & Const., 6 F. Supp. 2d at 1366.

[36] Susan Hanley Kosse & Robert H. Wright, How Best to Confront the Bully: Should Title IX or Anti-Bullying Statutes Be the Answer?, 12 Duke J. of Gender L. & Policy, 53, 56 (2005) (reporting that 84% of gay students suffer verbal, and 40% suffer physical, harassment because of their sexual orientation).

Furthermore, extracurricular activities have significant educational value. KP ¶ 5; CH ¶ 4; KG ¶ 5; EL Ex. C.[37] The requested preliminary injunctive relief would further the public interest by ensuring a more optimal educational environment for WCHS students. For all of these reasons, granting the requested preliminary injunctive relief would significantly further the public interest.[38]

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant the requested preliminary injunctive relief.

Dated: February 27, 2006.

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[37] See also Bd. of Educ. v. Earls, 536 U.S. 822, 831 n.4 (2002) ("Participation in such extracurricular activities is a key component of school life, essential in reality for students applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience.") (quotation omitted); Pope, 12 F.3d at 1254 ("[W]ip[ing] out all of [a school's] noncurriculum related student groups and totally clos[ing] its forum . . . . may be antithetical to progressive concepts of education."); Colin, 83 F. Supp. 2d at 1143 ("[C]lubs participate in the intellectual give and take of campus debate.") (quotation omitted).

[38] See Boyd, 258 F. Supp. 2d at 692; Seidel, 95 F. Supp. 2d at 1251; Colin, 83 F. Supp. 2d at 1151.

Respectfully submitted,

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FONT AND POINT CERTIFICATION

I hereby certify that, pursuant to Local Rule 5.1(C), the foregoing memorandum of law was prepared in 14-point Times New Roman font.

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