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The Right To Establish A GSA In Public Schools: A Basic Primer

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Can a school refuse to allow the establishment of a GSA?

Under the federal Equal Access Act (EAA) of 1984, any school that permits non-curriculum related student groups must provide equal access to all student groups, and that includes equal access for GSAs. Equal access means that the GSA must be afforded all the same rights and privileges as other student groups to use the facilities at the school for meetings and communications.

The text of the Equal Access Act, found at 20 U.S.C. § 4071(a), reads 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."

The United States Supreme Court has been crystal clear that the EAA requires schools "to grant equal access to student groups." *Bd. of Educ. of Westside Comm. Sch.* v. *Mergens,* 496 U.S. 226, 237 (1990). A school is subject to the EAA if it: (1) receives federal financial assistance and, (2) has a "limited open forum."

What's a limited open forum?

A "limited open forum" exists if the school "grants an offering to or opportunity for one or more non-curriculum related student groups to meet on school premises during non-instructional time." This definition is drawn directly from the text of the EAA. The bottom line is that if any non-curriculum student groups are allowed to meet at a school that receives federal funds (which means any public school), then a GSA must be allowed to do so on the same terms.

What's the difference between a curriculum and a non-curriculum related group?

GSAs are typically "non-curriculum" related student groups. You can distinguish between a curriculum related student group and a non-curriculum related group using the following examples. In a school that teaches French language, the French Club would be considered

curriculum related group. Similarly, all schools teach math, and therefore the Math Club would be a curriculum related group.

Meanwhile, common non-curriculum groups include: the Skating Club, Asian Club, Black Student Union, Christian Club, Key Club, Scuba Diving Club, and Chess Club. GSAs fall within this category of school clubs.

As long as a school accepts federal funding and has at least one non-curriculum related student group that meets during non-instructional time, the EAA prohibits the school from disallowing the GSA to do the same.

Can a school force a GSA to have a different name or purpose?

It is well-established that a school cannot require a GSA to adopt another name such as the "Diversity Club" or the "Tolerance Club," nor can it force a GSA to broaden its scope beyond the reach of LGBT issues. Refusal to allow students to form a GSA on the ground that the group must have a different name, or that it must have a different purpose, violates the Equal Access Act. Because other non-curricular groups are not forced to change their name or their purpose, for a school to force or attempt to force a GSA to do so would constitute impermissible differential treatment under the EEA.

There have been several court cases involving schools that have tried to force GSAs to adopt "less divisive" names or broaden the scope of the group's mission statement to include other issues. In all those cases, the GSAs have won the right to keep their name and their mission and the courts have found that it is impermissible for a school board to condition approval of the establishment of a GSA on a name change.

A GSA may *choose* to broaden its scope to include other issues, or it may vary its name *if it chooses,* but it cannot *forced* by the school administration to do either.

Are there any legitimate bases for a school to deny a GSA?

There are two bases on which a school that allows other non-curriculum groups *may* legitimately deny the formation of a GSA:

1. Schools may exclude GSAs that do not complv with their club-formation policies, as long as those policies are evenlv applied and not used as a pretext for discrimination.

Schools generally have rules for club formation. To be legitimate, the rules must be "content-neutral" – not aimed at a club's subject matter or constituents – but appropriately directed at procedures for forming and maintaining a club. For example, if a school has a policy that every group must have a faculty advisor, and, if the school consistently enforces that policy, then that counts as a "content neutral" rule. Thus, the failure of a GSA to identify a faculty advisor could be a legitimate reason for a school to deny a GSA. However, once a faculty advisor is found, the group must be allowed to go forward.

In a case where this is an issue, it will be important to really analyze the school's policy and to understand the facts. Does every other non-curriculum group have an advisor? Does the policy actually state that without an advisor the group cannot exist at all? What happens if there are temporary gaps in the advisor post (for example, a faculty member leaves or resigns his or her post and there is a lag before a new one is appointed). This may vary from school to school, so we will want to learn more facts when we hear that a group is encountering this problem.

It is important to note that the EAA is silent on the question of faculty advisors. This means that the law neither mandates nor prohibits them; schools are free to have a policy requiring a faculty advisor and we know that many schools do.

If a school has such a rule, or any other rule regarding club formation, and it is not consistently enforced, or not in a written policy accessible to students and faculty, some courts have concluded that the real reason for excluding the group was not its failure to follow the club-formation rules but that, instead, the school was using that reason as a "pretext" for discriminating against the GSA.

2. The EAA's Safe Harbor Provision

The EAA contains a safe harbor provision that allows a school to make distinctions among groups *if necessary* "to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary." As you might imagine, many school districts have invoked this safe harbor language in court to defend their refusal to recognize GSAs, arguing either that the presence of a GSA on campus would create uproar at the school and within the community, or that the presence of a GSA on campus would expose students to inappropriate messages.

In virtually *all* of these cases, the students have won and the schools have lost. This means that the courts have not, by and large, allowed schools to deny GSAs on the basis that they will be disruptive or will negatively affect student well-being. There has been just one exception, from a case in Texas, and that case had unique facts. For one thing, the GSA group in that case made explicit its commitment to teaching about safer sex in a school environment where the entire district had a formal abstinence only policy. Additionally, the GSA there maintained its own web site on which it included a link to a very sexually explicit web site. Other cases around the country have distinguished this single case from Texas by pointing at its unique facts.

Conclusion

The great news is that students and advocates have strong arguments against schools that try to deny their right to form a GSA. The prevailing law favors the students wishing to form the GSA, not the schools trying to shut them down or keep them from getting established.

A school presented with this informati6li should quickly understand that it must allow a GSA to form and exist on the same terms as other non-curriculum clubs. However, should legal action become necessary, we can feel confident because cases challenging a school's refusal to allow a GSA have been overwhelmingly successful.

Here is a list of some of those successful GSA cases: *Straights v. Osseo,* 471 F.3d 908 (8th Cir. 2006); *Gay-Straight Alliance of Yullee High Sch. v. Sch. Bd. of Nassau County,* 602 F. Supp. 2d 1233 (M.D. Fl. 2009); *Gonzalez* v. *Sch. Bd. of Okeechobee County,* 571 F. Supp. 2d 1257 (S.D. FI. 2008); *Gay-Straight Alliance* v. *Sch. Bd. of Okeechobee,* 483 F. Supp. 2d 1224 (S.D. Fl. 2007); *White County High Sch. Peers in Diverse Educ.* v. *White County Sch. Dist.,* 2006 WL 1991990 (N.D. Ga. 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,* 2002 WL 32097530 (S.D. Ind. 2002); *East High Sch. PRISM Club* v. *Seidel,* 95 F. Supp. 2d 1239 (D. Utah 2000); *Colin* v. *Orange Unified Sch. Dist.,* 83 F. Supp. 2d 1135 (C.D. Cal. 2000); *East High Gay/Straight Alliance* v. *Bd. of Educ. of Salt Lake City Sch. Dist.,* 81 F. Supp. 2cl1166 (D. Utah 1999).

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