GAY-STRAIGHT ALLIANCES:
COMMON LEGAL QUESTIONS AND ANSWERS

Does a public school have to allow a Gay-Straight Alliance (GSA) to form at a high school or middle school?

Generally, yes. Under the Equal Access Act (EAA),[1] a federal law passed in 1984 that applies to all public secondary schools that receive federal funding, a secondary school that allows at least one student-initiated non-curriculum-related club to meet on school groups during lunch or after school *must allow* all other non-curricular student groups, including GSAs, access to the school and cannot otherwise discriminate against the group, even if the club represents an unpopular viewpoint.[2]

As a federal judge concluded in an 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] [school officials] 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, Anthony Colin, Heather Zeitin, and the 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.[3]

Can the school refuse to allow the GSA to meet if other students or community members oppose the group and create a disruption?

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[1] 20 U.S.C. § 4071(a), (b).
[2] *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 271 (1990).
[3] *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1148 (C.D. Cal. 2000).

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No. A federal judge in Kentucky recently addressed this issue.[4] In that case, more than one-half of the students from the high school boycotted class to protest the decision of the Boyd County School Board to allow the GSA to meet. Subsequently, the school board reversed itself and decided that the GSA could not meet. In court, the school argued that it did not have to allow the GSA to meet on the ground that the GSA created a significant disruption to the school's functioning.

This argument was rejected by the court, which held that the negative reaction of others cannot be a basis upon which to refuse to allow the club to meet. Specifically, the court stated: "[A] school may not deny equal access to a student group because student and community opposition to the group substantially interferes with the school's ability to maintain order and discipline."[5] If the school allows at least one other non-curricular student club to meet, it can only deny access to another non-curricular student club if the club members' "*own* disruptive activities have interfered with [the school officials'] ability to maintain order and discipline."[6]

Does the school have to give a GSA the same privileges as other clubs?

Yes. Under the EAA, if a public school allows at least one non-curriculum related student group to use its facilities for a meeting place during non-instructional time, it cannot "deny equal access or a fair opportunity to, or discriminate against" any students who wish to conduct club meetings, such as a GSA.

This means that the school must give the GSA the *same privileges* and treat it the same as other clubs, including equal access to such things as meetings spaces, bulletin boards, use of the PA system, etc.[7]

Failure to grant a GSA the same privileges may also violate the Equal Protection Clause of the federal or state constitutions, the First Amendment, and/or state statutes prohibiting discrimination on the basis of sexual orientation.

Can the school create different tiers or categories of non-curricular student clubs?

No. As discussed above, the school must treat all non-curricular student clubs equally. So, the school cannot create different categories of non-curricular student clubs and grant the categories different privileges or impose different rules on them.

So, for example, it is a violation of the Equal Access Act for a school to create a category of "school-sanctioned" non-curricular clubs that are allowed to use the bulletin board and PA

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[4] *Boyd County High School Gay Straight Alliance v. Board of Educ. of Boyd County*, 258 F. Supp. 2d 667 (E.D. Ky. 2003)

[5] *Boyd County GSA*, 258 F. Supp. 2d at 690.

[6] *Id.*

[7] *Mergens*, 496 U.S. at 271 (1990) (Equal Access Act requires school to grant all non-curricular student clubs equal access to school newspaper, bulletin boards, public address system, and annual club fair); Prince v. Jacoby, 303 F.3d 1074, 1086 (9th Cir. 2002) (Equal Access Act requires school to grant all non-curricular student clubs equal access to loudspeaker and use of bulletin boards).

system, while, at the same time having a category of "non-school sanctioned" non-curricular student clubs (i.e. the ones that are "more controversial") that are denied the right to use the bulletin board and PA system.

Can the school require the club to change its name to something less "divisive" like the "Tolerance Club" or to broaden its mission statement?

No. The group has first amendment speech and associational rights in its name and its mission.[8] As one federal court explained:

> A group's speech and association rights are implicated in the name that it chooses for itself. The board is not allowed to require the student group to change its name merely because the Board finds that it would be less "divisive." . . . [The students] testified that these name changes would attack the very core reason for having the club. . . . [One student] said that the use of the word "Gay" in the title is important to announce that "being gay or homosexual is not bad, it's who you are." . . . [Another student] said that taking the word gay out would take the focus away from the issues people face and would imply that there's something wrong with the word "gay." . . . For all of the reasons that [the students] mentioned when talking about being forced to change the club's name, the Board's suggested name change clearly infringes on profound expressive meaning that the group attaches to its name.[9]

Moreover, as discussed above, once the Act has been triggered, a school cannot "deny equal access or a fair opportunity to, or discriminate against" a student club based on the content of the students' proposed discussions. Requiring the club to change its name or mission statement based on the content of the name or the mission violates the Act's prohibition against discrimination.

Is a club "curriculum-related" simply because the school says it is?

No. Whether a club is curriculum-related or not for purposes of the Act is a fact-based inquiry based on the connection between the subject matter of the group and the school's courses.[10]

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[8] *See, e.g., Latino Officers Ass'n v. City of New York*, 196 F.3d 458, 461, 465-66 (2d Cir. 1999) (describing as expressive conduct the marching of uniformed Latino policy officers in parade carrying banner bearing name of organization); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 570, 574 (1995) (noting that a group merely marching behind a "banner with the simple inscription 'Irish American Gay Lesbian and Bisexual Group of Boston'" expresses the point "that some Irish are gay, lesbian or bisexual" and suggests "their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals"); *Gay Activists Alliance v. Lomenzo*, 31 N.Y.2d 965, 966 (1973) (reversing secretary of state's refusal to accept filing of certificate of nonprofit corporation because it used the word "gay" which the secretary of state deemed "inappropriate").

[9] *Colin*, 83 F. Supp.2d 1335, 1147-48.

[10] *Boyd County GSA*, at p. 27 ("Just as the Supreme Court had done in *Mergens*, the Third Circuit in *Pope* held that the EAA is triggered by what a school does, not what it says. While a school certainly has the right to maintain a closed forum to avoid the dictates of the EAA, it does so at its own peril, running the risk that one or more of its groups will be determined to be a noncurriculum-related group.'").

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The Supreme Court has defined a curriculum related group as one "that has more than just a tangential or attenuated relationship to the courses offered by the school."[11] "[A] student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit."[12]

Examples of groups likely to be found curriculum related include: the French club, student government, and the school band. A non-curriculum related club, on the other hand, is one "that does not directly relate to the body of courses offered by the school."[13] Examples of non-curriculum-related clubs include the juggling club, the ski club, the scuba club, and the Christian club.

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[11] *Mergens*, 496 U.S. at 238.
[12] *Id.*
[13] *Id.* at 239.