UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 06-14320-Civ-Moore/Lynch

GAY-STRAIGHT ALLIANCE OF OKEECHOBEE HIGH SCHOOL, *et al*,

vs.

SCHOOL BOARD OF OKEECHOBEE COUNTY, *et al*.

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PREMININARY INJUNCTION

Plaintiffs reply to *Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction and Accompanying Memorandum of Law*. Defendants' opposition brief relies on a fundamental mischaracterization of the nature of the Okeechobee High School Gay-Straight Alliance ("OHS GSA") as a "sex-based club." Because the OHS GSA is about promoting tolerance and a welcoming environment for all students regardless of sexual orientation – not discussing or promoting sexual activity or providing access to sexually explicit material – defendants' arguments that the denial of equal access is justified by the abstinence curriculum and to protect the well-being of students fail and their reliance on *Caudillo v. Lubbock Independent Sch. District*, 311 F. Supp.2d 550 (N.D.Tex. 2004) is misplaced.

I. Plaintiffs Have Shown a Substantial Likelihood of Success on the Merits.

A. The OHS GSA Would Not Materially and Substantially Interfere with the Orderly Conduct of Educational Activities or Abstinence-based Curriculum at OHS.

1. The OHS GSA is not a "sex-based club."

The purpose of the GSA is to provide a safe, supportive environment for students and to promote tolerance and acceptance of one another, regardless of sexual orientation. Defendants attempt to manufacture some similarity between the club in *Caudillo* and the OHS

GSA, repeatedly referring to the OHS GSA as a "sex-based club" (eighteen times) in their opposition brief. They complete this verbal sleight-of-hand with the conclusion that "OHS has legitimately excluded the entire topic of sex and sexuality from its limited open forum . . . ." *See* Resp. at 10.[1] This characterization of the OHS GSA ignores the facts. There is absolutely no evidence here to support the suggestion that the OHS GSA discusses sexual activity or provides access to sexually explicit material like the club at issue in *Caudillo*.[2]

The facts in *Caudillo* make it inapplicable here, but Defendants ignore another case on all fours with the facts presented here that rejected their arguments and that is more consistent with the body of caselaw enforcing the EAA as to gay student groups. In *Colin v. Orange Unified School District*, 83 F. Supp.2d 1135 (C.D.Cal. 2000), one of the many cases in which the Equal Access Act rights of GSA's have been upheld, the court addressed and rejected an assertion nearly identical to the one advanced here. There, the defendant school board attempted to characterize the GSA as a "sexually charged club" whose "subject matter related to sexual conduct and sexuality" and argued that this interfered with educational concerns of the district in the area of sex education. *Id.* at 1139-40. The court rejected this characterization, pointing to the GSA mission statement and other evidence to show that the GSA provided a forum to discuss "tolerance," "issues related to sexual orientation and homophobia," the need to "treat everyone with respect," and counterattacking "unfair treatment and prejudice." *Id.* at 1144-45. The court also noted that assuming a GSA will discuss sex – and that other clubs will not – unfairly singles out the GSA based on a

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[1] Defendants state that they "are within the terms of the safe harbor exceptions to the EAA when they limit the subjects for which EAA clubs may be created to those purposes for which the forum was established." Resp. at 9-10. This is a misstatement of the law. While a school may dictate the subjects discussed in a First Amendment "limited public forum" to those for which the forum was created, there is no such ability in an EAA "limited open forum." Once the school creates an EAA limited open forum, it must grant access to all otherwise appropriate groups.

[2] For the same reason, defendants' reliance on *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157, 171 (D. Mass. 1994); and *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977) is misplaced. These cases all address lewd or sexually explicit speech.

stereotype. *Id.* at 1148. The Court held that the GSA was entitled to equal access under the EAA.

2. *The OHS GSA does not conflict with Florida or OHS' abstinence education policies.*

Defendants argue that laws and policies requiring schools to teach abstinence education mandate that they deny access to the GSA, citing Fla. Stats. §§1001.42, 1003.43, and 1003.46. But as discussed above, the OHS GSA does not discuss sex, let alone promote sexual activity. Thus, there is no conflict between the OHS GSA and abstinence curriculum. Defendants attempt to bridge this gap by suggesting an extraordinary interpretation of the Florida abstinence education statutes. Citing those statutes, defendants state:

> Florida clearly directed, and continues to direct, that in order to protect the well-being of students in Florida schools, officially sanctioned discussions about sexual identity or sexual orientation were limited to school officials teaching about abstinence before marriage as a way to avoid teen pregnancies, sexually transmitted diseases, and the attendant mental and emotional health issues. Resp. at 7-8.

This interpretation of these statutes flies in the face of their plain meaning. The statutes do not require or permit schools to limit the discussion of sexual identity or sexual orientation to school officials teaching about sexual abstinence before marriage. They require and permit certain lessons to be taught in the public schools but do not limit classroom discussion of sexuality to the discussion of abstinence,[3] much less restrict student speech during non-curricular activities.

3. *Discussion during non-curricular time of ideas that do not conform to the curriculum does not interfere with educational activities.*

As discussed above, there is no conflict between the GSA and Florida's sex education statutes because there is nothing in those laws outlining curriculum that grants schools authority

[3] In fact, section 1003.46 appears to mandate discussion of sexual issues unrelated to abstinence. The AIDS curriculum requires instruction in "the known modes of transmission, signs and symptoms, risk factors associated with acquired immune deficiency syndrome, and means used to control the spread of acquired immune deficiency syndrome." Fla. Stat. § 1003.46(1).

to censor student speech outside of the classroom. But even if there were a conflict, that is not a basis to deny equal access in violation of federal law. A similar argument was rejected by the court in *Colin*, where the court, in holding that the EAA protects a GSA, noted that schools may not "act as 'thought police' inhibiting all discussion that is not approved by and in accordance with the official position of the State." *Colin*, 83 F. Supp.2d at 1141. Denying access on the basis of a club's disagreement with the curriculum would conflict with the plain language of the EAA's prohibition of discrimination against a club "on the basis of the religious, political, philosophical, or other content of the speech at such meetings." *See* §4071(a). Discussion during non-curricular time of points of view and ideas that differ from the school curriculum does not interfere with educational activities in any way. If the expression of views that depart from the officially sanctioned view were a basis to deny equal access, the EAA would be meaningless. The EAA does not allow a school to deny equal access to a Christian club that discusses creationism on the basis that it conflicts with the science curriculum. Nor does the Act allow OHS to deny equal access to the GSA on the basis that it believes the club's speech is in conflict with the abstinence curriculum.[4]

B. The Well-Being Exception to the EAA Does Not Justify Denial of Equal Access to the OHS GSA

Defendants argue that 20 U.S.C. § 4071(f) allows them to permissibly discriminate against the GSA in order to protect the well-being of OHS students. 20 U.S.C. § 4071(f) states: "Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, 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."

A federal district court in Kentucky rejected the argument that the EAA's exception to protect the well-being of students allows a school to deny access to a GSA. *See Boyd County*

[4] The part of *Caudillo* that says that a club's inconsistency with curriculum allows for the denial of equal access cannot be reconciled with the language of the EAA and the rest of the caselaw concerning the Act.

High Sch. Gay Straight Alliance v. Bd. of Educ., 258 F. Supp. 2d 667, 691 (E.D. Ky. 2003). There, parents and students "expressed their concern[] about the approval of the GSA Club and how that approval might affect the safety of their children." *Id.* at 688. The Court held that neither the "well being" exception nor any other exception in §4071(f) allowed the school to discriminate against the GSA. *Id* at 688-691.

Defendants argue that "the school may restrict sex-based clubs…from the school's limited open forum because a student club organized around what immature students perceive to be their sexual orientation or preference at that early stage of their lives …would not protect student well-being." Resp. at 9. Defendants' argument is wrong on the facts and wrong on the law.

As discussed above, defendants' characterization of the OHS GSA as a "sex-based club" has no basis in reality. Moreover, the club is not "organized around" students' perception of their sexual orientation. The Okeechobee GSA is open to gay and straight students. The issues that it addresses are equally important for gay and straight members. All students benefit from an environment free of discrimination and harassment. And bullying directed at gay and lesbian students hurts the bully as well as the victim. Straight students who graduate into the college or professional world believing that it is acceptable to discriminate or bully based upon sexual orientation will be at a decided disadvantage. The purpose of the club is to provide a safe, supportive environment for students to talk about homophobia and work together to promote tolerance, understanding, and acceptance of one another, regardless of sexual orientation. The GSA constitution states that "members are in no way obligated to declare or define their sexual orientation. No member may declare any assumption about another member's sexual orientation." *See Gay Straight Alliance of Okeechobee High School Constitution*, attached to *First Amended Complaint* as Exhibit B.

Defendants also point to the harm of teen sex, suggesting that this would justify the

denial of access to the GSA. Plaintiffs do not dispute that teen sex can be harmful but that fact is irrelevant here because the GSA does not discuss or promote sexual activity.[5]

Defendants offer no substantiation for their assertion that the GSA is harmful to the well-being of students. They offer only conclusory statements, which are not sufficient to warrant the denial of equal access. *Hsu v. Roslyn Union Free Sch. Dist. No. 3.*, 85 F.3d 839, 872 (2d Cir. 1996)("A school's conclusory statement that prayer meetings will substantially and materially impede the orderly conduct of the school is an insufficient weight in the balance struck by the Act."). Not only is there no basis for this allegation about GSAs, but in fact, GSAs can promote students' well-being. *See Colin*, 83 F. Supp. 2d at 1146 (noting that the GSA was formed "to avoid the disruptions to education that can take place when students are harassed based on sexual orientation"); *see also* Carol Goodenow, Laura Szalacha, and Kim Westheimer, "School Support Groups, Other School Factors, and the Safety of Sexual Minority Adolescents," 43(5) *Psychology in the Schools* 573, 576.[6]

Defendants also misapply the law. As with all of Defendants' arguments, their argument that they may invoke the "well-being" exception of the EAA to deny access to the OHS GSA is based on the mistaken assertion that *Caudillo* is relevant to the facts of this case. In *Caudillo*, the plaintiffs' stated purpose in its mission statement was to educate about safe sex

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[5] Defendants also claim that concern about "mental health issues" justifies the denial of equal access. In their brief, defendants claim that GSA students "described [to Wiersma] mental and emotional difficulties they were experiencing with regard to their sexual orientation." Resp. at 3. They argue that Wiersma felt compelled to deny access to the club to protect their well-being because "these mental health issues were beyond the expertise of both the proposed teacher sponsor and the students themselves." *Id.* First of all, Wiersma does not state anywhere in her declaration that any students told her they were suffering from emotional or mental health problems relating to their sexual orientation. But even if they had, that would not be a justification for denying equal access because the OHS GSA is not a club that deals with mental health issues; its purpose is to promote tolerance and a welcoming environment for all students regardless of sexual orientation.

[6] "The presence of a GSA or other support group for LGB students was significantly associated with greater safety (see Table 3). Sexual minority youth in schools with such groups were less than half as likely as those in other schools to report dating violence, being threatened/injured at school, or skipping school due to fear [Odds Ratios (OR) .48, .47, and .43, respectively], and were less than one third as likely to report making multiple past-year suicide attempts (OR .29)."

and the group's website contained links to obscene sexually explicit material. These facts are not present here. Where, as here, the GSA does not discuss sexual activity or promote access to sexual materials, but, rather, seeks to promote tolerance and a hospitable environment for all students regardless of sexual orientation, *Caudillo* is inapposite.

Defendants mischaracterize the legislative history as well. Senator Danforth, author of the "well-being" exception to the EAA, suggested during Senate debate that the "theory of this amendment is to make it clear that the school administration does have, does continue to have inherent power to prevent the unrestrained, intensive, extreme psychological pressure which could be utilized by some religious groups to attempt to bring other kids within the religious community." Legislative History of P.L. 98-377, 98 CIS Legis. Hist. P.L. 377; 130 Cong. Rec. 19, 229 (1984). And in the Senate debate over the proposed EAA, several senators recognized that under the Act, gay rights clubs would be permitted to meet at school. Some expressed the view that such groups could be excluded if they advocate illegal sodomy (which was illegal in some states at the time) but not if they advocate for political rights. *Id.* at 119, 224. Senator Gordon stated that the EAA "clearly beyond the slightest peradventure of argument protects a gay rights organization in a school." *Id.* at 19, 224 (Sen. Gorton). He then voted against the EAA expressing dismay that "we have to craft a net . . . which is as broad as this" and "creates substantially greater evils than it cures." *Id.* at 19, 248. No senator expressed the view that the Act could be interpreted to exclude a gay rights club that did not advocate illegal activity. The view of the sponsor, Sen. Hatfield, who expressed distaste for gay rights clubs, was that the opening of secondary schools to gay rights groups was an acceptable consequence of protecting access for all groups. *Id.* at 19, 225 (Sen. Hatfield). This legislative history indicates that Congress understood the EAA to protect clubs like the OHS GSA, and did not consider them to fall within the well-being exception. *Id.* at 19, 211-50.

II. Defendants Actions Also Violate the First Amendment.[7]

Defendants' exclusion of the OHS GSA also violates Plaintiffs' First Amendment rights. Defendants ask this Court to fashion a broad and blanket exclusion from public schools of any club that discusses sexual orientation. Plaintiffs violate no law, do not discuss sexual activity, do not distribute obscene materials, and do not otherwise cause disruption of the educational process. There is simply no basis that Defendants offer to exclude this club except that its subject matter is sexual orientation. As the court recognized in *Colin*, "official suppression of student speech in high schools could not be justified by the bare desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Colin*, 83 F. Supp.2d at 1141, quoting *Tinker*, 393 U.S. at 509. Defendants are asking this Court to declare – for the first time anywhere in the United States – that a school can always exclude clubs whose subject matter concerns sexual orientation no matter what the purpose or activities of the club.

Such a rule would be a violation of the First Amendment because clubs like the OHS GSA do not "materially and substantially interfere with the operation of the school. *Tinker*, 393 U.S. at 509. Courts have recognized that the First Amendment protects students' right to discuss sexual orientation at school. *McLaughlin v. Board of Educ. of Pulaski County Special School Dist.*, 296 F. Supp.2d 960 (E.D.Ark. 2003) (recognizing that First Amendment protects junior high school student's right to talk about being gay at school during non-instructional time); *Henkle v. Gregory*, 150 F. Supp.2d 1067, 1074 (D.Nev. 2001) (high school student stated a claim for a First Amendment violation based on censorship of his speech relating to his sexual orientation); *Gay Lesbian Bisexual Alliance v. Pryor*, 16 F.3d 1543 (11th Cir. 1997) (state statute prohibiting universities from allowing any group that

[7] Defendants assert that Plaintiffs have not asserted the students' First Amendment rights here. Defendants are wrong. Plaintiffs argued in their Motion for Preliminary Injunction that even if the EAA would allow a school to ban a GSA, the First Amendment still would not. *See* Motion for Preliminary Injunction, p. 28 n. 25.

fostered or promoted a lifestyle or sexual activity that would violate the state sodomy laws to use public facilities was prohibited viewpoint discrimination in violation of the First Amendment).

III. Plaintiffs Meet All of the Other Requirements for a Preliminary Injunction.

A. Irreparable injury

Defendants argue that the GSA plaintiffs have not shown a substantial threat of irreparable injury because Defendants have offered to allow the GSA students to discuss issues of harassment with the school's guidance counselor in place of the formation of any club. The Equal Access Act requires, however, that once the Defendants have created a limited open forum, they must give Plaintiffs all the same rights and privileges that they grant to other clubs. In *Colin,* 83 F. Supp.2d at 1140, the court – in the context of a motion for preliminary injunction -- stated:

> Because the Board has created a "limited open forum," it must give Plaintiffs all the same rights and privileges that it gives to other student groups. Once recognized, student groups are permitted to meet on campus during noninstructional time, publicize the group at "Club Rush," post flyers, make announcements over the public address system, and have a group picture in the yearbook. Defendants argue that Plaintiffs' First Amendment rights have not been harmed or abridged because they can still meet informally. Defendants claim that being denied official recognition by the school and the privileges that flow from recognition does not constitute First Amendment harm. . . . To the extent that the Board opens up its school facilities to any noncurriculum related group, it must uniformly open its facilities to all student groups.

See also Ceniceros v. Board of Trustees of the San Diego Unified School District, 106 F.3d 878 (9th Cir. 1997)(allowing a religious club to meet before and after school but not during lunchtime was not sufficient to satisfy the EAA when other student groups were allowed to meet during lunchtime). Forcing the GSA to meet under restrictions and conditions not imposed on other non-curricular student groups violates the EAA and constitutes irreparable harm. Preliminary injunctive relief is appropriate under these circumstances.

B. Injury to defendants

Defendants assert, with no factual support, that the "threatened injury to the defendant school in this case and to the general student body" if the GSA is permitted to meet "far outweighs any threatened injury to the plaintiffs." Resp. at 15-16. The defendants ominously raise the specter of "potential lawsuits that might arise if student health and safety is compromised," but this is based on nothing but their mischaracterization of the GSA as a "sex-based club" and, thus, one that encourages teen sex. Defendants are employing a scare tactic, but there is nothing to substantiate the purported threat.

C. Public interest

Defendants essentially argue that the EAA was a bad idea, so the Court here should refuse to enforce it, relying on Justice Stevens lone dissent in *Bd. of Educ. v. Mergens*, 496 U.S. 226, 236 (1990). The fact that Defendants must rely on the *Mergens* dissent to find support for their argument amply demonstrates that they are wrong.

IV. Conclusion.

For the reasons set forth above, and in Plaintiffs memorandum of law is support of their Motion for Preliminary Injunction, the Court should grant Plaintiffs' Motion for Preliminary Injunction and order Defendants to grant access to the Plaintiffs on terms equal to the other noncurricular student groups catalogued in Plaintiffs' motion during the pendency of this lawsuit.[8]

[8] Plaintiffs request that they not be required to post any cash bond. In spite of the literal language of Fed.R.Civ.P. 65 (c), this Court clearly has the discretion to issue an injunction without requiring plaintiff to give security. *See, e.g., Caterpillar, Inc. v. Nationwide Equipment*, 877 F. Supp. 611, 617 (M.D. Fla. 1994); *Baldree v. Cargill, Inc.*, 758 F. Supp. 704 (M.D. Fla. 1990), *aff'd*, 925 F.2d 1474 (11th Cir. 1991).

Respectfully Submitted

s/Robert F. Rosenwald, Jr.

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Certificate of Service

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s/Robert F. Rosenwald, Jr.
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SERVICE LIST
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