

April 15, 1999

Bruce Doyle Ed.D., President
School District Eleven Board of Education
1115 N. El Paso Blvd.
Colorado Springs, CO 80903

Kenneth Burnley, Superintendent of Schools
School District Eleven
1115 N. El Paso Blvd.
Colorado Springs, CO 80903

By facsimile to 719-577-4546 and United States Mail

Re: Palmer High School gay/straight alliance

Dear President Doyle and Superintendent Burnley:

I am writing to you on behalf Dolores Garcia, a student at Palmer High School who, along with other Palmer students, is interested in chartering a gay/straight alliance: a new student organization that would provide a forum for a social and political dialogue on gay and lesbian issues. The proposed club would be similar to other gay/straight alliances that have formed at hundreds of high schools around the country in recent years.

Ms. Garcia contacted the American Civil Liberties Union after Palmer High School officials refused to approved a charter for the proposed extracurricular student group. Ms. Garcia first attempted to resolve this matter with Palmer High School Principal Jay Engeln and with John Bushey, District Eleven's Director of School Leadership. Her attempts were not successful, and that is why I am now writing to you.

The idea for starting the student group arose out of concern about the number of gay and lesbian students at Palmer High School who are forced to deal with verbal harassment and threats of physical confrontations because of their sexual orientation or their perceived sexual orientation. The students hoped to provide a forum for discussion of some of the issues that gay and lesbian students face on a daily basis at Palmer High School.

On January 7, 1999, seven students approached Principal Jay Engeln to ask that he charter the

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proposed student organization. Although Principal Engeln appeared unreceptive to chartering the group, he did not foreclose the possibility entirely at this initial meeting. The students then selected Ms. Garcia as their representative to meet with Principal Engeln one on one. Approximately a week later, Ms. Garcia met with Principal Engeln, and he rejected the students' request. According to Ms. Garcia, Mr. Engeln equated the proposed club to devil worshippers, white supremacists and hate groups. He reportedly said that if he recognized a gay/straight alliance, he would have to permit those groups to form student clubs as well.

Ms. Garcia then appealed Mr. Engeln's decision in a meeting with Mr. Bushey, who affirmed Mr. Engeln's decision. According to Ms. Garcia, Mr. Bushey also referred to the prospect of hate groups as a reason for denying a charter to the proposed gay/straight alliance. According to Ms. Garcia, Mr. Bushey acknowledged that the District Eleven policies do not preclude the formation of a gay/straight alliance, but he said that he had to take into account his own philosophy and opinions as well as the well-being of the school.

The students' unsuccessful efforts to form their student club were publicized in the Colorado Springs Independent on February 4 and in the Denver Post on February 5. The Post article quotes Mr. Engeln as confirming that he was concerned about the prospect that approving the group would open the door to devil worshippers and hate groups.

According to the Post story, Mr. Bushey also justified his refusal to charter the student group by alluding to the school board's policy regarding student clubs. As the quotation appeared in the Post, Mr. Bushey said: "(A gay club) doesn't address the issues around curriculum and instruction and what we do in school."

Although I have looked at the District Eleven policies, I have not found any policy that remotely suggests that student groups will be recognized only if they are devoted to discussion of curricular issues. Indeed, as I will explain, any such policy would contravene the interests of both students and the community; would contradict the school's current practice of chartering other student groups that are not devoted to curricular matters; and would also violate the Equal Access Act.

First, the recognition of noncurricular student groups promotes the interests of both students and the community. As Judge Matsch explained in a reported opinion, noncurricular student clubs are an integral component of students' educational experience:

[T]he mission of public education is preparation for citizenship. High school students, [who at virtually every high school] include persons of voting age, must develop the ability to understand and comment on the society in which they live and to develop their own set of values and beliefs. A school policy completely preventing students from

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engaging other students in open discourse on issues they deem important cripples them as contributing citizens. Such restrictions do not advance any legitimate governmental interest. On the contrary, such inhibitions on individual development defeat the very purpose of public education in secondary schools.

Rivera v. East Otero School District R-1, 721 F. Supp 1189, 1194 (D. Colo. 1989). The District 11 policies that I have read appear to endorse these principles and to recognize the importance of noncurricular student clubs. Indeed, the policies state that “[t]he Board of Education endorses the creation of clubs and other approved school organizations for the purpose of reaching as many students as possible.” Rather than restricting the subject matter of student groups to curricular matters, the Board policy states that student groups should “establish aims which are of school interest or community interest.”

Refusing to recognize a noncurricular club not only contradicts the school district’s policies, it also contradicts Palmer High School’s current practice. As I will discuss in more detail, the school already recognizes a number of noncurricular student organizations.

Finally, by recognizing some noncurricular clubs but not the proposed gay/straight alliance, Palmer High School violates the Equal Access Act, which provides:

“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). I will assume that Palmer High School is a public secondary school that receives federal financial assistance. Accordingly, the duty to provide equal access is triggered by the fact that Palmer High School maintains what the Act considers to be a limited open forum. A limited open forum is defined 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). According to my information, Palmer recognizes several groups that would be considered “noncurriculum related groups,” including Los Hermanos, Chess Club, and Peer Council. These clubs meet on school premises during noninstructional time. Because Palmer High School recognizes a number of student organizations that are noncurricular and that meet on school premises when classes are not being conducted, the school maintains what the
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Act calls a limited open forum.

Since Palmer High School maintains a limited open forum, it is unlawful to 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). That is exactly what Mr. Engeln and Mr. Bushey have done by denying Ms. Garcia and her colleagues an equal opportunity to meet and function as a student group, solely because of the content and subject matter of the ideas that they want to discuss and explore.

According to the article in the Denver Post, Mr. Bushey suggested that he rejected the proposed gay/straight alliance because “it doesn’t address the issues around curriculum and instruction and what we do in school.” This comment suggests that Mr. Bushey believes, erroneously, that he can refuse to recognize the proposed gay/straight alliance on the ground that its would not be sufficiently related to the curriculum.

On the contrary, the Equal Access Act does not permit Palmer High School to reject the proposed student organization on such a ground. Such a rejection is permitted under the Act only if all other student groups that meet during noninstructional time are “curricular” clubs instead of “noncurriculum related groups.” 20 U.S. C. § 4071(b). If Palmer High School permits even one “noncurriculum related group” to meet at the school during noninstructional time, the requirements of the Act apply. See Board of Education of Westside Community School v. Mergens, 496 U.S. 226, 235 (1990).

In assessing whether or not there is at least one noncurricular club in a school, the Supreme Court strives to be “consistent with Congress’ intent to provide a low threshold for triggering the Act’s requirements.” Id. at 240. Thus, a “noncurriculum related student group” means “any student group that does not directly relate to the body of courses offered by the school.” Id. at 239. According to the Court, a group directly relates to the school’s curriculum, and is thus a “curricular” group, 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. Id. at 239-40.

The requirements of the Act apply to Palmer High School unless every school club meets the foregoing definition of a “curricular” club. Such is not the case. Los Hermanos, Chess Club, and Peer Council, for example, cannot be considered curricular clubs under the definition articulated by the Supreme Court. Indeed, the Supreme Court mentioned a chess club as an example of a student organization that would likely be considered a “noncurriculum related student group.” Id. at 240.

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The Supreme Court has warned that schools will not be permitted to evade their responsibilities under the Equal Access Act by “strategically describing existing student groups” in a manner that brings them all within the category of “curricular” groups. Id. at 244. The Court quoted favorably from the earlier opinion of the Eighth Circuit Court of Appeals in the Mergens case:

“Allowing such a broad interpretation of ‘curriculum-related’ would make the [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. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. This is exactly the result that Congress sought to prohibit by enacting the [Act]. A public secondary school cannot simply declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech of that group.”

Id. at 244-45 (quoting Mergens, 867 F.2d 1076, 1078 (8th Cir. 1989)). Thus, the implication of the quotation attributed to Mr. Bushey in the Denver Post, to the effect that the noncurricular focus of the proposed group justifies failure to recognize it, must be rejected. Given the school’s recognition of other noncurricular clubs, Palmer High School cannot now discriminate against a gay/straight alliance on the basis of religious, political, philosophical or other content of the group’s speech. Failing to recognize the proposed gay/straight alliance would violate the Equal Access Act.

The same issues regarding a gay/straight alliance at Cherry Creek High School prompted a suit in federal district court in Denver in 1998. The case, Homosexual-Heterosexual Alliance Reaching for Tolerance v. Cherry Creek School District No. 5, No. 98-Z-110, was quickly resolved with full recognition of the gay/straight alliance and the entry of a consent decree.

In light of the foregoing, I respectfully request that you take immediate action to reverse the decision of Mr. Engeln and Mr. Bushey and instruct them to take all steps necessary to recognize the new student group proposed by Ms. Garcia.

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I would be happy to discuss these issues with you in more detail. You can call me at 303-777-2740.

Sincerely,

Mark Silverstein,
ACLU Legal Director

MS/md