



C. Ray Drew, Executive Director • Mark Silverstein, Legal Director

December 1, 2010

Union Colony Board Members
UNION COLONY SCHOOLS
2000 Clubhouse Drive
Greeley, CO 80634

Via Email: Tracy Barger - [REDACTED]
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Via Fax: 970-330-7604

Re: Union Colony Preparatory School Gay/Straight Alliance

Dear Union Colony Board Members,

I am writing to you on behalf of Steve Marcantonio, a student at Union Colony Preparatory School (“UCPS”) who, along with other students, is interested in starting a Gay/Straight Alliance (“GSA”) within the school. The idea for starting the student group arose out of concern about the number of gay and lesbian students at UCPS 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 the GSA would provide a forum for discussion of some of the issues that gay and lesbian students face on a daily basis at UCPS, and would help to combat anti-gay harassment and discrimination within the school and the community at large. The proposed GSA at UCPS would be similar to other gay/straight alliances that have formed at hundreds of high schools around the country in recent years.

Mr. Marcantonio contacted the American Civil Liberties Union after he learned that UCPS may not support the formation of a GSA. It is my understanding that the Faculty Council will meet to decide this issue on Friday, December 3, 2010, and that concerns have been raised that a GSA would disturb the “culture” of UCPS. Further, it is my understanding that UCPS may view itself as without obligation to allow formation of a GSA because only curricular student groups are permitted at the school. I am writing in the hopes of forestalling a possible decision by the Council forbidding Mr. Marcantonio and his fellow students to form a GSA on these or any other bases, because this decision would plainly violate federal law. Under the Equal Access Act, UCPS must treat GSAs the same way as any other non-curricular club at the school, including the Key Club and

Student Council. Where schools have refused to allow GSAs to form or otherwise denied these groups equal treatment, courts have held them to be in violation of the law.¹

The Equal Access Act, 20 U.S.C. § 4071, was signed into law in 1984 after being heavily promoted by religious groups who wanted to ensure that students could form Christian extracurricular clubs in public schools. The authors of the law understood that if this right were extended to students who wanted to start religious clubs, then it must be extended to all students. According to the Equal Access Act, if a public high school allows any student group whose purpose is not directly related to the school's curriculum to meet on school grounds during lunch or before or after school, then it cannot deny other student groups the same access to the school because of the content of their proposed discussions. Schools may not pick and choose among clubs based on what they think students should or should not discuss, or because the topics of discussion do not fit with the "culture" of the school. UCPS simply cannot deny Mr. Marcantonio and his 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.

In a remarkably analogous case, after protracted litigation, a federal judge forced a school to allow the formation of a GSA despite board member discomfort with the group. *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135 (C.D. Cal. 2000). The judge explained:

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] Defendants 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, . . . 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.

Id. at 1148. The judge went on to emphasize that the GSA provides an important forum for students who are concerned about sexual orientation. Recognizing the impact of discrimination on gay youth, the judge wrote: "This injunction is not just about student pursuit of ideas and tolerance for diverse viewpoints. As any

¹ See *Straights and Gays for Equality v. Osseo Area Schools-District No. 279*, 540 F.3d 911 (8th Cir. 2008); *Gay-Straight Alliance of Yulee High Sch. v. Sch. Bd of Nassau County*, 602 F. Supp. 2d 1233 (M.D. Fla., March 11, 2009); *Gonzalez v. Sch. Bd. of Okeechobee County*, 571 F.Supp.2d 1257 (S.D.Fla. 2008); *White County High Sch. Peers Rising in Diverse Educ. v. White County Sch. Dist.*, No. 2:06-CV-29WCO, 2006 WL 1991990 (N.D. Ga. July 14, 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 v. Franklin Township Cmty. Sch. Corp.*, No. IP01-1518 C-M/S, 2002 WL 32097530 (S.D. Ind. Aug. 30, 2002); *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1148 (C.D. Cal. 2000); *East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166 (D. Utah 1999).

concerned parent would understand, this case may involve the protection of life itself.” *Id.* at 1150.

In ruling as he did, the judge recognized that anti-gay harassment and violence are widespread among teenagers, especially in schools.² A disproportionate amount of physical violence against lesbian, gay, bisexual and transgender people of all ages is perpetrated by teenage boys. GSAs help to combat verbal and physical harassment. They create a space where students can come together to share their experiences, to discuss anti-gay attitudes they may experience in school, or to debate different perspectives on gay-related issues. Students talking openly and honestly with other students is a uniquely effective way of making young people aware of the harms caused by discrimination and violence.

School officials should not silence these student-initiated debates and discussions, as long as they do not involve targeted harassment of an individual student or group of students. Silencing ideas in a non-curricular setting because some people do not like those ideas is not only incompatible with the educational values of open inquiry and wide-ranging debate that are central to our free political system — it is against the law.

Further, the recognition of non-curricular student groups, such as a GSA, promotes the interests of both students and the community. As Colorado Federal District Judge Richard Matsch explained in a reported opinion, non-curricular 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 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).

As noted above, the protections of the Equal Access Act are triggered if the school allows just one non-curricular student activity on campus. While the Act itself does not define the differences between curricular and non-curricular clubs, a Supreme Court case does. In *Mergens*, 496 U.S. 226, the court held that a non-curricular student group is any group that does not “directly relate” to courses offered by the school. Groups like a chess club,

² Only a few months ago, a front page article in the DENVER POST explored the connection between the widespread bullying that gay and lesbian students endure and the documented high rate of suicide amongst gay and lesbian youth. See http://www.denverpost.com/recommended/ci_16314707.

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a stamp-collecting club, a community service club, or a GSA are by and large considered non-curricular, because what they do is not directly taught in any class.

While in some cases, the line between curricular student activities and non-curricular activities may be a bit blurry, in the instant case, it is absolutely clear that UCPS allows one or more non-curricular student groups to meet on school grounds, after school hours, including Key Club and Student Council. Notably, when federal courts have considered the nature of a Key Club in the context of the Equal Access Act, they have uniformly concluded that the club is a non-curricular activity triggering the protections of the Act.³ At least one court has also found that student councils are non-curricular and trigger the protections of the Act. *See White County High Sch. Peers Rising in Diverse Educ. v. White County Sch. Dist.*, No. 2:06-CV-29WCO, 2006 WL 1991990, at *23-24 (N.D. Ga. July 14, 2006). Given this caselaw, there is virtually no doubt that UCPS allows one or more non-curricular clubs to meet on school grounds after school hours, and that UCPS' exclusion of GSA would, therefore, plainly violate the Equal Access Act.

We hope this letter has given you a firm understanding of why UCPS must allow a GSA to form as well as how Union Colony Schools can remain in compliance with the Equal Access Act. By acknowledging students' right to form GSAs, UCPS not only obeys the law and avoids potential legal liability, it supports diversity in the school and takes a strong step towards addressing anti-gay harassment.

If you have questions, or would like to discuss these issues in more detail, please feel free to contact me at (303) 777-5482, ext. 104. In any event, we request that you contact our office by **December 14, 2010**, to inform us whether or not Union Colony Preparatory School intends to comply with federal law and allow Mr. Marcantonio and his colleagues to form a Gay/Straight Alliance as non-curricular student group.

Sincerely,



Rebecca T. Wallace

Staff Attorney, ACLU of Colorado

cc Principal Patrick Gilliam - [REDACTED]

³ *See, e.g., Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1254-54 (3d Cir. 1993) (holding that Kiwanis Key Club is a non-curricular student group triggering protections of Equal Access Act); *Gonzalez v. Sch. Bd.*, 571 F. Supp. 2d 1257, 1262 (S.D. Fla. 2008) (“A partial listing of noncurriculum student groups at OHS include the Chess Club,...Key Club...”); *see also Colin*, 83 F. Supp. 2d at 1143 (“Like its policy, El Modena’s actual practice is that of a ‘limited open forum,’ as it recognizes many noncurriculum clubs including the Asian Club...Red Cross/Key Club, and Ski Club.”).