



Dealing with Legal Matters Surrounding Students' Sexual Orientation and Gender Identity

FOREWORD

Editors Note

The article that follows is reprinted with the permission of the National School Board Association. The article is printed without editing. The overview of this article is separate from the article.

The IPA editorial staff requested that Larry Janes, the author of over 70 legal articles for the IPA, write the overview for this topic. In no way, does the over-

This study was conducted by a coalition of 13 national education organizations led by the National School Boards Association. The coalition included the American Association of School Administrators, the American Federation of Teachers, the American School Counselor Association, the Association for Supervision and Curriculum Development, the National Association of Elementary School Principals, the National Association of Independent Schools, the National Association of School Psychologists, the National Association of Secondary School Principals, the National Education Association, the National School Boards Association, the National Student Assistance Association, the School Social Work Association of America, and the United Church of Christ Justice and Witness Ministries.

view reflect the position of the National School Board Association.

Overview

When our authors of the 13th Amendment produced the equal protection clause, one can but speculate as to what their vision of the future applications of that clause would be. But one thing is certain: numerous case law exists as to the correct application of the law during the 2005-2006 school year, and unless legal changes occur, for infinity.

For several years we have wanted to address the issue of sexual orientation and the legal responsibilities of public schools as issues surrounding the topic occurred more frequently in our schools.

This article will be based on the same intent of the seventy or so legal articles I have authored for IPA: to provide current, accurate, and correct legal analysis of an issue of importance to the membership of IPA. The values you hold and your moral guideposts are your personal business, but your actions as an administrator are not only your concern but your district's as well. As always, we recommend following the advise of your district legal counsel.

We, as administrators, are bound by law to protect the rights of our students no matter what our belief systems. Failure to do so can have a high price, sometimes in dollars, sometimes in employment status, and sometimes both, let alone the impact on the students. The dollars may be the district's or its in-

surance; however, the dollars also may be your personal monies when you act contrary to the scope of your legal authority.

Community pressure, activist organizations, and internal district guidance can all cloud the picture. IPA is there for you on those cloudy days and is but a phone call or e-mail away. We will respect the pressures, your values, and your faith, but we will guide you by focusing on legally correct advice. We trust in you to make the correct decisions, after all you are one of the best of the best: you are an Illinois Principals Association member. The article that follows this overview is excellent. Good reading!

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Over the past decade, controversies surrounding students' sexual orientation and gender identity have become increasingly common in K-12 schools. Often it falls to school administrators and school boards to manage the conflicts that arise in areas of curriculum, student clubs, dress codes, and harassment. This publication provides practical guidance on schools' legal rights and responsibilities with respect to students, programs, and curriculum. Specific court decisions that have provided

clarity in this arena are cited in endnotes.

Like all other individuals, lesbian, gay, bisexual, and transgender (LGBT) students are guaranteed equal protection under the Fourteenth Amendment to the Constitution and free speech and association under the First Amendment. Like other student clubs, LGBT-related student groups¹ are guaranteed equal treatment and access under the Equal Access Act (1984).² Additionally, some courts have held that Title IX³ offers protections to LGBT students in certain circumstances,⁴ and some states and communities have enacted statutes, regulations, and professional standards prohibiting discrimination on the basis of sexual orientation and gender identity.⁵

Court cases addressing legal issues regarding LGBT students and related issues have resolved many questions and can provide guidance for schools if and when conflicts arise. Not all issues have been resolved, however, and in some instances court rulings differ from jurisdiction to jurisdiction. In some jurisdictions, the courts may not have considered every issue discussed here. As always, it is best to seek legal advice either from district legal counsel, the state education department, or your state professional organization to determine the specific legal authority in your jurisdiction.

Student Organizations and Clubs

Some students in my school want to form a Gay-Straight Alliance (GSA). What are my legal responsibilities?

The courts have found that the Equal Access Act (EAA) requires schools to treat student clubs that address LGBT issues the same as other student groups. The Equal Access Act requires any public secondary school⁶ that receives federal money AND has a “limited open forum” to allow LGBT-oriented clubs formed by students the same access to school facilities that other student groups enjoy. Two important caveats:

1) the clubs must be initiated at the request of students, and 2) the Equal Access Act applies only when the school has a “limited open forum,” meaning the school recognizes other “non-curriculum related” student groups.⁷ The bottom line: Schools that meet these conditions must permit LGBT-related groups such as GSAs to meet on the same basis as other student groups.⁸

If schools allow only curriculum-related clubs, then they are not required to grant access to any non-curriculum related group.⁹ Some school districts have attempted to change the rules regarding “non-curriculum related” groups after receiving a request to establish a student group that addresses LGBT issues. The courts have not looked favorably on attempts to finesse the legal definitions in order to approve only favored groups, and districts have typically lost these lawsuits.¹⁰

In one case a school district was successful in invoking an Equal Access Act exception that permits schools to deny access based on “material and substantial interference with the orderly conduct of educational activities within the school” to keep out a GSA.¹¹ But in this case, the court pointed out that the GSA would be discussing safe sex in a school that had an “abstinence-only” sex education program, that the GSA’s website linked to other websites with explicit content, and that the school at which the GSA was proposed served students as young as 12 years old.¹²

At least one district attempted to eliminate all student non-curriculum related organizations after students tried to hold a GSA meeting.¹³ This is legal only if the new rule is applied equally to every student club, and the district subsequently reconsidered this drastic measure.

In short, districts that meet the conditions above must provide to LGBT-related student organizations the same access given to any other student group. “Access” has been interpreted to include funding, access to school bulletin boards and other media, meeting space, and yearbook photos.¹⁴ To avoid potential legal problems, school districts should

have in place a uniform set of rules regarding the establishment of student organizations. The rules should be applied evenhandedly and should be available to students, parents, and staff.

But I have students and parents who object to the formation of any student clubs that address gay issues. How am I supposed to handle this situation?

The Equal Access Act originally was proposed to ensure that student religious clubs could meet in public schools, but Congressional debate and subsequent court rulings have made clear that the EAA is meant to apply to a broad array of student groups. Under the EAA, schools cannot “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.”¹⁵

A school cannot refuse to allow a group like a gay-straight alliance (GSA) to meet because other students, teachers, administrators, parents, or community members object to formation of the club. The unpopularity of particular expression has been rejected as a justification for preventing student speech.¹⁶ Where club opponents substantially disrupt the work of the school or the rights of the student GSA members, the appropriate response is to address the disruptive opponents.¹⁷ The Equal Access Act expressly allows schools to “maintain order and discipline on school premises, [and] to protect the well-being of students and faculty.”¹⁸ While schools may properly address disruption by GSA opponents, courts have not allowed districts to use this section of the EAA to prohibit LGBT-related clubs because of negative community sentiment or other potentially disruptive responses.¹⁹

While schools may issue a general statement that they are not sponsoring student groups, but rather are merely providing all student groups an opportunity to meet, schools should not single out or target a particular group for this

clarification. As a practical matter, in the face of controversy it may be helpful to explain to your school community that the same rules apply to recognition of GSAs as apply to all non-curriculum related student clubs.

How do I handle staff or outsiders wanting to be a part of the GSA?

To be covered by the Equal Access Act, student clubs must be “student initiated.” Outside community members “may not direct, conduct, control, or regularly attend activities of student groups,” although they may attend occasionally, if invited by students, unless the district has a policy prohibiting “non-school persons” from attending student group meetings. School faculty and staff, on the other hand, may regularly attend meetings, particularly for “custodial” purposes such as the need to provide adult supervision. Many districts assign (and even pay) teachers to supervise non-curricular clubs like ski club or chess club. If staff monitors are provided to other non-curricular student clubs, one should be assigned to the GSA as well. If staff is allowed to participate in other non-curricular student clubs in more than just a custodial capacity, the district cannot restrict staff from similar participation in the GSA.

I have been approached by some parents and members of the community who object to the fact that the Boy Scouts meet at the school. They feel that the Boy Scouts discriminate against gay people and that the school should not condone this.

The No Child Left Behind Act contains a provision called the Boy Scouts of America Equal Access Act.²⁰ This Act requires public schools that receive federal funds to provide the Boy Scouts with the opportunity to meet in school facilities, as long as the district makes school facilities available to other outside groups. The Act also states that schools cannot “discriminate against any group officially affiliated with the Boy Scouts of America...”²¹

This means that if the district per-

mits outside youth or community groups to meet on school premises or in school facilities before or after school, then the Boy Scouts must be given similar access to the school campus. This does not mean that a district is required to sponsor a Boy Scout troop. School sponsorship confers the school’s official support and extends benefits and rights that are not generally provided to other groups, and such sponsorship could raise other legal issues. But a school district that receives federal funds must make its facilities available to the Boy Scouts on the same basis it does to other organizations.

Some parents object to military recruiters being allowed on the school campus. They claim the military discriminates against gays and lesbians and should not be allowed at school.

The No Child Left Behind Act contains a provision requiring any school that receives federal funds to provide military recruiters with the “same access to secondary school students as is provided generally to post-secondary educational institutions or to prospective employers of those students.”²² So if your school has a policy allowing colleges, college recruiters, and employment recruiters on campus, then military recruiters must be allowed as well. Additionally, schools are required to provide recruiters with student “directory information,” such as names, addresses, and phone numbers, unless a parent or student has opted out. The law requires the school district to notify parents and students of their right to opt out and to explain the procedure for doing so.

Student Dress Code

I have had students wear both pro-gay and anti-gay messages on T-shirts. I’m getting complaints from all sides. What am I supposed to do?

Courts have recognized that students have rights to free speech and free expression that must be balanced against a school’s interest in maintain-

ing an appropriate learning environment.²³ With regard to “speech” (which includes words, symbols, artwork, or pictures) on student clothing, the courts have allowed schools to prohibit lewd, vulgar, indecent, or clearly offensive speech, as well as speech contrary to the school’s educational mission.²⁴ Some courts have held that messages or images deemed at odds with the values schools instill, such as civility, human dignity, and self respect, were contrary to a school’s educational mission.²⁵

School restriction on speech that does not fall into one of these categories has been allowed only where the school can show that the speech substantially disrupts or interferes with the work of the school or the rights of other students.²⁶ The fact that other students, teachers, or school administrators may disagree with, dislike, or object to a message conveyed on student clothing does not constitute sufficient disruption of the learning environment or interference with other students’ rights. If, on the other hand the message is similar to speech that has caused actual disruption, such as student altercations, the school may restrict such expression.²⁷ This does not mean that the school officials must wait for disruption to occur before they can act. But they must be able to demonstrate that their concerns are well founded. Prohibiting clothing that conveys a message that might be construed as pro- or anti-gay (e.g., “Barbie is a lesbian,” “Gay Pride,” or “Straight Pride”) but is not likely to disrupt the learning environment or interfere with other students’ rights risk legal challenge. Where school dress codes or anti-harassment policies might apply to speech contained on student clothing, schools are on the safest legal ground when they ensure that these policies are enforced to prohibit only speech that may disrupt the learning environment or interferes with other students’ rights.

Recently I have received complaints from transgender students about the prom, yearbook, and gradu-

ation dress codes. These students tell me that separate dress requirements for girls and boys unfairly restrict their “gender identity” or “gender expression.” What does that mean, and how should I handle it?

As a basic legal requirement, school rules must be reasonable or have a logical relationship to the school’s legitimate interests. Dress codes that are reasonably related to a school’s interest in ensuring that student attire is consistent with an effective educational environment are constitutionally acceptable.²⁸ Dress codes that impose restrictions based on the student’s gender (e.g., prohibiting boys but not girls from wearing earrings) should be adopted only after careful consideration, since they may draw challenges that the school is discriminating on the basis of sex. Some courts have held that sex stereotyping in the workplace and in schools constitutes discrimination “based on sex,” which is illegal.²⁹ These cases could be construed to support legal challenges to sex-specific dress codes on the grounds that they discriminate on the basis of sex in violation of the Constitution and Title IX. But other courts in addressing such challenges have allowed sex-specific distinctions, finding school concerns about safety, discipline, distraction from learning, and promoting community values to be valid grounds for the differences.³⁰ This does not suggest that all sex-specific dress regulations are permissible in all contexts. For example, a restriction on boys’ wearing dresses to school would be appropriate in communities where such attire on males would result in substantial disruption of the learning process, but in other locales, cross dressing might actually be more socially acceptable and cause minimal disruption in school, making such a restriction less legally justifiable. The setting and age of the students may be factors to consider as well; for example, a requirement that girls wear dresses to the prom might be harder to defend, since at a prom, distraction from learning would not be an issue.

Schools with sex-specific dress codes could consider making a narrow exception for transgender students—students that are biologically of one gender, but psychologically identify with the opposite gender. At least one court has said that a school could prohibit a male student who identified himself as female from wearing girls’ clothes where the district had no specific evidence that plaintiff’s manner of dress (rather than his behavior) caused substantial disruption.³¹

Curriculum and LGBT Issues

Some parents in my school have complained about what they see as “pro-homosexual” content in some classroom materials. They want more control over class content, or they want to remove their child from the class. What is the best response?

Local school districts generally have a great deal of latitude with respect to curricular content, and courts typically have rejected parental efforts to dictate or alter it.³² Decisions about classroom content should be based on sound education rationales, age appropriateness, relevancy to the course, and currency of the information. Districts may want to consider adopting a complaint-and-review procedure for resolving challenges to school curriculum. Including teachers, parents, and community members on the review panel will foster a sense of fairness in any decision made. All parents should be advised of their right to use this process. The courts have rejected constitutional claims by parents that they have the right to excuse or remove their children from classes they find objectionable.³³ However, some states have specific statutes that allow parents to opt their children out of classes or assemblies that include controversial topics such as sexuality, HIV, sexually transmitted diseases, abortion, or death. As a practical matter, school boards probably have the local discretion to adopt a more liberal

parental opt-out policy than is required by state law. However, such a policy should be reconciled with the district’s obligation to educate students in accordance with state curricular standards.

As of this writing, four states—Arizona, California, Nevada and Utah—require written parental consent before students can participate in classes where such topics as sex, sexuality, and AIDS are discussed.³⁴ Parental consent is not required under these laws if teachers will be discussing content such as harassment or discrimination based on sexual orientation or gender identity. These laws vary in scope, and you should become familiar with your state laws on this subject. Here again, a school board probably could choose to go beyond the minimal requirement of state law.

The federal Protection of Pupil Rights Amendment (PPRA)³⁵ affords parents the right to limit their child’s participation in surveys or questionnaires that may contain controversial and/or sexual subject matter. Prior written consent from parents is required before certain federally funded surveys are taken, and schools must notify parents annually of their rights under the PPRA.

Student Involvement in School Events

A group of students wants to participate in or have the school sponsor events like “Diversity Days” or a “Day of Silence.” What are the school’s obligations and limitations?

A school’s legal rights and responsibilities regarding any activity or event depend on whether it is initiated by students or by the school. In general, schools exercise less control over student-initiated activities and speech than over the school’s own activities, though some limits are permissible. When considering a student’s request, a school must accommodate students’ constitutional rights. As discussed above, the First Amendment allows schools to restrict speech that is lewd, vulgar, indecent, or clearly offensive or that sub-

stantially interferes with the work of the school or the rights of other students. Student requests to participate in a Day of Silence, during which students agree to remain silent for all or part of a day to raise awareness for LGBT students, or Diversity Days, when students may organize educational activities around such issues as race, class, sex, sexual orientation, and gender identity, typically do not raise such concerns. Keep in mind that your school, like most, probably allows and even encourages a broad range of student-initiated activities and may have established policies or practices that govern student-led activities. These policies should be applied evenhandedly to all requests. Treating requests from LGBT students or related issues differently invites legal challenge.

As compared to student speech, schools exercise a greater degree of control over school-sponsored speech, which generally is treated by courts as part of the school curriculum. A school has the discretion to decide whether sponsorship of an event or activity, including a Diversity Day or Day of Silence, appropriately conveys its educational mission.³⁶ Nearly every district has a procedure and established criteria to determine whether the district will participate in, or sponsor, student or community events. These procedures should be followed, and generally speaking, the criteria should not be altered because of the viewpoint or content involved in the proposed event. To do otherwise may raise First Amendment and Equal Protection problems.³⁷

Some students have religious or moral objections to homosexuality and want a chance to provide a public counterpoint to what they see as problematic “gay-positive” viewpoints during such events. Should I allow it?

The appropriate response depends on whether the school itself is the “speaker” (i.e., whether it’s the school’s message). If a school itself provides information to students (even outside the traditional classroom), the school

has greater control over that message. A school is free to implement a course of study or sponsor an official school assembly devoted to promoting tolerance of LGBT students and nondiscrimination. In general, others have no right to present an opposing view within these official school activities.³⁸ However, at least one court has said that, even in the context of a school-sponsored event, excluding expression in conflict with the message the school wanted to convey to students was impermissible viewpoint discrimination.³⁹ Most importantly, you must be careful to follow your school’s policies and rules in developing school activities.

If, however, you have created an opportunity for open discussion (a “limited public forum”), which is not school-sponsored speech, you may not exclude viewpoints within that forum just because you disagree with them or because others may be uncomfortable with them. This would mean that at a non-school-sponsored event discussing issues about tolerance toward gays and lesbians, the school could not prohibit a speaker who wanted to express religious or moral objections to homosexuality.

A limited public forum may be created when the event is sponsored by students or outside organizations, even though it is held in the school. Although schools can set parameters about the purpose of the forum prior to opening it, the ability to limit speech within a limited public forum once it’s open is fairly narrow and cannot be based on the speaker’s viewpoint.⁴⁰ The restrictions must be reasonable in light of the purpose of the forum. Because it is often difficult to determine what kind of forum has been established, school administrators may want to seek legal advice before making decisions about whether to allow or prohibit particular student expression.

A same-sex couple wants attend a school dance. What is the proper course of action?

Once again, you must look at the rationale or logic of the school rules.

School rules must be rationally related to a legitimate educational objective. Ask, what is the legitimate objective of a particular rule? For example, schools may have legitimate reasons to restrict an activity to students enrolled at the school or to impose an age limit on attendees, but a ban on same-sex couples would be more difficult to justify. Because it also discriminates on the basis of the sex and (actual or perceived) sexual orientation of the couple, such a restriction likely will invite legal challenge.

In at least one case, a court found that a school’s refusal to allow a student to bring his same-sex date to the prom violated that student’s First Amendment rights. Noting the opposition of some students to the same-sex couple’s prom attendance, the court observed, “The[F]irst [A]mendment does not tolerate mob rule by unruly school children.”⁴¹

Harassment of LGBT Students

Our School has an anti-bullying policy that allows us to discipline students for harassing students because of their sexual orientation. Some students have claimed this violates their freedom of speech. How do you strike the balance?

It is important to remember that there is no constitutional right to bully or intimidate other students. Speech or conduct that gives rise to a well-founded fear of disrupting the operation of the school or interfering with the rights of other students may be prohibited.⁴² School districts have a legitimate interest in disciplining students for disruptive behavior and can enact effective anti-harassment policies to do so.⁴³ Districts should write policies so as to protect students’ First Amendment rights to free expression, while at the same time prohibiting genuinely threatening, demeaning, and harassing speech and/or behavior.⁴⁴

LGBT students (or students perceived to be LGBT) have successfully sued school districts for failing to take

action against their harassers. For example, in a case from Minnesota,⁴⁵ a court held that a school district's failure to protect a gay student from peer harassment violated the federal Equal Protection Clause. The court also held that the student was protected by Title IX's prohibition on sex discrimination because he alleged that the harassment was based on his failure to conform to male stereotypes. In addition, guidance from the U.S. Department of Education's Office for Civil Rights (OCR) states that "sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX."⁴⁶

An important point to keep in mind is that school boards may be held liable for harassment of students by their peers if the harassment—verbal and/or physical attacks—has been severe and persistent and the school took no action after learning of the misconduct.⁴⁷

I've just been told the harassment based on sexual orientation is occurring at my school. What am I supposed to do?

Complaints about alleged harassment based on sexual orientation should be handled just like any other harassment complaints. All complaints or other information suggesting that harassment may be occurring should be investigated thoroughly and promptly by a trained investigator. No allegations about potential harassment should be ignored because the charge seems improbable or because the behavior seems unlikely to recur or is perceived as a harmless rite of passage. The student target of the alleged harassment should be informed of the steps the school is taking, the district's policy on harassment, and the name and contact information of the district's Title IX grievance officer.

Once the investigation is complete, appropriate measures should be taken depending on the results. If harassment did occur, the district's response must

be designed to ensure that the harassment stops. This could include discipline and counseling of the harassers, assistance to the victim, and school activities that focus on reducing harassment. The complainant should be notified of the determination made and encouraged to report any further incidents, including retaliation. Steps should be taken to monitor the effectiveness of the district's response and the need for any further action.

Schools also can be liable for harassment of LGBT students by faculty or staff members. In one such case, administrators failed to take action when the student reported anti-gay harassment by a teacher.⁴⁸ The assistant principal condoned the teacher's behavior, disciplined the student, ordered him to stop speaking about his sexual orientation, and informed the student's mother that her son was gay. The student and his mother sued, and district eventually agreed to settle the case for \$25,000.

If a staff member is reported or observed to be harassing or demeaning a student's real or perceived sexual orientation or gender identity, the school has the same responsibility to investigate and, if warranted, take corrective action as it would be for other inappropriate behavior.

Additional Resources

The following resources address legal issues concerning student sexual orientation, more general issues concerning LGBT students, and student rights to free speech, religious expression, and equal access. The listing of these resources in no way constitutes an endorsement by the participating organizations of the advice or content of these resources and sites; nor does it in any way imply an endorsement of this publication by the publishers of these resources and sites.

American Psychological Association

Healthy Lesbian, Gay, and Bisexual Students Project.
<http://www.apa.org/ed/hlgb/>

American Psychological Association

Just the Facts About Sexual Orientation & Youth: A Primer for Principals, Educators and School Personnel.

<http://www.apa.org/pi/lgb/publications/justthefacts.html>

American School Board Journal

Be Prepared: What Your School Board Needs to Know about Boy Scouts, School Policies, and the Law. April 2001.

<http://www.asbj.com/2001/04/0401ASBJjones.pdf>

Council of School Attorneys

Resources, news, and court opinions on school law issues, including student rights.
<http://www.nsba.org/cosa>

Gay, Lesbian & Straight Education Network

Resources on GSAs and anti-bullying and anti-harassment efforts.
<http://www.glsen.org>

Lambda Legal

Defending Gay/Straight Alliances and Other Gay-Related Groups in Public Schools Under the Equal Access Act – Questions and Answers.

<http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=251>

National Gay and Lesbian Task Force Policy Institute

Education Policy: Issues Affecting Gay, Lesbian, Bisexual and Transgender Youth.
<http://www.thetaskforce.org/downloads/EducationPolicy.pdf>

National Mental Health Association

What Does Gay Mean? How to Talk with Kids About Sexual Orientation and Prejudice.

<http://www.nmha.org/whatdoesgaymean/>

Parents, Family and Friends of Lesbians and Gays (PFLAG)

From Our House to the Schoolhouse.
<http://www.pflag.org/publications/schools.pdf>

Endnotes

¹LGBT-related clubs are not necessarily "gay student clubs"; they typically are formed to reduce prejudice.

²20 U.S.C. §§ 4071-4074 (2004).

³20 U.S.C. §§ 1681-1688 (2004). Title IX of the Education Amendments of 1972 prohibits gender-based discrimination in educational programs that receive federal funding.

⁴Although Title IX does not protect against discrimination on the basis of sexual orientation generally, LGBT students may be able to sue under Title IX for a school district's failure to protect them from harassment. See the question and answer on harassment.

⁵See, e.g., Cal. Educ. Code § 220 (West 2004) ("No person shall be subjected to discrimination on ... any basis that is contained in the prohibition of hate crimes set forth in a subdivision (a) of Section 422.6 of the Penal Code in any program or activity conducted by an educational institution ...," Section 422.6 includes gender and sexual orientation); Conn. Gen. Stat. Ann. § 10-15c (West 2004) ("...each child...shall have...an equal opportunity to participate in the activities, programs and courses of study offered in such public schools ... without discrimination on account of ... sexual orientation ..."); Minn. Stat. Ann. § 363A.13 (West 2004) ("It is an unfair discriminatory practice to discriminate in any manner in the full utilization of or benefit from any educational institution ... because of ... Sexual orientation ...").

⁶State law determines which grades fall into the definition of "secondary" school.

⁷See *Board of Educ. of Westside Cmty. Schools v. Mergens*, 496 U.S. 226 (1990). Examples of noncurricular clubs typically include the Key Club, Pep Club, Chess Club, Ski Club, Varsity Club, and Future Business Leaders of America. However, courts decide what clubs are curriculum- or noncurriculum-related on a case-by-case basis.

⁸See, e.g., *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135 (C.D. Cal. 2000); *East High Gay/Straight Alliance v. Bd. of Edu. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166 (D. Utah 1999).

⁹To be curriculum-related, a club must "directly relate" to courses offered by the school. The inquiry about whether student clubs relate to the curriculum only determines whether a limited open forum has been created; where such a forum is created, the curricular status of a student group cannot be used as a basis to deny access. See, e.g., *Colin*, 83 F. Supp. 2d at 1144-46 (rejecting argument that school could exclude a GSA because the GSA "directly relates" to the school's sex education curriculum).

¹⁰See, e.g., *Boyd County High Sch. Gay Straight Alliance v. Bd. of Ed. of Boyd County*, 258 F. Supp. 2d 667 (E.D. Ky. 2003).

¹¹*Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550 (N.D. Tex. 2004). This case is currently on appeal.

¹²See *id.*

¹³See *East High Gay/Straight Alliance*, 81 F. Supp. 2d 1166 (D. Utah 1999); *East High Sch. Prism Club v. Seidel*, 95 F. Supp. 2d 1239 (D. Utah 2000).

¹⁴See *Prince v. Jacoby*, 303 F. 3d 1074 (9th Cir. 2002).

¹⁵20 U.S.C. § 4071(a) (2004).

¹⁶See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-09 (1969).

¹⁷See *Boyd County*, 258 F. Supp. 2d at 690.

¹⁸20 U.S.C. § 4071 (f) (2004).

¹⁹See, e.g., *Boyd County*, 258 F. Supp. 2d at 690.

²⁰20 U.S.C. § 7905(a) (2004).

²¹20 U.S.C. § 7905(b) (2004).

²²10 U.S.C. § 503(c) (2004).

²³See *Tinker*, 393 U.S. 503.

²⁴See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

²⁵See, e.g., *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000) (holding that school could prohibit wearing of Marilyn Manson T-shirt because band promoted values contrary to school's educational mission); *Scott v. Sch. Bd. of Alachua County*, 324 F.3d 1246 (11th Cir. 2003) (upholding ban on display of Confederate flag to further fundamental values of civil discourse). But see endnote 26 below.

²⁶See, e.g., *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002) (upholding school's anti-harassment policy but invalidating enforcement of policy to prohibit students from wearing T-shirts that did not disrupt the learning environment or interfere with other students' rights); *Pyle v. South Hadley Sch. Cte.*, 861 F. Supp. 157 (D. Mass. 1994) (holding that school dress code prohibiting clothing that "harasses, threatens, intimidates, or demeans" individuals or groups was unconstitutional viewpoint discrimination because it was aimed at content rather than validity or potential for disruption).

²⁷See, e.g., *Sypniewski*, 307 F.3d at 254; *Scott*, 324 F.3d 1246 (upholding school ban on display of Confederate flag based on past racially charged incidents).

²⁸See, e.g., *Boroff*, 220 F.3d 465; *Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F. Supp. 1459 (C.D. Cal. 1993) (upholding ban on sports insignia used as gang symbols).

²⁹*Price Waterhouse v. Hopkins*, 409 U.S. 228 (1989) (ruling that employment action based on female employee's failure to comport with female sex stereotype in appearance and behavior is illegal sex discrimination under Title VII); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081 (D. Minn. 2000) (allowing gay student to sue under Title IX where school district allegedly failed to protect him from peer harassment for his failure to conform to male stereotype).

³⁰See, e.g., *Olesen v. Bd. of Educ. of Sch. Dist. No. 228*, 676 F. Supp. 820 (N.D. Ill. 1987) (upholding ban on boys' wearing of earrings where district had gang problem and some earrings were used as gang symbols); *Hines v. Caston Sch. Corp.*, 651 N.E. 2d 330 (Ind. App. 1995) (upholding ban on boys' wearing of earrings where, under local community standards of dress, earrings were considered female attire and earring rule discouraged rebelliousness); *Jones v. W.T. Henning Elem. Sch.*, 721 So.2d 530 (La. App. 1998) (upholding ban on boys' wearing earrings based on distraction it would cause as contrary to community values).

³¹*Doe v. Brockton Sch. Comm.*, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000) (granting preliminary injunction to student against school's enforcement of dress code provision).

³²See, e.g., *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994) (rejecting parental challenge to use of reading series in curriculum).

³³See, e.g., *Leebaert v. Harrington*, 332 F. 3d 134 (2d Cir. 2003) (ruling that school district did not violate parental rights by refusing to excuse student from mandatory health education course and failing him after he refused to attend).

³⁴Ariz. Rev. Stat. § 15-716 (2003); Cal. Educ. Code § 51550 (West 2003); Nev. Rev. Stat. § 389.065 (2003); Utah Code Ann. § 53A-13-101 (2003).

³⁵20 U.S.C. § 1232h (2004).

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³⁶See, e.g., *Down v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000).

³⁷See *id.* At 1011 and n.2 (noting varying rights of schools to limit (1) student speech (least control); (2) “school-sponsored” speech (reasonable rights to restrict, but may be problematic if restrictions are viewpoint-based); and (3) school’s own speech (greatest control).

³⁸See *Downs*, 228 F.3d 1003.

³⁹*Hansen v. Ann Arbor Public Schools*, 293 F. Supp. 2d 780, 794 (E.D. Mich. 2003) (invalidating school’s exclusion of student who wanted to express religious objections to homosexuality as part of diversity week panel’s promoting tolerance of gay and lesbian students).

⁴⁰See *Widmar v. Vincent*, 454 U.S. 263 (1981).

⁴¹*Fricke v. Lynch*, 491 F. Supp. 387 (D. R.I. 1980).

⁴²See, e.g., *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 243) (upholding constitutionality of school anti-harassment policy).

⁴³See *id.* Compare *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001) (finding harassment policy unconstitutionally “overboard” and “vague”).

⁴⁴See, e.g., *Sypniewski*, 307 F.3d at 249 (quoting anti-harassment policy found to be constitutional).

⁴⁵*Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081 (D. Minn. 2000); see also *Nabozny v. Podlesny*, 92 F.3d 446, 455-56 (7th Cir. 1996) (finding that school violated Equal Protection Clause by failing to protect gay male student); *Henkle v. Gre-*

gory, 50 F. Supp. 2d 1067 (D. Nev. 2001) (allowing claims under Title IX for discrimination and harassment by other students and under First Amendment based on demands by school officials that the student keep his sexual orientation to himself).

⁴⁶U.S. Dept. of Educ., Office for Civil Rights, Revised Sexual Harassment Guidance; Harassment of Students by School Employees, Other Students, or Third Parties (Jan. 19, 2001) at 3.

⁴⁷See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165 (N.D. Cal. 2000).

⁴⁸See, e.g., *McLaughlin v. Bd. of Educ. of Pulaski County Special Sch. Dist.*, 296 F. Supp. 2d 960 (E.D. Ark. 2003).



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