



Idaho Safe Schools Coalition

We all deserve safety and respect at school

August 10, 2011

Via U.S. Mail, Fax, and E-Mail

Honorable Mike Vuittonet, Chairman
Honorable Janet Calinsky
Honorable Loraine Hand
Honorable Reid Olsen
Honorable Anne Ritter
Board of Trustees
Joint School District No. 2
1303 E. Central Dr.
Meridian, Idaho 83642

Re: Proposed Policy Regarding Clubs in Secondary Schools

Dear Chairman Vuittonet and Members of the Board of Trustees of Joint School District No. 2 (the "Board"):

We write in response to the proposed policy of Joint School District No. 2 (the "District") regarding clubs in secondary schools that received its first reading on July 19, 2011 (the "Proposed Policy"). To introduce ourselves, Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual and transgender ("LGBT") people and those living with HIV through impact litigation, education, and public policy work. Lambda Legal has been counsel in many of the nation's leading cases regarding the rights of students under the federal Equal Access Act (the "EAA") and the First Amendment to the U.S. Constitution.¹ The Idaho Safe Schools Coalition is a statewide organization devoted to helping Idaho schools become safe places for students, families, and educators, regardless of sexual orientation or gender identity. We together have reviewed the Proposed Policy and urge you not to adopt the problematic provisions of it discussed below because those provisions will be harmful to students, violate their rights, and expose the District and members of the Board to the risk of expensive, protracted litigation.

¹ These have included Equal Access Act cases in Salt Lake City, Utah and Orange County, California, First Amendment cases in Salt Lake City and Reno, Nevada, and a pending Equal Access Act lawsuit in upstate New York, in which the United States Department of Justice has filed as *amicus curiae*.

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Factual Background

In late 2010, four students at Mountain View High School submitted an application to form a Gay-Straight Alliance (“GSA”). As detailed in their communication to the Board, the purpose of the GSA was to create a safe environment for LGBT students to be themselves and to foster respect from their peers. Some of the students had been through nearly four years of high school and were personally aware of the difficulties that many LGBT students face in coming out and maintaining social support networks. They also sought to create the GSA in order to reduce prevailing harassment, hostility, and discrimination against LGBT students within the District. Membership in the club, as its name implies, was not limited by sexual orientation, and the goal was to create a coalition of LGBT students and their allies to promote respect for all teens.

At the Board meeting on January 25, 2011, the Board voted to remove approval of the GSA application from the consent agenda. The Board then voted to postpone action on the GSA application, as well as another application for a comic book club, pending a review of all clubs currently approved in the District. The review was to include an assessment of the amount of staff time and resources spent on the clubs, the contribution the clubs make to the educational process, and the number of participating students. The stated purpose of the review was “to make an intelligent decision on the existence of clubs in the district.”

Several months passed, and the 2010-11 school year came to a close, without any action on the GSA’s application. As a result, the GSA was never able to meet formally, even though other non-curriculum clubs continued to do so, and access the full range of privileges afforded to recognized clubs. Students in their senior year who were interested in the GSA—including those who were designated as officers on the GSA’s application—have since graduated and have therefore permanently lost the opportunity to participate in the GSA.

On July 19, 2011, following completion of the review of existing clubs, the Board discussed a new proposed policy on student organizations. The Proposed Policy would exempt from its reach (a) all clubs whose membership is determined by student body election, which presumably includes organizations such as student council, and (b) all clubs governed by the Idaho High Schools Activities Association, which appears to include cheerleading, dance/drill, speech/debate, and sports. However, for clubs such as the proposed GSA, as well as diversity clubs, the Proposed Policy would, among other things:

- Require written parental or guardian consent for membership;
- Prohibit any student organization from “advocat[ing] or approv[ing] sexual activity outside of marriage,” even though same-sex couples may not marry in Idaho;² and
- Create two tiers of non-exempt student organizations, curriculum and non-curriculum, with significant restrictions on the latter, including that:

² Idaho Const., Art. III, § 28. To be clear, however, the students never indicated in any way that the GSA involved approval of sexual activity.

- Curriculum clubs could be given access to the school newspaper, yearbook, bulletin boards, and public address system (among other things), whereas non-curriculum clubs would be guaranteed access to advertise on only one designated bulletin board in the school;
- Schools could provide financial and other support to curriculum clubs, but would be allowed to provide only meeting space for non-curriculum clubs;
- Schools could limit the times and number of hours that non-curriculum clubs would be allowed to meet per month; and
- While there would be no minimum number of students for curriculum clubs, non-curriculum clubs would be required to have a minimum of 7 members.

The Board has not yet acted upon student club applications that were pending as of last school year, including the GSA's application.

Legal and Policy Analysis

Were it to be adopted, the Proposed Policy would have a devastating effect on the most vulnerable and at-risk students in the District. Across the nation, young people who face hostility and rejection because of their sexual orientation or gender identity have found some measure of relief through participation in clubs that provide peer support and seek to promote education about LGBT issues. LGBT youth must contend with staggering amounts of violence and harassment: nine out of every ten LGBT students are verbally or physically harassed because of their sexual orientation and six out of ten are harassed because of their gender expression.³ A disproportionate number of LGBT youth also commit suicide each year – as evident by the surge of reported suicides in the last year⁴ – because they are unable to cope with the harassment they face and feel alone and unsupported. LGBT students (and those harassed because they are perceived as such) are five times more likely to skip school for fear of their safety; five times more likely to be threatened with a weapon at school; six times more likely to be physically assaulted; and eight times more often in need of medical attention after an assault.⁵

³ Joseph Kosciw, et al., *The 2009 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools* 26 (2010).

⁴ These tragedies include the suicides of Seth Walsh, aged 13, Asher Brown, 13, Billy Lucas, 15, Justin Aaberg, 15, Tyler Clementi, 18, Raymond Chase, 19, Corey Jackson, 19, and Zach Harrington, 19. While media coverage of these tragedies has increased, the elevated rate of suicide among LGBT youth is not a new phenomenon. See Gary Remafedi, *Sexual Orientation and Youth Suicide*, 282(13) J. of Am. Med. Ass'n 1291 (1999). In light of the disproportionate number of lesbian, gay, and bisexual youth who take their own lives each year, courts have recognized that the reduction of antigay bias "may involve the protection of life itself." *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1151 (C.D. Cal. 2000) (a case in which Lambda Legal was counsel).

⁵ See U.S. Department of Health and Human Services, *Report of the Secretary's Task Force on Youth Suicide*, (Jan. 1989); *Making Schools Safe for Gay and Lesbian Youth: Report of the Massachusetts Governor's Commission on Gay and Lesbian Youth* (1993); Robert Garofalo et al., *The Association Between Health Risk Behaviors and Sexual Orientation Among a School-Based Sample of Adolescents*, 101(5) Pediatrics J. 895 (1998); *GLSEN's 1999 National School Climate Survey* (1999); Michael Bochenik & Widney Brown, *Hatred in the Hallways: Violence and Discrimination Against Lesbian, Gay, Bisexual and Transgender Students in U.S. Schools* (Human Rights Watch 2001).

School officials play a vital role in ensuring that LGBT students are safe and respected. The failure to take this obligation seriously can be extremely costly,⁶ and school officials must take proactive steps to prevent the harassment of LGBT students and certainly not impede valid efforts to counter harassment. In addition to responsible action by school officials, GSAs serve as an important part of the antidote to hostility toward LGBT youth: students in schools with a GSA are less likely to report feeling unsafe because of their sexual orientation, are less likely to hear homophobic remarks such as “faggot” or “dyke,” and are more likely to report that school personnel intervened when hearing such remarks.⁷ However, the Proposed Policy would cut the legs out from underneath the proposed Mountain View High School GSA, as well as many other non-curriculum clubs, by erecting barriers to prevent it and them from functioning effectively as student clubs.

A. The Proposed Policy’s Requirement of Parental Consent Would Deter and Block Participation By Those Most in Need of a GSA and Violate Students’ Rights of Expressive Association.

The requirement of parental consent burdens the most vulnerable of an already vulnerable population. Although some LGBT youth may be able turn to their family for support, this unfortunately is often not the case: more than 33% of lesbians and gay men report being attacked by a family member as a result of their sexual orientation; 26% of adolescent boys reported being forced out of their home after their sexual orientation was revealed; and youth who identify as non-heterosexual account for 46% of all homeless youth, even though they are estimated to constitute only 9% of the population.⁸ Thus, those who are most in need of the refuge that a GSA would provide are also those least likely to be safe seeking parental consent to join a GSA and least likely to be able to obtain it. That is particularly so for LGBT students who may not be “out” to their parents. Even students whose parents would be willing to grant permission may be deterred from joining a GSA by the extra hurdle that would be imposed by the Proposed Policy.

The Proposed Policy also would disadvantage students through the effect it would have on teachers, both in decreasing their willingness to act as the mandatory faculty advisor required for all clubs and increasing exposure to liability for themselves and their school. Because teachers will be required to police the membership and participation of each student at every meeting, and because there will be additional paperwork and potential liability for inaccurate consent forms, teachers will undoubtedly be less willing to serve in these unpaid positions. In addition, where a school voluntarily assumes the responsibility of ensuring parental consent, it creates new legal liabilities for itself: parents may sue the school if their children manage to participate in activities requiring parental consent if the parents withheld permission, rescinded permission they previously provided, or had their names forged on consent forms.

Any requirement of parental permission, coupled with the likely lack of faculty advisors to sponsor clubs, would decrease availability of and participation in extracurricular activities and

⁶ See, e.g., *Henkle v. Gregory*, No. 00-050 (D. Nev.) (Lambda Legal suit against school administrators on behalf of a gay student who had been subjected to violence, bullying, and physical attacks resulting in a \$451,000 settlement).

⁷ *Kosciw* at xvii-xviii.

⁸ See *supra* footnote 5.

increase the number of students involved in alternative activities, away from the safety of the school environment. This would harm students, who would not be able to list extracurricular activities on college and job applications and who would be deprived of the social learning and leadership opportunities provided by school clubs. It also could harm the community, as students who feel unsupported and who lack constructive outlets to channel their time and energy are more likely to engage in antisocial behavior.

The requirement of parental consent also violates students' constitutional rights of expressive association. High school students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁹ It is also "beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment."¹⁰ As an initial matter, because the Proposed Policy would compel the disclosure of the GSA's membership information (i.e., to students' parents), it impermissibly would discourage students from joining the GSA who fear disclosure of their participation in the organization.¹¹

By enforcing the parental consent requirement, the Proposed Policy improperly would use the power of the state to bar students from exercising their rights of expressive association. As the Supreme Court made clear earlier this year, simply because parents have traditionally had the ability to control what their children hear or say, "it does not follow that the state has the power to prevent children from hearing or saying anything without their parents' prior consent."¹² Laws or rules requiring parental consent "do not enforce parental authority over children's speech or religion; they impose governmental authority, subject only to a parental veto," and "the absence of any historical warrant or compelling justification for such restrictions . . . renders them invalid."¹³ For example, even if an atheist parent could forbid his or her child from attending a Bible Club meeting, the government may not inject itself into the equation and prevent the student from doing so absent parental consent. The government would be liable for interfering with a student's constitutional right of expressive association in the same way that it would be unconstitutional for the school to discipline a student for praying in the lunchroom or talking about political issues, regardless of whether the discipline was pursuant to a parent's wishes or not.

B. The Proposed Policy's Content-Based Restriction on What Student Organizations May "Approve" With Respect to Activity Outside of Marriage Would Violate Students' Rights under the Equal Access Act As Well As Their Constitutional Rights of Freedom of Speech.

After the GSA submitted its application, the District proposed a policy that would prohibit any student organization from "advocat[ing] or approv[ing] sexual activity outside of

⁹ *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

¹⁰ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

¹¹ *NAACP*, 357 U.S. at 462-63 (finding it "apparent that compelled disclosure of [a membership list of the NAACP] is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate").

¹² *Brown v. Entertainment Merchants Association*, 564 U. S. --, 180 L. Ed. 2d 708, 717 n.3 (2011) (declaring unconstitutional a California law which forbid the sale of certain video games without parental consent).

¹³ *Id.*

marriage,” even though same-sex couples may not marry in Idaho. To be clear, the purpose of GSAs is not to advocate or promote “sexual activity” (whether inside or outside of marriage), but it is difficult to see the proposed restriction as anything but a response to GSAs and one that could chill students from promoting respect for gay people out of fear that doing so would be construed as “approv[ing]” sexual activity outside of marriage. The first school district of which we are aware to have employed this same language (from which the proposed policy here seems to have borrowed) is one that Lambda Legal previously sued in response to the district’s refusal to permit a GSA to meet.¹⁴

The federal Equal Access Act does not allow a public secondary school that receives federal financial assistance (such as the schools in the District) to deny a student club equal access to the limited open forum it has created or to discriminate against it because of the content of the speech at club meetings.¹⁵ Likewise, under the First Amendment, schools may not restrict student speech merely to avoid controversy or to avoid the “discomfort and unpleasantness that always accompany an unpopular viewpoint.”¹⁶ Nor may schools suppress or discriminate against student speech because they disapprove of or disagree with the speaker’s ideas.¹⁷ Rather, content-based discrimination against student speech like that engaged in by GSAs, which does not advocate illegal conduct, may be justified only upon a showing that the prohibited speech would “materially and substantially interfere” with school operations.¹⁸

Such a showing could not be made with regard to GSA speech. The District also would not be able to justify the provision at issue by reliance on sex education policies or laws. Courts have rejected attempts by schools to discriminate against GSAs on the grounds that they would somehow interfere with the school’s sex education policies.¹⁹ Sex education policies and laws regulate what schools teach, not what is discussed among students during non-instructional time. Equally important, GSAs do not engage in “sex education.” As detailed in the GSA’s application here, its purpose is to promote respect for LGBT students, not to teach sex education. Even if a club wanted to discuss issues related to sexuality, however, school district and state policies and laws that would violate students’ rights under the federal Equal Access Act or the

¹⁴ See *East High Sch. Gay Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.*, No. 98-193, 1999 U.S. Dist. LEXIS 20254, at *10 (D. Utah 1999) (granting declaratory relief that school had violated Equal Access Act).

¹⁵ 20 U.S.C. § 4071(a) (“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.”).

¹⁶ *Tinker*, 393 U.S. at 509; see also *Colin*, 83 F. Supp. 2d at 1141; *Morrison v. Bd. of Educ.*, 419 F. Supp. 2d 937, 941 (E.D. Ky. 2006) (“The private, noncurricular speech of students is entitled to almost blanket constitutional protection.”), *aff’d*, 521 F.3d 602 (6th Cir. 2008).

¹⁷ See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (“Discrimination against speech because of its message is presumed to be unconstitutional.”); see also *Prince v. Jacoby*, 303 F.3d 1074, 1091 (9th Cir. 2002).

¹⁸ *Tinker*, 393 U.S. at 509. “The First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.” *Consol. Edison Co. v. Public Serv. Comm’n*, 447 U.S. 530, 537-38 (1980).

¹⁹ See *Gonzalez v. Sch. Bd. of Okeechobee County*, 571 F. Supp. 1257 (S.D. Fla. 2008) (rejecting school’s argument that it could bar a GSA as a “sexually oriented group” interfering with its marriage-dependent abstinence-only program where state law did not permit same-sex couples to marry); *Gay-Straight Alliance of Yulee High Sch. v. Sch. Bd. of Nassau County*, 602 F. Supp. 2d 1233 (M.D. Fla. 2009) (dismissing school’s argument that GSA would interfere with abstinence-only policy).

U.S. Constitution are preempted and may not be enforced.²⁰ To the extent that the Board might be concerned that the message of the GSA could be imputed to schools, the District or the Board itself, that fear is unfounded. As the Proposed Policy recognizes and makes clear, the “meetings, ideas and activities [of clubs] are not sponsored or endorsed in any way by the Board.”

C. The Proposed Policy’s Creation of Favored and Disfavored Tiers of Treatment For Student Organizations Also Would Violate the Equal Access Act.

We urge the Board to reject the approach of creating multiple tiers of treatment for student clubs, which would result in violations of the Equal Access Act and be unworkable in practice. The Proposed Policy appears to create three tiers of student organizations. First, sitting atop all other clubs, are those clubs that would be designated categorically exempt from the requirements of the Proposed Policy. The Proposed Policy provides that this would include “[c]lubs whose membership is determined by student body election, and clubs which are governed by the Idaho High Schools Activities Association.” This would apparently encompass, among other clubs, student council, cheerleading, dance/drill, speech/debate, and sports.

Second are curriculum clubs, which includes clubs whose subject matter is or will soon be taught in a regular course and clubs whose subject matter concerns the body of courses as a whole. Third are non-curriculum clubs (which do not have a subject matter that is or will soon be taught in a regular course and whose subject matter does not concern the body of courses as a whole) that are not categorically exempt from the requirements of the Proposed Policy. Clubs in this last group receive significantly disfavored treatment, including rules on how they may communicate with other students (only a single bulletin board is guaranteed), how many hours they may meet each month (no minimum is guaranteed), what support they receive from the school (only meeting space), and how many members are required to form a club (at least seven). In contrast, a school can choose to provide curriculum and exempt clubs with access to more—and more effective—means of communication with students (including the public address system and newspaper), as well as financial and other support, and permit such clubs to form without a minimum number of members.

As noted above, the Equal Access Act prohibits the District from denying equal access to or discriminating against students based on the content of their speech at meetings where, as here, it has created a “limited open forum” in which non-curricular groups are permitted to meet. Yet the Proposed Policy would do precisely that, by treating exempt groups, such as student council and cheerleading, differently than all other groups, which include other non-curricular groups. Several courts have found school districts liable for violating the EAA by favoring, for example, such staples of high school life as cheerleading teams, student councils, and drill teams, while failing to provide GSAs and other non-curriculum-related clubs equal treatment.²¹

²⁰ See *Prince v. Jacoby*, 303 F.3d at 1084.

²¹ See *SAGE v. Osseo Area Sch.-Dist. No. 279*, 471 F.3d 908, 912 (8th Cir. 2006) (finding that cheerleading and swimming were non-curricular clubs); *White Co. High Sch. Peers Rising in Diverse Educ. (P.R.I.D.E.) v. White Co. Sch. Dist.*, No. 06-CV-26-WCO, 2006 U.S. Dist. LEXIS 47955, at *18-24 (N.D. Ga. Jul. 14, 2006) (finding that student council and dance team were non-curricular clubs).

Reclassifying these exempt groups as either curriculum or non-curriculum would not solve the problem of potential liability under the EAA. In recent years, schools in California, Georgia, Indiana, Kentucky, Minnesota, Utah, and Washington have all been found to have violated the EAA by treating non-curriculum-related clubs differently than those they had attempted to classify as “curricular.”²² Attempts to treat non-curriculum clubs differently from curriculum clubs, or to characterize those that are not truly curriculum-related as being so, again and again have failed the strict mandates of the EAA. Whether a particular club is curricular or non-curricular is a legal determination for the courts, and the EAA is triggered whenever a school miscategorizes just *one* club or allows *one* group of students to enjoy different access.

* * *

The foregoing concerns are meant to be illustrative, and by no means exhaustive, of the potential constitutional infirmities and invitations to litigation that would flow from the adoption of the Proposed Policy. While the outcome of ensuing litigation may be unknown, there is no question that students benefit from unrestricted access to school activities and non-curriculum clubs, and that the changes outlined in the Proposed Policy would reduce participation and discourage involvement in these beneficial opportunities. We urge you to consider this matter as educators dedicated to students’ well-being and not based on political considerations. We are hopeful that once you consider the potential costs and consequences to the District and the student body, you will decide against adoption of the provisions of the Proposed Policy discussed above. Should you have any questions, or wish to discuss this matter further, please do not hesitate to contact us.

Sincerely,

Peter Renn
Staff Attorney
Lambda Legal

Krista Perry & Elizabeth Morgan
Co-Chairs
Idaho Safe Schools Coalition

²² See, e.g., *P.R.I.D.E.*, 2006 U.S. Dist. LEXIS 47955, at *41; *Garnett v. Renton Sch. Dist.*, 722 F. Supp. 531, 534 (W.D. Wash. 1991); *SAGE v. Osseo Area Sch.-Dist. No. 279*, No. 05-2100, 2008 U.S. Dist. LEXIS 71577, at *18 (D. Minn. Sept. 25, 2007); *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 687 (E.D. Ky. 2003); *East High Gay Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166, 1180 (D. Utah 1999); *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 221 (3d Cir. 2003); *Franklin Central Gay/Straight Alliance v. Franklin Township Comm. Sch. Corp.*, No. 01-1518, 2002 WL 32097530 at n.6 (S.D. Ind. Aug. 29, 2002).

Fax Transmission

To: Board of Trustees From: Peter Renn, Esq.

At: Joint School District, No. 2 Date: August 10, 2011

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Message: **Dear Honorable Vuittonet, Calinsky, Hand, Olsen, and Ritter:**

Please see the attached letter from Mr. Peter Renn, with Lambda Legal Defense and Education Fund, Inc., and Krista Perry & Elizabeth Morgan, with Idaho Safe Schools Coalition, dated August 10, 2011. Please contact me immediately at 213-382-7600, Ext. 237, should you have any difficulties receiving this document.

Sincerely,

Sklar K. Toy
Legal Assistant

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