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THE EQUAL ACCESS ACT REQUIRES EQUAL ACCESS FOR ALL: WHY THE ROWAN-SALISBURY SCHOOL SYSTEM'S POLICY AGAINST "SEX-BASED" CLUBS, DEVELOPED TO BAN GAY-STRAIGHT ALLIANCES, IS ILLEGAL

M. BLAKE HUFFMAN*

INTRODUCTION

Lesbian, gay, bisexual, and transgender (LGBT) students face frightening conditions every day in our nation's secondary schools. The string of gay teen suicides this past fall highlighted the issue of gay teens and bullying; across the country, there were five widely reported suicides by gay teenagers in just three weeks.¹ The distressing instances of gay teen suicide are backed up by chilling statistics. According to the 2009 National School Climate Survey conducted on LGBT students in grades six to twelve, "nearly three quarters (72.4%) of students reported hearing students make derogatory remarks, such as 'dyke' or 'faggot,' often or frequently in school[.]" and "88.9% of students heard 'gay' used in a negative way often or frequently at school."² Additionally, "29.1% of [LGBT] students skipped a class at

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1. Jeremy Hubbard, *Fifth Gay Teen Suicide in Three Weeks Sparks Debate*, ABC NEWS (Oct. 3, 2010), <http://abcnews.go.com/US/gay-teen-suicide-sparks-debate/story?id=11788128> (naming one student as Seth Walsh, "whose family said he was harassed by bullies for being gay"); Michelle Burford, *The Surge in Gay Teen Suicide*, AOL HEALTH (Oct. 12, 2010), <http://www.aolhealth.com/2010/10/12/gay-teen-suicide-surge/> ("In September 2010 alone, at least six gay youth — all of whom endured a relentless stream of taunts by their classmates — ended their own lives."); see also Susan Donaldson James, *Teen Commits Suicide Due to Bullying: Parents Sue School for Son's Death*, ABC NEWS (Apr. 2, 2009), <http://abcnews.go.com/Health/MindMoodNews/story?id=7228335&page=1> (describing the account of a seventeen year-old high school student in Ohio that committed suicide after facing anti-gay slurs and physical harassment on a daily basis at school).

2. JOSEPH G. KOSCIW ET AL., *THE 2009 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 16* (New York: Gay, Lesbian and Straight Education Network 2010), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1675-1.pdf.

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least once in the past month because they felt unsafe or uncomfortable.”³ Beyond homophobic remarks and generalized feelings of being unsafe, LGBT students experience frequent verbal and physical harassment. Almost ninety percent of students reported verbal harassment based on their sexual orientation within the past year.⁴ Regarding physical harassment, “40.1% of LGBT students had been physically harassed at school because of their sexual orientation, and 12.9% reported that this harassment occurred often or frequently.”⁵

To combat this violence, Gay-Straight Alliances (GSAs) have formed in schools across the country. GSAs are clubs run by students, usually in high schools, which meet to provide a safe space for students to socialize and talk about issues relevant to sexual orientation and homophobia.⁶ While some GSAs are involved in activism, such as promoting non-discrimination policies and inclusion of LGBT topics in curriculum, many GSAs simply serve as support systems for students coming to terms with their identity and as education vehicles on issues of gender and sexual orientation.⁷

These GSAs have increased safety for LGBT students.⁸ For example, LGBT students in schools with GSAs, as compared to students at schools without the groups, are less likely to hear anti-gay slurs.⁹ Furthermore, students attending schools with GSAs are more likely to attend class and more likely to report that “school personnel intervened when hearing homophobic remarks” than students at schools without GSAs.¹⁰ “[A]bout 54.3% of students with a GSA felt unsafe at school because of their sexual orientation, compared to 66.5% of other students.”¹¹ This reported increase in feelings of safety also stems from the fact that LGBT students in schools with GSAs experience less harassment and assault.¹² “24.2% of students with a GSA experienced high levels of victimization related to their sexual orientation, compared to 34.7% of those without a GSA.”¹³

Nowhere in the nation are GSAs more needed than in the South. Southern schools are less likely to provide students with LGBT-re-

3. *Id.* at xvi.

4. *Id.* at 26.

5. *Id.*

6. *What is a Gay-Straight Alliance?*, GSA NETWORK, <http://gsanetwork.org/resources/building-your-gsa/what-gsa> (last visited Mar. 26, 2011).

7. *Id.*

8. KOSCIW ET AL., *supra* note 2, at 64-65. Indeed, having a GSA in a high school will likely increase openness and tolerance towards all students of diverse backgrounds, though this issue is not analyzed here.

9. *Id.* at 64.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

lated resources and support than schools in any other region.¹⁴ The South trails every region on every resource level measured, including supportive administration, library resources, inclusive curriculum, and access to GSAs.¹⁵ Unsurprisingly, LGBT students in the South, as compared to those in every other region, were more likely to report that they had been physically assaulted.¹⁶ Rowan County, North Carolina exemplifies the need for GSAs in schools. The county is situated in a Southern state, has an especially conservative population,¹⁷ and its classrooms lack diversity generally.¹⁸ Mette Anderson, director of Time Out Youth, a LGBT youth resource organization in the Charlotte area, calls Rowan County a place where “[h]omophobia is widespread.”¹⁹

Despite the need for a GSA in such a community, in April 2006, the Rowan-Salisbury Board of Education (BOE) dealt a significant blow to the safety and security of LGBT students in its school system when it passed a ban on “sex-based” clubs.²⁰ Students at South Rowan High School formed a GSA in 2006, igniting controversy in the rural, conservative community.²¹ The school board’s policy was developed

14. *Id.* at 93, 101-02.

15. *Id.* at 102.

16. *Id.*

17. E.g. Peter Eisler, *2008 U.S. Presidential Election Results – By County*, USA TODAY, <http://content.usatoday.com/news/politics/election2008/PresidentialByCounty.aspx?sp=NC&oi=P&rti=G&loc=interstitialskip> (last updated Nov. 12, 2008) (providing statistics showing that in the 2008 presidential election Senator John McCain won over sixty-one percent of the vote in Rowan County); see also Peter Eisler, *2008 U.S. Presidential Election Results*, USA TODAY, <http://www.usatoday.com/news/politics/election2008/nc.htm> (last updated Nov. 6, 2008) (proving President Obama carried the state of North Carolina, even though Rowan County was conservative).

18. *Rowan County—Diversity in the Classroom*, N.Y. TIMES, <http://projects.nytimes.com/immigration/enrollment/north-carolina/rowan> (last visited Mar. 26, 2011). As of 2006, Rowan County ranked fiftieth out of the 100 North Carolina counties on diversity in the classroom based on race. *Id.*

19. Kirsten Valle, *South Students Can Challenge Gay Club Ban, Group Says*, SALISBURY POST, Apr. 12, 2006, http://archive.salisburypost.com/archive_detail.php?archiveFile=2006/April/12/Area/46730.xml&start=0&numPer=20&keyword=gay§ionSearch=&begindate=4%2F1%2F2006&enddate=4%2F14%2F2006&authorSearch=&IncludeStories=1&pubsection=&page=&IncludePages=1&IncludeImages=1&mode=allwords&archive_pubname=Salisbury+Post%0A%09%09%09; see also *infra* Part I.A (describing personal accounts of homophobia and harassment at South Rowan High School).

20. *Board of Education Meeting Minutes*, ROWAN-SALISBURY SCHOOL SYSTEM, 3-4 (Apr. 10, 2006), <http://www.rss.k12.nc.us/BOE/0506BOEMnts/BOE4-10-06.pdf>; *Board of Education Policies and Regulations*, ROWAN-SALISBURY SCHOOL SYSTEM, 6-8(E) (Aug. 14, 2006), <http://www.rss.k12.nc.us/BOE/Policy/BOECpt6PT1.pdf> (showing the Board of Education Policies, amended as of Aug. 14, 2006, banning sex-based clubs).

21. Jessie Burchette, *School Board Votes to Ban Gay/Straight Alliance Club; Groups Says Policy is Illegal, Could Challenge Ruling*, SALISBURY POST, Aug. 15, 2006, http://archive.salisburypost.com/archive_detail.php?archiveFile=2006/August/15/Area/56010.xml&start=0&numPer=20&keyword=Gay%2FStraight§ionSearch=&begindate=1%2F1%2F1983&enddate=3%2F22%2F2011&authorSearch=Jessie+Burchette&IncludeStories=1&pubsection=&page=&

exclusively to ban GSAs, including the one at South Rowan, and passed unanimously despite warnings of its illegality.²²

This Article will show that beyond being detrimental to the safety of LGBT students, the board's policy against "sex-based" clubs is illegal under the federal Equal Access Act (EAA). The first section will describe the South Rowan GSA and the Rowan-Salisbury policy. The next section argues that the EAA applies and that the Rowan-Salisbury BOE adopted a policy that denied the South Rowan GSA equal access based on the content of its meetings. Finally, the last section will demonstrate that this denial of equal access is illegal because no exception to the EAA was satisfied. Recent case law involving abstinence-only policies and bans on GSAs will be employed in this section since the majority of litigation involving GSAs occurs over whether exceptions to the EAA have been satisfied.²³

I. THE SOUTH ROWAN HIGH SCHOOL GAY-STRAIGHT ALLIANCE AND THE ROWAN-SALISBURY POLICY

A. *The Formation of the South Rowan Gay-Straight Alliance*

In the fall of 2005, students at South Rowan High School tried to form a GSA with hopes of making the school more tolerant and safe.²⁴ Many of those seeking to form the club had been on the receiving end of anti-gay harassment and prejudice.²⁵ Several of these students provided the following personal accounts of the homophobic environment encountered daily at South Rowan:

I see [prejudice] happening everyday at South Rowan High School

...

I once wore a skirt to school and being a male, this was not very accepted. My peers responded negatively by immediately beginning to spread rumors and shouting insults at me such as "faggot", [sic] "queer", [sic] and numerous other names.

The assistant principal approached me later that day stating that my clothes were "inappropriate". [sic] There is no rule in the code of conduct saying that males are not allowed to wear a skirt. The assistant

IncludePages=&IncludeImages=&mode=phrase&publicationSearch[]=Salisbury+Post&archive_pubname=Salisbury+Post%0A%09%09%09.

22. *Id.*

23. See Brian Berkley, Note, *Making Gay Straight Alliance Student Groups Curriculum-Related: A New Tactic for Schools Trying to Avoid the Equal Access Act*, 61 WASH. & LEE L. REV. 1847, 1872-73 (2004).

24. Letter from students at South Rowan High School to Dr. Wiley J. Doby, Superintendent of Rowan-Salisbury School System (Dec. 21, 2005) [hereinafter Letter from students] (on file with author) (this document and those following were obtained from the A.C.L.U. of N.C. with permission to use).

25. *Id.*

principal suggested that I changed [sic] as soon as possible. She then told me that many teachers went to her with complaints of the way I chose to dress. Two days later the assistant principal saw my father and took him aside to tell him what had happened

Student A
Grade 10

As a student at South Rowan High School[,] I have witnessed and been a victim of prejudice. Not only students participate in acts of prejudice but also teachers.

. . . Everyday teachers and I witness[] heterosexual couples expressing public displays of affection. Nothing was ever directly said to any of them.

A day in mid-November a teacher spotted my partner and me hugging. I noticed that the same teacher began to watch us everyday. A week later that same teacher came to my partner and me and asked us to “cool the P.D.A”. [sic] The following day I caught him videotaping us as we stood in the hallway. He then showed the videotape to his class.

Many students came to me telling me that [he] had shown this tape and allowed students to slander my friend and me.

Student B
Grade 11

My freshman year at South Rowan High School I experienced discrimination first hand.

I had a boyfriend at the time and we would hold hands. Another student did not approve of this and took the issue to the guidance office. My partner and I were then called to the guidance office. At that point I was told that China Grove was a very conservative town and the people within the town were not open, nor use, to people with a lifestyle such as mine. I was informed that if I were to be seen even speaking, at school, to my current boyfriend then we would both be suspended. She made it clear that same sex couples were prohibited at South Rowan High School. She called my parents, and my partner's, [sic] parents to let them know what had been occurring at school and that we were both homosexual.

Student C
Grade 12²⁶

These experiences led several students to become leaders of the effort to form the South Rowan GSA, and they did everything neces-

26. *Id.* The names of these students are not listed out of respect for their privacy.

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sary to be recognized as a student organization.²⁷ This included securing an advisor and drafting by-laws.²⁸ The by-laws specified five purposes of the club:

[1] To encourage tolerance and equality among students of all sexual orientations and gender identities through educational efforts and aware[sic]-building.

[2] To notify members and the student body of issues and events affecting[sic] the lives of lesbian, gay, bisexual, transgender (LGBT) and ally youth.

[3] To produce a safer, more respectful learning environment for all students.

[4] To work in coalition with administration and other on-campus clubs to expose and dismantle oppressions and prejudice in all of their expressions.

[5] To create a safe and welcoming environment for LGBT and straight ally students to socialize and converse about issues they hold in common.²⁹

Furthermore, the by-laws provided that membership was open to *all* students and “faculty members interested in the purpose of the club.”³⁰ To emphasize the openness of the club, the students attempting to form the GSA adopted a statement declaring that the GSA is not a “gay student club[]” and that “[i]t welcomes all students and all sexual orientations.”³¹ However, despite the students satisfying all requirements to be recognized as a student organization, their efforts to form a GSA were stymied by the school administration.³²

After being rebuffed by their principal, Dr. Ron Turbyfill, two students sent a letter to the superintendent of Rowan-Salisbury schools, Dr. Wiley Doby, informing him that the EAA required the school to allow the GSA to meet.³³ To further support their case, the students

27. *Id.*

28. *Id.*

29. By-laws of the South Rowan High School Gay-Straight Alliance, art. II [hereinafter GSA By-laws] (on file with author).

30. *Id.* at art. III.

31. South Rowan GSA Description (on file with author) (describing the membership requirements and the general goal of the organization titled “Gay/Straight Alliance”). The full description of the club reads:

Gay/Straight Alliance (GSA) are not ‘gay student clubs’. [sic] It welcomes all students and all sexual orientations. GSA is typically formed to reduce prejudice. We would like a GSA here at South to promote tolerance and equality among students of all sexual orientations and gender identities. The membership will be open to all students and faculty members who are interested in the purposes of this club, and will maintain the club environment free of harassment.

Id.

32. Letter from students, *supra* note 24.

33. *Id.*

attached the signatures of 100 students in support of the club and accounts of bullying and harassment from LGBT students at South Rowan.³⁴ On February 14, 2006, Superintendent Doby informed the two students that they could follow up with their principal to form the GSA at South Rowan.³⁵ The GSA was then approved on February 17.³⁶ The group met weekly throughout the rest of the school year,³⁷ discussing topics such as getting t-shirts, making brochures, celebrating Gay Pride, and creating a Lavender Graduation.³⁸ Specifically, on February 21, 2006, the GSA talked about how to deal with “haters” and tabling at lunch.³⁹ At a meeting a few weeks later, the group again confirmed that its purpose was to create a comfort zone within the school by increasing both awareness and tolerance.⁴⁰ Unfortunately, the GSA at South Rowan was never able to fully realize any of these goals because of the action of the Rowan-Salisbury BOE.

B. The Rowan-Salisbury BOE Responds: A Policy Against “Sex-Based” Clubs

On April 10, 2006, the Rowan-Salisbury BOE took action to ban all GSAs, including the one at South Rowan High School. According to minutes of the meeting, board member Jim Shuping stated that “he would like to ban all sexually oriented clubs in our schools” and that “this is Rowan County, not New York City.”⁴¹ Board member Bryce Beard agreed and noted that “he sees [that] the community at South Rowan does not want to accept this club. . . .”⁴² Much of the “community” Beard referred to practices a brand of conservative Christianity, with the group Operation Save America (OSA) having a presence in the region.⁴³ OSA stirred up community resistance to the South Rowan GSA, going so far as to take pictures of the students who founded the group and post them on the OSA website with a note stating that “[t]he three young and very naïve high school kids pic-

34. *Id.* (listing the 100 students and three accounts of harassment at the school).

35. Letter from Dr. Wiley J. Doby, Superintendent of Rowan-Salisbury School System, to students at South Rowan High School (Feb. 14, 2006) (on file with author).

36. South Rowan GSA Calendar (Feb. 2006) (on file with author).

37. *Id.*; South Rowan GSA Calendar (Mar. 2006) (on file with author); South Rowan GSA Calendar (Apr. 2006) (on file with author); South Rowan GSA Calendar (May 2006) (on file with author).

38. South Rowan GSA Research Notes (on file with author).

39. South Rowan GSA Meeting Notes (Feb. 21, 2006) (on file with author).

40. South Rowan GSA Meeting Notes (Mar. 1, 2006) (on file with author).

41. *Board of Education Meeting Minutes*, *supra* note 20, at 2.

42. *Id.* at 3; see also *School Board's Decision Stirs Controversy*, WBTV News (Apr. 11, 2006) (on file with author) (noting that Chairman, Mr. Bryce Beard, claimed over 2,000 community members were opposed to the club).

43. OPERATION SAVE AMERICA, <http://www.operationsaveamerica.org/streets/nc/charlotte-reports.htm.html> (last visited Mar. 26, 2011).

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tured here are being used by GLSEN [the Gay Lesbian Straight Education Network] to spread its agenda of hatred toward God, parents, and teachers.”⁴⁴ OSA also issued a call to action:

Here is the problem. Homosexuality is not only out of the closet and parading its sin publicly in the hallways of South Rowan, it demands all bow down and be subject to it, or be sued. Friends, if we do not fight this battle now when we have a good chance of winning in Jesus’ name, we may find ourselves having to fight when there is little or no hope of victory, realizing that it is better to die free than live under the bondage of homosexual slavery.

It is time for God’s Church to rise up, come out of the closet, and confront this giant in the name of Jesus Christ. The theology of the Church must become biography in the streets[.]

Will someone remind me again just how the radical homosexual agenda has free reign in our high schools, while Jesus has been expelled from school and banished from the school yard?⁴⁵

This call to action brought more than 700 protestors, “gentle Christians” in OSA’s words, to the meeting of the Rowan-Salisbury BOE when it voted on the policy.⁴⁶ Almost every single person present at the meeting voiced opposition to the GSA.⁴⁷ One student in support of the GSA was even forced to leave because she feared for her safety.⁴⁸ Despite a statement from the South Rowan principal that the GSA had *not* caused disruptions and that the school had continued to hold class as usual, the board unanimously approved a motion to ban all sexually-oriented clubs.⁴⁹ The official policy provides in whole that:

The Rowan-Salisbury School Board has been elected by the community, and the Board considers it to be the Board’s overriding duty to promote the academic excellence, best interests, and general well being of students.

44. Flip Benham, “*The Battle is on at South Rowan High School*,” OPERATION SAVE AMERICA (Apr. 6, 2006), <http://www.operationsaveamerica.org/streets/backtoschool/battle-is-on-at-south-rowan.htm.html>.

45. *Id.* Mr. Benham, the author of “*The Battle is on at South Rowan High School*” provided on the OSA website, must have forgotten that Bible clubs are allowed to meet on school premises because of the Equal Access Act, the very federal law that allows the GSA to meet. *See infra* Part II.A.

46. Press Release, *Radical Homosexual Agenda Reeling in Charlotte*, OPERATION SAVE AMERICA (Apr. 11, 2006), <http://www.operationsaveamerica.org/press/press/060411radical-homosexual-agenda-reeling-charlotte.htm.html> (“The preachers preached, the singers sang, the prayers prayed, and the theology of the church house became biography in the streets of Salisbury, North Carolina.”).

47. *School Board Member Expects Ban of Sexually-Oriented Clubs to be Challenged in Court*, WSOCTV (Apr. 10, 2006), <http://www.wsocvt.com/news/8608165/detail.html> [hereinafter *Ban of Sexually-Oriented Clubs*].

48. *Id.*

49. *Board of Education Meeting Minutes*, *supra* note 20, at 3-4.

The Board has previously determined that an abstinence-only sex education policy promotes the best interests and general well being of both students and their families. The Board has also adopted a zero tolerance harassment policy and provides a counseling program for all students.

The Board recognizes non-curricular student clubs formed under the Equal Access Act (EAA). However, the Board has not created, and does not intend to create, an open forum in its schools for student clubs, but intends to maintain a narrowly limited forum for both curricular and non-curricular clubs that is consistent with the school's academic curriculum and with the promotion of the best interests and general well being of the students. (See Regulation 6-8 E.))

Therefore, the Board will not permit the formation of any curricular or non-curricular clubs of any kind, whether official or student-initiated, that are sex based or that are based upon any sexual grouping or activity of any kind.⁵⁰

This policy is intended to promote the well being of students in the following ways:

- a. prevention of sexually transmitted diseases.
- b. prevention of unwanted teen pregnancies.
- c. prevention of sexual harassment.
- d. prevention of student-to-student harassment over sexual issues.
- e. prevention of child sexual abuse or molestation by either student or adult predators.
- f. prevention of contact by underage students with adult-only material. . [sic]
- g. prevention of school interference in the parent-child relationship.
- h. promotion of student communication with a responsible adult regarding sexual issue[s].⁵¹

This policy was a victory for the anti-gay forces.⁵² The students at South Rowan ultimately decided not to file a court challenge because they were harassed and shaken by the community's reaction.⁵³ How-

50. *Board of Education Policies and Regulations*, *supra* note 20. This policy seems extraordinarily broad, but has not been interpreted to prohibit all-boys or all-girls teams or groups of any kind. See *Athletics*, ROWAN-SALISBURY SCHOOL SYSTEM, <http://www.rss.k12.nc.us/srhs/Site/Athletics.html> (last visited Mar. 26, 2011) (showing the many all-boys and all-girls sports teams at South Rowan High School). Importantly, however, the GSA at South Rowan was not based on any sexual grouping of any kind but was open to all sexes and all sexual orientations. See *supra* text accompanying notes 30-31.

51. See *Board of Education Policies and Regulations*, *supra* note 20. Reading the goals of the South Rowan GSA, it would not interfere with any of these aims. See GSA By-laws, *supra* note 29. Promoting sex was not an objective of the GSA. *Id.*

52. Press Release, *supra* note 46 (crediting the board's decision to the "heat of the Christian community").

53. Telephone Interview with Katy Parker, Legal Director, American Civil Liberties Union of North Carolina, in Raleigh, N.C. (Jan. 7, 2009). How the policy was enacted was not lost on some observers; one caller into a local talk radio station noted "[t]his is an absolute bullying

ever, there have been efforts to get the board to repeal the policy. The next April, the Legal Director for the American Civil Liberties Union of North Carolina, Katy Parker, and graduates of several Rowan County high schools spoke against the ban.⁵⁴ Parker told the board of a recent case directly on point from Florida,⁵⁵ where a court found that a GSA was not a “sex-based” club and had a right to form under the EAA.⁵⁶ To highlight the personal effect of the ban and the need for GSAs, Rowan County high school alumni spoke about how intolerant and unsafe the county high schools are for LGBT students.⁵⁷ In particular, an East Rowan High School graduate told the board of being harassed and about an incident where other students put dead squirrels in her car without receiving significant punishment from the school.⁵⁸ Despite these stories and testimony about the policy’s illegality, the board took no action and the policy remains today.

II. THE ROWAN-SALISBURY POLICY IS A CONTENT-BASED DENIAL OF EQUAL ACCESS UNDER THE EQUAL ACCESS ACT

A. *The Equal Access Act is Applicable to South Rowan High School*

It is undisputed that the federal EAA⁵⁹ applies within the Rowan-Salisbury school district. For the EAA to apply, two requirements must be met: (1) the school must be a public secondary school receiving federal money; and (2) the school must maintain a “limited open forum.”⁶⁰ A “limited open forum” exists “whenever such school

effort by the religious right in this county.” *School Board’s Decision Stirs Controversy*, *supra* note 42. However, it is safe to say that most Rowan County citizens were satisfied with the outcome; another caller noted that “[t]he leftist, politically-correct, secular movement has been bullying our people for a long time and now the shoe is on the other foot.” *Id.*

54. Holly Fesperman Lee, *ACLU Rep Says Ban on Sex-Based Clubs is Illegal*, SALISBURY POST, Apr. 17, 2007, http://archive.salisburypost.com/archive_detail.php?archiveFile=/pubfiles/sls/archive/2007/April/17/Area/77263.xml&start=0&numPer=20&keyword=gay§ionSearch=&begindate=1%2F1%2F1983&enddate=12%2F31%2F2007&authorSearch=&IncludeStories=1&pubsection=&page=&IncludePages=1&IncludeImages=1&mode=allwords&archive_pubname=Salisbury+Post%0A%09%09%09.

55. *Gonzalez v. Sch. Bd.*, 571 F. Supp. 2d 1257 (S.D. Fla. 2008); *see infra* Part III.

56. Lee, *supra* note 54.

57. *Id.* One student said of Rowan County that “It’s a county of conformity and little tolerance.” *Id.*

58. *Id.* “With all the violence directed toward homosexuals today, why would anyone go against a program like GSA that helps promoted acceptance, she asked.” *Id.*

59. 20 U.S.C. §§ 4071-4074 (2006). The Act was passed primarily to “counteract perceived discrimination against content-based religious speech in public high schools, while balancing the Establishment Clause interests at stake.” *Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 680 (E.D. Ky. 2003). The Act was passed by large margins in both the House and the Senate in 1984. *Id.* It was also passed in response to two decisions of federal appellate courts forbidding student religious groups from meeting, during non-instructional time, on school grounds. *Id.*

60. § 4071(a).

grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.”⁶¹ Congress, however, did not define which groups are curriculum-related and which are not, leaving it to the courts to decide.⁶² Therefore, the Supreme Court has broadly interpreted the phrase “non-curriculum related student group” to mean “any student group that does not *directly* relate to the body of courses offered by the school.”⁶³ The Court also set out four factors to determine whether a student group directly relates to a school’s curriculum.⁶⁴

The EAA is triggered in this case because the Rowan-Salisbury BOE accepts federal funding and maintains a limited open forum, neither of which the board disputes; the Board’s policy itself states that “[t]he Board recognizes non-curricular student clubs formed under the Equal Access Act (EAA).”⁶⁵ Therefore, in drafting their policy, the members of the Rowan-Salisbury BOE were clearly aware of their obligation to comply with the EAA. Even if the Board decides to later dispute the existence of a limited open forum, its schools, such as West Rowan High School, allow student organizations to meet on its premises that courts have interpreted to be non-curricular,⁶⁶ specifically the Bible Club and the Student Council.⁶⁷ Thus, the school system maintains a limited open forum and is subject to the EAA.

B. *The Rowan-Salisbury Board of Education Denied the South Rowan Gay-Straight Alliance Equal Access and Discriminated Against It*

The Rowan-Salisbury BOE denied the South Rowan GSA equal access and discriminated against it by adopting a policy against “sex-based” clubs. Once the EAA is triggered, a school can place few lim-

61. *Id.* § 4071(b).

62. See *Straights & Gays for Equal. (SAGE) v. Osseo Area Schs.-Dist. No. 279*, 471 F.3d 908, 911 (8th Cir. 2006); *East High Gay/Straight Alliance v. Bd. of Educ.*, 30 F. Supp. 2d 1356, 1357 (D. Utah 1998).

63. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 239 (1990).

64. *Id.* at 239-40 (“[A] student group directly relates to a school’s curriculum 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.*

65. *Board of Education Policies and Regulations*, *supra* note 20.

66. See, e.g., *SAGE*, 471 F.3d at 915; see *Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 685-87 (E.D. Ky. 2003); see *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1143 (C.D. Cal. 2000).

67. See *WEST ROWAN HIGH SCHOOL*, <http://www.rss.k12.nc.us/WRHS/Default.html> (last visited Mar. 26, 2011) (providing Student Council and Bible Club Meeting Information).

its on the types of students groups allowed to meet.⁶⁸ This is because the Act mandates that the school may not, outside of the three exceptions discussed below, “deny equal access or a fair opportunity to, or discriminate against,” students wishing to hold meetings on “the basis of the religious, political, philosophical, or other content of the speech at such meetings.”⁶⁹ Courts have interpreted equal access to mean treating all groups “under the same terms and conditions as other extracurricular activities.”⁷⁰ A fair opportunity, as provided in the statute, requires that the school evenly afford that:

- (1) the meeting is voluntary and student-initiated;
- (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;
- (3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
- (4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
- (5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.⁷¹

In addition to requiring equal access and a fair opportunity, the EAA forbids discrimination, which includes “harassment or unequal penalties, as well as clearcut denial.”⁷²

Because the EAA applies to South Rowan High School, the Rowan-Salisbury BOE was required to provide equal access and a fair opportunity to, as well as to not discriminate against, the students that that formed the GSA. However, instead of providing equal access, the BOE singled out GSAs and banned the groups from the premises of the district’s high schools. No other group was banned by the BOE’s new policy, and it was solely the South Rowan GSA that prompted the change in district policy.⁷³ This outright denial of access to the South Rowan GSA is also discrimination since the GSA was singled out, and the students seeking to form the group were harassed, as evidenced at the board meeting about the policy.⁷⁴ In summary, because the Rowan-Salisbury BOE denied the GSA access to South Rowan’s campus while allowing other non-curriculum related groups to use the school’s facilities, it denied the South Rowan GSA equal access and also discriminated against the group.

68. *Gonzalez v. Sch. Bd.*, 571 F. Supp. 2d 1257, 1262 (S.D. Fla. 2008).

69. 20 U.S.C. § 4071(a) (2006).

70. *Prince v. Jacoby*, 303 F.3d 1074, 1081 (9th Cir. 2002) (citing *Widmar v. Vincent*, 454 U.S. 263, 267-71 (1981)). This access necessarily includes “all activities in which student groups are permitted to engage in a particular school.” *Boyd*, 258 F. Supp. 2d at 683-84.

71. 20 U.S.C. § 4071(c).

72. *Prince*, 303 F.3d at 1081.

73. See *supra* text accompanying notes 42-46.

74. See *supra* text accompanying notes 46-48.

C. *The Denial of Equal Access to the South Rowan Gay-Straight Alliance was Content-Based*

When the Rowan-Salisbury BOE denied access to the South Rowan GSA, it based the denial on the content of the group's speech, ultimately relying on its own notion of morality. This clearly violates the EAA because courts have consistently held that a school board's personal beliefs about homosexuality or its discomfort with students discussing sexual orientation is insufficient to justify a ban on GSAs.⁷⁵ Even Justice Kennedy recognized shortly after the passage of the Act that "one of the consequences of the statute . . . is that clubs of a most controversial character might have access to the student life of high schools that in the past have given official recognition only to clubs of a more conventional kind."⁷⁶

The Rowan-Salisbury BOE unlawfully relied on morality and its own discomfort in banning the South Rowan GSA. For its part, the South Rowan GSA had goals typical of GSAs, illustrating that the group only wanted to discuss sexual orientation and methods to increase safety.⁷⁷ This information was in front of the school board when it enacted the ban on such clubs. Instead of relying on that information and evaluating the GSA like any other student group, comments by school board members such as "this is Rowan County, not New York City"⁷⁸ and "the community at South Rowan does not want to accept this club"⁷⁹ demonstrate that the BOE was motivated by moral disapproval. This "community" pressured the BOE to ban the South Rowan GSA based on religious-based moral disapproval of homosexuality.⁸⁰ Thus, the denial of equal access to the South Rowan GSA was based on "the religious, political, or philosophical" views of its members, as well as the content of the GSA's speech, and courts have held that "this denial is 'exactly the type of content-based restriction that is forbidden by the Equal Access Act.'"⁸¹ Consequently, the Rowan-Salisbury BOE's policy banning the South Rowan GSA is illegal under the EAA unless the policy satisfies one of Act's exceptions.

75. See, e.g., *Boyd*, 258 F. Supp. 2d at 691; *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1149 (C.D. Cal. 2000).

76. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 259 (1990) (Kennedy, J., concurring).

77. *South Rowan GSA By-laws*, *supra* note 29, at art. IIA, B.

78. See *Board of Education Meeting Minutes*, *supra* note 20.

79. *Id.* at 3.

80. See *supra* notes 46-48, 52 and accompanying text.

81. *Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 680, 684 (E.D. Ky. 2003) (quoting *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1147 (C.D. Cal. 2000)).

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III. DENIAL OF EQUAL ACCESS TO THE SOUTH ROWAN GAY-STRAIGHT ALLIANCE WAS ILLEGAL BECAUSE THE EXCEPTIONS TO THE EQUAL ACCESS ACT WERE NOT SATISFIED

The Rowan-Salisbury policy against sex-based clubs that banned the South Rowan GSA is illegal because it did not meet any of the exceptions to the EAA. Whether a school district can use any exception to the EAA to deny a GSA equal access is the area where most EAA litigation occurs in the GSA context.⁸² The EAA provides that denial of a student group's access may be acceptable if a school satisfies any of the narrow exceptions to the Act.⁸³ First, a school may limit a student group's ability to meet when necessary "to protect the well-being of students and faculty."⁸⁴ Second, a school may deny a student group equal access when necessary "to maintain order and discipline" on its premises.⁸⁵ Third, a school may deny equal access if the student group would "materially and substantially interfere with the orderly conduct of educational activities within the school."⁸⁶

Only one school district has been able to overcome an EAA claim by a GSA by utilizing one of these exceptions,⁸⁷ and that case in-

82. See Berkley, *supra* note 23.

83. *Id.* "Most of these restrictions come from Congress's concern that Establishment Clause challenges would prevent student groups from receiving the Act's protection." *Id.* at 1866.

84. 20 U.S.C. § 4071(f).

85. *Id.*

86. *Id.* § 4071(c)(4). "Courts have used this phrase to describe the type of speech that can be prohibited by a school under the EAA. If a type of speech creates a genuine safety concern or interrupts or interferes with the teaching of curriculum, then it would 'materially and substantially interfere' with the school functions and may thus be restricted." *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550, 568 (N.D. Tex. 2004). Discussion of this exception will not encompass safety concerns, as that is addressed when covering the "order and discipline" exception. Rather, the focus will be on interference with abstinence-only curriculum. See *infra* Part III.C. The EAA also provides that access may be denied "to assure that attendance of students at meetings is voluntary." 20 U.S.C. § 4071(f). This exception, as in other cases discussed throughout, is not at issue.

87. See, e.g., *Caudillo*, 311 F. Supp. 2d at 571-72 (concluding that the school district had the right to control sexual issues on its campuses and thus deny a GSA access because the GSA sought to educate students on sexual issues). *But see* *Straights & Gays for Equal. (SAGE) v. Osseo Area Schs.-Dist.* No. 279, 540 F.3d 911, 916 (8th Cir. 2008) (affirming the district court's judgment granting SAGE summary judgment on its EAA claim and issuing a permanent injunction providing SAGE the same access as other groups); *Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 688, 693 (E.D. Ky. 2003) (granting the GSA a preliminary injunction after finding that the school has a limited open forum and that "[a]llowing the GSA to meet or have equal access to [the school's] facilities will neither materially or substantially interfere with the orderly conduct of educational activities within [the school], limit [the school's] ability to maintain order and discipline on school premises, nor limit [the school's] ability to protect the well-being of its students or faculty"); *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1143, 1149-50 (C.D. Cal. 2000) (granting the GSA's motion for a preliminary injunction after finding that the school had a limited open forum and denied equal access to the GSA in violation of federal law).

volved a GSA easily-distinguishable from the South Rowan GSA.⁸⁸ Of particular relevance to the South Rowan context, on July 29, 2008, a policy nearly identical to Rowan-Salisbury's was struck down by the U.S. District Court for the Southern District of Florida in *Gonzalez v. School Board of Okeechobee County*⁸⁹ because the policy violated the EAA.⁹⁰ The policy in *Gonzalez* provided that:

To assure that student clubs and organizations do not interfere with the School Board's abstinence only sex education policy and the School Board's obligation to promote the well-being of all students, no club or organization which is sex-based or based upon any kind of sexual grouping, orientation, or activity of any kind shall be permitted.⁹¹

Both the Rowan-Salisbury policy and the policy of the Okeechobee County Board considered GSAs to be "sex-based" and relied on abstinence-only policies to justify exclusion of GSAs in the name of the well-being of students. Additionally, like the South Rowan GSA, the GSA of Okeechobee High School seemed to be a typical GSA formed to promote tolerance and give students a safe space to discuss issues relevant to sexual orientation.⁹² Neither GSA aimed to educate students about sex, nor provided access to sexually explicit material.⁹³ Not only is *Gonzalez* consistent with prior victories for GSAs, but since it was decided in July of 2008, another federal court has adopted its approach in granting a preliminary injunction to a GSA under the EAA in the GSA's challenge to a school board policy denying it access based on an abstinence-only policy.⁹⁴ Because of the indistinguishable nature of the facts in *Gonzalez* and the South Rowan context, *Gonzalez* will be referenced (and cited) throughout in analyzing whether the Rowan-Salisbury policy meets any of the exceptions to the EAA.

A. *The Rowan-Salisbury Policy Does Not Satisfy the "Well-Being of Students" Exception*

Although it is clear that the Rowan-Salisbury BOE attempts to use its abstinence-only policy to come within the "well-being of students exception," this is insufficient to satisfy this exception to the EAA. The Rowan-Salisbury policy fails to advance the welfare of non-heter-

88. See *infra* Part III.D (discussing and distinguishing *Caudillo*).

89. 571 F. Supp. 2d 1257 (S.D. Fl. 2008).

90. *Id.* at 1260, 1270.

91. *Id.* at 1260.

92. *Id.* at 1263; see *supra* text accompanying notes 24, 29.

93. See *Gonzalez* 571 F. Supp. 2d at 1262; see *supra* text accompanying notes 29-31.

94. See *Gay-Straight Alliance of Yulee High Sch. v. Sch. Bd.*, 602 F. Supp. 2d 1233, 1236-37 (M.D. Fla. 2009).

osexual students, “the well-being of whom must also be considered.”⁹⁵ The board’s policy indicates that it believes denying the GSA access will protect the well-being of students by preventing sexually transmitted diseases and preventing teenage pregnancies.⁹⁶

When analyzing a policy nearly identical to Rowan-Salisbury’s, the *Gonzalez* court found that an abstinence-only policy failed to sufficiently advance the well-being of *all* students, heterosexual and homosexual, to justify banning the GSA: the “abstinence only message loses the core of its health and safety and child welfare component because a marriage-dependent abstinence only message is of *de minimus* relevance to non-heterosexuals.”⁹⁷ This loss of relevance to non-heterosexuals occurred because Florida only recognized marriage between a man and a woman, which meant there was no forum for sexual issues of non-heterosexuals.⁹⁸

North Carolina, like Florida, recognizes only marriages between a man and a woman.⁹⁹ Because abstinence-only policies fail to educate non-heterosexuals about safe sex, they can hardly further the well-being of non-heterosexual students by “preventing sexually transmitted diseases.” Therefore, non-heterosexual students within the Rowan-Salisbury school district, including those that tried to form the South Rowan GSA, are actually injured by the BOE policy. These students are not educated on issues like sexually transmitted diseases because the only instruction is to abstain outside of marriage.¹⁰⁰ While true that it is within the discretion of the Rowan-Salisbury BOE to adopt an abstinence-only policy, once such policy is adopted, the BOE cannot then claim that the policy furthers the well-being of *all* students. The board must also consider the well-being of non-heterosexual students.¹⁰¹ The board’s policy also hurt the well-being of LGBT students at South Rowan because, as reported above, LGBT students in high schools with GSAs feel safer and report that they are harassed and bullied less.¹⁰² Furthermore, the Rowan-Salisbury policy has kept an unknown number of other GSA groups in the school

95. *Gonzalez*, 571 F. Supp. 2d at 1266.

96. *Board of Education Policies and Regulations*, *supra* note 20.

97. *Gonzalez*, 571 F. Supp. 2d at 1265. I assume here that Rowan-Salisbury’s abstinence-only policy is similar in that it encourages not abstinence always but only abstinence outside of heterosexual marriage, as North Carolina also bans homosexual marriage.

98. *Id.* at 1265-66.

99. N.C. GEN. STAT. § 51-1.2 (2007) (“Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina.”).

100. *See Gonzalez*, 571 F. Supp. 2d at 1266.

101. *See id.*

102. *See supra* text accompanying notes 11, 13 (providing statistics).

district from forming that might have otherwise offered protection to students.

In its policy, the Rowan-Salisbury BOE also asserts that it is protecting the well-being of students by preventing sexual harassment, preventing child abuse and molestation, and preventing school interference in the parent-child relationship.¹⁰³ The first two of these justifications do not withstand scrutiny because they are a combination of unsupported statements and prejudice. The board's argument inherently relies on equating homosexuality with sexual harassment and child abuse. Regarding the board's view of sexual harassment, denial of access to a GSA does not mean that Rowan-Salisbury schools no longer contain LGBT students. Harassment still occurs, and it is often LGBT students that are on the receiving end. As we have seen, the absence of GSAs signifies more harassment.¹⁰⁴ Beyond that fact, LGBT students are just as affected by "sexual harassment" as straight students are. In fact, "[i]n a national survey, youth described being called lesbian or gay as the most deeply upsetting form of sexual harassment they experienced."¹⁰⁵

97% of high school students report regularly hearing homophobic remarks. (Making Schools Safe for Gay and Lesbian Youth: Report of the Massachusetts Governor's Commission on Gay and Lesbian Youth, 1993.)

One study found 18.4% of the gay, lesbian, and bisexual students had been in a physical fight resulting in treatment by a doctor or nurse compared to 4% of their peers, and 22.2% skipped school in the past month because they felt unsafe on route to or at school, compared to 4.2% of their peers. (Massachusetts Youth Risk Behavior Survey, Massachusetts Department of Education, 1997).¹⁰⁶

With evidence that GSAs *decrease* these forms of harassment, the school board stands on unsupportable ground when asserting that banning such groups is necessary to *prevent* sexual harassment.

As to the BOE's child abuse rationale, "the mainstream view among researchers and professionals who work in the area of child sexual abuse is that homosexual and bisexual men do not pose any special threat to children."¹⁰⁷ Gregory M. Herek, Ph.D., explains

103. *Board of Education Policies and Regulations*, *supra* note 20.

104. See *supra* text accompanying notes 4-5.

105. *Healthy Lesbian, Gay, and Bisexual Students Project: School Climate*, AM. PSYCHOL. ASS'N., <http://www.apa.org/pi/lgbt/programs/hlgbsp/school-climate.aspx> (last visited Mar. 26, 2011).

106. *Id.*

107. Gregory M. Herek, *Facts about Homosexuality and Child Molestation*, SEXUAL ORIENTATION: SCIENCE, EDUCATION, AND POLICY, http://psychology.ucdavis.edu/rainbow/HTML/facts_molestation.html (last visited Mar. 26, 2011) [hereinafter Herek, *Homosexuality*] (discussing numerous studies finding no links and refuting the studies by religious right groups

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“[m]embers of disliked minority groups are often stereotyped as representing a danger to the majority’s most vulnerable members” and gay individuals have increasingly been the target of such arguments.¹⁰⁸ In addition, Rowan-Salisbury BOE did not discuss child abuse and looked at no evidence concerning this issue when forming the policy banning GSAs.

On the board’s assertion that banning GSAs is necessary to prevent school interference with the parent-child relationship, the board misunderstands the very requirements of the EAA. Once a limited open forum is established, as has occurred in the Rowan-Salisbury school system, a fair opportunity must be given to *all* student groups.¹⁰⁹ Among the requirements of a fair opportunity are that “the meeting is voluntary and student-initiated” and that “there is no sponsorship of the meeting by the school, the government, or its agents or employees.”¹¹⁰ Therefore, the *school* will not be interfering with any relationship between parents and their children by allowing GSAs. Instead of endorsing any student group, the school is simply deferring to the free speech rights of its students, as the EAA requires. Moreover, the Supreme Court has found that “[s]econdary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.”¹¹¹ There is no reason why we cannot assume the same of parents.

B. *The Rowan-Salisbury Policy Does Not Satisfy the “Order and Discipline” Exception*

The Rowan-Salisbury board tries to justify excluding the GSA under the “order and discipline exception” by arguing that denying

that have found links); see also Gregory M. Herek, *Bibliography for Facts about Sexual Orientation*, SEXUAL ORIENTATION: SCIENCE, EDUCATION, AND POLICY, http://psychology.ucdavis.edu/rainbow/HTML/facts_bibliography.html (last visited Mar. 26, 2011) (providing a comprehensive list of sources on this issue).

108. Herek, *Homosexuality*, supra note 107 (“For example, Jews in the Middle Ages were accused of murdering Christian babies in ritual sacrifices. Black men in the United States were often lynched after being falsely accused of raping White women. In a similar fashion, gay people have often been portrayed as a threat to children. Back in 1977, when Anita Bryant campaigned successfully to repeal a Dade County (FL) ordinance prohibiting anti-gay discrimination, she named her organization ‘Save Our Children,’ and warned that ‘a particularly deviant-minded [gay] teacher could sexually molest children.’ In recent years, antigay activists have routinely asserted that gay people are child molesters. This argument was often made in debates about the Boy Scouts of America’s policy to exclude gay scouts and scoutmasters. More recently, in the wake of Rep. Mark Foley’s resignation from the US House of Representatives in 2006, antigay activists and their supporters seized on the scandal to revive this canard.” (citation omitted)).

109. 20 U.S.C. § 4071(c) (2006).

110. *Id.*

111. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).

the GSA access is necessary to prevent harassment among students over sexual issues.¹¹² This argument fails for two reasons. First, the board's reasoning ignores the fact that LGBT students are currently bullied; one of the major reasons behind forming the GSA was to combat this harassment.¹¹³ Second, this argument is a non-starter for the courts because the "disruption" to order and discipline must come from those engaged in the "forbidden conduct" (the GSA), not from those opposed to that conduct (community members or students opposed to the GSA's presence).¹¹⁴ Here, zero evidence exists that the South Rowan GSA caused any disruption to order and discipline. In fact, the South Rowan GSA had stated goals of promoting tolerance and increasing safety, both of which would increase order and discipline within the school.¹¹⁵ Further, GSA meetings had occurred throughout the spring of 2006 at South Rowan without incident. Even the South Rowan principal told the board that the GSA had not caused disruptions and that the school had continued to hold class as

112. See *Board of Education Policies and Regulations*, *supra* note 20.

113. See *supra* text accompanying notes 24-28 (showing examples of harassment inside a Rowan-Salisbury high school based on sexual orientation); see also Nicole Burgess & Drake Morgan, *Keep on Dancing: Gay High School Students in the Triangle Have to Put Up With a Lot More Than Just Acne, Homework, and Peer Pressure*, INDY WEEK.COM (June 11, 2003), <http://www.indyweek.com/gyrobase/Content?oid=oid%3A19660> ("Of 111 teens surveyed in North Carolina, Florida and Kentucky, 78 percent reported verbal harassment and 13 percent reported physical assault due to their sexual orientation. Further, nine out of 10 victims of harassment and three quarters of those assaulted say that the incident(s) happened at school. Perhaps most surprising, however, in 73 percent of harassment cases and 60 percent of the assaults, students who reported the abuse to their schools received no support.").

114. This standard is a result of courts incorporating the standard from the Supreme Court's holding in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and the heckler's veto cases into the EAA. *Tinker* stands for the proposition that it must be *engagement in the forbidden conduct* that creates the disruption, not the opposition to that conduct that creates the disruption (disallowing a heckler's veto to justify banning student speech). *Id.* at 505-06, 538. This incorporation into the EAA is significant; it means a school cannot ban a student group based on the disruptive conduct of those opposed to the group's existence. See *Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 689-90 (E.D. Ky. 2003) ("[A] school may not deny equal access to a student group because student and community opposition to the group substantially interferes with the school's ability to maintain order and discipline, even though equal access is not required if the student group itself substantially interferes with the school's ability to maintain order and discipline."). The Supreme Court in *Tinker* cited to the "leading heckler's veto case, *Terminiello v. Chicago*, 337 U.S. 1 (1949)." *Boyd*, 258 F. Supp. 2d at 689.

Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom — this kind of openness — that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Tinker, 393 U.S. at 508-09.

115. GSA By-laws, *supra* note 29.

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usual.¹¹⁶ The only harassment that had occurred over the GSA involved those opposed to the group, including the protestors that forced a student to leave the school board meeting out of fear for her safety.¹¹⁷ As in the *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*,¹¹⁸ “[t]here was no proof . . . that, if the GSA Club were provided equal access, [the school’s] ability to discipline any student who is disruptive would be diminished in any way.”¹¹⁹ The courts have found that it is those students “who react to [unpopular] views in a disruptive manner” and not those “who express unpopular views” that should be punished.¹²⁰ Thus, the Rowan-Salisbury BOE failed to come within the “order and discipline exception” because it ignored the purpose of the GSA, promoting safety, and it relied upon possible disruptions to the educational process originating from students or community members *opposed* to the GSA.

C. *The Rowan-Salisbury Policy Does Not Satisfy the “Interference with Educational Mission” Exception*

Finally, the Rowan-Salisbury board asserts in its policy that recognition of the GSA would conflict with its abstinence-only program, disrupting the district’s educational mission by contradicting its curriculum. To make this argument, the Rowan-Salisbury board, like the board in *Gonzalez*, labeled GSAs “sex-based.”¹²¹ Because the South Rowan GSA had a mission of tolerance and not of sex education, the Rowan-Salisbury BOE relied only on a presumption that tolerating non-heterosexuals *necessitates* discussing sexual activities. This is a concept the *Gonzalez* court squarely rejected, finding that for a GSA’s mission of tolerance towards non-heterosexuals to be *inconsistent* with an abstinence-only policy, one must accept the premise that “because the topic of tolerance relating to sexual identity is a subset of sexuality generally, the dialogue required to discuss tolerance towards non-heterosexuals is impossible to convey without doing violence to the principle of abstinence.”¹²² The court rejected this premise not only because the school board provided no evidence of any inconsistency but also because if such a premise were accepted, “then virtually any topic touching on sexual issues, including those al-

116. See *Board of Education Meeting Minutes*, *supra* note 20, at 3.

117. *Ban of Sexually-Oriented Clubs*, *supra* note 47.

118. *Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667 (E.D. Ky. 2003).

119. *Boyd*, 258 F. Supp. 2d at 690.

120. *Id.*

121. See *Gonzalez v. Sch. Bd.*, 571 F. Supp. 2d 1257, 1260 (S.D. Fla. 2008); see also *Board of Education Policies and Regulations*, *supra* note 20.

122. *Gonzalez*, 571 F. Supp. 2d at 1264.

ready part of [the board's] curriculum such as pregnancy and sexually transmitted disease, would also undermine an abstinence only policy."¹²³ In other words, the court rejected that the GSA was "sex-based." There is no reason this logic should not apply to the South Rowan GSA, which has identical goals to those of the GSA in *Gonzalez*.

The premise that GSAs by their very nature equate discussions of sex is further undermined by looking at the name of the group itself—Gay-Straight Alliance. Here, the words "gay" and "straight" refer to sexual orientation. Simple reference to any dictionary shows that sexual orientation is a *noun* describing which sex one is attracted to.¹²⁴ Being gay in and of itself no more requires having discussions about sex than being straight.

In this case, nothing indicates that the South Rowan GSA attempted to create a forum for discussion of sexual activity. To the contrary, the Rowan-Salisbury board heard comments before their final vote that "[a] GSA does not have to discuss personal health matters."¹²⁵ "GSAs do not exist to tell students about sex."¹²⁶ They also heard that "GSAs can serve as a support system."¹²⁷ "The overall goal of a GSA is to create a school environment of acceptance and respect."¹²⁸ Specifically, the by-laws of the South Rowan GSA did not mention sex education as a goal.¹²⁹ Instead, the goals of the group included promoting tolerance and making the school a safe environment.¹³⁰ When these goals were put into action, South Rowan GSA meetings included not one reference to sex of any kind.¹³¹ Moreover, upon its vote, the board made no comments and therefore did not indicate that it relied upon any *evidence* of sex education conflicting with its abstinence-only policy.¹³² It instead relied only on the name of the group, a basis that does not withstand scrutiny under the EAA.¹³³

123. *Id.* ("[T]his Court dismisses the unsupported assertion that curriculum based discussions of sexually related topics related to heterosexual activity may occur without violating the abstinence only program but that such a violation would occur in the case of noncurricular based discussions of tolerance towards nonheterosexuals.").

124. *See, e.g., Sexual Orientation*, THE FREE DICTIONARY, <http://www.thefreedictionary.com/sexual+orientation> (last visited Mar. 26, 2011).

125. *Lee, supra* note 54.

126. *Id.* (reporting comments by a GSA club leader from a county neighboring Rowan County).

127. *Id.*

128. *Id.*

129. *See* GSA By-laws, *supra* note 29.

130. *Id.*

131. *See supra* notes 37-39 and accompanying text.

132. *See* Burchette, *supra* note 21.

133. *Gonzalez v. Sch. Bd.*, 571 F. Supp. 2d 1257, 1261-62 (S.D. Fla. 2008).

D. *The South Rowan Gay-Straight Alliance is Easily Distinguished from the One Gay-Straight Alliance That has Lost Under the Equal Access Act*

The only significant case that a GSA has lost, *Caudillo v. Lubbock Independent School District*,¹³⁴ is not persuasive when evaluating the Rowan-Salisbury policy. *Caudillo*'s facts are easily-distinguishable from the facts involving the South Rowan GSA, and the *Caudillo* court adopts an incorrect interpretation of the "order and discipline" exception to the EAA. Like the Rowan-Salisbury school district, the school district in *Caudillo* had a clear abstinence-only policy and attempted to use that policy to justify a ban on GSAs.¹³⁵

However, based on facts not present in the South Rowan context, the *Caudillo* court concluded that the school district satisfied the "interference with educational mission" and the "well-being of students" exceptions to the EAA.¹³⁶ Unlike the South Rowan GSA, the GSA in *Caudillo* had a list of goals that included teaching safe sex and providing information about AIDS.¹³⁷ Based on these sex education goals, the *Caudillo* court found that because the school district's curriculum contained no discussion of sexual conduct, the GSA's speech would directly contradict the district's "abstinence-only policies and curriculum."¹³⁸ This contradiction was sufficient to come within the "interference with educational mission" exception to the EAA.¹³⁹ Nevertheless, as discussed previously, the South Rowan GSA did not attempt to discuss sexual activity at its meetings, nor did the group have a goal of sex education.¹⁴⁰ Therefore, *Caudillo* is not persuasive here regarding the "interference with educational mission" excep-

134. See *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550 (N.D. Tex. 2004); see *supra* note 87 and accompanying text.

135. *Caudillo*, 311 F. Supp. 2d at 556.

136. *Id.* at 571.

137. *Id.* at 556. The entire list of goals included:

- (1) Provide guidance to youth who come to us to the best of our ability and when we cannot provide help[,] relay them to those who can.
- (2) Educate those willing about non-heterosexuals.
- (3) Improve the relationship between heterosexuals and homosexuals.
- (4) Help the community.
- (5) Increase rights given to non-heterosexuals.
- (6) Educate willing youth about safe sex, AIDS, hatred, etc.
- (7) Enhance the relationship between youth and their families.

Id.

138. *Id.* at 568. The court itself admitted, however, that no precedent existed on "the bounds of the exceptions" to the Equal Access Act. *Id.* Instead, the court was guided by a "reasonableness" standard: "There must be demonstrable factors that would give rise to any reasonable forecast by the school administration of substantial and material disruption of school activities before expression may be constitutionally restrained." *Id.*

139. See *id.* at 570.

140. See GSA By-laws, *supra* note 29; see *supra* notes 37-39 and accompanying text.

tion.¹⁴¹ Additionally, the GSA in *Caudillo* ran a website that contained links to sexually explicit material.¹⁴² This material led the *Caudillo* court to find that the school district met the “well-being of students” exception to the EAA by banning the GSA because “the school has a compelling interest in protecting students from the obscene and inappropriate material.”¹⁴³ This again is not persuasive because the South Rowan GSA did not run a homepage and the group did not distribute explicit sexual material. To the contrary, evidence showed that the South Rowan GSA did not see itself as a sexual group at all or a group that supported sexual activity.¹⁴⁴

The *Caudillo* court also found the “order and discipline exception” met, but this is not convincing regarding the South Rowan GSA because the court adopted an approach rejected by every other court to hear the issue.¹⁴⁵ All other courts have held that the harassment and disruption must come from those engaged in the “forbidden conduct” and not from those opposed to that conduct.¹⁴⁶ Yet, the *Caudillo* court concluded that harassment and disruptions from those *opposed* to the GSA were sufficient to meet the “order and discipline exception.”¹⁴⁷ Not only is this approach contrary to all other court decisions, but it also contradicts the purpose of the EAA. From its inception, the EAA has represented a balance between protecting the First Amendment rights of students and not offending the Establishment Clause.¹⁴⁸ Congress understood well the Supreme Court holding that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁴⁹ This is why courts have interpreted the EAA to “dictate[] so much deference to the free

141. *Caudillo*, 311 F. Supp. 2d. at 570.

142. *Id.* at 557. The website provided a link to www.gay.com, which included topics such as: New Sexy Gay Game Pics” and “Favorite Questions. The latter included articles on (1) Why Am I Having Erection Problems?; (2) How Safe is Oral Sex?; (3) The Truth About Barebacking; (4) First Time With Anal Sex; (5) Kissing and Mutual Masturbation; (6) How Safe Are Rimming and Fingering?; (7) The Lowdown on Anal Warts.

Id. Another site available by link provided information on how to use condoms, unprotected oral sex, and safe sex. *Id.* at 558 n.4.

143. *Id.* at 570.

144. *See supra* text accompanying notes 30-31.

145. *See Caudillo*, 311 F. Supp. 2d at 570 (recognizing that it was adopting an outlier position).

146. *See, e.g., Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 689-90 (E.D. Ky. 2003); *see also supra* note 114 and accompanying text.

147. *See Caudillo*, 311 F. Supp. 2d at 568-69.

148. *See Boyd*, 258 F. Supp. 2d at 680; *see also Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1140-42 (C.D. Cal. 2000). This is why many challenges to a school’s decision to deny access to a student group include both challenges under the Equal Access Act and under the First Amendment. *See, e.g., id.* at 1137. Typically, courts decide the case under the Equal Access Act, alleviating the need to decide the First Amendment issue. *See, e.g., id.* at 1149.

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

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speech rights of students.”¹⁵⁰ Allowing *opposition* to student expression to trump student speech is counter to the very foundation of the EAA and cannot be a correct interpretation of the “order and discipline” exception.

In the end, *Caudillo* involved a highly unusual, distinct set of facts and the *Caudillo* court adopted an incorrect approach to the “order and discipline” exception. The *Gonzalez* court recognized this and squarely addressed *Caudillo* by limiting its application to situations where a GSA made available sexually explicit or obscene material and had goals of discussing sexual issues.¹⁵¹ The South Rowan GSA is identical to the GSA in *Gonzalez* and could not be more different from the GSA in *Caudillo*. Thus, all case law counsels against the Rowan-Salisbury BOE’s decision to deny the South Rowan GSA equal access.

CONCLUSION

GSAs are high school student groups that are generally formed to increase safety for LGBT students.¹⁵² When GSAs are present, it is proven that they increase security for LGBT students by decreasing harassment and bullying.¹⁵³ In the fall of 2005, students at South Rowan High School tried to form such a GSA with hopes of making their school more tolerant and safe.¹⁵⁴ After being rebuffed initially, the students succeeded and the group met throughout the end of the school year without incident.¹⁵⁵ However, the outside community and the extreme group OSA voiced opposition to the GSA.¹⁵⁶ This led the Rowan-Salisbury BOE to unanimously pass a policy in August of 2006 forbidding GSAs, calling the groups “sex-based” and asserting that they conflicted both with the school system’s abstinence-only policy and the well-being of students.¹⁵⁷

This Rowan-Salisbury policy against GSAs is illegal. The EAA provides that any school that receives federal assistance and “has a limited open forum” is prohibited from discriminating against students wishing to hold meetings on “the basis of the religious, political, philosophical, or other content of the speech at such meetings.”¹⁵⁸ The

150. See Berkley, *supra* note 23, at 1866.

151. Gay-Straight Alliance of Okeechobee High Sch. v. Sch. Bd., 483 F. Supp. 2d 1224, 1229 (S.D. Fla. 2007) (granting a preliminary injunction prior to deciding *Gonzalez*).

152. See GSA NETWORK, *supra* note 6.

153. See *supra* notes 8-13 and accompanying text.

154. Letter from students, *supra* note 24.

155. South Rowan GSA Calendar, *supra* note 36-37.

156. OPERATION SAVE AMERICA, *supra* note 43.

157. See *Board of Education Policies and Regulations*, *supra* note 20.

158. 20 U.S.C. § 4071(a) (2006).

EAA applies to the Rowan-Salisbury school district because it takes federal funding and has a limited open forum, neither of which it disputes. By banning the South Rowan GSA from meeting on school premises, the Rowan-Salisbury BOE is in violation of the EAA because it denies access based on the content of the South Rowan GSA's speech. The real reason for the denial of equal access is moral disapproval, which is not a sufficient justification.

The EAA does have several exceptions that are sufficient justifications to deny equal access, and yet none of the three exceptions to the EAA are satisfied in this case. First, the BOE does not meet the "well-being of students" exception because its abstinence-only policy fails to advance the welfare of non-heterosexual students, whose interest must be considered along with heterosexual students.¹⁵⁹ The abstinence-only policy actually hurts LGBT students within the school system by denying them information relevant to their sexual activity and by refusing to allow a student group that would increase their safety. The remainder of the BOE's reasoning in its attempt to come within the "well-being of students" exception boiled down to unsupported statements and prejudice. Next, the Rowan-Salisbury board failed to meet the "order and discipline exception" because it ignores the fact that LGBT students are currently bullied and it relies on possible disruptions to the educational process originating from students or community members opposed to the GSA. This reasoning is contrary to case law because the "disruption" to order and discipline must originate from those engaged in the "forbidden conduct" (the GSA), not from those opposed to that conduct (community members or students opposed to the GSA's presence).¹⁶⁰ Finally, the Rowan-Salisbury policy does not satisfy the "interference with educational mission" exception to the EAA because it inappropriately assumed, in the absence of any evidence, that the name of the group meant the GSA would discuss sex education, thus creating a conflict with the district's abstinence-only policy.

Because no exception to the EAA was met, the Rowan-Salisbury policy against GSAs is illegal under federal law. The one case that a GSA has lost, *Caudillo v. Lubbock Independent School District*, does not save the Rowan-Salisbury policy because the case is easily distinguishable on the facts and is incorrect on part of the law.¹⁶¹ The above analysis demonstrated that the critical factors that led the *Cau-*

159. *Gonzalez v. Sch. Bd.*, 571 F. Supp. 2d 1257, 1266 (S.D. Fla. 2008).

160. See *Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 689-90 (E.D. Ky. 2003).

161. *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550 (N.D. Tex. 2004).

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dillo court to uphold the policy against the GSA are not present in the South Rowan circumstance.

While the Rowan-Salisbury policy does stand today, it faces an imminent challenge under the 1983 federal Equal Access Act¹⁶² because the ACLU is willing to bring suit as soon as it finds students willing to withstand the negative community reaction that will likely, and unfortunately, follow.¹⁶³ In the end, the Rowan-Salisbury BOE needs to perform its proper role and do what is best for its students—all of its students—not take the course of action that will cause less controversy in the community and put the board more at ease.

The Board Members may be uncomfortable about students discussing sexual orientation and how all students need to accept each other, whether gay or straight. As in *Tinker*, however, when the school administration was uncomfortable with students wearing symbols of protest against the Vietnam War, [the school board] cannot censor students' speech to avoid discussions on campus that cause them discomfort or represent an unpopular viewpoint.¹⁶⁴

For the safety of its students, the Rowan-Salisbury BOE should repeal its policy against "sex-based" clubs and not wait for a court to invalidate it—the latter action is only a matter of time.¹⁶⁵

162. 20 U.S.C. §§ 4071-4074 (2006).

163. Telephone Interview with Katy Parker, *supra* note 53.

164. *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1149 (C.D. Cal. 2000).

165. The BOE should also not seek to restrict student access to GSAs through methods such as requiring permission from parents, as this defeats the entire purpose of this resource.

Requiring students to obtain parental permission could restrict access to GSAs for some LGBT students, particularly those who do not disclose their sexual orientation and/or gender identity to their parents. Although a majority (62.6%) of LGBT students were out to at least one parent or guardian, over a third (37.4%) of students were not out to any parent or guardian.

See KOSCIW ET AL., *supra* note 2, at 56.