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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

**ANTHONY COLIN, by and through
his mother and guardian, JESSIE
COLIN; HEATHER ZETIN, by and
through her mother and guardian,
JUDY ANDERSON; and GAY-
STRAIGHT ALLIANCE CLUB OF
EL MODENA HIGH SCHOOL, an
unincorporated association,**

Plaintiffs,

v.

**ORANGE UNIFIED SCHOOL
DISTRICT; ORANGE UNIFIED
SCHOOL DISTRICT BOARD OF
EDUCATION; LINDA DAVIS, in
her official capacity as President of the
Orange Unified School District Board
of Education; MARTIN JACOBSON,
in his official capacity as Vice President
of the Orange Unified School District
Board of Education; KATHY WARD,
in her official capacity as Member and
Clerk of the Orange Unified School
District Board of Education; and
MAUREEN ASCHOFF, WILLIAM
LEWIS, TERRI SARGEANT, AND
ROBERT VIVIANO, in their official
capacities as Members of the Orange
Unified School District Board of
Education; BARBARA VAN
OTTERLOO, in her official capacity as
Superintendent of the Orange Unified
School District; and NANCY
MURRAY, in her official capacity as
Principal of El Modena High School,**

Defendants.

CASE NO. SA CV 99-1461 DOC (ANx)

ORDER

**GRANTING PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

1 Before the Court is Plaintiffs' Motion for Preliminary Injunction. Plaintiffs are students who wish
2 to form a "Gay-Straight Alliance Club" at their high school. They claim that Defendants, the Orange
3 Unified School District and its Board of Education and administrators, have violated their rights under
4 the Equal Access Act and their First Amendment rights of expression and association when they voted to
5 deny Plaintiffs' application to form the club. At issue is whether Plaintiffs are likely to prevail on these
6 claims and whether an injunction should issue prohibiting Defendants, while this action is pending, from
7 continuing to deny Plaintiffs the same access to El Modena facilities that is accorded to other student
8 groups.

9 **I. Statement of the Facts**

10 There are limited factual disputes in this case. The parties have stipulated to the authenticity of all
11 exhibits submitted, except for newspaper articles. Out of an abundance of caution, the Court heard
12 testimony at the preliminary injunction hearing in order to address some of the limited factual disputes.

13 In late August 1999, Anthony Colin ("Colin") and his friend Shannon MacMillan ("MacMillan")
14 decided to form a "Gay-Straight Alliance Club" ("GSA") at their school, El Modena High School in
15 Orange, California. Colin, a tenth-grade student, had the idea after Matthew Shepherd, a young man
16 from Wyoming, died after being brutally assaulted due to his homosexuality. Colin testified that he
17 wanted to form the club to promote acceptance among and for gay and straight students at the school.
18 After discussing the idea with friends and family, Colin submitted a club constitution in compliance with
19 school policy during the week of September 7, 1999, the first week of the school year. The application
20 stated that the purpose of the club was "to promote interest in a supportive community amongst our
21 peers." Colin Decl., Ex. B.

22 Shortly thereafter, Colin submitted a mission statement for the club that had been written by
23 MacMillan, a twelfth grade student. The group's mission statement is:

24 Public schools have an obligation to provide an equal opportunity
25 for all students to receive an education in a safe, nonhostile,
26 nondiscriminatory environment. Our goal in this organization is to raise
27 public awareness and promote tolerance by providing a safe forum for
28 discussion of issues related to sexual orientation and homophobia. We

1 wish to stress the need for people to put aside their personal prejudice and
2 agree to treat everyone with respect when the situation calls for it. We
3 invite ALL students, gay or straight, to join us in discussions, field trips,
4 lectures, and social activities that will counterattack unfair treatment and
5 prejudice. We respect privacy and require NO one to make disclosures
6 regarding his or her own sexual orientation.

7 This is not a sexual issue, it is about gaining support and promoting
8 tolerance and respect for all students.

9 Colin Decl., Ex. C. Colin asked Mrs. Maryina Herde, a drama and English teacher at the school, to serve
10 as the faculty advisor and she accepted. The application was turned in to the teacher in charge of student
11 activities at the high school, who passed the application on to the Principal, Nancy Murray.

12 Colin and the other founders of the Gay-Straight Alliance had reason to believe that their
13 application would be accepted. Consistent with the policy of the Orange Unified School District's Board
14 of Education ("the Board"), their high school had a policy of allowing student-initiated groups to meet on
15 school grounds during lunch period and to use school facilities to publicize their meetings and activities.
16 A recent list of the clubs on campus, of which there are 38 in total, includes the following noncurriculum
17 related student groups: the Asian Club, Black Student Union, Christian Club, Gentlemen's Club, Girls'
18 League, Koinonia (for Catholic students), MECHA (Movimiento Estudiantil Chicano de Aztlán), and
19 Red Cross/Key Club. *See* Colin Decl., Ex. D. Plaintiff's application was not approved, however.
20 Principal Murray had been instructed by Assistant Superintendent Neil McKinnon ("McKinnon") in the
21 Spring of 1998 to keep him informed of the formation of any gay-straight alliance-type group. She was
22 told the Board may want to make a decision on the application, contrary to its custom of leaving the
23 decision to the administration, because the Board may not approve it. Principal Murray therefore
24 forwarded the policy to the Assistant Superintendent. McKinnon gave the application to the
25 Superintendent, Barbara Van Otterloo, who then forwarded it to the Board.

26 Because the Board had not yet acted on their application, Plaintiffs asked Principal Murray to
27 participate in "Club Rush," a one day informational fair about student groups, during the first week of
28 October 1999. It was only after they asked to participate in the club fair that Principal Murray informed

1 Colin that the group’s application had been passed on to the Board and the group would not be permitted
2 to participate in “Club Rush.” As Plaintiffs’ mission statement was being scrutinized by the Board, all the
3 other clubs displayed their banners and distributed their mission statements at “Club Rush.” Though
4 there was no Gay-Straight Alliance table at the event, approximately 58 students signed a petition in
5 support of the GSA. At the end of Club Rush, on October 7, 1999, the Board decided to delay action on
6 Plaintiff’s application and voted to have a public forum on whether the Gay-Straight Alliance should be
7 permitted. Weeks before the public forum, Principal Murray informed Colin that the name of his club
8 was inappropriate and suggested alternate names such as the “Tolerance Club,” the “Acceptance Club,”
9 or the “Alliance.” *See* Colin Decl., ¶ 12. No other club at El Modena has been approached by the
10 Principal or the Board with suggestions to change the name that they chose for their club. By the end of
11 October, a representative of the Gay Lesbian Straight Education Network of Orange County
12 (“GLSEN”), a volunteer group that tries to end anti-gay bias in schools, contacted Herde and the
13 Plaintiffs after learning of their struggle due to the publicity it had generated. “Gay-Straight Alliance” is a
14 name recommended for clubs by the national GLSEN. Since October, Luis Torres, the co-chair of the
15 Orange County chapter of GLSEN, has had three meetings with students interested in the GSA as a
16 means of providing them with moral support.

17 On November 9, 1999, the Board held the public forum. After hearing arguments both for and
18 against the GSA, the Board decided to postpone the vote until November 18, 1999. At the November
19 18, 1999 meeting, Defendant Board Member Bill Lewis said, “The Bible says we’re all sinners, but this,
20 in my opinion, is asking us to legitimize sin.” Codell Decl., Ex. A. Board Member Linda Davis said,
21 “We know the law is on their side, but our community members don’t want it.” *Id.* Plaintiff Heather
22 Zetin, an eleventh grade member of the student group, explained to the Board that she believed in sexual
23 abstinence and again assured the Board that the GSA would not discuss sex. Still, the Board postponed
24 its decision for a third time. After three months of delays, Colin, Zetin and the GSA filed this action.
25 Although there are about six hundred gay-straight alliance clubs at high schools across the country, this is
26 reportedly only the fourth lawsuit against school districts by students seeking to form such clubs. *See*
27 Kate Folmar and Marissa Espino, *Orange Unified Trustees Deny Gay Club*, 7-0, L.A. Times, Dec. 8,
28 1999 at A10.

1 On December 7, 1999, the Board unanimously, seven to zero, approved a motion by Defendant
2 Kathy Ward to deny Plaintiffs' application to form the Gay-Straight Alliance Club. The Board objected
3 to the appropriateness of what they claimed was a sexually charged club. The decision was publicly
4 announced as opponents of the club stood by with pickets, some of which stated, "GRADES NOT
5 AIDS." John Ritter, *Gay Students Stake Their Ground*, USA Today, Jan. 18, 2000 at 2A; Ann Pepper,
6 *District Rejects Gay School Club*, Orange Co. Register, Dec. 8, 1999 at A1 (picture). Ward's motion
7 was grounded on the following four reasons:

- 8 (1) the proposed GSA has a subject matter related to sexual conduct
9 and sexuality; (2) the District and El Modena High School offer
10 courses that address sex, sexual conduct, sexual abstinence, and
11 sexual transmission of diseases; (3) the State of California in the
12 Education Code imposes strict requirements on how, when and
13 by whom sex education and related courses are taught; and (4)
14 the Board should consider that unrestricted, unsupervised student
15 led discussion of sexual topics is age inappropriate and is likely
16 to interfere with the legitimate educational concerns of the
17 District in this sensitive area of sex education.

18 Codell Decl., Ex. E. The Board further stated that it would not foreclose the submission of a revised
19 mission statement "for a tolerance club with an appropriate name and a mission statement that clearly
20 states that sex, sexuality, [and] sex education . . . will not be the subject of discussion in club meetings."

21 *Id.*

22 On December 16, 1999, at 9:40 a.m., Superintendent Van Otterloo and Principal Murray pulled
23 some of the students interested in the GSA, including Colin and Zetin, out of their classes to discuss this
24 matter. Although Principal Murray believes that there is value in a club that allows harassed students to
25 discuss issues of homophobia and would have approved the club if it were her decision, she edited the
26 group's name and MacMillan's Mission Statement in a way that might meet the Board's concerns. She
27 proposed a "Draft" that deleted any references to "gay," "straight" or "sexual orientation." Her changes
28 included crossing out the name of the club and replacing it with "Tolerance For All," and deleting "sexual

1 orientation and homophobia” and replacing it with “intolerance in all of its forms.” Finally, Murray added
2 a statement that “sex, sexuality, [and] sex education” will not be discussed at the meetings. Colin
3 testified under oath that Principal Murray was “tearing my rights down” when she made these edits.
4 Similarly, Zetin testified that adding the language from the Education Code “would communicate that gay
5 people are inherently more sexual or sexually promiscuous when they’re just people.”

6 The dialogue between Plaintiffs and Defendants broke down after the December 16, 1999
7 meeting. To date, Colin, Zetin and 12 to 15 other students interested in the GSA have had five informal
8 meetings across the street from the school. Colin and Zetin testified that because close to 60 students
9 have expressed interest in the club, their efforts have been significantly frustrated by their inability to post
10 flyers, make announcements on the public address system or meet on campus like other official clubs.

11 12 **II. Analysis**

13 This Court has jurisdiction under 28 U.S.C. § 1331, for actions arising under the Constitution and
14 laws of the United States, as Plaintiffs allege violations of the Equal Access Act, 20 U.S.C. §§ 4071-
15 4074, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Fourteenth Amendment to the United
16 States Constitution. Plaintiffs seek declaratory relief under 28 U.S.C. §§ 2201-2202.

17 **A. The Equal Access Act**

18 Plaintiffs are suing under a federal law, the Equal Access Act. An understanding of how the law
19 came into being is helpful in order to understand its operation and whether or nor it has been violated.

20 The Equal Access Act was passed to fit within the Constitutional limits that the Court has placed
21 on school control over student speech. Some discussion of the First Amendment is therefore necessary
22 to explain the somewhat surprising notion of federal courts requiring local school officials to recognize a
23 student group that they did not choose to recognize. In general, “the education of the Nation’s youth is
24 primarily the responsibility of parents, teachers, and state and local school officials, and not of federal
25 judges.” *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562, 571, 98 L.Ed.2d 592
26 (1988). The “daily operation of school systems” is traditionally reserved to the States and their local
27 school boards. *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968)
28 (striking down state law that prevented teaching the theory of evolution in public schools). Federal

1 courts do intervene, however, when decisions of local school boards run afoul of the Constitution. *See,*
2 *e.g., Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). In *West Virginia*
3 *Board of Education v. Barnette*, for example, the Supreme Court found that a public school may not
4 compel a student to salute the flag. *See* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

5 Public school students do not “shed their constitutional rights to freedom of speech or expression
6 at the schoolhouse gate.” *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503,
7 511, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Students do not, however, have all the First Amendment
8 rights of adults in other settings because their rights must be “applied in light of the special characteristics
9 of the school environment.” *Id.* at 506. In *Tinker*, students were suspended until they removed their
10 armbands protesting the Vietnam War. The Court found that school censorship of student expression
11 was unconstitutional unless the speech “materially disrupts classwork or involves substantial disorder or
12 invasion of the rights of others.” *Id.* at 513. The “material disruption” standard is very similar to the one
13 adopted by Congress in the Equal Access Act. Though school officials in *Tinker* may have disapproved
14 of the war protesters’ beliefs, official suppression of student speech in high schools could not be justified
15 by the “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular
16 viewpoint.” *Id.* at 509.

17 The reason for the First Amendment’s ban on official censorship is because in a free society we
18 rely on the “marketplace of ideas.” *See Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17 (1919)
19 (Holmes, J., dissenting). Though the state education system has the awesome responsibility of
20 inculcating moral and political values, that does not permit educators to act as “thought police” inhibiting
21 all discussion that is not approved by, and in accord with the official position of, the state. The danger is
22 that public education could transform schools into “enclaves of totalitarianism” and convert students into
23 “closed-circuit recipients of only that which the State chooses to communicate.” *Tinker*, 393 U.S. at
24 511. Though it may educate many of Orange’s students, the Orange Unified School District must not
25 become an Orwellian “guardianship of the public mind,” *Thomas v. Collins*, 323 U.S. 516, 545, 65 S.Ct.
26 315, 89 L.Ed. 430 (1945) (Jackson, J., concurring), that can “strangle the free mind at its source.”
27 *Barnette*, 319 U.S. at 637.

28 The only way to maintain the “independence and vigor of Americans who grow up here” is

1 through tolerating speech that school authorities may vehemently disagree with. *Tinker*, 393 U.S. at 509.
2 “[O]ur history says that it is this sort of hazardous freedom--this kind of openness--that is the basis of our
3 national strength.” *Id.* at 508-9. The democratic response to speech that people disagree with is more
4 speech: by allowing students to express both the popular and unpopular viewpoints society can foster
5 “enlightened opinion.” *Cantwell v. Connecticut*, 310 U.S. 296, 310, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).
6 “[S]econdary school students are mature enough and are likely to understand that a school does not
7 endorse or support student speech that it merely permits on a nondiscriminatory basis.” *Board of*
8 *Education of the Westside Community Schools v. Mergens*, 496 U.S. 226, 250, 110 S.Ct. 2356, 110
9 L.Ed.2d 191 (1990).

10 The Supreme Court found in 1981 that when state universities make their facilities generally
11 available for use by registered student groups, they could not single out religious groups and prevent
12 them from meeting. *See Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981).
13 Though the presence of religious groups raised concerns about possibly violating the separation of church
14 and state, the Court found that the religious speech and association rights of a Christian group at the
15 University of Missouri at Kansas City were protected by the First Amendment. The *only* reason that the
16 idea of religious groups using public facilities did not violate the Establishment Clause of the First
17 Amendment (which provides that “Congress shall make no law respecting an establishment of religion”)
18 was because under an “equal access” policy, a school is not endorsing any particular viewpoint, either for
19 or against religion in general or for or against any particular religion. *See id.* at 270-76. The Court did
20 not decide in that case if high schools with an “equal access” policy, as well as universities, were
21 prevented from excluding certain student groups on the basis of the content of their speech. *See id.* at
22 274 n.14.

23 In the 1984 Equal Access Act, Congress extended the rule in *Widmar* to public high schools.
24 Under the Act, schools that allow student groups whose purpose is not directly related to the curriculum
25 to meet on school grounds during lunch or after school cannot deny other student groups access to the
26 school due to the content of the students’ proposed discussions. *See* 20 U.S.C. §§ 4071(a), (b). In the
27 words of the Act:

28 It shall be unlawful for any public secondary school which receives Federal

1 financial assistance and which has a limited open forum to deny equal
2 access or a fair opportunity to, or discriminate against, any students who
3 wish to conduct a meeting within that limited open forum on the basis of
4 the religious, political, philosophical, or other content of the speech at such
5 meetings.

6 20 U.S.C. § 4071(a). The Act was intended to counteract perceived discrimination against religious
7 speech in public schools and overturn two appellate court decisions that had held that allowing student
8 religious groups to meet on campus before and after classes would violate the Establishment Clause. *See*
9 *Mergens*, 496 U.S. at 239. The Act was “passed by wide, bipartisan majorities in both the House and the
10 Senate.” *Id.* at 239. As in the *Widmar* case, allowing religious groups on campus was constitutional only
11 because an “equal access” policy does not endorse any particular viewpoint, does not give direct benefits
12 to religion to such a degree that it tends to establish a state religion, or coerce students to participate in a
13 religious activity. *See id.* at 247-253 (plurality holding regarding endorsement) (O’Connor, J.); *id.* at
14 258-62 (concurring opinion regarding establishing a state religion or coercing students) (Kennedy, J.).
15 The constitutionality of the law therefore hinged on its openness and neutrality: if a school that accepts
16 federal funds allows some “noncurricular” student groups, it can not deny others “on the basis of the
17 religious, political, philosophical, or other content of the speech” at the student meetings. 20 U.S.C. §
18 4071(a).

19 When Congress passed the Equal Access Act, it “made a matter once left to the discretion of local
20 school officials the subject of comprehensive regulation by federal law.” *Mergens*, 496 U.S. at 259
21 (Kennedy, J., concurring). As Justice Kennedy pointed out, “one of the consequences of the statute, as
22 we now interpret it, is that clubs of a most controversial character might have access to the student life of
23 high schools that in the past have given official recognition only to clubs of a more conventional kind.”
24 *Id.* It’s true that when courts enforce the Act, they remove control from local school boards; “(t)his
25 decision, however, was for Congress to make, subject to constitutional limitations.” *Id.* Due to the First
26 Amendment, Congress passed an “Equal Access Act” when it wanted to permit religious speech on
27 school campuses. It did not pass a “Religious Speech Access Act” or an “Access for All Students Except
28 Gay Students Act” because to do so would be unconstitutional.

1 It is against the backdrop of this federal law that this Court must decide whether the locally
2 elected Orange Unified School District Board of Education can vote to deny recognition by the school to
3 one club out of many that have sought to meet on campus.

4 **B. Preliminary Injunction Standard**

5 Plaintiffs have the burden of showing that they are entitled to preliminary relief. The “traditional
6 test” requires that Plaintiffs demonstrate 1) a strong likelihood of success on the merits; 2) a significant
7 threat of irreparable injury; 3) greater hardship to Plaintiffs than Defendants; and 4) that the public
8 interest favors granting the injunction. *See American Motorcyclist Ass’n v. Watt*, 714 F.2d 962, 965 (9th
9 Cir. 1983).

10 **C. Plaintiffs Have a Strong Likelihood of Succeeding on the Merits of their Claim for**
11 **Violation of the Equal Access Act**

12 In order for Plaintiffs to show a likely violation of the Equal Access Act, they must show that El
13 Modena High School accepts federal funds, has a “limited open forum,” and has discriminated against
14 students wishing to conduct a meeting within the open forum due to the content of speech that will take
15 place at the proposed meetings. *See* 20 U.S.C. § 4071(a). It is undisputed that the Board accepts federal
16 funding.

17 **1. The Board has Established a “Limited Open Forum” at El Modena High**

18 A school has a “limited open forum” whenever it “grants an offering to or opportunity for one or
19 more noncurriculum related student groups to meet on school premises during noninstructional time.” 20
20 U.S.C. § 4071(b). “Even if a school allows only one ‘noncurriculum related student group’ to meet, the
21 Act’s obligations are triggered and the school may not deny other clubs, on the basis of the content of
22 their speech, equal access to meet on school premises during noninstructional time.” *Mergens*, 496 U.S.
23 at 236.

24 Many schools encourage the growth of a “limited open forum,” recognizing that clubs “participate
25 in the intellectual give and take of campus debate . . .” *Healy v. James*, 408 U.S. 169, 181, 92 S.Ct.
26 2338, 2346 (1972). Indeed, the El Modena Board “believes that curriculum- and non-curriculum-related
27 student organizations have an important place in students’ lives. . . [and] enhance school spirit and
28 students’ sense of belonging.” BP 6145.5(a). Recognizing the value of student groups on a high school

1 campus, the Orange Unified Board has provided for a “limited open forum” in both word and deed. The
2 Board’s written policy states that it has a “limited open forum in accordance with provisions of the
3 federal Equal Access Act” because the district allows student groups “not directly tied to the curriculum.”
4 BP 6145(a). The Board’s policies track the language of the Equal Access Act. *See* BP 6145(a), (b).
5 Whether or not a school has a “limited open forum” is determined by looking at “a school’s actual
6 practice rather than its stated policy.” *Mergens*, 496 U.S. at 246. Like its policy, El Modena’s actual
7 practice is that of a “limited open forum,” as it recognizes many noncurriculum clubs including the Asian
8 Club, Black Student Union, Chess Club, Christian Club, Earth Club, Eighties Club, Girls’ League,
9 Koinonia (for Catholic students), Juggling Club, Mountain Bike Club, Red Cross/Key Club, and Ski
10 Club. *See* Colin Decl., Ex. D. El Modena has created a “limited open forum” and is therefore precluded
11 from discriminating against student groups seeking access to that open forum.

12 **2. The Gay-Straight Alliance is a “Noncurriculum Related Student Group”**

13 Defendants contend that the Gay-Straight Alliance is not protected by the Act because it is related
14 to the curriculum. Specifically, Board Member Kathy Ward stated in her motion that “the District has a
15 curriculum on sex education, which deals with human sexuality, sexual behavior and consequences, and
16 prevention of sexually transmitted diseases. To the extent that the proposed GSA club intends to discuss
17 these issues related to sexual orientation, the club is a ‘curriculum related’ club, not covered by the Equal
18 Access Act.” Codell Decl., Ex. E. The District contends that these subjects are taught in the following
19 classes: Health (which is required for all ninth grade students); Biology and Life Sciences (students are
20 required to take one of the two to graduate); and Family Planning (which is an elective). The District has
21 specific guidelines for instruction on family life, sex education, and AIDS prevention. *See* BP 6142.1;
22 6142.1(a), (b); 6142.2(a), (b). The topics covered in the Sex Education curriculum include “physiology
23 of the reproductive system; conception through birth; prevention of pregnancy and sexually transmitted
24 diseases; the benefits of abstinence, including it being the only totally effective prevention method; issues
25 related to dating, marriage and parenting; and sexual assault and prevention.” AR 6142.1.

26 According to Colin, Zetin, and the Mission Statement of the Gay-Straight Alliance, however, they
27 do not intend to discuss topics that are covered under the sex education curriculum. According to the
28 Mission Statement, their goal was to talk about “tolerance,” “issues related to sexual orientation and

1 homophobia,” the need to “treat everyone with respect,” and counterattacking “unfair treatment and
2 prejudice.” Colin Decl., Ex. C. The Mission Statement emphasizes, in a one-sentence paragraph at the
3 end, that “[t]his is not a sexual issue, it is about gaining support and promoting tolerance and respect for
4 all students.” *Id.* Both Colin and Zetin state in their declarations that the club did not propose to talk
5 about the things that were covered in sex education. Furthermore, none of the classes at El Modena
6 covered discrimination and harassment based on sexual orientation. Zetin testified that “the word
7 homosexual is never even mentioned in our classes.” Colin testified that the club was about “acceptance”
8 for gay and straight people, and about helping people deal with being called “fag” or “dyke.” Both Colin
9 and Zetin laughed on the stand at the thought of the group discussing the “physiology of the reproductive
10 system” and the other issues covered in Health class. What the students *did* want to talk about is best
11 expressed in their own words. Echoing the Mission Statement, Zetin testified “I want us to talk about the
12 experiences that gay, lesbian and bisexual kids go through in their everyday lives such as harassment,
13 coming out of the closet or telling people that they are gay: the fear and the emotions such as self-hatred
14 or denial that a lot of kids go through and the harassment they get and how to deal with that.”

15 In order to establish that issues regarding homophobia were discussed in the curriculum, the
16 Defendants introduced into evidence a Teacher’s Edition of a *Human Sexuality* textbook. Principal
17 Murray testified that part of the book was used by some teachers in the required Health class. Under
18 cross-examination, however, Murray admitted that she was not sure if the section on homophobia in that
19 book was given to students. She also did not think that other sections in the book had ever been given to
20 students. Plaintiffs’ counsel pointed out the ridiculousness of the notion that everything in the book was
21 taught in Health class, as the book included sections on “sadism,” “sado-masochism,” “fetishism,”
22 “transvestitism,” “obscene phone calls,” “exhibitionism,” and “pedophilia.” These subjects would hardly
23 be offered as a normal part of any secondary school curriculum. Plaintiffs amply demonstrated that the
24 fact that El Modena had the Teacher’s Edition of this book on a shelf in its media center did not mean
25 that the subjects were necessarily taught in class. After reviewing the evidence submitted during the
26 briefing and listening to testimony at the preliminary injunction hearing, the Court finds as a matter of fact
27 that the subject matter of the proposed Gay-Straight Alliance was not covered in the curriculum at El
28 Modena High School.

1 Even if there were some overlap between what the students wanted to talk about and a subject
2 covered in the curriculum at El Modena, a greater nexus is required or else the club is still considered
3 “noncurriculum related” under the Equal Access Act. Congress did not define the phrase “noncurriculum
4 related” in the Act. It did define the “meetings” that must be accommodated under the Act as activities
5 of student groups that are “not directly related to the school curriculum.” 20 U.S.C. § 4072(3). This
6 “implies that student groups directly related to the subject matter of courses offered by the school do not
7 fall within the ‘noncurriculum related’ category.” *Mergens*, 496 U.S. at 237. The Supreme Court found
8 that this made sense in light of the Act’s purpose: “Because the purpose of granting equal access is to
9 prohibit discrimination between religious or political clubs on the one hand and other noncurriculum-
10 related student groups on the other, the Act is premised on the notion that a religious or political club is
11 itself likely to be a noncurriculum-related student group.” *Id.* at 238. A curriculum-related student group
12 is “one that has more than just a tangential or attenuated relationship to courses offered by the school”
13 and “must at least have a more direct relationship to the curriculum than a religious or political club
14 would have.” *Id.* Thus, if a Christian Club prays for abstinence, it is still “noncurriculum related” even
15 though abstinence is a topic covered in the curriculum. Indeed, Zetin testified that she believed in
16 abstinence. Just as with the Christian Club, if discussion of abstinence were to arise at one of the
17 meetings of the Gay-Straight Alliance, the club would still be “noncurriculum related.”

18 The Supreme Court found that the term “is best interpreted broadly to mean any student group
19 that does not directly relate to the body of courses offered by the school.” *Mergens*, 496 U.S. at 239.
20 The Court defined four ways in which a student group “directly relates to a school’s curriculum:”

- 21 [1.] if the subject matter of the group is actually taught, or will soon be taught, in a
22 regularly offered course; [2.] if the subject matter of the group concerns the body
23 of courses as a whole; [3.] if participation in the group is required for a particular
24 course; or [4.] if participation in the group results in academic credit.

25 *Id.* at 239-40. According to the Court, “this limited definition” was “consistent with Congress’ intent to
26 provide a low threshold for triggering the Act’s requirements.” *Id.* at 240. As stated earlier, the Court
27 finds as a matter of fact that there is no overlap between the curriculum and the GSA’s proposed
28 discussions. It takes a significant leap of the imagination to believe that the same board that voted

1 unanimously against permitting this group on campus has also included the subject matter of what
2 Plaintiffs intend to discuss in the curriculum. But even if there were some small nexus between what is
3 taught in some classes and what the group proposes to discuss, it would require considerably more for
4 the Gay-Straight Alliance to be considered curriculum related under *Mergens*. The subject matter of the
5 group, dealing with their personal experiences of homophobia and seeking to improve relations among
6 and between gay and straight students, is not “actually taught. . . in a regularly offered course” at El
7 Modena. *Id.* at 239.

8 Finally, even if the Court were to find at trial that the subject matter of the Gay-Straight Alliance
9 was actually taught in a regularly offered course at El Modena, the Equal Access Act does not then allow
10 the Board to withhold official recognition of the group. Whether or not a school recognizes a
11 “noncurriculum related student group” merely determines whether or not the Act’s obligations are
12 triggered. Once a school recognizes any such group, it has created a “limited open forum” and the school
13 is prohibited “from denying equal access to *any* other student group on the basis of the content of that
14 group’s speech.” *Id.* at 240 (emphasis added). Contrary to the Board’s interpretation of the Act, the
15 Board may not foreclose access to the “limited open forum” merely by labeling a group curriculum-
16 related. The only meetings that schools subject to the Act can prohibit are those that would “materially
17 and substantially interfere with the orderly conduct of educational activities within the school.” 20
18 U.S.C. § 4071(c)(4). So long as the Board has a “limited open forum” at El Modena and allows any
19 “noncurriculum related” student groups to meet, it can not prohibit the Gay-Straight Alliance even if its
20 meetings directly relate to the curriculum. Instead, the Board will have to show that meetings will
21 “materially and substantially interfere with the orderly” instruction of students. The Board will not likely
22 be able to show that groups of students discussing homophobia and acceptance of all students regardless
23 of sexual orientation somehow serves as a major disruption to the education of students. Indeed, this
24 club is actually being formed to avoid the disruptions to education that can take place when students are
25 harassed based on sexual orientation.

26 **3. The Gay-Straight Alliance is Not Controlled by Nonschool Persons**

27 The Equal Access Act provides a “safe harbor” provision that requires schools to offer a “fair
28 opportunity” to meet in several ways. Schools must provide that (1) “the meeting is voluntary and

1 student-initiated;” (2) the school does not sponsor the meeting; (3) school officials do not participate in
2 any religious meetings; (4) the meeting does not “substantially and materially interfere” with educational
3 activities; and (5) “nonschool persons may not direct, conduct, control, or regularly attend activities of
4 student groups.” 20 U.S.C. § 4071(c). Defendants denied the proposed club in part because the students
5 insisted on the title “Gay Straight Alliance” which Defendants claim is recommended by GLSEN.
6 According to Board Member Ward, “The use of the name suggests that this club is being directed and
7 controlled to some extent by nonschool persons.” Ward Decl., Ex. 1.

8 According to the testimony at the preliminary injunction hearing, however, Colin generated the
9 idea for the club himself, only discussing it with family and friends. Zetin agreed in her testimony that the
10 group was entirely student-initiated. Colin was contacted by GLSEN only after the Board had delayed
11 for several months after receiving the application. Luis Torres, a co-chair of the Orange County chapter
12 of GLSEN, testified that he wanted to provide “moral and emotional support” to their effort and inform
13 Colin of his legal rights. Before mid-October, when the group was already being reviewed by the Board,
14 Colin had not had any contact with GLSEN. The testimony of Colin, Zetin, and Torres was consistent
15 that after Torres contacted Colin, his help was limited to providing emotional support to the students in
16 their struggle to form a GSA. GLSEN in no way intended to “conduct,” “control,” or even “attend”
17 GSA meetings. The Court finds as a matter of fact that outside organizations had no role in the GSA
18 application to form a student group and that nonschool persons never planned to direct GSA meetings.

19 In addition, the Board would have to allege far more involvement from an outside organization to
20 justify denying a student group on the basis of Section 4071(c)(5); using a name that is similar to names
21 of other student groups, and which is the name suggested by the national GLSEN, would not approach
22 the level of control necessary to exempt a student group from the Act’s protections. Furthermore, the
23 Board would have to impose any restrictions regarding “nonschool persons” “uniformly” under the Act’s
24 “safe harbor” provision. 20 U.S.C. § 4071(c). The Board clearly has not done so since it permits the
25 names MECHA and Red Cross/Key Club. These names suggest affiliation with national organizations
26 and the clubs are in fact associated with, though not controlled by, nonschool persons. Considering all
27 the evidence submitted and the testimony taken at the hearing, the Court also finds as a matter of fact that
28 the Board’s contention that the group’s use of the word “straight” is “divisive” and “derogatory” is not

1 credible and merely pretextual.

2 **4. The Gay-Straight Alliance has been Denied Access to the “Limited Open Forum”**
3 **and the Accompanying Benefits of Being a School-Recognized Club**

4 Because the Board has created a “limited open forum,” it must give Plaintiffs all the same rights
5 and privileges that it gives to other student groups. Once recognized, student groups are permitted to
6 meet on campus during noninstructional time, publicize the group at “Club Rush,” post flyers, make
7 announcements over the public address system, and have a group picture in the yearbook. Defendants
8 argue that Plaintiffs’ First Amendment rights have not been harmed or abridged because they can still
9 meet informally. Defendants claim that being denied official recognition by the school and the privileges
10 that flow from recognition does not constitute First Amendment harm. Instead, Defendants contend no
11 “limited open forum” has been created with respect to the benefits of recognized club status because the
12 Defendants control the “time, place, manner, and *content* of expressive activities using these privileges, to
13 the extent allowed by the Equal Access Act and all other applicable laws.” Defs.’ Opp. 18 n.4 (emphasis
14 in original). This is exactly the type of content-based restriction that is forbidden by the Equal Access
15 Act. To the extent that the Board opens up its school facilities to *any* noncurriculum related group, it
16 must uniformly open its facilities to *all* student groups. *See Cenicerros v. Board of Trustees of the San*
17 *Diego Unified School District*, 106 F.3d 878 (9th Cir. 1997) (finding that allowing a religious club to
18 meet before and after school but not during lunchtime was not sufficient to satisfy the Equal Access Act
19 when other student groups were allowed to meet during lunchtime).

20 The Board also argues that the application has only been conditionally denied. According to the
21 statement of Kathy Ward at the Board Meeting voting down the club’s application, the student group
22 could be approved if (1) they agreed not to discuss sex education topics covered under the California
23 Education Code; and (2) their club was renamed with a different title that was less “divisive” and less
24 likely to be perceived as “derogatory” or affiliated with an outside adult organization. As detailed above,
25 the Board’s objections in regard to the outside adult organization are not factually justified or valid under
26 the Act. The Board’s allegedly “modest” proposal to require the group to change its name is also not
27 permissible.

28 A group’s speech and association rights are implicated in the name that it chooses for itself. The

1 Board is not allowed to require the student group to change its name merely because the Board finds that
2 it would be less “divisive.” The Board’s suggested alternatives include the “Tolerance Club” and
3 “Tolerance for All.” Zetin and Colin testified that these name changes would attack the very core reason
4 for having the club. Colin said that if he had to change the name, he “would feel my constitutional rights
5 are useless.” With the revised name change, Colin felt the emphasis of the club would not be on
6 counteracting homophobia, the core mission of the group. He said that the use of the word “Gay” in the
7 title is important to announce that “being gay or homosexual is not bad, it’s who you are.” Zetin testified
8 that the Board’s proposed revisions “take the whole purpose of the club and change it.” She said that
9 taking the word gay out would take the focus away from the issues people face and would imply that
10 there’s something wrong with the word “gay.” In addition, Colin does not even like the word “tolerance”
11 because it is not as affirming as the word “alliance” or “acceptance.” To him, “tolerance” means “to put
12 up with” in the sense that “Jews” and “Blacks” used to be “put up with” until they were finally
13 “accepted.” Though the group’s mission statement includes the word tolerance, Colin had objected to
14 the word’s use to McMillan when she drafted the mission statement (even though it was not ultimately
15 changed). Because Colin does not believe in “tolerance” and instead believes in “acceptance,” the
16 Board’s suggested name change would indicate a club that is not only more general than the one he
17 wants, but also a club that merely promotes “tolerance,” far less than he hopes to achieve. For all of the
18 reasons that Zetin and Colin mentioned when talking about being forced to change the club’s name, the
19 Board’s suggested name change clearly infringes on profound expressive meaning that the group attaches
20 to its name.

21 Similarly, the suggestion that the group incorporate a statement that it will not talk about sexual
22 activities, while not requiring other groups to add a similar statement, was hurtful according to Colin and
23 Zetin. Even though they had no plans to talk about sexual activities in the group, singling their group out
24 by requiring their mission statement to include a prohibition on discussion of sexual activities would harm
25 their freedom of expression. Zetin said that adding the requirement when no other groups have the
26 requirement would intimate that “gay people are inherently more sexual than others.” She testified that
27 you can talk about being gay without talking about having sex, just as you can talk about being
28 heterosexual without talking about sex. Plaintiffs’ counsel sensibly analogized it to requiring a Catholic

1 group to add a statement that it would not be intolerant of other religions. Even if the Catholic group
2 would gladly state that it did not intend to be intolerant of other religions, singling that student group out
3 to add a statement based on a stereotype that Catholics are intolerant of other religions, and requiring the
4 group to add a disclaimer to their mission statement, would be forced speech that could greatly harm
5 their expressive rights. Furthermore, Colin and Zetin have stated to Defendants and under oath in court
6 that the group does not intend to talk about sexual activity, and would readily accept a statement in their
7 mission statement that they will not talk about it if *all* groups are required to include the statement.

8 Plaintiffs have presented a considerable amount of evidence to show that Defendants denied them
9 access to the “limited open forum” based on the content of the proposed speech at Gay-Straight Alliance
10 meetings. First, Assistant Superintendent McKinnon had told Principal Murray to be on the look-out for
11 such clubs in the spring of 1998, approximately a year and a half before Colin applied to form the club.
12 Second, in the spring of 1999 the California Legislature considered legislation (A.B. 222) that would
13 prohibit discrimination based on sexual orientation in public schools. The Board passed a resolution
14 opposing the bill and sent it to the Legislature. *See* Second Codell Decl., Ex. I (Board Resolution No.
15 32-98-99 and Minutes of May 13, 1999 Board Meeting). According to the Board Minutes, Defendant
16 Board Member Jacobson moved to adopt the resolution against the bill because he claimed that certain
17 sexual behavior, like homosexuality, “would be accepted and validated in the public school system, which
18 would go against the religious and moral beliefs of most people.” *Id.* The Resolution was passed
19 unanimously. The Legislature passed the law in revised form as A.B. 537 despite the Board’s
20 disapproval. *See* 1999 Cal. A.B. 537, Stats. 1999, ch. 587. Third, the Board reviewed the application of
21 the student group unlike any other student group that had been proposed before. The Board subjected
22 the application to a long delay and ultimately voted it down unanimously. During consideration of the
23 application at the November 18, 1999 meeting, Defendant Board Member Bill Lewis said, “The Bible
24 says we’re all sinners, but this, in my opinion, is asking us to legitimize sin.” Codell Decl., Ex. A. Kathy
25 Ward’s statement cited a concern about “unrestricted, unsupervised student led discussion of sexual
26 topics” even though Plaintiffs had a faculty advisor who would be present at all meetings of the group if it
27 were recognized. Plaintiffs have made a preliminary showing not just of a content-based denial of student
28 recognition, but a pattern of delay and discrimination against the Plaintiffs on the basis of sexual

1 orientation or perceived sexual orientation.

2 In addition, Defendants’ contention that the Plaintiffs were not denied access to the “limited open
3 forum” since their application was only conditionally denied does not hold up under scrutiny. Even
4 though the suggested changes would violate the Equal Access Act as detailed above, there is little reason
5 to believe that any club dealing with homophobia and discrimination based on sexual orientation would
6 have been approved no matter what the title and the mission statement said. The Court finds that the
7 moderate position taken in court by Defendants, that the club would be approved with a few “modest”
8 changes, is not credible. Absent the threat of litigation and court-ordered enforcement of the students’
9 rights, Defendants were unlikely ever to recognize the club.

10 If this Court were to allow the School Board to deny recognition to the Gay-Straight Alliance, it
11 would be guilty of the current evil of “judicial activism,” carving out an exception from the bench to the
12 statute enacted by the politically accountable Congress. If this Court were to interpret the Equal Access
13 Act differently than courts have in the past when applying the Act to Christian groups, it would be
14 complicit in the discrimination against students who want to raise awareness about homophobia and
15 discuss how to deal with harassment directed towards gay youth.

16 The Board Members may be uncomfortable about students discussing sexual orientation and how
17 all students need to accept each other, whether gay or straight. As in *Tinker*, however, when the school
18 administration was uncomfortable with students wearing symbols of protest against the Vietnam War,
19 Defendants can not censor the students’ speech to avoid discussions on campus that cause them
20 discomfort or represent an unpopular viewpoint. *See* 393 U.S. at 509. In order to comply with the Equal
21 Access Act, Anthony Colin, Heather Zetin, and the members of the Gay-Straight Alliance must be
22 permitted access to the school campus in the same way that the District provides access to all clubs,
23 including the Christian Club and the Red Cross/Key Club. Plaintiffs have shown a strong likelihood of
24 succeeding on their claim that Defendants have violated their rights under the Equal Access Act.

25 **D. First Amendment Claim**

26 In finding that the District has likely violated the Equal Access Act, the Court need not reach
27 Plaintiffs’ First Amendment claim.

28 **E. Plaintiffs Will Be Irreparably Injured Absent Preliminary Relief**

1 “The loss of First Amendment freedoms, for even minimal periods of time unquestionably
2 constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547
3 (1976). Even though the Court does not reach the First Amendment issue, the same presumption of
4 irreparable harm arises in the case of violations of the Equal Access Act because it protects “expressive
5 liberties.” *Hsu v. Roslyn Union Free School Dist. No. 3*, 85 F.3d 839, 872 (2nd Cir. 1996) (finding that
6 the denial for one year of an after-school Bible group constituted “irreparable injury” and issuing a
7 preliminary injunction). Plaintiffs have already missed an entire semester, which is a significant portion of
8 the time that they will spend in high school. Because Zetin is a junior, she has only a year and a half left
9 before she graduates. By the time this matter is resolved in court, Zetin may have graduated.

10 Plaintiffs have been injured not only by the Board’s excessive delay, but also by the inability to
11 effectively address the hardships they encounter at school every day. Some students at El Modena do not
12 even feel safe using the school’s restrooms. Zetin is often harassed by students calling her a “dyke.”
13 While such harms may not be cured by a preliminary injunction, “gay-straight alliance clubs provide a safe
14 place for students . . . [and] create a respectful environment where students realize that they have a place
15 at the table . . .” Gogin Decl., ¶¶ 7-9. Without official recognition for nearly six months, the students
16 have not had the same privileges as other student groups and have been burdened by having to meet
17 across the street from their school. Thus, even without the presumption of irreparable harm in the area of
18 free speech, the urgency of this matter and the inadequacy of legal remedies mandates preliminary relief.

19 The balance of hardships also tips sharply in favor of Plaintiffs. Weighing in favor of the Plaintiffs
20 is the burden on their expressive rights, an injury of the highest magnitude. Defendants argue that if they
21 are forced to recognize the Gay-Straight Alliance, the parental notification laws of the California
22 Education Code will be triggered and they will be forced to send out costly mailings whenever the group
23 meets. The Board estimates this cost at over \$1000 each week. *See Van Otterloo Decl.*, ¶ 15. This
24 argument, like many of the other arguments put forth by the Board, appears to be pretextual. Plaintiffs
25 have demonstrated that the parental notification requirements deal with school-sponsored instruction, not
26 noncurriculum related, intra-student speech during noninstructional time. *See Pltf.’s Reply Memo*, at 14.
27 When other gay-straight alliance clubs in California meet, including clubs from Orange County, their
28 existence does not trigger the parental notification requirements of the Education Code. *See Gogin*

1 Decl., ¶ 5. Even if the Education Code were triggered, at most, it requires the school to notify parents
2 once at the beginning of the school year. *See* Cal. Educ. Code. §§ 51550, 51554.

3 Granting a preliminary injunction would also be in the public interest. Recent California
4 legislation confirms that it is state public policy to prevent discrimination on the basis of sexual
5 orientation. In passing the California Student Safety and Violence Prevention Act of 2000, the California
6 Legislature found that “[v]iolence is the number one cause of death for young people in California and
7 has become a public health problem of epidemic proportion” and “[t]he fastest growing, violent crime in
8 California is hate crime.” 1999 Cal. A.B. 537, Stats. 1999, ch. 587 § 2. The Legislature felt that “it is
9 incumbent upon us to ensure that all students attending public school in California are protected from
10 potentially violent discrimination.” *Id.* The California Penal Code already contained a prohibition on hate
11 crimes based on sexual orientation. *See* Cal. Penal Code § 422.6 (barring injury “because of the other
12 person’s race, color, religion, ancestry, national origin, disability, gender, or sexual orientation”). In
13 passing ch. 587, however, the Legislature added sexual orientation to the list of prohibited forms of
14 discrimination in public schools. *See* 1999 Cal. A.B. 537, Stats. 1999, ch. 587 § 3. In addition to
15 protecting students from hate crimes, the Legislature was also concerned about suicide. According to the
16 preamble:

17 [W]e must strive to reverse the increase in teen suicide. The number of teens who
18 attempt suicide, as well as the number who actually kill themselves, has risen
19 substantially in recent years. Teen suicides in the United States have doubled in
20 number since 1960 and every year over a quarter of a million adolescents in the
21 United States attempt suicide. Sadly, approximately 4,000 of these attempts every
22 year are completed. Suicide is the third leading cause of death for youths 15
23 through 24 years of age. To combat this problem we must seriously examine these
24 grim statistics and take immediate action to ensure all students are offered equal
25 protection from discrimination under California law.

26 1999 Cal. A.B. 537, Stats. 1999, ch. 587 § 2. By adding sexual orientation to the list of prohibited forms
27 of in-school discrimination, the Legislature could specifically target the teen suicide rate. According to a
28 Center for Disease Control and Prevention analysis of Massachusetts statistics in 1997, gay students were

1 more than six times as likely to have tried suicide as straight students. *See* John Ritter, *Gay Students*
2 *Stake Their Ground*, USA Today, Jan. 18, 2000 at 2A (citing study). This injunction therefore is not just
3 about student pursuit of ideas and tolerance for diverse viewpoints. As any concerned parent would
4 understand, this case may involve the protection of life itself. Since the Gay-Straight Alliance seeks to
5 end discrimination on the basis of sexual orientation, a preliminary injunction requiring the Board to
6 recognize the club would be consistent with state public policy and in the public interest.

7 In addition to demonstrating a strong likelihood that Defendants have violated the Equal Access
8 Act, Plaintiffs have also shown a significant threat of irreparable injury, greater hardship to Plaintiffs than
9 Defendants, and that the public interest favors granting the injunction. The Court finds that a preliminary
10 injunction is warranted under these circumstances.

11
12 **III. Disposition**

13 Plaintiffs' Motion for a Preliminary Injunction is GRANTED. Plaintiffs are hereby ordered to
14 prepare, lodge and serve a proposed preliminary injunction consistent with this Order.

15 Further, the Court finds that the bond requirement under Federal Rule of Civil Procedure 65(c) is
16 excused. Because the Court finds that there is a strong likelihood of success on the merits by Plaintiffs,
17 no bond is necessary. *See Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972). In addition, because
18 the Court has found that the parental notification provisions of the Education Code are not triggered by
19 the meetings of the Gay-Straight Alliance, the Court excuses the bond requirement because there is no
20 risk of monetary loss to the Defendants if the injunction is granted. *See Frank's GMC Truck Center, Inc.*
21 *v. G.M.C.*, 847 F.2d 100, 103 (3rd Cir. 1988).

22
23 IT IS SO ORDERED

24 DATED: February 4, 2000.

25
26 _____
27 DAVID O. CARTER
28 United States District Judge