UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

CARVER MIDDLE SCHOOL GAY-STRAIGHT ALLIANCE, et al.,

Plaintiffs,

v.

SCHOOL BOARD OF LAKE COUNTY, FLORIDA,

Defendant.

No. 5:13-cv-00623-WTH-PRL

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON EQUAL ACCESS ACT CLAIM

Pursuant to Rule 56, Fed. R. Civ. P., Plaintiffs move the Court for summary judgment on their claim pursuant to the federal Equal Access Act, 20 U.S.C. § 4071 *et seq*., (Count 1) and request the Court grant all the relief (except the declaration requested in ¶ B) demanded in the Complaint (Doc. 1)[1]:

I. INTRODUCTION

Plaintiff H.F. is an eighth grader at Carver Middle School ("Carver") in Leesburg, Florida. *See* H.F. Decl. (Doc. 4-2) ¶ 2 (last year she was in seventh grade). To create a safer and more welcoming environment for all students, including lesbian, gay, bisexual, and transgender ("LGBT") students and allied straight students, H.F. wants to continue the Gay-Straight Alliance ("Carver GSA") that began meeting as an official student group at the school following a lawsuit

[1] "Doc." refers to the docket entry of the document filed with the Court.

in May 2013 and that is also a plaintiff in this lawsuit. The stated purposes and goals of the group ("Carver GSA") are:

(1) to create a safe, supportive environment at school for students to discuss experiences, challenges, and successes of LGBT students and their allies

(2) to create and execute strategies to confront and work to end bullying, discrimination, and harassment against all students, including LGBT students

(3) to promote critical thinking by discussing how to address bullying and other issues confronting students at Carver Middle School.

Carver Middle School Gay-Straight Alliance Club Application (Doc. 4-11) at 2. Plaintiffs submitted a request to form and operate the GSA as a student group at Carver. *Id*. Yet Defendant School Board for Lake County, Florida ("School Board"), through its Superintendent, denied this request and disallowed the Carver GSA. *Id*. This denial violates the federal Equal Access Act, which protects students' ability to form and run student groups at school.

II. SUMMARY JUDGMENT STANDARD

"Summary judgment is appropriate where the evidence shows 'that there is no genuine issue as to any material fact and that the [movant] is entitled to a judgment as a matter of law.'" *Ellis v. England,* 432 F.3d 1321, 1325 (11th Cir. 2005) (quoting *Comer v. City of Palm Bay, Fla.*, 265 F.3d 1186, 1192 (11th Cir. 2001)). In disputing a material fact, it is insufficient for the nonmoving party "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Instead, the nonmoving party must produce enough evidence to enable a jury to reasonably find for the nonmoving party on that issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

III. ARGUMENT

Defendant violates the Equal Access Act by refusing to permit the Carver GSA to form and operate at Carver as a student group. The mandates of the Equal Access Act are straightforward: If (a) a public secondary school (b) receives federal financial assistance and (c) has a "limited open forum" granting "an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time," then it must not "deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. § 4071(a). Each of these elements is met here, and thus Carver is subject to the mandates of the Equal Access Act. Yet the Superintendent has denied equal access to the Carver GSA on the basis of its content in violation of the Equal Access Act. As the School Board delegated final decision-making authority to the Superintendent over the approval and disapproval of student groups, the School Board is liable pursuant to 42 U.S.C. § 1983.

A. Carver Middle School is a public "secondary school" within the meaning of the Equal Access Act.

The Equal Access Act applies to any school that is a "public secondary school," 20 U.S.C. § 4071(a), which is defined as one that "provides secondary education as determined by State law," 20 U.S.C. § 4072(1). Carver is a "secondary school" under the Act.

Prior to July 1, 2013, Florida law explicitly defined "secondary schools" as those "schools that primarily serve students in grades 6 through 12." § 1003.413(1), Fla. Stat. (2012). Under this definition, Carver, which teaches grades six through eight, H.F. Decl. (Doc. 4-2) ¶ 3, was unquestionably a "public secondary school" subject to the Equal Access Act. Indeed, Defendant implicitly conceded this point when it acknowledged liability under the Equal Access

Act in *B.N.S.*, a prior case against Defendant to establish the Carver GSA. *See* Final Order (Doc. 20) at 2 in *B.N.S. v. Sch. Bd. of Lake Cnty., Fla.*, 5:13-cv-205-ACC-PRL (M.D. Fla. May 30, 2013).

In 2013, however, as part of the repeal of the Florida Secondary School Redesign Act ("Redesign Act")—a law outlining the "guiding principles for secondary school redesign" and codified at Section 1003.413, Fla. Stat. (2012)—the Florida legislature repealed its only explicit definition of "secondary schools." Ch. 2013-27, § 12, Laws of Fla. From this total repeal of the Redesign Act as part of an 84-page law governing numerous aspects of K-20 Education, no intent to change how "secondary education" or "secondary schools" are defined in Florida can be inferred. Indeed, had the legislature wanted to redefine secondary education and schools, it could have done so. The repeal of the Redesign Act (and consequently the repeal of the only definition of "secondary school" in Florida's statutes) does not mean that "secondary schools" and "secondary education" have ceased to exist in Florida. In the absence of an explicit statutory definition, what constitutes "secondary schools" and "secondary education" can best be determined from how these terms are functionally used by Florida educators.

Notably, both the School Board and Carver's Principal consider middle schools to be secondary schools. On June 9, 2014, the School Board approved its *Student Progression Plan*, which states that "Lake County public Middle Grades are secondary schools that primarily serve students in grades 6 through 8." Student Progression Plan (Doc. 28-1) at 35 (VI)(A)(2)).[2] And

[2] This *Student Progression Plan* was approved as the final plan by the School Board in June 2014. *See* Lake Cnty. Sch. Bd. Reported Agenda (composite of "Simple," followed by "Detailed" agenda) (June 9, 2014) (Doc. 28-2) at 108 (reporting that the motion to approve the draft *Student Progression Plan* carried, 3-0).

the Principal of Carver Middle School testified that "middle and high school, we refer to those as secondary schools," and that she is considered a "secondary administrator" because Carver is a middle school. Cunningham Dep. (Doc. 28-3) at 12:25-13:2, 36:19-21. She is a member of the National Association of Secondary School Principals. *Id*. at 13:4-6.

The understanding that middle schools are secondary schools is shared by the Florida Association of Secondary School Principals (FASSP), whose membership is open to middle and high school administrators. *See* FASSP (Doc. 28-4), http://www.fasa.net/fassp/Become-A-Member.cfm (visited 8/22/14) (noting that membership is open to "Middle and High School Principals," "Other persons engaged in administration and supervision of a school with Middle or High School grades," and "Retired Middle and High School Administrators").

In addition, middle schools in Lake County Schools, including Carver, actually "provide[] secondary education as determined by State law." 20 U.S.C. § 4072(1). Florida law authorizes "public secondary school[s]" to offer career-themed courses. § 1003.493(3)(a), Fla. Stat. Consistent with this authority, Lake County Schools offers these career-themed courses in middle and high schools but not elementary schools. Moxley Dep. (Doc. 28-5) at 148:-13-149:8. In addition, middle schools in Lake County, including Carver, teach Algebra I,[3] a course that the Florida Department of Education considers a course for grades 9-12.[4] Given that it is undisputed

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[3] *See* Cunningham Dep. (Doc. 28-4) at 20:11-15, 20:25-21:9, 22:16-19; *see also id.* § 1003.4156(1)(b), Fla. Stat. (requiring middle schools to offer Algebra I).

[4] *Compare* Fla. Dep't of Educ., Grades 9 to 12 Education Course Listing (Doc. 28-6) at 26 (listing Algebra I) *with* Fla. Dep't Educ., Grades 6 to 8 Education Course Listing (Doc. 28-7) (not listing Algebra I); see also § 1003.4282(3)(b), Fla. Stat. (completion of this Algebra I course is a requirement for high school graduation).

that high-school courses constitute secondary education, Moxley Dep. (Doc. 28-5) at 139:9-11, and given that Algebra I—a high-school course—is in fact taught at Carver, the school is—in the most literal sense—providing "secondary education," 20 U.S.C. 4072(1), triggering the Equal Access Act.[5]

Although there is no longer any definition of "secondary school" in Florida's statutes,[6] an analysis of the statutes that use the terms "secondary school," "middle school," and "high school" also leads to the conclusion that middle schools are secondary schools and thus covered by the Equal Access Act. Florida statutes use these terms inconsistently in discussing the application of a given provision to schools, such that looking at any individual statute could lead to different interpretations of the term "secondary school." Some support Plaintiffs' position that secondary schools include middle schools. *See, e.g.*, § 1001.42(12)(a), Fla. Stat. ("The district school board, acting as a board, shall . . . [p]rovide for the operation of all public schools, both elementary and secondary, as free schools . . . ."); § 1007.35(2)(b), Fla. Stat. ("[i]t is the intent of the Legislature to provide assistance to all public secondary schools, with a primary focus on

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[5] Plaintiffs also note that, consistent with this understanding, the provision of education in middle and high schools—as distinct from elementary schools—is structured similarly. Students in middle schools, like high schools, take several classes at different periods from multiple teachers. Moxley Dep. (Doc. 28-6) at 144:22-145-1. Students in middle schools, like high schools, take end-of-course examinations and are graded by the same grading system (e.g. 90%-100% is an A). *Id*. at 145:8-16; *see also* § 1003.437, Fla. Stat.

[6] The repeal of the Redesign Act (including its definition of "secondary school") did not affect the courses or education offered at middle or high schools in Lake County. Moxley Dep. (Doc. 28-5) at 154:6-17. In the 2013-2014 school year, Lake County's public schools continued to provide largely the same courses and education in the middle and high schools as they did when the middle and high schools were explicitly defined as "secondary schools" during the 2012-2013 school year. *Id*. Because everyone agrees that until last year middle schools were secondary schools providing secondary education, and because those middle schools' provision of education did not change from year to year, then they (including Carver) continue to provide the same "secondary education," *see* 20 U.S.C. § 4072(1).

low-performing middle and high schools."). Some ostensibly support Defendant's position. *See, e.g.,* § 386.212, Fla. Stat. (prohibiting smoking within 1,000 feet of an "elementary, middle, or secondary school"); 1003.01(2), Fla. Stat. ("'School' means an organization of students for instructional purposes on an elementary, middle or junior high school, secondary or high school, or other public school level authorized under rules of the State Board of Education.").[7] Others do not appear to support any particular interpretation. *See, e.g.,* § 1012.467, Fla. Stat. ("'School grounds' means the buildings and grounds of any public prekindergarten, kindergarten, elementary school, middle school, junior high school, high school, or secondary school . . . .")

It is therefore necessary to look at the statutes as a whole. Although interpreting "secondary school" to include middle school leads to redundancy of terms in statutes that list "middle school" alongside "secondary school," only this interpretation applied to all the statutes gives Florida law its full effect. Only by interpreting middle school as a type of "secondary school" can nonsensical results be avoided when Florida law uses elementary and secondary to describe all possible K-12 schools. For example, Florida law requires "elementary" and "secondary" schools (with no mention of "middle schools") to display the state flag, § 256.032, Fla. Stat.; to ensure safety on independently operated school buses, § 316.615, Fla. Stat., and to be governed by school boards, § 1001.42(12)(a), Fla. Stat.; and it exempts "elementary" and

[7] However, where statutory provisions list both "middle" and "secondary" schools, that is not necessarily meant to assign those words different meanings. "Focusing on such semantics misses the larger purpose" of the language, which is to "cast[] a broad net" over the various school types. *Kutten v. Sun Life Assur. Co. of Canada*, --- F.3d ----, ----, No. 13-2559, 2014 WL 3562784, at *3 (8th Cir. July 21, 2014) (citing *JA Apparel Corp. v. Abboud*, 568 F.3d 390, 407 n. 4 (2d Cir.2009) (Sack, J., concurring) (reasoning that the "itemization of terms" in a list "may reflect an intent to occupy a field of meaning, not to separate it into differentiated parts" and concluding that the "rule against surplusage" should be "applied with a grain or two of salt when examining a list of words having similar or even overlapping meaning")).

"secondary" schools from the Florida law permitting the carrying of concealed weapons, § 790.06(12)(a)(10), Fla. Stat. Only under an interpretation of Florida law that includes middle schools within the definition of "secondary school" would these (and many other) provisions of Florida law that clearly are meant to apply to all public schools extend to middle schools.[8]

[8] *See also* § 1002.22, Fla. Stat. ("'Agency' means any board, agency, or other entity that provides administrative control or direction of or performs services for public elementary or secondary schools, centers, or other institutions . . . ."); § 1002.32, Fla. Stat. ("Each lab school may establish a primary research objective related to fundamental issues and problems that occur in the public elementary and secondary schools of the state."); § 1004.02, Fla. Stat. ("'Adult student' is a student who is beyond the compulsory school age and who has legally left elementary or secondary school."); § 1009.77(4), Fla. Stat. ("Public elementary or secondary school employers or postsecondary institution employers shall be reimbursed for 100 percent of the student's wages by the participating institution."); § 1012.797(1), Fla. Stat. (notification of district employees' criminal charges "shall include other education providers such as the Florida School for the Deaf and the Blind, university lab schools, and private elementary and secondary schools."); § 164.1051, Fla. Stat. (referring to the "[s]iting of elementary and secondary schools"); § 282.705, Fla. Stat. ("Private, nonprofit elementary and secondary schools are eligible for rates and services on the same basis as public schools if such schools do not have an endowment in excess of $50 million."); § 403.714(5)(b), Fla. Stat. (requiring school boards to "provide a program of student instruction in the recycling of waste materials," stating that this instruction "shall be provided at both the elementary and secondary levels of education"); § 403.7186, Fla. Stat. ("As funds become available, the department shall inform the public about the provisions of this section and about the dangers of mercury contamination in game and fish by: (c) Distributing, in primary and secondary schools within the state, informational materials relating to recycling of mercury-containing devices and spent lamps.") § 468.505(1)(i), Fla. Stat. (referencing "[a]n educator who is in the employ of a nonprofit organization approved by the council; a federal, state, county, or municipal agency, or other political subdivision; an elementary or secondary school; or an accredited institution of higher education"); § 665.0501(7), Fla. Stat (referring to a capital stock association's power "[t]o contract with the proper authorities of any public or nonpublic elementary or secondary school or institution of higher learning"); § 667.009(7), Fla. Stat. (referring to a savings bank's power "[t]o contract with the proper authorities of any public or nonpublic elementary or secondary school or institution of higher learning"); § 768.135(1), Fla. Stat. ("A volunteer team physician is any person licensed to practice medicine . . . (a) Who is acting in the capacity of a volunteer team physician in attendance at an athletic event sponsored by a public or private elementary or secondary school . . . ."); § 985.101(1)(b), Fla. Stat. (notification of certain delinquent acts of child "shall include other education providers such as the Florida School for the Deaf and the Blind, university developmental research schools, and private elementary and secondary schools.").

Moreover, the statutes that Defendant claimed support its assertion that "secondary school" under Florida law means only high schools[9] existed before the repeal of the explicit statutory definition of "secondary school" in section 1003.413(1), Fla. Stat. In other words, these statutes existed when Florida law clearly defined "secondary school" to include middle schools, which Defendant recognized by conceding liability under the Equal Access Act in *B.N.S.* The fact that these statutes co-existed with a statutory definition of "secondary school" that included middle schools precludes relying on them to conclude that Florida law defines "secondary school" as being limited to high schools.[10]

Finally, in the absence of any clear statement from the legislature that middle schools do *not* provide secondary education, because the Equal Access Act is a remedial statute, it must be construed broadly. *See, e.g.*, *Garcia-Celestino v. Ruiz Harvesting, Inc.*, No. 2:10-cv-542-FtM-38DNF, 2013 WL 3816730, at *6 (M.D. Fla. July 22, 2013) (ruling that because the FLSA is a remedial statute, it "must . . . be broadly construed").

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[9] *See* § 1003.01(2), Fla. Stat. ("'School' means an organization of students for instructional purposes on an elementary, middle or junior high school, secondary or high school, or other public school level authorized under rules of the State Board of Education."); § 1007.271(1), Fla. Stat. (providing that dual-enrollment programs are open to secondary students).

[10] This Court in an earlier Order pointed to § 1003.01(2), Fla. Stat., which defines "school" with reference to "elementary, middle or junior high school, secondary or high school, or other public school level authorized under rules of the State Board of Education," as supporting Defendant's interpretation of the law. Doc. 17 at 13 In addition to the fact that this statute co-existed with the now-repealed statute that defined "secondary school" to include middle schools, other Florida statutes support the opposite interpretation by explicitly including middle schools as a subcategory of "secondary schools." *See, e.g.*, § 1007.35(2)(b), Fla. Stat. ("[i]t is the intent of the Legislature to provide assistance to all public secondary schools, with a primary focus on low-performing middle and high schools."); § 1003.491(4), (5)(b), Fla. Stat. (providing for the adoption of proposed "secondary courses," including courses approved "for purposes of middle school promotion and high school graduation"). Moreover, the definition of "schools" in section 1003.01(2) has no operational effect on Florida schools; it simply provides that all of the types of schools listed are "schools" under Florida law. As discussed above, the only interpretation of "secondary school" that gives Florida law its full effect and avoids absurd results is that "secondary school" includes middle schools.

B. Carver Middle School "receives Federal financial assistance."

Lake County Schools "receives Federal financial assistance," 20 U.S.C. § 4071(a). *See* District School Board of Lake County, District Summary Budget, Fiscal Year 2013-2014 (Doc. 4-13) at 2, 6, 8 (listing estimated revenues from federal sources). The benefits of this federal financial assistance unquestionably flow to Carver as part of Lake County Schools. Thus, that element of the Equal Access Act is also met.

C. Defendant has created a "limited open forum" within the meaning of the Equal Access Act.

The School Board has created a "limited open forum" under the Equal Access Act, 20 U.S.C. § 4071(a), in two ways. First, its Policy 4.502 (Doc. 4-1) grants an "opportunity" or process by which middle school students can apply for and operate noncurriculum related student groups at school during noninstructional time. 20 U.S.C. § 4071(b) ("A public secondary school has a limited open forum whenever such school grants an . . . *opportunity* for one or more noncurriculum related student groups to meet on school premises during noninstructional time.") (emphasis added). Second, it actually "permits one or more 'noncurriculum related student groups' to meet on campus before or after classes." *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 236 (1990); 20 U.S.C. § 4071(b) ("A public secondary school has a limited open forum whenever such school grants an *offering* to . . . one or more noncurriculum related student groups to meet on school premises during noninstructional time.") (emphasis added).

1. The School Board grants an "opportunity" for noncurriculum related student groups to form and meet.

Although initially denied,[11] the School Board now admits that its middle school student club policy, Policy 4.502 (Doc. 4-1), grants an "opportunity" for noncurriculum related student groups to form and operate in the middle schools. The School Board's Rule 30(b)(6) designee testified that a student group would qualify to operate at a middle school by meeting *any one* of the following conditions listed in Policy 4.502(2):

(1) It "strengthen[s] and promote[s] critical thinking, business skills, athletic skills, [or][12] performing/visual arts."
(2) It "relat[es] to academic honor societies"
(3) It is a "student government"
(4) It is "directly related to the curriculum."

Moxley Dep. (Doc. 28-5) at 56-57.[13] Importantly, the School Board said that if a student group promotes critical thinking, business skills, athletic skills, or performing/visual arts, or is an honors society or student government, it need not be "directly related to the curriculum." *Id*. at 57:12-15, 62:9-19, 100:4-6, 98:19-21. By granting an opportunity to student groups that satisfy one of the first three requirements without regard to whether they are "directly related to the curriculum," the School Board provides an "opportunity" for noncurriculum related student

[11] *See* Def's. Mot. to Dismiss (Doc. 10) at 9.

[12] The School Board interprets this "and" in Policy 4.502(2) as an "or." Moxley Dep. (Doc. 28-5) at 54-55.

[13] Policy 4.502(2) (Doc. 4-1) reads as follows:

> Middle School clubs and organizations are an extension of the school curriculum. Middle School clubs must be sponsored by the school and are limited to organizations that strengthen and promote critical thinking, business skills, athletic skills, and performing/visual arts. Schools may also establish organizations relating to academic honor societies and student government and clubs that are directly related to the curriculum.

groups to form and meet. *See Mergens*, 496 U.S. at 237-38 (under Equal Access Act, a student group is noncurriculum related unless its activities are "directly related to the school curriculum.").[14]

This opportunity for noncurriculum related student groups to form and meet at Carver is further evidenced by the numerous noncurriculum related student groups that have been approved by the School Board at other middle schools in the district that are also subject to a *uniform* application of Policy 4.502 (Doc. 4-1).[15] Moxley Dep. (Doc. 28-5) at 30:14–32:5. For example, the School Board has approved the following student groups even though it considers them "not directly related to the curriculum": Tavares Middle School Student Government, *id*. at 67:25–68:8; Tavares Middle School Honor Society, *id*. at 68:22-25; Clermont Middle School Student Council, *id*. at 70:22-24; Mount Dora Middle School Student Government, *id*. at 86:23-87:1; Mount Dora Middle School National Junior Honor Society, *id*. at 86:9-12; Mount Dora Middle School Chess, *id*., 88:15-18; Umatilla Middle School National Junior Honor Society, *id*. at 92:18; Oak Park Middle School School Student Council, *id*. at 98:6-8; and Oak Park Middle School National Junior Honor Society, *id*. at 99:25–100:3; *see also id*. at 98:19-21 ("student government clubs are clubs that do not directly relate to the curriculum"), 100:4-6 ("academic honor societies do not directly relate to the curriculum").

[14] The School Board clarified that the Policy's stated requirement that the student club be "sponsored by the school," Policy 4.502(2), amounts to nothing more than a need for approval by the Superintendent. Moxley Dep. (Doc. 28-5) at 59 (agreeing that "'[S]chool sponsored' means, in short, that it was approved by the superintendent.").

[15] The "curriculum" to which the student club might relate is the district's middle school curriculum, not the individual school's curriculum. Moxley Dep. (Doc. 28-5) at 61:3-12.

Because School Board Policy 4.502 (Doc. 4-1) grants an "opportunity" for middle school student groups to form and operate if they satisfy any one of the first three requirements and without regard to whether they are "directly related to the curriculum," the Board has created a limited open forum under the Equal Access Act.

2. The School Board permits noncurriculum related student groups to form and meet before and after class at Carver.

A school also creates a "limited open forum" under the Equal Access Act if it permits "noncurriculum related student groups" to meet at school before or after class. 20 U.S.C. § 4071(b). In *Mergens*, the U.S. Supreme Court examined what constitutes a "noncurriculum related student group" triggering the obligations of the Equal Access Act. The Court began by reviewing the definition of a group "meeting" in § 4072(3), which includes activities "not *directly related* to the school curriculum." 496 U.S. at 237-38 (emphasis in court opinion, not statute). To give full effect to the Act's non-discriminatory purpose, the Court read "noncurriculum related" broadly, such that political groups, for example—which may be somewhat related to government or history class—would still be noncurriculum related, creating a limited open forum. In other words, while a group may have "a tangential or attenuated relationship to courses offered by the school," *id*. at 238, a group is nevertheless noncurriculum related unless (1) the student group's subject matter "is actually taught, or will soon be taught, in a regularly offered course"; (2) a student group's subject matter "concerns the body of courses as a whole"; (3) participation in the group is a class requirement; or (4) participation in the group itself results in academic credit. *Id*. at 239-40.

The Supreme Court in *Mergens* found numerous clubs to be "noncurriculum related," rejecting the school's contention that these clubs were curriculum related because they somehow

"related to abstract educational goals." *Id*. at 245-46. Instead, the Court demanded an exacting relationship between the club and a class—like French club and French class—before it found them to be *directly* related and thus curriculum related. *See id*. at 240; *see also Straights and Gays for Equality v. Osseo Area Schs.-Dist. No. 279* [*Osseo GSA II*], 540 F.3d 911, 914 (8th Cir. 2008) ("The circle of groups considered 'curriculum related' has a relatively small circumference and does not include 'anything remotely related to abstract educational goals'" (quoting *Mergens*, 496 U.S. at 24))).

The School Board bears the burden of proof that it does not have a "limited open forum." *See Mergens*, 496 U.S. at 236, 240 ("[U]nless a school could show that groups such as a chess club, a stamp collecting club, or a community service club fell within our description of groups that directly relate to the curriculum, such groups would be 'noncurriculum related student groups' for purposes of the Act."); *Pope v. E. Brunswick Bd. of Educ.*, 12 F.3d 1244, 1252 (3d Cir. 1993) ("The burden of showing that a group is directly related to the curriculum rests on the school district." (citing *Mergens*, 496 U.S. at 240)). Defendant cannot meet that burden: applying the definition in *Mergens*, numerous noncurriculum related student groups existed in Lake County's public middle schools, including two at Carver.

(a) *Carver Middle School's National Junior Honor Society is a noncurriculum related student group*.

The National Junior Honor Society (NJHS) at Carver is a noncurriculum related student group. NJHS is mainly a service organization. *See* NJHS Club Application (Doc. 4-3)[16]; Wright

[16] The group's planned activities include "Red Ribbon Week" (a drug prevention campaign, H.F. Decl. (Doc. 4-2) ¶ 5), "Can Good Drive," "Academic Competitions," "Community Service," and "School Service." *See* NJHS Club Application (Doc. 4-3), at 1.

Dep. (Doc. 28-8) at 17:4-8, 19:13-22:25.[17] The faculty sponsor of the NJHS testified that NJHS met after school (*i.e.*, during non-instructional time), Wright Dep. (Doc. 28-8) at 32:4-17, that students do not receive credit for participating in NJHS, *id.* at 35:1-8, that participation is not required by any course, *id.* at 35:9-12, and that the activities of NJHS do not relate to any particular course or concern the body of courses as a whole, *id.* at 35:18-38:20. Moreover, the School Board's Rule 30(b)(6) designee testified that "academic honor societies do not directly relate to the curriculum," Moxley Dep. (Doc. 28-5) at 100:4-6, and accordingly the Carver NJHS was approved as a student club "solely on the basis that it's a national honor society" and not because it relates to the curriculum, *id*. at 100:21-101:2.

For these reasons, Carver's NJHS is a noncurriculum related student group under *Mergens*. *See also Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd Cnty.*, 258 F.Supp.2d 667, 687 (E.D. Ky. 2003) (finding a community-service honor club to be noncurriculum related).

(b) *Carver Middle School's cheerleading squad is a noncurriculum related student group*.

The cheerleading squad is a noncurriculum related student group. The coach of the

[17] Linda Wright, the faculty sponsor of the NJHS, testified that there are no differences between the NJHS and the National Junior Beta Club, which formerly existed at the school, except that the Beta Club left selection up to the individual chapter while the Honor Society followed national guidelines. Wright Dep. (Doc. 28-8) at 17:4-12. The five requirements for admission to Carver's NJHS are leadership, service, character, citizenship, and academic achievement. *Id*. at 39:15-40:2. She further testified that the Beta Club predominantly performed community service and school service; *see id*. at 19:13-20:5; it also occasionally (around five of the nine to eleven years that Ms. Wright was the sponsor of the Beta Club, *see id*. at 19:1-4, 20:6-21:2) went to an annual academic competition in Orlando, *id*. at 20:6-9. Ms. Wright anticipated that future activities of the NJHS at Carver would be community-service related. *Id*. at 22:7-10.

cheerleading squad testified that cheerleading practices always take place after school, Haugabrook Dep. (Doc. 28-9) at 10:3-9, that participation in cheerleading is not required by any course and students do not get credit for participating, *id*. at 14:4-15, that cheerleading does not relate to any course at Carver, *id*. at 15:11-14, and that it is not taught in gym class, *id*. at 15:16-17; Forbes Dep. (Doc. 28-10) at 24:9-10.

For these reasons, Carver's cheerleading squad is a noncurriculum related student group under *Mergens*. *See also Straights and Gays for Equality (SAGE) v. Osseo Area Schs.-Dist. No. 279* [*Osseo GSA I*], 471 F.3d 908, 912-13 (8th Cir. 2006) (holding that cheerleading was a noncurriculum related student group where none of the courses offered at the school teach all of the subject matter performed in cheerleading, and cheerleading does not concern the body of courses as a whole.); *cf. also White Cnty. High Sch. Peers in Diverse Educ. v. White Cnty. Sch. Dist*., Civil Action No. 2:06-CV-29-WCO, 2006 WL 1991990 at *6 n.4 (N.D. Ga. July 14, 2006) ("Although the question of the curriculum relatedness of cheerleading and extracurricular sports is not currently before this court, it is not clear to the court that these activities could be considered 'curriculum related' within the scope of the EAA.").

D. The School Board denied access to Carver GSA because of the content of its proposed speech.

Because the Equal Access Act's obligations are triggered, Defendant must not "deny equal access or a fair opportunity to, or discriminate against" other clubs that students want to have at school. 20 U.S.C. § 4071(a). Despite this, School Board has denied the Carver GSA and its members, including H.F., access to the forum for student groups and the ability to operate at the school as a student group because of the proposed "content of the speech" at its meetings. *Id*.

Although the precise reason the School Board denied permission for the Carver GSA to form and operate as a student club is a matter of dispute, the dispute is immaterial because under either version, the Carver GSA was disallowed because of the proposed "content of the speech" at meetings. 20 U.S.C. § 4071(a). The School Board claims it disallowed the Carver GSA because the club did not satisfy any one of the four requirements in Policy 4.502(2). Moxley Dep. (Doc. 28-5) at 104:24–105:16. The School Board claims the Carver GSA did not "strengthen and promote critical thinking, business skills, athletic skills or performing [or] visual arts" or constitute an honor's society or student government. *Id*. It indicated that had the proposed purpose and content of the speech at meetings been different and incorporated these topics, the Superintendent would have approved the Carver GSA. *Id*. at 62:9-19.[18] Thus, her decision to disallow the Carver GSA is directly related to the club's "content of the speech" at meetings.

Plaintiffs have alleged that the denial of the Carver GSA was not about the purported failure to fit within the criteria of Policy 4.502(2) but about disapproval of discussion of LGBT-related issues. *See*, *e.g.*, 1/25/2013 e-mail from Sch. Bd. Member Tod Howard to Marybeth Harvey (Doc. 28-12) ("I am not interested in any clubs based on sex or sexual orientation.");[19] 2/11/2013 e-mail from Sch. Bd. Member Bill Mathias to Steven Moulden (Doc. 28-13) ("What

[18] Plaintiffs' counsel inquired how the application might be amended to conform to the district's policy but received no response. *See* 12/05/13 e-mail from Daniel Tilley to Steve Johnson (Doc. 28-11).

[19] "A district court may consider a hearsay statement in passing on a motion for summary judgment if the statement could be reduced to admissible evidence at trial or reduced to admissible form." *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1293-94 (11th Cir. 2012) (quoting *Macuba v. Deboer*, 193 F.3d 1316, 1322 (11th Cir. 1999)).

really bothers me is the sexual orientation club for 6[th] – 8th graders").[20] This reason too rests on the topics for discussion at the meetings. Under either version of the facts, the School Board disallowed the Carver GSA because of its "content of the speech at meetings."

E. No exception to the Equal Access Act applies.

"The expansive nature of the [Equal Access Act]'s description of student groups encompassed by the statute clarifies that there are few limits to the types of student groups permitted to meet once the [Equal Access Act] is triggered." *Gonzalez v. Sch. Bd. of Okeechobee Cnty.*, 571 F.Supp.2d 1257, 1262 (S.D. Fla. 2008) (citing *Mergens*, 496 U.S. at 239). Indeed, the Act only permits a school to deny access to a student club in limited circumstances, specifically, "to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary." 20 U.S.C. § 4071(f).

None of these statutory exceptions applies here. This Court has already held that a school's refusal to allow a GSA to form violates the Equal Access Act and thus, implicitly, that the clubs do not threaten school order or discipline or the well-being of students and faculty. *Gay-Straight Alliance of Yulee High Sch. v. Sch. Bd of Nassau Cnty.* [*Yulee GSA*], 602 F.Supp.2d

[20] The fact that the Carver GSA was denied despite satisfying the "strengthen and promote critical thinking . . . [or] . . . visual arts" requirement in Policy 4.502(2) (Doc. 4-1) further supports a finding that the Superintendent's decision to disallow the club was based on a disagreement with the club's speech. The Superintendent approves or disapproves clubs based solely on the information in their applications. Moxley Dep. (Doc. 28-5) at 50:25–51:17, 108:4-17. Carver GSA's application (Doc. 4-11) plainly states that its purpose and goals include "promot[ing] critical thinking by discussing how to address bullying" and "execut[ing] [those] strategies . . . to end bullying." *Id*. at 2. The School Board admitted that bullying is a "complex problem," Moxley Dep. (Doc. 28-5) at 27:22-23, that requires "critical thinking" to solve, *id*. at 28:13–29:21, but inexplicably did not know whether the Carver GSA's attempts to tackle this "complex problem" would require "critical thinking," *id*. at 109–113. And the club planned to "create educational pamphlets, fliers, posters, and/or artistic displays," which relates to the visual arts. *Id*. Given that these activities and goals satisfy Policy 4.502(2), the Carver GSA should have been approved under the Policy's own terms.

1233 (M.D. Fla. 2009).[21] And courts across the country have done likewise. *See Osseo GSA II*, 540 F.3d 911 (8th Cir. 2008); *Gonzalez*, 571 F.Supp.2d 1257 (S.D. Fla. 2008); *White Cnty.*, Civil Action No. 2:06-CV-29-WCO, 2006 WL 1991990 (N.D. Ga. July 14, 2006); *Boyd Cnty.*, 258 F. Supp. 2d 667 (E.D. Ky. 2003); *Franklin Cent. Gay/Straight Alliance v. Franklin Township Cmty. Sch. Corp.*, No. IP01-1518, 2002 WL 32097530 (S.D. Ind. Aug. 30, 2002); *Colin v. Orange Unified Sch. Dist.*, 83 F.Supp.2d 1135, 1148 (C.D. Cal. 2000); *cf. also Yulee GSA*, 602 F.Supp.2d at 1235 n. 2 ("There are thousands of secondary school [GSAs] nationwide."); *Gonzalez*, 571 F.Supp.2d at 1264 (recounting the undisputed facts about the number of GSAs in the U.S. and Florida in 2008).

These courts have rejected the notion that GSAs like the Carver GSA will negatively affect the well-being of high school students. *See, e.g., Yulee GSA*, 602 F.Supp.2d at 1236 (rejecting argument that using the name "Gay–Straight Alliance" for a student club would harm the well-being of students); *Gonzalez*, 571 F.Supp.2d at 1266-67 (rejecting assertion that GSA focused on preventing bullying and harassment and educating about issues affecting lesbian, gay, bisexual, and transgender students would cause "premature sexualization" of children or otherwise harm their well-being). Indeed, as the Southern District of Florida recognized, the GSA's purposes would actually protect the well-being of students, particularly non-heterosexual and transgender students, whose well-being must also be "taken into account." *Gonzalez*, 571 F.Supp.2d at 1267.

[21] The purposes of the GSA at Yulee High School were very similar to those of the Carver GSA, focusing on preventing bullying and harassment and education about issues affecting lesbian, gay, bisexual, and transgender students. *Yulee GSA*, 602 F.Supp.2d at 1235.

The fact that this case involves a middle school is a distinction without significance given the nature of the activities planned by the Carver GSA. There is no basis for any suggestion that middle school-aged children would be harmed by participation in the club.[22] In fact, the School Board admits it has no reason to think the Carver GSA would present a challenge to "the well-being of students and faculty," *see* 20 U.S.C. § 4071(f). Moxley Dep. (Doc. 28-5) at 129:5–130:11. It also admits that it has no basis to forecast that the Carver GSA would threaten school order and discipline. *Id*. at 127:1-6.

Therefore, the statutory exceptions in 20 U.S.C. § 4071(f) do not apply to prevent the application of the Equal Access Act to Carver GSA.

F. The School Board is liable for the Superintendent's denial of access to the Carver GSA in violation of the Equal Access Act.

Pursuant to 42 U.S.C. § 1983, the School Board "may be held liable for acts or policies of individuals to whom it delegated final decisionmaking authority in a particular area." *Holloman v. Harland*, 370 F.3d 1252, 1291 (11th Cir. 2004). Here, the School Board delegated final decision-making authority to the Superintendent by vesting her with the sole authority to approve student groups. Policy 4.502(3) (Doc. 4-1) ("All student clubs and organizations must be approved by the Superintendent before they can operate at a school."). Therefore, the School Board is liable for the Superintendent's disapproval of the Carver GSA.

The Superintendent's decision to approve or deny a student group's application has "legal

[22] Although School Board member Bill Mathias suggested in an e-mail with a blogger (Doc. 4-14) that the Carver GSA would not be "age appropriate," he offers no indication that the GSA plans to engage in inappropriate activities.

effect without further action by the [School Board]." *Holloman*, 370 F.3d at 1292 (citations omitted). Numerous applications were approved and denied without the School Board's consultation. Moxley Dep. (Doc. 28-5) at 96:8-19 (testifying if the Superintendent (or designee) signs the application, it is approved).

The School Board's delegation is further substantiated by the fact that it provides "no meaningful administrative review" of the Superintendent's decisions to approve (or disapprove) a student group. *See Scala v. City of Winter Park*, 116 F.3d 1396, 1401 (11th Cir. 1997) (negating final policymaking authority when the "official's decisions are subject to meaningful administrative review"); *see also Holloman*, 370 F.3d at 1292-93 (emphasizing that the opportunity for review must be *meaningful*) (interpreting alternatively a delegation as final of authority to mete out punishment without specific review); *Grech v. Clayton Cnty., Ga.*, 335 F.3d 1326, 1351 (11th Cir. 2003) (characterizing the necessary review to strip an official of final decision making authority as "significant"). The School Board has no set procedure allowing "meaningful review." When asked to provide the "procedural steps by which an application to operate as a Student Club may be brought before the final decision maker," the School Board explained "[t]here were not policy specific procedural steps to appeal the approval to the School Board" but that the "procedural guidelines" were produced in response to a request for production. *See* Sch. Bd.'s Interrogatory Resp. (Doc. 28-14) at ¶ 4. Yet the School Board provides no written policy or guidance for student clubs to appeal adverse decisions, *see* Moxley Dep. (Doc. 28-5) at 19:18-24, and provided none in discovery.[23] This stands in stark contrast to

[23] Even if the School Board had produced the documents as requested, the School Board's suggestion that the guidelines were among the documents produced to Request for Production, No. 2, seeking "[a]ll documents used in responding to any interrogatories" fails to

other provisions, where the School Board explicitly provides that guidance for aggrieved persons to appeal other Superintendent decisions. *Id*. at 173:18-174:9. The School Board does invite the public to offer comments during its public forum that precedes its meetings, and a student group might "comment" during this about the Superintendent's decision to deny their club application. *Id*. at 20:22-21:11. However, this is not "meaningful." The School Board advises the public that it will not take any action on a concern raised by a citizen during the "public input" portion of its meeting, unless the concern is on the agenda. *See* Lake Cnty. Sch. Bd. Reported Agenda (June 9, 2014) (Doc. 28-2) at 1. And the School Board controls its meetings. Therefore, the School Board affords no assurance that the School Board will actually consider and act on the public comment. *See* § 286.0114(2), Fla. Stat. (requiring public boards to give the public "a reasonable opportunity to be heard" before taking action, but not requiring an opportunity when no action is to be taken). Unsurprisingly, no student club has ever appealed to the School Board the Superintendent's decision to disallow it. Moxley Dep. (Doc. 28-5) at 19:1-4; *see also Holloman*, 370 F.3d at 1292-93 ("'If a higher official has the power to overrule a decision but as a practical matter never does so, the decision maker may represent the effective final authority on the question.'") (quoting in a parenthetical *Bowen v. Watkins*, 669 F.2d 979 (5th Cir. 1982)).

Finally, inasmuch as the School Board responded to the Carver GSA's formation in the spring of 2013 by changing its policy to disallow the Carver GSA in the future, *see* Pls.' Mot. for Prelim. Injunc. (Doc. 4) at 18, n. 17, in every respect the Superintendent's decision to deny Carver GSA's application "may fairly be said to represent official policy" of the School Board, *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978).

"specify[] the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them readily as the responding party." Fed.R.Civ.P. 33(d)(1).

Therefore, the School Board is liable for the Superintendent's violation of the Equal Access Act because it delegated authority to the Superintendent to approve or deny student club applications.

IV. CONCLUSION

The new school year has just begun. The School Board through its Superintendent has violated the Equal Access Act in disallowing the Carver GSA to form and operate as a student group. Plaintiffs request that the Court ensure that they are given equal access to all of the benefits afforded to any other noncurriculum related student group as the school year resumes. *See Mergens*, 496 U.S. at 237, 247 (requiring equal access to official recognition as a school club, including access to school newspaper, bulletin boards, public address system and club fair).

WHEREFORE, Plaintiffs request that the Court grant their motion for summary judgment on their Equal Access Act claim (Count 2) and award all the relief (except the declaration requested in ¶ B) demanded in the Complaint (Doc. 1).

Dated: August 22, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed today the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all persons registered for this case, including any opposing counsel that have appeared.

Respectfully Submitted,

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