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Student clubs and school discipline

Dear Friends and Clients,

Before you head off for the holidays, please take a moment to consider the cases and issues discussed below. These are issues that all of you deal with if you receive federal funding and they are important points to consider as you begin a new semester.

At the end of 2016 and in the middle of this school year, let me express my gratitude for being able to work with you regularly—some of you on a near daily basis. It's an immense pleasure and privilege for me to have you among my clients and friends.

Best,
Aaron

The Equal Access Act and school clubs

The Equal Access Act, 20 U.S.C. § 4071, states that it is "unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." In plain language, that means that when a school allows a noncurricular student club to meet on school property during non-instructional time, the school has to allow *any* such club to have a similar meeting regardless of that club's viewpoint or purpose. Curricular clubs are those that are related to the school curriculum in that they extend what is taught in a course offered by the school—think of a Math club or Spanish club. A noncurricular club—young Democrats, Bible club, chess club, etc.—is something that is outside the school's curriculum.

Once a school creates a "limited open forum" by allowing one non-curricular club, it must allow any other such clubs to meet if they meet certain elements: (1) attendance is voluntary, (2) the group is created and led by students (although a faculty member could be a sponsor, if a school requires each club to have a faculty member), and (3) the group "does not materially and substantially interfere with the orderly conduct of educational activities within the school." Assuming those provisions apply, the school must allow each group equal access.

Equal access requires that groups have the same access to meeting space, bulletin boards, announcement opportunities, and other school resources. Although a school could prohibit *all* groups from using certain spaces or resources, if it allows any group to use the resources, it must allow all groups to use the resources on an equal basis. The foundational case on the application of the Act is *Board of Education of Westside Community Schools v. Mergens* (1990), which involved a school that prohibited a Christian Bible club from meeting even though the school already had a chess club, scuba-diving club, and a service club. In an 8-1 decision, the Court held that the presence of even one non-curricular club creates a limited open forum. It also defined a "non-curricular club" as one "that does not directly relate to the body of courses offered by the school. A group directly relates to a school's curriculum if the group's subject matter is actually taught, or will soon be taught, in a regularly offered course; if that subject matter concerns the body of courses as a whole; or if participation in the group is required for a particular course or results in academic credit."

On December 6, in *Carver Middle School Gay-Straight Alliance v. School Board of Lake County, Florida*, the Eleventh Circuit Court of Appeals allowed a lawsuit to move forward that alleged that the school district prevented a gay-straight alliance club from forming when it had allowed other similar clubs. The main question was whether the middle school was considered a "secondary school" so as to fall under the Act. The court held that the middle school was a secondary school because it offered some courses that

allowed students to obtain high school credit. As a result, the court applied the Act to the school and remanded the case to the district court to allow the case to move forward.

The case is noteworthy for a few reasons. First, it is a reminder for all schools, especially between semesters, to look at their current policy on school clubs and to assess their own practices in light of the demands of the Equal Access Act. Second, in deciding that a middle school was a "secondary school," the court's reasoning may have broader effects on cases throughout the country as courts apply state law definitions to the Equal Access Act. Third, for those who are politically minded, the opinion was written by Judge William Pryor. Judge Pryor is not only generally considered to be a consistently conservative judge, he appears on President-elect Trump's list of potential Supreme Court nominees. Conservative or not, the opinion clearly applies the law to the facts and, I think, renders the correct decision.

If you have not reviewed and updated your policy on school clubs in a while, you may wish to use the semester break to look at it and evaluate whether it accomplishes the goals you have for your school.

U.S. Supreme Court extends deadlines in transgender case

Makes Trump administration transition a key factor

The Supreme Court extended the time for the parties to file their briefs in *Gloucester County School Board v. G.G.* on December 7. Now the school district's brief if due on January 3 and the student's brief will be due February 23. Given the delay, it is possible that the Court will not hear the case until its session beginning March 20 or April 17. And given the inauguration of President-elect Trump, it is possible that there may be a ninth justice confirmed to the Supreme Court before this case is heard and decided.

Perhaps more importantly, the government's position in the case (and the Department of Education's guidance on the issue) has come from an Obama administration, not a Trump administration. The Obama administration's interpretation of the provisions of Title IX were the basis for the lower court's opinion, and that interpretation could change once Trump takes office. I'll be following this issue very closely and we'll see what happens after the inauguration.

Trump's Education Secretary is a charter school champion

Betsy DeVos, the billionaire philanthropist tapped to be Trump's Education Secretary, has been a consistent advocate for school choice. As described in this *New York Times* article, DeVos has argued that charter schools should not only be championed by states, but regulated as little as possible. The theory, DeVos says, is that the market will remove deficient schools because parents will not send their children there. Government regulation is a burdensome (and often, unnecessary) addition to the market in that view. This approach will emphasize principles of choice, accountability, and quality that parents seek in choosing a school for their children.

Critics may cite Detroit as an example of the perils of too little regulation—an influx of for-profit entities establishing schools, for instance (nearly 80% in Michigan)—but it points to how DeVos will view the Department of Education's role in regulating schools.

I am particularly interested in how DeVos's leadership will shape offices within the Department. The Department of Education's Office for Civil Rights recently published its 2016 annual report. That report notes that OCR received 16,720 complaints this year, a record high for the office. Over the last ten years, complaints have increased in number by 188%. Although we need to protect children with disabilities and ensure they are receiving a free, appropriate public education, it will be interesting to see what DeVos does with OCR and other enforcement arms of the Department given her emphasis on deregulation.

Does race affect how you discipline students?

Speaking of OCR, the office issued a resolution recently regarding the Oakland Unified School District that concluded that the district disciplined African-American students more frequently and more harshly than their non-African-American peers. The trend is occurring across the nation.

Martin Luther King once noted that "the function of education is to teach one to think intensively and to think critically. Intelligence plus character - that is the goal of true education." The OCR's resolution letter is a good reminder for schools to look at their own policies—and how those policies are actually applied—to see whether we are building character through consistent and proportional discipline for all students. At the very least, it is something a school may wish to consider because OCR is interested in the issue and may increase its investigation and enforcement of discipline-related issues.

Questions?

Comments?

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