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February 8, 2006

Senate Education Committee  
Utah State Senate  
W115 Capitol Complex  
Salt Lake City, UT 84114

**Re: Senate Bill 97 “Student Club Amendments”**

Dear Member of the Senate Education Committee,

I write on behalf of the American Civil Liberties Union of Utah to express our concerns regarding the constitutionality of Senate Bill 97, “Student Club Amendments.” Senate Bill 97 must be understood in the context of the 1984 Federal Equal Access Act (EAA) (attached). The EAA mandates that if a public high school allows any student group whose purpose is not directly related to the curriculum to meet on school grounds, then it must provide other non-curricular student groups equal access to the school’s resources. Schools may not pick and choose among non-curricular student clubs based on their preferences for what students discuss. All non-curricular clubs must be treated equally or public high schools risk losing their federal funding.

Senator Buttars has indicated that SB 97 is an attempt to ban Gay Straight Alliances in public high schools, while still allowing other non-curricular clubs to meet. In reality, no bill can circumvent the requirements of the EAA without putting federal funds in jeopardy. Utah schools should not be required to choose between violating state law or losing federal funds.

The EAA, which was championed by supporters of high school religious clubs, upholds students’ First Amendment rights to free speech and association. Specifically, the Act provides that a school cannot deny equal access to student activities because of the “religious, political, philosophical, or other content of the speech at such meetings.” § 4071(a). In other words, when non-curricular student clubs are permitted, “the school may not deny other clubs, on the ‘basis of the content of their speech.’” *Board of Educ. of Weside Community Schools v. Mergens*, 496 U.S. 226, 236 (1990). SB 97 violates this prohibition on content discrimination.

SB 97 prohibits non-curricular clubs in which “a substantial, material, or significant part” of student “conduct or means of expression . . . involve[s] human sexuality.” Particularly troubling from a First Amendment standpoint is the bill’s expansive definition of “involve human sexuality.” The definition now includes: “Promoting or encouraging self-labeling by students in terms of sexual orientation” and “disclosing attitudes or personal conduct of students or members of their families regarding sexual orientation, attitudes, or belief.”

Schools can constitutionally regulate speech that is materially disruptive, indecent, lewd or sexually explicit. However the expanded definition of human sexuality catches protected speech that does not fall into the above categories. Disclosing one's sexual orientation, or discussing attitudes about sexual orientation could incorporate a wide range of social, political, and religious ideas. These discussions may be fundamental to a school club that seeks to create a safe environment for all students, regardless of their sexual orientation.

Silencing speech because some people find it objectionable is not only incompatible with the educational values central to our free political system—it is also against the law. In light of SB 97's conflict with the Equal Access Act and the First Amendment, I urge you to vote against the bill. Thank you for your consideration.

Sincerely,

Margaret Plane  
Legal Director

## **TITLE 20--EDUCATION**

### **CHAPTER 52--EDUCATION FOR ECONOMIC SECURITY**

#### **SUBCHAPTER VIII--EQUAL ACCESS**

##### **Sec. 4071. - Denial of equal access prohibited**

(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) "Limited open forum" defined

A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Fair opportunity criteria

Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that--

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Construction of subchapter with respect to certain rights

Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof--

- (1) to influence the form or content of any prayer or other religious activity;
  - (2) to require any person to participate in prayer or other religious activity;
  - (3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;
  - (4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;
  - (5) to sanction meetings that are otherwise unlawful;
  - (6) to limit the rights of groups of students which are not of a specified numerical size; or
  - (7) to abridge the constitutional rights of any person.
- (e) Federal financial assistance to schools unaffected

Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Authority of schools with respect to order, discipline, well-being, and attendance concerns

Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, 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.

(Pub. L. 98-377, title VIII, Sec. 802, Aug. 11, 1984, 98 Stat. 1302.)

#### Short Title

Section 801 of title VIII of Pub. L. 98-377 provided that: “This title [enacting this subchapter] may be cited as ‘The Equal Access Act’.”