Applying the Equal Access Act to Gay/Straight Alliances

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ALMOST EVERY ISSUE in a community becomes an issue in public schools, from religion in public life, to the prevention of violence, to issues of human sexuality. In fact, even if public school curricula excluded all discussion of sexual orientation, the presence of gay, lesbian, and bisexual students and employees in most school systems could not be ignored. For better or worse, school administrators increasingly will have to deal with issues related to sexual orientation.[1] Consider, for instance, this finding: in 1979 the average age for men to identify their sexual orientation as gay was twenty; by 1998 that age had dropped to thirteen.[2] The increasing role teens are playing in the debate over homosexuality is further evidenced by the increasing number of Gay/Straight Alliances, student-initiated groups that include gay and straight students who work together to address issues of homophobia. Currently there are over 600 Alliances in U.S. schools.[3]

To the surprise of some, a federal law known as the Equal Access Act[4] (EAA) has come to play a pivotal role in schools' response to the issue of homosexuality. The EAA originally was intended to ensure that student-initiated religious groups could use public secondary school facilities during noninstructional time on the same basis as other student groups, but the EAA provides protection for a wide range of student groups, some of them far afield from religious or other traditional school groups. As a result, schools covered by the EAA (not all are) are legally constrained in their ability to limit the topics addressed by student-initiated groups, including those groups organized for the purpose of discussing issues related to homosexuality. Within the last five years, two courts have held that schools covered by the EAA may be required to recognize student groups that wish to discuss these issues.

This article examines the EAA, the role it plays in protecting student-initiated groups, and the criteria school officials should consider when determining whether their school is covered by the EAA. The article focuses solely on the legal issues involved and does not advocate for or against any particular student groups in public schools.

The EAA

Congress passed the EAA in 1984. It applies to secondary schools that (1) accept federal funds and (2) per-

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1. *See* American Academy of Pediatrics, "Policy Statement on Homosexuality and Adolescence," *Pediatrics* 92, no. 4 (1993): 631–634, *available at* http://www.aap.org/policy/05072.html. *See also* Kevin Jennings, ed., *Telling Tales Out of School: Gays, Lesbians and Bisexuals Revisit Their School Days* (Los Angeles, CA: Alyson Publications, 1998); Donovan R. Wallings, ed., *Open Lives, Safe Schools* (Bloomington, IN: Phi Delta Kappa Int'l Inc., 1996).

2. Lambda Legal Defense and Education Fund, "News and Views: Youth Bring Gay Rights Movement to School," (Oct. 10, 1999) (citing study by Cornell University Professor Ritch Savin-Williams), *at* http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=494.

3. *Tolerance Club*, City News Service, Dec. 8, 1999, LEXIS, News Library.

4. 20 U.S.C. §§ 4071-74 (1999).

mit one or more student groups not directly related to the curriculum to meet on school premises during noninstructional time. For such schools, the EEA establishes an all-or-nothing choice: a school must implement an equal access policy for all noncurriculum-related groups, or it must ban all of them.

The EAA applies only to schools that have a "limited open forum." The statute says that a school has a limited open forum if it "grants an opportunity for one or more noncurriculum-related student groups to meet on school premises during noninstructional time."[5] Schools that have a limited open forum must provide all student groups with equal access to school facilities—for example, meeting space, bulletin boards, and the intercom system for announcements.[6]

A school can escape EAA coverage by closing its limited open forum: that is, by banning all noncurriculum-related groups.

If, however, a school does permit one or more such groups, it has created a limited open forum and may not discriminate against student-initiated groups in that forum on the basis of "the religious, political, philosophical or other content of" their speech.[7] Enforcement of the EAA is accomplished by allowing persons harmed by an EAA violation to sue. However, the EAA does not allow the federal government to withhold federal funds from schools that violate the Act.[8]

In its limited open forum, a school must ensure that (1) meetings are voluntary and student-initiated; (2) meetings are not sponsored by the school, the government, or its agents or employees; (3) employees or agents of the school are present at *religious* meetings only in a nonparticipatory capacity; (4) meetings do not materially and substantially interfere with the orderly conduct of educational activities in the school; and (5) nonschool persons do not direct, conduct, control, or regularly attend activities of student groups.[9]

Additionally, a school may not do the following: (1) influence the form or content of any prayer or other religious activity; (2) require any person to participate in prayer or other religious meeting; (3) expend public funds beyond the incidental cost of providing the space for a student-initiated meeting; (4) 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; or (5) allow meetings that are otherwise unlawful.[10] Congress enacted these requirements, in part, to address First Amendment Establishment Clause concerns. Following these restrictions should help a school to avoid activity that could be construed as establishing a religion.

In summary, the EAA is triggered if a school both accepts federal funds and allows one or more "noncurriculum-related" student groups to use school facilities. If the school is covered by the EAA, then it may not refuse a student-initiated group access to school facilities, as long as the student group satisfies the five requirements listed above. However, a school is not covered by the EAA if it does not accept federal funds or if it allows only "curriculum-related groups" (a term discussed later in this article) to use its facilities. A school not covered by the EAA has broad latitude in controlling student groups' speech, including speech regarding homosexuality and discrimination.[11]

EAA History

Congress passed the EAA primarily to protect student-initiated religious activity in public schools in the light of many questions left open by court decisions. Courts dealing with student religious expression have to grapple with two clauses in the First Amendment of the United States Constitution: the Free Exercise Clause and the Establishment Clause. The Free Exercise Clause reads, "Congress shall make no law prohibiting the free exercise of [religion]." The Establishment Clause reads, "Congress shall make no law respecting an establishment of religion." This language prohibits the government from acting to promote religion over nonreligion and

5. *Id.* § 4071(b).

6. Schools must allow equal access to the type of forum they create. For example, if a school allows one group to announce meetings over the intercom, then it must allow all groups to do so. Thus one court found that a school was *not* required to let a group read a prayer over the intercom system if it traditionally only allowed groups to make short announcements. Herdahl v. Pontotoc County School Dist., 933 F. Supp. 582 (N.D. Miss. 1996).

7. 20 U.S.C. § 4071(a).

8. *Id.* § 4071(e).

9. *Id.* § 4071(c).

10. *Id.* § 4071(d).

11. As one author put it:

> Under the attribution rationale, queer student groups have limited First Amendment rights because [if the school maintains a closed public forum] external observers and members of the school community may perceive the students' speech as the speech of the school. Because the Constitution grants broad latitude for the government to select which message it wishes to convey when the governmental entity is the speaker, the school could easily subject the club to regulation.

Doni Gewirtzman, *"Make Your Own Kind of Music": Queer Student Groups and the First Amendment,* 86 CAL. L. REV. 1131, 1152 (1998) (footnotes omitted).

from favoring one religion over another. Together these clauses support the fundamental notion that people should be able to worship (or not) without government intervention or endorsement.

The Free Exercise Clause and the Establishment Clause may come into tension when citizens wish to engage in religious expression in public facilities. Citizens have the right to the free exercise of religion, even on public grounds, but not in a manner that implies special treatment by the government. This situation is especially complicated in public schools because courts have expressed concern that students are particularly vulnerable to the impression that their school might favor a particular religion.[12]

The first case to reach the U.S. Supreme Court directly dealing with private student-initiated, as opposed to government-sponsored, religious expression occurred in the college setting. In *Widmar v. Vincent*[13] the Court ruled that a state university with an equal access policy could not deny a religious group access to school facilities. Specifically, the Court held that allowing the group to use school facilities would not result in a violation of the Establishment Clause.[14] A key finding was that university students were mature enough to understand the difference between school endorsement of religion and the application of an equal access policy.[15]

Lower courts split on whether *Widmar* applied to secondary schools.[16] This led Congress to hold hearings in 1983 on the issue of student-initiated religious groups. As a result, Congress made two significant findings. First, it found that because the law was so unclear, school boards were adopting policies banning these groups rather than risk lawsuits. Second, Congress found that, like the college students in *Widmar*, high school students were mature enough to understand the difference between an equal access policy and a policy designed to establish religion.[17]

The following year Congress passed the EAA. Although the catalyst for this legislation was to provide student-initiated religious groups opportunities to use public school facilities, the EAA itself was worded broadly to prevent discrimination "on the basis of the religious, political, philosophical, or other content of the speech" at student club meetings. Thus, the EAA requires that schools, if they choose to permit noncurriculum-related groups, provide access to a range of student-initiated ideas and viewpoints.

Supreme Court Review

In 1990 the Supreme Court reviewed a challenge to the constitutionality of the EAA. The case, *Westside Community Schools v. Mergens*,[18] involved a student-initiated religious group that had been denied access to facilities at a high school in Omaha, Nebraska. The school system defended its actions with two arguments. First, it argued that the EAA violated the Establishment Clause. Second, it argued that even if the EAA was constitutional, it did not apply in this situation because all groups at the school were curriculum-related, and thus the school had not established a limited open forum.

The Court held that the EAA did not violate the Establishment Clause because it requires only that schools with limited open forums have an equal access policy.[19] The Court ruled that Congress' findings were sufficient to conclude the high school students were mature enough to understand the difference between the results of an equal access policy and government sponsorship of religion.[20]

As to the second argument—that the EAA did not apply to the school because the school had not established a limited open forum—the Court had to determine whether the school had recognized noncurriculum-related clubs. The school undoubtedly had clubs, but were they curriculum related? The EAA itself provides no definition of "noncurriculum related." Looking at dictionary definitions and the wording of the EAA, the Court determined that a group is noncurriculum related if it does not relate

12. For example, in a case holding unconstitutional a state plan that provided funding to parochial school teachers to teach state-mandated course material, the Supreme Court stated that the provision of funds would provide "a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school." School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985).

13. 454 U.S. 263 (1981).

14. *Id.* at 271–274.

15. *Id.* at 274.

16. *Compare* Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981) (holding that the Establishment Clause forbids student-initiated religious groups from meeting on secondary school property), *with* Bender v. Williamsport Area Sch. Dist., 563 F. Supp. 697 (D.C. Pa. 1983) (subsequent history omitted) (holding that the public forum doctrine requires schools to permit religious meetings).

17. S. Rep. No. 98-151, at 6 (1974), *reprinted in* 1984 U.S.C.C.A.N. 2349.

18. 496 U.S. 226 (1990).

19. *Id.* at 247–48.

20. *Id.* at 250–51.

"directly" to the school's curriculum. The Court established four criteria for courts and schools to use in determining whether a group is curriculum related. A group is curriculum related if any of the following criteria apply:

(1) it involves a subject that is actually taught, or soon will be taught, in a regularly offered course;
(2) the subject matter of the group concerns the body of courses as a whole;
(3) participation in the group is required for a particular course; or
(4) participation in the group results in academic credit.[21]

Applying these criteria, the Court found that the school's chess and scuba clubs did not directly relate to the curriculum and, therefore, the school had created a limited open forum. As a result, the EAA was triggered, and the school could not deny access to a student prayer group on the basis of the group's religious purpose.

Application of the EAA to Gay/Straight Alliances

Given the EAA's focus on student religious groups, some were surprised when the EAA became the focal point of disputes between student-initiated Gay/Straight Alliances and school boards that attempted to deny them official recognition. Within the past five years two school districts were sued in federal court in just such disputes. In 1995 a student group at East High in Salt Lake City, Utah, requested permission to form a Gay/Straight Alliance. Soon another group, the "Students Against Faggots Everywhere" (S.A.F.E.), also requested permission to use school facilities. The Salt Lake City School Board contacted the Utah Attorney General's office to ask whether the board could deny the applications. Both the Attorney General and the Utah State Board of Education ruled that, under the EAA, the clubs were entitled to use school facilities as long as they did not engage in illegal activity.[22] To avoid that outcome, the board passed a resolution closing its limited open forum, allowing only curriculum-related groups to use school facilities. As a result, the school terminated forty-six noncurriculum-related student groups, including the Key Club and a Bible club.[23]

In response, several members of the Alliance sued the board alleging that the school had violated the EAA. In *East High Gay/Straight Alliance v. Board of Education Salt Lake City School District*,[24] the court found that after 1998 the school in fact allowed only curriculum-related groups. The EAA therefore did not cover the school, and the school was not required to accept these (or any other) noncurriculum-related groups.[25] Concurrent with, and partly in response to this court case, the Utah legislature passed a bill requiring school boards to ban student groups that encourage criminal behavior, promote bigotry, or involve human sexuality.[26]

The community became concerned about the lack of student groups, and the Salt Lake City School Board began considering proposals to reestablish the limited open forum. At a board meeting in July 2000, one speaker expressed concern that the policy restricted students' ability to connect with their school. Other community members argued that fewer student groups translated into fewer leadership positions, possibly putting students at a disadvantage when they apply to college.[27] The school board had its own reasons for wanting to change the policy: It hoped that doing so would encourage students to drop a lawsuit filed after the school denied the application of an academic club, known as PRISM (People Recognizing Important Social Movements), which planned to discuss gay and lesbian issues. In addition, the board had learned that the state's insurance policy might not pay for the cost of the litigation.[28] In October 2000 the board agreed to grant both PRISM and the Alliance access to school facilities, and all legal actions were dropped.

Perhaps the most dramatic case involving the EAA occurred in Orange County, California, where a clash between a conservative school board and students seeking recognition of a Gay/Straight Alliance led to a courtroom defeat for the board.[29] Administrators at El

21. *Id.* at 239–40.

22. Regina M. Grattan, *It's Not Just for Religion Anymore: Expanding the Protections of the Equal Access Act to Gay, Lesbian, and Bisexual High School Students*, 67 GEO. WASH. L. REV. 577, 587–88 (1999).

23. Ruth Ann Mitchell, *Ironic Twist Dooms West Bible Club*, THE DESERET NEWS, Feb. 28, 1996, at 1, *available in* LEXIS, News Library.

24. 81 F.Supp.2d 1166 (D. Utah 1999).

25. *Id.* at 1184.

26. Utah Code Ann. § 53A-3-419 (2000).

27. Heather May, *Schools May Restore Nonacademic Clubs*, SALT LAKE TRIBUNE, July 19, 2000, LEXIS, News Library.

28. *Id.*

29. *See* Benjamin Dowling-Sendor, "Equal Access Means Equal: What Happens When Community Opinion and Students' Rights Collide," *American School Board Journal* (July 2000): 22–23, 60 (provides another account of the events occurring in the El Modena law suit).

Modena High forwarded the club's application to use school facilities to the school board. While the board considered the application, the principal of the high school told the students that the board would be more likely to approve the application if the students changed the name of the club from the "Gay-Straight Alliance" to the "Tolerance Club" and stated in the club charter that the group would not discuss sex. The students refused the changes. They noted that other clubs were not required to ban any discussion of sex[30] and they said that the name change was demeaning to gay people.[31] Before making a decision about the application, the board held two public hearings. At the second, one board member opined, "The Bible says we're all sinners, but this, in my opinion, is asking us to legitimize sin." Another board member said, "We know the law is on their side, but our community members don't want it."[32] Three months after the initial application was made, the board voted unanimously to deny the application.

When it became clear that the board likely would deny their application, but before the final decision was made, the Alliance filed suit in federal court. In *Colin v. Orange Unified School District*, [33] a federal district court considered the students' motion for a preliminary injunction to allow the group to meet on school grounds until a final court ruling. The motion required the court to evaluate the students' chance of success at trial, and the court determined that a full trial likely *would* result in a ruling that the high school had violated the EAA. The existence of thirty-eight noncurriculum-related clubs, including a Christian club, clearly established that the school had created a limited open forum.[34] As a result, the court found that a trial court likely would rule that the EAA applied and that the school was legally obligated to recognize the Gay/Straight Alliance.[35] Based on this analysis, the court granted an injunction that required the school to allow the group to meet until the case went to trial.

A week after the court issued the injunction, the board voted to require that high school students have a "C" average and parental permission before joining any club. In addition, the board barred all extracurricular clubs from discussing sexual matters. Finally, the board, in a move that upset many parents, passed a resolution preventing elementary and middle schools from recognizing any noncurriculum-related groups, closing the limited open forum at those schools. One parent stated that the decision was "basically a reactionary situation that didn't solve [the district's problem because] [t]hey still have the gay student club in high school and we don't have the clubs." [36] However, at least one parent group, Orange Unified Citizens for Safe Schools, advocated that the board ban noncurriculum-related groups at the high school as well. The president of the group, calling for a ban on all noncurriculum-related clubs, said in reference to the Gay/Straight Alliance, "They create 'victims' like [the plaintiffs], then if the community opposes it, they make the community look like a bunch of bullies . . . They [members of the Gay-Straight Alliance] wait until they are embedded in the community, then they really break loose."[37] In the end, the board settled the lawsuit by allowing the Alliance to keep its name and by providing the group the same access to school facilities enjoyed by other student groups.[38]

North Carolina's Situation

The EAA applies to North Carolina in the same way it applies to Utah and California. If a school is covered by the EAA, it cannot legally deny an application from a Gay/Straight Alliance. With one exception,[39] school boards in North Carolina have no explicit policies about the rights of homosexual students and may be caught off guard if students decide to form a Gay/Straight Alliance.

30. Kate Folmar, *Students Testify on Gay Club; They Explain to a Federal Judge Why Their Organization, Banned by the Orange Unified School District, Should be Allowed at El Modena High*, L.A. TIMES, Jan. 25, 2000, at B1 (quoting plaintiff Heather Zetin's testimony that "prohibiting the group from discussing sexuality would send the message that gay people are inherently more sexual or sexually promiscuous than just people.").

31. *Id.* (quoting plaintiff Anthony Colin: "Tolerance means 'to put up with,'" he said. "Like Jews were 'put up with' and blacks were 'put up with.' . . . I don't respect that word at all. I don't believe in it. A better word," he said, "would be acceptance.").

32. Colin v. Orange Unified School District, 83 F.Supp.2d 1135, 1139 (C.D. Cal. 2000).

33. 83 F.Supp.2d 1135 (C.D. Cal. 2000).

34. *Id.* at 1143.

35. *Id.* at 1146.

36. Jeff Gottlieb and Kate Folmar, *O.C. District's New Rules for Clubs Trigger More Protests*, L.A. TIMES, Feb. 12, 2000, at B1.

37. *Tolerance Club*, City News Service, Santa Ana, Dec. 8, 1999, *available in* LEXIS, News Library.

38. Lambda Legal Defense and Education Fund, "News and Views: El Modena Students and School Board Resolve Lawsuit Over Gay-Straight Alliance," (Sept. 7, 2000) *at* http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=696.

39. The Chapel Hill–Carrboro City Board of Education has adopted a policy prohibiting discrimination on the basis of sexual orientation.

No state law in North Carolina explicitly prevents students from forming groups to discuss issues related to sexuality. State law does, however, require the State Board of Education to direct sex education programs to teach that "a mutually faithful monogamous heterosexual relationship in the context of marriage is the best lifelong means of avoiding disease transmitted by sexual contact."[40] Moreover North Carolina law requires that any instruction concerning the causes of sexually transmitted diseases "where homosexual acts are a significant means of transmission" must include instruction on the current legal status of those acts.[41] Based on these provisions, a school board could argue to a court that accepting a group that deals with any issue related to homosexuality is inconsistent with North Carolina law. It is unlikely, however, that such an argument would succeed, in part because Gay/Straight Alliances and similar groups generally do not discuss or promote any type of sexual activity. These groups exist to promote respect and acceptance of all students regardless of their sexual orientation, as is indicated by this fairly typical Alliance mission statement from the student group in the *Colin* case:

> Our goal in this organization is to raise public awareness and promote tolerance by providing a safe forum for discussion of issues related to sexual orientation and homophobia . . . This is not a sexual issue, it is about gaining support and promoting tolerance and respect for all students.[42]

Because Gay/Straight Alliances do not discuss sexual conduct, it would be difficult to successfully argue that these groups promote illegal activity. Indeed, a group might argue that Gay/Straight Alliances support character education provisions included in North Carolina law. Those provisions allow North Carolina school boards to require schools to teach character traits including courage, kindness, and respect.[43] As a result, a court is not likely to find that Alliance groups conflict with North Carolina law.

While at present there are no identified Gay/Straight Alliances in North Carolina schools, it is only a matter of time before some school will receive an application from such a student group. In evaluating the application, it seems a safe assumption that school administrators will be faced with objections from some in the community. At the same time, denying student group applications raises difficult and potentially expensive legal issues.[44]

Determining Whether a School Is Covered by the EAA

School administrators should determine whether the EAA applies to their school. Because all public secondary schools receive federal funds, the only real question is whether the school has a limited open forum. The answer is "yes" if a school allows one or more "noncurriculum-related groups to meet on school premises during noninstructional time."[45]

Whether or not a group is curriculum related is a fact-specific inquiry that depends on a school's curriculum, but it is not solely up to school officials to determine what is curriculum related. The Supreme Court stated:

> To the extent that petitioners contend that "curriculum related" means anything remotely related to abstract educational goals, however, we reject that argument. To define "curriculum related" in a way that results in almost no schools having limited open fora, or in a way that permits schools to evade the Act by strategically describing existing student groups, would render the Act merely hortatory.[46]

School officials and lower courts must be aware that while a school's policy may require that all groups be curriculum related, in practice the school may be allowing noncurriculum-related groups to use school facilities. Therefore, a court cannot determine whether a school has a limited open forum solely by reference to the school's policy. A court will look at the policy and also will analyze every student group to determine if all are curriculum related. Finally, school officials carry the burden of proving a group's status as curriculum related.[47]

40. N.C. GEN. STAT. § 115C-81(d)(3) (hereinafter G.S.).
41. *Id.*
42. *Colin*, 83 F.Supp.2d at 1138.
43. G.S. 115C-81(h).
44. One school district spent as much as $300,000 defending itself against allegations that administrators violated the EAA. Kate Folmar and Marissa Espino, *Orange May Require Parents' OK on Clubs*, L.A. TIMES, Feb. 11, 2000, at A1.
45. 20 U.S.C. § 4071(b).
46. *Mergens,* 496 U.S. at 245.
47. Pope v. East Brunswick Board of Education, 12 F.3d 1244, 1252 (3d Cir. 1993), *citing Mergens*, 496 U.S. at 240.

Other Court Rulings on Curriculum-Relatedness

Because the *Mergens* decision requires such a close examination of a school's curriculum, it is difficult to predict how any particular court will apply these rules to a particular school. Nonetheless, a look at how some courts have made this determination can provide school officials with an indication of how they should evaluate their own student group policies and practices.[48]

1. Does the group's subject matter have a direct relationship to any class actually taught?

Mergens provides an example of how a court decides whether a group involves subject matter currently taught in the curriculum. Of thirty voluntary clubs at Westside High School, the Court determined that the Subsurfers (a scuba diving club), the Chess Club, and the Peer Advocates Club (a service group that worked with special education classes) were noncurriculum-related clubs. Although the physical education program included swimming, scuba diving was not part of a regularly offered course. Similarly, although math teachers at the school encouraged students to participate in the chess club, participation was not required for any class and did not result in any extra credit. As for the Peer Advocates, the principal testified that the club did not directly relate to any class at the school and participation was not required.[49] Courts will look for a direct relationship with classes actually taught.

In *Colin v. Orange Unified School District*,[50] the school board argued that because the district had a sex education curriculum and because the Alliance dealt with issues of sexuality, the Alliance constituted a curriculum-related group. (If the school board had been successful in its argument, it could have denied the group's application because curriculum-related groups constitute school-sponsored speech, which schools have broad authority to regulate.)[51] The court found that the Alliance dealt primarily with issues of tolerance and homophobia, not sexuality. Furthermore, the court said, "[e]ven if there were some overlap between what the students wanted to talk about and a subject covered in the curriculum at [the school], a greater nexus is still required or else the club is still considered 'noncurriculum related.'"[52] A curriculum-related student group is "one that has more than just a tangential or attenuated relationship to courses offered by the school," the court said, and "must at least have a more direct relationship to the curriculum than a religious or political group would have."[53]

In *East High Gay/Straight Alliance v. Board of Education Salt Lake City School District*,[54] the school system had specifically attempted to avoid the EAA by adopting a policy in which only curriculum-related groups were allowed to use school facilities. The Gay/Straight Alliance argued that, whatever its policy, in practice the school supported noncurriculum-related groups. The court disagreed. After analyzing the policy and the student groups supported by the high school, the court determined that, after the school's only noncurriculum-related group became part of student government, the district was not subject to the EAA and could exclude noncurriculum-related groups including the Alliance.

Unlike *Colin*, *East High* found that overlap between a student group's activity and a course taught at the school does make the group curriculum-related. Specifically, the court said, "If at least part of a club's activities enhance, extend, or reinforce the specific subject matter of a class in some meaningful way, then the relationship between the club and class is more than tangential or attenuated, and the club may be 'directly related' to the class in terms of its subject matter."[55] Three groups—the Future Homemakers of America, the Future Business Leaders of America, and Odyssey of the Mind—were found to be directly related to the curriculum. Future Homemakers worked to provide food, clothing, and childcare to those in need, activities directly related to learning about food, sewing, and child development skills taught in the Family and Consumer Science curriculum.[56] Similarly, Future Business Leaders allowed students to explore career opportunities related directly to the Applied Technology Education curriculum.[57] Finally, the Odyssey of the Mind group taught creative thinking and problem solving skills. Although the court agreed with the Alliance that this involved a skill set rather than a substantive academic subject, the group

48. Of the cases cited here, the Supreme Court decision is the only one that is binding on North Carolina courts. Other opinions may be persuasive to a North Carolina court, but courts in this state are not required to follow their reasoning.

49. *Mergens,* 496 U.S. at 245–46.

50. 83 F.Supp.2d 1135 (C.D. Cal. 2000).

51. Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

52. *Colin*, 83 F.Supp.2d at 1145.

53. *Id.*, *citing Mergens*, 496 U.S. at 238.

54. 81 F.Supp.2d 1166 (D. Utah 1999).

55. *Id.* at 1177 (emphasis omitted).

56. *Id.* at 1181.

57. *Id.* at 1182.

Free Speech Claims

Congress passed the Equal Access Act (EAA) to address concerns arising from the religion clauses of the First Amendment. The EAA does not eliminate the possibility of a student suing for a violation of the right to free speech, which is also protected by the First Amendment.[1] As a result, even if a school is not covered by the EAA, its policies and practices with regard to student groups may still be vulnerable to a legal challenge.

Schools that maintain closed public forums have broad latitude in controlling student groups because a court likely would characterize activities carried on by curriculum-related clubs as school-sponsored speech.[2] Schools may regulate school-sponsored speech, "so long as their actions are reasonably related to legitimate pedagogical concerns."[3]

Courts will view with suspicion school officials' efforts to ban speech *solely* because they disagree with the content of that speech. For example, in *East High* the court was willing to consider the students' allegation that the school had an unwritten policy of discriminating against "gay positive" viewpoints in the curriculum. The students argued that this policy was apparent when the school refused to approve the application for a curriculum-related club, called the Rainbow Club, that planned to discuss the "impact, contribution and importance of gay, lesbian, bi-sexual and transgender individuals."[4] The court found that the students' allegations had enough merit to go to trial because "there remains a genuine issue of material fact concerning whether an unwritten policy exists barring plaintiffs from expressing their viewpoint on matters germane to the permissible subject matter of the defendants' existing forum for 'curriculum-related' student groups."[5] This issue was never tried, however, because the court ultimately dismissed the lawsuit after the school declared that it would not censor gay-positive views.[6]

1. 20 U.S.C.A. § 4071(D)(5) (stating that the EAA should not be construed to sanction the violation of constitutional rights).

2. *See, e.g.,* Doni Gewirtzman, *"Make Your Own Kind of Music": Queer Student Groups and the First Amendment*, 86 CAL L. REV. 1131, 1152 (1998).

3. *See* Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 273 (1988) (affirming the constitutionality of a school's censorship of a school-sponsored newspaper).

4. East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District, 81 F.Supp.2d 1166, 1195 (D. Utah 1999).

5. *Id.* at 1197.

6. Lambda Legal Defense and Education Fund, "Gay Positive Views Will Not be Censored, Salt Lake City School Officials Guarantee," (Dec. 2, 1999) *at* http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=535.

directly related to the curriculum because the teacher, who also was the group's faculty advisor, taught these skills in his regular classes.[58]

The court found that one group, the Improvement Council at East (ICE), a group dedicated to creating a caring, positive school environment, initially did not relate directly to the curriculum.[59] Of particular significance to the court was the fact that the school itself had previously denied the group's application to become a curriculum-related group. Thus, during the time that ICE operated as an independent group, it qualified as a noncurriculum-related group. However, the school eventually included ICE as part of student government, a group that was curriculum related. When that happened, the school's only noncurriculum-related club was gone, the limited open forum was closed, and the EAA no longer applied.

The *East High* court stated that its analysis was qualitative rather than quantitative.[60] That is, the court said it would look at a group's activities as a whole, not classify each activity and then determine whether it, in isolation, directly related to the school's curriculum. The court rejected the Alliance's argument that activities like fund raising and social events were by definition not curriculum related.[61]

In *Pope v. East Brunswick Board of Education,*[62] the Third Circuit Court of Appeals found that a class's limited participation in Key Club, a student service organization affiliated with the Kiwanis, was not sufficient to make the group curriculum related. The history class at the school included a unit on homelessness, hunger, and poverty. As part of this unit, students participated in and coordinated the Key Club's food and toy drives. The court held that class participation in one or two club activities was insufficient to qualify the club's subject matter as "taught in a regularly offered course." The court stated, "The history course and the Key Club accordingly have different subject

58. *Id.* at 1183–84. This allowed the *East High* court to distinguish the Odyssey of the Mind club from the chess club in *Mergens*. While both clubs facilitated the learning of a skill, chess strategy, the math department in *Mergens* did not teach chess.

59. *East High,* 81 F.Supp.2d at 1180.

60. *Id.* at 1177–80.

61. *Id.*

62. 12 F.3d 1244 (3d Cir. 1993).

matter . . . [T]he curriculum-relatedness of a student activity must be determined by reference to the primary focus of the activity measured against the significant topics taught in the course that assertedly relates to the group."[63] Under this test, the primary focus of the group must directly match the focus of the class. The primary focus of the Key Club was community-related service, while the primary focuses of the history unit were homelessness and poverty.[64]

The courts in *Colin* and *Pope* held that some overlap between a group and a course taught in school is insufficient to find that the group is directly related to the curriculum. In contrast, the court in *East High* seemed to suggest a looser standard—that is, if a group extends a course in a meaningful way, then it is directly related to the curriculum.

2. Does the subject matter of a group concern the body of courses as a whole?

A group can be curriculum related for EEA purposes if it concerns the body of courses as a whole. The courts have not provided much specific guidance on this point. *Mergens* did strongly suggest that student government satisfies this criteria.[65] The *East High* court determined that the National Honor Society related to the curriculum as a whole by honoring and encouraging academic achievement in the specific context of that high school.[66] In contrast, a federal district court in Washington held that a group that combined general academic achievement and community service did not relate to the body of courses as a whole.[67]

3. Does participation in a group's activities by students in a high school course make that group curriculum related?

As discussed above, the plaintiffs in *Pope* argued that the history club's participation in Key Club food and toy drives satisfied this part of the *Mergens* test. The court focused on the fact that the history class did not require students to maintain membership in the club after the drives were over. The court said that allowing limited class participation in a student group to qualify the group as curriculum related would make the EAA too easy to evade and speculated that schools could have classes participate in one or two activities of each club they wished to have at the school. This would "not be consistent with the low threshold for triggering the Act."[68]

4. Does giving academic credit for participation in a group make the group curriculum related?

In *Garnett v. Renton School District*, [69] a federal district court in Washington held that allowing members of the school dance squad club to petition for a physical education credit did not make the club curriculum related. Allowing such an arrangement to qualify a club as curriculum related would make the EAA too easy to avoid. The court stated that "[t]he *Mergens* criteria require a consideration of substance and not just appearance."

Court Ruling on Noninstructional Time

As discussed above, a school has a limited open forum under the EAA when it recognizes at least one noncurriculum-related group that meets during noninstructional time. The EAA defines noninstructional time as "time set aside by the school before actual class time begins or after actual classroom instruction ends."[70] The Ninth Circuit Court of Appeals extended this definition, holding that noninstructional time includes lunch period.[71] The court concluded that because no classroom instruction occurred during lunch period, lunch period qualified as noninstructional time for EAA purposes. This case is not binding on North Carolina courts, but it does suggest that other courts may read the definition of "noninstructional time" broadly.

School Options vis-à-vis Student-Initiated Groups

Whether or not a school is covered by the EAA, it still possesses certain rights and responsibilities vis-à-vis student-initiated groups.

Options within a Limited Open Forum

A school that maintains a limited open forum does not give up all control over student groups. The EAA recognizes schools' authority to control group activities that would disrupt the school environment. The statute

63. *Id.* at 1253.
64. *Id.*
65. *Mergens*, 496 U.S. at 245.
66. 81 F. Supp.2d 1166, 1182–84.
67. Garnett v. Renton School District, 772 F.Supp. 531 (W.D. Wash. 1991), *rev'd on other grounds*, 987 F.2d 641 (9th Cir.1993).
68. *Pope*, 12 F.3d at 1252.
69. 772 F.Supp. at 534 (W.D. Wash. 1991), *rev'd on other grounds*, 987 F.2d 641 (9th Cir.1993).
70. 20 U.S.C. § 4072(4).
71. Ceniceros v. Board of Trustees of the San Diego Unified School. Dist., 106 F.3d 878 (9th Cir. 1997).

provides that it is not to be interpreted "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 the attendance of students at meetings is voluntary."[72] This provision is bolstered by another that prohibits nonschool personnel from conducting or controlling group meetings,[73] thus preventing outsiders from using school facilities to reach a student audience. Moreover, a third provision states that a meeting may not "materially and substantially interfere with the orderly conduct of educational activities within the school."[74] Finally, the EAA allows schools to ban groups that advocate illegal activity.[75]

In addition to these limits contained within the EAA itself, schools choosing to maintain a limited public forum (as well as schools that do not) have the authority to give parents a veto over which groups their children join. As noted above, the Salt Lake City school board's policy required students to maintain a certain grade point average and to obtain parental permission before joining a noncurriculum-related club.[76] Other schools have chosen to send home with every child a list of noncurriculum-related groups so that parents can discuss with them which groups it would be appropriate to join.

Options within a Closed Forum

The EAA does not apply when a school restricts student activities to curriculum-related groups only, thus maintaining a closed forum. School officials wishing to maintain a closed forum must use consistent standards to determine which groups qualify as curriculum related.

The Utah high school in *East High* found itself in court again when it denied the application of a student group seeking recognition as a curriculum-related group. The student group, PRISM, planned to "serve as a prism through which historical and current events, institutions and culture can be viewed in terms of the impact, experience and contributions of gays and lesbians."[77] Schools officials denied the application claiming that the group's focus was not directly related to the school's curriculum. PRISM asserted that its subject matter was directly related to the United States history, American government, and sociology courses at the school.[78] The court granted PRISM the right to meet on school grounds until the case could go to trial, finding that the high school had used inconsistent criteria to determine whether a group was curriculum related. The court found that PRISM was at least as directly related to the curriculum as the Polynesian Club and a humanities club, both of which the high school accepted as curriculum related.[79] The school's inconsistent determination of curriculum-related status[80] favored some viewpoints—the Polynesian Club's, for example—over others—specifically, the PRISM club's—and violated some students' First Amendment free speech rights.[81]

A school that currently has a limited open forum may change that policy or practice, moving to curriculum-related groups only, so that the EAA will not apply, a point made in *Mergens*.[82]

Conclusion

Schools covered by the EAA cannot deny access to a group solely because it deals with issues related to homosexuality. Any secondary school that (1) accepts federal funds, and (2) allows at least one noncurriculum-related club to meet on school grounds during noninstructional time is covered by the EAA. The Supreme Court in *Mergens* indicated that the phrase "noncurriculum related" should be interpreted broadly to ensure that schools with a limited open forum do not engage in viewpoint discrimination. School officials can escape the reach of the EAA altogether by maintaining a closed forum—that is, allowing only curriculum-related groups—or they can comply with the EAA's terms and allow a wide range of student groups to exist. ■

72. 20 U.S.C. § 4071(f).
73. *Id.* § 4071(c)(5).
74. *Id.* § 4071(c)(4).
75. *Id.* § 4071 (d)(5).
76. Gottlieb and Folmar, *supra* note 36.
77. East High School PRISM Club v. Seidel, 95 F.Supp.2d 1239, 1243 (D. Utah 2000).
78. *Id.*
79. *Id.* at 1247–51.
80. East High criteria for determining when a group qualified as curriculum related mirrored the four criteria established in *Mergens*. The district provided students seeking recognition for curriculum-related groups with a two-page application. The first page listed the district's criteria, which were essentially the same as the four *Mergens* criteria discussed in the body of this article. On the second page of the application were directions to the group to include its mission statement, to provide the curricular basis for the club, and to attach teacher disclosure statements describing the relevant course material. *East High PRISM Club,* 95 F.Supp.2d at 1242.
81. *Id.* at 1244–45.
82. *Mergens*, 496 U.S. at 241.