Brigham Young University Education and Law Journal

Volume 1999 | Number 1 Article 6

Summer 3-1-1999

Gay/Straight Alliances and Other Controversial Student Groups: A New Test for the Equal Access Act

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GAY/STRAIGHT ALLIANCES AND OTHER CONTROVERSIAL STUDENT GROUPS: A NEW TEST FOR THE EQUAL ACCESS ACT

I. INTRODUCTION

At a recent hearing in the case of *East High Gay/Straight Alliance v. Board of Education*, Utah Assistant Attorney General Dan Larsen, arguing on behalf of the school board stated, "[t]o now throw open the door to gay student clubs and others would rattle schools. . . . It would send a shock wave not only through the district, but the state and possibly the nation."[1] Mr. Larsen fears the problems that may arise in schools and throughout communities if gay student clubs are allowed equal access to school facilities. His fears may be well-grounded. Gays and lesbians, in general, have historically been subjects of violence and ostracism. Students who claim to be gay are just as prone, if not more prone, to face such animus. But the fear isn't necessarily limited to, or even directed at, the safety of the gay students. Mr. Larsen expresses the perceptions of perhaps many people who feel that having gay clubs in the schools would be harmful to other students and would be against community morals.

While there are still many schools without such organizations, a few states and school districts have already allowed groups like the gay/straight alliance to meet and enjoy equal access to school facilities.[2] Those who would keep such groups out of the schools argue that gay clubs teach values that will improperly influence school children even at the high school level, and worse, that gays would "recruit" on campuses. On the other hand, those who seek equal access claim that the Constitution protects the right to engage in this type of speech and

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1. East High Gay/Straight Alliance v. Board of Educ., No. 2:98CV193J (C.D. Utah Nov. 16, 1998).

2. *See* List of Gay/Straight Alliances and Other Gay-Related Student Groups, (visited Apr. 9, 1999) <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=1517.

they claim that disallowing such a group is wrongful discrimination. Although the argument rages on in school boards and city meetings throughout the nation, the solution may have already been given nearly fifteen years ago by the U.S. legislature in the form of the Equal Access Act (EAA).[3]

Since the Equal Access Act was ruled to be constitutionally sound in *Board of Education of Westside Community School v. Mergens*,[4] the sponsors and advocates of the Act have been vindicated in the purpose for which the Act was intended. The sponsors wanted to protect the expression of religion, though they included other forms of political and philosophical expression. The religious issues that first inspired the EAA, have recently expanded to include groups and issues that it never intended to protect—namely clubs for gay students. Gay student groups have appealed to the EAA because they don't have to jump the separation of church and state hurdles as provided in the Constitution. Nevertheless, the battle over who is entitled to protection under EAA rages on.

This note addresses the history of the EAA and the treatment of school gay and lesbian clubs in schools in their fight for use of school property on a commensurate level with other clubs. First, this note looks at areas where the EAA has already been applied—primarily to religious clubs. In order to understand the role of the EAA on public school campuses, this note examines the First Amendment, particularly the right to freedom of speech and the limitations of the Establishment clause. Next, this note focuses on what is likely for the future of student clubs and organizations under the EAA. It then looks at how the EAA factors into determining recognition for controversial clubs such as the Gay/Straight Alliance. In addition, this note examines the future of gay student clubs in light of the existence of so-called "hate groups" like the Ku Klux Klan and other controversial clubs.

This note addresses what every group is entitled to regardless of the EAA and whether students have a constitutional right to meet. It addresses the questions regarding the extent to which schools and parents can control and limit speech content. It briefly looks at the recent legislation and litigation in Utah

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3. 20 U.S.C. §§ 4071 - 4074 (1984).
4. Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226 (1990).

surrounding the controversy over equal access for gay student groups. Finally, it looks at whether freedom of speech by school organizations is protected beyond the scope of the EAA.

The EAA has created a strange (but not surprising) dilemma for school districts: the very words that granted the right to free expression of religion by voluntary student groups also grant similar access to homosexual support groups, atheist clubs, and other "fringe" groups. Those who wanted equal access for religious groups must now face the fact that non-religious groups likewise seek equal access.

II. THE EQUAL ACCESS ACT

A. *History*

The Equal Access Act was passed in 1984 as a response to substantial litigation and disagreement over allowing religious organizations onto public high school campuses. The legislators who supported and passed the Act wanted to avoid discrimination against religious clubs in the school setting.[5] They wished to state clearly, in statutory terms, the holding of the Supreme Court in *Widmar v. Vincent*,[6] which affirmed the religious speech rights of students. They also sought to rectify faulty decisions such as *Brandon v. Guilderland Board of Education*,[7] a case in which a prayer group was denied the right to meet together.

The Committee on the Judiciary stated three false assumptions by the Second Circuit Court of Appeals in the *Brandon* decision and used the counter-arguments to those assumptions in support of the Equal Access Act.[8] The first assumption was that high school students were not mature enough to overcome peer pressure to attend religious meetings, thus making those meetings involuntary.[9] The senate dismissed this assumption, stating that many commentators and courts had affirmed the maturity of secondary school students. The second assumption considered by the legislature was that teachers would inevitably become involved in the content of the meetings, thus giving the

5. S. REP. NO. 98-377, at 8 (1984).
6. 454 U.S. 263 (1981).
7. 635 F.2d 971 (2d Cir. 1980), *cert. den.* 454 U.S. 1123 (1981).
8. S. REP. NO. 98-377, at 8 (1984).
9. *See id.*

appearance of state sponsorship of religion. The senate report dismissed this assumption by arguing that teachers are capable and willing to act as monitors without disobeying school limits and rules.[10] The third assumption was the fear that compulsory attendance laws would act as an unconstitutional advancement of religion. The Committee found this fear to be "groundless in the case of truly voluntary, student-initiated, religious activities at any time."[11]

The Equal Access Act purported to protect freedom of speech and to make clear the fact that the state is not hostile to religion. Additionally, legislators were concerned about the confusion of school officials and administrators because of inconsistent judicial opinions. Senator Charles Klein stated:

> Our school boards and our school administrators need help. They need to have the laws of this land clarified so that they can restore the proper freedoms that every one of their students should have and allow for the free expression that is the right of every American citizen, no matter what age.[12]

The Judiciary Committee's report dealt only with the Equal Access Act in its relation to the effect on religious groups in schools. According to the legislative history, it is clear that the Act intends to protect religious speech. However, the Act's terms explicitly included not only religious but also political, philosophical, or other forms of speech. The problem then arises for the courts in determining whether to rely on the intent of the legislature or the actual language of the Act. The possibility exists that the court may look to the plain language of the Act and then apply it to groups not falling within religious categories and may in fact even be contrary to those groups the legislature wanted to protect.

Contrary to the evidence included in the Senate Report, the legislative debate did include support of the idea that groups other than those of a religious nature would be benefactors of the EAA. An earlier version of the Act had been defeated because it did not include language giving political or philosophi-

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10. *See id.* at 9.
11. *See id.*
12. S. REP. NO. 98-377, at 19 (1984) (statement of Senator Klein).

cal speech equal footing. But after such terms were included, several legislators shifted from voting against the bill to supporting it. Representative Eckart referred to the change in language as follows:

> By extending the equal access principle to meet the serious and well-taken objections of the opponents the first time around, we have extended to all voluntary student groups, political, philosophical, and other nonreligious groups in their orientation, the free-speech opportunity for young adults, people who we all hope to see mature and to become viable parts of our society.[13]

It was quite predictable even at that time that future nonreligious groups would seek out the benefits of the EAA. Not only was it predictable, but some of the supporters of the Act would not have given their approval had they not intended it to cover non-religious groups. While the bulk of the legislative history revolves around issues of religion, there is little doubt that at least some of the supporters saw it covering much more. It should have come as no surprise to anyone that gay students began seeking equal access, just as Christian, Jewish, and other religious students had done before them.

B. *Definitions.*

1. *"Non-Curricular"*

One of the most important definitions at play in the litigation between the Gay/Straight Alliance and the Salt Lake City School District as well as other past litigation is the definition of "non-curricular." One of the reasons this definition is so important is because it was ignored by the drafters of the EAA. The importance of making such a definition is that those schools that recognize non-curricular groups create a "limited open forum" (defined below) and thus trigger the EAA.

A non-curriculum related student group is a group or club "that does not directly relate to the body of courses offered by the school."[14] The Supreme Court addressed the definition of a

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13. 130 CONG. REC. 20,944 (1984).

14. Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 239 (1990).

"noncurriculum related student group" by setting forth the criteria for a "curriculum related student group." A student group is "curriculum related" only if:

> the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.[15]

The "non-curriculum related" trigger is not a loophole by which school districts may avoid compliance with the Act. The Court noted that school officials may not "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" as curriculum related in order to avoid triggering the Act.[16] A school cannot claim that all of its groups are curriculum related by definition and, thereby, avoid application of the Act.

The Court held that groups such as a chess club,[17] or a community service club would fall into the non-curriculum category.[18] Other courts have enumerated some of the clubs that would be considered non-curriculum. For example, the U.S. District Court of the Western District of Washington found the Pep Club, Chess Club, Girl's Club, Ski Club, Minority Student Union, Dance Squad, and Future Business Leaders of America, and others to be non-curriculum organizations.[19]

As to those groups which would be considered curriculum related, the Supreme Court observed in *Mergens* that the French Club, Student Government, and School Band would likely be related to the curriculum.[20] The parties in *Garnett* had stipulated that the Computer Club, the Distributive Education Club of America, the Diversified Occupation Club of America and the Vocational Industrial Club of America were all curriculum re-

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15. *See id.* at 239-40.
16. *See id.* at 246.
17. *See id.* at 245.
18. *See id.* at 246.
19. Garnett v. Renton Sch. Dist., 772 F. Supp. 531 (D. Wash. 1991).
20. *Mergens*, 496 U.S. at 240.

lated. *Garnett*, however, gave no explanation as to why such a stipulation had been made.

The proper classification of each club helps to determine whether the school has created a limited open forum or a closed forum as discussed below.

2. *"Limited Open Forum"*

Limited open forum is defined in the Act in section 4071 (b) as follows: "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." Some school boards have used this definition to create "closed forums" in their districts. A closed forum would consist of schools that only allow student groups to form and meet as long as they are strictly curriculum related. No club that is non-curriculum would be allowed and if any group meeting that definition was granted access to the school facilities it would change the school's status to a limited open forum.

3. *"Materially and substantially interferes"*

Another key, albeit undefined phrase used in the EAA is "materially and substantially interfere[s] with the orderly conduct of educational activities within the school."[21] The courts have used this phrase to describe the type of speech that can be prohibited by a school under the EAA. If a type of speech creates a genuine safety concern or interrupts the teaching of necessary subjects, then it would "materially and substantially interfere" with the school functions and may thus be restricted. The significance of this provision and its definition will be discussed in greater detail below.

4. *"Sponsorship"*

Sponsorship of a school organization means that the school promotes, leads, or participates in the content of the organization.[22]

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21. 20 U.S.C. § 4071(c)(4) (1984).
22. 20 U.S.C. § 4072(2) (1984).

5. *"Recognition"*

Recognition of a school organization is not defined by the EAA but is important to the functions of student orginizations because it allows access to school bulletins, newspapers, announcements, club fairs, participation in activities of the school and so forth. Sponsorship on the other hand implies that the schools themselves are endorsing or promoting the purposes and speech of the organization. The distinction between sponsorship and recognition sometimes depends on whether organizations are curriculum or non-curriculum related. Those groups that are curriculum related are generally school sponsored whereas non-curriculum clubs can receive school recognition only. In fact, the EAA prohibits sponsorship of those groups that trigger the Act, such as those which are religious in nature.

C. *Applying the Equal Access Act*

1. *The Establishment Clause*

In *Board of Education of Westside Community School v. Mergens*, the Supreme Court found that there was no violation of the Establishment Clause. Using the test set forth in *Lemon v. Kurtzman*,[23] the Supreme Court found that the EAA had met each of the three components of the *Lemon* test to show there was no conflict between the Act and the Establishment Clause. The Court held that the Act featured a secular purpose in that it prohibited discrimination on the basis of the content of speech, whether it was political, philosophical, or religious.[24]

Second, the EAA had a primarily neutral effect on school students who were more mature (of high school age) and thus able to understand that allowing a certain type of speech did not necessarily indicate school endorsement of it. Thus the school was not viewed as advancing religion in violation of the Establishment Clause.[25]

The third requirement of *Lemon* is that the EAA could not foster an excessive entanglement between the government and religion. The Supreme Court held that the EAA did not cause

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23. 403 U.S. 602, 612-13 (1971).
24. *Mergens*, 496 U.S. at 248.
25. *Id.* at 250.

such entanglement but actually aided in reducing the possibility of entanglement because the Act required that non-curriculum student groups be student controlled and that attendance must be voluntary.[26] This particular area of the test had been one of the controlling factors in part of the language of the Act that attempted to implement the holding of the Supreme Court in *Widmar v. Vincent*.[27]

The Court in *Widmar* had suggested that denying equal access to religious speech might create greater entanglement between the state and school if it would require invasive monitoring of any meeting where religious speech might occur.[28] The test as set forth by the Supreme Court in *Lemon* has been the subject of heated debate among the justices of the Court in recent decisions. Nevertheless, *Mergens*' three-prong test upholding the validity of the Equal Access Act, at least as far as it relates to religious student groups, remains intact.

2. *Freedom of Speech*

The Supreme Court has held that students are "possessed of fundamental rights which the State must respect. . . . In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression."[29]

First Amendment rights of gay and lesbian students are violated if a school fails to grant access, after allowing access to other non-curriculum groups, on the basis of content of ideas which the organization wishes to express, and there is no compelling state interest justifying the denial of access. Such discrimination in the school system may be allowed as a compelling state interest if the school can show that it is denying access because of legitimate safety, maintenance, or school discipline and order. In *Healy v. James*, the Supreme Court warned that a public university "may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."[30]

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26. *Id.* at 253.
27. Widmar v. Vincent, 454 U.S. 263 (1981).
28. *Id.* at 272 n.11.
29. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 505 (1969).
30. Healy v. James, 408 U.S. 169, 187-88 (1972).

3. *The "Hecklers' Veto"*

"I think the issue is this: Can a school board stop some groups from using their facilities? Unless an organization is there to be disruptive or to break the law, I read the language . . . as saying that they cannot."[31]

Possible disturbances created by controversial speech is an issue of real concern for school administrators, parents, and students. The safety of students and creating an atmosphere conducive to learning is of utmost importance. As previously discussed, the meaning of free speech is also very important. The balance between limiting potential disturbances and not unreasonably impairing free speech was the topic of much discussion prior to the passing of the EAA. If a potential cause of disturbance was found to be a sufficient reason to deny access, it would allow a "hecklers' veto" to take away the free speech rights of those speaking out on such controversial issues. After the EAA was enacted, two of the House sponsors of the Act commented on the "hecklers' veto" as follows:

> The rights of the lawful, orderly student group to meet are not dependant upon the fact that other students may object to the ideas expressed. All students enjoy free speech constitutional guarantees. It is the school's responsibility to maintain discipline in order that all student groups be afforded an equal opportunity to meet peacefully without harassment. The school must not allow a "hecklers' veto."[32]

The Equal Access Act assures that school administrators retain the authority to prohibit activities that materially and substantially interfere with the orderly conduct of educational activities within the school.[33] This standard comes directly from the Court's decision in *Tinker v. Des Moines Independent School District*,[34] where the Court protected the political speech of students protesting the Vietnam War. The Center for Law and

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31. *Id.*

32. 130 CONG. REC. 32315-18 (daily ed. October 11, 1984) (statements of Reps. Bonker and Goodling).

33. 20 U.S.C. § 4071(c)(4) (1984).

34. 393 U.S. 503 (1969).

Religious Freedom asserts that "the Court set forth a workable standard in *Tinker*, allowing school administrators to prohibit activity or speech that materially and substantially interferes with the orderly conduct of educational activities within the school."[35]

4. *The Funding Provisions*

The Act seemingly contradicts itself regarding the funding provisions. According to section 4071(a), any school receiving federal funding must comply with the Act; however, section 4071(e) states that "[n]otwithstanding 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."[36]

Although it then seems to allow schools to do whatever they want in following the Equal Access Act, the Court stated in *Mergens* that "a school district seeking to escape the statute's obligations could simply forgo federal funding."[37] While this particular provision has yet to be ruled upon specifically, the dicta of *Mergens* and other courts indicate that the schools would have to follow the specifications of the Act in order to receive federal funding.[38]

III. THE FUTURE OF SCHOOL ORGANIZATIONS.

A. *Current Issues Regarding School Organizations*

What has come from the application of the Act and the subsequent cases suggests that schools and courts must make certain decisions prior to determining whether or not they should allow an extra-curricular group to meet under school sponsorship. The first determination is to establish whether there is a fundamental right protected by the First Amendment either

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35. CENTER FOR LAW AND RELIGIOUS FREEDOM, A GUIDE TO THE EQUAL ACCESS ACT: QUESTIONS & ANSWERS (1993).

36. 20 U.S.C. § 4071(e) (1984).

37. Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 241 (1990).

38. *See also* Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839 (2nd Cir. App. 1996) ("The school can avoid the requirements of the EAA . . . by declining federal funding").

explicitly or implicitly, such as freedom of speech, association, or some other right. The second is to determine if that right is being abridged or violated by not granting equal access to the group. Third, based on previous court opinions, it must be decided whether or not there is a material or substantial reason to limit that right. Finally, the question must be asked whether or not the violation or abridgment of that right violates the Constitutional rights of others. Kate Frankfurter writes concerning recent litigation:

> In the Fall of 1997. . . Linda Harmon became a plaintiff in the first lawsuit ever filed by a Gay/Straight Alliance (GSA) against a school. The Homosexual/Heterosexual Alliance Reaching for Tolerance (HHART) sued the Cherry Creek School District for recognition as a student club equal to those the district already supported. In January 1998, HHART won, as the district chose to settle prior to a scheduled hearing in U.S. District Court.[39]

1. *The "Unpopular" Groups*

a. *Lifestyle Organizations Such as the Gay/Straight Alliance*

Some past litigation has taken place between gay student organizations and universities. This litigation has focused on particular groups seeking either equal treatment from the schools or to fight against discrimination. Generally, these cases have ruled in favor of the gay and lesbian groups when the basic issues have focused on the right to associate or on First Amendment (content of speech) rights.[40]

On the other hand, in a case against a private university, the District of Columbia Court of Appeals held that Georgetown University was not compelled to recognize the gay students' group. Interestingly, however, the court decision also held that states have a constitutionally compelling governmental interest in eradicating sexual orientation.[41]

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39. Kate Frankfurter, *Caution: Falling Rocks*, (visited Mar. 1, 1999) <http:www.glsen.org/pages/sections/news/back-to-school/1998/release>.

40. *See* Gay/Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543 (11th Cir. 1997) (holding statute prohibiting recognition of gay student group unconstitutional).

41. Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536

These cases reflect the same type of expected trends in public school settings and the litigation surrounding rights of younger public school students. Yet there have been only a few cases, including the current pending case in Utah, regarding homosexual students or groups in high schools.

b. *Hate Groups Such as Students Against Faggots Everywhere*

The group Students Against Faggots Everywhere (S.A.F.E.) organized in response to the Gay/Straight Alliance's attempt to meet on school campuses. An argument in favor of allowing such a group to meet can be made for many of the same reasons already presented (such as the argument that there is no presumption of illegal or criminal behavior nor the forbidden use of the "hecklers' veto"). However, the EAA does allow school officials the necessary authority to deny permission to hate groups, cults, or any group whose conduct is disruptive or threatening to students.

In *Mergens*, the Court noted that "[t]he Act expressly does not limit a school's authority to prohibit meetings that would 'materially and substantially interfere with the orderly conduct of educational activities within the school.'"[42] The Center for Law and Religious Freedom further explains:

> [u]nfortunately, some opponents of the Act use the "hate groups and cults" argument in order to intimidate school officials into closing, unfairly and unnecessarily, the forum for all non-curriculum related student groups. The argument is a red herring that, if believed, may cause school officials to needlessly restrict many legitimate student groups, out of the false belief that the Act restricts school officials' authority to deal effectively with hate groups and cults.[43]

The pamphlet goes on to explain various ways in which school officials can protect against such groups. The Center for

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A.2d 1 (D.C. 1987).

42. *Mergens*, 496 at 241; *see also* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 509 (1969).

43. CENTER FOR LAW AND RELIGIOUS FREEDOM, A GUIDE TO THE EQUAL ACCESS ACT: QUESTIONS & ANSWERS (1993).

Law and Religion basically concludes that "the Act includes this standard as a protection against extremist groups."[44]

The EAA allows school administrators to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to ensure that student attendance at any meeting is voluntary. Section 4071(c) of the EAA makes clear that school administrators retain the authority to prohibit illegal activities.

The Supreme Court has recognized the authority of school administrators to restrict lewd or obscene speech.[45] For these reasons, the argument that a closed forum must be adopted in order to prevent meetings by hate groups or cults is false.

c. *Hate Groups Such as the Aryan Nations*

Groups such as the Aryan Nations or the Ku Klux Klan can also be prohibited using arguments similar to those just presented. Discretion is given to the school districts in deciding what groups may be allowed in the interest of student safety. The standard which prohibits substantial or material interference with school work or activities may also be enforced to ban certain hate groups. But even with those restrictions and the authority to limit certain activity on campus, the line is becoming less distinct. As Senator Gorton argued during the debate prior to the passage of the EAA:

> I am convinced that the limited open forum which . . . Senator [Mark Hatfield] has described clearly covers the Ku Klux-Klan – as long as it agrees not to engage in any violent activity – clearly allows an organization, discussions of which involve promoting the idea of racial superiority of one group or another; clearly beyond the slightest peradventure of argument protects a gay rights organization in a school.[46]

The significant difference between hate groups and lifestyle organizations is found in their purpose. The Ku Klux Klan's purpose is directly aiming discrimination at another group of

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44. *Id.*
45. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683-85 (1986).
46. 130 CONG. REC. S8344 (June 27, 1984) (statement of Sen. Gorton).

people based on animus. Lifestyle groups, however, seek to promote their own ideas about sexuality, but is not formed as a direct attack on an individual or another group.

d. *Magic/Pagan Clubs*

Section 4071(f) of the EEA was adopted explicitly to give school administrators the authority to exclude cults from the school campus. Of course definitional problems will undoubtedly come up as certain groups apply for school recognition. The application of this section will depend on how the group is categorized and if the court accepts such definitions as functionally and practically correct. As previously noted, schools have experienced difficulty in their definitions of "extra-curricular" and the court has held that it is not what the court calls it, but what it actually is. Similar analysis will likely be applied to the definitions of a cult.

e. *Young Democrats/Republicans*

College campuses have allowed political groups on their campuses for quite some time. The courts, most likely determine that students are mature enough to be treated similarly to college-age students in the recognition of political party sponsored groups. "[h]igh School and college students are both able to understand the proposition that schools do not endorse everything they fail to censor."[47] Even when a political group's opinions may find disfavor among the majority of the community, most people accept the idea that the political process and opposing views on political issues is necessary.

2. *Why Don't Schools Want to Allow Equal Access to "Unpopular" Groups?*

One commentator has stated that one of the flaws contained in the EAA is its pre-textual protection of many forms of speech in order to solely protect religious speech:

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47. Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 556 (1986) (Powell, J. dissenting).

> An examination of the Equal Access Act exposes the web of hypocrisy on which the Act rests. For example, freedom of speech is discussed with much enthusiasm when that freedom will be exercised by a conventional, mainstream group, but that enthusiasm is noticeably lacking when the freedom of speech is to be exercised by an unpopular group.[48]

For years many student groups have come and gone across the country with little notice being taken of them. But when a group whose views do not fall within the accepted norms of the mainstream speaks out, then people will get involved to stop their message from reaching others. Currently the controversy surrounding gay student groups is of particular importance to many communities throughout the country.

In addition, schools want to avoid giving endorsement to unpopular or controversial clubs. However, the *Mergens* Court found that students can understand the difference between a school allowing and sponsoring a certain club:

> Under the Act a school with a limited open forum may not lawfully deny access to a Jewish students' club, a Young Democrats club, or a philosophy club devoted to the study of Nietzsche. To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion.[49]

Further, school districts wish to avoid promoting certain sexual activity or encouraging criminal conduct. The Utah legislature stated that recognition of sexually oriented clubs "could lead to increased sexual conduct, abortion, out-of-wedlock children, and sexually transmitted disease."[50] Utah State Senator Craig Taylor stated that the reason for passing the Utah act restricting clubs like the gay/straight alliance is necessary because the Utah criminal code prohibits all sexual activity out-

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48. Robert C. Boisvert, *Of Equal Access and Trojan Horses*, 3 LAW & INEQ. 373 (1985).

49. Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 252 (1990).

50. S.J., 2d. Spec. Sess. 1233 at 1236 (Utah 1996).

side of marriage and such a club would promote criminal conduct in this area.[51] Furthermore, the legislature stated that such a club might engender bigotry and a divisive atmosphere.[52]

While this argument is certainly grounded on meritorious concern, it is premature to assume that such a club or meeting would necessarily promote illegal activity. In fact, Senator Meztenbaum addressed this very point during the Senate debate over the EAA:

> So if a group wanted to use the facilities for a peaceful meeting, I read this language to say that the school board would have absolutely no authority to deny them that right, and if some group advocating gay rights wanted to use the school, it would appear very clear that there would be no right to deny them those facilities. . . .
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> I am not even certain that you can make a distinction between those States that make homosexual activities illegal and those that make homosexual activities legal, because, we have recognized that people can speak out with respect to various issues whether or not they are actually involved in committing acts that are prohibited. . . . I think the issue is this: Can a school board stop some groups from using their facilities? Unless an organization is there to be disruptive or to break the law, I read the language of this proposal as saying that they cannot.[53]

Gay clubs and their supporters argue that they are not organized to promote criminal conduct, but to provide support to students who are gay or for students who are friends or relatives of gay persons. To make a sweeping declaration that such clubs will promote sexual activity or criminal conduct is highly speculative. Regardless of the accuracy of the fears of promoting such activity, at least one court has ruled that such an argument is inadequate to disallow such groups at a university level:

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51. Floor Debate, Statement of Sen. Craig Taylor, 51st Utah Leg., 2d Spec. Sess. (April 17, 1996) (Senate recording no. 1 side A).

52. S.J., 2d. Spec. Sess. 1233-34 (Utah 1996).

53. 130 CONG. REC. 19226 (1984) (statement of Sen. Metzenbaum).

> Even if the university's formal recognition of a homosexual student organization would tend to 'perpetrate' or 'expand' homosexual behavior or increase 'homosexual activities', as indicated by the University's expert witnesses, that provided no legal justification for withholding formal recognition from the organization, where the record failed to demonstrate that the organization advocated present violation of state laws or of University rules or regulations.[54]

B. *Attempts to avoid the EAA*

Garnett v. Renton[55] is a case in which the Washington state constitution forbade the meeting of religious clubs on school premises. On appeal, the U.S. Supreme Court found that the school district had created a limited open forum and that the EAA could not require activity prohibited under the state constitution. The Supreme Court then remanded the case to determine if the prohibited activity fell within those activities allowed by the state constitution. On remand, the U.S. District court addressed the application of the EAA to the school and concluded that the school did indeed have a limited open forum for purposes of the Act but that the Act did not preempt the state constitution from forbidding the religious club to meet. Therefore, the school district could preclude the club from the school.

The U.S. District Court noted that states have long had the power to go further than the federal constitution in protecting certain rights so in this case the state could preserve the bright line separation between church and state.[56] However, the U.S. District court failed to discuss the constitutional right which others courts, including the Supreme Court, had focused on–freedom of speech. Such over protection of the church and state separation might be interpreted by future courts as allowing courts to ignore earlier holdings that protect students rights of expression so long as the state constitution allows it.

Therefore, there is still some dispute over conflicts between the EAA and state regulations controlling school policies. State

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54. Gay Lib v. Univ. of Missouri, 558 F.2d 848 (8th Cir. 1977).
55. Garnett v. Renton, 772 F. Supp. 531 (D. Wash. 1991).
56. *See id.* at 537.

legislatures have the power to create laws controlling the action of school boards within that state. While the EAA is a federal act, it cannot abridge the constitution of a state; the Act's purpose is not to preempt state laws.[57] This type of uncertainty is at issue in current litigation in Utah because the Salt Lake School Board relied on the actions of the Utah Legislature allowing them to set restrictions on the operation and formation of student clubs. The legislation and the litigation is discussed in greater detail below.

1. *The Utah Legislation*

The Utah legislature met in a closed meeting to enact a bill that authorizes local school districts to restrict access to specified student clubs and organizations. The legislation was passed in response to the activities of a group of students wishing to form the Gay/Strait Alliance and a group which formed in response to that group, S.A.F.E. (Students Against Faggots Everywhere).

The Act passed by the Utah legislature has three basic parts:

(a) School districts are authorized, or in some cases required, to limit or deny access to certain student clubs and organizations;

(b) School employees and volunteers may not support or encourage criminal conduct; and

(c) School districts are authorized to require parental permission for student involvement in school clubs and organizations.[58]

A few school districts have opted to ban all non-curricular clubs, including groups like the Gay/Straight Alliance. The act passed in Utah allows for this option under the assumption that it apparently does not violate the EAA. However, civil rights groups are targeting even this approach as a back-door method of discrimination against the Gay/Straight Alliance and claiming that such a ban is a violation of the EAA and the U.S. Con-

57. *See id.*

58. *See*Responsibilities of School Employees and Limitations Regarding Student Clubs, ch. 10, 1996 Utah Laws 1872 (codified as Utah Code Ann. § 53A-3-419 (1997)).

stitution. The Gay/Straight Alliance has filed suit against the Salt Lake City School Board.

2. *Current Litigation of the Gay/Straight Alliance in Utah*

A recent decision by U.S. Federal District Judge Bruce Jenkins denying an injunction against the school district was a victory for those who support the ban on the Gay/Straight Alliance. The injunction would have forced East High School to ban certain groups which it claims are curriculum related. A judgment against the school, on the other hand, would have suggested that the school was breaking its own rules of establishing a "closed forum." This victory at least temporarily gives school districts a vote of confidence that they can continue to decide on a case by case basis which clubs should be allowed access and which ones should not.[59] But school district supporters still have their share of hurdles to overcome in proving that the ban on all extra-curricular groups is not directed solely at discriminating against the Gay/Straight Alliance.

If the Gay/Straight Alliance can show that the East High School has created a limited open forum, then the implications of the EAA will be in full effect and would very likely protect the Alliance's access to the school facilities just as it does for other groups. A recent case invalidating a state law aimed at preventing the organization of a gay student group may be an important forerunner to current litigation. Although that case took place at the university level, the arguments were very similar to those made in the East High School case. The gay student group argued a First Amendment concept called viewpoint discrimination. The Eleventh Circuit Court writes,

> [w]hen the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination . . . . These principles provide the framework forbidding the state from exercising viewpoint

59. East High Gay/Straight Alliance v. Board of Educ., No. 2:98CV193J (C.D. Utah Nov. 19, 1998).

discrimination, even when the limited public forum is one of its own creation.[60]

Additionally, some states and school districts across the country have not only allowed such groups to be recognized by the schools in which they participate, but many areas have passed anti-discrimination rules and regulations which help prevent against discrimination based on sexual orientation.[61]

3. *Arguments Favoring Granting of Equal Access to the Gay / Straight Alliance*

Besides the arguments regarding free speech as already discussed in detail above, schools have additional reasons to allow groups such as the Gay/Straight Alliance. First, the ban on gay groups could (and most likely would) mean a ban on all non-curricular groups. There are negative implications for many students who cannot participate in certain clubs and activities. College admissions are sometimes based in part on groups that students have been involved with in high school. Additionally, organizations may provide social, leadership, and civic responsibilities that are valuable to the overall education of teenagers.

It may seem, therefore, that "[f]rom a policy perspective, shutting down all extracurricular activities to stamp out an unpopular view is antithetical to the very spirit of education."[62] Many students and parents have used this argument when they have been faced with the possibility of all non-curricular student clubs being denied access. Although some parents and students have expressed personal feelings of disapproval of gay student groups, they have also argued the negative effects of the closed forum school. At a school board meeting earlier this year, 250 teens, parents, and other supporters gathered together to debate a ban on all extra-curricular clubs. One student expressed her feelings over losing the extra-curricular clubs two years ago by

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60. Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543, 1549 (11th Cir. 1997) (quoting Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819 (1995)).

61. *See List of Gay / Straight Alliances and Other Gay-Related Student Groups*, (visited Apr. 9, 1999) <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=1517.

62. John A. Russ, Note, *Creating a Safe Space for Gay Youth: How the Supreme Courts Religious Access Can Help Young Gay People Organize at Public Schools*, 4 VA. J. SOC. POL'Y & L. 545, 572 (1997).

asking, "What's it going to take to get [clubs] back?" She continued speaking to the board members, "[i]f you were acting in the interests of your students, these clubs never would have been banned."[63]

Many people have come to recognize that granting access to one group may in turn require access for all. Last year, during a heated debate in Arizona over legislation regarding the use of public school facilities by gay clubs, a Pastor for the First Southern Baptist Church stated that although he was opposed to homosexuality and considered it immoral, he is "not sure you can draw the line, if we want to have Bible Clubs, as well. . . . I'm for our kids being able to meet together and study the Bible."[64] He also asserted that "the classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"[65]

Those in favor of establishing gay student groups have expressed a number of reasons that such groups should be given equal access to the schools. They cite various statistics regarding those students who identify themselves as gay, lesbian, or bisexual as in need of acceptance and support groups. According to a survey conducted in Vermont and Massachusetts and from information gathered by the Seattle Safe Schools Report, students identifying themselves as gay, lesbian, or bisexual reported that they are:

(a) Two to five times more likely than their peers to skip school because they feel unsafe;

(b) Three times as likely to have been threatened with a weapon at school during the past 12 months;

(c) Twice as likely to have seriously considered suicide in the past year;

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63. Stephanie Innes, Anne T. Denogean, *Gay Clubs Get Widespread Support: Tucsonans of Various Political Stripes Oppose a Ban on Such Groups at Public Schools*, THE TUCSON CITIZEN, Feb. 8, 1997.

64. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 512 (quoting Keyishina v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

(d) Four times as likely to have attempted suicide in the past year;

(e) Three to ten times as likely to have tried cocaine; and

(f) Twice as likely to report on being on alcohol at least once in the past month.[66]

Time magazine also reported that according to a Massachusetts study, 62% of students identifying themselves as gay, lesbian, or bisexual said they had been in a fight in the previous year, in contrast to 37% of all students.[67]

Civil Rights organizations and gay rights activists assert that such statistics only solidify the need to have groups like the Gay/Straight Alliance in the public schools. They argue that these types of groups can help to create more positive, friendly, and safe environment for all school children by educating and promoting awareness of the issues. Furthermore, they claim that if all children are to be compelled to attend school, as they currently are, then the schools owe those children an environment in which they can learn. Gay students, who are at a much higher risk of skipping school or dropping out, should be given at least some extra consideration as to ways in which they might be encouraged to remain in school and receive an education.

Supporters of the gay student clubs also argue that by denying equal access to the school facilities, schools are sanctioning harassment, discrimination and animus towards people based on sexual orientation. Schools, they argue, should be a place of a sharing of ideas and teaching to respect others. The Gay, Lesbian, and Straight Education Network (GLSEN) states that;

> [a] typical high school student hears anti-gay slurs as often as 26 times a day. When this occurs, faculty will intervene in such incidents only 3% of the time. As a result of this lack of intervention, 19% of [lesbian, gay, bi-

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66. *Youth at Risk, A Fact Sheet on Lesbian, Gay, Bisexual, and Transgender Youth*, (visited Apr. 9, 1999) <http://204.179.124.82/sections/news/back-to-school/1998/youthatrisk>.

67. John Cloud, *Out, Proud, and Very Young Gay Teenagers are Emerging as Never Before. But These New Activists Still Face the Old Prejudices*, TIME, Dec. 8, 1997.

> sexual, and transgender] students suffer physical attacks associated with sexual orientation with 13% skipping school at least once per month and 26% dropping out all together.[68]

Kevin Jennings, a former high school history teacher and founder of the GLSEN states that the torment and intolerance of gay students allowed by educators is "a basic failing as a professional. . . . You don't have to like every kid. . . . But we have to serve every kid. We have to make sure each gets an equal shot at education."[69] The Gay and Lesbian Issues Task Force for the Arizona Psychological Association has commented that "gay teens are a high risk of depression and suicide because they feel isolated." The Task Force passed a resolution in 1996 that said gay youth should have an opportunity to develop their personal identity, and public schools should provide safe places for them.[70]

A teacher from Anchorage, Alaska, who agreed to be the faculty advisor for the Gay/Straight Alliance in the high school, expressed similar sentiments when she said, "we know that in our collective experience, the atmosphere of intolerance for gay and lesbian students has always been present. We don't want to teach our students to stand by when they witness discrimination of any kind. We want them to stand up and speak out."[71]

C. *What is the Role of the School in Teaching Certain Morals or Values?*

It has long been established that schools must have a certain degree of flexibility to administrate over a school. For example, schools are generally allowed some latitude in determining the rules of testing and the curriculum taught with at least some consideration of the standards of the community. One of the main responsibilities of a school is to help students prepare for

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68. *Schools Fail for Second Year as Educators Release National "Report Card" on Efforts to Protect Students And Teachers From Harassment*, (visited Mar. 1, 1999) <http:www.glsen.org/pages/sections/news/back-to-school/1998/release>.

69. Margo Harakas, *Group Wants Educators to Learn Gay is OK and Schools Should be Safe for Everyone*, SUN SENTINEL, Sept. 25, 1997 1E.

70. Monica Mendoza, *Psychology Group Opposes Plan to Ban Gay School Clubs*, THE ARIZONA DAILY STAR, Jan. 9, 1997 at 1B.

71. Rosemary Shinohora, *School Board Compromises on Student Clubs*, ANCHORAGE DAILY NEWS, Feb. 12, 1997.

adulthood: "That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected."[72]

There is significant disagreement, however, as to how far schools may go in teaching beyond the three "R's." Debates over sex education, darwinism, and many other subjects show that there are differing opinions as to what schools should be teaching. But the debate is not only over certain subject matter. Schools are also expected to teach basic social skills and to teach students how to function well in society by fostering principles such as honesty, patriotism, and so on. However, differing values in a number of areas make those decisions controversial. For example, people in any given community may have very different views as to how issues concerning human sexuality should be taught, if at all, to school children:

> Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the 'work of schools.'. . . The process of educating our youth for citizenship in public schools is not confined to the books, the curriculum, and the civics class; school must teach by example the shared values of a civilized social order."[73]

The schools do have the authority to refuse to sponsor speech otherwise inconsistent with the following:

> 'the shared values of civilized social order' . . . or to associate the school with any position other than neutrality on matters of political controversy. . . . [S]chools [should not] be unduly constrained from fulfilling their role as 'a principal instrument in awakening the child to cultural values, in preparing him for later professional training,

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72. Meyer v. Nebraska, 262 U.S. 390, 401-02 (1922).

73. Matthew Hilton, *Options for Local School Districts Reviewing Local Governance and Moral Issue Raised by the Equal Access Act: The Gay-Straight Alliance in Utah*, BYU EDUC. & L.J. Spring 1996, at 1, 21-22 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683-85 (1986)).

> and in helping him to adjust normally to his environment."[74]

However, schools must not simply exclude speech because it is the view of a minority group. Any words or ideas that are different from another may cause disturbance or tension. One scholar explains why we need to allow for differences of opinions:

> [O]ur Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[75]

Simply disliking the form or content of the speech is not necessarily an acceptable reason to restrict access. Schools should make responsible decisions about what they will teach. One solution might be to include teaching about some of the differing values within their communities at least in those controversial areas. Another solution may be to try to avoid teaching or referring to those issues at all, but that is often impractical if not impossible.

D. *What are Parents' Rights Regarding School Organizations?*

The Utah legislature addressed the issue of protecting the parental autonomy in determining matters of conscience. The legislature wished to allow for family privacy regarding sexual matters, religious beliefs, and family relationships and to "ensure that those who 'work at creating one type of moral environment at home' are not required to have their children participate in school curricula or activities 'that teaches a different set of values.'"[76]

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74. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272-73 (1988) (citations omitted).

75. Robert C. Boisvert, *Of Equal Access and Trojan Horses*, 3 LAW & INEQ. 373, 394 (1985).

76. Hilton, *Supra* note 72, at 23 (quoting WILLIAM KIRKPATRICK, WHY JOHNNY CAN'T TELL RIGHT FROM WRONG, 252 (1993)).

Some schools have set rules that require parental permission before a student may join a school club. A school district in Alaska has implemented a policy where parents must sign before a student's participates, and the permission slips will include a statement of the club's purpose. This may be one reasonable middle ground which allows for greater parental involvement and alleviates some of the fears that children will join groups that their parents find undesirable, yet still allows such groups a place on the campus as an expression of student rights.

Opponents of such a rule fear that it would limit the student access to groups that are very important to them and it would abridge their rights of privacy. Gay students may be afraid to tell their parents about their sexual orientation, and a club at school would help them to face those apprehensions. But if the students aren't allowed access to them because of a lack of parental permission, then this important purpose may be defeated.

IV. BEYOND THE EQUAL ACCESS ACT

As pointed out previously, schools may not discriminate against a student group based on the content of its speech. The uselessness of the Act under this argument was made before its passage. Senator Metzenbaum's minority view states, "the fundamental flaw of S. 1059 [the Equal Access Act] is that it seeks to provide a sweeping legislative solution to a problem which has been successfully handled by the courts on a case-by-case basis."[77] Furthermore, Senator Mathias argues that the remedy provided by the Act is duplicative of other statutes already in effect, notably the Civil Rights Act of 1871.[78] In the end, it is difficult to see what the EAA does to provide additional necessary protection of a right already protected by the Constitution and defined by the Supreme Court in case law.[79]

Senator Metzenbaum also argues that the Act does nothing to address the complexities of the issue of access to public school facilities by religious groups. Furthermore, it does not help school boards determine what is "voluntary" extracurricular activity.[80] Much of the litigation since passage of the Act has

77. S. REP. NO. 98-377 at 46 (1984).
78. *Id.* at 44.
79. *See* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969).
80. S. REP. NO. 98-377, at 45 (1984).

involved the questions of defining what groups are considered extra-curricular.

In *Board of Education of Westside Community School v. Mergens*, the Supreme Court states explicitly that its holding is based upon a violation of the EAA and that the Act does not violate the Establishment Clause. The plurality opinion stated that because the Justices find that the EAA is violated, they "do not decide respondents' claims under the Free Speech and Free Exercise Clauses."[81] To what extent a school district may control the content of a student group's speech beyond the EAA and thus potentially abridge any constitutional rights is a different argument altogether. There is no constitutional right to have a student organization at a school. But if the school allows some groups to meet but restricts others based simply on the content of their speech, then First Amendment rights are implicated.

Of course it remains the responsibility of the school board to decide whether they maintain the limited open forum or a closed forum.[82] The question which seems to have been avoided up to this point is the extent to which a school with a closed forum may still limit the content of the speech of its students. Does the EAA preempt the field of all school speech? While the EAA has been ruled to be constitutionally sound, and to protect religious clubs seeking school recognition, it is uncertain whether the EAA protects other types of clubs.

It is settled that students may have certain informal discussions about many subjects so long as they do not interfere with school functions or violate school rules. Even at East High School, the Gay/Straight Alliance is meeting but without school recognition.

Likewise, the EAA does not give certain clubs more rights than others. The Center for Law and Religious Freedom states:

> The fact that a disruptive activity is religious, political or philosophical does not give it special protection. The Act merely gives religious, political or philosophical groups equal access to school facilities. Those groups still must

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81. Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 253 (1990).

82. Pope v. East Brunswick Bd. of Educ., 12 F.3d 1244, 1248 (3d Cir. 1993).

> abide by the same disciplinary rules that are applied to any other activity within the school.[83]

Public education legislation and litigation deals in constitutional issues with a different spin than in other areas. Because of the great importance of acting in the best interest of the schoolchildren there are no easy answers about how broadly certain rights should be construed when dealing with those children. School districts and administrators are left with the great task of controlling the atmosphere of the schools while still teaching children a myriad of the things that society demands. Many different opinions as to what those matters should be is at the heart of the Free Speech discussion. As important as the freedom of speech for students may be, there is also a great necessity to aid in the proper administration conducted by school officials. One scholar expresses the following concern:

> If the courts were to recognize a broad right to 'freedom of conscience' grounded in the First Amendment or a 'liberty' interest to direct the education of one's child based in the Fourteenth Amendment, the inevitable result would be the judicial dismantling of public education as we now know it.[84]

V. CONCLUSION

After all the debate over morals and values has ended, the real question as to the usefulness of the Equal Access Act is straightforward: take away the religious aspects surrounding club access and what will be left to argue? Does the EAA really protect philosophical or political speech of school organizations? If so, is there any valid argument remaining that would restrict access to clubs such as the Gay/Straight Alliance? The answer is unclear. However, one thing is certain: freedom of speech is protected at least to some degree whether it falls under the EAA or not.

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83. CENTER FOR LAW AND RELIGIOUS FREEDOM, A GUIDE TO THE EQUAL ACCESS ACT: QUESTIONS & ANSWER (1993).

84. Rosemary C. Salomone, *Struggling with the Devil: A Case Study of Values in Conflict*, 32 GA. L. REV. 633, 693 (1998).

A school's best argument under the EAA is to show that the clubs "materially and substantially interfere with the orderly conduct of educational activities within the school."[85] If the schools can show that the presence of a club like the Gay/Straight Alliance on campus will interfere with the curriculum or another essential function of the schools, then they may be able to exclude access to such a club.

Assistant Attorney General Dan Larsen wants to avoid sending a "shock wave" through the state and the nation by restricting access to the Gay/Straight Alliance. But it remains unknown what that shock wave would be or how it would "materially or substantially interfere" with the activities of the schools.

It seems that there is no reason other than to regulate the content of the speech. That reason has been couched in many different arguments including everything from morals to safety. Nevertheless, it cannot be denied that the courts have long held that a school may not restrict the freedom of speech of students based solely on the content of the message.

Perhaps the irony of this conflict in the schools will soon play out in full measure. Religions have traditionally viewed homosexuality with disfavor. Many religions teach that being gay is a sin. Religious groups and gay rights groups are often at odds with one another. But now, in this arena of free speech, they may be forced to fight together to protect every high school student's constitutional rights.

Susan Broberg

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85. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 509 (1969).