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Student Speech: School Boards, Gay/Straight Alliances, and the Equal Access Act

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STUDENT SPEECH: SCHOOL BOARDS, GAY/STRAIGHT ALLIANCES, AND THE EQUAL ACCESS ACT

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Twenty years ago, school districts experienced virtually no litigation concerning the sexual orientation of their students. In recent years, however, school authorities have been drawn into a growing number of lawsuits in which sexual orientation is the central issue of the litigation.

This litigation can be divided into three categories: lawsuits by gay and lesbian students seeking damages for harassment they experienced while at school;[1] suits brought by faculty members or students who oppose a school district's efforts to promote tolerance and understanding toward gay and lesbian students;[2] and lawsuits brought by gay and lesbian student groups seeking to meet on school premises under the auspices of the Equal Access Act (EAA).[3]

This article deals with the last category of sexual-orientation litigation in the schools: lawsuits brought by gay and lesbian students under the EAA. Prior to the passage of

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1. *See, e.g.*, Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130 (9th Cir. 2003) (alleging violation of Equal Protection Clause arising from peer harassment based on sexual orientation); Nabozny v. Podlesny, 92 F.3d 446, 454 (7th Cir. 1996) (same); L.W. v. Toms River Reg'l Sch. Bd. of Educ., 886 A.2d 1090, 1105 (N.J. Super. Ct. App. Div. 2005) (holding that a student "was subjected to severe or pervasive harassment on the basis of his perceived sexual orientation").

2. *See, e.g.*, Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006) (alleging school violated First Amendment right to free speech when it prohibited a student from wearing a t-shirt critical of homosexuality); Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003 (9th Cir. 2000) (suing school authorities for prohibiting teacher from putting anti-homosexual materials on school bulletin board).

3. *See, e.g.*, Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135 (C.D. Cal. 2000); East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist., 30 F. Supp. 2d 1356 (D. Utah 1998).

the EAA, "religious student groups were denied permission to meet even though other . . . student groups could do so."[4] Congress passed the EAA in 1984 as a means of assisting student religious groups seeking to meet in public high schools.[5] In the years immediately following passage of the Act, reported court cases generally involved religious groups.[6]

In recent years, however, gay and lesbian student groups have sued school districts under the EAA for refusing to recognize them or allow them to meet on school premises. Indeed, over the past ten years, there has been substantial growth in student gay-friendly clubs in public schools. "In 1997 there were approximately 100 gay-straight alliances (GSAs)–clubs for gay and gay-friendly kids–on U.S. high school campuses. Today there are at least 3,000 GSAs—nearly 1 in 10 high schools has one—according to the Gay Lesbian Straight Education Network, which registers and advises GSAs."[7]

Gay student groups have aroused a great deal of controversy in some of the communities in which they have sought recognition in schools.[8] In Virginia, "homosexual rights

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4. Ralph D. Mawdsley, *The Equal Access Act and Public Schools: What Are the Legal Issues Related to Recognizing Gay Student Groups?*, 2001 BYU EDUC. & L.J. 1, 1. *See* Bender v. Williamsport Area Sch. Dist., 741 F.2d 538 (3d. Cir. 1984) (upholding decision not allowing religious clubs to meet during activity); Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist., 669 F.2d 1038 (5th Cir. 1982) (upholding decision not to allow students to hold religious meetings on school property before or after school).

5. *See* S. REP. NO. 98-357, at 12 (1984) ("The priceless rights of freedom of speech and free exercise of religion are being denied by our Nation's schools, the very institutions that ought to teach their importance to the American way of life."); *see also id.* at 15 ("[S]chool authorities across the country are banishing religious clubs from campus or placing such onerous restrictions on them that meetings become almost impossible."); 130 CONG. REC. 23, 32,316 (1984) ("The congressional intent in passing The Equal Access Act was to develop legislation that respects both the Establishment Clause and the Free Exercise and Free Speech Clauses of the First Amendment, so that secondary school students may organize meetings. While Congress recognized the constitutional prohibition against state-sponsored religious activities in public schools, it also believed that student-initiated speech, including religious speech, should not be excised from the school environment.").

6. *See* Ceniceros v. Bd. of Trustees of the San Diego Unified Sch. Dist., 66 F.3d 1525 (9th Cir. 1995) (holding that religious club must be allowed to meet at lunchtime because nonreligious clubs were allowed to meet); Pope v. East Brunswick Bd. of Educ., 12 F.3d 1244 (3d Cir. 1993) (holding that school must recognize the Bible Club because it had recognized the noncurricular Key Club).

7. John Cloud, *The Battle over Gay Teens*, TIME, Oct. 10, 2005, at 44 (internal parenthesis omitted).

8. For news stories concerning controversies about formation of gay student clubs on high school campuses, see, e.g., Lucas Wall, *Teens Seek to Form Gay Groups in Schools*, HOUS. CHRON., Jan. 5, 2003, at A29; Michael Winerip, *Tolerance and*

advocates say the clubs help communities bridge divisions – but more conservative groups fear students will be lured into engaging in behavior they don't support."[9] While some educators may hope that the controversy surrounding the access of gay student groups on high school campuses will eventually diminish, the growing number of alliances does not support such wishful thinking. As the number of GSAs has grown in schools, and as these clubs begin seeking EAA protection pioneered by earlier religious clubs, the controversy about a homosexual voice on high school campuses now challenges school communities all over the United States.

This article contains four parts. The first part provides an overview of the Equal Access Act and its legislative history. The second part discusses the Supreme Court's treatment of the EAA in *Board of Education of Westside Community Schools v. Mergens*,[10] in which the Court upheld the constitutionality of the Act. The third part discusses all reported litigation brought by gay and lesbian students seeking to have a student club devoted to their interests recognized by school districts under the Equal Access Act. The article's fourth and final part discusses the themes that have emerged from EAA litigation and the policy implications for a school district when considering whether to permit a gay or lesbian student group to meet on high school campuses under the EAA. The evolution of case law on this topic suggests that school authorities will best serve the basic aims of public education by granting gay and lesbian student groups the right of equal access to school premises in compliance with the EAA and the basic constitutional principal of the right of free speech.

I. THE EQUAL ACCESS ACT: AN OVERVIEW

Congress enacted the Equal Access Act (EAA) in 1984.[11] "In essence," one commentator noted, "the EAA is a federal nondiscrimination statute for student groups."[12] The EAA

Hypocrisy on Gay-Straight Clubs, N.Y. TIMES, Jan. 29, 2003, at B10.

9. Christina Bellantoni, *'Gay-straight' Clubs in Schools Anger Foes*, WASH. TIMES, Nov. 18, 2004, at B01.

10. 496 U.S. 226, 247–48 (1990).

11. 20 U.S.C. § 4071 (2000); Eric W. Schulze, *Gay-Related Student Groups and the Equal Access Act*, 196 EDUC. L. REP. 369 (2005).

12. Schulze, *supra* note 11.

ideas."[22]

II. *MERGENS*: THE SUPREME COURT DECLARES THE EAA CONSTITUTIONAL

Under the language of the Act, the EAA's protective function is triggered when a school creates a limited open forum[23] by allowing a single noncurriculum related student club to meet on school grounds. Schools are considered closed forums[24] unless the school through policy or practice opens the forum to noncurriculum related student groups. A school district that prohibits all noncurriculum related clubs from meeting[25] on campus during noninstructional times effectively shields the district from the requirements of the EAA. Thus, what constitutes a noncurriculum related club is critical to understanding and applying the EAA.

Since Congress failed to define "noncurriculum related student groups" when it passed the EAA, the Supreme Court was obliged to define the term in *Board of Education of Westside Community Schools v. Mergens*.[26] In the case, a Nebraska school district challenged the constitutionality of the EAA as well as its applicability to the school district itself.

In *Mergens*, a school district refused equal access to a Christian student club—the very type of group Congress intended to assist through the EAA.[27] Students who were members of the club brought suit to compel the school district

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22. 130 CONG. REC. 14, 19,221 (1984) (statement of Sen. Leahy).

23. The Equal Access Act defines a limited open forum 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." 20 U.S.C. § 4071(b) (2000).

24. The classroom is considered a closed forum in that the school board reserves its use for an intended purpose—the teaching of the adopted curriculum. *Chiras v. Miller* held that the "use of textbooks in public school classrooms is government speech and not a forum for First Amendment purposes." 432 F.3d 606, 618 (5th Cir. 2005). Furthermore, the Supreme Court in *Board of Education, Island Trees Union Free School District No. 26 v. Pico* held that a school board "might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values." 457 U.S. 853, 869 (1982).

25. *Thompson v. Waynesboro Area School District* held that activities are meetings if they are voluntary, student initiated, occur in a meeting place, and are capable of being ignored by those students who choose not to participate. 673 F. Supp. 1379, 1383 (M.D. Pa. 1987).

26. 496 U.S. 226, 237 (1990).

27. *See id.* at 232; *supra* note 5.

to allow them to meet under the auspices of the Act.[28] The school district responded by arguing that the law did not apply to the school district because it had not permitted any noncurriculum related student groups to meet on school premises and thus had not created a limited open forum.[29] Alternatively, the school district argued, if the Act did apply to the school district, the school district's decision to deny access to the Christian club must still be upheld because the EAA is unconstitutional as a violation of the Establishment Clause.[30]

In deciding *Mergens*, the Supreme Court first turned its attention to the school district's statutory argument—that the EAA did not apply to the district because it had not permitted any noncurriculum related group to meet on school premises. To address this argument, the Court had to first determine what constitutes a "noncurriculum related student group."[31] The plaintiff students asserted that the school district allowed several noncurriculum related student groups to meet on school premises and was therefore obligated by the EAA to grant the same privileges to the Christian club. If plaintiffs could show that a single one of the district's student clubs was not related to the curriculum, then they would establish that the district indeed did maintain a limited open forum, which would entitle the Christian club to EAA protection.

In an opinion written by Justice O'Connor, the Supreme Court held that a student club relates to the curriculum if: (1) "the subject matter of the group is actually taught, or will soon 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 club is required for a particular course" or (4) "participation in the group results in academic credit."[32] "The logic of the Act," the Court concluded, "supports [the] view . . . that a curriculum-related student group is one that has more than just a tangential or attenuated relationship to courses offered by the school."[33] Using these criteria, the Supreme Court found that the school had allowed at least three noncurriculum related clubs to meet on campus: the chess club;

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28. *Mergens*, 496 U.S. at 233.
29. *Id.* at 245–46.
30. *Id.* at 247.
31. *Id.* at 237.
32. *Id.* at 239–40.
33. *Id.* at 238.

the "Subsurfers" (a scuba diving club); and the Peer Advocates program—none of which were directly related to courses offered at the plaintiffs' school.[34]

The school district argued that all its clubs were curriculum related. The district maintained that the scuba diving club was related to physical education classes and that the chess club was associated with the school's mathematics courses.[35]

Without going so far as to label the district's arguments as disingenuous, the Supreme Court strongly rejected the school district's position that all its student clubs were curriculum related. To the extent that the school district contended that "'curriculum related' means anything remotely related to abstract educational goals," the Court wrote, "we reject that argument."[36] To permit schools to evade the EAA by "strategically describing existing student groups, would render the Act merely hortatory. . . ."[37]

The Supreme Court then turned to the school district's second argument—that the EAA violated the Establishment Clause of the First Amendment. Applying the three-pronged *Lemon* test,[38] the Court concluded that the Act did not run afoul of the First Amendment. First, the *Mergens* Court concluded that the law has a secular purpose—to prevent discrimination against student speech.[39] The Court distinguished government speech that promotes religion in violation of the Establishment Clause from private religious speech protected by the Free Speech and Free Exercise Clauses of the First Amendment.[40] Second, the Court found that the EAA did not have the primary effect of advancing religion.[41] Finally, the Court concluded, the EAA created no "excessive entanglement" between religion and the government.[42]

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34. Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 245–46 (1990).

35. *Id.* at 244.

36. *Id.*

37. *Id.*

38. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). The Lemon test provides that to avoid conflict with the religion clauses of the First Amendment, a statute "must have a secular legislative purpose, . . . its principal or primary effect must . . . neither advance[ ] nor inhibit[ ] religion," and it "must not foster 'an excessive government entanglement with religion.'" *Id.*

39. Mergens, 496 U.S. at 248–49.

40. *Id.* at 250.

41. *Id.* at 251–52.

42. *Id.* at 252–53.

The *Mergens* Court fashioned an easily understandable definition of what constitutes a noncurriculum related student club, making it relatively simple for courts to determine whether a school district maintains a limited open forum for the purposes of the EAA. School districts found to have limited open forums would be required to grant equal access to other petitioning student groups. For example, three years after *Mergens*, the Third Circuit rejected a school board claim that the Key Club, a student group associated with the Kiwanis Club, was related to the school's history and humanities classes.[43] The court of appeals found that the club was essentially noncurriculum related, and thus the school had established a limited open forum.[44] Therefore, the EAA required the school to allow a Bible club to have access to school facilities, the public address system, and bulletin boards.[45]

While early litigation under the EAA involved requests by student religious groups to meet on school property, recent litigation has involved nonreligious groups with more controversial agendas than religion. Indeed, Justice Kennedy in his concurring opinion in *Mergens* predicted that the EAA would one day be invoked by more unconventional groups than student religious clubs. "[O]ne of the consequences of the statute, as we now interpret it," Justice Kennedy observed, "is that clubs of a most controversial character might have access to the student life of high schools that in the past have given official recognition only to clubs of a more conventional kind."[46] The EAA prohibits schools from discriminating against student groups on the basis of religious, political, philosophical, or other content of the speech of those groups. Thus, the spectrum of student organizations entitled to protection under the EAA includes student clubs devoted to the interests of gay and lesbian students.

In recent years, the issue of school recognition of gay and lesbian clubs in high schools has become a hot-button topic in

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43. Pope v. East Brunswick Bd. of Educ., 12 F.3d 1244, 1253 (3d Cir. 1993) ("[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.").

44. *Id.* at 1251.

45. *See id.* at 1246, 1251, 1256.

46. *Mergens*, 496 U.S. at 259 (Kennedy, J., concurring).

many communities.[47] For example, when students at Newsome High School in Florida wanted to form a Gay-Straight Alliance club they met stiff community resistance.[48] One couple worried that the students would discuss sexual issues, stating, "Students should discuss sexual-orientation issues with their families, or with psychologists, not with peers in a school-sanctioned club."[49] In the end, the gay group was recognized by the school, but students had to have their parents' permission to become a member.[50]

III. GAY-STRAIGHT ALLIANCE EAA CASES

While the first wave of EAA litigation involved religious clubs, more recent cases have involved gay, lesbian, and transgendered students who began using the courts to claim their right to form student clubs under the auspices of the EAA. As one commentator noted, "Gay students are now encountering resistance similar to that which opposed students who previously sought recognition from public secondary schools of religious clubs."[51]

In several instances, school districts have refused to allow gay student groups to meet on high school premises, in spite of the groups' arguments that the EAA required the districts to accommodate them. In some cases, gay student groups have sued in federal court for recognition under the EAA. Reported cases involving EAA challenges brought by gay student groups are discussed below. In most instances, the gay student groups prevailed in these lawsuits.

A. East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District (1998) *and the PRISM Club Litigation (2000)*

East High Gay/Straight Alliance v. Board of Education o

47. *See, e.g.*, Wall, *supra* note 8; Winerip, *supra* note 8.

48. S.I. Rosenbaum, *Gay-Straight Group Forms at High School*, ST. PETERSBURG TIMES, Sept. 15, 2005, at 1.B; S.I. Rosenbaum, *Parents: School No Place for Gay Issues* ST. PETERSBURG TIMES, Sept. 13, 2005, at 1.B [hereinafter *Parents*].

49. *Parents*, *supra* note 48.

50. Rosenbaum, *supra* note 48.

51. Mawdsley, *supra* note 4, at 31.

Salt Lake City School District[52] was the first reported EAA case involving gay-related school groups.[53] The Gay/Straight Alliance (GSA) club sued in federal court seeking declaratory and injunctive relief[54] after being denied access to school facilities in Salt Lake City. Like the school board in the *Mergens* case, the Salt Lake City School District claimed that it had not established a limited open forum because all its student clubs were curriculum related.[55] The district pointed to its policy,[56] which explicitly stated that it did not allow a limited open forum to exist.[57] The student plaintiffs lost at the preliminary injunction stage because they failed to show that any of the suspected clubs were noncurriculum related.[58]

However, at a trial on the merits of the case, the court found that the school district had indeed created a limited open forum because one group, the Improvement Council of East (ICE), could not be tied to the curriculum.[59] Therefore, a limited open forum had been created that would require the same recognition and access for the GSA group that had been granted to ICE. However, the victory for the GSA was largely symbolic. Soon after the lawsuit was initiated the school district integrated ICE into the curriculum,[60] thereby shutting down its limited open forum.

However, the controversy about recognition of a student group devoted to gay and lesbian students did not end when the Salt Lake City School District closed its limited open forum. Sometime later a group calling itself the East High School PRISM Club ("People Recognizing Important Social Movements") sought recognition as a curriculum-related student group.[61] The group described its goal as being a prism through which historical and current events, institutions, and

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52. 30 F. Supp. 2d 1356 (D. Utah 1998).

53. Schulze, *supra* note 11, at 374.

54. *East High Gay/Straight Alliance*, 30 F. Supp. 2d at 1357.

55. *Id.* at 1357, 1359–62.

56. *See id.* at 1357.

57. East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist., 81 F. Supp. 2d 1166, 1168 (D. Utah 1999).

58. *Id.* at 1364.

59. East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist., 81 F. Supp. 2d 1166,1180 (D. Utah 1999).

60. *Id.* at 1180.

61. East High Sch. PRISM Club v. Seidel, 95 F. Supp. 2d 1239, 1240 (D. Utah 2000).

culture could be viewed in terms of gay and lesbian contributions. In its application, the group explicitly denied that it was "advocating homosexuality" or discussing sexual behavior; rather, the group argued that it was related to American history, law, government, and sociology—subjects covered by courses in the high school curriculum.[62]

The school district denied PRISM recognition on the grounds that the group's focus was narrowed to "the impact, experience, and contributions of gays and lesbians," and that this narrow subject matter was not covered in courses that the group had cited.[63]

The PRISM group sued, alleging a violation of their members' First Amendment rights, and sought an injunction requiring the school district to recognize the club as a curriculum-related student group.[64] The federal court conducted a detailed analysis of PRISM and of several other student clubs to determine whether the PRISM club was in actuality a curriculum-related student group. The court concluded that the PRISM club was such a group because "the subject matter of the PRISM club is 'actually taught . . . in a regular course'" as required by the school's club-recognition policy.[65]

The court then went on to consider the school district's argument that it could reject curriculum-related clubs on the grounds that their focus was too narrow. "Even assuming a 'no narrowing of a club's viewpoint' rule exists," the court observed, "it is not at all clear that such a rule would even make sense."[66] The court reasoned that "[a]ll clubs are in a sense, viewpoint exclusive: French clubs are 'viewed' from the prospective of French-speaking students; science clubs are 'viewed' from the perspective of science-oriented students; all student clubs are 'viewed' from the perspective of Utah high school students."[67] Furthermore, the court ruled, a "no narrowing" rule could not be reasonably inferred from the district's written policy on curriculum-related student clubs or from the school district's

62. *Id.* at 1242–43.
63. *Id.* at 1243.
64. *See id.* at 1240.
65. *Id.* at 1246.
66. *Id.* at 1246 n.5.
67. *Id.*

past practices.[68] The district had "never explicitly articulated" such a rule and, "even if such a rule could be inferred," the court concluded that the district had not consistently applied the rule with regard to all student clubs.[69]

Thus, the court granted the PRISM club's motion for an injunction requiring the school district to recognize the club. The school district attempted to dissuade the court from taking this action by arguing that the courts should avoid "judicial micro-management" of the schools.[70] The court agreed with the school district that judicial micromanagement should generally be avoided, "but only so long as District policy is applied in a constitutionally-permissibl[e] manner."[71]

B. Colin v. Orange Unified School District *(2000)*

In *Colin v. Orange Unified School District*,[72] a group of students at El Modena High School formed a Gay Straight Alliance club to promote tolerance and acceptance of gay and straight students.[73] The group found an advisor and applied for school recognition similar to the recognition given to other noncurriculum related clubs—including the Chess Club, the Christian Club, the Black Student Union, and the Asian Club.[74] The school administration treated the group's request differently from other requests for student-group recognition and sent the request to the school board.[75] The school board delayed action and then held a public forum on the group's request. Eventually the school board voted unanimously to deny the GSA application.[76] The board explained that its denial of the group's application was based on concerns that discussions of sexuality were age inappropriate, even though the GSA assured the board that its focus was on tolerance and not sex education.[77]

The federal district court found in favor of the GSA. The

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68. *Id.* at 1251.
69. *Id.*
70. *Id.* (internal quotation marks omitted).
71. *Id.*
72. 83 F. Supp. 2d 1135 (C.D. Cal. 2000).
73. *Id.* at 1138.
74. *Id.* at 1138, 1164.
75. *Id.* at 1138–39.
76. *Id.* at 1139.
77. *Id.*

court concluded that board recognition of the group was unlikely to run afoul of subsection (c)(4) of the EAA.[78] In other words, GSA meetings were not likely to "materially and substantially interfere with the orderly conduct of educational activities within the school."[79] In fact, the court noted that the group was formed for the very purpose of fostering discussion which might help prevent "disruptions to education that can take place when students are harassed based on sexual orientation."[80]

C. Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County *(2003)*

In *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*,[81] a group of high school students sought recognition for a GSA club at a school where a limited open forum had previously been established.[82] The club's stated purpose was to "provide students with a safe haven to talk about anti-gay harassment[83] and to work together to promote tolerance, understanding and acceptance of one another regardless of sexual orientation."[84] The GSA submitted a request for club status early in 2002,[85] but the district took no action on the request, purportedly because it was late.[86]

The GSA resubmitted its application for recognition. Its application was one of twenty applications, but was the only one turned down.[87] Among the clubs receiving recognition were at least three noncurriculum related clubs, including the

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78. *Id.* at 1146.

79. *Id.* (quoting 20 U.S.C. § 4071(c)(4)). For a discussion of the material and substantial disruption, see Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969).

80. *Colin*, 83 F. Supp. 2d at 1146.

81. 258 F. Supp. 2d 667 (E.D. Ky. 2003).

82. *Id.* at 672.

83. *Id.* at 670 n.1 ("One example of the harassment includes students in Plaintiff Fugett's English class stating that they need to take all the fucking faggots out into the back woods and kill them.").

84. *Id.* at 670.

85. *Id.* at 672. When the superintendent of schools, Bill Capehart, was notified that the GSA was seeking recognition, he told the principal of the school that "having a GSA Club was the right thing to do for all students and that the School District needed the students to follow through with starting the GSA Club at BCHS [Boyd County High School]." *Id.* at 671.

86. *Id.* at 672.

87. *Id.*

Fellowship of Christian Athletes.[88]

The GSA contacted the American Civil Liberties Union (ACLU), which wrote a letter to the school council.[89] At the next council meeting the GSA and two other clubs were approved. The reaction from those opposed to the GSA Club was "acrimonious," with the principal characterizing it as "open hostility."[90] A crowd confronted the GSA supporters. A school board member stated that she "was appalled at the reaction of the group, the audience. There was nothing but hatred in that room and ignorance showed by moms and dads and grandparents."[91]

Two days after the Council approved the GSA, a group of students congregated in front of the high school to protest the Council's decision and the existence of the GSA.[92] The protesters shouted at arriving students, saying, "'If you go inside, you're supporting the GSA;' 'We don't want something like that in our school;' and 'If you go inside, you're supporting faggots.'"[93] The protesters, however, did not prevent any students from entering the school and there was no counter-demonstration by GSA supporters.[94]

Four days later, on November 4, 2002, anti-GSA students staged a boycott, with nearly half of the students staying home.[95] There was no reported disruption of classroom activities; teachers were not prevented from teaching, and students were not prevented from attending school.[96] However, the faculty advisor for the GSA received threatening notes from students and her car was "keyed." Nevertheless, this alleged harassment did not disrupt her teaching or classroom activities.[97]

On December 16, 2002, the superintendent proposed that the Council ban all noncurricular clubs.[98] On December 20,

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88. *Id.* at 672, 673.

89. *Id.* at 672.

90. *Id.* at 673.

91. *Id.*

92. *Id.* at 674 (stating that "approximately 100 of BCHS's 974 enrolled students remained outside during the protest").

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 675.

GSA the same access to school facilities that the school district had granted to other noncurriculum-related clubs.[116]

D. White County High School PRIDE v. White County School District *(2006)*

The issue of what constitutes a noncurriculum student club acts as a controversial lynchpin—a key definition that unlocks and opens the school as a forum for discussing issues important to gay and lesbian students. The United States District Court (Northern District) in Georgia in 2006 addressed this issue when a group of students called PRIDE—commonly known as the gay-straight alliance (GSA)—sought access to school facilities under the EAA.[117] In January 2005, the plaintiffs sought recognition by the school district so that students could meet "to support those who have been bullied or harassed because of their identity . . . in particular . . . to support students who are lesbian, gay, bisexual, or transgender."[118] Initially, the high school principal denied the group's request for recognition. Later, the school district's superintendent informed the group that it could proceed with the formation of the GSA, but that it must provide the principal with a list of proposed members and bylaws prior to receiving organizational recognition.[119]

The request for recognition soon became the subject of public controversy. Some protests were held outside the school and the administration received requests to recognize "potentially controversial clubs" such as the "Redneck Club," the "Wiccan Club," and the "Southern Heritage Club."[120] In February 2005, the plaintiffs changed their name to PRIDE and reworded their mission statement to include support for all students bullied and harassed.[121] On March 21, 2005, the school informed PRIDE that the club had been given official

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116. *Id.* at 693.

117. White County High Sch. PRIDE v. White County Sch. Dist., No. 2:06-CV-29-WCO, 2006 WL 1991990 (N.D. Ga. July 14, 2006) (PRIDE stands for Peers Rising in Diverse Education).

118. *Id.* at *1 (quoting Complaint at 8, *White County*, No. 2:06-CV-29-WCO, 2006 WL 1991990).

119. *Id.* (stating that plaintiffs alleged "that no other noncurricular student group was subjected to such a lengthy and formal process before recognition").

120. *Id.* (stating that some students wore t-shirts displaying anti-GSA messages).

121. *Id.* at *2.

recognition and was permitted to meet on campus during noninstructional time.[122] PRIDE met approximately three times during the remainder of the 2004–2005 school year.[123]

At a school board meeting in March of 2005, the high school principal made several recommendations, including limiting student clubs to only those related to the school curriculum and school programs. In June, a study committee created by the school board recommended the elimination of all noncurriculum related clubs and organizations.[124] In effect, this action closed the limited open forum previously created by the recognition of noncurriculum related clubs. Following the new board policy, the principal decided that four clubs—the Fellowship of Christian Athletes, Key Club, Interact Club, and PRIDE—would not be allowed to meet on school premises during the upcoming 2005–2006 school year.[125]

Thus, PRIDE was not allowed to meet on campus. The group brought suit against the school district, claiming that "the decision to ban all noncurriculum student groups was motivated by a desire to ban PRIDE and to suppress the content and viewpoint of its members' speech."[126] The plaintiffs also asserted that the district continued to allow certain noncurriculum related clubs to continue meeting on school premises in spite of the school district's official ban on such clubs. Specifically, plaintiffs alleged that the following clubs were noncurriculum related and that these clubs continued to meet on campus: the Beta Club, Dance Team, Student Council, Youth Advisory Council, Prayer Group, Shotgun Team/4-H Club, and Prom Group.[127]

The court analyzed each group in turn. First, the court concluded that the Beta Club was curriculum related because membership extended only to students who "achieved a sufficiently high grade point average in the school's core classes."[128] Even though club members held scholarship fundraisers for its members—a noncurriculum related activity—"the group's main purpose, honoring academic

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122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 4.
128. *Id.* at *6.

excellence, is directly related to the curriculum."[129]

Next, the court considered the status of the Dance Club. The court found that dance was not taught in the curriculum and that there were no plans to offer dance as a course. Thus, the Dance Club was a noncurriculum related student group.[130]

As for the Student Council, the court considered the school's argument that the council was related to the school's social studies program. The court rejected this explanation, writing, "[D]efendants fail[ed] to provide evidence that the [Student Council's] subject matter is 'actually taught' in [the social studies courses]."[131]

The Youth Advisory Council, the school explained, was curriculum related because it assisted the school's guidance and counseling department.[132] The subject matter of the Council included teen pregnancy and drug, alcohol, and tobacco abuse.[133] However, the school district failed to convince the court that the speech of the Council was related to a "regularly offered course."[134] In addition, the court ruled that the "defendants . . . failed to show that th[e] subject matter concern[ed] the body of courses as a whole."[135]

The school district may have believed that it had acted in good faith in denying official recognition to the Fellowship of Christian Athletes or to any prayer group.[136] However, the plaintiffs asserted that the school had granted the prayer group access to school facilities after the club's recognized status was revoked.[137] The student group gathered around the flagpole, held hands, and bowed their heads on at least one occasion and

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129. *Id.* However, the court cautioned that "[a] noncurriculum-related student group would not become curriculum related simply because its members were required to maintain a particular academic standard in order to participate." *Id.* n.3.

130. *Id.* In *dicta*, the court may have sent shivers up the backs of many school boards that believe that they have not created an open forum when the court wrote, "Although the question of the curriculum relatedness of cheerleading and extracurricular sports is not currently before this court, it is not clear to the court that these activities could be considered 'curriculum related' within the scope of the EAA." *Id.* n.4.

131. *Id.* at *8.

132. *Id.*

133. *Id.* at *9.

134. *Id.*

135. *Id.* ("While this subject matter may relate to the guidance and counseling program and its services, defendants have failed to establish that this subject matter is related to any academic course.").

136. *Id.* at *10 n.11.

137. *Id.* at *9.

possibly two.[138]

The court expressed some ambivalence regarding the status of the prayer group on the high school campus. The court indicated that it "[did] not believe that Congress intended for an unrecognized, unorganized group of students who met on one or two occasions to engage in activities unrelated to the school's curriculum to trigger the Act's obligations."[139] Nevertheless, evidence showed that the school had allowed the prayer group to use the school's public address system to announce group meetings, which, the court observed, gave "credence to plaintiffs' assertion that this group was recognized by the school."[140] In the court's view, a limited public forum had been created when the school allowed the prayer group to meet on school premises in a conspicuous location and to use school facilities to publicize its meeting.[141]

The court dealt only briefly with two other disputed student groups—the "Shotgun Team" and the 4-H Club. The litigation parties stipulated that these two groups were noncurricular but disagreed as to whether the school had permitted the clubs to meet on school premises during noninstructional time. The court concluded that there was sufficient evidence to find that the 4-H Club had met on school premises outside instructional hours and that the school's involvement with the 4-H Club was extensive enough to create a limited open forum under the EAA.[142]

The Prom Group was the last group considered by the court. As its name implies, the Prom Group planned proms. The plaintiffs contended that the group was allowed to meet on school grounds during noninstructional time and that the group's activities were not directly related to the school's curriculum.[143] The school countered that the Prom Group was not a "student group" within the meaning of the EAA.[144] The school described the Prom Group as "no different from a group of students recruited by the school for any particular

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138. *Id.*

139. *Id.* at *10 (citing Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 240 (1990)).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at *11.

144. *Id.*

responsibility such as picking up trash left on the school grounds."[145]

The court rejected the school's characterization of the Prom Group, finding that it "was more structured than the hypothetical group of trash collectors."[146] The regularity of the Prom Group's meetings, the assistance of the faculty, and the publicity that the group received over the school's public address system convinced the court that the Prom Group met the definition of a student group under the EAA.[147] Because the school made no attempt to tie the Prom Group's activities to the school's curriculum, the school had created a limited open forum.[148]

In short, based on the court's designation of several student groups, it found that the school had created a limited open forum. After analyzing seven student groups, the court found that only one, the Beta Club, met the criteria for being curriculum related.[149]

White County should be of interest to school officials because the court adopted a fairly broad view of what constitutes a noncurriculum related student group for EAA purposes. In particular, the prayer group and the Prom Group were fairly casual collections of students with little organizational structure.[150] Nevertheless, the court concluded that both groups were noncurriculum related and that the school had created a limited open forum by allowing them to meet on school premises during noninstructional time.[151]

At the same time, the *White County* court's definition of "curriculum related" was fairly narrow. In *Mergens*, the Supreme Court suggested that a school's student government would be a curriculum-related group if it "addresses concerns, solicits opinions, and formulates proposals pertaining to the

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145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *See id. at* 5–6.

150. *See id.* at 9–11. The prayer group "met on school premises to pray at least once" and "publicized their meeting via the school's public address system." *Id.* at *10. For the Prom Committee, one teacher "sought student volunteers to help plan the prom," and Morning Bulletins "contain[ed] announcements of three separate meetings of Prom Committee throughout the course of the school year." *Id.* at *11.

151. *Id.*

body of courses offered by the school."[152] Perhaps shaping its argument with *Mergens* in mind, the White County School District contended that the Student Council's activities were related to the high school's social studies program.[153] The court rejected that argument, however, finding that the school had not provided sufficient evidence to establish a connection between the social studies program and the Student Council.[154]

The *White County* decision indicates that it is relatively easy for a rejected student group to show that a school district has established a limited open forum and thus is subject to the EAA.[155] The federal court in that case asserted that the term "curriculum related" is a "strict framework in which schools can operate with regard to student groups."[156] Student groups falling outside that "strict framework"—whether formal or informal—will bring a school district under the strictures of the EAA if the school allows such groups to meet on school premises during noninstructional time.[157]

E. Straights and Gays for Equality v. Osseo Area School *(2006)*

Maple Grove High School in Minnesota recognized sixty student teams, groups, clubs, and organizations.[158] These student organizations were classified as either "curricular" or "noncurricular."[159] Approximately nine of the sixty clubs were

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152. Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 240 (1990).

153. *White County*, 2006 WL 1991990, at *7.

154. *Id.* at *8.

155. *See id.* at 12 ("[A] school system that chooses to evade the EAA's equal access requirements must do so within the confines of the law. The court finds that, despite defendants' good faith efforts, they have run afoul of the EAA.").

156. *Id.*

157. *See id.* ("Plaintiffs have demonstrated that defendants maintained a limited open forum under the EAA. Plaintiffs have also presented evidence that they have been denied equal access to meet based on the content of their speech at such meetings. Therefore, the court finds that defendants have violated plaintiffs' rights under the EAA.").

158. Straights and Gays for Equality v. Osseo Area Sch., Civ. No. 05-2100(JNE/FLN), 2006 U.S. Dist. LEXIS 16326, at *4 (D. Minn. Apr. 4, 2006).

159. *Id.* The curricular clubs were "related to the school's curriculum, and [we]re sponsored by the school." *Id.* (internal quotations omitted). These groups included student government associated organizations such as the Crimson Cabinet; Crimson Council; Diversity Council; Asian Culture Leadership Group; Black Achievers; Native American Group; Gays, Lesbians, Bisexuals, Transgenders, Questioning, and Allies (GLBTQ-A); Students Against Destructive Decisions (SADD); selected sports, including synchronized swimming; and cheerleading. *Id.* at *5.

designated as noncurricular.[160] Straights and Gays for Equality (SAGE) was one of the noncurricular groups.[161] Curricular clubs were allowed to "communicate via PA, Yearbook, scrolling screen" as well as "other avenues of communication" and to participate in fundraising activities and field trips at the discretion of the principal.[162] Noncurricular groups could not use these venues or participate in these activities.[163] They could only announce meetings by posting notices on a community bulletin board or outside their meeting space.[164]

SAGE brought suit in federal court in Minnesota under the EAA, asserting that it was entitled to "the same access for meetings, avenues of communication, and other miscellaneous rights afforded to other groups," specifically the curricular designated groups.[165] The plaintiffs sought a preliminary injunction compelling the school to allow them the right of equal access provided to other student groups.[166] According to the plaintiffs, some groups designated as curricular were in fact noncurriculum-related groups under the EAA.[167] The school maintained that school authorities had properly categorized the curricular groups with regard to their relationship to the curriculum; therefore, the EAA did not require that SAGE, a noncurricular group, be afforded the same rights as the curricular groups.[168] The suit centered on whether the disputed student groups were noncurriculum related rather than curriculum related.[169]

The dispute was not over whether a limited public forum existed at the high school; both parties agreed that such a

160. *Id.* at *5.

161. *Id.*

162. *Id.*

163. *Id.* at 5–6.

164. *Id.* at *5.

165. *Id.* at *6 (internal quotation omitted).

166. *See id.* at *9 ("Plaintiffs argue that, in addition to meeting space, they are entitled to hang posters throughout the school, announce meetings over the PA system, hand out flyers, and conduct fundraising activities on behalf of SAGE.").

167. *Id.* (arguing that the student government councils, the Asian Culture Leadership Group, Black Achievers, Native American Group, GLBTQ-A, SADD, National Honor Society, Dance Team, gymnastics, synchronized swimming, track and field, and cheerleading are not curriculum related).

168. *Id.* at *9–10.

169. *Id.* at *10.

forum had been created.[170] The school asserted that it treated all noncurricular clubs the same and thus SAGE was not denied equal access that other noncurricular clubs received.[171] If it could be shown that even one of the so-called curricular clubs was in fact a noncurriculum related student group under the EAA, then it could be established that other noncurricular clubs, including SAGE, were not being treated equally with the favored noncurricular clubs.[172] As the court put it, in order for SAGE to prevail, it "need only demonstrate that one of the identified student groups is noncurriculum related under *Mergens* and that the group is afforded greater rights than SAGE."[173]

On the motion for preliminary injunction, the federal district court held that the plaintiffs were likely to prevail because cheerleading and synchronized swimming were not curriculum related.[174] This finding is instructive as an example of how a federal court might designate similar groups in other cases brought under the EAA. After all, most public high schools have cheerleading programs of one kind or another. Under the reasoning of *Osseo Area Schools*, those high schools will be operating limited open forums under the auspices of the EAA based solely on their cheerleading activities.

After finding that SAGE was likely to prevail, the court asked whether it would suffer irreparable harm if its motion for a preliminary injunction was not granted.[175] The court held that since the defendant school district was violating SAGE's rights under the EAA, it was entitled to a presumption of

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170. *Id.*

171. *See id.* at *9–10 ("Defendants maintain that they have properly categorized as 'curricular' the groups Plaintiffs have identified and therefore that they are not required by the EAA to grant SAGE the same access rights these groups are afforded.").

172. *Id.* at *13–14.

173. *Id.* at *14.

174. *Id.* at *13–15. "[T]he Court is persuaded that both cheerleading and synchronized swimming are noncurriculum related student groups; because MGSH has categorized the groups as 'curricular' under the Framework, both are afforded greater access to the school than SAGE." *Id* at *14. The holding that cheerleading is not curriculum related may well capture the attention of many high schools which have, in their estimation, a closed forum and have cheerleading groups. These schools may well seek to ascertain if the organization of their cheerleading squads is similar to the organization of the squad questioned in this case. According to the court, neither cheerleading nor synchronized swimming was required or available for course credit. *Id.* at *14.

175. *Id.* at *15–16.

irreparable harm.[176] Citing *Colin v. Orange Unified School District*, the court wrote, a "'presumption of irreparable harm arises in the case of violations of the [EAA] because it protects 'expressive liberties.'"[177] The court refused to accept the defendants' rebuttal, asserting: "Plaintiffs are suffering, and will continue to suffer, irreparable harm if the injunction is not granted."[178]

On appeal, the defendant sought an order from the district court staying the injunction pending the appeal and the plaintiff brought a motion for civil contempt.[179] The defendant school district argued that it would "sustain severe prejudice" if the order was implemented because all of the other noncurricular groups would also have to be granted the same access as the plaintiff SAGE.[180] The district court held that the plaintiff did not seek onerous rights or privileges and that granting full access to the groups would not be "a great burden to the school."[181] Furthermore, and importantly, Judge Erickson asserted that "the public interest [was] served by enforcing Plaintiffs' rights under the EAA."[182] With respect to the plaintiff's motion for civil contempt, the judge denied the motion, stating that the defendant had not yet had enough time to implement the order.[183] The Court left open the door for SAGE to renew the motion if the school district did not immediately comply with the order.[184]

According to the district court, student speech associated with the EAA is not of minor value or of incidental importance. The denial of student speech under the EAA is considered irreparable harm that requires immediate action on the part of the court.[185] This case is not just about the speech of a gay student group. The school had already recognized the Gays, Lesbians, Bisexuals, Transgenders, Questioning, and Allies

176. *Id.* at *16.

177. *Id.* at *17 (quoting Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135, 1149 (C.D. Cal. 2000)).

178. *Id.*

179. *Id.* at *2–3.

180. *Id.* at *4–5.

181. *Id.* at *5.

182. *Id.* at *6.

183. *Id.*

184. *Id.*

185. *Id.* at *16.

(GLBTQ-A) group.[186] It is about the speech of students, who in this case wish to speak about gay, lesbian, and straight issues. The denial of their speech under EAA constituted irreparable harm, allowing the court to take appropriate action to minimalize or reduce the harm pending full adjudication on the matter.

F. Caudillo v. Lubbock Independent School District *(2004)*

The cases discussed so far support the conclusion that the Equal Access Act requires a public secondary school to recognize a gay student group if the school previously recognized other noncurriculum related student groups and thereby established a limited open forum. Based on these decisions, the question of whether gay/lesbian student clubs are entitled to the same right of access to school facilities as religious clubs or other noncurricular clubs would appear to be settled.

However, in March 2004, a federal district court in Texas bucked this judicial trend. In *Caudillo v. Lubbock Independent School District*,[187] the court ruled that the Lubbock school system was not required to recognize the Lubbock High School Gay Straight Alliance[188] in spite of the fact that the school district had established a limited open forum under the EAA.[189] The court ruled that the school district had not violated the free speech rights of students who had sought the gay group's recognition.[190] The court also ruled that the school system was entitled to ban the group under exceptions contained in the EAA.[191]

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186. *Id.* at *5.

187. 311 F. Supp. 2d 550 (N.D. Tex. 2004).

188. The court made reference to the Lubbock High School Gay Straight Alliance and the Lubbock Gay Straight Alliance; both names refer to the same group.

189. *See Caudillo*, 311 F. Supp. 2d at 572; *see also id.* at 561 ("Defendants would have clearly denied *any* group access to school facilities if such a group had chosen to violate the school's policy regarding discussion of sexual activity. . . ."); *id.* at 565 ("'Because the Court interprets the language of the EAA to *permit a school to impose reasonable content-neutral regulations* on a limited open forum, the Court will consider the Defendants' argument as being applicable to the EAA as well.'" (quoting Franklin Cent. Gay/Straight Alliance v. Franklin Twp. Cmty. Sch. Corp., 2002 WL 32097530, at *19 (S.D. Ind. Aug. 30, 2002))).

190. *Id.* at 564 ("Listing as a goal the discussion of safe sex and advertising a website address with links to obscene and explicit sexual conduct go beyond the bounds of First Amendment protection in the public school setting.").

191. *Id.* at 571 ("[T]he Defendants properly invoked the 'well-being exception' to

These are the facts of the *Caudillo* case as outlined by the federal district court. In September 2002, Joseph Schottland, a faculty member at Lubbock High School ("LHS") wrote Fred Hardin, Assistant Superintendent for Secondary Education at Lubbock Independent School District ("LISD"), asking for permission for the Gay and Proud Youth Group ("GAP Youth") to post notices at the high school concerning an upcoming off-campus meeting of the group.[192] (The group's name was later changed to Lubbock Gay Straight Alliance ("LGSA")).[193]

Later that month, Rene Caudillo and Ricky Waite, LHS seniors, wrote a school board trustee and asked for permission to advertise the GAP Youth group through posted flyers at LHS and via announcements over the school's public address system.[194] Waite and Caudillo followed up this petition with a request to the school board and to Assistant Superintendent Hardin, asking for permission to advertise their gay student group at the high school.[195] In response to their request, Caudillo, Waite, and the GAP Youth founders were placed on the school board's agenda for a November 2002 meeting.[196] Waite addressed the school board, but the board did not allow the group to advertise at the high school.[197] Later the group requested permission to meet at the high school, but this request was also denied.[198]

In July 2003, Caudillo and LGSA filed a federal lawsuit against the school district and several administrators, alleging violations of the Equal Access Act ("EAA") and the right to free speech under the First Amendment. The court had no difficulty finding that LISD was subject to the EAA; in fact, the district had previously adopted a formal policy recognizing a limited open forum at its high school.[199] Thus, the central question for the federal court was whether the Lubbock school district could refuse to recognize the gay student group without violating the

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the EAA in denying the GAP Youth/LGSA requests as presented to the Defendants.").

192. *Id.* at 556.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 557.

198. *Id.*

199. *Id.* at 556.

EAA or the First Amendment.[200]

In its March 2004 decision, the court ruled in favor of the school district, granting its request for summary judgment.[201] In so ruling, the court placed heavy reliance on these key facts. First, the school district had adopted a formal policy of abstinence applying to all matters concerning sexual activity among students.[202] Second, the gay student group listed as one of its goals the discussion of safe sex, which was contrary to the school district's abstinence policy.[203] Third, during at least part of the relevant time period in question, the group operated a web site with a link to at least one other site that presented what the court termed "obscene" material.[204]

The linked web site was particularly troubling to the judge and may set *Caudillo* apart from the cases discussed earlier in this article. With regard to GAP Youth's web site, the court reached these detailed factual conclusions. First, the group advertised its web site address in the flyers that it had requested to post at the Lubbock High School.[205] Second, school authorities had reviewed the site (and apparently its links) prior to denying the student group's requests to post flyers at the high school and to meet on campus.[206] Third, as related by the court, GAP Youth's web site contained a button link to a site titled "gay.com." Topics on the gay.com site included: "New Sexy Gay Game Pics," and "Favorite Questions." The "Favorite Questions" section of the cite included articles dealing with sexually explicit topics, arguably very inappropriate for teenagers.[207]

In the court's view, the school district had adopted a reasonable, viewpoint-neutral policy of excluding discussion about sexual matters from the limited open forum it established at LHS.[208] Relying on the Supreme Court's

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200. *Id.* at 559.

201. *Id.* at 557.

202. *Id.* at 556.

203. *Id.* at 563–64.

204. *Id.* at 557, 571.

205. *Id.* at 557.

206. *Id.*

207. *Id.* ("(1) Why Am I Having Erection Problems?; (2) How Safe is Oral Sex?; (3) The Truth About Barebacking; (4) First Time With Anal Sex; (5) Kissing and Mutual Masturbation; (6) How Safe Are Rimming and Fingering?; and (7) The Lowdown on Anal Warts.").

208. *Id.* at 563 ("The Court finds that LISD's abstinence-only policy is clearly

decision in *Bethel School District No. 403 v. Fraser*,[209] the court found "that it was appropriate for educators to protect students from sexually explicit, indecent, or lewd speech."[210] In addition, quoting *Hazelwood School District v. Kuhlmeier*, the court said, "A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school."[211] In short, the *Caudillo* court ruled that the Lubbock school district had not violated the plaintiffs' constitutional right to free speech by refusing to recognize GAP Youth/LGSA or to permit the group to advertise on the school campus.[212]

Turning to the plaintiffs' EAA claim, the court concluded that the school district was entitled to ban the GSA under the "Maintaining-Order-and-Discipline" exception and the "Well-Being-of-the-Students" exception of the Act.[213] With regard to the first exception, the court acknowledged that "[t]here must be demonstrable factors that would give rise to any reasonable forecast by the school administration of substantial and material disruption of school activities before expression may be constitutionally restrained."[214] Nevertheless, the court went on to state that an actor's geographical location can be considered when "determin[ing] the constitutional protection that should be afforded to his or her acts."[215] Here, the court pointed out, plaintiffs were located on public school campuses in Lubbock, Texas. In the court's view, LISD officials "made a reasonable forecast of disruption considering the circumstances of this case and the location of the actors."[216]

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reasonable, especially when viewed in light of the age group affected. . . .").

209. 478 U.S. 675 (1986).

210. *Caudillo*, 311 F. Supp. 2d at 562; *see also Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684–85 (1986).

211. *Caudillo*, 311 F. Supp. 2d at 563 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988)). It is interesting to note that the court "ignored the club's tolerant message," which would most likely be consistent with the board's message. *See* Berkley, *supra* note 21, at 1881.

212. *Caudillo*, 311 F. Supp. 2d at 572.

213. *Id.* at 570–71. 20 U.S.C. § 4071(f) (2000) of the EAA states, "Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, *to maintain order and discipline* on school premises, to *protect the well-being of students* and faculty, and to assure that attendance of students at meetings is voluntary." (emphasis added).

214. *Caudillo*, 311 F. Supp. 2d at 568.

215. *Id.* (quoting Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960, 974 (5th Cir. 1972)).

216. *Id.* However, there was no showing of prior disruption over gay or lesbian

More specifically, the court noted that school officials received anonymous telephone calls from callers who expressed concerns about student safety in the context of GSA's activities.[217] In the court's opinion:

> LISD officials relied on their years of experience in the realm of public education to make a judgment call as to the safety of the students. Defendants argue that a potential for sexual-orientation harassment existed on LISD campuses that could lead to disruptive and dangerous conditions for the students. The Court finds that in the opinion of those with years of experience, whose consideration included the circumstances of the anonymous phone calls, legitimate safety concerns existed as well as concerns for harassment.[218]

To support its second conclusion, that banning the GSA was permissible under the EAA's "Well-Being-of-the-Students defense," the court stated that school officials "properly considered the effects of exposing minors to sexual subject matter and materials and how that could be detrimental to the students' physical, mental, and emotional well-being."[219] The court accepted school officials' representation that recognizing the gay student group might interfere with its educational mission—specifically its abstinence-only curriculum.[220] The court stated flatly that "students should not be exposed to the type of material that was available on the [GSA] website."[221]

Caudillo will undoubtedly interest school officials who are considering how to respond to requests by gay student groups for recognition as a noncurriculum related student group under the EAA. *Caudillo* indicates that a high school can refuse such requests without violating the EAA or the First Amendment if it has an abstinence-only policy concerning sexual activity among minors and has banned any discussion of sexual activity on its campus. In addition, the *Caudillo* court was the first to recognize the "Well-Being-of the-Students" and "Maintaining-Order-and-Discipline" exceptions to the EAA.[222] In that federal

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issues at school. *See id.*

217. *Id.* at 569.

218. *Id.* at 569–70.

219. *Id.* at 571.

220. *Id.* at 568. This argument is similar to the one advanced by the Supreme Court in Morse v. Frederick, 127 S.Ct. 2618 (2007) (upholding a restriction on student speech on drug use inconsistent with school policy).

221. *Caudillo*, 311 F. Supp. 2d at 571.

222. *Id.* at 570–71.

court's view, concerns about GSA members' safety and the inappropriateness of the subject matter that the GSA group might discuss can justify the banning of a gay student group from meeting on school premises.[223]

In assessing the significance of this opinion, it is important to recognize that the *Caudillo* opinion relied heavily on a couple of factual elements: 1) GAP Youth acknowledged in writing that it planned to discuss "safe sex" in contravention of the abstinence policy,[224] and 2) the group's web site had links to web sites that the trial court deemed obscene.[225] If the Lubbock GSA had avoided those two factual pitfalls and proposed only to discuss sexual orientation issues in general terms, perhaps the federal court would have ruled that the school district was required to recognize the group under the EAA. However, the court did give considerable weight to the school officials' concerns about student safety.[226]

For now, the trial court's decision in *Caudillo* stands alone for the proposition that a high school's abstinence-only policy regarding sexual activity among minors and its decision to exclude discussions about sexual activity from its campus justifies a school's decision not to recognize a gay student group. In such circumstances, one federal court has held a school violates neither the EAA nor the First Amendment.[227]

IV. CONCLUSION

This article reviewed all reported federal litigation involving efforts by gay and lesbian student groups to obtain recognition as noncurriculum related student groups under the EAA. What can we learn from this body of cases?

First, with the exception of the *Caudillo* case,[228] gay and lesbian student groups have prevailed in EAA-related litigation

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223. *Id.* at 572.

224. *Id.* at 556, 564.

225. *Id.* at 563 ("LISD's secondary schools contain students as young as twelve years of age, even less mature than the age the Supreme Court found to be too immature for such subject matter. Thus, . . . this Court finds that the material on GAP Youth/LGSA's website and the group's goal of discussing sex both fall within the purview of speech of an indecent nature, such that LISD may regulate and prohibit such speech from its campuses.").

226. *Id.* at 569–70.

227. *Id.* at 572.

228. *See supra* Part III.F.

against school districts.[229] In fact, these student groups experienced the same high level of litigation success that college-level gay and lesbian groups experienced when they sued to gain recognition from higher education institutions during the 1970s and 1980s.[230]

Second, school districts that sought to avoid recognizing gay student groups by closing their limited open forums were largely unsuccessful. In the *Boyd County* case[231] and the *White County* case,[232] school districts were found to have allowed noncurriculum related student clubs to meet on school campuses during noninstructional time, and these courts rejected school district arguments that all of their clubs were curriculum related. Indeed, cheerleading, a prom club, and a student council—student activities present in nearly every public high school—were found to be noncurriculum related student groups that created limited open forums in their respective high schools. In addition, the Salt Lake City School District, which had closed its limited open forum to avoid recognizing a gay student group, was ordered to allow a gay and lesbian student club to meet as a *curriculum related* student group.[233]

In *Mergens*, the Supreme Court stated that school districts that wish to avoid the EAA's obligations can simply close their premises to all noncurriculum related student groups.[234] As a practical matter, however, this may be virtually impossible for many school districts to do. School districts have strong educational reasons for allowing noncurriculum related student groups to meet on their high school campuses—groups such as

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229. *See supra* Parts III.A–E.

230. *See, e.g.*, Gay Student Services v. Texas A & M Univ., 737 F.2d 1317 (5th Cir. 1984), (holding that the university was required to recognize gay student group), *cert. denied*, 471 U.S. 1001 (1985); Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976) (holding that the university was required to register gay student club); Gay Students Org. of the Univ. of N.H. v. Bonner, 509 F.2d 652 (1st Cir. 1974) (holding that the university was required to allow gay student organization to hold social functions).

231. Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County, 258 F. Supp. 2d 667 (E.D. Ky. 2003).

232. White County High Sch. PRIDE v. White County Sch. Dist, No. 2:06-CV-29-WCO, 2006 WL 1991990 (N.D. Ga. July 14, 2006).

233. East High Sch. PRISM Club v. Seidel, 95 F. Supp. 2d 1239, 1251 (D. Utah 2000) ("[T]he forum is still limited (to student clubs) and it is still not open (clubs must be related to the curriculum and endorsed by a club advisor). . . . Plaintiffs are entitled to injunctive relief. . . .").

234. Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 241 (1990).

prom clubs, cheerleaders' clubs, student councils, hobby groups, etc. Parents also expect schools to provide a full range of extracurricular activities. Thus, closing campuses to noncurriculum related groups as a strategy for avoiding recognition of gay student groups is not a realistic option for many school districts.

Third, *Boyd County* suggests that even massive student and parental protests about a school's recognition of a gay student club will not be sufficient for a school district to establish that a gay student club's presence on campus is so disruptive that it can be banned from school premises on that basis alone. In *Boyd County*, about one hundred students attempted to persuade fellow students to boycott school one morning as a protest against a GSA club.[235] A few days later, about half of the high-school student body staged a one-day boycott in protest of the club.[236] Those two events, most educators would agree, were more than minimally disruptive; but a federal court concluded that these incidents did not justify banning a gay student group from meeting on school premises.[237] It seems likely that other courts would adopt the *Boyd County* decision's rationale and conclude that anti-gay forces should not be allowed to exercise a heckler's veto against gay and lesbian student groups meeting on high school campuses—even if the heckling occurs on a fairly massive scale.

In short, with the exception of *Caudillo*, the cases discussed in this article point to one simple conclusion—when a gay student group seeks to meet on a public high school campus pursuant to the EAA, a school district with a limited open forum is legally obliged to recognize such a group and to permit it to meet on school premises on the same terms that are granted to other noncurriculum related student groups.

Compliance with federal law should not be a school district's sole motivation for allowing gay and lesbian student groups to meet on their high school campuses. It is now recognized that gay and lesbian students are particularly vulnerable to discrimination and harassment in the public schools,[238] and the formation of gay-friendly student clubs is

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235. *Boyd County*, 258 F. Supp. 2d at 674.

236. *Id.*

237. *Id.* at 690.

238. *See, e.g.*, Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178–79 (9th Cir. 2006) (citing research on vulnerability of gay and lesbian students to harassment in

one way for these students to find mutual support and to work collectively to promote a safe and tolerant school environment for gay and lesbians students.

The American Psychological Association and the National Association of School Psychologists (NASP) expressed the need for a safe environment for gay and lesbian students. In their position statement, titled "Lesbian, Gay, and Bisexual Youth in the Schools" (adopted February 28, 1993), they stated, in pertinent part:

> WHEREAS it is a presumption that all persons, including those who are lesbian, gay, or bisexual, have the right to equal opportunity within all public educational institutions; . . .
>
> WHEREAS many lesbian, gay, and bisexual youths and youths perceived to belong these groups face harassment and physical violence in nschool environments; . . .
>
> THEREFORE BE IT RESOLVED that the American Psychological Association and the National Association of School Psychologists support providing a safe and secure educational atmosphere in which all youths, including lesbian, gay, and bisexual youths, may obtain an education free from discrimination, harassment, violence, and abuse, and which promotes an understanding and acceptance of self; . . . .[239]

Finally, school authorities should be motivated to recognize gay and lesbian student groups because to do so upholds students' basic constitutional right to free speech. As the Supreme Court ruled nearly forty years ago in *Tinker v. Des Moines Independent Community School District*, students enjoy a constitutional right to free speech in the high schools that cannot be abrogated by school officials unless they reasonably believe the speech will cause substantial disruption in the school environment or interfere with the rights of other

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school).

239. AMERICAN PSYCHOLOGICAL ASSOCIATION, APA POLICY STATEMENT, http://www.apa.org/pi/lgbc/policy/youths.html (last visited Nov. 23, 2007). Similarly, the American School Counselor Association Position Statement on Sexual Orientation (Revised 2000) includes the following: "Professional school counselors are committed to the affirmation of youths of all sexual orientations and identities." AMERICAN SCHOOL COUNSELOR ASSOCIATION, POSITION STATEMENT: GAY, LESBIAN, BISEXUAL, TRANSGENDERED AND QUESTIONING YOUTH (Revised 2005), http://www.schoolcounselor.org/content.asp?contentid=217 (last visited Jan. 17, 2008).

students.[240] Student speech cannot be quashed simply because it makes some people uncomfortable.[241]

Sexual orientation is a contentious issue in the nation's public schools and will continue to be so for a considerable period of time. All student voices should be allowed to speak on this issue, consistent with the free speech principles set forth in *Tinker* and *Widmar v. Vincent*.[242] School authorities will best serve the basic aims of public education by granting gay and lesbian student groups the right of equal access to school premises in compliance with the EAA and the basic constitutional principal of the right of free speech.

240. 393 U.S. 503 (1969).

241. *Id.* at 509 ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

242. 454 U.S. 263 (1981).