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## Making Gay Straight Alliance Student Groups Curriculum-Related: A New Tactic for Schools Trying To Avoid the Equal Access Act

Brian Berkley

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# Making Gay Straight Alliance Student Groups Curriculum-Related: A New Tactic for Schools Trying To Avoid the Equal Access Act

Brian Berkley\*

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### I. Introduction

In *Tinker v. Des Moines Independent Community School District*,<sup>1</sup> the Supreme Court clarified that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>2</sup> Since 1984, however, high school student groups have not relied solely on their

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1. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). For a discussion, see *infra* Part III.B.

2. *Tinker*, 393 U.S. at 506; see also U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

constitutional free speech rights for protection. Instead, student groups have been using the Federal Equal Access Act (EAA)<sup>3</sup> to protect their free speech rights within the "schoolhouse gate." Modeled after the Supreme Court's *Widmar v. Vincent*<sup>4</sup> decision, the EAA mandates that schools receiving federal funding and maintaining a limited open forum cannot discriminate against student groups meeting within that limited open forum based on the content of the group's speech.<sup>5</sup> In passing the EAA, Congress was primarily motivated by extending statutory protection to religious student clubs, which at the time were experiencing discrimination at the hands of school officials.<sup>6</sup> By the plain language of the statute, however, free speech protection also extends to "political, philosophical, or other content" of speech exercised by different student clubs.<sup>7</sup> As a result, a new wave of litigation has emerged in which Gay Straight Alliance (GSA) clubs are using the EAA for free speech protection.<sup>8</sup>

As a consequence, schools that are petitioned by GSA clubs for recognition face tough decisions. Due to the controversial nature of GSA clubs, schools that choose to recognize such a club will have to deal with the

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3. 20 U.S.C. § 4071 et seq. (2000).

4. *Widmar v. Vincent*, 454 U.S. 263 (1981). For a discussion of *Widmar*, see *infra* Part II.A.

5. 20 U.S.C. § 4071(a) (2000). In its entirety, the section is as follows:

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

*Id.*

6. 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.").

7. See 130 CONG. REC. S19,221 (1984) (statement by Sen. Leahy) ("Under the present amendment, a limited open forum is available to young people to meet and discuss religious, political, philosophical, and other ideas. That list of categories is not only content-neutral, but I would be hard pressed to think of a topic that would not be covered.").

8. See *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550, 570 (N.D. Tex. 2004) (ruling on whether a school properly restricted a GSA club school access under the EAA); *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 693 (E.D. Ky. 2003) (granting preliminary injunction enjoining school from denying the formation of a GSA club because such denial would most likely violate the EAA); *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1151 (C.D. Cal. 2000) (granting preliminary injunction enjoining school from denying the formation of a GSA club because such denial would most likely violate the EAA); *East High Gay/Straight Alliance v. Bd. of Educ.*, 81 F. Supp. 2d 1166, 1180 (D. Utah 1999) (finding EAA granted GSA club the right to meet on school campus in year 1997-98 because the school allowed a noncurriculum student club to meet during that time).

potentially hostile reaction the club will create among the student body and surrounding community.<sup>9</sup> If a school chooses to deny recognition to a GSA club, however, the school will have to circumvent the EAA. This is not easy. The EAA protects student group access for student groups that fit within the EAA's limited open forum.<sup>10</sup> A school is considered to have a limited open forum if it allows a "noncurriculum-related" student group to meet on campus during noninstructional time.<sup>11</sup> The courts have given the term "noncurriculum-related" such a broad definition that it is very difficult for the typical school to argue that it does not allow at least one noncurriculum-related student group to meet on campus.<sup>12</sup> Therefore, according to the majority of courts that have applied the EAA to a GSA club, most schools will be subject to the EAA and will have to grant the typical GSA club equal access to the school's limited open forum.<sup>13</sup>

In this difficult situation, schools that are hostile to a GSA club would have the same three choices faced by schools that are hostile to religious groups. First, they could succumb to the EAA's mandate and grant the GSA club access to its facilities.<sup>14</sup> Schools making this choice will have to treat the GSA club the same way they treat other noncurriculum-related clubs.<sup>15</sup> Second, they could deny the GSA club access and forego federal funding.<sup>16</sup> This is a very unpopular decision given the already stressed budgets of local schools.<sup>17</sup> Finally, they could attempt to close their limited open forum by

9. See, e.g., *Colin*, 83 F. Supp. 2d at 1139 (detailing a community's hostile picketing in reaction to the proposed GSA club).

10. See *infra* Part II.B (recognizing that noncurriculum-related clubs are entitled to access to a limited open forum).

11. 20 U.S.C. § 4071(b) (2000).

12. See *infra* Part II.B (noting the broad definition courts give "noncurriculum-related").

13. See *Boyd*, 258 F. Supp. 2d at 692-93 (granting preliminary injunction enjoining school from denying the formation of a GSA club because such denial would most likely violate the EAA); *Colin*, 83 F. Supp. 2d at 1151 (granting preliminary injunction enjoining school from denying the formation of a GSA club because such denial would most likely violate the EAA); *East High Gay/Straight Alliance*, 81 F. Supp. 2d at 1184 (finding EAA granted GSA club the right to meet on school campus in year 1997-98 because the school allowed a noncurriculum student club to meet during that time). *But see Caudillo*, 311 F.Supp. 2d at 570 (finding that a school was within the boundaries of the EAA's exclusions when the school denied a GSA club access to its limited open forum).

14. 20 U.S.C. § 4071(a) (2000).

15. See *Prince v. Jacoby*, 303 F.3d 1074, 1081 (9th Cir. 2002) (interpreting equal access to mean all noncurriculum-related clubs are to be treated in the same manner).

16. See *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1254 (3d Cir. 1993) (noting that "school districts that do not wish to allow religious and other student groups equal access to their facilities" must forego federal funding).

17. See *id.* (noting that foregoing federal funding is a burden on schools).

refusing to allow noncurriculum-related student groups to meet on campus.<sup>18</sup> However, the broad definition of "noncurriculum-related" makes this decision also very unpopular because it means schools will have to deny access to clubs that are very common among high schools.

What if a school was not totally hostile to the meeting of a GSA club but wanted to exert more control over the club's access than is permissible under the EAA? Is such a school still left with just these three choices? This Note offers such schools a new choice. By making a GSA club curriculum-related, a school can circumvent the equal access the Act offers a noncurriculum-related student group.<sup>19</sup> This opportunity proves crucial for schools that do not want to deny a GSA club access to its facilities totally, but instead want to limit their access. In fact, Massachusetts is attempting to place such a restriction on GSA clubs by requiring parental consent for any student wanting to join or form a GSA club.<sup>20</sup> If a Massachusetts school maintains an EAA limited open forum, the EAA would invalidate this parental consent restriction if the restriction was applied to noncurriculum-related GSA clubs.<sup>21</sup> By making a GSA club curriculum-related, however, a school will pull a GSA club out of the EAA's limited open forum, and therefore, the school can exert control over that student group's access that would otherwise be impermissible under the EAA. This Note argues that a school willing to make a GSA club curriculum-related could circumvent the EAA and thus salvage a parental consent restriction.

This approach may be the best option for schools faced with a tough decision. On one hand, a school may have concerned parents that do not want their children attending GSA club meetings without parent approval.<sup>22</sup> Certainly, school boards must answer to these parents. On the other hand, the school has to contend with the EAA and may not want to take the drastic

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18. See *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County*, 258 F. Supp. 2d 667, 682–83 (2003) ("[w]hile a school has the right to maintain a closed forum to maintain the dictates of the EAA, it does so at its own peril, running the risk that one or more of its groups will be determined to be a 'noncurriculum-related group.'").

19. See *infra* Part IV.A (arguing that curriculum-related clubs do not get EAA protection).

20. An Act Relative to Parental Notification and Consent, H. 1445 (proposed 2003), available at <http://www.mass.gov/legis/bills/house/ht01445.htm> (last visited Oct. 25, 2004) (on file with the Washington and Lee Law Review).

21. See *infra* Part III.C.2 (arguing that the EAA invalidates a Massachusetts' parental consent law as applied to noncurriculum-related GSA clubs).

22. See Parents' Rights Coalition, *Fight for the Strengthened Massachusetts Parents Rights Bill!*, available at <http://www.parentsrightscoalition.org/NewPRbill.htm> (last visited Oct. 13, 2004) (advocating for a parental consent restriction to be placed on GSA clubs) (on file with the Washington and Lee Law Review).

measures that were traditionally considered the only choices available to schools attempting to circumvent the EAA. Clearly, school boards facing this situation have a dilemma. Foregoing federal funding and eliminating the recognition of noncurriculum-related clubs are not popular decisions. As will be argued in this Note, however, complying with the EAA would invalidate a parental consent restriction and thus prevent a school from adequately serving its students' parents.<sup>23</sup> By making a GSA club curriculum-related, a school can grant recognition to a GSA club while also salvaging a parental consent law, thus serving its parental contingency. This choice, unfortunately, also comes at a price. Making a GSA club curriculum-related is not easy and will require a school to adopt substantially the subject matter of a GSA club.<sup>24</sup>

In order to fully understand how this curriculum-related argument functions, it is necessary to understand the background of the EAA and how the Act operates. Therefore, Part II of this Note introduces the history of the EAA, its major provisions, and the important case law interpreting the Act. Specifically, this Note examines in detail how an EAA limited open forum is created and thereby triggers EAA protection.<sup>25</sup> Understanding how the courts have defined "noncurriculum-related" under the EAA becomes crucial in understanding how a school can avoid the EAA's limited open forum. In addition, Part II will detail the case law interpreting what is meant by "equal access" under the EAA.<sup>26</sup> Finally, this Part will introduce the different statutory restrictions the EAA places on student clubs' rights to meet.<sup>27</sup>

Part III illustrates how the EAA protects a noncurriculum-related GSA club.<sup>28</sup> Although the EAA was meant to protect religious student groups, Part III nevertheless details how the legislative history, language, and background of the EAA mandate free speech protection for GSA clubs.<sup>29</sup> Part III then focuses on case law that applies the EAA to GSA clubs.<sup>30</sup> Although a split exists among the federal district courts, this Note argues that the majority of

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23. See *infra* Part III (arguing that the EAA invalidates Massachusetts' proposed parental consent law).

24. See *infra* Part V.A (arguing that a school wanting to make a GSA club "curriculum-related" will have to adopt the club's message).

25. See *infra* Part II.B (introducing the "limited open forum" concept).

26. See *infra* Part II.C (introducing case law interpreting "equal access").

27. See *infra* Part II.D (introducing the different free speech restrictions codified in the EAA).

28. See *infra* Part III (applying the EAA to a noncurriculum-related GSA club).

29. See *infra* Part III.A (justifying the extension of EAA protection to GSA groups).

30. See *infra* Part III.B-C (discussing how different courts have applied the EAA to GSA clubs).

courts are correct when they grant GSA clubs EAA access.<sup>31</sup> Finally, to illustrate how much protection the EAA offers noncurriculum-related GSA clubs, Part III introduces Massachusetts' proposed law and shows how the EAA would invalidate such a law as applied to schools that maintain an EAA limited open forum.<sup>32</sup>

Part IV introduces the curriculum-related argument and argues that curriculum-related student groups do not enjoy EAA protection. Two district courts have suggested in dictum that curriculum-related student groups receive EAA protection as long as a school allows one noncurriculum-related club to meet on campus.<sup>33</sup> This Part demonstrates that such an interpretation misinterprets the language of the EAA and also misconceives the notion of limited open forum.<sup>34</sup>

Finally, Part V revisits Massachusetts' proposed parental consent law and shows how a school using a curriculum-related argument can salvage the parental consent restriction. To do so, a school must make the GSA club curriculum-related. This Part examines what it would take for a Massachusetts school to make a GSA club curriculum-related.<sup>35</sup> A school willing to make a GSA club curriculum-related will be able to salvage Massachusetts' proposed parental consent law. Finally, this Part briefly explores the different policy issues surrounding such a decision.<sup>36</sup>

## II. Equal Access Act

Understanding the purpose and operation of the EAA is crucial for understanding this Note. The EAA's importance is also felt in student group free speech cases because courts usually only apply the EAA and rarely reach the First Amendment concerns.<sup>37</sup> Therefore, this Part details the history and

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31. See *infra* Part III.D (arguing that the majority of courts are correct in granting EAA access to GSA clubs).

32. See *infra* Part III.E (applying the EAA to Massachusetts' proposed parental consent law).

33. See *infra* Part IV.A (discussing the district courts' erroneous interpretation of the EAA as applied to curriculum-related student groups).

34. See *infra* Part IV.B–C (arguing that the EAA does not extend to "curriculum-related" student clubs).

35. See *infra* Part V.A (exploring what it would take to make a GSA club curriculum-related).

36. See *infra* Part V.B (considering the policy justifications for salvaging Massachusetts' proposed parental consent law).

37. See *Bd. of Educ. v. Mergens*, 496 U.S. 226, 247 (1990) (resolving the conflict based on the EAA and explicitly choosing not to rule on the First Amendment claims); *Pope v. East*



purpose behind the EAA, introduces the critical concepts embodied within the EAA, and introduces the case law interpreting these concepts. This Part concludes with a summary of the overall themes one can glean from how the courts apply the EAA's major provisions.

### A. History of the EAA

In an attempt to thwart discrimination against religious student groups while also balancing Establishment Clause interests,<sup>38</sup> Congress enacted the Equal Access Act in 1984.<sup>39</sup> Congress modeled the EAA on the Supreme

Brunswick Bd. of Educ., 12 F.3d 1244, 1247 (3d Cir. 1993) (explaining that the plaintiff filed suit for violation of free speech and violation of the EAA and noting that the District Court granted summary judgment on EAA grounds). *But see* Prince v. Jacoby, 303 F.3d 1074, 1090–92 (9th Cir. 2002) (applying the First Amendment for free speech claims not covered by the EAA); East High Gay/Straight Alliance v. Bd. of Educ., 81 F. Supp. 2d 1166, 1185 (D. Utah 1999) (rejecting defendant's claim that the First Amendment claims are preempted by the EAA).

38. The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

39. 20 U.S.C. § 4071(a) (2000). The Act, in its entirety, is as follows:

- a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited. It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.
- b) "Limited open forum" defined. A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.
- c) Fair opportunity criteria. Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—
  - 1) the meeting is voluntary and student-initiated;
  - 2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;
  - 3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
  - 4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
  - 5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.
- d) Construction of subchapter with respect to certain rights. Nothing in this

Court's *Widmar v. Vincent*<sup>40</sup> decision, which held that a state university could not restrict a religious student group's access to a forum that is generally opened to other student groups.<sup>41</sup> In *Widmar*, the University of Missouri denied a registered religious group named Cornerstone access to its university buildings on the grounds that a regulation adopted by the Board of Curators prohibited the use of university buildings "for purposes of religious worship or religious teaching."<sup>42</sup> At the time, the university recognized over a hundred student groups and provided these groups with access to its facilities for group meetings and other activities.<sup>43</sup> The Court found that the school had created an open forum by allowing these other student groups to meet on campus.<sup>44</sup> The Court found the school engaged in an impermissible content-based exclusion in denying religious student group access to this forum, thus violating the students' free speech and association rights.<sup>45</sup> Although the Court noted that

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subchapter shall be construed to authorize the United States or any State or political subdivision thereof—

- 1) to influence the form or content of any prayer or other religious activity;
  - 2) to require any person to participate in prayer or other religious activity;
  - 3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;
  - 4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;
  - 5) to sanction meetings that are otherwise unlawful;
  - 6) to limit the rights of groups of students which are not of a specified numerical size; or
  - 7) to abridge the constitutional rights of any person.
- e) Federal financial assistance to schools unaffected. Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.
- f) Authority of schools with respect to order, discipline, well-being, and attendance concerns. Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

*Id.*

40. *Widmar v. Vincent*, 454 U.S. 263 (1981).

41. *Id.* at 277.

42. *Id.* at 265 (quoting the applicable regulation).

43. *Id.*

44. *See id.* at 267 ("Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups.").

45. *Id.* at 277.

respecting the Establishment Clause could act as a compelling state interest justifying certain content-based discrimination, in this instance an "equal access" policy allowing a religious student group to meet on a college campus did not violate the Establishment Clause.<sup>46</sup>

Because the Supreme Court in *Widmar* included language suggesting its holding was restricted to universities and did not extend to secondary public schools,<sup>47</sup> the federal courts remained split on the issue of religious student group accommodation in the high school setting.<sup>48</sup> In response to this split and the subsequent confusion it caused among school administrators, Congress enacted the EAA for the purpose of extending the *Widmar* speech protection to high school students.<sup>49</sup>

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46. *Id.* at 273. In finding the Establishment Clause was not violated, the Court used the oft-cited "Lemon test," announced by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). *Widmar*, 454 U.S. at 271. Under the *Lemon* test, government action will not offend the Establishment Clause if the following three prongs are satisfied: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [policy] must not foster 'an excessive government entanglement with religion.'" *Id.* (citing *Lemon*, 403 U.S. at 612-13).

In applying this test to the situation in *Widmar*, the Supreme Court held that an "open forum" policy including nondiscrimination against religious speech would satisfy the *Lemon* test. *Id.* at 271-72. An open forum's secular purpose of promoting idea exchange does not lose its secular nature by merely allowing religious speech access. *Id.* at 271 n.10. The Court emphasized that the forum was open not only for religious groups, but also for other groups. *Id.* Second, a nondiscriminatory policy allowing religious groups access would not have a primary effect of advancing religion because the forum is open to all for discourse, and an open forum does not "confer an imprimatur of state approval on religious sects or practices." *Id.* at 274. Although the Court did recognize that a religious group would benefit from access to an open forum, such a benefit was merely incidental and did not rise to the level of primary advancement. *Id.* at 273. Finally, because the risk of entanglement would actually increase if the school was permitted to prevent the religious group access to the forum, the third prong of the *Lemon* test was satisfied, and the Court ruled a nondiscriminatory access policy to a limited open forum did not violate the Establishment Clause. *Id.* at 272 n.11.

47. *See Widmar*, 454 U.S. at 274 n.14 ("[University students] are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.").

48. *Compare* *Brandon v. Bd. of Educ.*, 635 F.2d 971, 980 (2d Cir. 1982) (denying a religious student group the right to meet on school premises before the school day because to allow the club to meet would violate the Establishment Clause) *with* *Bender v. Williamsport Area Sch. Dist.*, 563 F. Supp. 697, 716 (M.D. Pa. 1983) (holding that a public high school created an open forum and therefore could not prevent a religious student club from meeting on campus).

49. *See* 130 CONG. REC. S19,212 (1984) (statement of Sen. Hatch) ("Federal legislation can end this confusion by applying to federally assisted public secondary schools the principles of constitutional law enunciated by the Supreme Court in the *Widmar* case in 1981."); *see also* 130 CONG. REC. S19,218 (1984) (statement of Sen. Dixon) ("Although the Supreme Court did

Although the EAA was championed for mainly religious purposes, the protection of the Act was extended to political and philosophical speech.<sup>50</sup> As set forth in subsection (a), the EAA makes it unlawful for any public secondary school receiving federal funding and "which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within [a] limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings."<sup>51</sup> If a school violates this provision, then it will either have to allow the plaintiff to meet on campus, close its limited open forum, or forego federal funding.<sup>52</sup> Therefore, it becomes crucial for schools to understand what is meant by a "limited open forum" under the Act and whether that term is interpreted liberally or narrowly by the courts. The following subpart will examine in detail how "limited open forum" operates in the EAA context.

### *B. Limited Open Forum*

Just as student group free speech protection in *Widmar* hinged upon whether the university created a limited open forum, similar protection under the EAA will exist only if the school provides a limited open forum for student groups. However, unlike *Widmar*—which relied on established constitutional principles in defining the school's forum—"limited open forum" in the EAA context is statutorily defined by the Act.<sup>53</sup> An EAA limited open forum is

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not rule on the equal access issue as it relates to students in elementary or secondary schools, I do not think there's anything wrong with giving our high school students the same right to equal access in the schools as is permitted for university students.").

50. See 20 U.S.C. § 4071(a) (2000) (prohibiting federally funded schools with limited open forums from discriminating against student groups "on the basis of the religious, political, philosophical, or other content of the [group's] speech").

51. *Id.*

52. See *Bd. of Educ. v. Mergens*, 496 U.S. 226, 240–41 (1990) (explaining that schools with limited open forums either have to close the forum, allow the plaintiff club to meet, or forego federal funding).

53. The actual difference between the statutorily defined "limited open forum" in the EAA and the "limited public forum" referred to in *Widmar* is very difficult to explain. See Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. REV. 1, 36 (1986) (noting that comparison between EAA's "limited open forum" and the constitutional concept of "limited public forum" could be misleading). The Supreme Court in *Mergens* does recognize that the EAA does not incorporate the *Widmar* definition of "limited public forum":

Congress was presumably aware that "limited public forum," as used by the Court, is a term of art . . . and had it intended to import that concept into the Act, one would suppose that it would have done so explicitly. Indeed, Congress' deliberate

created at a public secondary school "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."<sup>54</sup>

Clearly, "noncurriculum" and "noninstructional" are key concepts in the definition of "limited open forum." The definition of those terms will determine whether a school will fall under the purview of the EAA.<sup>55</sup> The EAA defines noninstructional time as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends."<sup>56</sup> The definition of noncurriculum is especially important for purposes of this Note because how that term is defined will dictate what a school has to do to make a student group curriculum-related. If a student group is curriculum-related, then the group will not fall within the EAA's limited open forum and will not enjoy EAA protection.

Unfortunately, Congress chose not to define "noncurriculum," leaving the meaning of "limited open forum" vague until the Supreme Court interpreted the Act in *Mergens v. Board of Education*.<sup>57</sup> In *Mergens*, a student at

choice to use a different term—and to define that term—can only mean that it intended to establish a standard different from the one established by our free speech cases.

*Mergens*, 496 U.S. at 242.

54. 20 U.S.C. § 4071(b) (2000).

55. See *Mergens*, 496 U.S. at 237 (noting that "noncurriculum-related" is a key phrase and that "noninstructional" means before or after classes).

56. 20 U.S.C. § 4072(4) (2000). Despite this definition, a circuit split has developed regarding the definition of "actual classroom instruction." Compare *Prince v. Jacoby*, 303 F.3d 1074, 1088 (9th Cir. 2002) (defining "actual classroom instruction" as any time when a school mandates attendance, regardless of whether the teacher is holding formal instruction) with *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 224 (3d Cir. 2003) (disagreeing with the Ninth Circuit and holding that "actual classroom instruction" is defined as when formal instruction is being held).

57. See *Mergens*, 496 U.S. at 237–38 (interpreting for the first time the meaning of "noncurriculum related student group").

A plurality of the Supreme Court found that the EAA did not violate the Establishment Clause and therefore was constitutional. *Id.* at 248. In *Mergens*, the school district argued that because school recognition of student activities was an integral part of its educational mission, official recognition of a religious club would represent an impermissible endorsement of religion by the school. *Id.* at 247–48. The school further noted that unlike the college setting in *Widmar*, a state's compulsory attendance laws for public secondary schools creates an impermissible risk that the objective high schooler will perceive official school recognition of a religious student group as official school support for such religious meetings. *Id.* at 249.

In rejecting these arguments, the *Mergens* plurality noted that the *Widmar* court found that an "equal access" policy at the university level did not violate the Establishment Clause and that the "logic of *Widmar* applies with equal force to the Equal Access Act." *Id.* at 248. Furthermore, the plurality recognized that although the legislators might have had religious

Westside High School, Bridget Mergens, requested the principal's permission to form a Christian club at the school.<sup>58</sup> At this time, Westside permitted students to join various student groups—including a chess club—that all met after school on school premises.<sup>59</sup> The principal and other school officials denied Mergen's request to form the Christian club because school policy required all clubs to have a faculty sponsor, which a religious club could not have because of the Establishment Clause. Also, the school stated that the mere existence of the club at the school would violate the Establishment Clause.<sup>60</sup> Mergens brought suit alleging that the school's refusal to recognize her religious club violated the EAA.<sup>61</sup> The district court found for the school, and the Eighth Circuit Court of Appeals reversed, holding that the school did create a limited open forum under the Act and that the Act itself did not violate the Establishment Clause.<sup>62</sup>

In affirming the Eighth Circuit, the Supreme Court found that the EAA's passage and legislative history reflected a broad legislative purpose, which supported an interpretation of "noncurriculum related student group" to mean broadly "any student group that does not *directly* relate to the body of courses offered by the school."<sup>63</sup> According to the Court:

[A] student group directly relates to a school's curriculum 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.<sup>64</sup>

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motives in promulgating the Act by prohibiting discrimination on the basis of political, philosophical, and other speech, as well as religious speech, the Act evinced a secular purpose and thus satisfies the secular prong of the Establishment Clause analysis. *Id.* The plurality also found that secondary school students were "mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Id.* at 250. Therefore, the plurality found that by extending the same free speech protection given to University students in *Widmar* to high school students, the EAA did not violate the Establishment Clause. *Id.* at 253.

58. *Id.* at 232.

59. *See id.* at 231 ("Students . . . are permitted to join various student groups and clubs, all of which meet after school hours on school premises.").

60. *Id.* at 232–33.

61. *Id.* at 233.

62. *Id.* at 233–34.

63. *See id.* ("We think it significant, however, that the Act, which was passed by wide, bipartisan majorities in both the House and the Senate, reflects at least some consensus on a broad legislative purpose.").

64. *Id.* at 239–40.

A French club would fit within the first category if the school offered a French class.<sup>65</sup> A student government would fit within the second category because it formulates proposals and is generally proactive with respect to the body of courses as a whole.<sup>66</sup> A student group would satisfy the last two categories if participation in the group was required by a class or if academic credit was offered.<sup>67</sup> The Court further noted that a tangential relationship to abstract educational goals of the school will not satisfy the definition of "curriculum related" under the EAA because to hold otherwise would make it too easy for schools to get around the EAA.<sup>68</sup> In determining whether a school has created a limited open forum, a trial court must look beyond the school's stated policy and apply the above definition to the school's actual practice, keeping in mind the broad legislative purpose embodied in the EAA.<sup>69</sup>

When turning to the facts in *Mergens*, the Court rejected the school board's argument that it did not have a limited open forum.<sup>70</sup> In doing so, the Court focused on several clubs, including the school's chess club.<sup>71</sup> The school tried to argue that its chess club was a curriculum-based student group because it encouraged critical thinking skills used in classes such as math and science.<sup>72</sup> The Supreme Court reasoned that even though some math teachers did encourage their students to play chess, chess was not taught as a regular course and a student did not receive extra credit as a result of playing chess.<sup>73</sup> Therefore, the chess club fit within the definition of "noncurriculum related student group" under the EAA.<sup>74</sup> Because this club, and several others, were considered noncurriculum, the Court determined that the school had created a limited open forum; thus, the school fell within the purview of the EAA.<sup>75</sup>

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65. *Id.* at 240.

66. *See id.* ("A school's student government would generally relate directly to the curriculum to the extent that it addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses offered by the school.").

67. *See id.* ("If participation in a school's band or orchestra were required for the band or orchestra classes, or resulted in academic credit, then those groups would also directly relate to the curriculum.").

68. *See id.* at 244 (noting that defining "curriculum related" as meaning something remotely related to abstract educational goals would make the act merely "hortatory").

69. *Id.* at 246 ("[O]ur definition of 'noncurriculum related student activities' looks to a school's actual practice rather than its stated policy.").

70. *Id.*

71. *Id.* at 245-46.

72. *Id.* at 244.

73. *Id.* at 245.

74. *Id.*

75. *See id.* at 246 (explaining the ways that various clubs at the school were "noncurriculum related student groups" and thus "finding that [the school] has maintained a

The Supreme Court's analysis of noncurriculum-related activities offers a few key themes that schools need to be aware of when determining whether a school has created a limited open forum under the EAA. First, because the Court recognized that the EAA received bipartisan support, suggesting a broad legislative intent, a court will apply *Mergen's* curriculum-related test broadly.<sup>76</sup> As the Supreme Court stated, clubs will not be considered curriculum based if they only have a tangential relationship with the school's curriculum.<sup>77</sup> Indeed, a very close nexus between the student club and the curriculum is necessary for a school to argue successfully that a particular club is curriculum-related. Second, a court need only find one noncurriculum-related club in order to conclude that a school has created a limited open forum.<sup>78</sup> And finally, courts will look at the school's actual practices, not just its policy, when determining whether the school has created a limited open forum.<sup>79</sup> These themes are important to recognize because they will influence a school's decision on whether it is acceptable to create a close nexus between the school's curriculum and a GSA club's subject matter.

These themes are well exemplified in the Third Circuit Court of Appeal's decision in *Pope v. East Brunswick Board of Education*.<sup>80</sup> There, the school board characterized its extracurricular activities as an integral part of its curriculum so that it would avoid the EAA.<sup>81</sup> After *Mergens*, the school board changed its policy to reflect that decision and thus required every extracurricular activity to be sponsored by the board with an appointed faculty member leading the organization.<sup>82</sup> The policy further attempted to emulate

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limited open forum under the Act").

76. *See id.* at 239 ("In light of this legislative purpose, we think that the term 'noncurriculum related student group' is best interpreted broadly to mean any student group that does not *directly* relate to the body of courses offered by the school.").

77. *See id.* at 238 ("The logic of the Act also supports this view, namely, that a curriculum-related student group is one that has more than just a tangential or attenuated relationship to courses offered by the school.").

78. *See* 20 U.S.C § 4071(b) (2000) (explaining that a limited open forum is created whenever a school allows one or more noncurriculum-related groups to meet).

79. *See* Bd. of Educ. v. *Mergens*, 496 U.S. 226, 246 (1990) (recognizing that the Court's definition of "noncurriculum related activities" looks to a school's actual practice rather than its stated policy).

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

81. *Id.* at 1246.

82. *Id.* at 1246-47.



the *Mergens* definition of "curriculum related" by categorizing all of the school's clubs as directly related to the school curriculum.<sup>83</sup>

Although several clubs disbanded due to the new policy, the Key club—a student service organization dedicated to assisting and enhancing a student's development of civic responsibility to the community—survived.<sup>84</sup> The school argued that because students taking the high school's history and humanities class were required to participate in some of the events run by the club, this participation provided a sufficient nexus between the club and the school's curriculum to survive the *Mergens* test.<sup>85</sup> In rejecting this characterization, the Court reasoned that mere student participation in club activities is not sufficient to survive the *Mergens* test.<sup>86</sup> Rather, required membership would be necessary to show a sufficient nexus between the group and the school curriculum.<sup>87</sup> In making this distinction, the Third Circuit stated that "the 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."<sup>88</sup>

Although the *Mergens* Court did give a somewhat bright line rule regarding the definition of noncurriculum, application of this rule is extremely difficult. Scholars have grappled with making sense of this definition and have explored its importance.<sup>89</sup> It is imperative to recognize that the definition of "noncurriculum" has been given a very broad import by the *Mergens* Court and its progeny.<sup>90</sup> In fact, the *Mergens* Court's definition of noncurriculum

83. See *id.* at 1247 (quoting the school district's policy). The policy states:

All co-curricular clubs and activities to be approved for Board sponsorship shall be directly related either to specific subject matter which is the subject of one or more courses offered in the school district, concern the body of courses offered as a whole, or provide experiences which are deemed by the school district to enhance understanding of a course or courses offered within the district curriculum.

*Id.*

84. *Id.*

85. *Id.* at 1252.

86. *Id.*

87. See *id.* (observing that *Mergens* focused on participation in the group and not participation in the group's activities).

88. *Id.* at 1253.

89. See Laycock, *supra* note 53, at 35–38 (detailing the difficulty in determining when a limited open forum may exist at a school); Ralph D. Mawdsley, *The Equal Access Act and Public Schools: What are the Legal Issues Related to Recognizing Gay Student Groups?*, 2001 B.Y.U. EDUC. & L. J. 1, 29 (noting the difficulty in predicting how different federal courts would apply the *Mergens* test in analogous situations).

90. See *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 684 (E.D. Ky. 2003) (noting that under the *Mergens* test, a group is noncurriculum-related

arguably expands the concept of "limited open forum" from the Court's constitutional definition of limited open or public forum used in *Widmar* and other similar free speech cases.<sup>91</sup> As a result, the EAA is interpreted as transferring significant discretion away from school boards to federal judges.<sup>92</sup> By offering a mechanically applied bright line test, combined with an imputed broad legislative intent, the Supreme Court's "noncurriculum" formulation functions to restrict severely the school board's autonomy to structure its extracurricular activity in a way commensurate with a pedagogical strategy.<sup>93</sup> Once a school allows a noncurriculum-related student group to meet on campus, thus creating a limited open forum, that school must grant other noncurriculum clubs "equal access" to that limited open forum.<sup>94</sup> The next subpart explores the meaning of "equal access" under the EAA.

### C. Equal Access

The Act also did not define "equal access," and only a few federal courts have interpreted the term.<sup>95</sup> The interpretation of this term will dictate how a school must treat student groups that are entitled to access to the school's limited open forum. This point becomes especially important when analyzing

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even if there is overlap between what the group discusses and what is taught in the school's curriculum); *see also supra* Part II.B (discussing the *Mergens* definition and how it has been applied by the Third Circuit).

91. *See Bd. of Educ. v. Mergens*, 496 U.S. 226, 276 (1990) (Stevens, J., dissenting) (rejecting the Court's articulation of noncurriculum and rather advocating that "limited open forum" should be defined in a manner consistent with the forum that existed in *Widmar*); *see also* Laycock, *supra* note 53, at 36 (arguing that the statutory limited open forum goes well beyond the Supreme Court's limited public forum concept).

92. *See Mergens*, 496 U.S. at 259 (Kennedy, J., concurring) ("It must be apparent to all that the Act has made a matter once left to the discretion of local school officials the subject of comprehensive regulation by federal law."). *But see* Caudillo v. Lubbock Indep. Sch. Dist., 311 F. Supp. 2d 550, 570 (N.D. Tex. 2004) (upholding the school's decision to prevent a GSA club EAA access to school facilities).

93. *See Mergens*, 496 U.S. at 276 (Stevens, J. dissenting) (suggesting that a limited open forum exists when a school allows a partisan group to meet on campus, so that a school can retain some level of pedagogical power over the make up of its extracurricular activities).

94. *See id.* at 247 (suggesting noncurriculum-related clubs are to be treated equally at a school that maintains an EAA limited open forum).

95. *See id.* at 247 (interpreting briefly the meaning of equal access); *Prince v. Jacoby*, 303 F.3d 1074, 1080–81 (9th Cir. 2002) (interpreting equal access); *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839, 859–62 (2d Cir. 1996) (interpreting the meaning of equal access).

the applicability of Massachusetts' proposed parental consent law to a noncurriculum-related GSA club.<sup>96</sup>

The *Mergens* Court briefly considered the meaning of "equal access," finding that under the EAA, Westside High School had to give *Mergen's* religious student club the same official recognition it gave other noncurriculum clubs.<sup>97</sup> The federal appellate courts have engaged in a more focused inquiry into the meaning of "equal access" under the EAA. Consistent with the Supreme Court's finding of an overall broad legislative purpose, these courts have given the term "equal access" a very broad import.<sup>98</sup> For instance, in *Prince v. Jacoby*,<sup>99</sup> the Ninth Circuit Court of Appeals determined that once a school has offered a limited open forum to student groups, "religiously-oriented student activities must be allowed under the same terms and conditions as other extracurricular activities."<sup>100</sup> In *Prince*, an eleventh grade student at Spanaway Lake High School petitioned the school district to grant her Christian Bible club—the "World Changers"—formal recognition as an "Associated Student Body" (ASB) club.<sup>101</sup> The school district denied Prince her request, offering to grant the club recognition only as a "Policy 5525" club.<sup>102</sup> The school district enacted Policy 5525 in order to comply with the EAA, specifically modeling the policy after Section 4071(c) of the EAA, the "fair opportunity" criteria section.<sup>103</sup> Prince complained that Policy 5525 clubs were not entitled to the same benefits as ASB clubs. These benefits included: (1) access to ASB money to fund club activities, (2) free participation in ASB fundraising events, (3) school yearbook appearance free of charge, (4) permission to meet during student/staff time during school hours, (5) greater access to facilities for publicity purposes, and (6) use of audio-visual equipment and school vehicles.<sup>104</sup>

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96. See *infra* Part III.C (applying the EAA to Massachusetts' proposed parental consent law).

97. *Mergens*, 496 U.S. at 247.

98. See *Hsu*, 85 F.3d at 862 ("By concluding that the School's non-recognition denies the Hsus 'equal access,' we are giving the term 'equal access' the broad construction that the Supreme Court requires.").

99. *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002).

100. *Id.* at 1081 (citing *Widmar v. Vincent*, 454 U.S. 263, 267–71(1981)).

101. *Id.* at 1077.

102. *Id.*

103. *Id.* For a detailed discussion of the "fair opportunity" section, see *infra* notes 110–22 and accompanying text.

104. *Prince*, 303 F.3d at 1078.

Although Congress did not define "equal access," the Ninth Circuit noted that the EAA was mirrored after *Widmar*.<sup>105</sup> Therefore, "equal access" under the EAA means what the Supreme Court said in *Widmar*, namely that religious student groups are to be treated in the same manner schools treat other student groups in a limited open forum setting.<sup>106</sup> Therefore, the Ninth Circuit found that the EAA required the school district to extend to Policy 5525 clubs any benefit the school district offered to ASB clubs, as long as in doing so other sections of the EAA were not violated.<sup>107</sup>

*Prince* suggests that noncurriculum student clubs under the EAA cannot be treated differently based on the content of their speech. However, this does not mean that a school policy uniformly applied to all student groups will necessarily be sufficient to satisfy "equal access" under the statute. In *Hsu v. Roslyn*,<sup>108</sup> the Second Circuit Court of Appeals held that a school's nondiscriminatory policy was not applicable to a religious student group's exclusionary leadership rule under the EAA because the school's nondiscriminatory policy prevented the group from structuring its leadership in a manner consistent with the group's characteristic.<sup>109</sup> In that case, the school district adopted a policy where students could not be excluded from participating in extracurricular activities because of their religious beliefs.<sup>110</sup> The religious group "Walking on Water" wanted to institute a policy whereby students who did not believe in Jesus could not be leaders in the club, but the school barred the group from having such a restriction.<sup>111</sup> Although the school uniformly applied its policy to all clubs, the court said that under the EAA the school had to exempt the Walking on Water club from such a policy because the policy barred the club from protecting its character.<sup>112</sup> The court reasoned that the group's leadership exclusion was no different than a chess club requiring members to know something about chess.<sup>113</sup> As a Christian group, Walking on Water should be able to structure its leadership in such a way that it could ensure its agenda will be advanced

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105. *Id.* at 1080.

106. *Id.* at 1081.

107. *Id.* at 1084.

108. *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839 (2d Cir. 1996).

109. *Id.* at 862.

110. *Id.* at 850.

111. *Id.* at 850-51.

112. *Id.* at 862.

113. *See id.* at 860 ("The club's leadership eligibility requirement on the basis of religion is therefore similar to a chess club's eligibility requirement based on chess.").

at its meetings.<sup>114</sup> Thus, the club should have the same latitude in structuring its leadership as other clubs enjoy.<sup>115</sup>

Courts interpreting the term "equal access" continue the theme of supporting the free speech rights of students. The EAA's broad legislative purpose dictates so much deference to the free speech rights of the students that even a nondiscriminatory policy will be invalidated if it unduly hinders those rights.<sup>116</sup> On the other hand, the EAA does place certain restrictions on the free speech rights it extends to students. As succinctly stated by the *Hsu* court, the Act's equal access mandate "can be trumped by the School's responsibility for upholding the Constitution, for protecting the rights of other students, and for maintaining 'appropriate discipline in the operation of the school.'"<sup>117</sup> The following subpart examines these restrictions in more detail.

#### D. EAA Restrictions on Student Speech

Although the EAA offers student groups broad protection, the Act does place certain restrictions on that protection. Most of these restrictions stem from Congress's concern that Establishment Clause challenges would prevent student groups from receiving the Act's protection.<sup>118</sup> Defendant schools in GSA club litigation, however, have picked up on these restrictions and have argued that these restrictions permit a school to deny GSA clubs access to the school's limited open forum.<sup>119</sup> It is important to be aware of these restrictions; therefore, the following sections describe them in more detail.

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114. *See id.* ("[A]n officer's commitment to the group's cause allow[s] the group to ensure that its agenda will be advanced at its meetings.").

115. *See id.* at 860 ("[E]xemptions from neutrally applicable rules that impede one or another club from expressing the beliefs that it was formed to express, may be required if a school is to provide 'equal access.'").

116. *See id.* (same).

117. *Id.* at 862 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

118. *See Laycock, supra* note 53, at 42–43 (noting that three of the five fair opportunity criteria set forth in § 4071(c) were placed in the EAA in response to Establishment Clause concerns).

119. *See infra* Part III.B (introducing the defendant's argument that subsection (c)(4) permits schools to deny GSA clubs EAA protection).

### 1. Fair Opportunity Criteria

In addition to providing equal access, the EAA also requires a school to give a student group a "fair opportunity" to meet on campus.<sup>120</sup> Subsection (c) of the EAA defines the meaning of fair opportunity by offering five different criteria.<sup>121</sup> An admittedly confusing part of the EAA's statutory scheme, this subsection was included in the Act primarily so that schools complying with the EAA could also comply with the Establishment Clause.<sup>122</sup> The first three criteria speak to this concern and require that: (1) a school uniformly provide that student meetings are voluntary and student-initiated, (2) school officials have not sponsored the meetings, and (3) school officials are present at religious meetings only in a nonparticipatory capacity.<sup>123</sup> The fourth criterion allows a school to forbid the meeting of groups that would "materially and substantially interfere with the orderly conduct of educational activities within the school," and the fifth criterion requires schools to prohibit nonschool personnel from directing, controlling, or regularly attending activities of the group.<sup>124</sup> According to the EAA, schools that meet these five criteria have offered student groups a "fair opportunity" to meet on campus.

As pointed out by Professor Douglas Laycock, the first three criteria are specifically designed to apply to religious student clubs who also have to respect Establishment Clause restrictions, while the final two criteria protect "legitimate interests of the school."<sup>125</sup> Although this Note will not

120. 20 U.S.C. § 4071(a) (2000).

121. *See id.* (setting forth the five criteria).

122. *See Prince v. Jacoby*, 303 F.3d 1074, 1081 (9th Cir. 2002) ("This provision [subsection (c)] was included to avoid excess entanglement with religion, so that the Act would withstand an Establishment Clause challenge.").

123. 20 U.S.C. § 4071(c)(1)–(3) (2000).

124. *Id.*

125. Laycock, *supra* note 53, at 42–43. The EAA's "fair opportunity criteria" subsection is a very confusing piece of the EAA's statutory scheme. Indeed, Professor Laycock characterizes this subsection as suffering from a statutory glitch. *Id.* at 43. He notes that although three of the criteria were specifically added to address Establishment Clause concerns as they related to religious student groups, the subsection's language suggests that the criteria are meant to apply to all student groups seeking recognition under the Act. *Id.* Professor Laycock finds it even more troubling that subsection (c)'s introductory clause says a fair opportunity to meet has been offered if the school "uniformly provides" for these five criteria. *Id.* He notes that this language, if read literally, would mean a school would have to uniformly apply all of these criteria to its noncurriculum student groups if it would satisfy the Act, even though three of these criteria are only meant to apply to religious student groups. *Id.* Exploring the effect of this so called "statutory glitch" is outside the purview of this Note. This subsection's importance as it relates to the thesis of this Note stems from the *Tinker* restriction and, to a lesser extent, subsection (c)(5).

focus on the first three sections, it is important to note that sponsorship—as it is used in subsection (c)(2)—means "promoting, leading, or participating in a meeting."<sup>126</sup> By limiting the meaning of sponsorship to meetings, the EAA offers schools the ability to oversee their extracurricular clubs without being deemed to have sponsored the groups' meetings.<sup>127</sup> Furthermore, when a school refuses to offer groups the opportunity to use bulletin boards for advertising, newspapers, et cetera, the school cannot claim that to do so would mean it is sponsoring the group.<sup>128</sup> Rather, offering such an opportunity means the school is recognizing the group, not sponsoring it.<sup>129</sup>

Most courts read the fourth criterion, as found in subsection (c)(4), as simply codifying the Supreme Court's holding in *Tinker v. Des Moines Independent Community School District*.<sup>130</sup> This holding is premised on the

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126. 20 U.S.C. § 4072(2) (2000).

127. See *Prince v. Jacoby*, 303 F.3d 1074, 1083 (9th Cir. 2002) (ruling that state regulations requiring student groups to "be formed with the approval, and operated subject to the control, of the board of directors of a school district" did not amount to sponsorship because (1) the regulations did not require the board to be involved in the specific meetings of the group, and (2) the board's approval was directed to group budgets as a whole and did not require the board to approve any specific group's constitution or by-law) (quoting Wash. Admin. Code § 392-138-010(1) (1999)).

128. See *id.* at 1086–87 (noting that the EAA requires a school to offer a religious club access to bulletin boards, newspapers, and public address systems).

129. See Susan Broberg, Note, *Gay/Straight Alliances and Other Controversial Student Groups: A New Test for the Equal Access Act*, 1999 B.Y.U. EDUC. & L.J. 87, 94 (distinguishing sponsorship from recognition by noting sponsorship under the EAA "implies that the schools themselves are endorsing or promoting the purposes and speech of the organization" whereas recognition means simply the group may enjoy "access to school bulletins, newspapers, announcements, club fairs, participation in activities of the school and so forth").

130. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). In a 7-2 decision, the Supreme Court ruled that a student's free speech rights cannot be abridged unless the student's conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Id.* at 509 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). In December 1965, two high school students and one junior high student decided to wear black armbands to school in protest of the Vietnam War. *Id.* at 504. The plan was to wear the armbands from December 16 to New Year's Eve. *Id.* When principals of the Des Moines schools became aware of the armband plan, they adopted a policy on December 14, 1965, stating that "any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband." *Id.* The students disobeyed the policy, were suspended from school, and did not return until after New Year's Day. *Id.* The students and their parents sued to enjoin school officials from disciplining the students. *Id.* The district court ruled in favor of the school, declaring that the school's policy was reasonable in order to prevent disturbance of school discipline, and the Eighth Circuit affirmed in an unpublished opinion. *Id.* at 505.

In reversing the Eighth Circuit, the Supreme Court first characterized the students' conduct as pure speech, which is entitled to broad protection under the First Amendment. *Id.* at 508. From that premise, the Court made its popular assertion that "[i]t can hardly be argued that

notion that students do not give up their constitutional free speech rights when they go to school.<sup>131</sup> Rather, schools cannot regulate personal student speech unless it materially "disrupts classwork or involves substantial disorder or invasion of the rights of others."<sup>132</sup> Although this language is difficult to define precisely, it is important because defendant schools have been using it as justification for preventing GSA clubs' access to their

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either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. However, the Court did note that within the public school context, the free speech rights of students needed to be reconciled with school officials' legitimate interest in maintaining discipline and furthering the educational process. *Id.* at 507. In viewing the record, the Court noted that the students' conduct did not cause any disorder or disturbance and was instead a "silent, passive expression of opinion." *Id.* at 508. In powerful and poignant language, the Supreme Court rejected a school board's fear that such speech would cause a disturbance as a basis for suppressing the students' free speech rights. In particular, the Court made the following remarks:

[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take the 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.

*Id.* at 508–09.

The Court further commented that school officials do not have absolute authority over their students, students have fundamental rights that the State must respect, and "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Id.* at 511. Instead, the classroom is considered a marketplace of ideas, and personal intercommunication among students is one of several activities to which schools are dedicated. *Id.* at 512. Therefore, unless a student's expression of his or her opinion would materially and substantially interfere with schoolwork or discipline, school officials cannot limit such speech. *Id.* at 514.

Courts find this holding to be embodied in subsection (c)(4). See *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839, 870 (2d Cir. 1996) (recognizing that subsection (c)(4) embodies the *Tinker* holding); *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 682 (E.D. Ky. 2003) (viewing subsection (c)(4) as a codification of the *Tinker* holding); *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1145 (C.D. Cal. 2000) (viewing subsection (c)(4) as a codification of the *Tinker* holding). But see *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550, 569 (N.D. Tex. 2004) ("Although § 4071(c) somewhat tracks the *Tinker* language, this court does not believe that the EAA requires such a substantial showing of interference under other exceptions.").

131. See *Tinker*, 393 U.S. at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

132. *Id.* at 513.



limited open forums.<sup>133</sup> How these arguments operate and why they fail is the focus of Part III.<sup>134</sup>

Subsection (c)(5) restricts nonschool personnel from directing, conducting, controlling, or regularly attending student group activities.<sup>135</sup> Although this prohibits nonschool persons from regularly attending student group meetings,<sup>136</sup> this restriction does not necessarily mean that student groups are not allowed to receive some kind of support or contact from nonschool persons.<sup>137</sup>

## 2. Preserved Rights and Power Retained by Schools

Subsection (d)(5) prevents the EAA from being used to "sanction meetings that are otherwise unlawful,"<sup>138</sup> and subsection (d)(7) prevents the EAA from abridging the constitutional rights of any person.<sup>139</sup> Subsection (f) states that the Act is not meant to limit the authority of the "school 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."<sup>140</sup> Although this subsection sounds as though it repeats the fair opportunity criteria, at least one court and one scholar have suggested that this subsection can offer schools a distinct way to combat student speech that is not available under subsection (c).<sup>141</sup>

133. See *Boyd*, 258 F. Supp. 2d at 690–91 (rejecting the school's *Tinker* argument).

134. See *infra* Part III.B (discussing how the EAA protects GSA clubs).

135. U.S.C. § 4071(c)(5) (2000).

136. See *Sease v. Sch. Dist.*, 811 F. Supp. 183, 190 (E.D. Pa. 1993) (finding that a school gospel choir violates the EAA by hiring and allowing a nonschool person to participate).

137. See *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1146 (C.D. Cal. 2000) (finding that it was acceptable under the EAA for a Gay Straight Alliance club to receive limited moral support from a nonschool volunteer group).

138. 20 U.S.C. § 4071(d)(5) (2000).

139. *Id.* § 4071(d)(7).

140. *Id.* § 4071(f).

141. See *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550, 571 (N.D. Tex. 2004) (holding that subsection (f), also known as the "well-being exception," properly allowed a school to deny a GSA club EAA access); Matthew Hilton, *Options for Local School Districts Reviewing Local Governance and Moral Issues Raised by the Equal Access Act: The Gay-Straight Student Alliance in Utah*, 1996 BYU EDUC. & L.J. 1, 28 (arguing that the well-being part of subsection (f) permits schools to restrict club access based on a moral foundation).

*E. Summary of EAA and EAA Case Law*

Courts apply the EAA in a way that grants students a broad free speech protection at the expense of school official authority. With courts giving the term "noncurriculum" a broad import, schools have difficulty controlling which clubs will have access to their facilities.<sup>142</sup> It only takes one noncurriculum-related club meeting on campus for a court to decide that a school has created a limited open forum.<sup>143</sup> The concept of "equal access" also enjoys a broad legislative import that mandates a school to treat all student groups in the EAA limited open forum in a similar manner.<sup>144</sup> The deference to students is so strong that even a nondiscriminatory policy will yield to the student club if that policy unduly hinders student rights.<sup>145</sup>

On the other hand, the EAA does impose restrictions on the free speech rights it gives students. Although most of these restrictions exist out of concern for the Establishment Clause, there are other restrictions that exist, most notably the *Tinker* standard and subsection (f).<sup>146</sup> These restrictions are by no means the only non-Establishment Clause related restrictions, but they are arguably the most popular, at least in the GSA club context.<sup>147</sup>

Before continuing, it is important to note how the typical court analysis under the EAA proceeds. For all student groups that sue for EAA protection, courts will start their EAA analysis by applying the *Mergens* curriculum-related test to determine whether a school has allowed a noncurriculum-related student group to meet on campus.<sup>148</sup> If at least one noncurriculum-related club has been found to meet during noninstructional time, then a court will rule that the school has created a limited open forum and will apply the EAA.<sup>149</sup> Furthermore, courts will employ a broad interpretation of "equal access."<sup>150</sup>

142. See *supra* Part II.B (noting how the EAA limits school official discretion when regulating student group speech).

143. See *supra* Part II.B (discussing the meaning of noncurriculum-related).

144. See *supra* Part II.C (discussing the meaning of equal access).

145. See *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839, 873 (2d Cir. 1996) (immunizing a student group from a nondiscriminatory policy that violated the student groups' free speech rights).

146. See *supra* Part II.D.1 (discussing the fair opportunity criteria section).

147. See *infra* Part III.B (discussing the *Tinker* argument as applied to GSA clubs seeking EAA protection).

148. See *supra* Part II.B (discussing the *Mergens* curriculum-related test).

149. See *Bd. of Educ. v. Mergens*, 496 U.S. 226, 237 (1990) (noting that a school is deemed to have created a limited open forum if one or more noncurriculum-related groups are permitted to meet before or after class).

150. See *supra* Part II.C (noting the broad definition courts give the term "equal access").

And, depending on the circumstances of the case, courts will determine whether a school can validly restrict the student group's access based on the restrictions codified in the EAA.<sup>151</sup> The next Part focuses on how such an analysis operates when EAA protection is extended to GSA clubs.

### III. Extending EAA Protection to Gay Straight Alliance Groups

Until recently, most of the litigation involving the EAA has focused on speech protection for religious groups.<sup>152</sup> In that context, courts dealt with issues regarding whether a limited open forum was created,<sup>153</sup> the interpretation of "equal access,"<sup>154</sup> and whether extending EAA protection to religious clubs would violate the Establishment Clause.<sup>155</sup> With a new wave of litigation involving EAA protection to GSA clubs,<sup>156</sup> defendant schools have offered new arguments in challenging the EAA. Given the controversial nature of GSA clubs, some schools have argued that allowing such clubs to

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151. Compare *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1146-47 (C.D. Cal. 2000) (addressing argument that GSA club is run by nonschool personnel in violation of subsection (c)(5) of the EAA) with *Sease v. Sch. Dist.*, 811 F. Supp. 183, 190 (E.D. Pa. 1993) (finding that a school gospel choir violates the EAA by hiring and allowing a nonschool person to be involved with the group).

152. See *supra* Part II.A (discussing cases applying the EAA to religious clubs). Although most litigation did involve religious groups, at least one case prior to 1999 discussed EAA protection of a secular group. See *Student Coalition for Peace v. Lower Merion Sch. Dist.*, 776 F.2d 431, 438-39 (3d Cir. 1985) (discussing potential EAA protection for an antinuclear student group).

153. See *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1248-54 (3d Cir. 1993) (determining whether the school created a limited open forum).

154. See *Prince v. Jacoby*, 303 F.3d 1074, 1081 (9th Cir. 2002) (interpreting the meaning of "equal access"); *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839, 859-62 (2d Cir. 1996) (same).

155. See *Bd. of Educ. v. Mergens*, 496 U.S. 226, 247-48 (1990) (finding the application of the EAA to religious student groups does not violate the Establishment Clause); *Pope*, 12 F.3d at 1254 (rejecting the argument that enforcing the EAA would violate the Establishment Clause); *Sease*, 811 F. Supp. at 193 (explaining that "it is not unconstitutional for the School District to condition [the Gospel choir's] access to [the school] on compliance with the Equal Access Act").

156. See *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 692-93 (E.D. Ky. 2003) (granting preliminary injunction enjoining school from denying the formation of a GSA club because such denial would most likely violate the EAA); *Colin*, 83 F. Supp. 2d at 1151 (granting preliminary injunction enjoining school from denying the formation of a GSA club because such denial would most likely violate the EAA); *East High Gay/Straight Alliance v. Bd. of Educ.*, 81 F. Supp. 2d 1166, 1184 (D. Utah 1999) (finding EAA granted GSA club the right to meet on school campus because the school allowed a noncurriculum student club to meet during that time).

meet would materially and substantially disrupt the school's educational purpose, and thus it is prohibited under subsection (c)(4) of the EAA.<sup>157</sup> Other schools have argued that the well-being exception under subsection (f) allows a school to deny EAA access to GSA clubs that make sexually explicit material available to students.

In order for a school to realize the value of the aforementioned curriculum-related argument, it is imperative to recognize that EAA protection extends to GSA clubs. It is also important to note that with this protection comes the broad interpretation courts give the EAA, which means that Massachusetts' proposed parental consent law will most likely be invalidated by the EAA. Therefore, this Part first argues that the legislative history and language of the EAA mandates that GSA clubs enjoy such protection.<sup>158</sup> Then, this Part analyzes the different arguments against extending EAA protection to GSA clubs by focusing on several cases that address the issue.<sup>159</sup> After concluding that EAA protection extends at least to GSA clubs whose main focus is promoting tolerance and acceptance of homosexuals,<sup>160</sup> this Part applies the EAA to Massachusetts' proposed parental consent law, showing that in fact the law would be invalidated for those schools that are subject to the EAA.<sup>161</sup>

#### A. *The EAA's Purpose Includes Extending Free Speech Protection to GSA Clubs*

Although Congress passed the EAA primarily to extend free speech protection to religious student groups, several commentators have argued that this extension includes speech protection for GSA clubs.<sup>162</sup> The language of

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157. See *infra* Part III.B (detailing the *Tinker* argument).

158. See *infra* Part III.A (arguing that the legislative history and language of the EAA mandates EAA protection for GSA clubs).

159. See *infra* Part III.B–C (focusing on the most recent cases considering whether the EAA protection extends to GSA clubs).

160. See *infra* Part III.D (concluding that EAA protection extends to GSA clubs that focus on tolerance and acceptance).

161. See *infra* Part III.E (concluding that the EAA invalidates Massachusetts' proposed parental consent law).

162. See Regina M. Gratton, Note, *It's Not Just for Religion Anymore: Expanding the Protections of the Equal Access Act to Gay, Lesbian, and Bisexual High School Students*, 67 GEO. WASH. L. REV. 577, 599 (1999) (arguing that a Utah act that limited gay student clubs' access to school premises based on the content of their speech was impermissible under the EAA because the Utah act was a content-based discrimination); see also Broberg, *supra* note 129, at 116 (exploring the different arguments for and against extending EAA protection to Gay

the Act clearly supports this conclusion. As the EAA mandates, schools cannot discriminate against "political, philosophical, or other content" of speech, in addition to religious speech.<sup>163</sup> By extending the EAA's mandate so broadly as to include political, philosophical, and any other speech content, the EAA's language clearly would include protection for a GSA club.

Indeed, even the EAA's legislative history offers evidence that Congress considered such an extension.<sup>164</sup> Although Congress clearly passed the EAA in order to protect religious groups, comments by several senators suggest EAA protection for gay rights groups and other groups the senators considered to be "fringe groups" was a necessary price to pay in order to protect religious groups. Senator Mark Hatfield, a sponsor of the EAA, commented that although GSA clubs may not be the favored group, including language in the EAA that would arguably extend EAA protection to such a group was necessary to pass an effective statute.<sup>165</sup> While the EAA's legislative history is too contradictory to be convincing evidence of the legislators' intent on this particular issue, the fact that the issue of gay rights protection under the EAA was discussed during the debate regarding this Act shows at the very least that Congress contemplated the possibility of such protection when it passed the EAA.

Straight Alliance clubs, and concluding that the school's best argument under the EAA is to show that the clubs materially and substantially interfere with the educational activities of the school).

163. 20 U.S.C. § 4071(a) (2000).

164. See 130 CONG. REC. S19,226 (1984) (statement of Sen. Metzbaum) (stating that EAA language could include gay rights group). Senator Metzbaum stated:

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.

*Id.*

165. 130 CONG. REC. S19,225 (1984) (statement by Sen. Hatfield). After facing repeated questions from Senator Gorton regarding what groups could seek access to school premises under the EAA, Senator Hatfield made the following comment:

Any time you are trying to address a question of rights, you always have the possibility of extending those rights for those who would abuse them, but that does not deter us from addressing those rights . . . . You are going to have groups that will seek to abuse the rights of the constitution. But by the same token, I would rather take that risk than to narrow something down so much to satisfy the concern about one group not getting in under the tent that we in effect, by the same token, have tightened it down so that even the legitimate groups cannot get in under the tent.

*Id.*

Further evidence suggests that implementation of the EAA is not limited to religious groups. The *Widmar* case—after which Congress modeled the EAA—was specifically characterized as free speech, as opposed to a free exercise case.<sup>166</sup> Senator Hatfield clarified that, despite Congress's main motivation of protecting religious speech, "you can equally present [EAA protection] as purely a matter of freedom of speech and freedom of assembly."<sup>167</sup> In fact, when Senator Howard Metzenbaum asked whether this bill could limit its protection to religious student groups, Senator Hatfield answered that the bill had to extend beyond protecting religious student groups to satisfy all constituencies involved in drafting the EAA.<sup>168</sup>

### B. Courts Granting EAA Protection to GSA Clubs

Certainly, the language of the statute and its legislative history demonstrate that the EAA was meant to extend protection to more than just religious student groups. Several federal district courts have agreed and have applied EAA protection to GSA clubs.<sup>169</sup> In line with the statute's purpose and the jurisprudence that applied the EAA to religious groups, these courts have taken an expansive view of the EAA when applying it to GSA clubs. The following two cases—*Boyd County High School Gay Straight Alliance v.*

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166. See *Widmar v. Vincent*, 454 U.S. 263, 273 n.13 (1981) (characterizing the case as a free speech claim). The Court stated:

Here, the University's forum is already available to other groups, and respondents' claim to use that forum does not rest solely on rights claimed under the Free Exercise Clause. Respondents' claim also implicates First Amendment rights of speech and association, and it is on the bases of speech and association rights that we decide the case.

*Id.*

167. 130 CONG. REC. S19,217 (1984) (statement by Sen. Hatfield).

168. See 130 CONG. REC. S19,225 (1984) (statement by Sen. Hatfield) ("I say, to answer the question of the Senator, no, that would not suffice. This verbiage is basically an attempt to meet the concerns of various and sundry groups in protecting rights as well as extending rights, and this was the most concise, the briefest way we were able to do that.").

169. See *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 692–93 (E.D. Ky. 2003) (granting preliminary injunction enjoining a school from denying the formation of a GSA club because such denial would most likely violate the EAA); *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1151 (C.D. Cal. 2000) (granting a GSA club a preliminary injunction); *East High Gay/Straight Alliance v. Bd. of Educ.*, 81 F. Supp. 2d 1166, 1184 (D. Utah 1999) (finding EAA granted a GSA club the right to meet on school campus in year 1997–98 because the school allowed a noncurriculum-student club to meet during that time).

*Board of Education*<sup>170</sup> and *Colin v. Orange Unified School District*<sup>171</sup>—exemplify how such an expansive view operates to extend EAA protection to GSA clubs.

### I. Boyd County High School Gay Straight Alliance v. Board of Education

As discussed in Part II, the EAA does not prevent school boards from exercising discretion when maintaining order and discipline on school premises or protecting the well-being of students.<sup>172</sup> Indeed, a school does not have to extend access to a club that will materially and substantially interfere with the educational activities within the school.<sup>173</sup> It is quite foreseeable that the existence of a GSA club in high schools in certain areas of this country would cause great controversy, leading to potentially violent behavior on the part of students opposed to these clubs. Therefore, opponents to GSA clubs argue that this kind of reaction justifies denying GSA clubs EAA protection, pursuant to the authority retained by school officials under the Act to maintain discipline in the schools.<sup>174</sup>

Such an argument was presented and explicitly rejected by a federal district court in *Boyd*.<sup>175</sup> In this case, a group of students formed a GSA club at Boyd County High School in order to "provide students with a safe haven to talk about anti-gay harassment and to work together to promote tolerance, understanding and acceptance of one another regardless of sexual orientation."<sup>176</sup> However, once school officials granted access to the club,<sup>177</sup> student and parent reaction was openly hostile.<sup>178</sup> In reaction to student

170. *Boyd*, 258 F. Supp. 2d at 693. For a discussion of this case, see *infra* Part III.B.1.

171. *Colin*, 83 F. Supp. 2d at 1151. For a discussion of this case, see *infra* Part III.B.2.

172. 20 U.S.C. § 4071(f) (2000).

173. *Id.* § 4071(c)(4).

174. *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550, 569 (N.D. Texas 2004) (considering whether § 4071(c)(4) allows a school to deny EAA access to a GSA club based on the potential controversy accompanying the club); *Boyd*, 258 F. Supp. 2d at 688–91 (addressing defendant's argument that the controversy spawned by formation of a GSA club warrants denying that club EAA access).

175. See *Boyd* 258 F. Supp. 2d at 690–91 (rejecting defendant's *Tinker* argument).

176. *Id.* at 670.

177. The group's application was originally denied access by the high school's governing body—Site-Based Decision Making Council (the Council). *Id.* at 672. However, after receiving a letter from the ACLU detailing the requirements of the EAA, the Council eventually reconsidered the application and approved the club. *Id.* at 673.

178. *Id.* at 673. The court characterized the school as suffering from serious homophobic problems, noting that students in the school had commented that "they needed to take all the

protests and class boycotts,<sup>179</sup> the school board decided to prevent all student clubs from meeting on campus, including noncurriculum and curriculum clubs.<sup>180</sup>

After finding that the school had failed to prevent noncurriculum clubs from meeting on campus,<sup>181</sup> the district court rejected the school's claim that the hostile reaction to the GSA club justified denying the club access.<sup>182</sup> The school argued that under the *Tinker* rule, as codified by the EAA, the school had discretion to restrict access to the GSA club because the club's existence "materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school."<sup>183</sup> In rejecting this argument, the court noted that the *Tinker* rule was not meant to give school officials authority to suppress student speech based solely on the reaction that speech generated.<sup>184</sup> The school's argument would allow a "heckler's veto" to justify speech suppression, a result that is antithetical to free speech doctrine.<sup>185</sup> The court found that the EAA's incorporation of the *Tinker* holding "means that a school may not deny equal access to a student group because student and community opposition to the group substantially interferes with the school's

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fucking faggots out in the back woods and kill them." *Id.* at 670 n.1. Further harassment included using a megaphone to chant "faggot-kisser" and "fag-lover" to other students during a basketball game. *Id.* When school officials approved the club at a public meeting, community reaction was embarrassing. *Id.* at 673. One member of the Council stated that she was

[A]ppalled 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. When I left that meeting, I honestly thought that, you know, yes, a GSA is very much needed in our community, and these people right here needed to be mandated to go to it. It was horrible. And I literally left that meeting with a fear of what was going to happen in our school the next few days. I believe that we can teach tolerance and we can teach it until we are blue in the face, but if our parents don't teach it to our children also, then it's almost like a losing battle.

*Id.*

179. *Id.* at 674.

180. *Id.* at 675. In response to the disruption created by opponents to the GSA club, the school board held an emergency meeting whereby it voted to suspend all clubs, noncurricular and curricular, for the rest of the 2002–03 school year. *Id.* Despite this suspension, the school allowed several clubs to meet during noninstructional time on school premises, including a Drama Club, Bible Club, Executive Council, and Beta Club. *Id.* at 676–80.

181. *Id.* at 688.

182. *Id.* at 690–91.

183. *Id.* at 689 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

184. *Id.* at 690.

185. *See id.* at 689 (noting that both *Terminiello v. Chicago*, 337 U.S. 1 (1949), and *Tinker* hold that a "heckler's veto" is not sufficient to deny an individual's free speech rights).



ability to maintain order and discipline."<sup>186</sup> Rather, the real question is whether the student group's activities have been sufficiently disruptive to meet the *Tinker* test.<sup>187</sup> The court found the GSA club members were not sufficiently disruptive<sup>188</sup> and, therefore, granted the students a preliminary injunction.<sup>189</sup>

## 2. Colin v. Orange Unified School District

The facts in *Colin* exemplify the type of bias and discrimination GSA clubs can face from hostile school boards. There, students from El Modena High School in Orange, California, requested permission to form a GSA club.<sup>190</sup> The club was formed to help promote acceptance and tolerance among gay and straight students.<sup>191</sup> The students obtained a faculty advisor and applied to school officials for official recognition.<sup>192</sup> Instead of following their custom of leaving the approval decision to the school administration, school officials sent the application to the school board to see whether it would approve the GSA club.<sup>193</sup> The board delayed action on the GSA application, and the delay caused the group to miss several student group functions held by the school for officially recognized groups.<sup>194</sup> After holding a public forum to hear arguments both for and against the GSA and delaying the decision several times, the board unanimously voted to deny the students' application to form the GSA club.<sup>195</sup> Although the students assured the board that the focus of the club was on tolerance and not sex education, the board chose not to believe the students and denied the club

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186. *Id.* at 690.

187. *Id.*

188. Despite all of this hostility directed to the existence of the GSA group, only once was classroom disruption caused by a GSA supporter. *Id.* at 691. Apparently, GSA supporters had pressured a student to leave a particular classroom. *Id.* at 675.

189. *Id.* at 693. The GSA club eventually received a favorable settlement from the school district whereby the district promised to let the club meet, to initiate antiharassment training for teachers and students, and to pay for the students' legal fees. See *Gay Students Win 12 Month Legal Battle with Kentucky School*, 365GAY.COM, at <http://www.365gay.com/news/con04/02/020304boydSettles.htm> (last visited Oct. 13, 2004) (on file with Washington and Lee Law Review).

190. *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1138 (C.D. Cal. 2000).

191. *Id.*

192. *Id.*

193. *Id.* at 1138–39.

194. *Id.* at 139.

195. *Id.*

recognition on the basis that discussions regarding sexuality were age inappropriate.<sup>196</sup>

In granting the students a preliminary injunction, the district court explained that the school board would not likely be able to show that the GSA club would violate subsection (c)(4) of the EAA by materially and substantially interfering with the school's educational activities.<sup>197</sup> Rather, the court found that a group of students formed to discuss tolerance and acceptance actually may help prevent "disruptions to education that can take place when students are harassed based on sexual orientation."<sup>198</sup> In addition, the court noted that issuing an injunction best serves the public interest because it protects a student club that promotes tolerance and prevents discrimination.<sup>199</sup> After citing several statistics that suggested homosexual teens are subjected to violent discrimination, the court stated that its injunction not only supported a student's pursuit of ideas and tolerance of diverse viewpoints, but also may "involve the protection of life itself."<sup>200</sup>

### C. Denying EAA Protection to a GSA Club: Caudillo v. Lubbock Independent School District

Courts taking an expansive view of the EAA interpret subsection (c)(4) as a codification of the *Tinker* standard.<sup>201</sup> As discussed in *Boyd*, the *Tinker* standard prevents a school board from restricting student speech based solely on the reaction such speech will garner from those opposed to its message.<sup>202</sup> However, the GSA club speech protected in both *Boyd* and *Colin* was speech that promoted tolerance and acceptance.<sup>203</sup> After those cases, the question

196. *Id.* at 1139–40.

197. *Id.* at 1146.

198. *Id.*

199. *Id.* at 1150.

200. *Id.* at 1151.

201. See *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839, 870 n.30 (2d Cir. 1996) (recognizing that subsection (c)(4) is a codification of the *Tinker* standard); *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 690 (E.D. Ky. 2003) (same).

202. See *Boyd*, 258 F. Supp. 2d at 690 (ruling that student body opposition to a GSA club cannot solely justify denying a GSA club EAA access).

203. See *id.* at 669 (recognizing that the purpose of the GSA club was "to promote tolerance, understanding and acceptance of one another regardless of sexual orientation"); *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1138 (C.D. Cal. 2000) (noting that the proposed GSA club's purpose was "to promote interest in a supportive community amongst our peers").

remained as to whether the EAA protected GSA club speech that included lewd and sexually explicit material.

This question has been answered in the negative by at least one court.<sup>204</sup> In *Caudillo v. Lubbock Independent School District*,<sup>205</sup> a gay rights group wanted to post flyers, use the school's public address system, and also meet on campus.<sup>206</sup> While the group's goals included promoting tolerance and acceptance of homosexuals, the group also articulated an intent to "[e]ducate willing youth about safe sex, AIDS, hatred, etc."<sup>207</sup> In addition, the group's website included links to gay-topic websites that discussed in detail sexually explicit material.<sup>208</sup> The school maintained an abstinence-only policy restricting club discussions of sexual activity.<sup>209</sup> Because the school board viewed the gay rights club as based on discussions of sexual activity, it denied the club access to its facilities because the club would materially and substantially disrupt the school's educational mission.<sup>210</sup>

After finding that the EAA applied, the court ruled that the school board's actions did not violate the EAA.<sup>211</sup> Specifically, the court agreed that the club's speech was primarily focused on discussions of sexual activity.<sup>212</sup> Therefore, the school's abstinence-only policy justified the school's decision to deny EAA protection to the gay rights club because allowing the club to meet would materially and substantially disrupt the school's educational mission.<sup>213</sup> Although the club argued that subsection (c) of the EAA codified the *Tinker* ruling, the court rejected this argument and held that the EAA does not require as substantial a showing of interference as that articulated in *Tinker*.<sup>214</sup> Because of the controversial nature of such a club, the court reasoned that the

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204. See *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550, 571 (N.D. Tex. 2004) (holding that the EAA does not extend to a GSA club that promotes lewd and sexually explicit material).

205. *Id.*

206. *Id.* at 556–57.

207. *Id.* at 556.

208. *Id.* at 557. This material included articles on, among other things, erection problems, oral sex, anal warts, anal sex, and masturbation. *Id.*

209. *Id.*

210. See *id.* (explaining that the school board denied the club's request after reviewing the club's website that contained links to sexual material because such "content and material were inappropriate for students and the . . . campus").

211. *Id.* at 570.

212. See *id.* at 561 (finding the information in the group's website to be lewd, indecent, and obscene).

213. *Id.* at 568.

214. *Id.* at 569.

school was justified in denying the club access to its facilities in order to protect potential club members from harassment.<sup>215</sup> Although the club argued that such a ruling would amount to impermissibly allowing a heckler's veto, the court again reasoned that allowing such a veto was permissible when legitimate safety concerns are at issue regarding school age children.<sup>216</sup>

The court also found that the EAA's well-being exception allowed the school board to deny the gay rights club access to the school's facilities.<sup>217</sup> The school board argued that EAA's well-being exception allowed it to protect children from sexually explicit material.<sup>218</sup> The court agreed and ruled that the explicit material available on the club's website in conjunction with the club's stated goal to educate its members regarding safe sex and sexually transmitted diseases justified the school's decision to prevent EAA access to the club.<sup>219</sup> The court concluded by stating that "[t]his case is simply about a school district's ability to control sexual subject matter on its campus."<sup>220</sup>

#### *D. Reconciling the District Court Split Regarding EAA Application to a GSA Club*

The *Caudillo* court exemplifies a more restrictive view of the EAA and creates a potential split among the district courts. By refusing to recognize that subsection (c)(4) acts as a codification of the *Tinker* standard, the *Caudillo* court allows the potentially violent reaction of many to restrict the free speech rights of few. In addition, the court employed the little used "well-being" exception to justify restricting EAA access to a club stating that part of its purpose for meeting was to promote tolerance.<sup>221</sup> By characterizing the gay rights club as a club primarily focused on the discussion of sexually explicit material, however, the court ignored the club's tolerant message to reach a restrictive interpretation of the EAA.<sup>222</sup>

The *Caudillo* holding should be limited to its facts. That is, schools should only be able to invoke subsection (c)(4) and the well-being exception to

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215. *Id.*

216. *Id.*

217. *Id.* at 571.

218. *Id.* at 570.

219. *Id.* at 571.

220. *Id.* at 572.

221. *Id.* at 571.

222. *See id.* at 556 (referring only once to the fact the group was also formed to promote tolerance and acceptance).

prevent sexually explicit material from being discussed at a school with an abstinence-only policy. Extending such a holding to GSA clubs whose sole mission is to promote tolerance and acceptance of homosexuals not only violates the EAA but is also constitutionally suspect. As supported by *Boyd* and *Colin*, a GSA club that meets solely to promote tolerance and acceptance without discussing in detail sexually explicit material should enjoy the same EAA protection enjoyed by other noncurriculum-related student groups.<sup>223</sup> Schools should not be allowed to deny a GSA club EAA access simply because the existence of such a group may garner violent reaction. GSA groups should not be punished for the ignorant, hostile reaction of the community.<sup>224</sup> To hold otherwise would violate a bedrock principle of our free speech jurisprudence that the popularity of the speech should not dictate whether the state may or may not restrict it.<sup>225</sup> In *Tinker*, the Supreme Court eloquently stated this concept when it ruled in favor of students who wore armbands in protest of the Vietnam War:

Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take the 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.<sup>226</sup>

And as the *Boyd* court noted, this First Amendment risk extends to the EAA.<sup>227</sup>

*Caudillo*, however, suggests that subsection (c)(4) does not codify the *Tinker* standard.<sup>228</sup> Instead, the *Caudillo* court reasons that because students do not enjoy the same free speech rights as adults, school administrators are justified

223. See *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 692 (E.D. Ky. 2003) (ruling that a GSA club whose primary purpose is to promote tolerance and acceptance should be granted EAA access); *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1151 (C.D. Cal. 2000) (concluding that a court would likely grant EAA access to a GSA club whose primary purpose is to promote tolerance and acceptance).

224. See *Boyd*, 258 F. Supp. 2d at 689 (recognizing that violent opposition to a GSA club should not justify denying that GSA club EAA access).

225. See *id.* at 689 (noting that both *Terminiello v. Chicago*, 337 U.S. 1 (1949), and *Tinker* hold that a "heckler's veto" is not sufficient to deny an individual's free speech rights).

226. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969).

227. *Boyd*, 258 F. Supp. 2d at 692.

228. See *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550, 569 (N.D. Tex. 2003) ("Although § 4071(c) somewhat tracks the *Tinker* language, this court does not believe that the EAA requires such a substantial showing of interference under the exceptions.").

under subsection (c)(4) to restrict EAA access to a student club that may provoke violent opposition from the student body.<sup>229</sup> This interpretation is highly suspect for several reasons. First, as noted by the Second Circuit Court of Appeals in *Hsu*, the language of subsection (c)(4) closely tracks the language of the *Tinker* holding and thus should embody the expansive constitutional rights granted students by *Tinker*.<sup>230</sup> Second, the EAA was passed at least to maintain the constitutional rights of students, if not expand such free speech rights.<sup>231</sup> It cannot be interpreted to limit or restrict the constitutional rights of its students.<sup>232</sup> As noted in *Boyd*, a student's constitutional rights cannot be suppressed solely out of fear that such speech will generate a violent reaction.<sup>233</sup> Therefore, any suggestion by *Caudillo* that subsection (c)(4) permits a school board to restrict EAA access to a student group solely because that group might generate violent opposition is unwarranted under both the Constitution and EAA jurisprudence.

Certainly, it is reasonable to suggest that schools need not tolerate lewd and sexually explicit speech conducted by their students.<sup>234</sup> This Note does not suggest such a conclusion. Rather, this Note suggests that a GSA club whose primary focus is to promote tolerance and acceptance of homosexuals—as was the case in *Boyd* and *Colin*—should enjoy the same EAA protection as other noncurriculum-related student groups. The following subpart applies the

229. See *id.* at 569–70 (noting that the First Amendment allows school authorities to exercise greater control over the speech of students and finding that the school officials relied on their experience to make a judgment call as to the safety of the students).

230. See *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839, 870 n.30 (2d Cir. 1996) (suggesting that because the language of subsection (c)(4) closely tracks the *Tinker* standard, subsection (c)(4) acts as a codification of that standard).

231. See 130 CONG. REC. S19,225 (1984) (statement by Sen. Hatfield) (noting that the EAA was meant to expand student free speech rights). Senator Hatfield stated:

I say, to answer the question of the Senator, no, that would not suffice. This verbiage is basically an attempt to meet the concerns of various and sundry groups in protecting rights as well as extending rights, and this was the most concise, the briefest way we were able to do that.

*Id.*; *Bd. of Educ. v. Mergens*, 496 U.S. 226, 259 (1990) (Kennedy, J., concurring) ("It must be apparent to all that the Act has made a matter once left to the discretion of local school officials the subject of comprehensive regulation by federal law.").

232. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech."); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (recognizing that Congress cannot limit the constitutional free speech rights of students).

233. See *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 689 (E.D. Ky. 2003) (recognizing that a "heckler's veto" was insufficient to deny an individual's free speech rights).

234. See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684 (1986) (holding that a school can restrict a student's speech if it contains obscene or sexually explicit material).

EAA to Massachusetts' proposed parental consent law with such a GSA club in mind.

### *E. Applying the EAA to Massachusetts' Proposed Parental Consent Law*

As suggested by *Boyd* and *Colin*, EAA protection extends to GSA clubs that promote tolerance and acceptance of homosexuals. The language and legislative history warrants such a conclusion, and the previous Part detailed how the restrictions codified in the EAA do not prevent the EAA from protecting such GSA clubs. As evinced by *Boyd*, the EAA prevents schools with a limited open forum from categorically denying noncurriculum-related GSA clubs access to that forum.<sup>235</sup> However, equal access means more than that. It also means a school must treat a GSA club in the same manner as it treats other clubs that fit within the EAA limited open forum.<sup>236</sup> To illustrate that point, this subpart applies the EAA to Massachusetts' proposed parental consent law and shows how such a law is invalidated under the EAA. It is important to note that the following analysis assumes the GSA club is noncurriculum-related. As Part V discusses, this statute can be saved if a school is willing to make a GSA club curriculum-related.

#### *1. Massachusetts' Proposed Parental Consent Law*

Massachusetts is considering passing a "parental notification and consent" law that would require parental consent for any student who wants to form or join a GSA club.<sup>237</sup> The law has two specific mandates. First, it requires

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235. See *Boyd*, 258 F. Supp. 2d at 688 (noting that absent a showing of material and substantial interference, a school that has created a limited open forum must grant GSA clubs access to that forum).

236. See *supra* Part II.C (detailing the definition of "equal access").

237. An Act Relative to Parental Notification and Consent, H. (proposed 2003), available at <http://www.mass.gov/legis/bills/house/ht01445.htm> (last visited Oct. 25, 2004). The proposed law, in its entirety, is as follows:

Every city, town, regional school district or vocational school district implementing or maintaining curriculum or portion thereof, or school sanctioned program or activity, which primarily involves human sexual education, human sexuality issues, or sexual orientation issues shall adopt a written policy ensuring parental/guardian notification.

All such curriculum, programs, and activities shall be offered only in clearly identified non-mandatory elective courses in which parents or guardians may choose to enroll their children through written notification to the school, in a manner reasonably similar to other elective courses offered by the school district.

school districts to adopt a written policy ensuring parental or guardian notification of any school sanctioned program or activity, "which primarily involves human sexual education, human sexuality issues, or sexual orientation issues."<sup>238</sup> The second mandate says that "[a]ll such curriculum, programs, and activities shall be offered only in clearly identified non-mandatory elective courses in which parents or guardians may choose to enroll their children through written notification to the school."<sup>239</sup> As stated by several Massachusetts state legislators, this bill is meant to place a parental consent restriction on any students wishing to join or form a GSA club.<sup>240</sup>

## 2. *Massachusetts' Proposed Parental Notification Law as Applied to Noncurriculum-Related GSA Clubs Is Invalid Under the EAA*

By incorporating not only clubs that focus on sex education but also clubs that focus on "sexual orientation issues," the proposed law does not distinguish between *Caudillo*-like clubs or *Boyd/Colin*-like clubs. Therefore, if passed, this law would permit a school to place a parental consent restriction on a GSA club whose sole mission was to promote tolerance and acceptance of homosexuals. Such an access restriction is based on the content of the GSA

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To the extent practicable, instruction materials and related items for said curriculum, programs, and activities shall be made reasonably accessible to parents, guardians, educators, school administrators, and others for inspection and preview.

No public school teacher or administrator shall be required to participate in any such curriculum programs, or activities that violate his or her religion's belief.

*Id.*

238. *Id.*

239. *Id.* By only allowing schools to offer activities primarily involving sexual orientation to be offered as nonmandatory elective courses, this language might suggest that the bill in fact restricts even the existence of extracurricular GSA clubs in that such clubs by virtue of being extracurricular are not considered "courses" under the language of the statute. Massachusetts state legislators, however, do not intend for this language to be interpreted to restrict wholly GSA club existence. Rather, the bill is meant to require parental permission for any student joining the extracurricular GSA club. Michael J. Meade, *Mass Law Would Require Parental Approval for Gay Straight Clubs*, at <http://www.gaywired.com/article.cfm?Section=9&ID=1095> (last visited Oct. 13, 2004) (on file with the Washington and Lee Law Review). A political interest group advocating for passage of the bill offers the same interpretation, suggesting that the proposed bill improves upon Massachusetts' current parental notification law by requiring parental consent for not only sex education classes, but also for membership into the "insidious 'gay straight alliance' clubs." Parents' Rights Coalition, *Fight for the Strengthened Massachusetts Parents Rights Bill! Action Needed Now!*, at <http://www.parentsrightscoalition.org/NewPRbill.htm> (last visited Oct. 13, 2004) (on file with the Washington and Lee Law Review).

240. See Meade, *supra* note 239 (describing the drafters' intent).



club's speech, thus acting as an impermissible "content-based" discrimination under Section 4071(a) of the EAA.<sup>241</sup> While the proposed law does not purport to categorically deny GSA clubs access to school facilities, it does place a hurdle to that access based on the clubs' potential discussion regarding sexual orientation. This policy would give schools in Massachusetts the right to require parental consent for a noncurriculum-related GSA club while not having the same requirement for other noncurriculum-related clubs. Such a result would certainly violate the meaning of "equal access" under the EAA, which current case law interprets as meaning that schools must allow noncurriculum-related student groups to meet under the same terms and conditions as other noncurriculum-related student groups.<sup>242</sup> If such groups are to be treated differently, the different treatment must be in favor of the student club's free speech rights, not against such rights.<sup>243</sup> Furthermore, because the Ninth Circuit Court of Appeals in *Garnett v. Renton*<sup>244</sup> found that

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241. See 20 U.S.C. § 4071(a) (2000) (making it unlawful for any school receiving federal assistance and maintaining a limited open forum to deny equal access to student groups based on the content of that group's speech).

242. See *Prince v. Jacoby*, 303 F.3d 1074, 1081 (9th Cir. 2002) (interpreting equal access to mean that a school must treat noncurriculum-related student groups equally).

243. See *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839, 862 (2d Cir. 1996) (interpreting the meaning of "equal access" broadly to protect student free speech rights).

244. *Garnett v. Renton Sch. Dist.*, 987 F.2d 641 (9th Cir. 1993). The Ninth Circuit held that the EAA's broad legislative purpose incorporates a federal free speech right to religious student groups that cannot be abridged by state law. *Id.* at 646. In *Garnett*, several students at Lindbergh High School in Renton, Washington, sought school approval to form a religious student club. *Id.* at 643. The school district denied the students' request, citing that such meetings would violate both the state and federal constitutions. *Id.* The students brought suit alleging that the EAA allowed them to meet at school on the same basis as other noncurriculum-related clubs. *Id.* The Ninth Circuit originally affirmed the district court's denial of the student's claim, finding that the EAA violated the Establishment Clause. *Id.* However, the Supreme Court vacated this decision in light of its *Mergens* decision, and the case was sent back to the district court. *Id.*

The district court again denied the student's claim, finding that subsections (d)(5) and (d)(7) of the EAA limited the Act from preempting state law. *Id.* at 644. Because the Washington state constitution prohibited student religious meetings on school grounds, the district court found for the school. *Id.* The Ninth Circuit reversed, finding that these subsections did not preclude the EAA from preempting state law. *Id.* at 646. The court found that subsections (d)(5) and (d)(7) were rules of construction, not exceptions, and therefore they "instruct the court how to interpret the Act's central command that schools not discriminate against religious speech." *Id.* at 644-45. The Ninth Circuit interpreted subsections (d)(5) and (d)(7) as explicitly excluding from protection "the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement.'" *Id.* at 645 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)). However, the court held that these subsections do not allow for state laws to prohibit religious student groups from meeting on school grounds because to hold otherwise would make it too easy for schools and states to evade the EAA. *Id.* Because the Supreme Court in *Mergens* found that the EAA evinced a broad legislative purpose,

the EAA preempts state law, the fact that parental consent restriction comes from state law as opposed to school policy does not save the restriction.<sup>245</sup> Therefore, Massachusetts' proposed parental consent law is invalidated for schools that fall within the purview of the EAA.

Although a Massachusetts school may argue that the EAA's well-being exception allows such a restriction, no case law supports this position. Again, *Caudillo* embodies a situation where a GSA club exposed students to sexually lewd and explicit materials.<sup>246</sup> It would be a bit disingenuous to suggest that the EAA's little-used well-being exception would support a content-based restriction on a GSA club whose primary focus would be promoting tolerance and acceptance. Rather, as suggested in *Colin*, allowing such a group full EAA access would actually help support the well-being of students because it would help teach the student body tolerance and acceptance of others.<sup>247</sup>

#### F. Summary

The language and legislative history of the EAA justify extending free speech protection to GSA clubs. A community's potentially hostile reaction will not justify preventing GSA clubs access to a school's facilities. The *Tinker* standard codified in the EAA is meant to apply to the actions of the club itself, not its opponents.<sup>248</sup> Therefore, unless members of a GSA club act in such a way that they materially and substantially disrupt the educational purpose of a school, schools cannot invoke the *Tinker* rule as a justification for denying GSA clubs EAA protection. Although the *Caudillo* court suggests that the EAA does not protect lewd and sexually explicit speech, the same is not true for clubs whose main focus is promoting tolerance and acceptance for

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the Ninth Circuit found that Congress intended to preempt state law. *Id.*

Despite the Ninth Circuit's holding, some might argue that there still exists a question whether state law that affects nonreligious student groups can be preempted. However, given that the statute extends protection not only to religious groups, but also to clubs engaged in political and philosophical speech, such arguments would seem meritless.

245. See *id.* (finding that the EAA preempts state law).

246. See *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550, 561 (N.D. Tex. 2004) (noting that the GSA club at issue engaged in sexually lewd and explicit speech).

247. See *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1150 (C.D. Cal. 2000) (noting that protecting a GSA club would serve public policy).

248. See *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 689 (E.D. Ky. 2003) (emphasizing that *Tinker* restrictions must be justified by the actions of the speaker, not by the speaker's opponents).

homosexuals. These clubs pose no threat to the well-being of a school's students, and thus, these clubs should enjoy EAA protection.

This protection extends so far that it invalidates Massachusetts' proposed parental consent law. Because the law attempts to single out GSA clubs based on the content of their speech, the law acts as an impermissible content-based restriction. Although the law does not intend to deny categorically access to a GSA student group, following the law would mean a school would have to treat a GSA club differently from other noncurriculum-related student groups. The EAA prevents schools from engaging in such unequal treatment because to do so violates the broad interpretation of "equal access."

This analysis assumes that the GSA club in question was noncurriculum-related and that its sole purpose was promoting tolerance and acceptance. As noncurriculum-related clubs, such clubs are by definition entitled to the school's limited open forum. However, if a Massachusetts school could make the GSA club curriculum-related, it could argue that the GSA club is not a noncurriculum-related student group and therefore not entitled to access to the school's limited open forum. As a result, the EAA would not invalidate Massachusetts' proposed parental consent restriction. How a Massachusetts school can achieve this result is discussed in more detail in Part V.

However, because the concept of making a GSA club curriculum-related is new, the district courts have misinterpreted the EAA when handling such an argument. In dictum, they have suggested that even if a school can make a GSA club curriculum-related, the club is still entitled to access to the school's limited open forum.<sup>249</sup> Therefore, to salvage Massachusetts' proposed parental consent law, Part IV must first show how these courts have misinterpreted the EAA.<sup>250</sup>

#### *IV. Curriculum-Related Clubs Do Not Get EAA Protection*

Whether schools with EAA limited open forums must grant EAA protection to curriculum-related clubs is a new issue raised by GSA club litigation. The secular nature of GSA clubs makes them unique from the religious clubs that have previously been at the center of EAA litigation. Schools cannot choose to make a religious club curriculum-related in order

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249. See *id.* at 684 (suggesting that once a limited open forum is created, curriculum-related clubs must receive the same treatment as noncurriculum-related clubs); *Colin*, 83 F. Supp. 2d at 1146 (same).

250. See *infra* Part IV (arguing that curriculum-related clubs do not receive EAA access, even if a school creates a limited open forum).

to work around the EAA because to do so would most likely involve sponsoring the club in some manner, thus raising Establishment Clause concerns.<sup>251</sup> This is further supported by the fact the *Mergens* curriculum-related test assumes that religious clubs are likely noncurriculum-related. In formulating the curriculum-related test, the *Mergens* Court reasoned that

[b]ecause the purpose of granting equal access is to prohibit discrimination between religious or political clubs on the one hand and other noncurriculum-related student groups on the other, the Act is premised on the notion that a religious or political club is itself likely to be a noncurriculum-related student group.<sup>252</sup>

In contrast, there is no Establishment Clause barrier for schools that want to make a GSA club curriculum-related, and as a result, schools defending EAA claims coming from GSA clubs have asserted that the GSA club is curriculum-related and therefore not subject to EAA protection.<sup>253</sup> In handling these arguments, both the *Boyd* court and the *Colin* court suggested in dictum that once a school creates an EAA limited open forum, it must grant even curriculum-related clubs equal access to that forum.<sup>254</sup> This Part argues that the district courts have misinterpreted the EAA. The EAA's language suggests that the Act's protection extends only to student groups found in the school's limited open forum, which by definition includes only noncurriculum-related clubs, not curriculum-related clubs. Therefore, schools can validly place content-based restrictions on such speech.

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251. See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (setting forth "the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity'") (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

252. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 238 (1990).

253. See *Boyd*, 258 F. Supp. 2d at 684 (discussing the applicability of the EAA to GSA groups); *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1143–46 (C.D. Cal. 2000) (addressing defendant's argument that a GSA group is curriculum-related and therefore cannot avail itself of EAA protection).

254. See *Boyd*, 258 F. Supp. 2d at 684 ("Thus, once a court determines that a limited open forum has been created because school access has been provided to at least on noncurriculum-related group, the access afforded must be equal to that provided to all groups curricular and noncurricular."); *Colin*, 83 F. Supp. 2d at 1146 ("So long as the Board has a limited open forum at El Modena and allows any 'non-curriculum related' student groups to meet, it cannot prohibit the Gay-Straight Alliance even if its meetings directly relate to the curriculum.").

### A. District Courts Misinterpret the EAA

#### 1. Colin v. Orange Unified School District Revisited

In considering the school's curriculum-related argument, the *Colin* court in dictum contended that even if the GSA club was curriculum-related, the EAA prevents the school board from withholding recognition of the group.<sup>255</sup> According to the court, the only meetings schools could prohibit under the EAA were meetings that did not meet the *Tinker* standard as codified in Section 4071(c)(4).<sup>256</sup> That is, unless a GSA club had materially and substantially disrupted the school's educational purpose, then the EAA prevented schools from denying GSA clubs access to a school's EAA limited open forum. Because a club whose focus is tolerance and acceptance will almost always pass the *Tinker* standard, the EAA prevents schools from denying curriculum-related GSA clubs equal access.<sup>257</sup> Therefore, "[s]o long as the Board has a 'limited open forum' . . . and allows any 'noncurriculum related' student groups to meet, it can not prohibit the Gay-Straight Alliance even if its meetings directly relate to the curriculum."<sup>258</sup>

The *Colin* court's interpretation is premised on the erroneous assertion that the EAA offers the *Tinker* standard as the only possible restriction a school is permitted to place on clubs otherwise qualified to meet.<sup>259</sup> However, as discussed in Part II, the EAA offers schools authority to limit the structure of student group meetings in several ways, including the authority to require student meetings to be voluntary and student-initiated,<sup>260</sup> the authority to restrict nonschool personnel access to the meetings,<sup>261</sup> and the authority to prevent application of the EAA from abridging any person's constitutional rights.<sup>262</sup> Certainly, the *Tinker* standard and well-being exception is a popular

255. *Id.*

256. *See id.* at 1146 (suggesting that the EAA allows schools to prohibit only meetings that "materially and substantially interfere with the orderly conduct of educational activities within the school") (citing 20 U.S.C. § 4071(c)(4) (2000)).

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

258. *Id.*

259. *See id.* (suggesting subsection (c)(4), which codified the *Tinker* standard, is the only restriction school boards can permissibly place on student speech under the EAA).

260. 20 U.S.C. § 4071(c)(1) (2000).

261. *Id.* § 4071(c)(5).

262. *Id.* § 4071(d)(7). Although outside the scope of this Note, this provision could be implicated by the proposed parental consent law discussed in Part III because that law attempts to strengthen a parent's constitutional right to rear their children. *See supra* Part III (discussing the Massachusetts proposed parental consent law).

defense argued by school boards refusing to grant GSA clubs EAA protection.<sup>263</sup> However, this popularity is not rooted in the fact that it is the only defense available under the EAA, but rather because GSA clubs are so controversial. Asserting that the *Tinker* standard is the only identifiable limitation on EAA protection for schools subject to the Act—as asserted by the *Colin* court—is simply a false premise.

## 2. Boyd County High School Gay Straight Alliance v. Board of Education

The *Boyd* court offered a similar interpretation when it briefly considered another section of the EAA, Section 4072(3)'s definition of "meeting."<sup>264</sup> The court interpreted Section 4072(3)'s definition of meeting so broadly as to include EAA protection for all activities in which students are permitted to engage in a particular school.<sup>265</sup> The court suggested that Section 4072(3) defined meeting "to include all activities in which student groups are permitted to engage in a particular school."<sup>266</sup> This statement was not a direct quote of Section 4072(3) but rather the *Boyd* court's interpretation of that section's language.<sup>267</sup> From this interpretation, the *Boyd* court concluded that "once a court determines that a limited open forum has been created . . . the access afforded must be equal to that provided to all groups, both curricular and noncurricular."<sup>268</sup>

On the other hand, a closer reading of Section 4072(3) shows the definition of meeting does not warrant the *Boyd* court's broad interpretation. Under Section 4072(3), meeting "includes those activities of student groups which are permitted under a school's limited open forum and are not directly

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263. See *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550, 571 (N.D. Tex. 2004) (finding that a school properly invoked the EAA's well-being exception when denying a GSA club EAA access); *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 688–91 (E.D. Ky. 2003) (considering defendant's argument that the GSA club materially and substantially interferes with the educational opportunities at the school); *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1146 (C.D. Cal. 2000) (concluding that the GSA club was not materially and substantially interfering with educational opportunities of the school).

264. *Boyd*, 258 F. Supp. 2d at 683–84 (noting the broad definition of "to meet" under the EAA).

265. *Id.*

266. *Id.*

267. See 20 U.S.C. § 4072(3) (2000) (defining meeting as including "those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum").

268. *Boyd*, 268 F. Supp. 2d at 684.

related to the school curriculum."<sup>269</sup> Clearly, the *Boyd* court's definition of meeting is much broader than that in the statute. By limiting the definition of "meeting" to activities permitted under the limited open forum and *not* directly related to the school curriculum, the EAA's language suggests a conclusion contrary to the one reached by the *Boyd* court. That is, the EAA's scope is limited to the student groups that fall within the school's limited open forum, which by definition only include noncurriculum-related student clubs, not curriculum-related student clubs.

### *B. EAA's Language Does Not Grant Protection to Curriculum-Related Clubs*

Granting EAA protection to curriculum-related clubs is also not warranted under other sections within the EAA. Under Section 4071(a), schools with limited open forums are prevented from denying equal access to "any students who wish to conduct a meeting *within* that limited open forum on the basis of the . . . content of the speech at such meetings."<sup>270</sup> A limited open forum is defined by the existence of a noncurriculum-related student club meeting at school.<sup>271</sup> Combine this definition with Section 4072(3)'s definition of meeting, which excludes meetings directly related to school curriculum, and it becomes clear from the language of the EAA that EAA protection is intended to extend only to clubs within the limited open forum. Because the Act does not consider curriculum-related clubs as part of a school's limited open forum, EAA protection does not extend to curriculum-related clubs even if a school does maintain a limited open forum.

### *C. District Courts' Interpretation Misconceives the Concept of Limited Open Forum*

It is easy to understand why these district courts misinterpreted the EAA. Because religious student groups did not make this curriculum-related argument, these GSA cases are the first cases where the *Mergens* curriculum-related test is applied to the plaintiff student club. Typically in religious student group cases, the courts apply the *Mergens* curriculum-related test to the other student groups currently meeting at the school to determine whether

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269. 20 U.S.C. § 4072(3) (2000).

270. *Id.* § 4071(a) (emphasis added).

271. *Id.* § 4071(b).

the school maintained a limited open forum.<sup>272</sup> If the court found a noncurriculum-related student group, then the school was deemed to have an EAA limited open forum, and it was assumed that the religious club would fit within that limited open forum. As discussed, this assumption stems from the fact the *Mergens* curriculum-related test was premised on the notion that a religious student group is by its nature noncurriculum-related.<sup>273</sup> Therefore, if a school had a limited open forum, then the plaintiff religious group was entitled to equal access to that limited open forum by virtue of the club being a noncurriculum-related student group.

However, by suggesting that a plaintiff GSA club that is curriculum-related receives equal access to a school's EAA limited open forum, the district courts misconceive the concept of limited open forum. The EAA limited open forum is modeled after the constitutional concept of limited public or open forum.<sup>274</sup> In the constitutional context, a limited public forum is created when a school opens its property to the public for a limited class of speakers, on limited topics, or for a limited amount of time, or both.<sup>275</sup> Because the forum is limited, a school can confine access to that forum based on the "limited and legitimate purposes for which it was created."<sup>276</sup> However, those groups and speakers that fit within that limitation must be granted equal access. "Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set."<sup>277</sup> In *Widmar*, for example, the university could not restrict a religious student group's access to its campus because the school opened its property to use by other student groups.<sup>278</sup>

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272. See *Bd. of Educ. v. Mergens*, 496 U.S. 226, 245–46 (1990) (applying the curriculum-related test to a school's pre-existing student groups); *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1248 (3d Cir. 1996) (applying the *Mergens* curriculum-related test to the school-approved Key Club).

273. See *supra* note 252 and accompanying text (noting that the *Mergens* Court formulated the noncurriculum-related test based on the notion that religious student groups are noncurriculum-related).

274. See Laycock, *supra* note 53, at 36 ("[EAA limited open forum] resembles the constitutional concept of 'limited public forum,' but it goes well beyond the Supreme Court's cases.").

275. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 815, 829 (1995) (explaining that a limited public forum is created when a forum is open for only limited purposes such as for certain topics or certain groups).

276. *Id.*

277. *Id.*

278. *Widmar v. Vincent*, 454 U.S. 263, 277 (1981).



Like the constitutional limited public forum, an EAA limited open forum is defined by the limited purpose upon which the forum is dedicated. However, whereas the contours of a school's constitutional limited public forum are determined by what a particular school has intended through practice and policy, the EAA limited open forum is determined by a federal court's application of the *Mergens* curriculum-related test to the school's extracurricular clubs.<sup>279</sup> That is, if a federal court applying *Mergens'* curriculum-related test to a school finds that the school allowed a noncurriculum-related club to meet, then the school is deemed to have an EAA limited open forum regardless of whether the school intended to create such a forum.<sup>280</sup> Nevertheless, for both a constitutional limited public forum and an EAA limited open forum, a school does not have to grant equal access to those student groups that do not fit within the forum. In the case of the EAA, a curriculum-related student group is not part of an EAA limited open forum because the EAA intends to include only noncurriculum-related clubs in that forum. Therefore, if a school is willing to make a GSA club curriculum-related, then that school can escape the clutches of the EAA.

#### D. Summary

Curriculum-related student groups do not enjoy EAA protection. To adopt the interpretation asserted by the *Colin* and *Boyd* courts would undermine the concept of "limited" in limited open forum. Instead, the EAA is meant to protect only noncurriculum-related student groups, and therefore, schools willing to make a GSA club curriculum-related may circumvent the EAA. This opportunity proves valuable to schools that may be amicable to the formation of a GSA club but want to exert more control over the club than the EAA offers. To circumvent the EAA, however, a school still has to pay a price. To make a GSA club curriculum-related, a school has to link the subject matter of its curriculum to the subject matter of the GSA club. The next Part explores how close of a relationship is necessary by considering what a Massachusetts school would have to do to save Massachusetts' proposed parental consent law.

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279. See Laycock, *supra* note 53, at 36 (noting the differences between a constitutional limited public forum and an EAA limited open forum).

280. See *id.* ("Most notably, government speech does not create a constitutional public forum, but a school-sponsored student group that is not curriculum-related (if there is such a thing) creates a statutory open forum.").

V. *Salvaging Massachusetts' Proposed Parental Consent Law by Making a GSA Club Curriculum-Related*

As was pointed out in Part II, usually any court hearing an EAA challenge must conduct an analysis determining whether the defendant school had created an EAA limited open forum.<sup>281</sup> In doing so, courts will determine whether the school has allowed a noncurriculum-related student club to meet on campus by applying the *Mergens* four-prong curriculum-related test.<sup>282</sup> For a student club to be considered curriculum-related under this test, the student group must fit within one of the following categories: the subject matter of the group is actually taught by a regularly offered course, the subject matter of the group concerns the school's curriculum as a whole, participation in the group is required for a particular class, or group participation results in academic credit.<sup>283</sup> This Part applies this test to a GSA club to show how a school intending to salvage Massachusetts' proposed parental consent law can do so by making a GSA club curriculum-related.

A. *Applying the Mergens Curriculum-Related Test to a GSA Club*

A Massachusetts school attempting to salvage the state's proposed parental consent law will find the first category of the *Mergens* curriculum-related test most useful in making a GSA club curriculum-related. A GSA club likely will not fit within the second category because that category relates to groups concerned with the body of courses as a whole, which the *Mergens* court points out translates to a student government.<sup>284</sup> To say that a GSA club relates to the whole school's curriculum is indeed a stretch. The third option will not be applicable because a Massachusetts school is attempting to place a parental consent restriction on the GSA club, so it is inapposite to suggest that participation in the GSA club is required by a course if parental consent is also needed to participate in the club.<sup>285</sup> It might be possible to make the club

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281. See *infra* Part II.B (discussing the EAA limited open forum).

282. See *infra* Part II.B (noting how the *Mergens* curriculum-related test operates).

283. Bd. of Educ. v. *Mergens*, 496 U.S. 226, 239–40 (1990).

284. See *id.* at 240 (noting that a student government satisfies prong two of the curriculum-related test); see also *East High Gay/Straight Alliance v. Bd. of Educ.*, 81 F. Supp. 2d. 1166, 1183 (D. Utah 1999) (finding that a National Honors Society satisfies prong two of the curriculum-related test).

285. See *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1252 (3d Cir. 1993) (noting that, under *Mergens*, required student membership is sufficient to make a group curriculum-related).

curriculum-related by awarding course credit for participation, but a school might be hesitant to do so because of the controversial nature of such a club.

Indeed, a Massachusetts school's best choice for making a GSA club curriculum-related is to make the subject matter of the club a part of the curriculum. Given that a GSA club focused on promoting tolerance and acceptance may be characterized as political, a school's political science or history class may be a candidate for making the subject matter of the GSA club curriculum-related.<sup>286</sup> Furthermore, although the GSA club may not discuss anything sexually explicit regarding homosexuality, a sex education class may also serve as a candidate because both a sex education class and a GSA club's mission can encapsulate sexual orientation issues.<sup>287</sup> But how much of the GSA club's subject matter must be a part of the school's curriculum before the club is deemed curriculum-related?

The EAA's broad legislative purpose dictates a narrow reading of the *Mergens* curriculum-related test so that a school cannot simply circumvent the EAA by calling a club curriculum-related.<sup>288</sup> Courts will focus on the school's practice and will require a close nexus between the GSA club and the school's curriculum before that GSA club is considered curriculum-related.<sup>289</sup> Of course, figuring out what degree of relatedness is required to satisfy a federal judge is difficult to determine. The *Pope* court's analysis discussed in Part II offers some guidance and suggests that curriculum-relatedness can be determined by looking at the primary focus of the student activity compared to the significant topics discussed in the class assertedly related to the group.<sup>290</sup> Professor Mawdsley's interpretation also proves helpful as he suggests the classes need to have an interactive component such that the "inputs of knowledge and skills [flow] between the courses and student groups."<sup>291</sup>

Clearly, these interpretations suggest that at the least the mere coexistence of a political science class or sex education class and a GSA club will not

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286. See *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1144 (C.D. Cal. 2000) (addressing the school's argument that the GSA club was curriculum-related in that it overlapped with the school's sex education class).

287. *Id.*

288. See *Mergens*, 496 U.S. at 246 (noting that the curriculum-related test is applied to a school's practice rather than merely its policy).

289. *Id.*

290. See *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1253 (3d Cir. 1993) ("The 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.").

291. Mawdsley, *supra* note 89, at 25.

satisfy *Mergens*' curriculum-related test.<sup>292</sup> Such a connection is too tenuous to satisfy the *Mergens* test.<sup>293</sup> Furthermore, just because sexual orientation is a subject included in the teacher's edition of a class textbook will not satisfy the *Mergens* test if that teacher does not teach that section to the class.<sup>294</sup> Again, courts will look at the actual practice of the school. Furthermore, given that the *Pope* court's analysis suggests the club's subject matter needs to be a significant topic discussed in class, a few isolated discussions in a sex education class or political science class about homosexuality will not meet the *Mergens* test.<sup>295</sup>

Given the narrow application of the *Mergens* curriculum-related test, a school interested in making a GSA club curriculum-related likely will have to adopt the GSA club's message. If the *Colin* and *Boyd* cases are any indication, a GSA club in Massachusetts likely will have tolerance and acceptance of homosexuality as their mission.<sup>296</sup> Therefore, this means a school intent on

292. See *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1144–45 (C.D. Cal. 2000) (rejecting school's argument that the GSA club was related to school's sex education curriculum simply because the club dealt with sexual issues).

293. *Id.* at 1145 (explaining that curriculum-related groups must directly relate to the subject matter of courses). This argument was considered in detail by the *Colin* court. *Id.* There, the school tried to argue that the GSA club was curriculum-related, and, thus, was not entitled to EAA protection. *Id.* In determining whether the subject matter of the GSA club was actually taught in the school sex education class, the court noted that the school had mischaracterized the stated mission of the club. *Id.* at 1143. According to the court, the school board failed to recognize that the student's proposed mission statement stated that the purpose of the club was to promote tolerance and acceptance, not sexuality. *Id.* In contrast, the school's sex education class had no discussion of tolerance and acceptance of homosexuality. *Id.* Although the school board noted that the health book included a section on homophobia, the court stated there was no evidence that section was ever taught in class. *Id.* Therefore, the court concluded that "as a matter of fact . . . the subject matter of the proposed Gay-Straight Alliance was not covered in the curriculum at El Modena High School." *Id.* at 1144.

294. *Id.* at 1144.

295. *Id.* at 1145 ("[E]ven if there were some small nexus between what is taught in some classes on what the group proposes to discuss, it would require considerably more for the Gay-Straight Alliance to be considered curriculum related under *Mergens*.").

296. *Id.* at 1141. The mission statement in full read as follows:

Our goal in this organization is to raise public awareness and promote tolerance by providing a safe forum for discussion of issues related to sexual orientation and homophobia. We wish to stress the need for people to put aside their personal prejudice and agree to treat everyone with respect when the situation calls for it. We invite ALL students, gay or straight, to join us in discussions...that will counterattack unfair treatment and prejudice. We respect privacy and require NO one to make disclosures regarding his or her own sexual orientation....This is not a sexual issue, it is about gaining support and promoting tolerance and respect for all students.

*Id.*

making a GSA club curriculum-related most likely will have to adopt a gay-positive message into its curriculum. The federal courts' narrow application of *Mergens*' curriculum-related test requires a close nexus between the class and the club. Given this narrow reading, a school attempting to evade the EAA should adopt the message of the GSA club and teach tolerance and acceptance of homosexuality. To deviate from the subject matter of the GSA club any more leaves a school open to a federal judge's interpretation of the *Mergens* test.

Schools, however, would not have to discuss the practice of homosexuality in graphic detail. As was true in *Colin*, GSA clubs likely will not consider sex as the main component of the GSA club.<sup>297</sup> And, as was held in *Caudillo*, for those clubs that do primarily focus on sexually explicit material, the school could justifiably deny such a group EAA protection based on the EAA's well-being exception.<sup>298</sup> Therefore, for those schools that are being petitioned by a GSA club whose primary focus is tolerance and acceptance, they will not have to discuss the practice of homosexual sex in their curriculum to make the club GSA related.

By teaching tolerance and acceptance, the school will be able to argue that the GSA club is curriculum-related, thereby evading EAA protection. The value of doing this in the Massachusetts context is clear—it allows Massachusetts schools to require parental permission before a student could join or form a GSA club. The EAA would invalidate such a requirement if the school had a limited open forum and the GSA club was noncurriculum-related. By making the GSA club curriculum-related, a Massachusetts school that has a limited open forum would not have to close that forum and still will be able to require parental permission for the GSA club without violating the EAA. Furthermore, as is being attempted by Massachusetts' proposed law, the school also could require parental permission for the class that includes the gay-positive curriculum.<sup>299</sup>

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297. *Id.*

298. *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550, 571 (N.D. Tex. 2004).

299. See An Act Relative to Parental Notification and Consent, H. 1445 (proposed 2003) ("To the extent practicable, instruction materials and related items for said curriculum, programs, and activities shall be made reasonably accessible to parents, guardians, educators, school administrators, and others for inspection and review."), available at <http://www.mass.gov/legis/bills/house/ht01445.htm> (last visited Oct. 25, 2004).

*B. The Policy Ramifications of Salvaging Massachusetts' Proposed Parental Consent Law*

Choosing to salvage Massachusetts' proposed parental consent law forces schools to adopt a substantive part of the GSA clubs' subject matter and therefore still comes at a significant price. To make the GSA club curriculum-related, a Massachusetts school will most likely have to teach tolerance and acceptance of homosexuality in either a sex education class or political science class. This may sound self-defeating in that the school that wants to control access to a GSA club would most likely abhor talking about homosexuality in a sex education class. If the concern of the school is whether a parent approves of the GSA club's discussion of homosexuality, certainly the same concerns would hold true and become even more manifest if the school is adopting the GSA club's message into its curriculum.<sup>300</sup> However, Massachusetts schools can mitigate this problem to a degree by also requiring parental permission for the sex education class or political science class.<sup>301</sup> By placing a parental consent requirement on both the class and the GSA club, a school successfully serves the parental interest of monitoring the student's exposure to homosexuality.

This may act as the best choice for both opponents and proponents of gay rights. Opponents are best served in that students will not join a GSA club without parental permission, and therefore, students will not be able to join these clubs behind the back of the parents.<sup>302</sup> Proponents are also served in that a school will have to incorporate a gay rights discussion into the school's curriculum. As such, students who might not otherwise join a GSA club might become exposed to sexual orientation discussions. More importantly, the school will be sponsoring a discussion regarding gay rights, which adds more credence to the issue than if such speech is relegated to mere student endorsement in a noncurriculum-related GSA club. Although the speech still would be restricted by parental consent, at least it would send the message that the school is willing to offer such discussions as part of its curriculum.<sup>303</sup> In

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300. See Parents Right Coalition, at [http://www.parentsrightscoalition.org/Horror\\_Stories.htm](http://www.parentsrightscoalition.org/Horror_Stories.htm) (last visited Oct. 13, 2004) (evincing a distaste for any exposure that students may receive to homosexuality) (on file with the Washington and Lee Law Review).

301. See An Act Relative to Parental Notification and Consent, H. 1445 (proposed 2003) (proposing a parental consent restriction on both sex education and also GSA clubs), available at <http://www.mass.gov/legis/bills/house/ht01445.htm> (last visited Oct. 25, 2004).

302. Parents Right Coalition, at <http://www.parentsrightscoalition.org/NewPRbill.htm> (last visited Oct. 13, 2004) (noting a concern for students joining GSA clubs without telling parents) (on file with the Washington and Lee Law Review).

303. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1987) (alluding to the

that respect, an implicit message of acceptance would be communicated to a larger segment of the school community.

On the other hand, this option might warrant the exact opposite reaction from both proponents and opponents of GSA clubs. Opponents of GSA clubs would disagree with incorporating a gay rights discussion into the curriculum because it would take on the imprimatur of the school. A school that allows a GSA club to meet unfettered is not adopting that club's message or subject matter. However, incorporating such discussion into a school's curriculum would force a parent opposed to homosexuality to decide whether that parent is opposed enough to keep his child from sitting in on that political science or sex education course. Knowing that the school is implicitly tolerating gay rights discussion by incorporating such talk into the curriculum might inflame opponents of gay rights. Proponents of GSA clubs might be disturbed by the fact GSA clubs cannot meet unfettered and would find little solace that the school adopted a pro-gay stance in a class also subject to parental consent. These are all difficult issues that a Massachusetts school must consider when assessing the political and social dynamic of the school district's respective community.

## *VI. Conclusion*

Schools face a tough decision when GSA clubs petition for recognition. If a school offers an EAA limited open forum, that decision becomes even tougher. The EAA forces such schools to grant a noncurriculum-related GSA club access to its facilities. Parents and the surrounding community may not like the idea that students can join these GSA clubs after school without parental consent. Massachusetts is trying to accommodate this concern by requiring parental consent for any student wanting to join or form a GSA club. Unfortunately for Massachusetts, the EAA's expansive application not only allows GSA groups promoting tolerance and acceptance to meet on campus, but it also invalidates such a law as it applies to schools with EAA limited open forums because the proposed law singles out GSA clubs with an impermissible content-based restriction.

On the other hand, the EAA protection does not extend to curriculum-related student groups. By adopting the subject matter covered in a GSA club into a school's curriculum, a Massachusetts school could avoid the EAA and thereby preserve Massachusetts' parental consent restriction. A Massachusetts

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legitimizing effect schools have on speech they sponsor, as opposed to merely accommodate).

school can salvage the state's proposed parental consent law without having to forgo federal funding or close the school's limited open forum. Although transforming a GSA club into a curriculum-related student group warrants the school's acceptance of the group's gay-positive message, it just may be the best option the school has in avoiding the purview of the EAA while still serving its community's interests.



