

CHAPTER THREE: EQUAL ACCESS

1. The Equal Access Act: An Overview

The Equal Access Act (EAA) is a federal law that generally requires a public school to allow student religious clubs to use school facilities on the same terms that the school provides those facilities to other “non-curriculum student clubs”—although the ability of the school and its staff to be involved in those clubs remains circumscribed.¹ In particular, the EAA makes it 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.²

Accordingly, the EAA prohibits (a) public secondary schools that receive federal funds from (b) “deny[ing] equal access or a fair opportunity to, or discriminat[ing] against” (c) “any *students* who wish to conduct a meeting” (d) within that “limited open forum” (e) “on the basis of the religious, political, philosophical, or other content of the speech at such meetings.”

- (a) By its plain terms, the EAA applies to all public secondary schools that have received federal financial assistance. In other words, a public secondary school is required to comply with the EAA only if it receives federal funding. Notwithstanding this legal string attached to federal funding, the federal government may not “deny or withhold Federal financial assistance to any school” as a remedy for failing to comply with the EAA.³ Instead, the group claiming that the public school has denied it equal access generally must bring a Section 1983 civil rights claim.⁴
- (b) By its plain terms, the EAA prohibits public secondary schools from discriminating against student groups. The discrimination can take several forms, but the most common form is for a school to deny a student group access to school facilities to conduct meetings even though the school has granted access to other student groups. The EAA’s discrimination principle also extends to student access

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to the school newspaper, bulletin boards, the public address system, and the annual club fair.⁵

- (c) The EAA prohibits discrimination against *student* groups. By its plain terms, other groups are not protected by the EAA's prohibitions. For example, in *Doe v. Duncanville Independent School District*, the Fifth Circuit held that the EAA's prohibition against discrimination did not extend to coach-led prayers at the beginning of basketball practice.⁶ The court further explained that, "[a]lthough teachers or other school personnel can be present at religious meetings, the Equal Access Act permits . . . school personnel to be present solely in a 'custodial' capacity—'merely to ensure order and good behavior.'"⁷ Nor may schools do an end-run around the EAA by adopting a policy that all student groups must be school-board-approved.⁸
- (d) The EAA applies only to public secondary schools that provide a limited open forum.⁹ A public secondary school maintains 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."¹⁰ Once a school provides a limited open forum, by even allowing "only one 'noncurriculum related student group' to meet, the [EAA]'s obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time."¹¹ Accordingly, where a school tolerates at least one noncurriculum-related club, that school has established a limited open forum and must give a student club devoted to religious studies the same official recognition and access that it has given to other student clubs, which may include "access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair."¹²

Once a public secondary school has established a limited open forum, it must also grant fair opportunity to students who wish to conduct a meeting within that forum. Public schools meet the EAA's fair opportunity requirements where the school "uniformly provides" the following:

- (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.¹³

These factors are generally important in ensuring that the school, in providing a forum for religious groups, does not violate the Establishment Clause.

(e) Finally, the EAA, by its plain terms, protects student groups from discrimination on the basis of students' speech content. In particular, by enacting the EAA, Congress sought to protect student religious groups, although the EAA also protects all types of student groups on the basis of political, philosophical, and other messages.

2. Circumstances Under Which “Equal Access” Obligations Are Triggered: The Relationship Among the Limited Open Forum, Noncurriculum-Related Groups, and Fair Opportunity to Meet

Because a school's creation of a limited open forum triggers that school's obligations under the EAA, understanding the statutory definitions of “limited open forum,” “meeting,” “noninstructional time,” and “noncurriculum” is vital to understanding a public school's obligations under the EAA. As explained above, a public secondary school maintains 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 non-instructional time.”¹⁴ The EAA defines “meeting” to include “those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.”¹⁵ The EAA further defines noninstructional time as “time set aside by the school before actual classroom instruction begins or after actual classroom instructions ends.”¹⁶

Distinguishing between curriculum- and noncurriculum-related student groups is also a key to delineating the type of student groups that

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trigger obligations under the EAA. After all, too broad a definition of “‘curriculum-related’ would make the [EAA] meaningless. A school’s administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those clubs to some broadly defined educational goal.”¹⁷ The Court also “looks to a school’s actual practice rather than its stated policy” to determine whether a particular group’s activities are curriculum- or noncurriculum-related.¹⁸

The EAA does not, however, define the phrase, *noncurriculum-related student group*. The Supreme Court had the opportunity to define that phrase in *Board of Education of the Westside Community Schools v. Mergens*, where it noted that any “sensible interpretation of [that phrase] must . . . be anchored in the notion that such student groups are those that are not related to the body of courses offered by the school.”¹⁹ The Court added that the phrase is “best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school.”²⁰

Consistent with “Congress’ intent to provide a low threshold for triggering the [EAA]’s requirements,” the Court developed the following test for determining whether “a student group directly relates to a school’s curriculum”:

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

A school district bears the burden of showing that a student group is curriculum-related.²² Schools may not end-run around the EAA by finding arbitrary or disingenuous ways to relate the clubs to curriculum.²³

Applying those factors to various school clubs, the Court noted that a French language club is curriculum-related—and the EAA is not triggered—if French is a regularly offered course or will be in the future. But groups such as the scuba club, chess club, stamp collecting club, and community service clubs would normally be noncurriculum-related because they are unlikely to meet any of *Mergens*’ four prongs.²⁴ Accordingly, “[t]he existence of such clubs would create a ‘limited open forum’ under the [EAA] and would prohibit the school from denying equal access to any other student group

on the basis of the content of that group's speech."²⁵ In keeping with a low threshold trigger of the EAA's obligations, the Court expressly rejected the argument that "an extracurricular student organization is noncurriculum related if it has as its purpose (or as part of its purpose) the advocacy of partisan theological, political, or ethical views."²⁶

Nor would broad abstract educational goals suffice to demonstrate a valid connection between the group's subject matter and the school's curriculum. For example, in *Mergens*, the Court rejected the school district's argument that two service clubs were curriculum-related because they promoted the goal of effective citizenship—an educational goal of the Social Studies Department.²⁷ The Court explained that a school district could not simply circumvent the EAA by defining "curriculum related" as a club relating to abstract educational goals, a contention that would "result[] in almost no schools having limited open fora, or in a way that permits schools to evade the Act by strategically describing existing student groups, would render the Act merely hortatory."²⁸

3. Navigating the Tension Between the EAA's Purpose of Protecting Student Groups from Content-Based Discrimination and a School's Obligations Under the Establishment Clause

The EAA's main purpose is to ensure that schools will not discriminate against student groups based on the content or viewpoint of the group's message by affording student religious clubs the same access enjoyed by other student groups—in other words, to protect religious expression from discrimination. Even so, the EAA does not permit the government or public schools to engage in conduct that violates the Establishment Clause in the name of protecting a religious group from discrimination. Accordingly, no public school may use the EAA as a cloak

- (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;

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- (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.²⁹

In *Board of Education of the Westside Community Schools v. Mergens*,³⁰ the Supreme Court first held constitutional—as not violating the Establishment Clause—the EAA’s mandate of granting school access to religious groups on the same basis as nonreligious groups.³¹ In *Mergens*, discussed above, a public secondary school had permitted several noncurriculum-related clubs, such as the scuba club, the chess club, and service clubs to use school facilities for meetings during noninstructional time. The principal, in consultation with other school officials, refused to approve a similar request from student Bridget Mergens to form a Christian Club on grounds that school approval, which mandated faculty sponsorship, would violate the Establishment Clause. The school board upheld the principal’s decision.³²

The Supreme Court found the principal’s decision constitutionally invalid and upheld the EAA’s constitutionality. The Court began by noting that Congress had enacted the EAA in part to extend to public schools the principles already being applied in the university context.³³ In *Widmar v. Vincent*, the Court had previously held that a university’s “equal access” policy permitting religious groups to use university facilities would not violate the Establishment Clause because such a policy would pass the *Lemon* test: “[it] would have a secular purpose, would not have the primary effect of advancing religion, and would not result in excessive entanglement between government and religion.”³⁴ Applying “the logic of *Widmar*” to the EAA, the Court concluded that the EAA did not violate the Establishment Clause because the EAA’s prohibition of discrimination on the basis of “political, philosophical, or other” speech as well as religious speech constituted a sufficient basis for meeting *Lemon*’s secular purpose prong.³⁵ The Court further concluded that *Lemon*’s remaining two prongs were satisfied, because the EAA required not only students, rather than teachers, to initiate the club, but also required students to meet during noninstructional time so as to not make attendance mandatory or cause student discomfort.

The Court rejected (as unfounded) the school district's fears that the EAA's requirements would remove local school control over curriculum and other decisions for the following three reasons: First, the EAA does not speak to curriculum matters and schools can always circumvent the EAA by permitting only curriculum-related groups to use its facilities. The Court explained: nothing in the EAA changes the school's "traditional latitude to determine appropriate subjects of instruction. To the extent that a school chooses to structure its course offerings and existing student groups to avoid the Act's obligations, that result is not prohibited by the Act."³⁶ Second, the EAA respects a school's traditional authority to maintain order and discipline. The EAA "expressly does not limit a school's authority to prohibit meetings that would 'materially and substantially interfere with the orderly conduct of educational activities within the school.'"³⁷ The EAA also preserves "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."³⁸ Third, any school district that wishes "to escape the statute's obligations could simply forgo federal funding."³⁹ Recognizing that this option "in some cases this may be an unrealistic option," the Court nevertheless viewed the EAA's nondiscrimination mandates as "the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups."⁴⁰

4. Schools Retain Authority to Decide Curriculum and to Avoid the EAA's Obligations By Allowing Only Curriculum-Related Student Groups but Schools May Not Circumvent the EAA By Merely Calling All Student Groups Curriculum-Related

As the Supreme Court pointed out in *Mergens*, public secondary schools remain at liberty to determine curriculum within the confines of state guidelines. Moreover, schools may lawfully structure curriculum and student groups to avoid obligations under the EAA—although schools may not "evade the [EAA] by the simple expedient of requiring some or all students to participate in a single activity or meeting of each group with which the school's administrators wished to create a curriculum relationship," and render the threshold for triggering the Act "merely hortatory."⁴¹

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Accordingly, the distinction between curriculum- and noncurriculum-related becomes significant: If a school permits even one noncurriculum-related group to meet then it must permit other groups, such as a Bible club, to meet. Since *Mergens*, lower courts have attempted to flesh out that distinction further, making it more likely that a school's decision to permit student-activity groups triggers obligations under the EAA. In particular, lower courts have rejected attempts by school districts to broaden the definition of curriculum-related by requiring a relatively tight nexus between the group's subject-matter and curriculum. For example, in *Donovan ex rel. Donovan v. Punxsutawney Area School Board*,⁴² the Third Circuit concluded that the school had established a limited open forum, because it had permitted a ski club and another student group to meet during the school's activity period.⁴³ The court found that any relation between the subject-matter of those clubs and the school's curriculum was too far attenuated to qualify the clubs as curriculum-related.⁴⁴ Similarly, in *Colin ex rel. Colin v. Orange Unified School District*,⁴⁵ a district court rejected the school's contention that the Gay-Straight Alliance was curriculum-related because it related to the human sexuality lessons that were a part of the school district's sex education program.⁴⁶ And in *Garnet v. Renton School District*,⁴⁷ another district court concluded that the Future Business Leaders of America club constituted a noncurriculum-related student group because the business class students were not required to attend the FBLA meetings and no academic credit was awarded for participation, notwithstanding that both school district and state guidelines required that the school district offer FBLA as a student club.⁴⁸

In keeping with *Mergens*' low threshold for triggering the EAA, courts have made even finer distinctions, with close calls tending to fall on the side of equal access.⁴⁹ Accordingly, courts will not allow public schools to get away with calling everything a curriculum-related club but rather will scrutinize the actual clubs to determine whether they are curriculum or noncurriculum-related. For example, the Third Circuit, in *Pope v. East Brunswick Board of Education*,⁵⁰ early on rejected a school district's argument that the Key Club, a community service group related to the Kiwanis, was curriculum-related because its subject matter, to assist students in developing civic responsibility through fundraising for local charities, was directly related to the high school's History and Humanities classes, which taught units on homelessness, hunger, and poverty. The court concluded that, in light of

the policies underlying the EAA, showing that a student group's activities were "tied directly to a specific instructional unit of a specific course" was insufficient to relieve the school district of its obligations.⁵¹ Nor may a school impose limitations on what may qualify as a club that treat religious clubs differently than any other noncurriculum club.⁵²

One case, with little if any precedential value and which represents a minority interpretation of the noncurriculum-related clubs under the EAA, is worth mentioning for its suspect reasoning and lack of statutory basis. In *East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District*, a district court in Utah concluded that the school was not required to grant the Gay/Straight Alliance the same privileges as the other clubs recognized by the school because all of the school's clubs were curriculum-related thereby failing to trigger obligations under the EAA. In coming to this conclusion, the court found that that Future Homemakers of America was a curriculum-related group because its activities served "to enhance, extend, or reinforce the specific subject matter of one or more Applied Technology Education classes in a meaningful way, generally by affording students an opportunity to apply the skills that they have learned in the classroom."⁵³ The court similarly concluded that the Future Business Leaders of America was also a curriculum-related club because it related to the business classes offered at the school and that the National Honor Society was curriculum-related because "[a]ctivities promoting academic excellence have a far more direct relationship to the school's 'body of courses as a whole . . .'"⁵⁴ And, without relating the student group to any of the four prongs of the *Mergens* test, the court concluded that the school's Odyssey of the Mind group was curriculum-related because the OM club's substantive content was "sophisticated 'creative thinking and problem solving' skills," which were in "direct reflection in the 'creative thinking and problem solving' skills actually taught by the group's advisor in his regular classes."⁵⁵

5. Under the EAA, Schools Retain the Authority 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

Notwithstanding the numerous restrictions on the public school's power to

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restrict access to any limited open forum the school provides, public schools retain a great deal of authority over school activities.⁵⁶ In particular, public schools retain “the authority . . . 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.”⁵⁷ For example, schools may “maintain order and discipline in the school hallways and classrooms by limiting the number and manner of both printed and oral announcements for all student groups . . . [but] it may not discriminate among student groups based on the religious content of the expression or proposed meeting.”⁵⁸

Along these lines, schools may restrict the broad free speech rights protected under the EAA when club meetings “materially and substantially interfere with the orderly conduct of educational activities within the school.”⁵⁹ Because Congress did not define “substantial disruption” in the EAA and because the Supreme Court in *Mergens* failed to give guidance as to what would constitute a substantial disruption under the EAA, courts have adopted the test from *Tinker v. Des Moines Independent Community School District*.⁶⁰ In *Tinker*, the Supreme Court explained that the Constitution permits school-imposed restrictions on speech where “conduct by the student . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others,”⁶¹ or “the record . . . demonstrate[s] any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities”⁶² In other words, prohibiting expression is unconstitutional “without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline.”⁶³ The school district bears the burden of demonstrating such facts.⁶⁴

Courts have imposed a relatively high burden on schools to demonstrate that a club’s meetings “materially and substantially interfere with the orderly conduct of educational activities within the school.”⁶⁵ For example, in *Bowler v. Town of Hudson*,⁶⁶ the court found that the school district violated students’ free speech rights by taking down posters advertised by the Conservative Club that “listed the website address for a national organization of high school conservative clubs, which in turn contained a link to another website hosting graphic video footage of hostage beheadings in Iraq and Afghanistan”⁶⁷ without showing an actual or reasonable forecast of substantial disruption. Applying *Tinker*, the court concluded that, although the school produced evidence that the videos themselves were “graphic and disturbing,”

it failed to produce evidence that “the videos were reasonably likely to result in a substantial interference with the operation of the school” and therefore failed to show that censorship was “necessary to avoid material or substantial interference with schoolwork or discipline.”⁶⁸

When incorporating *Tinker* into an analysis of rights and obligations under the EAA, courts have also been careful to explain that *Tinker* did not permit a “heckler’s veto” to justify suppression of student speech.⁶⁹ Instead, the analysis must focus on whether “engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline.”⁷⁰ This analysis comes directly from *Tinker*: Relying on the leading heckler’s veto case,⁷¹ the *Tinker* Court concluded that the protesting students’ speech was protected because it was “entirely divorced from actually or potentially disruptive conduct by those participating in it.”⁷² Applying that reasoning, the court in *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*, concluded that evidence of student threats and homophobic remarks to gay student members of a Gay Straight Alliance Club was insufficient evidence to show that the club’s meetings materially and substantially interfered with the orderly conduct of educational activities within the school.⁷³

Lower courts have, however, permitted schools to rely on the EAA’s “order and discipline” exclusion to restrict speech,⁷⁴ where the school can show that permitting the speech would invite a lawsuit. For example, in *Geretzke v. Kenosha Unified School District No. 1*, the Seventh Circuit concluded that, although the school had given an open invitation to all student clubs to paint murals in the main hallway of the school, it was not required to permit the Bible Club to paint a 4 feet by 5 feet mural, which depicted “a heart, two doves, an open Bible with a well-known passage from the New Testament . . . , and a large cross.”⁷⁵ In a context where the student body included adherents to Satanism and neo-Nazism, the court found constitutional the school’s decision to approve all paintings but the cross based on a fear that “the inclusion of so salient a Christian symbol would invite a lawsuit against the school based on the establishment clause . . . and might also require [the school] to approve murals of a Satanic or neo-Nazi character, which would cause an uproar.”⁷⁶ The court also based its findings on evidence of actual disruption—the Bible Club’s mural was in fact defaced with a witchcraft symbol and the principal refused the skinheads’ request to paint a mural containing

a swastika.⁷⁷ Similarly, in *Caudillo v. Lubbock Independent School District*,⁷⁸ the court concluded that the school could restrict both access and student speech where the website advertised on flyers to be distributed by the Gay Straight Alliance contained a link to an outside website that contained information about sexual activity, where state law made it a crime for minors to engage in sexual acts.⁷⁹ The court explained that those restrictions were permissible under the EAA's "order-and-discipline" exception in part because gay students could be sexually harassed and the school district could subsequently become liable for a Title IX sex discrimination lawsuit.⁸⁰ The court further held those restrictions permissible under the EAA's "well-being-of-the-students" exclusion, accepting the school's argument that it was obliged to protect its students from teen pregnancy, sexually transmitted diseases and other harms associated with teen sexual activity.⁸¹

6. Non-Discrimination Principle: Once Obligations Under the EAA Are Triggered, Schools Must Grant Religious Clubs the Same Privileges They Grant to Other Clubs, Including Use of School Bulletin Boards and the Public Address System

It is well-settled that, once the EAA has been triggered religious clubs must be given the same privileges as other clubs, so long as the club does not present a substantial disruption or material interference with the operation of the school. Indeed, the Supreme Court squarely held in *Mergens* that the EAA required public secondary schools to give religious clubs the same official recognition and access that it gave to other student clubs, which included being a part of the student activities program, as well as "access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair."⁸² As the Ninth Circuit explained: "There is no qualification in the Act or in *Mergens* that would allow the school to limit bulletin board space based on the religious nature of the activity. Access to such space must be 'equal.'"⁸³ Further, "to the extent that the school allows [nonreligious, noncurriculum-related] clubs to announce meeting times or events over the public address system, it cannot then discriminate against [religious] clubs that seek the same privilege."⁸⁴

Lower courts have followed suit, harmoniously concluding that religious clubs must be given the same club status and privileges as other non-

curriculum related clubs under the Equal Access Act, as long as permitting such access would not fall under one of the Equal Access Act's exceptions. For example, in *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*,⁸⁵ the Court concluded that the school was obliged under the EAA to give the Gay Straight Alliance the same opportunity to use school facilities, bulletin boards, and so forth, that was given to other non-curriculum related clubs at the school. In analyzing both *Mergens* and other persuasive case law, the Court stated: “[e]qual access ‘to meet’ is broadly defined under the EAA to include all activities in which student groups are permitted to engage in a particular school.”⁸⁶ Accordingly, “once a court determines that a limited open forum has been created because school access has been provided to at least one noncurriculum-related group, the access afforded must be equal to that provided to all groups, both curricular and noncurricular.”⁸⁷

7. Public Schools Are Not Traditional Public Fora for First Amendment Purposes Although a School Can Create a Limited Public Forum Depending on How It Chooses to Allow Outside Groups to Use Its Facilities

The question whether public secondary schools must, as a matter of constitutional law, open school facilities to local religious leaders, where it has lent its facilities to other local leaders, turns on the answer to the question of forum. If the school were a traditional public forum, such as a park or the public sidewalk, then it would not be able to deny access to local religious leaders unless the school could meet the standards of strict scrutiny—it must show that “the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.”⁸⁸ The reason for this high level of scrutiny is obvious: “a principal purpose of traditional public fora is the free exchange of ideas.”⁸⁹ Similarly, if the school had designated a public forum by opening its facilities for use “by the public as a place for expressive activity,” then it would be “bound by the same standards as apply in a traditional public forum” so long as it retained the open character of that facility.⁹⁰ In either case, schools may impose content-neutral time, place, or manner restrictions on the use of traditional or designated public

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fora “provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’”⁹¹

It is well-settled that public schools are not traditional public fora.⁹² Accordingly, “school facilities may be deemed to be public forums only if school authorities have ‘by policy or by practice’ opened those facilities ‘for indiscriminate use by the general public,’”⁹³ or “by some segment of the public, such as student organizations.”⁹⁴ It is further settled that if “the facilities have . . . been reserved for other intended purposes, ‘communicative or otherwise,’ then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.”⁹⁵ A public school “does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”⁹⁶

A public school may also create a public forum for use by limited groups or use of a limited purpose.⁹⁷ For example, in *Widmar v. Vincent*, the Court found that the University of Missouri at Kansas City had created a limited public forum for use by student groups by issuing an official policy of recognizing over 100 student groups for which it accommodated student meetings.⁹⁸ The Court thereby held that the University could not discriminate to exclude student religious groups based on the religious content of the group’s message, even though the University had as its mission to provide a secular education to its students.⁹⁹ In *City of Madison Joint School District v. Wisconsin Employment Relations Commission*, the Court held that the local school board had created a limited public forum to discuss school board business at school board meeting open to the public, and therefore could not constitutionally prohibit a teacher from speaking about that subject at the meeting.¹⁰⁰ In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, the Court explained that the “the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject” even though “a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created.”¹⁰¹

8. Once Public Schools Create a Limited Public Forum, Constitutional Free Speech Principles, Such As Content and Viewpoint Discrimination Prohibitions, Apply but Schools Remain in Control of Who They Invite to School Assemblies

Applying the above principles, there are circumstances under which a public school district has been held to have created a public or limited public forum as a matter of constitutional law, although these actions would not have triggered liability under the EAA. For example, in *Lamb's Chapel v. Center Moriches Union Free School District*, the Court held that the school district created a limited public forum when it permitted civic, social, and recreational uses of its schools, under a New York law that authorized local school boards to adopt reasonable regulations permitting the after-hours use of school property for ten specified purposes, but not permitting meetings for religious purposes. Accordingly, the school district violated the Free Speech Clause of the First Amendment when it twice refused the requests of the pastor of an evangelical church to use the school facilities after hours to present a six-part film discussing Christian family values and child rearing.¹⁰² The Court explained that “the [school] violates the *First Amendment* when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject,” even though the school could have excluded a speaker from “a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created”¹⁰³ Applying that principle to the instant case, the Court concluded that because the school engaged in impermissible viewpoint discrimination in violation of the Free Speech Clause when it established a limited public forum and then denied the pastor’s requests in circumstance where it presented no evidence that any training on child rearing or family values would have been denied except for the fact that it was presented from a religious viewpoint. Applying *Lemon*, the Court rejected the school district’s argument that permitting the church group would violate the Establishment Clause:

The showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The [school] property had repeatedly been used by a wide variety of pri-

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*vate organizations. Under these circumstances . . . there would have been no realistic danger that the community would think that the [school] was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.*¹⁰⁴

Similarly, in *Good News Club v. Milford Central School*,¹⁰⁵ the Court held that a New York school district had created a limited public forum when it opened its facilities for use by other community groups, but excluded the Good News Club based on its religious character. Once again, the Court analyzed the case under Free Speech principles, finding that the school had engaged in impermissible viewpoint discrimination.¹⁰⁶ As in *Lamb's Chapel*, the Court rejected the school's Establishment Clause argument, while musing whether an interest in avoiding an Establishment Clause violation is sufficient to justify viewpoint discrimination.¹⁰⁷

Following *Good News Club*, several lower court opinions dealing with equal access for religious groups have involved religious groups seeking to distribute flyers through a school's flyer distribution system. Accordingly, the Courts have analyzed whether denying access constituted impermissible viewpoint discrimination under the First Amendment's Free Speech Clause by utilizing traditional public forum analysis.¹⁰⁸

Notwithstanding this line of cases, a public school does not typically create a public forum by having a school assembly or even by inviting a local civic leader to speak at a school assembly. In other words, speakers would not be subject to the Establishment Clause. Rather, the public school becomes responsible for the speaker and therefore the speaker is subject to the same rules as the public school. Like the school newspaper in *Hazelwood*, a school assembly is likely to be "developed within the adopted curriculum and its educational implications in regular classroom activities."¹⁰⁹ Of course, an assembly's deviation from the adopted curriculum or educational mission may be sufficient to create a public forum, thereby leaving the school obligated under the Constitution.

Nor is a school assembly likely to trigger obligations under the EAA unless the assembly is student-governed, "noncurriculum related" and conducted during "noninstructional time,"¹¹⁰ defined by the EAA as "time set aside by the school before actual classroom instruction begins or after actual

classroom instruction ends.”¹¹¹ Accordingly, schools may generally host educational or curriculum-related school assemblies without opening the doors to all outside speakers, such as local religious leaders.

The closest case on point is *Donovan ex rel. Donovan v. Punxsutawney Area School Board*, where the high school there created an in-school activity period immediately prior to the commencement of the school’s instructional time. During that activity period, the school allowed at least one noncurriculum related group to meet. In these circumstances, the Third Circuit held that the school violated the EAA by not allowing the Bible Club to meet during this activity period.¹¹²

END NOTES

END NOTES - CHAPTER THREE

- 1 20 U.S.C. § 4071 (2009). The EAA does not cover treatment of outside groups that request access to school premises. For the law governing treatment of such groups, see *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), discussed later in this chapter.
- 2 20 U.S.C. § 4071(a).
- 3 20 U.S.C. § 4071(e).
- 4 42 U.S.C. § 1983 (2009). See, e.g., *Gay-Straight Alliance v. Sch. Bd.*, 477 F. Supp. 2d 1246, 1249-52 (S.D. Fla. 2007) (allowing unincorporated student club to use Section 1983 to bring suit under the EAA).
- 5 See *infra* Section 6 of this chapter.
- 6 994 F.2d 160, 161-62, 164 (5th Cir. 1993).
- 7 994 F.2d at 164 (quoting *Bd. of Educ. v. Mergens*, 496 U.S. 226, 252-53 (1990)).
- 8 *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1246, 1249 (3d Cir. 1993) (distinguishing between the use of the term “student group” found in § 4071(b), which defines the conditions that trigger the EAA, and the term “student-initiated” found in § 4071(c)(1), which “describes the requirements for meetings that must be allowed once the Act is triggered”). See generally Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Actors*, 81 Nw. U. L. Rev. 1, 39-40 (1986) (“[A] limitation to student-initiated groups defeats the broader purpose of the statute. A school with many faculty-initiated student groups can largely preempt demand for student-initiated groups. The result could be an open forum for mainstream interests and views, all sponsored by the faculty, with minority views excluded because of faculty hostility or indifference. Such a school would exclude religious groups with the ironclad excuse that the faculty could not sponsor one.”).
- 9 For an in-depth discussion of “limited open forum,” see *infra* notes 152-166 and accompanying text (§ 2 of this chapter).
- 10 20 U.S.C. § 4071(b) (2009).
- 11 *Bd. of Educ. v. Mergens*, 496 U.S. 226, 236 (1990).
- 12 *Id.* at 247.
- 13 20 U.S.C. § 4071(c).
- 14 20 U.S.C. § 4071(b).
- 15 20 U.S.C. § 4072(3).
- 16 20 U.S.C. § 4072(4).
- 17 *Mergens*, 496 U.S. at 244-45.
- 18 *Id.* at 246.
- 19 *Id.* at 238.
- 20 *Id.* at 239.
- 21 *Id.* at 239-40 (numbers added).
- 22 “The burden of showing that a group is directly related to the curriculum rests on

- the school district.” *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1252 (3rd Cir. 1993) (citing *Mergens*, 496 U.S. at 240).
- 23 *Id.* at 1252-53.
- 24 For example, the *Mergens* Court concluded that the scuba club was not a curriculum-related group, because scuba diving was not taught in any regularly offered course at the high school, did not result in extra academic credit, did “not directly relate to the curriculum as a whole in the same way that a student government or similar group might,” and was not required by any course at the school. *Mergens*, 496 U.S. at 246.
- 25 *Id.* at 240.
- 26 *Id.* at 241-43 (internal quotation marks omitted).
- 27 *Id.* at 244.
- 28 *Id.*
- 29 20 U.S.C. § 4071(d) (2009).
- 30 496 U.S. 226 (1990).
- 31 *Id.* at 239 (explaining that the EAA’s legislative history supports claim that the EAA “was intended to address perceived widespread discrimination against religious speech in public schools”) (citing H. R. Rep. No. 98-710, p. 4 (1984); S. Rep. No. 98-357, pp.10-11 (1984)); *see also id.* (explaining that the EEA was also enacted in part to respond to federal appellate court decisions “holding that student religious groups could not, consistent with the Establishment Clause, meet on school premises during noninstructional time”).
- 32 *Id.* at 231-33.
- 33 *Mergens*, 496 U.S. at 235 (citing *Widmar*, 454 U.S. at 271-74).
- 34 *Id.* (citing *Widmar*, 454 U.S. at 271 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971))).
- 35 *Mergens*, 496 U.S. at 248 (citing *Edwards v. Aguillard*, 482 U.S. 578, 586 (1987)).
- 36 *Id.* at 241.
- 37 *Id.* at 241 (citing 20 U.S.C. § 4071(c)(4); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).
- 38 *Id.* (quoting 20 U.S.C. § 4071(f)).
- 39 *Id.* (citing 20 U.S.C. § 4071(a)).
- 40 *Id.*
- 41 *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1252 (3rd Cir. 1993). Nor may schools structure curriculum in ways that violate the Establishment Clause. We take up that question in Chapter 4 of this book.
- 42 336 F.3d 211 (3d Cir. 2003).
- 43 *Id.* at 221.
- 44 *Id.*
- 45 83 F. Supp. 2d 1135 (C.D. Cal. 2000).
- 46 *Id.* at 1144-45.
- 47 772 F. Supp. 531, 534 (W.D. Wash. 1991), *rev'd on other grounds*, 987 F.2d 641 (9th Cir. 1993).
- 48 *Id.* Applying *Mergens*, the court also found that the Pep Club, Chess Club, Girls’ Club, Ski Club, Bowling Club, SKY (Special Kiwanis Youth) Club, International Club, Varsity Club, Minority Student Union, Dance Squad, and Future Business Leaders of America were all non-curriculum-related clubs that also triggered the EAA. *See id.* at 533-34. In each case, the court concluded that the group’s subject matter either was not taught in a regularly offered course or is not sufficiently related to course work to qualify as curriculum-related. *See also Ceniceros v. Bd. of Trustees*, 106 F.3d 868, 880 (9th Cir. 1995) (determining, with little analysis, that the African American, African Friends, Hackey Sac, Surf Club, California Scholar-

- ship Federation, Movimiento Estudiantial Chicano Aztlan, and the Organization for Nature Conservation were all noncurriculum related clubs that created an limited forum, and subsequently required the school to recognize and permit a religious club to meet during noninstructional time); *White County High Sch. Peers Rising in Diverse Educ. v. White County Sch. Dist.*, 2006 U.S. Dist. LEXIS 47955, *16 (N.D. Ga. July 14, 2006) (concluding that Beta Club was curriculum-related because its purpose—to honor students' performance in the core curriculum—was not “merely a broadly defined educational goal”); *id.* at *18 (concluding that the Dance Team, among other groups, was noncurriculum-related, and therefore triggered the EAA because the Dance Team was not taught and will not soon be taught as a regularly offered course and participation on the team did not result in academic credit); and *id.* at *27 (concluding that YAC, a student advisory council whose membership is appointed by school counselors, was noncurriculum-related because the school district failed to provide any “evidence of the existence of any regularly offered course that teaches the subject matter of YAC, namely prevention of teen pregnancy and substance abuse”); *Perger v. Wilson County Sch. Bd.*, 1990 U.S. Dist. LEXIS 20240 (M.D. Tenn. Aug. 2, 1990) (determining, with little analysis, that the French, Drama, Drug Prevention and 714 Club for students with alcohol problems within the family, and the Fellowship of Christian Athletes, were all noncurriculum related clubs that triggered the Equal Access Act and required the school district to permit the Bible Club to meet during noninstructional time).
- 49 This result is appropriate given that the burden of showing that a group is curriculum-related rests on the school district. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 240 (1990).
- 50 12 F.3d 1244, 1251-52 (3rd Cir. 1993).
- 51 *Id.* at 1253.
- 52 *Id.* at 1248-51.
- 53 *East High Gay/Straight Alliance v. Board of Ed. of Salt Lake City Sen. Dist.*, 81 F. Supp. 2d 1166, 1181 (D. Utah 1999).
- 54 *Id.* at 1182.
- 55 *Id.* at 1184.
- 56 It is well-settled that “the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). The “daily operation of school systems” is traditionally reserved to the States and their local school boards. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). “Courts do not and cannot intervene in the resolution of conflicts . . . which do not directly and sharply implicate basic constitutional values.” *Id.*
- 57 20 U.S.C. § 4071(f) (2009).
- 58 *Prince v. Jacoby*, 303 F.3d 1074, 1087 (9th Cir. 2002).
- 59 20 U.S.C. § 4071(e)(4). See generally *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 870 (2d Cir. 1996).
- 60 393 U.S. 503 (1969).
- 61 *Id.* at 513.
- 62 *Id.* at 514.
- 63 *Id.* at 511.
- 64 *Id.* at 509. See also e.g., *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 676-77 (7th Cir. 2008) (Rovner, J., concurring); *Lowery v. Euverard*, 497 F.3d 584, 601 (6th Cir. 2007) (Gilman, J., concurring); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38 (2d Cir. 2007); *PolICASTRO v. Kontogiannis*, 2005 WL 1005131, *3 (3d Cir. 2005); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1274-75 (11th Cir. 2004); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 530 (9th Cir. 1992); *cf.*

- DeJohn v. Temple Univ., 537 F.3d 301, 317 & n.16 (3d Cir. 2008) (applying *Tinker* standards in university context); Gay Student Servs. v. Texas A & M Univ., 737 F.2d 1317, 1324 (5th Cir. 1984) (same).
- 65 20 U.S.C. § 4071(c)(4).
- 66 514 F. Supp. 2d 168 (D. Mass. 2007).
- 67 *Id.* at 171.
- 68 *Id.* at 178 (quoting *Tinker*, 393 U.S. at 511). This conclusion is bolstered by the fact that the school had previously shown videos depicting graphic violence such as FARENHEIT 9/11, SHINDLER'S LIST, and even "a film depicting Emmet Till's disfigured body at his open-casket funeral . . ." *Id.* at 175 & n.6.
- 69 Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ., 258 F. Supp. 2d 667, 689 (E.D. Ky. 2003).
- 70 *Id.* at 689 (quoting *Tinker*, 393 U.S. at 538 (emphasis added)).
- 71 *Tinker*, 393 U.S. at 509 (quoting *Terminiello v. Chicago*, 337 U.S. 1 (1949))
- 72 *Id.* at 505-06 (emphasis added).
- 73 *Boyd*, 258 F. Supp. 2d 667.
- 74 20 U.S.C. § 4071(f).
- 75 Gernetzke v. Kenosha Unified Sch. Dist. No. 1, 274 F.3d 464, 466 (7th Cir. 2001) (Posner, J.).
- 76 *Id.*
- 77 *Id.*
- 78 311 F. Supp. 2d 550 (N.D. Tex. 2004).
- 79 *Id.* at 556-58.
- 80 *Id.* at 568 (citing 20 U.S.C. § 1681(a)); *see, e.g., Davis v. Monroe Bd. of Educ.*, 526 U.S. 629, 641 (1999). The court relied on other factors as well, including that the student group was advocating sexual activity among minors that was a crime under Texas law. *Caudillo*, 311 F. Supp. 2d at 565-66 (distinguishing *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding unconstitutional Texas statute making it a crime for persons to engage in same sex sodomy as applied to *adult* males))—and that the group's overtly sexual message would contradict the school's abstinence-only curriculum *Caudillo*, 311 F. Supp. 2d at 568.
- 81 *Id.* at 570-71.
- 82 496 U.S. 226, 247 (1990).
- 83 *Prince v. Jacoby*, 303 F.3d 1074, 1086 (9th Cir. 2002).
- 84 *Id.* at 1086-87.
- 85 258 F. Supp. 2d 667 (E.D. Ky. 2003).
- 86 258 F. Supp. 2d at 683-84 (citing 20 U.S.C. § 4072(3) (2009); *Mergens*, 496 U.S. at 237, 247 (requiring equal access to school newspaper, bulletin boards, public address system and Club Fair); *Prince v. Jacoby*, 303 F.3d 1074, 1086 (9th Cir. 2002) (requiring equal access to loudspeaker and use of bulletin boards).
- 87 258 F. Supp. 2d at 684. *See also Prince*, 303 F.3d 1074, 1090 (holding that the EAA requires "access to funding, the yearbook, the public address system, and the bulletin boards"); *Straights and Gays for Equal. v. Osseo Area Schs.-Dist. No. 279*, 471 F.3d 908, 909-10, 913 (8th Cir. 2006) (under EAA, student gay rights group was "entitled to the same avenues of communication" as other noncurriculum student groups, including access to the public address system, yearbook, and scrolling screen).
- 88 *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).
- 89 *Cornelius*, 473 U.S. at 800.

- 90 *Perry Educ. Ass'n*, 460 U.S. at 45-46. See *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981) (university meeting facilities); *City of Madison v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 174-76 (1976) (school board meeting); See *Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552 (1975) (municipal theater).
- 91 *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).
- 92 *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988).
- 93 *Id.* (quoting *Perry*, 460 U.S. at 47).
- 94 *Id.* (citing *Perry*, 460 U.S. at 46 n.7).
- 95 *Id.* (quoting *Perry*, 460 U.S. at 46).
- 96 *Id.* (quoting *Cornelius*, 473 U.S. at 802).
- 97 *Perry*, 460 U.S. at 45-46 & n.7. See also *Cornelius*, 473 U.S. at 802 (defining limited public forum as a “public forum . . . created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain topics”)
- 98 454 U.S. 263, 267-68 (1981).
- 99 *Id.* at 268-69.
- 100 429 U.S. 167, 174-76 (1976).
- 101 *Cornelius*, 473 U.S. at 806.
- 102 508 U.S. 384, 387-89, 391-92 (1993).
- 103 *Id.* at 393-94 (emphasis added) (quoting *Cornelius*, 473 U.S. at 806).
- 104 *Id.* at 395.
- 105 533 U.S. 98 (2001).
- 106 *Id.* at 107-12. See also *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (articulating the principles that once a state actor “has opened a limited forum . . . [it] must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not ‘reasonable in light of the purpose served by the forum,’ . . . nor may it discriminate against speech on the basis of its viewpoint.”) (quoting *Cornelius*, 473 U.S. at 804-06).
- 107 533 U.S. at 112-13 (“We have said that a state interest in avoiding an Establishment Clause violation ‘may be characterized as compelling,’ and therefore may justify content-based discrimination. . . . However, it is not clear whether a State’s interest in avoiding an Establishment Clause violation would justify viewpoint discrimination.”) (citing *Widmar v. Vincent*, 454 U.S. 263, 271 (1981)); see also *Wigg v. Sioux Falls Sch. Dist.* 49-5, 382 F.3d 807, 815-16 (8th Cir. 2004) (holding that public school violated the Free Speech Clause by prohibiting one of its elementary school teachers from participating in a Christian after-school program when the school opened its facilities to other community organizations and when the school permitted that very same teacher to participate in other after-school programs).
- 108 See *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044 (9th Cir. 2003) (concluding that school district policy prohibiting distribution of flyers of “commercial, political, or religious nature” when the district permitted other nonprofit organizations to distribute literature through its schools, which promoted events and activities of interest to students, was unconstitutional viewpoint discrimination under *Good News Club*, because the school had created a limited open forum and was discriminating based on a religious viewpoint); *Child Evangelism Fellowship of MD, Inc. v. Montgomery County Pub. Schs.*, 457 F.3d 376, 383, 386-87 (4th Cir. 2006) (stating that a flyer forum providing “a method to facilitate, without disruption, communication of ‘informational material or announcements’ from certain government speakers and community groups,” was likely a limited public forum, and that a religious group had

to be given access to the take-home flyer forum because the school's policy did not provide safeguards sufficient to ensure viewpoint neutrality); *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 523-25, 527-30 (3d Cir. 2004) (Alito, J.) (determining that the elementary school had created a limited public forum for distributing information by using the school's take-home flyer system, posting flyers on school walls and bulletin boards, and displaying information at Back-to-School nights; accordingly, prohibiting Child Evangelism from participating in such fora was impermissible viewpoint discrimination in violation of the First Amendment's Free Speech Clause); *cf. Planned Parenthood, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 825-30 (9th Cir. 1991) (determining that school did not engage in viewpoint discrimination by refusing to print Planned Parenthood's advertisements in the student newspapers, school yearbooks, and athletic programs, because the school had not created a limited public forum, and rather, had maintained sufficient editorial control over the yearbook to make the school's decision not to print the advertisements related to a legitimate pedagogical concern under *Hazelwood*; moreover, the school was permitted to make such a judgment under *Hazelwood*, because both students and members of the public could reasonably view the advertisements as "bear[ing] the imprimatur of the school") (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988)).

109 *Hazelwood*, 484 U.S. at 268 (internal quotation marks and citation omitted).

110 20 U.S.C. § 4071(b) (2009).

111 20 U.S.C. § 4072(4).

112 336 F.3d 211, 221-22 (3d Cir. 2003). *See also* *Prince v. Jacoby*, 303 F.3d 1074, 1088 (9th Cir. 2002) (concluding that "mandatory attendance marks the beginning of 'actual classroom instruction'" (citing 130 Cong. Rec. at 19,234-35); *Ceniceros v. Bd. of Trs.*, 106 F.3d 878, 880 (9th Cir. 1997) (concluding that noninstructional time includes lunch period); *but see Donovan*, 336 F.3d at 223 (rejecting analysis set forth in *Prince v. Jacoby*).