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THE EQUAL ACCESS ACT AND PUBLIC SCHOOLS: WHAT ARE THE LEGAL ISSUES RELATED TO RECOGNIZING GAY STUDENT GROUPS?

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I. INTRODUCTION

In 1984, Congress passed the Equal Access Act (EAA)[1] as an addition to a larger legislative package providing financial assistance for public schools.[2] As reflected in hearings before the House of Representatives and the Senate Judiciary Committee,[3] the EAA responded to testimony that religious student groups were denied permission to meet even though other non-religious student groups could do so.[4]

By passing the EAA, Congress sought to correct this ine-

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1. 20 U.S.C. §§ 4071-74 (1984).

2. Education for Economic Security Act of 1984, Pub. L. No. 98-377, 98 Stat. 1267 (1984). The EAA was Title VIII of this legislation; the first seven titles provided funds for math and science education, asbestos abatement, innovative programs, and desegregation.

3. For a discussion of the inequalities that existed regarding meetings for student groups, *see* H.R. Rep. No. 98-710, 1-16 (1984); S. Rep. No. 98-357, 7-19 (1984).

4. *See* Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist., 669 F.2d 1038 (5th Cir. 1982) (striking down school district policy permitting students to gather after regular school hours with supervision, either before or after regular school hours, for educational, moral, religious, or ethical purposes, as a violation of the Establishment Clause; failure to provide meeting place at school, was not a violation of free exercise as long as students were free to practice their religion during the hours when they were not in school), *superceded by* Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160 (5th Cir. 1993); Brandon v. Guilderland Bd. of Educ., 635 F.2d 971 (2d Cir. 1980) (upholding under the Establishment Clause school district's refusal to permit a religious club to meet on school premises because religious speech did not have the same First Amendment protection as political speech).

quality. From then on, school districts could either limit student groups only to those related to the curriculum or had to provide open access to a broader range of groups with no connections to the curriculum. Until recently, litigation under the EAA focused solely on access by religious clubs to public secondary schools.[5] Litigation that developed under the statute centered on religious use of school premises by students.[6] However, the question arose whether the EAA applies only to groups meeting for religious reasons.

The purpose of this article is to briefly explore the history and language of the EAA and to examine the only reported non-religious case to date, *East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District* ("*East High*").[7] This case, along with past litigation involving student religious groups, has implications for public school districts because it provides guidelines in determining which student groups should be recognized by the districts.

II. THE LANGUAGE AND LITIGATION HISTORY OF THE EAA

The EAA broadly prohibits public schools receiving federal assistance and having a limited open forum from discriminating against students or denying them "a fair opportunity . . . 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."[8] A school is considered to have a lim-

5. The EAA applies to "any public secondary school." 20 U.S.C. § 4071(a) (1984).

6. *See generally* Ralph D. Mawdsley, *Noncuriculum Related Student Groups Under the Equal Access Act*, 137 EDUC. LAW REP. 865 (1999).

7. 81 F. Supp. 2d 1166 (D.Utah 1999).

8. 20 U.S.C. § 4071(a) (1984). The "limited open forum" created under the EAA, although tantalizingly close to the concept of "limited public forum" under the free speech clause, was not intended by Congress to be interpreted under the "limited public forum" concept. *See supra*, note 3. The meaning of "limited public forum" was readily available to members of Congress when they fashioned "limited open forum." In 1983, the year prior to the passage of the EAA, the Supreme Court recognized, for purposes of free speech protection, three kinds of fora - public, nonpublic, and limited public. *See* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37 (1983). Public fora, such as public parks are open to all communicative activities subject only to "reasonable time, place, and manner of expression regulations." *Id.* at 46. In nonpublic fora, such as public schools, school boards can limit activities to those that relate to the education function. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1988) (stating that a school could punish student speech in an assembly that interfered with "fundamental values of habits and manners of civility essential to a democratic society"); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (holding that a student

ited open forum if it permits "one or more non[-]curriculum[-]related groups to meet on school premises during non-instructional time."[9] A "fair opportunity" for student participation in non-curriculum-related student groups is confined to meetings, which must satisfy the following criteria. They should: (1) be "voluntary and student-initiated;"[10] (2) have "no sponsorship of the meeting by the school, the government, or its agents or employees;"[11] (3) permit school employees to attend "only in a nonparticipatory capacity;"[12] (4) should not "materially and substantially interfere" with the orderly educational activity of the school;[13] and (5) ought not allow non-school persons to "direct, conduct, control, or regularly attend activities" of the groups.[14]

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newspaper as part of journalism course permitted principal greater latitude in controlling student content). The limited public forum, a modification of the nonpublic forum, restricts public school limitation on free speech where public schools have been opened up for other uses by non-school persons. *See* Widmar v. Vincent, 454 U.S. 263 (1981) (holding that university's refusal to permit student groups to use university premises for meetings when other groups were permitted to meet was a violation of free speech because, having opened its campus for student expression, the university could not prohibit religious speech); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (relying on *Widmar*, public school district could not engage in viewpoint discrimination in prohibiting religious use of school premises during after school hours where others with different viewpoints on same subject had been permitted to use the premises).

9. 20 U.S.C. § 4071(b) (1984). Non-instructional time includes meetings during lunchtime where other non-curriculum-related student groups are permitted to meet at that time. *See* Ceniceros v. Board of Trustees, 106 F.3d 878 (9th Cir. 1997).

10. 20 U.S.C. § 4071(c)(1) (1984).

11. *Id.* § 4071(c)(2). This provision responds to concerns in the Supreme Court decisions under the Establishment Clause that involvement between religion and government could not appear to carry the sponsorship or imprimatur of government. In Lynch v. Donnelly, 465 U.S. 668, 683 (1984), the Court upheld the use of a creche in a public park display of a number of seasonal symbols by noting that alignment of government with Christianity does not occur simply because "some advancement of religion will result from governmental action." *See also* Lee v. Weisman, 505 U.S. 577, 590 (1992) (in striking down graduation prayers arranged by school officials, the Court observed that "the degree of school involvement here made it clear that the graduation prayers bore the imprint of the State").

12. 20 U.S.C. § 4071(c)(3) (1984). *See* Sease v. School Dist. of Philadelphia, 811 F. Supp. 183 (E.D.Pa. 1993) (the EAA's ban on involvement by school officials in religious meetings applied to school secretary who sponsored and led a student gospel choir).

13. 20 U.S.C. § 4071(c)(4) (1984). Although student rights under the EAA are obviously statutory and not rights under the free speech clause, there is a similarity. The idea that certain student conduct is not protected is borrowed from *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511 (1969), where school authorities could limit student expression where necessary "to avoid material and substantial interference with schoolwork or discipline."

14. 20 U.S.C. § 4071(c)(5) (1984).

The EAA specifically prohibits schools from various actions. First, schools may not influence "the form or content of any prayer or other religious activity."[15] Second, schools may not require "any person to participate in prayer or other religious activity"[16] or expend "funds beyond the incidental cost of providing the space for student-initiated meetings."[17] Additionally, schools are not permitted 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."[18] Nor do employees in school have to sanction "meetings that are otherwise unlawful."[19] Lastly, schools may not curtail student group rights, "which are not of a specified numerical size,"[20] and abridge "the constitutional rights of any person."[21]

Although the EAA only applies to schools receiving federal assistance, the Act expressly prohibits the government from "deny[ing] or withhold[ing] Federal financial assistance to any school."[22] In addition, the EAA does nothing "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."[23]

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15. *Id.* § 4071(d)(1).

16. *Id.* § 4071(d)(2).

17. *Id.* § 4071(d)(3).

18. *Id.* § 4071(d)(4). The obvious purpose of this provision is, since schools may require all student groups on school premises to have a school employee in attendance in order to protect the students and school property, to limit the authority of school officials in making assignments. What is not clear is whether the EAA would create a private cause of action under the EAA for school employees who object to an assignment where student expression is contrary to their religious beliefs. No reported cases have been litigated under this section, but employees with religious objections to employer decisions are far more likely to challenge assignments under Title VII or the free speech clause. *See, e.g.,* Favero v. Huntsville Indep. Sch. Dist., 939 F. Supp. 1281 (S.D.Tex. 1996) (holding that two bus drivers lost in their Title VII claim that the school district failed to accommodate their religious beliefs by refusing their eight-day leave to participate in a religious observance); Peloza v. Capistrano Unified Sch. Dist., 782 F. Supp. 1412 (C.D.Cal. 1992) (holding that state and school district curriculum guides requiring biology teacher to teach evolutionist views and prohibiting him from teaching creationist views did not violate free speech), *aff'd in part, rev'd in part,* Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1993).

19. 20 U.S.C. § 4071(d)(5) (1984).

20. *Id.* § 4071(d)(6).

21. *Id.* § 4071(d)(7).

22. *Id.* § 4071(e).

23. *Id.* § 4071(f).

Courts can use a full range of legal and equitable remedies in enforcing the EAA. In addition to declaratory and injunctive relief, courts can award damages and attorney fees under the Act.[24] Damages are also available under Section 1983 of the Civil Rights Act of 1964.[25]

Despite statutory permission for a broad range of student activities to meet on school premises, the EAA has become identified with religious student groups in public schools. Not surprisingly, the Act was promptly challenged under the Establishment Clause of the U.S. Constitution. In 1990, the U.S. Supreme Court upheld the constitutionality of the EAA[26] in *Board of Education of the Westside Community Schools v. Mergens* ("*Mergens*").[27] The Court's review of the EAA was a two-step process: (1) consideration of its constitutionality and (2) determination as to whether school officials at Westside High School violated the Act.

In analyzing the EAA under the *Lemon v. Kurtzman*[28] tripartite test,[29] the Supreme Court found that the Act satisfied

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24. *See* Garnett v. Renton Sch. Dist., 1994 U.S. Dist. LEXIS 14188, at *11 (Sept. 15, 1994) (stating that nominal damages of $1.00 awarded for six-year delay by school in permitting Bible Club to have full meeting rights of other student groups, and, as prevailing party, plaintiff-students were entitled to $400,000 attorney fees under 42 U.S.C. § 1983 (1964)).

25. Section 1983 of Title 42 of U.S. Code provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured . . . .

See East High, 81 F. Supp. 2d at 1185-86 (stating that an implied private remedy under the EAA does not preclude a remedy for damages under Section 1983).

26. Justice O'Connor, joined by Chief Justice Rehnquist and Justices White, Blackmun, Scalia, and Kennedy held that Westside High School violated the EAA. Justice O'Connor's opinion that the EAA did not violate the Establishment Clause under the *Lemon* test was joined only by Chief Justice Rehnquist and Justices White and Blackmun, with Justice Kennedy concurring because, although there was no evidence that students were pressured to participate in the religious club, the appropriate test was coercion, not neutrality under *Lemon*. Justice Kennedy's coercion argument came to fruition in *Lee v. Weisman* where he invoked a psychological coercion test in striking down graduation prayers organized by school officials.

27. 496 U.S. 226 (1990).

28. 403 U.S. 602 (1971).

29. The three parts of the test are:

(1) whether the statute has a secular purpose;

(2) whether the principal or primary effect of the statute is neither to advance nor to inhibit religion;

(3) whether the statute fosters an excessive entanglement with religion.

all three tests. The first prong, secular purpose, was met because the Act was neutral in granting use of school premises to both secular and religious student groups.[30] The Act also passed the second prong of the *Lemon* test, neither advancing nor inhibiting religion, because by furthering the private speech of students, it could not be viewed by mature high school students as endorsing religion.[31] Finally, the Act's prohibition of involvement by school officials in religious clubs eliminated the possibility of violating the third prong, government entanglement in religion.[32]

After determining that there was no Establishment Clause problem, the Supreme Court found that Westside High School officials violated the Act by refusing to permit a Christian club to meet on school premises under the same terms and conditions as other student groups. There were thirty Westside student groups (or activities),[33] ten of which were "non-curriculum[-]related"[34] under the EAA. The Court interpreted "non-curriculum[-]related student group" to mean "any student group that does not directly relate to the body of courses offered

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Id. at 612-13.

30. *Mergens*, 496 U.S. at 249 ("Because the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act's purpose was not to 'endorse or disapprove of religion.'") (quoting Wallace v. Jaffree, 472 U.S. 38, 56 (1985)).

31. *Mergens,* 496 U.S. at 250 ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech which the Free Speech and Free Exercise Clauses protect") (emphasis in original).

32. *Id.* at 251 ("[T]he possibility of *student* peer pressure remains, but there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate") (emphasis in original).

33. The groups or activities were: Band, Chess Club, Cheerleaders, Choir, Class Officers, Distributive Education (DEC), Speech and Debate, Drill Squad and Squires, Future Business Leaders of America (FBLA), Future Medical Assistants (FMA), Interact, International Club, Latin Club, Math Club, Student Publications, Student Forum, Dramatics, Creative Writing Club, Photography Club, Orchestra, Outdoor Education, Swimming Timing Club, Student Advisory Board (SAB), Intramurals, Competitive Athletics, Zonta Club (Z Club), Subsurfers, Welcome to Westside Club, Wrestling Auxiliary, National Honor Society. *Mergens*, 496 U.S at 253-58. To these groups must be added Peer Advocates, a service group that worked with special education classes. *Id.* at 246.

34. *Id.* at 243-44 ("Interact (a service club related to Rotary International); Chess; Subsurfers (a club for students interested in scuba diving), National Honor Society; Photography; Welcome to Westside (a club to introduce new students to the school); Future Business Leaders of America; Zonta (the female counterpart to Interact); Student Advisory Board (student government); and Student Forum (student government)"). The Court also added "Peer Advocates." *Id.* at 246.

by the school."[35] The Court focused on only three clubs (Subsurfers, Chess, and Peer Advocates). These clubs were selected under the theory that the presence of even one non-curriculum-related student group would be sufficient to invoke the EAA.[36] Despite the school's efforts to relate the clubs to the curriculum,[37] the Court found all three to be non-curriculum-related because they were "not required by any course at the school and [did] not result in extra academic credit."[38] Having found a statutory violation under the EAA, the Court did not address the student-plaintiffs' claim that the school also violated their free speech rights under a limited public forum theory.[39]

Cases since *Mergens* have addressed a variety of statutory and constitutional questions under the EAA.[40] Until recently, all of those cases involved student religious groups. In 1998, the federal court in *East High* was called upon for the first time to determine the application of the EAA to a non-religious student club.[41] Under a slightly revised set of facts, the court granted summary judgment to almost all of the school's claims.[42] In *East High,* a federal district court was required to perform the same kind of curriculum-related analysis for a gay-rights student group that the Supreme Court had done for a religious group in *Mergens.*

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35. *Id.* at 239.

36. *Id.* at 246.

37. *Id.* at 244, 246 (Subsurfers were alleged to be related to physical education and Chess to math; at trial, the school principal acknowledged that Peer Advocates, which involved providing services for special education classes, was not related to any curricular classes).

38. *Id.* at 245.

39. *See supra* note 8 for discussion of limited public fora.

40. *See, e.g.*, Pope v. East Brunswick Bd. of Educ., 12 F.3d 1244 (3d Cir. 1993) (requiring school to permit religious group to meet where only one non-curricular club existed); Hsu v. Roslyn Union Free Sch. Dist. No. 3, 876 F. Supp. 445, *aff'd in part, rev'd in part, remanded*, 85 F.3d 839 (2d Cir. 1996) (holding that school could not prohibit Christian student group from requiring that certain officers needed to be Christians); Ceniceros v. Board of Trustees, 106 F.3d 878 (9th Cir. 1997) (stating that students entitled to meet for religious purposes during lunch time where other student groups also permitted to meet).

41. 30 F. Supp. 2d 1356 (D.Utah 1998).

42. 81 F. Supp. 2d 1166 (D.Utah 1999) (holding that the court granted summary judgment to the school regarding its curriculum-related claims under the EAA, except as to one club for the school year, 1987-88). In addition, the court granted summary judgment to the school on plaintiff's free speech claim. East High Gay/Straight Alliance v. Board of Educ. of Salt Lake City Sch. Dist., 1999 U.S. Dist LEXIS 20254 (Nov. 30, 1999).

III. *EAST HIGH*: FACTS OF THE CASE

In 1996, the Board of Education of Salt Lake City School District adopted a formal policy concerning student organizations that "[did] not allow or permit student groups or organizations not directly related to the curriculum to organize or meet on school property."[43] Adopting the language of the EAA, the policy expressly declared that the school district would not "allow a 'limited open forum.'"[44]

In the fall of 1998, students representing East High Gay/Straight Alliance[45] sought injunctive relief because they were denied permission to have the same privileges of other student groups to "use the public address system for announcements about meetings, post notices, and pass out fliers at the school fairs and put up information sheets on bulletin boards."[46] The student group asserted that the high school was a limited open forum because it had five non-curriculum-related student groups:[47] Future Business Leaders of America ("FBLA"), National Honor Society ("NHS"), Future Homemakers of America ("FHA"), Odyssey of the Mind ("OM"), and Improvement Council of East High ("ICE").[48] In response, the school district argued that a "closed forum policy" was in the public interest.[49] Resolving this dispute required that the dis-

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43. *East High*, 81 F. Supp. 2d at 1168.

44. *Id.*

45. Between the decision on the preliminary injunction and the final decision on the EAA, the students requested that another student group, Rainbow Club, be recognized. The school denied recognition on the grounds that sexual orientation is not part of the curriculum. Since the club was not part of the original lawsuit, the court proceeded solely to consider the Gay/Straight Alliance Club. *East High*, 81 F. Supp. 2d at 1196-97.

46. *East High*, 30 F. Supp. 2d at 1357 (quoting Memorandum in Support of Plaintiff's Motion for Partial Preliminary Relief, filed Oct. 13, 1998 (dkt. No. 60) at 9); *See also East High*, 81 F. Supp. 2d at 1168-69.

47. At the hearing for the preliminary injunction, plaintiffs claimed only three non-curriculum-related clubs, FBLA, ICE, and NHS. The court ruled only on FBLA and NHS because ICE had become part of student government by the time of the trial on the merits. *East High,* 30 F. Supp. 2d at 1358-59.

48. *East High*, 81 F. Supp. 2d at 1173.

49. *East High*, 30 F. Supp. 2d at 1357. At trial, the school district justified denial of recognition to the gay/straight student group, Rainbow Club, because state statute provides that "local school boards shall deny access to any student organization or club whose program or activities would materially and substantially: (i) encourage criminal or delinquent conduct; (ii) promote bigotry; or (iii) involve human sexuality." Utah Code Ann. § 53A-3-419(2)(a) (1999). *East High*, 81 F. Supp. 2d at 1196 n.46.

trict court directly address whether the five student groups should be categorized as non-curriculum-related for purposes of the EAA.

IV. *EAST HIGH*: DISTRICT COURT DECISION

The district court in *East High* looked to the Supreme Court's decision in *Mergens* for insight and guidance. In defining curriculum-related student groups under the EAA as those that "directly relate to the body of courses offered by the school,"[50] the Supreme Court identified four situations for student groups to directly relate to a school's curriculum: (1) if the subject matter of the group is actually taught or soon will be taught in a regularly taught 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; and (4) if participation in the group results in academic credit.[51]

An example of the first situation would be "a French Club . . . if a school taught French in a regularly offered course or planned to teach the subject in the near future."[52] Under the second situation, "[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."[53] The third and fourth situations would be met "[I]f participation in a school's band or orchestra were required for the band or orchestra classes, or resulted in academic credit."[54]

None of the five non-curricular clubs were related to any courses. The school district argued that its student groups fell under the second, third, and fourth *Mergens* situations. At the preliminary injunction hearing, the district court framed the critical question as whether relatedness under the EAA required sameness in content. Plaintiffs argued that "relatedness" of student groups to curriculum under *Mergens* required "sameness."[55] Groups "meaningfully diverge[d]" from this

50. *Mergens*, 496 U.S. at 239.

51. *Id.* at 239-40.

52. *Id.* at 240.

53. *Id.*

54. *Id.*

55. *East High*, 30 F. Supp. 2d at 1359 (quoting Reply Memorandum in Support of Plaintiffs' Motion for Partial Preliminary Relief, filed November 13, 1998 (dkt. No. 82),

"sameness" when they "engage[d] in activities having a social, fund-raising or community service function."[56]

Both at the preliminary injunction hearing and the trial on the merits, the district court rejected plaintiffs' argument, applying a "qualitative rather than quantitative" analysis that required only that student groups "enhance, extend, or reinforce the specific subject matter of a class *in some meaningful way*."[57] Since the East High Gay/Straight Alliance had never been permitted to meet, the court recognized that it would have to "weigh the curriculum-relatedness of an existing student group against the hypothetical subject matter of 'a religious or political club' not yet established."[58] *Mergens* established that what mattered was not what a new club might bring to the school, but what "a school's actual practice"[59] was in relating existing student groups to the curriculum. In *East High*, this meant determining how the activities of the clubs related to the curriculum.

Plaintiffs argued for an "assay process"[60] whereby various kinds of student group activities (social, fundraising, and community service) would be separated out to determine the purpose of the clubs. By assigning activities to categories that did not relate to "significant topics taught in the course,"[61] the result would be a diminished number of "curriculum-related" activities. The district court rejected this "kind of subtractive reasoning that plaintiffs' weighing-and-balancing assay method represents."[62] The court held the critical test was not the number of activities that fit into various categories, but how those activities represent "an extension of the classroom experience."[63]

The court articulated different qualitative analyses in examining the curriculum-relatedness of the five clubs. Regarding FBLA and FHA, the court considered whether the groups,

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at 3).

56. *Id.*

57. *East High*, 30 F. Supp. 2d at 1360 (emphasis added), *quoted in East High*, 81 F. Supp. 2d at 1177.

58. *Id.*

59. *Mergens*, 496 U.S. at 246.

60. *East High*, 81 F. Supp. 2d at 1177-78.

61. *Id.* at 1177 (quoting Pope v. East Brunswick Bd. of Educ., 12 F.3d 1244, 1253 (3d Cir. 1993)).

62. *Id.* at 1179.

63. *Id.*

since their names denoted connection to the Business and Family and Consumer Sciences programs, had a connection to specific courses in those programs. Although OM had no name connection, the court examined whether it was tied to the specific courses taught by the faculty advisor. For NHS, the court considered whether it had a connection to curriculum in a broad sense (like student government) by promoting and recognizing outstanding academic achievement. Finally, the court reviewed ICE and its claim to be part of student government.

The court concluded that FHA was curriculum-based because "[its] activities, community service-oriented though they may be, nevertheless serve to enhance, extend, or reinforce the specific subject matter of one or more Applied Technology Education classes in a meaningful way, generally be affording students an opportunity to apply the skills that they have learned in the classroom."[64]

Likewise, the court found that FBLA "maintain[ed] the direct relationship to East High's Applied Technology Education curriculum . . . ."[65] The court rejected plaintiffs' claims that social events negated a direct relationship to curriculum. At the preliminary injunction hearing, the court observed that "curriculum-related student clubs . . . may function as clubs - members may socialize, raise funds, and even assist others as part of their group activities - without altering the club's status under the [EAA]."[66] At trial, the court amplified its observation by noting that a "[social] event may also serve to build interest in and enthusiasm for the group and its more substantive business- and career-oriented activities."[67] Not only was FBLA "a vital component of the school-to-work programs in the area of applied technology education," but also the club's faculty advisor awarded "extra credit in the form of a three percent grade increase" to the FBLA students in her classes.[68] In connecting the functions of FBLA to the school's course requirements, the

64. *Id.* at 1181.

65. *Id.* at 1182.

66. *East High*, 30 F. Supp. 2d at 1360. Plaintiffs argued, using their "assay process," that the number of activities devoted to functions not related to classes indicated non[-]curriculum-related activities. *See* Memorandum in Support of Plaintiffs' Motion for Partial Preliminary Relief at 10 (over the preceding year, six activities were characterized as "social," three as "fundraising," and three as "community service").

67. *East High*, 81 F. Supp. 2d at 1182.

68. *East High*, 30 F. Supp. 2d at 1361. *See* Memorandum in Opposition to Plaintiffs' Motion for Partial Preliminary Relief at vii ¶¶ 29-30, 6; xiii ¶ 47.

court observed that FBLA would be curriculum-related if it "actually engage[d] in activities which enhance[d], extend[ed], or reinforce[d] the specific subject matter of one or more business classes in a meaningful way."[69] Indeed, using this definition, FBLA was curriculum-related because the career opportunities aspect of the club[70] overlapped with the Business Management course during a competition that "reinforce[d] student skills learned in word and information processing classes, accounting classes, introductory business classes, business law classes, and communications classes."[71]

In its examination of NHS, a student group that obviously lacked FHA or FBLA kind of connection to a specific part of the curriculum, the court concluded that a student group could be curriculum-related as long as it furthered a broad educational goal of the school. Plaintiffs argued that NHS was not curriculum-related because its activities, unlike student government under *Mergens*, were only "remotely related to abstract educational goals."[72] Plaintiffs reasoned that NHS failed to meet the definition of a student group under *Mergens* not only because it did not provide "input to schools [sic] officials about the curriculum,"[73] but also because the primary function of campus meetings was community service orientation. The court rejected plaintiffs' claims by observing that "[s]o long as NHS relates directly to the body of courses as a whole by honoring, recognizing and encouraging academic achievement in the specific context of [a high school's] curriculum . . . participation by NHS members in community service projects does not negate that relationship or render non-curricular that which is otherwise curriculum-related."[74]

The OM student group had as its purpose "creative thinking and problem solving."[75] Plaintiffs analogized OM to the chess club in *Mergens* that the Supreme Court determined to

69. *East High*, 30 F. Supp. 2d at 1361.

70. Plaintiffs argued that only four of the FBLA activities dealt with this function: a fall leadership conference, a guest speaker, a field trip to a local candy manufacturer and a spring business education competition. *Id.* at 1360-61 (quoting Memorandum in Support of Plaintiffs' Motion for Partial Preliminary Relief at 10, 32-33).

71. *East High*, 30 F. Supp. 2d at 1361.

72. *Id.* at 1362 (quoting *Mergens*, 496 U.S. at 244).

73. *Id.* at 1362 (quoting Memorandum in Support of Plaintiffs' Motion for Partial Preliminary Relief at 37).

74. *East High*, 81 F. Supp. 2d at 1183.

75. *Id.*

be non-curricular, because even if the math teacher encouraged participation in chess, chess skills were not taught in any courses offered by the school.[76] The court in *East High* reasoned, however, that OM was different because the club's creative and problem solving skills were actually taught as a significant part of the faculty advisor's classes.[77]

Regarding ICE, the court determined that the club was non-curricular for the year 1997-98, the first year plaintiffs unsuccessfully attempted to have their club recognized. The activities of ICE were not "tied to subject matter actually taught in a course; nor [did] they relate to the body of courses as a whole in a way that would satisfy *Mergens*."[78] Shortly after the beginning of the 1998-99 school year, ICE was merged into student government, at which point it fit into one of the *Mergens* examples of a curriculum-related student group. Thus, summary judgment was granted to plaintiffs for an EAA violation only for the year 1997-98.[79]

At the trial on the merits, the district court addressed plaintiffs' free speech claims. Plaintiffs made two free speech claims. First, they argued that under free speech forum analysis, the school district created a limited public forum. Having created this kind of forum, the district court could not refuse to recognize the Gay/Straight Alliance. Second, the school district's 1996 policy regarding the curriculum-related student groups, even if neutral on its face, was applied in a discriminatory manner. The court ruled that, except for 1997-98 as to the ICE, plaintiffs' free speech rights were not violated and found for the school district on both claims.

For free speech purposes, the court distinguished between limited open forum under the EAA and limited public forum under free speech.[80] Although the school district argued that it operated a nonpublic forum for free speech purposes because it did not have a limited open forum under the EAA, the court adopted plaintiffs' claim that the school created a limited public forum. However, the school's forum was limited to curriculum-related student groups. The court, following the reasoning of the U.S. Supreme Court in *Rosenberger v. Rector and Visitors*

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76. *Mergens*, 496 U.S. at 245.

77. *East High*, 81 F. Supp. 2d at 1184.

78. *Id.* at 1180.

79. *Id.* at 1198.

80. *See supra* note 8 for discussion of the three kinds of fora.

of the University of Virginia,[81] opined that the permissible subject matter of the school district's forum "encompass[ed] the subject matter actually taught in courses offered at each high school and any additional matters which would be deemed curriculum related."[82]

Despite the fact that a school could create the subject matter for its own forum (in this case, curriculum-related student groups), it could not engage in viewpoint discrimination. Plaintiffs argued that the effect of the school district's 1996 policy, through an alleged "unwritten policy" against expression of homosexual viewpoints, was "to exclude all gay-positive views from the forum of East High School."[83] Plaintiffs argued that since discussions regarding sexual orientation had not occurred in any of the school's existing clubs, students were denied the opportunity to express their views without their own club. In response, the school district simply asserted that a club organized for that purpose could not be permitted within the 1996 policy[84] because sexual orientation was not part of the school's curriculum.

In a later decision, the district court granted summary judgment to the school district on the free speech claim (except for 1997-98 when the school had operated a limited open forum under the EAA).[85] Although based on the ruling in *Hazelwood School District v. Kuhlmeier*[86] public schools had greater con-

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81. 515 U.S. 819 (1995) (by holding that public university violated free speech rights of a religious student group by refusing to fund its publication on the same basis as other groups, the Court reasoned that the University, by opening its forum to student groups and their publications, could not engage in viewpoint discrimination).

82. *East High,* 81 F. Supp. 2d at 1187.

83. *Id* at 1188. As an example, Plaintiffs used 300 parents' requests for the resignation of the high school principal when he permitted a short presentation on historical viewpoints from gays and lesbians at a multi-cultural assembly. *Id.* at 1191 n.39.

84. In addition to Gay/Straight Alliance, school officials also denied approval of a student group, Rainbow Club, the subject matter of which included the "impact, contribution, and importance of gay, lesbian, bi-sexual, and transgender individuals." *Id.* at 1196. The school's rationale for the denial was that the subject matter of the club was "not actually taught in a regular course," would not "be taught in a regular course," and "[did] not concern the body of courses as a whole." *Id.*

85. East High Gay/Straight Alliance v. Board of Educ. of Salt Lake Sch. Dist., 1999 U.S. Dist. LEXIS 20254,at *10 (Nov. 30, 1999). The court refused to grant summary judgment at the trial on the merits regarding free speech, pending further argument. *East High*, 81 F. Supp. 2d at 1198.

86. 484 U.S. 260 (1988) (holding that school principal's authority to review school newspaper and remove material that represented inappropriate journalism was upheld where the paper was part of a school course).

trol over "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school,"[87] allowing a student group to meet "during non-instructional time [did] not equate with publishing a school newspaper or producing a school play . . . ."[88] However, because school district officials affirmed that "gay-positive viewpoints . . . [could] be freely expressed in the existing forum at East . . . High School" curriculum-related student groups, coupled with the fact that no student [had] been reprimanded for expression of gay-positive views, the court found no risk that plaintiffs would suffer immediate and irreparable harm.[89]

V. ANALYSIS OF THE *EAST HIGH* DECISION

The district court decision in *East High* is significant because it is the only reported non-religious student club case to be decided on the merits.[90] As Justice O'Connor observed in *Mergens*, the EAA was "passed by wide bipartisan majorities in both the House and Senate – to address widespread discrimination against religious speech in public schools."[91] In this light, how should the Act be applied to student groups, such as those advocating gay rights, viewed as unattractive by some school officials today as religious groups were viewed by some school districts prior to passage of the EAA?[92] In deciding that the East High School was not a limited open forum, was the district court correct in its interpretation of *Mergens?* Since the EAA declares a limitation on the broad control that school dis-

87. *Id.* at 271.

88. *East High*, 81 F. Supp. 2d at 1194.

89. *East High*, 1999 U.S. Dist. LEXIS 20254, at *9.

90. For a more recent unreported case where a federal district court issued a preliminary injunction requiring a public high school to permit a "Gay-Straight Alliance Club" to meet during lunch period, as did a wide range of other student clubs, and to publicize its meetings, *see* Colin v. Orange Unified Sch. Dist., 2000 U.S. Dist. LEXIS 1742 (Feb. 4, 2000).

91. *Mergens*, 496 U.S. at 239.

92. *See* Ann Pepper, *District Rejects Gay School Club,* Orange Co. Register, Dec. 8, 1999, at A1 (report of school board decision denying Gay-Straight Alliance Club to meet at school without changing its name and without affirming that it would not be discussing issues of sex, sexuality, and sex education). One school board member was quoted as saying that "We know the law is on their side, but our community members don't want it." *Colin*, 2000 U.S. Dist. LEXIS 1742, at *7. *See also* John Ritter, *Gay Students Stake Their Ground*, USA Today, Jan. 18, 2000, at 2A.

tricts have over student groups, what implications does *East-High* have for other school districts?

To answer those questions, *Mergens* analysis is an appropriate starting point. In *Mergens*, the Supreme Court focused on three student groups (Subsurfers, Chess, and Peer Advocates) as not being related to the curriculum. The Court rejected the school district's efforts to relate Subsurfers (scuba diving) to physical education and Chess to math because neither chess nor scuba diving were "taught in any regularly offered course at the school" nor did either "result in extra academic credit."[93] Likewise, a special education service group, known as Peer Advocates, was not required by "any courses offered by the school," did not figure as part of a required participation for any course, and did "not result in extra credit in any course."[94]

Efforts by school officials to connect Subsurfers to swimming that was taught as part of physical education and Chess to math based on encouragement by math teachers to play the game were brushed aside by the Court. The Court explained that curriculum-related must mean something other than being "remotely related to abstract educational goals;" otherwise, "no schools [would have] limited fora . . . and schools could evade the Act by strategically describing existing student groups."[95] However, in the case of Westside High School, the Court's conclusion that the clubs were non-curriculum-related was aided by the school's own descriptions of its courses. Some clubs, such as Band, Orchestra, Choir, Dramatics, and Distributive Education, were identified as extensions of courses offered in the regular curriculum. The absence of such a statement for clubs like Subsurfers, Chess, and Peer Advocates, "strongly suggest[ed] that those clubs [did] not, by the school's own admission, directly relate to the curriculum."[96]

The Court's finding that Westside High School operated a limited open forum under the EAA, based on the three clubs, has two noteworthy subsidiary observations. First, the Court disabuses school districts of the notion that the curriculum-relatedness of clubs could depend on written descriptions. In its

93. *Mergens*, 496 U.S. at 245.
94. *Id.* at 246.
95. *Id.* at 244.
96. *Id.* at 246.

definition of "non[-]curriculum[-]related student activities," the Court notes that it "looks to a school's *actual practice* rather than its *stated policy*."[97] Second, among the clubs that plaintiffs alleged were non-curriculum-related were Future Business Leaders of America (FBLA) and National Honor Society (NHS). Although the Court did not address the curriculum-relatedness of FBLA or NHS at Westside High School, the school connected neither club to academic courses in the club descriptions.[98]

Whether or not a club has a description relating it to curriculum, a court has to examine how the school recognizes the connection between clubs and academic courses in practice. This level of judicial scrutiny is supported by the Court's conclusion that "curriculum-related" under the EAA is to be narrowly defined. "[A] broad interpretation of 'curriculum-related' would make the [Act] meaningless . . . [in that] the [school] administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content."[99]

Since *Mergens*, federal courts have adopted the same narrow interpretation of curriculum-relatedness when addressing access by student religious groups to school facilities. In *Pope v. East Brunswick Board of Education* ("*Pope*"),[100] the Third Circuit Court of Appeals held that the school board created a limited open forum under the EAA by permitting the Key Club, a national service organization associated with Kiwanis, to meet during non-instructional time. Prior to the litigation, the board attempted to remove the high school from the reach of the EAA by restructuring and eliminating student groups.[101] In defend-

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97. *Id.* (emphasis added).

98. *See id.* at 255, 258 for club descriptions:

FUTURE BUSINESS LEADERS OF AMERICA (FBLA)—This is a club designed for students interested in pursuing the field of business. It is open to any student with an interest. Membership begins in the fall of each school year.

NATIONAL HONOR SOCIETY—Westside Honor Society is a chapter of the national organization and is bound by its rules and regulations. It is open to seniors who are in the upper 15% of their class. Westside in practice and by general agreement of the local chapter has inducted only those juniors in the upper 7% of their class. The selection is made not only upon scholarship but also character, leadership, and service. A committee meets and selects those students who they believe represent the high qualities of the organization. Induction into NHS is held in the spring of each year.

99. *Id.* at 244-45.

100. 12 F.3d 1244 (3d Cir. 1993).

101. As a result of the restructuring, a number of clubs (Audio Visual, Bicycle,

ing retention of the Key Club, the school board argued that it was related to the high school's History and Humanities classes, which taught a unit on homelessness, hunger, and poverty. The Third Circuit, in rejecting the board's claim, concluded that retention of this one club was sufficient to bring the school within the EAA and require that it permit a Bible club to have access to its facilities, the public address system, and bulletin boards.

The Court explained:

> [T]he nexus between the service club (Key Club) and the curriculum is stronger than it was in *Mergens*. The activity of the Key Club that East Brunswick relies upon is not merely connected in some abstract sense to an overall goal of 'good citizenship,' but is tied directly to a specific instructional unit of a specific course. Nevertheless, East Brunswick's argument remains flawed and cannot prevail. . . . [Unlike the connection between a French Club and a French course], [t]he subject matter of the Key Club is *not* poverty and homelessness, but community-related service and fund-raising. The history course and the Key Club accordingly have different subject matter.[102]

In order for a school to make a curriculum-related connection between a student group and a course, the Third Circuit reasoned 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."[103] Despite its assiduous efforts to avoid the requirements of the EAA, the school board in *Pope* had not gone far enough.

In *Garnett v. Renton School District* ("Garnett"),[104] a federal

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Booster, Youth Ending Hunger) were no longer permitted access to school facilities, and other clubs appeared (Drama, Institute for Political/Legal Education Club, Students Against Drunk Driving). *Id.* at 1247.

102. *Id.* at 1253 (emphasis in original).

103. *Id.*

104. 772 F. Supp. 531, 534 (W.D.Wash. 1991), *rev'd on other grounds*, 987 F.2d 641 (9th Cir. 1993), *cert. denied*, 510 U.S. 819 (1993), *on remand*, 1994 U.S. Dist. LEXIS 14188 (finding that FBLA was a non-curriculum club, it nonetheless held that the EAA was not applicable for purposes of requiring a Bible Club to meet on school premises because such a requirement would violate the state constitution. Eventually, the Ninth Circuit, after the case had been remanded on appeal from the Supreme Court in the wake of *Mergens*, held that the EAA preempted the state constitution and, therefore, the Bible Club would have to be permitted to meet since the school created a limited open forum. On remand, the district court issued declaratory and injunctive relief on

district court held that a school violated the EAA by refusing to permit a Bible club to meet. The court further determined that Future Business Leaders of America (FBLA) was "a non[-]curriculum[-]related student group."[105] School district and state guidelines required that FBLA be offered, but business class students were not required to attend and no academic credit was awarded for participation. Where a club such as FBLA is required to be offered, the options open to a school to avoid a limited open forum under the EAA are restricted: "adjust class requirements, provide instruction in FBLA meetings, or drop business classes."[106]

In *Hoppock v. Twin Falls School District*,[107] a federal district court granted injunctive relief to students who had been denied their request to form a Christian religious club to meet on school premises on the same basis as other groups. Although the school district made no serious arguments regarding the curriculum-relatedness of its student groups, its challenge, under the religion provisions of its state constitution[108] to the authority of the federal government in requiring student religious group to meet on school premises,[109] had curricular implica-

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behalf of students seeking to meet for religious purposes on school premises).

105. FBLA was only one of 11 student clubs that the district court found were non-curriculum-related. The other clubs were: Pep Club, Chess Club, Girl's Club, Ski Club, Bowling Club, SKY (Special Kiwanis Youth) Club, International Club, Varsity Club, Minority Student Union, Dance Squad. *Garnett*, 772 F. Supp. at 534.

106. *Id.*

107. 772 F. Supp. 1160 (D.Idaho 1991).

108. Idaho Const., art. IX, § 6:

> No sectarian or religious tenets or doctrines shall ever be taught in the public schools . . . . No books, papers, tracts or documents of any political, sectarian or denominational character shall be used or introduced in any schools . . . .

Idaho Const., art IX, § 5:

> [No] . . . school district . . . shall ever make any appropriations, or pay from any public fund or monies whatever, anything for any sectarian or religious purpose . . . nor shall any grant or donation of land, money or personal property ever be made by . . . such public corporation . . . for any sectarian or religious purpose.

109. The argument raised in this case that conduct can be authorized under federal law, but invalid under more restrictive state law, has some support, albeit in a different context. However, as the courts in *Hoppock* and *Pope* observed, there is a difference between state provisions more restrictive than federal in dealing with permissibility under the Establishment Clause and accepting federal money with mandatory provisions adopted pursuant to Congress' funding authority. *See* Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986) (holding that state providing assistance to a blind student enrolled in a ministry preparation program at a religious college did not violate the federal constitution's Establishment Clause), on remand 771 P.2d 1119 (Wash. 1989) (holding that providing assistance, even if it did not violate the U.S. Constitution, nonetheless, violated the state constitution).

tions. The court made short shrift of the district's argument related to the authority of the federal government:

> [I]t is too late in the day for the defendant school district . . . to avoid the rude grasp of the EAA . . . [Even though] the EAA constitutes federal intrusion into local school administration . . . [o]nce the District accepts the federal handout, the District is bound by the heavy federal conditions attached to the payment."[110]

As the Third Circuit observed in *Pope*, not only was the EAA an example of federal supremacy,[111] but the reception of federal money had a direct impact on student groups and the curriculum:

> While the option . . . of wip[ing] out all noncurriculum related student groups and totally clos[ing] the forum may be antithetical to progressive education, that cost, like the rejection of federal funds, is the burden that Congress [has] imposed on school districts that do not wish to allow religious and other student groups equal access to their facilities.[112]

The combined effect of *Mergens* and its progeny, *Garnett*, *Pope,* and *Hoppock*, is not only that the federal government can directly impact school district decisions about student groups under the EAA, but that the interpretation of what is "curriculum-related" will be narrowly construed. The *East High* decision and its interpretation of "curriculum-related" must be viewed in the context of its legal setting.

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110. *Hoppock*, 772 F. Supp. at 1161, 1163.

111. U.S. Const., art. VI, cl. 2, provides that:

> The Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or Laws of any state to the contrary notwithstanding.

The federal court in *Hoppock* addressed directly the balance between the EAA and the Idaho Constitution involving permission of a religious club to meet on school premises where the state constitution was more restrictive than the U.S. Constitution's Establishment Clause:

> The EAA challenges Idaho's sovereign power by requiring schools within the state to disregard the state's constitution. . . . Once the District accepts the federal handout, the District is bound by the heavy federal conditions attached to the payment. . . . [W]hen federal law mandates rather than permits certain activity, limitations on congressional power such as the Bill of Rights and the implicit protection of state sovereignty, the Supremacy Clause takes over and prohibits the states from using their own constitution to block federal law.

Hoppock, 772 F. Supp. at 1163, 1164. *See also Pope*, 12 F.3d at 1256, where the Third Circuit Court of Appeals recognized application of the Supremacy Clause to the EAA.

112. *Pope*, 12 F.3d at 1254.

East High, like other cases where student groups invoke the protection of the EAA, began with a motion for a preliminary injunction. The focus by student-plaintiffs on this remedy is understandable because high school students have only a fixed amount of time until graduation. If they had to wait until a trial on the merits in order to prevail against the school district, their victory would be meaningless. At trial, students might win their EAA claim but having graduated in the meantime, they would not be able to enjoy the benefit of their victory.[113]

The district court in *East High* articulated the difference between the distribution of the burden of proof among the parties regarding a preliminary injunction hearing and a trial on the merits. In order to secure a preliminary injunction, plaintiffs must produce evidence of irreparable harm and likelihood of success on the merits.[114] At trial, "[t]he burden of showing that a group is directly related to the curriculum rests on the school district."[115]

Since the school district prevailed on the merits regarding curriculum-relatedness, the issue of irreparable harm ceased to be relevant. However, *East High* is the first case to assess the merits of a non-religious club's access under the EAA and, more certainly, other cases will follow. Irreparable harm under the EAA relates to the amount of time that students will lose without the opportunity to meet as a group. The harm to the East High students can be compared with the harm to students in other cases where preliminary injunctions were issued.

In *Hsu v. Roslyn Union Free School District No. 3*,[116] a

113. Having graduated, the student-plaintiffs will not be deprived of the opportunity to prevail, but the remedy available to them will be affected. If they graduate prior to the final decision in the case, they can receive damages as a prevailing party, but cannot be awarded declaratory or injunctive relief. *See* Ceniceros v. Board of Trustees, 106 F.3d 878 (9th Cir. 1997) (in reversing district court's summary judgment for school district as to plaintiff-student when she was a senior in 1992, the Ninth Circuit Court of Appeals held that, since she had graduated by the time of the appeals court's decision, she was eligible for damages, but not declaratory or injunctive relief. However, the court would enjoin the school district from future violations of the EAA).

114. *See* Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 853 (2d Cir. 1996). *See also* Colin v. Orange Unified Sch. Dist., 2000 U.S. Dist. LEXIS 1742, at *19 (Feb. 4, 2000).

115. *Pope*, 12 F.3d at 1252.

116. *Hsu*, 85 F.3d 839 (2d Cir. 1996) (holding that the club was entitled under the EAA to require that three of its officers - President, Vice President, and Music Coordinator - be Christians).

school district refused to approve a student Christian group's constitution because the group insisted that its officers be Christians. In reversing the district court's decision on behalf of the school district and upholding the students' motion for preliminary injunction under the EAA, the Second Circuit Court of Appeals reasoned that "the denial for one year (now two years) of the right to pray in an after-school Bible group as envisioned by the Hsus . . . constitutes 'irreparable injury,' and that the Hsus are entitled to the issuance of a preliminary injunction so that the injury will cease."[117]

Implicit in the Second Circuit's reasoning is an assessment of the students' purpose for meeting. In *Hsu*, the court determined that "[t]he Equal Access Act protects free speech rights," which in the case of the student group meant "preserv[ing] the content of the religious speech at their meetings by discriminating in a way that ensures that the Club's leaders will be committed to both its cause and a particular type of expression."[118] In a recent decision granting a preliminary injunction for a Gay/Straight Alliance club, *Colin v. Orange Unified School District Board of Education*,[119] the federal district court found irreparable injury in the students' having already missed an entire semester because of the school's refusal to permit them to meet. In addition, the school's delay caused the students to meet across from the school and denied them "the ability to effectively address the hardships they encounter at school every day."[120]

Even though the district court in *East High* never reached the issue of irreparable harm because it found that plaintiffs did not have a likelihood of success on the merits, the issue of delay is critical for students whose tenure in high school is limited. Arguably, the students' desire to form the Gay/Straight Alliance to discuss issues of sexual orientation and tolerance was as compelling for them as was the need for students to pray in *Hsu*.

The issue of curriculum-relatedness at a preliminary injunction hearing is very similar to that at trial, except for the obvious difference as to which party has the burden of proof re-

117. *Id.* at 872.

118. *Id.* at 862, 872.

119. *Colin*, 83 F. Supp. 2d 1135 (2000).

120. *Id.* at 1150 (holding that the students stated they were subjected to name-calling at school and did not feel safe using the school's restrooms).

garding curriculum-relatedness. Was the district court correct in concluding at both the hearing and the trial that the four student groups at issue, FBLA, FHA, NHS, and OM (ICE ceased to be an issue after its merger with student government at the beginning of the 1998-99 year), were curriculum-related?

Using the language of *Mergens*, to what extent did the subject matter of these groups concern "the body of courses as a whole," "result in academic credit," or was the subject matter taught "in a regularly offered course" at the school? [121] The school argued that FBLA and FHA were extensions of the business curriculum, family, and consumer science courses.[122] In addition, the FBLA "faculty advisor award[ed] 'extra credit in the form of a three percent grade increase' to FBLA members in her classes who participate[d] in FBLA activities."[123] Although OM was different from FBLA and FHA because it did not reflect a number of courses in a broad curriculum, it was curriculum-related because it was connected to classes taught by the club's advisor. A student group can be outside the scope of the EAA if students "meet together to hone the creative thinking and problem solving skills they may have learned in class."[124] Finally, NHS was curriculum-related because "[a]cademic excellence has no meaning apart from the courses of study offered by a school and cannot be achieved outside of the school's curriculum."[125]

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121. *Mergens*, 496 U.S. at 239.

122. *See East High*, 30 F. Supp. 2d at 1361. For example, the school's argument was that FBLA was a extension of the business curriculum, fulfilling three goals of a Business Management class that overlapped with the career opportunities and learning experience objectives of FBLA:

> . . . .
>
> 2. Develop an understanding of the economic principles that influence business decisions.
>
> . . . .
>
> 4. Explore career opportunities, consumer issues, and other aspects of personal economics.
>
> 5. Provide hands-on experience in the operation of a business enterprise, and have weekly contact with representatives of the business community.

See also East High, 81 F. Supp. 2d at 1181. FHA highlighted three skills "taught in the three major subjects of the Family and Consumer Science curriculum: food, sewing, and child development."

123. *East High*, 30 F. Supp. 2d at 1361.

124. *East High*, 81 F. Supp. 2d at 1184.

125. *East High,* 30 F. Supp. 2d at 1363. ("NHS rewards academic achievement as reflected by its members' entire scholastic performance, reinforcing a core purpose of the school curriculum as a whole. NHS activities also extend the school's college preparatory curriculum by helping to pave the students' road from a high school classroom

Keeping in mind that only one non-curriculum-related student group is necessary to invoke the protection of the EAA, the focus is on the extent to which the court in *East High* has accurately interpreted the four categories of curriculum-relatedness in *Mergens*.[126] Of special interest is the situation when a student group concerns the body of courses as a whole at a school. An example is student government, as identified by the *Mergens* court.[127] Although FBLA and FHA were challenged because of their connection to a broad range of courses within an area, the student group that seems the least connected to a particular set of courses is NHS.

East High is the first reported case where the curriculum-relatedness of NHS has been directly challenged. The *East High* court asserts that NHS's activities of "promoting academic excellence" have more relationship to the school's "body of courses as a whole" than did the example of student government in *Mergens*.[128] Qualitatively, is student government that "addresses concerns, solicits opinions, and formulates proposals"[129] pertaining to the curriculum sufficiently different from NHS? One can argue that a group that recognizes academic achievement for work done in courses within the curriculum (NHS) is different from one that seeks to effect changes in the curriculum (student government); the question is whether the difference should matter. The conclusion of *East High* answers this question in the negative. If the court is correct, curriculum-relatedness can be viewed solely from the perspective of an output of the curriculum (academic recognition) and does not have to concern inputs such as evaluative comments and proposals for change that flow from a student group (student government) to the curriculum.

Should NHS's non-interactive relationship with the curriculum be adequate to remove it from the EAA? The notion that passivity regarding the curriculum might be sufficient for purposes of the EAA clearly does not seem to be appropriate for groups such as FBLA, FHA, and OM. The court at both the

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to a college education."). *See also East High*, 81 F. Supp. 2d at 1183 (curriculum-relatedness extends to "honoring, recognizing and encouraging academic achievement").

126. *See supra* note 49.

127. *Mergens*, 496 U.S. at 240.

128. *East High*, 81 F. Supp. 2d at 1183.

129. *Mergens*, 496 U.S. at 240.

trial and preliminary injunction hearing spent considerable time identifying how these three groups were connected with the goals and objectives of courses in the curriculum.[130] In other words, curriculum-relatedness for these groups required inputs of knowledge and skills that flowed between the courses and student groups.

One could argue that the court, in asserting that NHS is "far more direct[ly] [related] to the school's 'body of courses than . . . a student government,'"[131] is simply incorrect. To reach its conclusion, the *East High* court has engaged in a misinterpretation of the *Mergens* court's category recognizing student groups that relate to the body of courses as a whole. Not only does *Mergens*' definition of student government rely on an interactive relationship between the student government and the curriculum,[132] but the other three student group categories also have interactive components.[133]

Has the *East High* court given a "broad interpretation of 'curriculum-related'"[134] to NHS, contrary to the requirement in *Mergens*, with the result that the Gay/Straight Alliance was denied recognition? One can argue that the *East High* court applied a different qualitative definition to NHS than to the other clubs. A passive connection to a curriculum is certainly different from an interactive one. To the extent that this definition broadens curriculum-relatedness, one can suggest that the *East High* court has overstepped its bounds. Whether future courts will view NHS the same way as *East High* or apply a more restrictive definition remains to be seen.[135]

A reason for denying a preliminary injunction to

130. *See, e.g.*, *East High*, 30 F. Supp. 2d at 1361 (FBLA activities involved stated goals of the Business Management course); *East High*, 81 F. Supp. 2d at 1181, 1184 (FHA and OM utilized specific vocational and problem solving skills taught in several courses).

131. *East High*, 81 F. Supp. 2d at 1183.

132. *Mergens*, 496 U.S. at 240 ("addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses as a whole"), *quoted* in *East High*, 30 F. Supp. 2d at 1358.

133. *Mergens*, 496 U.S. at 240 (holding that French club related to a French language course required participation in band or orchestra clubs for students in courses of the same names as well as academic credit for band and orchestra students in the clubs), as referenced in *East High*, 30 F. Supp. 2d at 1358.

134. *Id.* at 244.

135. It is worth remembering that, even though the Court did not address it, plaintiffs in *Mergens* identified NHS as one of the ten student groups that were non-curriculum-related. *See id.*

Gay/Straight Alliance was that the FBLA advisor awarded academic credit to her students who participated in the club. The Supreme Court in *Mergens* recognized curriculum-relatedness where "participation in a school's band or orchestra . . . resulted in academic credit."[136]

Like NHS and student government, the *East High* court's comparison between FBLA and the *Mergens* Court's orchestra and band example is not a perfect fit. In the example used in *Mergens*, not only were the band and orchestra student groups identical in name to the academic classes, but also the credit was connected to required participation.[137] In *East High*, while FBLA had aspects of skill development and connection to curriculum goals tying it to academic courses, it did not have the identity in name and the required participation used in the *Mergens*' example. To what extent can individual teachers assure the curriculum-relatedness of student groups by deciding to award academic credit, particularly as in *East High* where some, but not all, students in a club would receive credit? While it is not likely that teachers would award academic credit for participation in clubs that did not have some similarities to their course(s), the notion that curriculum-relatedness can depend on individual teacher decisions does have a bootstrap quality to it. This method of awarding credit to individual students in an existing student group, while an acceptable method of rewarding club participation, could also be viewed as a way of validating groups that otherwise might have no other claim to be curriculum-related.

The facts in *East High* addressed a request for a gay/straight club that originated from students not connected to a course. What if the facts were changed and the request came from students enrolled in an academic course (e.g., a humanities course)? Would the result be the same? The simplest response would be that the EAA looks only to the curriculum-relatedness of *existing* student groups, not to the curriculum-relatedness of those seeking approval.[138] Thus, if all existing

136. *Mergens*, 496 U.S. at 240.

137. *Id.* ("[I]f participation in a school's band or orchestra were required for the band or orchestra classes, or resulted in academic credit, then these groups would also directly related to the curriculum.").

138. *See, e.g., East High*, 81 F. Supp. 2d at 1195. The court refused to rule on the high school's denial of recognition for the Rainbow Club (gay, lesbian, bi-sexual, and transgender students). While it is not clear whether the request for this club was generated from students in a particular course, the school's reason for denying recognition,

student groups were curriculum-related, students seeking approval for a gay/straight alliance club would have no remedy under the EAA. Nothing in the EAA compels a secondary school to start a new student group. However, would students making such a request have a remedy under another theory, such as free speech?

Although beyond the scope of the EAA, requests for student group recognition under free speech highlight constitutional tensions between school district control over schools in general, curriculum in particular, and the expressive rights of students. The Supreme Court in *Mergens*, citing *Hazelwood School District v. Kuhlmeier*[139] and *Bethel School District No. 403 v. Fraser*,[140] emphasized that "schools and school districts maintain their traditional latitude to determine appropriate subjects of instruction."[141] Under these precedents, public schools have successfully prohibited students[142] (as well as faculty)[143] from expressive activities. Under *Tinker v. Des Moines Independent School District*,[144] students and faculty have rights of free expression in public schools as long as that expression "does not concern speech or action that intrudes upon the work of the schools or the rights of other students."[145] However, student expression can be prohibited where "it is necessary to avoid material and substantial interference with schoolwork or discipline."[146]

In a recent federal district court case, *Colin v. Orange Uni-*

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that sexual orientation was not included as part of the subject matter in the curriculum, seems compatible with the EAA.

139. 484 U.S. 260 (1988) (upholding control by school principal over school newspaper where, since it was produced as part of a journalism class, it could be considered part of the school's curriculum).

140. 478 U.S. 675 (1986) (upholding discipline of student who used an elaborate and graphic sexual metaphor in an assembly speech because schools can inculcate "fundamental values of habits and manners of civility" and because schools have an "interest in teaching students the boundaries of socially appropriate behavior"). *Id.* at 681.

141. *Mergens*, 496 U.S. at 241.

142. *See, e.g.*, Settle v. Dickson County Sch. Bd., 53 F.3d 152 (6th Cir. 1995) (upholding teacher prohibition of student paper on the life of Christ).

143. *See, e.g.*, Boring v. Buncombe County Bd. of Educ., 136 F.3d 364 (4th Cir. 1998) (holding that changes in play, selected by drama teacher for student competition, and required by principal, did not violate teacher's free speech because play was part of curriculum).

144. 393 U.S. 503 (1969).

145. *Id.* at 508.

146. *Id.* at 511.

fied School District,[147] a high school with clearly non-curriculum-related student groups unsuccessfully attempted to use a *Hazelwood*-type argument to deny approval of a Gay-Straight Alliance Club. The school's reasoning, despite the presence of non-curriculum-related groups, was that "the District has [an existing] curriculum on sex education, which deals with human sexuality, sexual behavior and consequences, and prevention of sexually transmitted diseases."[148] Not only did the court reject the district's argument because "the subject matter of the proposed Gay-Straight Alliance was not covered in the curriculum,"[149] but suggested that the school board's lack of comfort with students' "discussing sexual orientation and how all students need to accept each other" paralleled the board's response in *Tinker* where school officials objected to students wanting to wear black armbands to protest the war in Vietnam.[150]

In a separate decision, the *East High* court determined that, even if the high school was not required to recognize the Gay/Straight Alliance because all existing student groups were curriculum-related, it could not prohibit "gay-positive viewpoints" from expressing in existing clubs.[151] While the court could find no evidence regarding an "unwritten [school district] policy forbidding expression of gay-positive views,"[152] the court clearly stated that the students' right to express their views was not limited to the curriculum of the school.[153]

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

148. *Id.* at 1144.

149. *Id.* at 1145.

150. *Id.* at 1149 (holding that because the court found for plaintiff-students under the EAA, it did not need to reach the free speech issue). *See Tinker*, 393 U.S. at 509 ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

151. *East High*, 1999 U.S. Dist. LEXIS 20254, at *4, (Nov. 30, 1999).

152. *Id.* at 10.

153. *See East High*, 81 F. Supp. 2d at 1194 (quoting *Kuhlmeier*, 484 U.S. at 270-71) ("The question whether the First Amendment requires a school to tolerate particular student speech - the question that we addressed in *Tinker* - is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.").

VI. IMPLICATIONS FOR SCHOOL DISTRICTS

The implications for school districts in addressing requests for gay student clubs is not appreciably different from those for religious clubs. The EAA requires that schools make hard choices regarding whether they want all of their student groups to be connected to the curriculum. With the certain knowledge that only one non-curriculum-related student group is sufficient to invoke the provisions of the EAA, the process for determining student club acceptability needs to be a thoughtful and deliberate one. The choice is clear for school boards that do not want their students to be exposed to controversial or unacceptable subject matter, be it religious or homosexual in nature, during non-instructional school hours on school premises. All student groups must relate to the curriculum.

East High is an interesting case for a number of reasons. Not only is it the first reported non-religious case decided on the merits under the EAA, but it is also the first case to address a request by a gay student group. Perhaps, more importantly for school officials, it is the first case to address the curriculum-relatedness of one of the most revered student groups, National Honor Society. Although the court in *East High* may be correct that NHS is curriculum-related, the fact remains that another district court might find, in a similar set of facts, that NHS is qualitatively different from other curriculum-related groups, particularly student government. If NHS does not function in an interactive manner like student government, should it be considered non-curricular? If it is non-curriculum-related, can school officials make it more like student government by ascribing it with interactive functions? Presumably, this result would be possible, but just how NHS would interact with the curriculum as a whole is difficult to imagine.

Alternatively, could a school forestall recognition of a gay group by having its teachers award extra credit to students in their courses who are members of NHS? *Mergens* states, and *East High* reinforces, that awarding academic credit by classroom teachers to members of student groups can create curriculum-relatedness. Awarding credit would be an issue only for those student groups that do not fit neatly within one of the four *Mergens*' situations.

Presumably, the reason that the *Mergens*' court recognized awarding of credit as one of the indicia of curriculum-

relatedness is that teachers would not grant credit to students in clubs unless the students were using skills and knowledge from the course. The notion that granting credit would bootstrap student groups into curriculum-relatedness where there are no interactive skills and knowledge would seem highly risky and suspect. Assuming that granting credit to students in a group like NHS is appropriate, who should award it? Would awarding of credit by an English teacher for students in NHS be sufficient or, since NHS represents the curriculum at large, would other teachers also have to participate? Without some form of interaction between course and student group, awarding credit seems neither warranted nor advisable.

Perhaps the ultimate test of curriculum-relatedness for school officials is the extent to which they would be willing to give up a popular student group rather than come within the EAA. For example, how many schools would be willing to give up their NHS charter in order to avoid permitting student groups they considered unacceptable to meet on their premises?

For student groups that have no claim to recognition under the EAA, what should be the school's responsibility to assure that the student's right of free speech is not excluded within the curriculum? *East High* suggests that a school's curriculum-related clubs make it a limited public forum for purposes of free speech analysis, but under *Rosenberger,*[154] they are prohibited from engaging in viewpoint discrimination.[155] The suggestion that students who cannot meet as a group, nonetheless, have the right to present their views in classes, is easier said than done. Students may well find that the content of existing courses does not lend itself to expressing their views or that they are met with hostility from other students or teachers.[156]

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154. 515 U.S. 819 (1995).

155. *Rosenberger* distinguishes between subject matter of free speech that forms the basis for a limited public forum and viewpoint discrimination that applies to expressions regarding the subject matter. For public schools the subject matter of the school's limited public forum is its curriculum-related student groups. Once a school has created a limited public forum in its curriculum-related student groups, it cannot prohibit expression within that forum based on the content of the expression. *See id.* at 829 ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

156. *See Colin,* 83 F. Supp. 2d, at 1143-46. Students demonstrated that their

To date, courts have been reluctant to create a justiciable right for students who allege that they have been discriminated against in the expression of their views in classes,[157] but that does not mean that schools should not take the lead and present a model of "tolerance of divergent political and religious views."[158]

School officials, whose function is to instruct students with "fundamental values of 'habits and manners of civility' essential to a democratic society,"[159] have the difficult task of making choices regarding the content of curriculum. However, at what point do actions of school officials in shaping and defining a school's curriculum run counter to students' right to express their views? *East High* represents the dilemma for students with goals that do not fit into the school's curriculum.

Gay students are now encountering resistance similar to that which opposed students who previously sought recognition from public secondary schools of religious clubs.[160] For students with unpopular views, *East High* exposes the Achilles heel of the EAA. Although the Act was to assure that religious clubs would be permitted to meet on the same basis as other curriculum-related groups, the EAA does nothing, under *Hazelwood,*[161] to dilute a school board's control over the curriculum. The EAA neither speaks to the content of school curriculum nor requires that a school recognize all student clubs related to the curricu-

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Gay/Straight Alliance did not include material covered by the regular sex education curriculum. *But see East High*, 1999 U.S. Dist. LEXIS 20254, at *9 (holding that the gay students' assertions that they had "refrained from expressing gay-positive viewpoints out of fear that such expression would not be deemed 'appropriate'" were not sufficient to establish viewpoint discrimination).

157. *See* C.H. v. Oliva, 195 F.3d 167 (3d Cir. 1999) (stating that public teacher's refusal to allow first-grade student to read a Bible story in class, in response to teacher's assignment to read a favorite story, did not violate free expression); Settle v. Dickson County Sch. Bd., 53 F.3d 152 (6th Cir. 1995) (holding that student's free speech rights not violated when she was denied, pursuant to class assignment to write a biography, to write about the life of Christ).

158. *Bethel Sch. Dist.*, 478 U.S. at 681.

159. *Id.*

160. *Cf. Lubbock* and *Brandon*, *supra* note 4, with *Pope*, *Hsu*, and *Ceniceros*, *supra* note 40, for the progress of students before and after passage of the EAA in asserting their right to meet as religious clubs on the same basis as other student groups.

161. *Hazelwood*, 484 U.S. at 271 (holding that educators have authority over expressive activities that "may fairly be characterized as part of the school curriculum, whether or nor they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.")

lum. Rather, the Act only addresses the curriculum-relatedness of clubs that exist when compared to those seeking recognition.

What *East High* indicates for school administrators who find themselves with non-curriculum-related student groups is that they can change the school's status under the EAA. As the court indicates, the non-curriculum-related status of the East High School existed for only 1997-98 until the school eliminated the offending club (ICE). After that year, all student groups were curriculum-related and the school was no longer subject to the EAA. Student groups whose requests for recognition are denied for the EAA-covered year might claim damages,[162] but they have no retrospective right to form their club.

VII. CONCLUSION

Was the East High Gay/Straight Alliance an "unfavored student club [that had been denied access to the high school] on the basis of the content of [its] speech" in violation of the EAA?[163] *East High* challenges the logic and purpose of the EAA. Although the Act was originally passed to prohibit unequal treatment of non-curricular, religious clubs, it is uncertain whether the Act should apply to an equal extent to all clubs regardless of "content of the speech."[164] The federal district court in *Colin* observed that "due to the First Amendment, Congress passed an *'Equal Access Act'* when it wanted to permit religious speech on school campuses. It did not pass a 'Religious Speech Access Act' or an 'Access for All Student Except *Gay Students* Act' because to do so would be unconstitutional."[165]

For many high schools in the United States, the fact situation in *East High* is not an issue because these schools already acknowledge a number of non-curriculum-related student groups. Therefore, a new student group addressing gay rights could likewise be recognized.[166]

However, *East High* suggests that some high schools may strive to make all student groups curriculum-related and re-

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162. *See East High*, 1999 U.S. Dist. LEXIS 20254, at *7 n.5.

163. *Mergens*, 496 U.S. at 245.

164. 20 U.S.C. § 4071(a) (1984).

165. *Colin*, 83 F. Supp. 2d at 1142 (emphasis in original).

166. See Kate Folmar and Marissa Espino, *Prange Unified Trustees Deny Gay Club, 7-0*, L.A. Times (Orange County Edition), Dec. 8, 1999, at 10 (approximately 600 gay/straight alliance clubs exist at high schools across the country).

move themselves from the EAA. For these schools, the EAA affords an avenue for limiting student groups that can use school facilities to only those that are curriculum-related. However, as *East High* indicates, the dividing line between what is curriculum-related and what is non-curriculum-related is difficult to discern. There is a bright side: students denied recognition to meet as a group always have a free speech right to express their views in class.