

The Equal Access Act: "Not the Access for All Students Except  
Gay Students Act": Federal Judicial Decisions and Their  
Implications for School Systems' Policies and Practices  
Regarding Student Requests to Establish Gay Straight Alliance  
Clubs in Public Schools

Danielle Suzanne Crossley

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N. Wayne Tripp, Co-Chair

Carol S. Cash, Co-Chair

Susan G. Magliaro

Ann G. Kilkelly

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Blacksburg, Virginia

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(ABSTRACT)

To ensure an educational opportunity for every child that passes through America's schoolhouse doors, it is imperative that non-heterosexual students' educational needs are not ignored in the educational milieu (Zirkel, 2006). In the last decade or so, the desire of non-heterosexual students to organize Gay-Straight Alliance (GSA) clubs on high school campuses have been met with angst by school leaders (Duncan & Rogers, 2008). Despite the passage of the Equal Access Act (EAA) in 1984, school leaders have often denied non-heterosexual students the right to establish GSA clubs on campus, consequently resulting in these students utilizing the judicial system as the venue to assert their rights under the law (Essex, 2005). As it is imperative that educational leaders understand the legal rights of all students under their care, and

make informed decisions in order to avoid costly litigation, this research focused on analyzing the Equal Access Act of 1984, federal case law, legal commentary, and historical documents, in order to track the developments of non-heterosexual students' ability to utilize the EAA to establish GSA clubs in the public schools in the United States. The study employed a traditional legal research methodology as described by Alder (1993) and Russo (1993), relying on electronic data bases and traditional legal finding tools to carry out the research. From the resulting legislation, case law, scholarly commentary, and other relevant documents reviewed and analyzed, an accurate historical perspective on the EAA as it relates to the formation of GSA clubs was constructed. In addition, the significant themes that arose from the findings were synthesized in order to offer guidance to educational leaders and policymakers when facing requests from students to establish GSA clubs on school property. Recommendations for school leaders when considering such requests from students to form GSA clubs under the EAA are also provided.

## Dedication

During my twenty years as an educator, I never would have envisioned that I would come to possess such conviction to impart on my colleagues the importance of this issue. Perhaps this was so because I did not realize the magnitude of the issue? Perhaps I was blinded by my own ignorance and prejudice? Perhaps it was because I was frightened by the fact that I was one of them; a non-heterosexual individual, hiding my true identity for reasons of self preservation?

Whatever the reasons might have been, I now look forward to ensuring that individual differences are looked upon as an asset and not a detriment, where inequity and dissonance are torn down and replaced with justice and symbiotic harmony. I owe this new found passion to my children: Christopher David, Brian Edward, Emily Taylor, and my soulmate Suzanne Kelly. I thank God for them. A special dedication is also warranted for Mrs. Francis Freitas, one of my best friends who always believed in me, treated me as a family member, and gave me the confidence that I could reach higher and accomplish more.

## Acknowledgements

When the little girl in the movie *Poltergeist* was told to walk into the light, fear and uncertainty must certainly have been experienced, but with compassion and assistance from others to help guide her on the necessary journey, the little girl prevailed and her family became the beneficiary of what resulted following the experience. All who are named below knew how personal this topic was to me, and despite the sensitivity of the subject matter were unwavering in their support; guiding me in my journey. Bless you.

I could not have completed this dissertation without the willingness, the care, and the compassion of the following individuals: Dr. N. Wayne Tripp, my Co-Chair who gifted me with his professionalism, humanity, and caring; Ms. Ennis M. McCrery, Graduate Student Ombudsperson, my confidante and my inspiration to strive for greatness; Dr. Karen P. DePauw, Vice President and Dean of the Graduate School who bestowed her confidence in me, not only to embark on such an important topic, but to complete the dissertation. Of no less importance, I would like to thank the rest of my committee members: Dr Carol S. Cash, Co-Chair; Dr. Susan G. Magliaro; and Dr. Ann G. Kilkelly for their collaboration in this endeavor. A special thanks to Professor William Oglesby, Esq., who assisted me in controlling for any bias on the part of this researcher.

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## Preface

Those who won our independence believed that ...the greatest menace to freedom is an inert people; that it is hazardous to discourage thought, hope and imagination...that fear breeds repression; that repression breeds hate; that hate menaces [a] stable government...(Whitney v. California, 1927, p. 375)

-Opinion of Supreme Court Justice Brandeis

In 2004, I was working as a school administrator for an urban school district in upstate New York. It was my first position in a leadership role. During this time in my life I was also coming to terms with my gender identity. In August of that year, I approached the district's human resource director to discuss my upcoming transition from male to female. In the weeks following my disclosure, many acts of harassment and discrimination ensued. From the use of pejoratives by a few teachers to students congregating outside my office door just to leer and make jokes, no action was taken by school district personnel to curtail the harassment. Although the school district's policy prohibited discrimination and harassment based on gender, school personnel appeared to not apply their own policies to my particular circumstance.

Following communication from the American Civil Liberties Union, the New York State Division on Human Rights, and my attorney, and in order for the school district to avoid facing state and federal lawsuits, the school board offered me a

financial compensation package if I agreed to voluntarily relinquish my position. In light of the rampant discrimination I was encountering, I tendered my resignation.

Zirkel (2006) has asserted that the hatred exhibited toward non-heterosexual individuals has risen to the level of racially motivated hatred of decades past and continues to be ignored. Why do schools wait until the threat of being taken to court to act (Essex, 2005)?

With the desire to effect positive change in the lives of students who are or who are perceived to be non-heterosexual, and the hope that community tax dollars are spent for the betterment of its citizens and not wasted on preventable litigation, I found myself immersed in researching this topic.

## Chapter I

### Introduction

The goal in formulating school policy should be to provide an education system that can meet the diverse needs of students. ...Students should leave our schools prepared to live productive and satisfying lives in a democratic society. To do so, they will need to be prepared to contribute to the economic and social well-being of this nation. It is this dual emphasis on personal and public goals that creates the rationale for a system of public schools free and open to all. And it is this system that has fueled the remarkable progress this nation has made (Phi Delta Kappan, 2006, p.54).

### Nature of the Problem

Today, educators face complex challenges as the law requires, parents expect, and students deserve an educational environment safe from harm, conducive for learning, and protective of the rights students are afforded under the laws of the United States of America. Due to the need for schools to carry out the governmental objectives in their charge, and a student's special status as a minor, the law generally bestows on schools larger latitude over the child than society exercises over adults. Yet, in all functions relating to public education,

the law demands that the rights of students as citizens under federal and state constitutions and laws be protected (*Tinker v. Des Moines Independent Community School District*, 1969). The landmark Supreme Court decision in *Tinker* (1969) ushered in a new epoch regarding the rights of school children. The 1969 *Tinker* decision altered the previous judicial landscape that attendance at public schools is a privilege and not a right (Alexander & Alexander, 2005). Historically, many of the most difficult issues arising out of education law have encompassed the conflict between the individual rights of students and the governmental objectives of the educational institution (Imber & Van Geel, 2001). Although providing a free, equitable, and appropriate education for all children has been a major goal of educational leaders even prior to the landmark Supreme Court case *Brown v. Board of Education* (1954), an important goal for educational leaders today, as they carry out their school systems' policies and practices, is to ensure that their educational systems can meet the diverse needs of all students within their charge.

The Equal Access Act of 1984 (Public Law 98-377), initially encompassed within the structure of the Education for Economic Security Act (1984), stipulates that,

"It shall be unlawful for any public secondary school which receives federal financial assistance and which has a limited

open forum to deny equal access ...or discriminate against, any students who wish to conduct a meeting within that limited open forum..." (Equal Access Act, 20 U.S.C. §4071(a)). The legislation, incorporating the term, *fair opportunity*, was established to provide uniformly that

...(1) the meeting is voluntary and student-initiated; (2) there is no sponsorship of the student-initiated meeting by the school...; (3) employees ...of the school or government are present at the student-initiated meeting only in a nonparticipatory capacity; (4) the student-initiated 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" (Equal Access Act, 20 U.S.C. §4071(c)).

Section 4071(a) of the Equal Access Act of 1984 explicitly states that schools cannot deny "a fair opportunity" to hold on-campus meetings, and §4071(c) of the Act explains that a fair opportunity exists when the educational system establishes uniformity in its rules for the establishment of such organizations on school grounds (Caplan, 2003).

Passed by Congress in 1984 and signed into law by President Ronald Reagan, the Equal Access Act (EAA) was established out of

concerns that courts were prohibiting schools from allowing religious clubs to meet on campus and was a "...legislative attempt to provide direction on an issue in which the Supreme Court had yet to rule" (Lake, 1991, p.4). Prior to the EAA, student clubs incorporating a perceived religious message were generally denied access on the basis that their presence would violate the Establishment Clause within the First Amendment (*Brandon v. Board of Education of Guilderland*, 1980; *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 1982). Sendor-Dowling (2004) asserts that through the EAA, Congress gave a broad conditional right of access to all types of non-curriculum related groups and consequently, courts were soon presented with many cases claiming violations of the Act.

Six years after the passage of the EAA, the Supreme Court heard its first EAA case. In *Board of Education of the Westside Community Schools v. Mergens* (1990), a public high school permitted students to join clubs that met after school, but when a few students wanted to form a Christian club, for the purpose of discussing the Bible and praying together, school officials denied the request. The school officials' denial was based on their existing policy and their view that a religious club meeting within the school would violate the Establishment Clause within the First Amendment. In delivering the Court's opinion,

Justice Sandra Day O'Connor stated that the school's denial violated the EAA.

As a result of *Mergens* (1990), the Supreme Court established a framework for what constitutes a noncurriculum-related student group in the law. Interpreting Congressional intent, the Supreme Court established that a noncurriculum-related student group means a group that does not directly relate to the courses taught by the school. In addition, the Supreme Court solidified the meaning of the term fair opportunity, stating that to ensure a fair opportunity, agents of the school must abstain from attending student-initiated meetings held by the organization unless their attendance is strictly in a "nonparticipatory capacity" (*Board of Education of the Westside Community Schools v. Mergens*, 1990, p.260). The particulars of this decision are discussed in Chapter III.

Although this case settled the question of whether or not religious clubs could meet on campus, school leaders were once again in judicial proceedings involving student requests to form organizations they found objectionable, primarily on moral and ethical grounds. Commencing in 1998, litigation has been brought before federal courts claiming violations of the EAA due to exclusions of student-lead organizations whose themes center around homosexual issues (*East High Gay/Straight Alliance v. Board of Education*, 1998). Although the Supreme Court has yet to

hear a case involving student-lead organizations whose themes center around *non-heterosexual* issues, most federal courts have generally ruled that to prohibit a student-lead club whose themes center around non-heterosexual issues can constitute viewpoint discrimination (*Colin v. Orange Unified School District*, 2000).

The U.S. Supreme Court has ruled that when government agencies do not object to a particular subject matter, but a particular view taken by individuals on the subject matter, a violation of the First Amendment occurs in the form of content discrimination (*R. A. V. v. St. Paul*, 1992). The U.S. Supreme Court has also stated that viewpoint discrimination is a flagrant form of content discrimination and occurs when governmental officials fail to abstain from regulating speech when the specific ideology of the speaker or the topic conveyed is the primary reason for the restriction (*Perry Education Association v. Perry Local Educators' Association*, 1983). Even though the Supreme Court continues to hold that government officials must refrain from regulating speech when the motivating principle, opinion, or perspective of the speaker is the rationale for the restriction (*Good News Club v. Milford Central School*, 2001; *Rosenberger v. Rector and Visitors of University of Virginia*, 1995), school leaders in 2010 continue to struggle with establishing and implementing policies and

practices that uphold the values and convictions of the many without violating the legal rights of the few.

In an extensive examination of various legal and educational resources, it appears that the only research conducted similar to the research proposed in this study was performed by DeMitchell and Fossey (2008). Published as a law review, DeMitchell and Fossey provided a brief analysis of the EAA litigation with regard to Gay-Straight Alliance (GSA) organizations; attempting to illuminate the similarities in the existing case law in order to make inferences on prudent education policy for "a school district when considering whether to permit a gay or lesbian group to meet on high school campuses under the EAA" (p. 91). DeMitchell and Fossey concluded that school officials would be best served if they permitted such groups on high school campuses.

Expanding on the legal work of DeMitchell and Fossey and utilizing the most recent case law and other data sources available, this research is intended to offer educational leaders a comprehensive understanding of the: EAA; the origins, proliferation, and objectives of student-led GSA clubs; the federal judicial decisions that have ensued as a result of school personnel denying students the right to organize such organizations and the judicial outcomes of the case law; and the legal and educational policy themes that can be conceptualized

from the research. It is also the goal of the research to extract the themes that emerge from the relevant litigation in order to provide suggestions that may aid school leaders and policymakers in effectively enforcing school systems' policies and practices.

#### Purpose of the Study

School leaders are held accountable for maintaining a safe environment free of disruption while ensuring that the personal rights of students are not violated with respect to fundamental fairness. The challenge for leaders then becomes achieving a reasonable balance between an orderly educational environment and respect for the rights of non-heterosexual students (Essex, 2005). With increasing numbers of students coming to terms with their homosexuality during their high school years (Savin-Williams, 2005), resulting in an proliferation of requests by these students to establish GSA clubs in their schools (Kosciw & Diaz, 2006); the past 12 years of litigation associated with the establishment of such organizations; the fact that some school leaders are finding such clubs abhorrent on religious or moral grounds (*Colin v. Orange Unified School District*, 2000); and the lack of available guidance for school leaders to effectively address such issues free from fear of costly civil litigation, the purpose of this study is to: (1) investigate the legal history of the Equal Access Act litigation brought by non-

heterosexual students in search of their rights to form GSA clubs within their high schools; (2) synthesize the policy implications for educational practitioners when confronting the issue of whether or not to permit the formation of GSA clubs on school grounds; and (3) provide suggestions that may aid school leaders in effectively enforcing school systems' policies and practices. To that end this study examined: 1) the legislative history of the EAA leading up to the Supreme Court Case, *Westside Community Schools v. Mergens* (1990) in order to synthesize the parameters of the EAA as it relates to student-sponsored clubs on campus; (2) the impetus and proliferation of GSA clubs in the public schools of the United States in order to provide educational leaders with an understanding of the history and role that these organizations have played in school systems since their inception; (3) the relevant judicial history surrounding students' legal rights to organize and hold GSA clubs on high school campuses and their use of the EAA to seek federal protection under the law; and (4) emerging legal and educational policy themes that were able to be conceptualized as a result of the relevant EAA litigation. Finally, the study offers recommendations for policymakers and school administrators when faced with students wishing to organize GSA clubs on school property.

Until educational leaders appropriately and equally apply the rules governing student-led clubs on school campuses, unrest and litigation are likely to continue.

Although administrators are not expected to be legal experts, it is imperative that they have a working knowledge of the rights of students in the school setting. The points of litigation concerning those rights are only unpredictable as far as the cause of action. For an administrator not to be cognizant of the current law is inexcusable (Woodward, 1990, p.1).

Though the process of ensuring that student rights are not abridged is becoming more complex in today's educational milieu, educational leaders need not be impaired in their ability to maintain a conducive and orderly learning environment. However, it is imperative that they have an adequate understanding of students' legal rights when they create and implement policies and practices' regarding student speech rights and their right to assembly as it pertains to student-led clubs on school grounds (Kosciw & Cullen, 2003; Zirkel, 2006). With the amount of litigation that has ensued nationally over the last decade, there appears to be a need for clarification regarding the issues and appropriate processes involved in accepting or rejecting GSA clubs on high school campuses (*East High Gay/Straight Alliance v. Board of Education of Salt Lake City*

*School District, 1999; Gay-Straight Alliance of Yulee High School v. School Board of Nassau County, 2009*). In an effort to provide insight that provokes reflection and prompts lively discourse on the subject matter, this study was guided by the research questions below.

#### Research Questions

The study answered the following research questions:

1. What is the relevant judicial history surrounding students' legal right to organize and hold Gay-Straight Alliance organizations on high school campuses?
2. What legal themes emerge as a result of the relevant Equal Access Act litigation that may serve as a guide for educational leaders confronted with accepting or rejecting Gay-Straight Alliance organizations on their high school campuses?
3. What recommendations for school divisions regarding policies and implications can be extracted from the themes that emerge from relevant Equal Access Act litigation?

#### Significance of the Study

Inescapable in public education today is the conflict between the desire to prepare children to be responsible independent adults and the educational need of school leaders to

govern children and inculcate them with certain knowledge, skills, and character. Decisions handed down by the Supreme Court regarding students' constitutional rights while in attendance at school have embodied this tension and reflect the continuous discord in society between these two competing ideals (Reiner, 2006). Such discourse becomes even more contentious when it involves the rights of non-heterosexual students to formally assemble in order to discuss, on school property, issues that encompass an individual's sexuality and the tolerance of sexual orientation and gender identity differences (Butler, 1990; Reiner, 2006).

Lake's 1991 study, *The Equal Access Act of 1984: Principals' Knowledge of Students' Rights to use Facilities for Religiously Orientated Meetings* stipulated that the need for his research, addressing religious organizations and religiously contextual speech, was predicated on the fact that in 1991 school leaders continued to struggle with accepting student religious organizations on school grounds despite the Mergens (1990) case. At the time of Lake's study only advocates of religious speech had persistently attempted to make use of the EAA to advance their particular views.

Similarly, with the litigation that has taken place across the United States directly addressing the formation of GSA clubs on high school campuses (DeMitchell & Fossey, 2008), and the

absence of a Supreme Court decision specifically addressing GSA clubs on high school campuses, the need for this study is timely. In today's litigious milieu, school leaders must be cognizant that when school policy and practices abridge the rights of non-heterosexual students they not only create inequities within their schoolhouses, they expose the school division and the community to costly litigation (Essex, 2005). The outcome of this study may not only help prevent costly litigation, but may also assist educational leaders in ensuring that requests by non-heterosexual students to form GSA clubs are treated no differently than their heterosexual counterparts similarly situated. It is the expectation of the researcher that this study may provide insight that provokes reflection and prompts lively discourse in hopes that it may serve as a vehicle by which educational leaders lead, model, and support continuous improvement in education for the benefit of all students within their charge.

#### Methodology Employed in the Study

This study employs a traditional methodological approach to legal research as described by Alder (1993) and Russo (1993). Employing the methodology principles used by Berlin (1996) and Brown (2004), this study relied on electronic data bases, critical fact finding steps, and traditional legal finding tools. An extensive examination of primary sources such as

federal constitutional provisions, legislation, regulations, and case law related to the organization of GSA clubs on school campuses under the EAA was conducted. Secondary sources, such as law reviews and scholarly commentary were analyzed for intellectual interpretations of existing case law. An analysis of high school students' legal rights to use the EAA as a means to succeed in establishing GSA clubs on secondary school campuses was examined. Finally, the study conceptualized the themes that arose as a result of synthesizing existing federal case law. Specific details regarding the methodology employed in this study can be found in Chapter II.

#### Delimitations and Limitations of the Study

As a researcher, scholar, and educator, I understand that I may view the world differently than my educational colleagues. I am a *transgender* woman who has experienced discrimination in the educational milieu first hand. At this juncture of my life there is nothing more fascinating and more important than the issues that surround individuals who are often abused and ignored because they are or appear to be outside the parameters of what American society considers to be normal. Scholar and feminist writer Judith Butler (1987) has noted, that "the social constraints upon gender compliance and deviation are so great that ...it is not possible to exist in a socially meaningful sense outside of established gender norms" (p.132). As research

has shown, the attitudes of heterosexual individuals toward non-heterosexuals are so ensnared in gender expectations that it is not surprising that non-heterosexuals are simply rejected because they do not comport to the generally accepted gender roles (Butler, 1990; Taylor, 1983). Garland (2001) has suggested that rhetoric at the behest of agents of the government continue to justify such bias and disdain. "...In a culture purportedly grounded in law and order ...those who have inflicted, supported, or ignored bias-motivated [decisions] have historically done so in the name of some alleged civil cause (p.41). With that said, I discuss the delimitations and limitations of the study.

#### *Delimitations of the Study*

For the purpose of this study an assumption is made that the term, non-heterosexual *students* relates to individuals who typically are categorized by society as sexually behaving in such a manner as to appear outside the parameters of what is considered to be heterosexual (Crossley, 2007). The term non-heterosexual has been used by Schneider and Owens (2000) to describe sexually-minority youth who may or may not identify as gay, lesbian, bisexual, and transgender. No consideration in this study will be given to implications for any other student populations attempting to formulate other types of social, political, or philosophical organizations on school property by

means of the EAA. In addition, limited consideration will be given to case law jurisdiction issues (court decisions that only have legal standing in specific areas of the country) throughout the study, although it is noted that federal circuit courts have differed in their interpretations of law (Marcus, 1984). Since whether non-heterosexual students are an insular or suspect group, deserving of special protections has yet to be established by the United States Supreme Court, and the appellate courts have differed in their opinions as to such protections, the information to be presented in this study will be limited in its scope to non-heterosexual students and their ability or inability to utilize the EAA to establish and hold GSA clubs on secondary school campuses; avoiding assertions of non-heterosexuals as an insular group.

#### *Limitations of the Study*

The impetus for this research idea is that the state, as the governmental authority, charged with the diffusion of knowledge to ensure an educated citizenry has through the course of American history overlooked the education of children who are or perceived to be non-heterosexual, and as a result litigation has ensued. Using Virginia Tech's electronic law libraries, LexisNexis and Westlaw, and Virginia Tech's electronic EBSCO databases, the information included in this study will consist of historical documentation, federal judicial decisions, federal

statutory law, and an analysis thereof. As this research incorporates legal interpretations of existing case law by a researcher who does not possess a law degree, one could argue that the analysis of existing judicial precedent may be flawed for this reason. In order to ameliorate this situation (discussed in Chapter III), a review of the researcher's analysis of existing case law was conducted by a licensed attorney; thus minimizing the lack of a law degree on the part of the researcher and the degree to which the researcher may have imparted any bias in evaluating the existing case law.

#### Definition of Terms

When undertaking a review of the educational laws regarding the legal history of non-heterosexual students' ability to utilize the EAA to exercise their rights to organize GSA clubs within their high schools, and the resulting litigation that has ensued, a number of authors, courts, and texts that will be used within this study make use of terms with which educational leaders may not readily be familiar. Therefore, the definitions below are included for clarity and consistency in understanding the study.

#### *Overview of the Domains of Sex and Gender*

Prior to providing simplistic definitions to domains of sex and gender for the practicable purposes of this research, and the audience the researcher has primarily selected for the

particular study, it is prudent to convey that the knowledge of sex and gender has emanated from two primary, yet divergent philosophical factions: the naturalist researcher and constructivist researcher points of view. Fundamental naturalist, such as Ellis (1933) and Hirschfeld (1948) historically asserted that sex is determined at the time of conception. Ellis and Hirschfeld have asserted that sex is biological and a natural phenomenon, analogous in all cultures. Gender, defined as sexual behavior and sex role, was viewed by Ellis and Hirschfeld as determined by endocrine factors, and although influenced by social mores, these researchers asserted that gender is directly correlated to sex (male-man-masculine, female-woman-feminine).

In the later part of the 20th century, scientists prescribing to a social and cultural approach to understanding sexual identity and orientation (constructivists) separated the terms sex and gender. With the increase visibility of homosexuals, masculine women, and feminine men, these scientists shifted their focus to the environment. Such constructivists viewed childhood experiences as a harbinger to sex and gender. Researchers such as Money (1988) and Stoller (1968) considered environmental factors as the reasons for divergent gender and sexual orientation conditions. Social constructivists, such as

Carol Vance (1989), maintain that sex and gender are predominantly culturally determined and malleable over time.

Perhaps as researchers dealing with concepts such as sex, sexual orientation, and gender we need to integrate the Darwinian theories of biological determinism and the analytical powers of the social theories to best understand and conceptualize such naturally occurring human development (Fausto-Sterling, 2000). "Whether scientific, social, and political rhetoric regarding sex and gender is allowed to flourish, a disservice to humanity will continue to occur when we narrowly construe what we are just beginning to understand" (Crossley, 2006, ¶ 5).

#### *Definitions*

*Bisexual.* Males or females who are physically, sexually, and emotionally attracted to individuals of both sexes (Lev, 2004).

*Declaratory and Injunctive Relief.* A clear and direct order giving to the prevailing party what they have asked the court for (Black's Law Dictionary, 2004).

*Gay.* Males who are physically, sexually, and emotionally attracted to other males. The term "gay" is often used generically to describe: males who are attracted to males; females who are attracted to females; and males and females who are attracted to both sexes (Lev, 2004).

*Gay Straight Alliance organizations.* Gay-Straight Alliance (GSA) Clubs are student clubs that work to improve school climate for all students, regardless of sexual orientation or gender identity (GLSEN, 2009)

*Gender.* The culturally determined behavioral, social, and psychological traits commonly associated with being male or female. This term has often been used synonymously with sex (Brown & Rounsley, 1996).

*Gender identity.* An individual's psychological concept of being male or female regardless of the individual's physiological sex (Brown & Rounsley, 1996; Lev 2004).

*LGBT.* Acronym often used to denote the collective group of gay, lesbian, bisexual, and transgender individuals. The acronym is sometimes referred as GLBT (Lev, 2004).

*Heterosexual.* A sexual orientation in which an individual is physically and emotionally attracted to individuals of the opposite sex (Ellis, 1933; Hirschfeld, 1948; Kinsey, Pomeroy, & Martin, 1948).

*Homophobia.* The fear, dislike, and distain of same-sex relationships or those who love and are sexually attracted to those of the same sex (Lev, 2004).

*Heterosexism.* The assumption that all people are or should be heterosexual. Heterosexism excludes the needs, concerns, and life experiences of lesbian, gay, bisexual, and transgender

people while it gives advantages to heterosexual people. It is often a subtle form of oppression, which reinforces realities of silence and invisibility for gay and lesbian youth (D'Augelli, Pilkington & Hershberger, 2002).

*Heteronormative.* Constraints placed on individuals to conform to normal or traditional mores of heterosexuals (Schneider & Owens, 2000).

*Homosexuality.* A sexual orientation in which an individual is physically and emotionally attracted to individuals of the same sex (Ellis, 1933; Hirschfeld, 1948; Kinsey, et al., 1948).

*Injunctive Relief.* A court order preventing or commanding an action by a party. Relief is provided when the court determines that irreparable injury will result (Black's Law Dictionary, 2004).

*Lesbian.* Females who are physically, sexually, and emotionally attracted to other females (Lev, 2004).

*Limited public forum.* Public property that has not traditionally been open for public assembly (Black's Law Dictionary, 2004).

*Live Controversy.* The party filing suit in court must have an issue which has not already been resolved or invalidated (Black's Law Dictionary, 2004).

*Moot.* That which possesses no practical significance (Black's Law Dictionary, 2004).

*Non-heterosexual.* Nomenclature used throughout this study to reference individuals who typically are categorized by society as sexually behaving in such a manner as to appear outside the parameters of what is considered to be heterosexual (Crossley, 2007).

*Precedent.* Prior cases which are binding upon a specific court (Not all decisions are binding on all courts) (Black's Law Dictionary, 2004).

*Preliminary injunction.* An order by a court to prevent irreparable harm to the party bringing the suit. Irreparable harm is generally considered to be harm which cannot be remedied by monetary means (Black's Law Dictionary, 2004).

*Rational Basis Test.* A rational basis test is the test used when there is not a suspect class nor a fundamental right involved. The state must show that the state statute is rationally related to a valid state purpose (Black's Law Dictionary, 2004).

*Sex.* Biological classification of being either male or female. This term has often been used synonymously with gender (Brown & Rounsley, 1996).

*Sexual Orientation.* A physical, emotional, and sexual attraction to another individual. Its boundaries may be limited in an affinity to members of the opposite, the same sex, or may be generalized to both sexes (Remafedi, 1985).

*Shepardizing.* A tool used to determine the subsequent history of the law to ensure that such remains good law (Black's Law Dictionary, 2004).

*Strict Scrutiny.* Strict scrutiny is used by the courts to determine if there exists a compelling reason for the statute's enactment which threatens a fundamental right or impacts a suspect class. If a state cannot produce a compelling reason to enact such a statute, then the courts will hold the statute in violation of the equal protection clause (Black's Law Dictionary, 2004).

*Subject Matter Jurisdiction.* Jurisdiction over the case and the type of relief sought (Black's Law Dictionary, 2004).

*Summary Judgment.* An expedited ruling by the judge on a claim by one of the parties (Black's Law Dictionary, 2004).

*Suspect Class.* Suspect classifications are "those based on race or national origin, religion, and alienage" (American Jurisprudence, 1979, p.816). African-Americans, women, and legal aliens are all suspect classes. The courts have not definitively held that non-heterosexuals are a suspect class.

*Transgender.* Individuals whose natal sex is discordant with their gender identity. Transgender individuals fall along a spectrum of gender variant behaviors, the most extreme being a transsexual; one who seeks, through medical means, to actually become the opposite sex to which they were born (Johnson, 2004;

Lev, 2004). Similar to individuals who possess congruence between natal sex and gender identity "... transgender individuals can be heterosexual, homosexual, or nonsexual" (Lev, 2004, p.399).

*Writ of Certiorari*. The term is used as an order by a higher court directing a lower court, to send the record in a given case for review. The Supreme Court uses Certiorari to review most of the cases it decides to hear (Black's Law Dictionary, 2004).

#### Organization of the Study

Chapter I presents the nature of the problem, the purpose of the study, a list of research questions to be addressed, the significance of the study, the method utilized, a statement detailing the delimitations and limitations of the study, and a listing of definitions and terms used in the study. Chapter II provides a detailed explanation of the methodology, including the collection and analysis of federal judicial decisions relative to the topic studied. Chapter III includes a review of the literature surrounding students' constitutional protections; the history of the EAA leading up to the Supreme Court Case *Board of Education of the Westside Community Schools v. Mergens* (1990); and the impetus and proliferation of GSA clubs in the public schools of the United States, thus providing a rationale for the study. Chapter IV provides an analysis of the relevant

federal case law that has ensued as a result of school leaders refusing to permit GSA clubs to meet on school property. Chapter V conceptualizes and synthesizes the themes; discusses educational policy implications; offers recommendations for school leaders; and provides suggestions for future study.

## Chapter II

### Methodology

This chapter presents the research methodology used in this study. Cohen and Olson (2000) describe legal research as "the process of finding the law that governs an activity and materials that explain or analyze that law" (p.2). This study employed a traditional research methodology, incorporating various sources of law, electronic research tools, organizational devices, academic writing techniques, and data organizational and analysis methods. Specifically, the traditional research methodology consisted of locating relevant case law and other scholarly commentary pertaining to students' rights to organize GSA clubs within their schools in order to construct an accurate historical and legal perspective on the EAA as it relates to the formation of these clubs. The use of this methodology provided a forum to discuss the emerging themes that arose from the relevant litigation, and as a result, guidance to school leaders on the policy and legal implications when facing requests from students to organize GSA clubs was able to be offered. Reliability and adequacy of the legal research employed in this investigation is also discussed in this chapter. A copy of the Virginia Polytechnic Institute and State University's Internal Review Approval Letter (#10-353) is provided in Appendix A.

## Research Questions

It is no great surprise that none of the avenues of assessing research provides a clear standard for competent legal research. Legal research is complex, and context-dependent. There are as many approaches to research as different types of legal issues. It is virtually impossible to articulate a clear, concrete standard to apply in all contexts (Margolis, 2007, p.107).

In a Yale law review, Margolis (2007) articulates that the conventionalization of a standard methodology in conducting legal research is problematic at best and that any specific methodology employed is dependent on the subject matter and intended outcome of the endeavor. Barkan, Mersky, and Dunn (2009) view legal research as much an art as a science. Barkan, et al., also consider legal research qualitative in its approach, as its aim is to acquire an understanding of human behavior and the motives that govern such. While Barkan, et al., believe that legal research "calls for a strategy as well as serendipity" (p.14), some legal scholars have noted that significant attention in the legal field has been given to what lawyers find rather than how they find it (Danner, 2003; Howe, 2003). Although some methodologies may be diametrically opposed to others' philosophically (personnel communication, Dr. Susan

G. Magliaro, November 10, 2009), perhaps due to what Margolis (2007) believes about research being "complex, and context-dependent" (p.107), this study made use of a traditional methodological legal approach, as discussed below, to answer the following research questions:

1. What is the relevant judicial history surrounding students' legal right to organize and hold Gay-Straight Alliance organizations on high school campuses?
2. What legal themes emerge as a result of the relevant Equal Access Act litigation that may serve as a guide for educational leaders confronted with accepting or rejecting Gay-Straight Alliance organizations on their high school campuses?
3. What recommendations for school divisions regarding policies and implications can be extracted from the themes that emerge from relevant Equal Access Act litigation?

#### Application of the Traditional Methodological Legal Approach

To get at the root of the question of what the law is on a particular subject matter, and thus locate the appropriate material to defend one's position, a researcher must make use of a traditional methodology (Adler, 1993). It is through

traditional legal research that the researcher is enabled to “focus on a particular topic” through an analysis of relevant case law and law review articles in order to “trace judicial reasoning” (Alder, 1993, p.2). To that end, and to answer the aforementioned research questions, this study employed the traditional methodology of legal research as cited by Alder (1993) and Russo (1993), and used by Berlin (1996) in her doctoral work, *Peer to Peer Sexual Harassment: Emerging Law as it Applies to School Building Administrators’ Legal Responsibility For Prevention and Response*.

As Berlin (1996) asserts, “legal research is the process of finding the law that governs activities in human society” (p.17). Through identifying and retrieving the relevant case law related to the topic being investigated, describing the participants and their roles in the situation, stating the claims the parties have evoked, analyzing the facts of the problem, and articulating the results of the investigation, a traditional approach to legal research is achieved (Alder, 1993; Barkan, et al., 2009; Russo, 1993). Russo (1993) regards the traditional method of legal research as a qualitative historical approach “that involves the interpretation and explanation of the law and events in a wide array of settings in which the law may be involved” (p. 2). Berlin (1996) and Merriam (1988) consider the traditional method of legal research a method that

can take the form of evaluative case studies, providing rich descriptions and evaluations of events and outcomes. By enabling the researcher to compare and contrast legal case studies "to develop conceptual categories, or to illustrate, support or challenge theoretical [or legal] assumptions held prior to data gathering" (Berlin, 1996, p.18), a formal data base for "future comparison and theory building" can be accomplished (Merriam, 1988, p.27).

#### Sources of Law

In the context of legal research, the term 'sources of law' can refer to three different concepts. In one sense, the term sources of law refers to the origins of legal concepts and ideas. Custom, tradition, principles of morality, and economic, political, philosophical, and religious thought may manifest themselves in law. Legal research frequently must extend to these areas, especially when historical or policy issues are involved (Barkan, et al., 2009, p.1).

In using the traditional methodology of legal research as cited by Alder (1993) and Russo (1993), three major types of information must be investigated: primary sources, secondary sources, and research tools (Russo, 1993). Barkan, et al., (2009) consider primary sources in legal research to be

"statements of the law formulated by governmental institutions" (p.2). Authorities such as federal and state courts, federal and state constitutions, enacted legislation, and regulations of administrative agencies are all primary sources. Primary sources are typically binding. Secondary sources in legal research, according to Barkan, et al. (2009), consist of "articles of law reviews and other scholarly journals" (p.2). These sources are used as a means to "explain summarize, critique, or interpret primary sources" (p.2). "Secondary sources are particularly valuable ...and can open the door to discovery of the appropriate primary sources" (Russo, 1993, p.3). Although not binding, secondary sources can be influential (Barkan, et al., 2009). Research tools come in a variety of print, microforms (i.e., microfiche) and electronic media. Books, private publishers, online subscription services and governmental websites are just a few of the research tools available today (Cohen & Olson, 2000; Kunz, Schmedemann, Bateson, Downs, & Catterall, 2004). As electronic databases are predominantly used in law schools and in legal practice (Cohen & Olson, 2000), this study relied heavily on electronic media to obtain the necessary case law and scholarly materials needed to acquire answers to the research questions posed in the study.

## The Use of Electronic Research Tools

Using the Virginia Polytechnic Institute and State University's electronic libraries, a systematic review was made through the use of LexisNexis and Westlaw databases to locate the relevant primary and secondary source material to acquire the necessary information to complete the study. As Margolis (2007) purports, there are ways to assess whether certain sources or legal techniques are standard, and they all point towards electronic research. By 1998 the dawn of the information revolution was brought about by the Internet and it has become firmly established as a major resource in mainstream culture (Howe, 2003; McMillan & Schumacher, 2001). The instantaneous access to digital material and the availability for most anyone to access such information endlessly and without loss of quality could no longer be ignored; particularly in the legal field (Howe, 2003). "For all practicable purposes, "legal research, a central aspect of any legal practice has migrated to the Internet" (Howe, 2003, pp.15-16). When one is familiar with the area of law being investigated and the particular combination of issues are narrow, the use of LexisNexis and Westlaw can be the most effective way of focusing one's research (Cohen & Olson, 2000). With electronic resources such as LexisNexis and Westlaw becoming the most powerful and effective tools used in legal

research in the 21<sup>st</sup> century, this study made full use of these databases to locate the relevant case law.

Finally, the sine qua non of legal research within this venue was to verify that the judicial cases cited or the relevant facts used in the research were still a valid source of law (Margolis, 2007). *Shepardizing* through the use of LexisNexis took place in this study to ensure due diligence on the part of the researcher. As Margolis has stated, "failing to perform this simple task is a basic lack of diligence" (p.92).

#### Organizational Devices

Incorporating an effective note taking process can aid the researcher in the "research, analysis, and writing" of the academic endeavor. While no uniform method exists in organizing legal research, it is important to incorporate some method to keep track of the sources that have been consulted and the index terms or searches that have been employed (Barkan, et al., 2009, p. 28). According to Barkan, et al. (2009), this type of note taking process enables the researcher to keep track of the name of the case, the facts of the case, key words and phrases, as well as jurisdictional issues; assuring that scholarly writing can be achieved. Of no less importance, replication of the study may be enhanced. Therefore, a litigation analysis log similar to the "case analysis chart" used by Barkan, et al. (p.29) was used by the researcher in carrying out the study. The completed

litigation analysis log for this research is available in Appendix D.

#### Academic Writing Techniques

This study made use of "scholarly legal writing" as described by Barkan, et al. (2009, p.26). This type of writing relies heavily on citing sources (primary and secondary) to support every suggestion, assumption, and conclusion drawn from an analysis of what is to be examined. Barkan, et al., claim that on a positive note this type of writing can be a windfall for future researchers.

According to Barkan, et al., academic legal writing "can fall anywhere on the spectrum from objective to persuasive" (p.26). It was the goal of this researcher to be as objective as possible in the research and analysis, thus minimizing any bias on the researcher's part.

Fausto-Sterling (1978), has commented that no matter how noble a researcher's intentions, researchers have often embarked on research with self-serving motives. Social advancement, political gain, and monetary reward, are quite enticing for even the best researcher. In the best circumstance when the research is intrinsically conducted, the researcher is often limited by their own conditional boundaries. As researchers study their surroundings to make inferences and judgments, they call upon what is already in their repertoire of experiences.

With accepted legal research practices learned from doctoral course work taken at Virginia Polytechnic Institute and State University including school law and qualitative and quantitative research methods courses; the professional training gained in educational research from other graduate schools attended; and serving over ten years as an educational administrator, it is the researcher's belief that bias was minimized. As stated by Brown (2004) in her Virginia Polytechnic Institute and State University dissertation entitled, *Brown v. Board of Education and School Desegregation: An Analysis of Selected Litigation*:

Each person is likely to have his or her own inclinations, proclivities, and predilections... This researcher claims no exemption from these human frailties, but motivation for this study calls for the researcher to achieve a level of professionalism that keeps bias to a minimum (p.21).

As this research incorporated legal interpretations of existing case law by a researcher who does not possess a law degree, a peer review of the researcher's analysis of the relevant judicial decisions and the conclusions drawn from such by the researcher was conducted by Professor William Oglesby, Esq., an attorney licensed in the Commonwealth of Virginia; thus

minimizing any potential researcher bias (see Appendix E for vita).

#### Data Organization

The data organization technique used in this study, similar to Berlin's (1996) dissertation work, collected the available and necessary data and organized them to demonstrate the progression of the judicial interpretation with regard to high school students' legal rights to use the EAA as a means to establish GSA clubs on secondary school campuses. The relevant EAA litigation, contained in Chapter IV was organized chronologically in order to provide a linear history of how school boards and their administrators defended their actions in rejecting student applications to organize GSA clubs within their respective schools.

#### Data Analysis

Researchers in education law hope not only to inform policy makers and practitioners about the meaning and status of the law, but also to seek to raise questions for future research... Rooted in the historical nature of the law and its reliance on precedent, students of the law must necessarily look to the past to locate authority that will govern the disposition of the question under investigation (Russo, 1993, p.2).

The data analysis used for this study, similar to Berlin's (1996), made use of a computer search in order to locate relevant case law and secondary sources that discuss the case law to be analyzed. The judicial decision of each court case was analyzed to ascertain the influences on the federal court's opinion in each case. Emergent themes among the examined case law in Chapter IV are synthesized in Chapter V, in order to conceptualize the effect of the existing case law on school systems and to offer guidance to school boards and their administrators when confronted with requests from students to form GSA clubs within their schools. For each case analyzed, the following legal writing model, developed by Perilli (1986, p.16), was used:

1. The facts of each case were summarized.
2. A clear and concise statement of the legal issues was presented.
3. Application of the law (statutes and/or existing case law) was applied to the facts of each case.
4. A summary statement of the opinion of the court and the major findings of the case were provided.

McMillan and Schumacher (2001) assert that analytic research requires a "systematic application of methodological procedures to phrase an historical problem, locate and criticize sources, and interpret facts for causal explanations" (p.507).

In order to answer the three research questions of this study, the researcher made use of "The Process of Analytical Research" asserted by McMillan and Schumacher (2001, p.505). This process entailed: searching and locating the relevant court cases (primary source); obtaining pertinent secondary sources; applying internal and external criticism regarding each case; identifying factual evidence; and developing generalizations and interpretations.

#### Reliability and Adequacy of Legal Research

To ensure to the fullest extent that the legal research method used in this study was reliable and thus replicable, the researcher made use of all available primary sources (case law) as well as the necessary secondary sources (law reviews and scholarly commentary) to substantiate the analysis of the relevant litigation included in the study. To make reliable assumptions on how the law has evolved and how it might change in the future, primary sources such as relevant case law as well as secondary sources such as scholarly commentary or law reviews were utilized (Berlin, 1996). It was through these two types of sources that a systematic inquiry into the law was achieved and reliability attained (Alder, 1993; Russo, 1993). McMillan and Schumacher (2001) assert that when "analytical interpretations are justified or supported by the facts in the study, the explanations are considered valid" (p.505). Although Berlin

(1996) in her dissertation stated that "commentaries in legal research do not follow the format of other analytical research" (p.24), her use of McMillan and Schumacher's methods helped her justify that "...past explanations of educational ideas, or concepts, judicial decisions, legal principles, and policy making can suggest insights" regarding current educational events (p.16). Therefore, this research authenticated all sources through established legal standards as outlined by McMillan and Schumacher and utilized by Berlin.

Finally, as legal research is qualitative in nature (Barkan, et al., 2009), and Foreman (1948) recommends the use of an independent investigator to "establish validity through pooled judgment" (p.413), a licensed attorney was employed as a peer reviewer to validate the legal findings and assumptions made by the researcher to control for potential bias on the part of the researcher. Merriam (1988) has stated that such techniques help to ensure "internal validity" (p.169).

### Chapter III

#### A Review of the Literature Pertaining to Students Constitutional Protections, the Equal Access Act of 1984, and Gay-Straight Alliance (GSA) Clubs

The literature relevant to this study is presented in this chapter. This study is a legal survey of the EAA and the rights of students to organize GSA clubs under the auspices of the Act. In order to provide a comprehensive review of the subject matter, the literature presented in this chapter is divided into five sections: The first section serves as an introduction to the discussion of the EAA and the rights of students to organize GSA clubs by providing the reader with an understanding of the constitutional principles that affect all students while attending public schools. This includes a brief description of First, Fifth, and Fourteenth Amendments to the United States Constitution and their impact on school children. Legal and educational scholars' views on the scope of the constitutional protections and an overview of the federal court systems' involvement in securing these rights for public school students are also included. The second section provides a summary of the underpinnings of the EAA commencing in 1969 and the relevant litigation that led to enactment of the EAA in 1984. The third section covers the congressional passage of the EAA. The fourth section highlights the 1990 Supreme Court Decision, *Board of Education of the Westside Community Schools v. Mergens* that

determined the constitutionality of the EAA and established the parameters for school leaders to contemplate when confronted with students' desires to organize student-led organizations on school campuses. The fifth section provides an historical account of the origins of GSA clubs and their proliferation in the schools of the United States. The literature review will be arranged in chronological order to provide the reader with a perspective on the historical developments of the EAA and GSA clubs, and the litigation that occurred as a result.

#### Student Access to the Law

In the last century, federal case law has made a significant and lasting impact on educational policy and the rights of school children. Supreme Court cases such as *Board of Education v. Barnette* (1943) and the landmark case *Brown v. Board of Education* (1954) set the stage in the first half of the 20<sup>th</sup> century for the rights of students while attending American public schools. However, prior to 1969, federal and state courts had typically abstained from determining the constitutional rights of elementary and secondary school students, allowing local school boards unfettered discretion in determining the rights and privileges of their students while in attendance at school (LaMorte, 1999). Following the Supreme Court case, *Tinker v. Des Moines Independent Community School District* (1969), in which the court declared that children do not relinquish their

constitutional rights at the schoolhouse gate, a plethora of legal restrictions have been placed on school boards and administrators as they create and implement school policy (Essex, 2005). Nolte (1974) stated that the outcome of *Tinker v. Des Moines Independent Community School District* was the most significant decision made by the courts affecting public schooling since *Brown v. Board of Education* (1954). Nolte stated that:

The sentiments of *Tinker* are found liberally sprinkled throughout many court decisions. Surely no greater watershed case can be imagined in the field of school law than can *Tinker*, which completely transformed students from objects of public direction to persons in their own right (p.50).

The result of the *Tinker* decision affected more than the freedom of speech by students in public schools, it clarified the fundamental rights afforded to students as citizens under the Constitution of the United States:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our constitution. They are possessed of fundamental rights which the state must respect,

just as they themselves must respect their obligations to the State. In our system, students may not be regarded as close-circuit recipients of only that which the State chooses to communicate (*Tinker v. Des Moines Independent Community School District*, 1969, p.511).

Following *Tinker v. Des Moines Independent Community School District* (1969), federal courts have been employed by advocates and supporters of public school students to secure student rights. Much of the litigation brought forth by those advocating for school children have claimed violations of the First and Fourteenth Amendments to the U.S. Constitution. The importance of local school boards and administrators in understanding these laws and how they impact students' rights to an equitable educational opportunity cannot be overstated. Salomone (1986) described the basic right of an equitable educational opportunity as the "concept of 'minimal floor' of basic services... tempered by the economic realities and political concerns of recent years" (p.201). Salomone went on to say that by providing an equitable educational opportunity, educators possess the means "to overcome social and economic disadvantages" that many children face (p.201). LaMorte (1999), interpreting the Supreme Court case, *Goss v. Lopez* (1975) acknowledged that, "...students possess liberty and property

interests in their education..." (p.89). Woodard (1990)

demonstrated that:

Although administrators are not expected to be legal experts, it is imperative that they have a working knowledge of the rights of students in the school setting. The points of litigation concerning those rights are only unpredictable as far as the cause of action. For an administrator not to be cognizant of the current law is inexcusable (p.1).

Until local school boards and administrators develop and implement school policy cognizant of the rights of all students, conflict and litigation will continue. "[Educating] ...students in today's more liberal environment is a whole new ball game, and woe unto him who does not understand what is going on, and govern himself and his classroom accordingly" (Nolte, 1980, p.179). Nolte (1980) further stated that apathy on the part of educators will not only have severe legal consequences for the school district in general, but will also result in civil litigation targeting school personnel individually. Although Nolte's assertions about the importance of appropriate governance, and the lack thereof becomes an invitation to litigation are now 30 years old, Lichty, Torres, Valenti, and Buchanan (2008) complement Nolte's sentiments by asserting that school personnel failing to properly respond to student

incidents of intolerance as they arise expose themselves to an increased risk of liability.

The *Civil Rights Act of 1871* has provided an avenue for students and parents to collect monetary damages from individual school personnel who violate their rights under the law:

Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, 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 party injured in an action at law, suit in equity, or other proper proceeding for redress (U.S.C. Title 42, chapter 21, subchapter I, §1983 (1871)).

The ability of parents along with their non-heterosexual children to effectively utilize this statute as a means of seeking remedy from perceived liability on the part of school officials has been established by the U.S. Supreme Court for over 35 years. In *Wood v. Strickland* (1975) the Supreme Court ruled that school board members can be held liable regardless of their ignorance of constitutional law. In *Nabozny v. Podlesny* (1996), the United States Court of Appeals for the Seventh

Circuit specifically found it to be unconstitutional for educators to allow harassment on the basis of *sexual orientation* to occur in schools and act with deliberate indifference in quelling such occurrences. The Supreme Court, in this case, acknowledged a student's right for relief under the Civil Rights Act of 1871 and upon remand to the district court the school district was found liable for punitive damages in the amount of 900,000 dollars (Jones, 1999).

The *Nabozny v. Podlesny* (1996) case is a prime example of the necessity of school boards and their administrators to appropriately develop and implement school policies that protect the rights of all students, including students who may be non-heterosexual. Zirkel (2006) noted that the relationship of *gay* rights and education litigation has become a heated policy issue for school boards and educational administrators. Zirkel states that "... gay right suits have resulted in published case law predicated on the [federal] Equal Access Act, Title IX [of the Education Amendments of 1972] peer harassment, equal protection, and freedom of expression" (p.335). Essex (2005) as well Kosciw and Cullen (2003), argue that the educational issues surrounding non-heterosexual children not only encompass social, political, and moral, importance, but are also an important economic issue that cannot be ignored.

## Public School Students and Constitutional Protections

Although the Supreme Court has determined that education is not a fundamental right guaranteed by the United States Constitution (*San Antonio Independent School District v. Rodriguez*, 1973), state school systems are prohibited from abridging the constitutional rights of school children (*Tinker v. Des Moines Independent Community School District*, 1969). As the *Tinker* (1969) decision stated, students are entitled with the same inalienable rights afforded adults, despite the fact that they have not reached the age of majority. In order to facilitate a critical review of the judicial *precedent* that has impacted educational institutions and the non-heterosexual students in their charge, an examination of the pertinent constitutional rights afforded to school children is necessary.

### *The First Amendment*

The First Amendment states, in part, that "Congress shall make no law ...abridging the freedom of speech" (U.S. Constitution, amendment I, 1791). While the First Amendment generally prohibits the government from limiting or prohibiting speech, this guarantee is not unconditional. Supreme Court Justice Murphy stated, in communicating a unanimous decision in *Chaplinsky v. New Hampshire* (1942) "...it is well understood that the right of free speech is not absolute at all times and

under all circumstances. There are certain well-defined and narrowly limited classes of speech... These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words' ...which by their very utterance inflict injury or tend to incite an immediate breach of the peace (p.572). In *Cantwell v. Connecticut* (1940), Supreme Court Justice Roberts in delivering the Court's opinion stated that, "...epithets or personal abuse is not in any proper sense communication ...safeguarded by the Constitution" (p.310).

Although the Supreme Court has stated that certain categories of speech under certain circumstances are not protected under the First Amendment, the right to freely speak ones mind in effort to promote diversity of ideas, even unpopular ideas that have the possibility of creating a disturbance, is sacrosanct to our Constitution. It is the power of free speech that "...sets us apart from totalitarian regimes" (*Terminiello v. Chicago*, 1949, p.4).

As school administrators see themselves as responsible for providing students with an environment conducive for learning as well as a safe environment, they often find it difficult in interpreting school policy as it relates to student's free speech rights, placing them at risk for liability (opinion by Chief Justice Roberts, *Morse v. Frederick*, 2007, p.393).

Major Supreme Court decisions in the last 70 years have made an indelible mark on the discretion of public school leaders' ability, or lack thereof, to regulate students' free speech rights while attending school or school-sponsored events (*Board of Education v. Barnette*, 1943; *Tinker v. Des Moines Independent Community School District*, 1969). However, the Supreme Court has recognized that school leaders do have greater latitude in regulating student speech "even though the government could not censor similar speech outside the school" (*Hazelwood School District v. Kuhlmeier*, 1988, p.266).

The Supreme Court has also stated that outside of political speech, which was at the heart of *Tinker* (1969), public school students' first amendments rights are not violated when the speech given during school or school-sponsored events are sexually suggestive (*Bethel School District No. 403 v. Fraser*, 1986). In *Fraser* (1986), a high school student delivered a speech during an assembly referring to one of the students for a school elected office using sexually explicit metaphors. He was subsequently suspended. Justice Burger, in his opinion in *Fraser* made the "distinction between the political 'message' of the armbands in *Tinker* and the sexual content of respondent's speech in this case" (p.680) and stated that "...the constitutional rights of students in public school are not automatically

coextensive with the rights of adults in other settings” (p.682). Justice Burger went on to conclude that:

These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior (p.681).

In the most recent Supreme Court case regarding students' free speech rights, *Morse v. Frederick* (2007), Chief Justice Roberts concluded that students do not possess free speech rights under the First Amendment, while in school or at a school-sponsored event, when the message promotes an illegal act. Chief Justice Roberts concluded that "[t]he First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers" (p.409). Although the majority of the Supreme Court in *Morse v. Frederick* (2007)

made the determination that no violation of students' First Amendment rights occurred, Justices Stevens, Souter and Ginsburg in dissenting, stated that that the Court arrived at the decision because it considered first, the "constitutional rights of students in school settings are not coextensive with the rights of adults... and second, that deterring drug use by schoolchildren is a valid and terribly important interest" (p. 434). Justice Stevens concluded his dissent by asserting that even though the milieu at issue is a public high school

...it is the expression of the minority's viewpoint that most demands the protection of the First Amendment. Whatever the better policy may be, a full and frank discussion of the costs and benefits of the attempt to prohibit the use of marijuana is far wiser than suppression of speech because it is unpopular (p.444).

Although the 1969 Tinker decision concluded that school children are entailed with the same inalienable rights afforded adults, despite the fact that they have not reached the age of majority, it is noteworthy to mention that LoMonte (2009), a legal scholar at the Student Press Law Center in Arlington, Virginia, has stated that the lower federal courts have been chipping away at the tenants of Tinker, "taking a reductionist view of Tinker ...attempting to reconcile Tinker with

traditional notions of the government's authority to regulate speech on its own property..." (p.1326). However, LoMonte clearly stated that the 1969 Tinker decision is "still good law" and that every Supreme Court decision "...about student speech since 1969 has quoted Tinker as authority" (p.1326).

#### *The Fifth Amendment*

The Fifth Amendment states, in part, that no person shall ...be deprived of life, liberty, or property, without due process of law (U.S. Constitution, amendment V, 1791). Essentially the Fifth Amendment protects individuals from discipline without due process of law. Such due process is applicable to all individuals within the United States, including foreign nationals, whether in America legally or illegally (*Matthews v. Diaz*, 1976; *Plyler v. Doe*, 1982). Although the Fifth Amendment (U.S. Constitution, amendment V, 1791) is applicable to the federal government and not individual states (*Barron v. Baltimore*, 1833), the Fourteenth Amendment, upon its ratification in 1868 bound the states to the same due process clause contained within the Fifth Amendment, and in addition, bound the states by an equal protection clause as well (U.S. Constitution, amendment XIV, 1868). Although it would appear that the language contained within Fourteenth Amendment essentially deems the Fifth Amendment *moot*, it is worth mentioning the amendment since the District of Columbia is not a

state within the United States and therefore the Fourteenth Amendment would not appear to apply.

In the Supreme Court case *Bolling v. Sharpe*, (1954), the idea that the District of Columbia was not obligated to comply with the Brown decision since the Equal Protection Clause contained within the Fourteenth Amendment was only applicable to the states and that the Fifth Amendment contains no such language was brought before the high court immediately following the then recent Brown (1954) ruling. Although the Supreme Court acknowledged that the Fifth Amendment contained no Equal Protection Clause, the Supreme Court ruled that the premise of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive and that "...it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" (p. 500). With this decision, the Supreme Court assured that all students within the United States, its commonwealths and territories are afforded equal protection under the law.

#### *The Fourteenth Amendment*

The Fourteenth Amendment (1868) states, in part that, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law" (U.S. Constitution,

amendment XIV,). The establishment of the Fourteenth Amendment assured that the rights afforded in the Fifth Amendment would also apply to the States. Following the abolition of slavery, the Fourteenth Amendment became "...the nexus for history's subsequent struggles: the fight for women's suffrage and the civil-rights movement of the mid-20th century" (Salih, 2006, pp. K-2). "More than the Declaration of Independence, more than the original Constitution, more than even the Bill of Rights, it is the 14th Amendment that makes America a democratic country" (Epps, 2006, p. 1).

Since the ratification of the Fourteenth Amendment, the Supreme Court through various decisions has applied the Equal Protection Clause within the amendment to disavow laws or actions that discriminate against a person or groups of people on the basis of race (*Strauder v. West Virginia*, 1880); *Yick Wo v. Hopkins*, 1886); *Brown v. Board of Education*, 1954 & *Loving v. Virginia*, 1967), sex (*United States v. Virginia*, 1996), sexual orientation (*Romer v. Evans*, 1996 & *Lawrence v. Texas*, 2003), gender (*Hopkins v. Price Waterhouse*, 1989), citizenship (*Plyler v. Doe*, 1982), or religious beliefs (*Board of Education v. Barnette*, 1943).

Since the *Tinker* (1969) decision, federal courts have recognized the tension between a public school's responsibility to carry out its governmental objectives in maintaining an

environment conducive to learning, but at the same time the courts have been prudent to ensure that school systems provide equal protection for all under the law, "...allow for the exercise of constitutional expression" (*Chambers v. Babbitt and Independent School District No. 833*, 2001, p. 1071), and ensure individuals possess "...liberty of the mind as well as liberty of action" (*Palko v. Connecticut*, 1937, p. 327).

#### The Underpinnings of the Equal Access Act of 1984

Although together the Free Exercise Clause and the Establishment Clause have work synergistically in an attempt to ensure that religion and government are kept strictly separate, religious principles and practices have permeated American public schools (Laycock, 1986). "Historically, the public schools openly taught Protestant Christianity, and many opened the day with prayers, Bible readings, or both" (Laycock, 1986, p. 1). Since the Nineteenth Century and into the early Twentieth Century many states and the public schools within those states provided release time from school to allow the children an opportunity to attend Christian teachings (Delany, 1907). During the late 1800s, educational scholars were concerned about the decay of morality in their communities and looked to religious organizations to aid the public educational systems in addressing this problem. Nineteenth century scholars saw that good citizens, in addition to arithmetic, grammar, and reading

skills required formal moral training, and who better to instill that training than the Protestant clergy (Bouton, 1888).

It is perhaps natural to propose that some scheme of distinctly religious instruction be devised and followed in the schools, to the end that the character and the conduct of pupils may be improved and the ethical duty of the State be performed... (Bouton, 1888, p. 416).

The provision of providing a public education was predicated on the fact that the primary goal is to provide "societal cohesion ...for promoting our common destiny" (Fuller, 1994, p. 88, citing *Everson v. Board of Education*, 1947). However, in 1947, the Supreme Court laid out the meaning of the Establishment Clause at length:

Neither a state nor the Federal government can set up a church. ...pass laws which aid one religion, aid all religions, or prefer one religion over another. ...nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. ...be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. ...Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any

religious organizations or groups and vice versa  
(*Everson v. Board of Education*, 1947, pp. 15-16).

In the years that followed, the Supreme Court has heard and in most cases declared unconstitutional school sponsored prayer and bible readings. Holmes (1994) states that:

The effort to re-integrate religion into public schools has been infused with new vigor and direction. In the early history of this country, prior to 1948, religion was a regular part of public school education through state-sponsored prayer and regular religious instruction during school hours. [However,] ...the Supreme Court has systematically supported efforts to eliminate prayer and religious instruction from the public school and has consistently declared that religion is an unconstitutional part of the state's function in educating children (p. 377).

In 1962 the Supreme Court struck down a New York law which required a prayer composed by the New York Board of Regents to be recited in every public school at the beginning of the school day (*Engel v. Vitale*, 1962). The Supreme Court overturned the decision of the New York State court declaring that the daily invocation of God's blessing violated the Establishment Clause and thus was unconstitutional. The Court held that "it is no part of the business of government to compose official prayers

for any group of the American people to recite as a part of a religious program carried on by government (p. 425). Justice Black, giving the opinion of the Court, stated that, "by using its public school system to encourage recitation of the prayer, the State of New York adopted a practice wholly inconsistent with the [Establishment] clause" (p. 424). Although it was argued that the prayer was 'non-denominational' the practice, according the legal scholar Minard (2005) could not be cured by that detail.

*Students' rights to express themselves in open forums*

Adolescence is a time of rebellion, growth, change, and the beginning of meaningful self-awareness. It is not suprising [sic], therefore, that the 1960s, which constituted the adolescent period of the baby-boomer generation, was noted for its lack of commitment to discipline, obedience and deference to authority. It was a time remembered more for political and cultural conflict, urban chaos, civil rights battles, free speech movements on university campuses, and, perhaps most of all, the national divide over the Vietnam War. The 1960s was an era during which the value of order - of deference to authority - was challenged profoundly, to the great chagrin of those who view order as an

imperative in a civilized society (Ingber, 1995, p. 421).

The right to express one's convictions and to speak freely with others about those convictions affirms the individuality of each and every member of society, validates his or her existence, and fosters the ability of each and every member to realize his or her potential. It has been said throughout our history and referenced in many judicial decisions that freedom of expression "is the matrix, the indispensable condition, of nearly every other form of freedom" we hold sacrosanct as American citizens (*Palko v. Connecticut*, 1937, p. 327).

Following the Supreme Court decisions in *Tinker* (1969) and *Police Department of Chicago v. Mosley* (1972), which stated that "government may not grant the use of a forum to people whose views it finds acceptable, but deny [access] ...to those wishing to express less favored or more controversial views" (p. 96), relevant case law regarding equal access started to take root. Although the fervor of judicial activity concurrently took place at the university and the secondary school level, different outcomes and opinions based on the age or grade level of the students occurred.

Prior to the enactment of the EAA, a trio of federal judicial decisions directly dealt with the ability of students to utilize school facilities for religious activities. Two of

the cases, dealing with high school students, were heard by federal appellate courts: *Brandon v. Board of Education of Guilderland* (1980) and *Lubbock Civil Liberties Union v. Lubbock Independent School District* (1982). The third case, *Widmar v. Vincent* (1981), involving students at the university level, was the only case of the three to be heard by the Supreme Court (Piele & Pitt, 1984).

Beginning with the 1962 Supreme Court's decision in *Engel v. Vitale*, and up until the 1980s, the Court had not directly addressed the tension between students' free speech rights and the Establishment Clause in the context of education. However, in the mid 1970s, the University of Missouri at Kansas City had opened its facilities to student-initiated, voluntary, nonreligious student groups. Within a short time thereafter, an evangelical Christian student group was established and started to use the school facilities to pray and worship. Following four years of utilizing university property, the university changed its policy to exclude facility use for the purposes of worship and religious teaching. Consequently, the Christian student group sued the university. In 1981, the Supreme Court in *Widmar v. Vincent* concluded that the University erred in its decision to bar the evangelical Christian student group from use of the university facilities. The Supreme Court ordered the university to grant the Christian group equal access to the facilities as

it would to other non-religious organizations. Justice Powell, speaking for the Court, concluded that since the University of Missouri created a *limited public forum*, making its facilities generally accessible to student groups, the university, in denying equal access to the Christian group discriminated between groups on the basis of speech. Lacking any compelling state interest for the restriction, Justice Powell reasoned that permitting the Christian group's access posed no threat to state endorsed religious expression

The state university's exclusionary policy violated the fundamental principle that a state regulation of speech should be content-neutral, ...by creating a discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the university was required to show that its regulation was necessary to serve a compelling state interest ...equal access to the religious group would not necessarily have been incompatible with the establishment clause of the First Amendment (*Widmar v. Vincent*, 1981, p.264).

The Supreme Court thus set the stage for a policy of equal access on university campuses, providing an open forum for meetings of both religious and non-religious student groups, concluding that such voluntary, student-led groups, do not

violate the Establishment Clause of the Constitution and may participate on campus barring a compelling state interest to the contrary (*Widmar v. Vincent*, 1981). Although the Supreme Court in *Widmar* (1981) provided clear direction for universities to follow with regards to equal access of students' free speech rights, the Court did not attempt to decide whether a public high school could constitutionally deny access to school facilities to student-initiated religious groups given the same factual situation (Sturgill & Oliver, 1983). In *Widmar v. Vincent*, Justice Powell specifically stated that college students are young adults and "they are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion" (p.274). Although Justice Powell did not elaborate in *Widmar* that there exists a demarcation with regard to age of students and their impressionability toward organizations encompassing religious tenets, the Supreme Court "...left open the question of whether a public high school could constitutionally deny access to school facilities to student-initiated religious groups in a similar factual situation" (Sturgill & Oliver, 1983, p. 136).

*The Nexus between Widmar and Public High Schools*

Courts have consistently held that school board recognition of student-initiated religious activity

has the effect of advancing religion... The conclusion that such recognition leads to an unconstitutional advancement of religion rests in large part on the assumption that high school students are impressionable and immature, and thus incapable of understanding a school board's true role when it recognizes student-initiated religious activity. This assumption, however, is inconsistent with the position taken by courts in other First Amendment cases involving public high school students... (Rooney & Sparks, 1983, p. 502).

As *Widmar v. Vincent* (1980) was being decided by the Eighth Circuit U.S. Court of Appeals and ultimately upheld by the Supreme Court (*Widmar v. Vincent*, 1981), high school students were concurrently fighting for their right to hold religious clubs on their campuses. In 1980, a group of students at Guilderland Central School District, an Albany, New York suburb, formed a club called, Students for Voluntary School Prayer. The premise of the group was to hold, on a voluntary basis and prior to the start of the school day, a student-initiated prayer meeting (Lake, 1991).

Denied permission by the school board to hold prayer meetings, the Students for Voluntary School Prayer filed suit in federal district court alleging violations of the First and

Fourteenth rights (*Brandon v. Board of Education*, 1980). The Second Circuit U.S. Court of Appeals held in favor of the school district for two specific reasons. First, the court's denial to allow the Students for Voluntary School Prayer Club to meet was due to the fact that "a high school is not a 'public forum' where religious views can be freely aired..." (*Brandon v. Board of Education*, 1980, p. 980). The court felt that despite that fact that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (*Tinker v. Des Moines Independent School District*, 1969, p. 506) and that they may have the "rights to political speech in public schools" (*Brandon v. Board of Education*, 1980, p. 980), "the granting of the group's request would have had the impermissible effect of advancing religion" (*Brandon v. Board of Education*, 1980, p. 974). Second,

Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit (*Brandon v. Board of Education*, 1980, p. 978).

According to Lake (1991) this was the first U.S. Court of Appeals decision to deny "equal access to students for religious activities on public school premises based on the belief that they are too impressionable..." (p. 47).

In *Lubbock Civil Liberties Union v. Lubbock Independent School District* (1982), the second Court of Appeals case reached the same conclusion as the court in Brandon (1980) regarding the impressionable aspect of students. The Fifth Circuit U.S. Court of Appeals, overturning a Texas district court's opinion, reiterated from Brandon the issue of impressionable youth. The opinion of the Fifth Circuit U.S. Court of Appeals was clear that by

allowing religious meetings at a time closely associated with the beginning or end of the school day implies recognition of religious activities and meetings as an integral part of the District's extracurricular program and carries with it an implicit approval by school officials of those programs. This, in combination with the impressionability of secondary and primary age school children and the possibility that they would misapprehend the involvement of the District in these meetings, renders the primary effect of the policy impermissible advancement of religion (p. 1045).

In *Brandon* (1980), Judge Kaufman viewed religious clubs meeting on school property "too dangerous to permit" (p. 978). However, the actions by Judge Kaufman in *Brandon* (1980) appear to have separated issues involving student's free exercise of religion from other moral or political issues involving schoolchildren. In *Pico v. Island Trees Union Free School District* (1980), Judge Newman, giving the opinion for the court, stated that schoolchildren "have a right to be free from official conduct that tends to suppress ideas... [as] ...First Amendment values are not only precious; they are fragile" (p. 419).

In light of other First Amendment federal court cases since *Tinker* (1969), involving school-age children, *Arp* (1990) views the decisions in *Brandon* and *Lubbock* (1982) as "factually unsupported and inherently illogical" (p. 154). *Arp* goes on to assert that, the Supreme Court in *Widmar* (1981) did not "...as stated in a footnote" address high school students specifically (p. 154). *Rooney and Sparks* (1983) drawing on research from three notable psychologists *Erickson* (1968), *Piaget and Inhelder* (1973) regarding the understanding of child development, stated that if judicial systems

...have viewed high school students as mature enough to discuss controversial nonreligious issues without imputing endorsement of student views to the school

board. ...school board recognition of student-initiated religious expression need not produce the effect of inducing or coercing the nonreligious to participate in religious activity" (p. 518).

As Lake (1991) concluded:

...court decisions of the early 1980's further clouded the issue of student religious rights in public schools. A university could not restrict student speech based on the presumed religious content if an open forum had been established. [However, the federal courts] ...would not grant this same right to high school students because they were too impressionable and could not distinguish between endorsement and neutrality" (p. 55).

*Congressional Reaction to Widmar, Brandon, and Lubbock as it Pertained to Public High Schools*

In the years following the Supreme Court decision in *Widmar* (1981) the lower federal courts were unsure whether the Supreme Court's equal access reasoning in *Widmar* applied to public secondary schools. Unsure of the application of *Widmar*, most lower federal courts held that it did not apply (*Brandon v. Board of Education of Guilderland Central School District*, 1980; *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 1982; & *Nartowicz v. Clayton County School District*

1984); The only judicial decision to rule in favor of the students was *Bender v. Williamsport Area School District* (1984). The above judicial decisions finding for the school district against the students prior to, and following the passage of the EAA was predicated on the fact that, according to Cheng (1996), the Supreme Court considered public high school students "younger and more impressionable than university students" (p. 356). Interpreting *Widmar*, Cheng asserted that the Supreme Court was "unable to perceive government neutrality towards religious speech" for high school students in comparison to students at the university level (p. 444).

As such judicial reasoning resulted in the continual denial of high school students' requests to form religious organizations on high school campuses, many congressional leaders became concerned. Senator Hatfield who introduced an EAA-type bill in 1982 (Lake, 1991), saw these court decisions as pervasive discrimination against religious speech in public schools. In the absence of a Supreme Court decision on the precise matter, the 98th U.S. Congress took on the task of enacting a law to remedy the issue congressional leaders saw as escalating (130 Cong. Rec. 11, 1984). It was the intent of the U.S. Congress to extend the reasoning of *Widmar v. Vincent* (1981), which permitted such gatherings on college campuses, to public secondary schools (Cheng, 1996).

According to Knicely (1993), the impetus for the enactment of the of the EAA did not stem from a conservative agenda "hatched in the Reagan-Bush White House, but in the spontaneously simple, yet persuasive, complaints of individual students who were prohibited from praying or discussing religious subjects on school property..." while other groups were free to use school property and speak their mind (p. 74). Cheng (1996), concurring with Knicely (1993), stated that "whatever the intent of school administrators, many religious students perceived a message of state hostility toward religion (pp. 358-359).

In the hearings for the EAA, students testified before the House and Senate judiciary committees that they felt unequally treated. High school student Lisa Bender, the plaintiff in *Bender v. Williamsport Area School District* (1984) saw that her constitutional rights were being denied. Her classmates, also in attendance concurred (130 Cong. Rec. 11, 1984). Student Bonnie Bailey of Lubbock, Texas commented that:

We have been taught the Constitution guarantees us freedom of speech. But we feel that here we have been discriminated against, because we can picket, we can demonstrate, we can curse, we can take God's name in vein, but we can not voluntary get together a talk

about God on any part of our campus inside or outside of school (130 Cong. Rec. 11, 1984).

After reading the testimony of many other students, Senator Denton, presenting the "Denton-Hatfield Compromise" on the issue of equal access commented that the examples presented by the students represent a clear "ominous perception of state hostility toward religion when schools treat students' religious expression in such a manner" (130 Cong. Rec. 11, 1984). The compromise Senator Denton crafted was to specifically word the bill to solely reference religious organizations, granting the right to establish themselves in schools on an equitable basis as any other non-curriculum club. While Senator Denton did state that it was his wish to "permit the name of God to be uttered again in our schools...., he also wanted to clarify and confirm the first amendment rights of freedom of speech, freedom of association, and free exercise of religion" (130 Cong. Rec. 11, 15,004, 1984). Along with school children participating in the congressional hearings on the EAA, many civil rights scholars including notable constitutional legal experts, such as Harvard Law Professor Laurence Tribe testified before Congress (Cheng, 1996 & Knicely, 1993).

Ironically, and perhaps not germane to the situation, in his closing argument before the Senate committee,

Senator Denton urged support for the bill that day, stating: "...if the Gay Rights Club can meet ...surely fundamental fairness and equal treatment demand that religious students be allowed to meet under the same terms and conditions..." (130 Cong. Rec. 11, 15,005, 1984). The senator was referring to *Gay Students Organization of the University of New Hampshire v. Bonner* (1974), heard by the First Circuit Court of Appeals. The case involved university students seeking injunctive and declaratory relief under the Civil Rights Act of 1871 for violation of their First Amendment rights by the University of New Hampshire and the New Hampshire Governor. In the case, the students prevailed, but like *Widmar* (1981), the plaintiffs were in college not high school.

On June 27, 1984 the debate on the EAA and the Denton-Hatfield Compromise continued in the Senate. Senator Hatch from Utah opened the debate discussing the need for the EAA. Before the committee, he stated that school leaders "...often feel that they are compelled by judicial interpretation of the first amendment to ban any religious activities on the campus, even when they are totally student-initiated ...and meeting on the same terms as other student initiated clubs" (130 Cong. Rec. 14, 19,212, 1984). Senator Hatch felt that federal legislation would provide the assistance school leaders needed to put an end to

the confusion over whether to allow student-sponsored religious clubs to meet on campus. His desire was apply the reasoning in Widmar (1981) to secondary students by enacting the EAA (130 Cong. Rec. 11, 1984). Senator Hatfield, addressing the committee stated his concern about usurping the authority of local school leaders on such matters, stating that:

...education in general must be under the guidance and control of local school districts... [however]

...where there is an action taken which denies a right that is guaranteed under the Constitution, then the Congress of the United States ...has a duty and an obligation to step in and remedy that violated right (130 Cong. Rec. 14, 19,217, 1984).

Prior to yielding the floor to his colleagues, Senator Hatfield, commenting that the EAA is not about giving every group access to get into our school classrooms, but to ensure that students, attending those schools, have equal access to school facilities to form non-curriculum clubs, religious or not, sent his "perfect amendment" for consideration (130 Cong. Rec. 14, 19,217, 1984). Two notable changes were: first, to strike out the Denton-Hatfield Compromise reference that spoke solely to the access of student-led religious clubs and substituted the statement that no public secondary schools which receives federal financial assistance and has a limited open

forum may "...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 bases of religious, political, philosophical, or other content of the speech at such meetings" (130 Cong. Rec. 14, 19,219, 1984). Second, to define the term secondary school as:] "...a public school which provides secondary education as determined by state law" (130 Cong. Rec. 14, 19,219, 1984). According to Aaron (1985) the primary reason to include the language religious, political, philosophical, or other content of the speech at such meetings was to further distance the EAA from judicial scrutiny on the basis of violating the Establishment Clause of the First Amendment.

Opponents of Senator Hatfield's perfect amendment, such as Senator Gordon of Washington, were concerned about the amended language which included the right of access to political, philosophical, or other speech clubs as well as religious organizations. The Senator feared that hate groups like the Nazis, the Ku Klux Klan, and even gay rights activists would be able to utilize school facilities in a similar fashion as the religious clubs. Senator Hatfield's response to Senator Gordon's concerns was that such clubs "cannot be unlawful, they cannot interfere with the basic program of the school - that is, the orderly conduct of educational activities within the school"

(130 Cong. Rec. 14, 19,224, 1984). When Senator Gordon asked Senator Hatfield if he was correct in stating that

if the school finds that the prohibition of an organization is necessary or advisable to maintain order and discipline on school premises, they can prohibit the formation of a student organization in spite of the limited open forum, even though that student organization is only going to engage in talk and not in any form of action or physical disruption whatsoever (130 Cong. Rec. 14, 19,224, 1984),

Senator Hatfield replied, "...yes" (130 Cong. Rec. 14, 19,224, 1984). The Senator went on to state that as far as providing equal access he would rather "risk expanding a right and then taking remedial action, if it is abused, than to deny a right" (130 Cong. Rec. 14, 19,225, 1984).

Senator Gordon's concerns were also a primary issue within the House of Representatives. Meeting on July 25, 1984, Congressman Goodling stated that the Act would "take all the hate groups out" (130 Cong. Rec. 15, 12,270, 1984).

Congresswoman Boxer specifically mentioned that "any group that advocates the superiority of certain racial groups or the subjugation of certain groups would be excluded" (130 Cong. Rec. 15, 12,270, 1984). As discussed later in this chapter, the issue of a school district's right to deny a group the ability to

organize on school property based on what the law defined as a limited open forum, became a crucial point that the Supreme Court deciphered in the Mergens (1990) case (Davis, 2000). As discussed in Chapter IV, the issue of a school district's right to deny a group the ability to organize on school property based on what the law defined as a district's ability to maintain order and discipline on school premises became a crucial point for the federal judicial system following Mergens.

At the end of the hearings on June 27, 1984, the bill passed the Senate 88-11 and on July 25, 1984, after many of the same concerns were raised, it passed by the House of Representatives 337-77 (Lake, 1991). On August 11, 1984, President Reagan signed the *Education for Economic Security Act*, which included, as subpart VIII, the *Equal Access Act* (Lake, 1991).

The Enactment of the Equal Access Act of 1984

*The Equal Access Act*

The EAA, United States Code, Title 20, Chapter 52, Subchapter VIII, §§4071-4074, was an important piece of legislation for public schools for it clarified the First Amendment rights of students' freedom of speech, freedom of association, and free exercise of religion while attending the public schools within the United States and its territories (Arp, 1990). Enacted on August 11, 1984, the EAA permits, despite any judicial decisions

in the past to the counter, secondary students to organize on school property for religious, political, philosophical, or other student-sponsored speech clubs during extracurricular periods of the school day when the school provides a limited open forum. The EAA essentially "extends statutorily the *Widmar v. Vincent* [1981] holding to public high school equal access disputes" (Arp, 1990, p. 140).

However, the EAA is not limited to the protection of religious clubs' right to meet as the Act, as written by Congress, "prevents all content-based discrimination by public schools against student clubs seeking access to school premises" (Grattan, 1999, p. 577). According to Caplan (2003), "for such a brief statute, the EAA, however, is notable for its confusing structure and clumsy draftsmanship" (p. 287). The overall language of the EAA is "vague, rendering compliance with its directive difficult and unrealistic (Morgenstein, 1991, p. 253). "...The text is replete with coined negative terms like 'noncurriculum' related, 'noninstructional time,' 'nonparticipatory capacity,' and 'nonschool persons'", making it confusing to the reader interpreting the intent of the law (Caplan, 2003, p. 287). Caplan further asserts that neither Congress nor the Webster dictionary considers noncurriculum, noninstructional, nonparticipatory, and nonschool to be antonyms of these respective words. Caplan's analysis stems from Supreme

Court Justice Stevens' comments in his dissenting opinion in *Westside Community Schools v. Mergens* (1990).

According to Justice Stevens,

the use of a dictionary is a necessary, and sometimes sufficient, aid to the judge confronted with the task of construing an opaque act of Congress. In a case like this, however, I believe we must probe more deeply to avoid a patently bizarre result. Can Congress really have intended to issue an order to every public high school in the nation stating, in substance, that if you sponsor a chess club, a scuba diving club, or a French club -- without having formal classes in those subjects -- you must also open your doors to every religious, political, or social organization, no matter how controversial or distasteful its views may be? I think not (pp. 271-272).

It was Justice Stevens' opinion that Congress did not intend to enact such a broad law permitting any religious, political, or social organization to be recognized. Despite the law's idiosyncrasies, the enacted language of the EAA remains intact today and is summarized below. A full text copy of the EAA legislation is presented in Appendix C.

*Section 4071(a)*

This section provides that it is unlawful for school districts to deny equal access to their facilities. This section states that, "It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings" (U.S.C. Title 20, Chapter 52 Subchapter VIII, §4071 et seq., 2009). According to Caplan (2003), this section of the EAA is the "centerpiece" of the Act (p. 287). Caplan (2003) goes on to state that, in summary, this section provides that public secondary schools "...must give all student groups equal access to any limited public forum it may have" (p. 289). Although most judicial courts have referenced the term public forum, the EAA refers to an open forum in §4071(a) of the Act (Laycock, 1986). Laycock (1986) asserts that public forum and open forum are interchangeable. However, Laycock perceives the term open forum as more precise. "No one contends that a forum in a school is open to the general public. The issue is whether there is a forum open to students and faculty" (p. 35).

*Section 4071(b)*

This section provides that any public secondary school has a limited open forum, whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time (U.S.C. Title 20, Chapter 52 Subchapter VIII, §4071 et seq., 2009). This section explains how the provisions of the EAA are initiated (Lake, 1991). Caplan states that it is this section that the EAA "requires far less evidence for a limited open forum..." (p. 289). In many respects, this section of the EAA is credited with enabling, permitting "...and even encouraging activities that, in its absence, might have been banned" (Friedelbaum, 2000, p. 1094). Despite Congress defining many of the terms included in the EAA, it failed to define the ambiguous term "noncurriculum related" which will prove to be "crucial to an equal access analysis because the existence of even one 'noncurriculum related' group would result in a 'limited open forum,' requiring a school to admit any and all student groups into the student activity forum" (Morgenstein, 1991, p. 253).

*Section 4071(c)*

This section establishes the Act's fair opportunity criteria, delineating to public secondary school leaders how they must meet five requirements in order to be in compliance with the EAA (Lake, 1991). Section 4071(c) states that schools

shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that: (1) the meeting is voluntary and student-initiated; (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees; (3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity; (4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and (5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups (20 U.S.C. §4071(c) (2009)). In this section, Congress adopted language from *Tinker* (1969) stipulating school board authority to restrict student club activity that materially and substantially interferes with the orderly conduct of educational activities within the school (Caplan, 2003; Lake, 1991). As Caplan states, the authority of school leaders to restrict student club activity must be "...understood to incorporate *Tinker's* caution that student expression on school grounds cannot be limited on the basis of an undifferentiated fear of disruption" (p. 300). School personnel cannot confine such clubs "to the expression of those sentiments that are officially approved" (*Tinker v. Des Moines Independent Community School District*, 1969, p. 511).

Section 4071(c) "circumscribes what the school may do" (*Prince v. Jacoby*, 2002, p. 1081).

*Section 4071(d)*

This section explains the governmental prohibitions under the Act. In essence, no governmental entity, such as a school division, may: (1) influence the form or content of any prayer or other religious activity; (2) to require any person to participate in prayer or other religious activity; (3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings; (4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee; (5) to sanction meetings that are otherwise unlawful; (6) to limit the rights of groups of students which are not of a specified numerical size; or (7) to abridge the constitutional rights of any person (U.S.C. Title 20, Chapter 52 Subchapter VIII, §4071 et seq., 2009). Similar to the provisions of the previous section, §4071(c), mixes and matches issues unique to religious clubs with that of general applicability to all other non-curriculum organizations, "...limiting a school's freedom to support activities it believes are valuable" (Caplan, 2003, p. 299). According to Caplan (2003), a school may want to support some non-curriculum related clubs through expenditure of funds beyond the cost of providing overhead, and Congress has no valid

reason to declare that such expenditures are not authorized. In addition, Berkley (2004) and Caplan assert that it is this section of the EAA that explicitly delineates matters such as the admonition that schools are compelled to sanction meetings that are otherwise illegal or could be construed to abridge the constitutional rights of students. However, school personnel cannot abridge student rights of freedom of speech, freedom of association and free exercise of religion, nor will content-based or viewpoint exclusions of student groups be tolerated (Brown, 1993).

*Section 4071(e)*

This section delineates the enforcement procedures or rather the lack thereof when non-compliance by school personnel occurs. This section stipulates that "notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school" (U.S.C. Title 20, Chapter 52 Subchapter VIII, §4071 et seq., 2009). According to Lake (1991), the EAA "... contains no explicit remedy such as a federal cutoff of [federal] funding for noncompliance" (p. 60). Caplan (2003) states that within this section "Congress appears to have contemplated enforcement of the EAA through 1983" (p. 301), meaning under the Civil Rights Act of 1871 Congress has

provided an avenue for students to collect monetary damages from school personnel who violate their rights under the law.

Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, 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 party injured in an action at law, suit in equity, or other proper proceeding for redress (42 U.S.C. §1983, 1871).

The ability of students to effectively utilize this statute as a means of seeking remedy from perceived liability on the part of school officials has been established by the U.S. Supreme Court for over 30 years. In *Wood v. Strickland* (1975) the Supreme Court ruled that school board members can be held liable regardless of their ignorance of constitutional law.

*Section 4071(f)*

This section states that the EAA does not diminish the authority of the school board, 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 (U.S.C. Title

20, Chapter 52 Subchapter VIII, §4071 et seq., 2009). This section, added by Senator Danforth during Congressional hearings on the EAA, was proposed for fear that that student members of religious cults would try to brainwash students into becoming members and he wanted school leaders to have the authority to deny such groups from forming (Aaron, 1985).

Perhaps one of the most contentious statements incorporated within the EAA, this subsection does not "imply legislative intent to grant an exemption" diminishing the value of students' right of free expression based on a "heckler's veto" (Orman, 2006, p. 243). According to Orman (2006), the First Amendment as interpreted by the Supreme Court in the *Tinker* (1969) decision "forms the background against which the EAA was enacted - thus the statute incorporates the value of not allowing a heckler's veto to influence students' right of free expression. In *Fricke v. Lynch* (1980) it was the opinion of Judge Pettine of the U.S. District Court for the District of Rhode Island that "fear however justified of a violent reaction is not sufficient reason to restrain ...[student] speech in advance..." as this type of action is nothing more than a heckler's veto (p. 387).

To prevent 4071(f) from becoming a loophole for schools to evade their equal access obligations, it cannot be invoked solely on the basis of the speech of the group that is proposing to meet. Consistent with

Tinker, there must be concrete evidence that allowing the group to meet on campus during noninstructional time would endanger the school's ability to pursue its lawful functions. Even in a school setting, "the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it" (Caplan, 2003, p. 300).

Since 1986, the material disruption rule included within this subsection of the EAA has been narrowed by three leading Supreme Court cases that have held against students claiming First Amendment rights to speak in a way unacceptable to school administrators: *Bethel School District No. 403 v. Fraser* (1986); *Hazelwood School District v. Kuhlmeier* (1988); and *Morse v. Frederick* (2007). In *Fraser* (1986) the Supreme Court held that a high school student did not have a First Amendment right to give a "sexually suggestive speech at a school assembly" (p. 675). The Court concluded that students' rights to free speech in school are not coextensive with adults' rights and the sexual offensiveness of the in-school speech given can be punished, in contrast with speech encompassing a political viewpoint as protected in *Tinker*. In *Kuhlmeier* (1988), the Supreme Court reiterated that public schools do not possess all of the attributes of other traditional

public forums, and as such, school personnel possess a legitimate interest in restricting student speech printed in the school newspaper, where the newspaper was produced in a journalism class, edited by the journalism teacher, and paid for with school money. Most recently, in *Frederick* (2007), the Supreme Court did not find any First Amendment violation when school personnel suspended a student from school after he refused to take down a banner he unfurled at a school supervised event. The banner, which read: "Bong Hits for Jesus" was determined to be substantially disruptive and counterproductive to governmental interests in preventing student drug abuse.

In delivering the opinion of the Court, Chief Justice Roberts held that "...schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use" without violating students' First Amendment rights (p. 396). According to Whittaker (2009), the specific circumstances in *Fraser* (1986), *Kuhlmeier* (1988), and *Frederick* (2007) add to the list of *Tinker* exceptions that can be applied under this subsection of the EAA. According to Zirkel (2005), the EAA was not meant to be all encompassing as it permits schools to prohibit a group's

meeting if it substantially interferes with the effective educational operation of the school.

*Section 4072*

This section defines key terms used throughout the EAA. As used in this section, the term *secondary school* means a public school which offers secondary education as determined by state law. The term *sponsorship* includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting. The term *meeting* includes student activities which are permitted under a school's limited open forum and are not directly related to the school curriculum. The term *noninstructional time* refers to time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends (U.S.C. Title 20, Chapter 52 Subchapter VIII, §4071 et seq., 2009). Although absent in §4072 of the EAA is the definition of *noncurriculum-related student groups* (Lake, 1991), the Supreme Court in *Board of Education of the Westside Community Schools v. Mergens* (1990) explicitly defined the term noncurriculum-related six years after the enactment of the EAA. Caplan (2003) has stated that such groups constitute a meeting under in

§4072(3) when the meeting, in the form of a forum, is “not directly related to the school curriculum” (p. 321).

#### *Sections 4073 and 4074*

These sections are self explanatory as §4073 provides that if any portion of the Act is invalidated, the remaining portions of the Act remain in force, while §4074 stipulates that the Act supersedes any provision of law that might be inconsistent with the EAA (U.S.C. Title 20, Chapter 52 Subchapter VIII, §4071 et seq., 2009).

#### *Conclusion*

Passed by Congress in 1984, the EAA was established out of concerns that federal courts were prohibiting schools from allowing religious clubs to meet on campus. Prior to the EAA, religious-type clubs were generally denied access on the basis that their presence would violate the Establishment Clause within the First Amendment (Sendor-Dowling, 2004). Knicely (1993) and Sendor-Dowling (2004) assert that through the EAA, Congress gave a broad conditional right of access to all types of non-curriculum related groups, beyond that of just religious-based groups, upholding the rights of all students to acquire access to school grounds for “extracurricular student-initiated speech (Knicely, 1993, p. 73). Knicely states that the importance of the EAA lies in the “reaffirmation of free

speech rights of students in the public schools" (p. 73). Knicely also contends that prior to the EAA school administrators "smothered student expression, misunderstanding the Establishment Clause, seeking to avoid controversy, or becoming confused over contradictory decisions" (p. 74). Many school administrators continued to have difficulty differentiating the Establishment Clause and the EAA when confronted with requests from students to form student-sponsored groups whose premise is religiously based (Lake, 1991). This was evident by the number of judicial cases that were soon presented in federal courts that ultimately made their way to the Supreme Court in 1990.

Board of Education of the Westside Community Schools v.  
Mergens (1990)

#### *Antecedents to Mergens*

Since the passage of the EAA, delineating the statutory and constitutional rights of any public high school student group, seeking access to its school's facilities to organize non-curriculum related activities, was a challenge for school leaders. This became more evident when the intent of the group in question was religiously based or desired to organize under the premise of discussing a controversial topic that, prior to

the EAA, would generally not have been permitted in the public school forum.

Prior to the Supreme Court decision in *Mergens* (1990) federal courts were split over the applicability of the EAA in public secondary schools (Gibbons, 1990). Gibbons (1990) contends that, while some federal courts "...readily applied the Act, others invalidated it under the establishment clause" (p. 1141). Within six months of the passage of the EAA, the newly enacted legislation was confronted with judicial interpretation. Some of the initial cases to consider the EAA simply did not apply (*Bell v. Little Axe Independent School District No. 70*, 1985). According to Gibbons, the EAA "...did not apply in this case at all, except by analogy" (p. 1168). In *Bender v. Williamsport Area School District* (1986), the Supreme Court came close to considering the constitutionality of the EAA, but was shy one vote. The Court disposed of the case on other grounds (Gibbons, 1990).

In *Student Coalition for Peace v. Lower Merion School District Board of School Directors* (1985a), the district court for the Eastern District of Pennsylvania was the first court to directly address and interpret the EAA. In this case, a student group wanted to hold an anti-nuclear war rally and peace exposition on school property, and the school denied their request. The court held that although the EAA expanded the

Supreme Court's decision in *Widmar* (1981) to secondary school students, the EAA "did not provide new and expanded constitutional rights of speech..." (p. 59). Therefore, the court concluded that the EAA was not applicable to the issue raised by the student group, namely, whether or not a school might deny access to its facilities to a non-curriculum related student group intending to invite non-students to its function. The court failed to examine whether or not a limited open forum as contemplated under EAA existed (*Student Coalition for Peace v. Lower Merion School District Board of School Directors*, 1985a).

Following the Third Circuit Court of Appeals reversal of the district court's, opinion in *Student Coalition for Peace v. Lower Merion School District Board of School Directors* (1985b), which had denied the student organization the right to assemble, the appellate court remanded the district court to determine whether the school board had specifically created a limited open forum as stipulated by the EAA. Upon remand, the district court for the Eastern District of Pennsylvania, after further analysis of the EAA, concluded that Congress through the newly enacted EAA, provides "students the right to use school property beyond the constitutional guarantees in the first amendment" (*Student Coalition for Peace v. Lower Merion School District Board of School Directors*, 1986, p. 1043). Since the boy's gym was used

by other groups, a limited open forum was determined to exist in the school, thereby requiring school personnel to permit the Student Coalition for Peace access to the gym. Although the Eastern District of Pennsylvania, the first court to interpret the EAA afforded students the right to use school facilities during non-instructional time, other federal courts disagreed; particularly when the speech was religiously based (*Garnett v. Renton School District*, 1989).

From 1985 until the Supreme Court decision in *Mergens* (1990), at least ten state and federal judicial cases expressly referenced the EAA (Gibbons, 1990). "One reason for the volume of litigation is that the Equal Access Act was used both offensively by students asserting free exercise rights and defensively by school boards contending either that they did not come under the Act or that the Act was unconstitutional" (Gibbons, 1990, p. 1179). While federal courts hearing EAA cases involving student religious activities refused to apply the EAA due to Establishment Clause issues, no federal court explicitly ruled that the EAA was unconstitutional (Gibbons, 1990) .

Through a *writ of certiorari* by the Board of Education of the Westside Community Schools in the case *Board of Education of the Westside Community Schools v. Mergens* (1989), and in light of the differing opinions between the U.S Court of Appeals for the Ninth Circuit and the U.S. Court of Appeals for the Eighth

Circuit, the Supreme Court decided to grant the writ and hear the case. In *Garnett v. Renton School District* (1989), the Ninth Circuit ruled that the school board was justified in refusing to allow the students to conduct a prayer group before each school day, because to do so would have violated the Establishment Clause. However, the Eighth Circuit in *Board of Education of the Westside Community Schools v. Mergens* (1989) ruled that a denial of the formation of a religious study club at a high school solely due to the Establishment Clause would make the EAA meaningless. As the Supreme Court is often pressed to resolve lower courts diverging opinions about how the law is supposed to apply in similar situations, the Supreme Court commenced hearings on January 9, 1990.

#### *The Mergens Case*

"There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect" (Green, 2009, p. 846).

Westside High School, a public school in Omaha, Nebraska had allowed its students to join extracurricular groups and clubs that meet after school and on school premises. In 1989 the school recognized about 30 groups, including a chess club, a scuba-diving club, and a service learning group working with special needs students. Although the district's school board

policy required each club to have a faculty member sponsor the group, there was no written policy dictating the formation of the type of clubs that could be organized. Students who wished to organize a club were required to present their request to an appropriate school faculty member. The decision to allow the request was determined by the respective faculty member following their reading and interpretation of applicable school board policy and the EAA. In January 1985, a group of students, including Bridget Mergens, at Westside High requested permission to organize a Christian club; their premise to read and discuss the Bible and to pray together. It was the intent of the group that the membership would be voluntary and open to all, regardless of an individual's religious affiliation.

In February 1985, school personnel denied the request. They explained to the students wishing to organize that the group would be unable to acquire a faculty sponsor, and that the theme of a religious club on school grounds would violate the Establishment Clause of the First Amendment. Following the denial of the respective students' appeal to the Westside School Board in March 1985, the affected students filed suit in the United States District Court for the District of Nebraska against the school board and various individual school officials. The students' claim was based primarily on the refusal of the school board to allow the group to organize

under, among other laws, the recently enacted EAA which provides, in part, that:

(1) public secondary schools which receive federal assistance and have a "limited open forum" may not deny equal access to that forum to students wishing to conduct a meeting, on the basis of the religious, political, or other content of the speech at such a meeting..., and (2) a "limited open forum" exists where a school allows "noncurriculum related student groups" to meet on school premises during noninstructional time... (20 U.S.C. §§4071(a)-4071(b)).

The District Court for the District of Nebraska focused primarily on the EAA in determining whether or not the students had a viable claim. Although the students claimed the school board violated their First Amendment rights in addition to their rights under the EAA, the district court, referencing the Third Circuit Court of Appeals decision in *Bender v. Williamsport Area School District* (1984) dismissed the students First Amendment claim. In *Bender*, the court concluded that the constitutional balance of interests between students' free speech rights and the Establishment Clause of the First Amendment tilted against the free speech rights of the students and towards the Establishment Clause.

The district court turning to the students' EAA claim determined that Westside High School did not have a limited open forum within the terms of the EAA, since all of the student clubs at the school "were curriculum-related and tied to the educational function of the school" (*Mergens v. Board of Education*, 1988, p. 17). As a result, the district court in this case dismissed the student claims that the school board violated the students' rights to organize a religious club on school grounds.

The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart (*McCullum v. Board of Education*, 1948, p. 203).

On appeal to the U.S. Court of Appeals for the Eighth Circuit, Miss Bridget Mergens and her classmates were granted a hearing. Commencing on October 17, 1988, the Eighth Circuit Court of Appeals reviewed the district court's decision, which ruled in favor of the school district in that the school had not created a limited open forum and thus no violation of the EAA had occurred. Following a review of an order from the lower court, the Court of Appeals reversed the district court's

decision on two specific grounds (*Board of Education of the Westside Community Schools v. Mergens*, 1989).

First, the appellate court concluded that Westside High School indeed maintained a limited open forum within the meaning of the EAA, consequently discriminating against the proposed club due to its religious content. Since several student clubs at Westside High School existed at the time, including a chess club and a scuba diving club, and given the fact that the appellate court considered them not directly related to the curriculum as delineated within the EAA, the appellate court determined that they must be noncurriculum related. In addition, the appellate court concluded that the district court's broad interpretation of what was considered curriculum-related would make the EAA meaningless. Second, the appellate court concluded that the EAA did not violate the Establishment Clause (*Board of Education of the Westside Community Schools v. Mergens*, 1989).

In reversing the district court's entry of judgment for the school board, the court of appeals held that the EAA was enacted to "forbid discrimination against respondents' proposed club on the basis of its religious content" not to counter existing jurisprudence regarding the role of religion in the public schools (*Board of Education of the Westside Community Schools v. Mergens*, 1989, p. 1078). As the EAA codified the Supreme Court's *Widmar* (1981) decision "...extending that holding to secondary

public schools" the court of appeals in this case found that no violation of the Establishment Clause existed (p. 1079). On February 8, 1989, the U.S. Court of Appeals for the Eighth Circuit reversed the district courts decision and ruled in favor of the students at Westside High School.

On July 3, 1989, the Supreme Court granted petition for writ of certiorari to the Board of Education of the Westside Community Schools *Board of Education of the Westside Community Schools v. Mergens* (1989).

The language of the EAA closely tracks the holding of the Court in *Widmar*. In fact, the only difference between the EAA and *Widmar* is the EAA's express extension of the equal access principle to public secondary school students. Any constitutional attack on the EAA must therefore be predicated on the difference between secondary school students and university students. We reject this notion because Congress considered the difference in the maturity level of secondary students and university students before passing the EAA. We accept Congress' fact-finding (*Board of Education of the Westside Community Schools v. Mergens*, 1989, p. 1080).

Commencing on January 9, 1990, the Supreme Court deliberated the case *Board of Education of the Westside*

*Community Schools v. Mergens* (1990). Affirming the Eighth Circuit Court of Appeals decision (holding for the students), the majority of Supreme Court Justices concurred that the EAA prohibited Westside High School from denying the students' request to form a Christian club. Even though all the Supreme Court Justices were unable to agree on whether the EAA violated the Establishment Clause, six Court Justices: O'Connor; Rehnquist; White; Blackmun; Scalia; and Kennedy concurred that the EAA did not violate the Establishment Clause.

Justice O'Connor delivering the opinion for the court considered, as did the United States Court of Appeals for the Eighth Circuit, the following issues: First, whether or not non-curriculum groups existed at Westside High School resulting in the school providing a limited open forum as defined by the EAA, thus triggering the equal access obligation of the Act; and second, did the EAA violate the Establishment Clause of the First Amendment?

The EAA provides that it is 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 (20 U.S.C. §4071(a) (2009)).

The major focus before the Supreme Court in answering the first issue of whether or not one or more non-curriculum groups existed at Westside High School, resulting in a limited open forum as defined by the EAA, pivoted upon the meaning of the word 'noncurriculum-related student group', which the EAA failed to define. As "...the Act does not define a noncurriculum-related student group, the Court recognized the need for statutory interpretation" (Lake, 1991, p. 77).

As early as 1805, the Supreme Court has stated that "it cannot be pretended that the natural sense of words is to be disregarded, because that which they [judicial system] import might have been better, or more directly expressed" (United States v. Fisher, 1805, p. 387). In 1828, the Supreme Court stated that as far as the intent of the legislature in the enactment of laws, "[t]he ordinary meaning of the language, must be presumed to be intended, unless it would manifestly defeat the object of the provisions" (*Minor v. Mechanics Bank*, 1828). However, the Supreme Court has also stated that when a particular statute is ambiguous, "deference should be given to the prevailing statutory interpretation" (*United States v. Hill*, 1887, p. 169), and when that statute is to be interpreted, the

"popular import of words furnishes the general rule for interpretation..." (*Arthur v. Morrison*, 1887, p. 111).

Although it is the duty for the Supreme Court to "ascertain the will of Congress from the words employed in a statute, interpreting them according to their ordinary meaning as well as in the light of all the circumstances that may fairly be regarded as having been within the knowledge of the legislative branch ...at the time it [was] enacted... (*Dewey v. United States*, 1900, p. 520), "in the absence of a definition of a statutory word by the legislature the etymology of the word must be considered and its ordinary meaning applied" *United States v. Lombardo*, 1916, p. 78). Throughout American history, what has emerged is that the Supreme Court has been unwavering in stating that in the "absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning (*National Railroad Corporation v. Morgan*, 2002, p. 110).

In interpreting the intent of the statute, Justice O'Connor, in *Board of Education of the Westside Community Schools v. Mergens* (1990), utilizing Webster's New International Dictionary, defined the term curriculum as "the whole body of courses offered by an educational institution or one of its branches" (p. 237). The Court reasoned that, any "sensible interpretation of 'noncurriculum related student group' must

therefore be anchored in the notion that such student groups are those that are not related to the body of courses offered by the school (p. 237). The court then focused on the issue surrounding the degree of "'unrelatedness to the curriculum' required for a group to be considered 'noncurriculum related'" (p. 237).

The Supreme Court then examined §4072(3) of the EAA, which defines the word 'meeting' as "those activities of student groups which are ...not directly related to the school curriculum. From this definition, and in light of the fact that the legislative history was of little help due to the numerous revisions of the bill prior to its enactment, the Court reasoned that a noncurriculum-related group "...is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school (p. 239). The Court then reasoned that a student group which is directly related to a school's curriculum is one that

...is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit (pp. 239-240).

As affirmed by the Court, it appeared logical that the EAA supported the view "...that a curriculum-related student group

is one that has more than just a tangential or attenuated relationship to courses offered by the school" (p. 238).

The Supreme Court went on to state that to determine whether or not "...a specific student group is a 'noncurriculum related student group' will therefore depend on a particular school's curriculum, but such determinations would be subject to factual findings well within the competence of trial courts to make" (p. 240). Although the Westside School Board felt that such judicial interpretation of the EAA "unduly hinders local control over schools and school activities" (p. 240), the Court disagreed. In the words of the Supreme Court,

...schools and school districts nevertheless retain a significant measure of authority over the type of officially recognized activities in which their students participate. ...First, schools and school districts maintain their traditional latitude to determine appropriate subjects of instruction. ...Second, the Act expressly does not limit a school's authority to prohibit meetings that would "materially and substantially interfere with the orderly conduct of educational activities within the school [or] ...to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary. ...Finally, because the Act applies only to

public secondary schools that receive federal financial assistance ...a school district seeking to escape the statute's obligations could simply forgo federal funding (p. 241).

Although Congress considered it an unrealistic option that school districts would refuse federal funding just to avoid the requirements of the EAA, the Supreme Court felt that it was the explicit intent of Congress to "prohibit schools from discriminating on the basis of the content of a student group's speech, and that obligation is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups" (*Board of Education of the Westside Community Schools v. Mergens*, 1990, p. 241). The Supreme Court affirming the appellate court's reasoning that it only takes one noncurriculum student-related group to trigger the EAA determined that Westside High School, with its chess club and scuba diving club indeed had set in motion the need for the school to comply with the EAA.

Taking up the second issue of whether the EAA violated the Establishment Clause of the First Amendment, the Supreme Court, applied the three-part Lemon test established by *Lemon v. Kurtzman* (1971). The Court concluded that the EAA has a secular purpose (the first prong of the test) as the EAA prohibited discrimination against political, philosophical, as well as

religious speech. What was relevant in the Supreme Court's decision was that the legislative purpose of the EAA was secular in spite of the motives of some legislators who voted in favor of the Act for religious reasons. Assessing the second prong, the Court noted that, "...secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis" (p. 250). The Supreme Court also determined that since the formation of religious clubs by students was just one use the students had under the EAA the club's primary effect neither advanced nor inhibited religion (the second prong of the test). Finding little risk of government entanglement since the EAA explicitly prohibited school sponsorship of religious functions, no violation of the third and final prong of the Lemon test was found.

Even though the Act permits 'the assignment of a teacher, administrator, or other school employee to the meeting for custodial purposes,' ...such custodial oversight of the student-initiated religious group, merely to ensure order and good behavior, does not impermissibly entangle government in the day-to-day surveillance or administration of religious activities (*Board of Education of the Westside Community Schools v. Mergens*, 1990, p. 253).

Accordingly, the Supreme Court on January 9, 1990 concluded that the EAA "does not on its face contravene the Establishment Clause" (p. 252). Given that the Supreme Court held that the Westside School Board violated the EAA based on the two aforementioned principles and affirmed the ruling of the Eighth Circuit Court of Appeals.

#### *Aftermath of Mergens*

Although the Mergens (1990) case helped settle whether or not religious clubs could meet on campus, school boards and their administrators soon found themselves enmeshed in judicial proceedings surrounding student-sponsored clubs or organizations they found objectionable on moral grounds. Commencing in 1998, litigation has been brought before federal courts claiming violations of the EAA due to exclusions of student-lead clubs whose themes center around non-heterosexual issues. While the Supreme Court has yet to hear such a case, federal district and appellate courts have generally ruled that to prohibit such a club based solely on the message the group conveys, is viewpoint discrimination (*Colin v. Orange Unified School District*, 2000). In a quasi-related case, *Good News Club v. Milford Central School* (2001), the Supreme Court specifically stated that viewpoint discrimination is inconsistent with federal law.

Though it has been held that, "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" (*Rosenberger v. Rector & Visitors of University of Virginia*, 1995, p. 829), school leaders continue to struggle with establishing and implementing policies that uphold the values and convictions of the many without violating the rights of the few. An in-depth analysis of the respective cases, involving non-heterosexual students' rights under the EAA to organize GSA clubs within their secondary schools, is discussed in detail in Chapter IV.

#### The Birth and Proliferation of Gay-Straight Alliance Clubs in the Schools of the United States

Numerous controversies over the place of sexuality in schools mirror social discomfort over sexual differences. Sexuality not only splits school communities, but it also helps to form communities within schools. A particularly potent new form of community organized around the issue of sexuality is that of alliances among and between sexual identities (Mayo, 2004, p. 24).

#### *Recognition of Non-Heterosexual Youth as an At-Risk Population*

The enactment of such laws as: *Title VII of the Civil Right Act of 1964; Title IX of the Education Amendments of 1972; Section 504 of the Rehabilitation Act of 1973; the Education of All Handicapped Children Act of 1975; and the American*

*Disabilities Act of 1990* have built upon *Brown v. Board of Education* (1954) in assuring equitable treatment for many school children. However, non-heterosexual students continue to face inequities in their education (Friend, 1993; Hershberger, Pilkington, & D'Augelli, 1997; Kosciw & Diaz, 2006; Macgillivray, 2000; Vare & Norton, 2004). Johnson (2004), Kozik-Rosabal (2000), and Macgillivray (2000) have found that the inequities that exist in the provision of an educational opportunity for non-heterosexual students can have serious consequences on their psychological wellbeing as well as their academic performance.

According to the *2005 National Student Climate Survey*, most non-heterosexual students encountered emotional and physical discrimination throughout their high school years (Kosciw & Diaz, 2006). According to Kosciw and Diaz (2006), many students encounter the use of emotionally injurious terms such as, "that's so gay" or "you're so gay." Of the students who participated in the national survey, 75% of students reported peers uttering such words as "faggot" and "dyke" and 38% and 26% of students reported that they had been victim to harassment as a result of their actual or perceived sexual orientation or gender identity, respectively. Seventeen percent and 12% of students surveyed reported being physically assaulted while attending school as a direct result of their actual or perceived

sexual orientation and gender expression, respectively. In 40% of the reported harassment and assaults, the researchers found that school personnel failed to curtail such incidences or acted with deliberate indifference.

The idea of non-heterosexual students surfacing as a population of concern came about through a "complex combination of academic and governmental research, experiences and reports of various agencies who have worked with youth, the experiences of those in organizations that serve the gay and lesbian community, and the voices of the youth themselves" (Micelli, 2005, pp. 19-20). Commencing in the late 1970s, schools across America experienced a generation of gay and lesbian students who refused to cower in their own private closets, resulting in new challenges for school boards and their administrators to establish learning environments not only conducive for the learning of the masses, but for the silent, typically invisible population of non-heterosexual children (Doppler, 2000). Many school leaders, policymakers, and individuals, cognizant to the plight of these students, established school-based programs to address the needs of the non-heterosexual population. According to Doppler (2000), these programs "moved through three stages of development: separation/segregation, counseling, and school safety" (p. 24).

Doppler (2000) and Micelli (2005) have both acknowledged that one of the first institutions within the separation/segregation stage to acknowledge the necessity to address the needs of non-heterosexual youth was the Hetrick-Martin Institute (HMI). The HMI, established in 1979 in the City of New York as a result of a sexual assault and eviction of a non-heterosexual boy in a city group home is the "oldest and largest organization helping gay, lesbian, bisexual, transgender, and questioning (LGBTQ) youth" (Hetrick-Martin Institute, 2009, ¶1). Since its beginnings, the goal of HMI was to ensure that all young people, regardless of sexual orientation or gender identity are afforded a safe and supportive environment in which to thrive. By 1985, the New York City Department of Education partnered with HMI to establish the Harvey Milk School. The school, named after the first openly gay elected official to the Board of Supervisors for the City of San Francisco, later assassinated because of his sexual orientation, "was established as an institutional reaction to the growing body of research on, and reported instances of, serious harassment faced by gay students and students perceived to be LGBT in schools in New York City and across the country" (Micelli, 2005, p. 20). Still in existence today, HMI plays a major part in researching, understanding and assisting

educational institutions curtail the prejudices encountered by non-heterosexual youth.

The Harvey Milk School, the flagship of HMI, continues to protect non-heterosexual students, providing them with an equitable opportunity to learn in what Doppler (2000) has referred to as a separation/segregation model. Although the school has faced attempts by politicians and community members to shut down the school based on that fact that the school segregates students (Hedlund, 2004), the Board of Education for the City of New York "...authorized a \$3.2 million expansion to triple the size of the student body ...and increase the physical size of the school (Ludwig, 2006, p. 514). As Ludwig (2006) stipulates "the Harvey Milk School is open to all students regardless of their sexual orientation and does not exclude students on that basis. ...Therefore, it should be easily safe from a constitutional challenge (p. 542).

One of the first institutions to adopt what Doppler referred to as the second stage of development, the counseling stage, to acknowledge the necessity to address the needs of non-heterosexual youth originated 3000 miles away from HMI. In 1984, Dr. Virginia Uribe, a school counselor working for the Los Angeles Unified School District, disheartened by the treatment of gay youth, initiated a support group for gay and lesbian high school students. The first program to offer in-school

counseling, emotional support, professional referrals, and educational information regarding issues surrounding sexual orientation, Dr. Uribe called the program Project 10, after the notable 1948 Alfred Kinsey Report which affirmed that 10 percent of the population is non-heterosexual. This endeavor became a nationally recognized in-school program for meeting the needs of non-heterosexual teenagers (Micelli, 2005; Uribe, 1994). Over the years, Doppler (2000) found that many other school districts around the country adopted Uribe's model and some communities expanded the available supports to include community outreach, to provide professional development for educators, to model non-discrimination policies, as well as to be centers for advocacy.

In 1989, the U.S. Department of Health conducted their first study on non-heterosexual youth. The outcome of the research, perhaps the most extreme and tragic findings to date regarding non-heterosexual youth, revealed that the number one cause of death among this population was self-inflicted (Marinoble, 1998). Marinoble (1998) also reported that the Health Department's findings indicated that non-heterosexual youth were two to three times more likely to attempt suicide when compared to their heterosexual counterparts.

In 1993, the Massachusetts Governor's Commission on Gay and Lesbian Youth published a report entitled, *Making Schools Safe*

*for Lesbian and Gay Youth*. The first state to embark on such a large scale study, found that 97% of secondary school students reported witnessing homophobic and derogatory comments being made toward actual or perceived non-heterosexual students during the school day. Of the students surveyed, 53% indicated that homophobic slurs were also made by the school faculty (Jennings, 1994; Russell, Seif & Truong, 2001).

As a result of the findings from the Massachusetts Governor's Commission on Gay and Lesbian Youth Report, the Massachusetts Department of Education, in collaboration with the Governor's Commission on Gay and Lesbian Youth, established the very first statewide effort to combat *homophobia* in the public schools of Massachusetts. The Safe Schools for Gay and Lesbian Students Program utilized what Doppler (2000) referred to as the third stage of development; the school safety stage. This stage was used to address the needs of non-heterosexuals by means of knowledge through understanding. Today GLSEN, founded by Kevin Jennings, the first school teacher to ever sponsor a GSA and presently President Obama's Safe and Drug Free Schools Czar, conducts annual research as to the climate of schools with regard to non-heterosexual youth. The *National Student Climate Survey*, last published in 2007, found that nearly 86.2 percent of non-heterosexual youth nationally continue to experience harassment at school (GLSEN, 2009).

In the present culture in the United States, many individuals view non-heterosexual youth as living an abnormal lifestyle (Swartley, 2003). Many religious groups view non-heterosexuals as blasphemous (Levy, 1993). Much of the negative attitudes towards these individuals are "...similar to that of 30 to 40 years ago for students of color, the poor, women, and students with disabilities, before educators began to create more supportive and inclusive environment for them" (Pohan & Bailey 1998, p. 52). Regardless of societal attitudes towards this population, the fact remains there are millions of non-heterosexual students in the United States and they are entitled to an equitable educational opportunity (Woog, 1995). In an attempt to seek an equitable educational opportunity, non-heterosexual students began to form organizations to support one another as well as to fight for their right to be heard in academia by the existing *heteronormative* ethos that surrounded them.

*Antecedents to Non-Heterosexual Organizations on High School Campuses*

It is not by chance that when children approach puberty and increased sexual awareness they begin to taunt each other ...It is at puberty that the full force of society's pressure to conform ...is brought to bear. Children know what we have taught them, and

we have given clear messages that those who deviate from standard expectations are to be made to get back in line. The best controlling tactic at puberty is to be treated as an outsider, to be ostracized at a time when it feels most vital to be accepted. ...It is at this time that their academic achievements begin to decrease... (Pharr, 1997, p. 17)

Even though GSA clubs first appeared within the secondary level, the idea of such organizations, prior to being referred to as a GSA club first appeared on college campuses in the decade prior (Dilley, 2002). Prior to the 1960s, conversations about non-heterosexual issues within the realm of education were absent or taboo (Tierney & Dilley, 1998). Following in the footsteps of the civil rights movement, the Vietnam protest of the 1960s, the hippie counterculture, and in the aftermath of the Stonewall riots in the summer of 1969, a climate had been created for social "unrest and possibility" (Cohen, 2005, p. 71). During this period, non-heterosexual college students began forming student organizations to affect social change (Cohen, 2005; Micelli, 2005). In the aftermath of the Stonewall riots in the City of New York, non-heterosexual college students "began to form student organizations and fight for their right to exist and to have a voice on their campuses" (Micelli, 2005, p. 16). In 1971 a New York Times article reported that at least 150 non-

heterosexual college organizations existed throughout the country and were rapidly growing in number (Reinhold, 1971). As more and more college campuses experienced the presence of non-heterosexual organizations, it was only a matter of time until such organizations reached American high schools (Tenney, 1995).

Although a precursor to the GSA clubs of present day, in 1972 a group of non-heterosexual students at George Washington High School in the Bronx borough of New York City formally organized the first school-based non-heterosexual group on record in the United States. The mission of the extracurricular group was to enact change within their school, making it a safer place for non-heterosexual students to learn (Johnson, 2007). Cohen (2005) has asserted that two other New York City high schools also established non-heterosexual organizations and more were being created in the early 1970s. As Johnson (2007) has stated, these "students utilized a definitively political orientation in their activism for participation in their school community ....where they could be free from both physical and psychological harm" (p 381). While their approach to advocate for themselves was more politically charged than the modern day GSA clubs, they are viewed as ancestors to the GSA clubs of present day (Cohen, 2005 & Johnson, 2007).

## The Evolution of Gay-Straight Alliance Organizations

The birth of the modern-day GSA clubs transpired at a private boarding school in Massachusetts called the Concord Academy (Jennings 2006; Micelli, 2005). According to Micelli (2005), a heterosexual female student of lesbian parents approached an openly gay teacher to inquire if he would help her initiate a student group to address the social conditions at the school negatively affecting the students at Concord Academy who were gay, lesbian, *bisexual*, *transgender*, and the straight students who supported them. Unlike the popular organizations Project 10 in Los Angeles, and the Harvey Milk School in New York, which were primarily support groups solely for the LGBT population, the heterosexual female student at the prestigious academy wanted to create an organization to change the social environment "of fear, intolerance, and discrimination of LGBT people in which all students existed" (Micelli, 2005, p. 27). The gay teacher of the female student at the time was Kevin Jennings. As previously mentioned, Mr. Jennings is the founder of GLSEN and President Obama's Safe and Drug Free School Czar (GLSEN, 2009; Micelli, 2005). As the student and Mr. Jennings were attempting to provide a name for the group, the student said, "I've got it. You're gay and I'm straight, so why don't we call it the gay-straight alliance" (Micelli, 2005, p. 27).

Concurrently, a neighboring private school, the Phillips Academy, was establishing their own gay-straight alliance; this time the teacher was straight and the student was gay. However, their premise was the same in "that lesbian and gay issues should be an interest to everyone, because they affect everyone. ...The alliance of straight people and gay people gave the groups greater legitimacy and influence with school administrators, faculty, and the community at large" (Micelli, 2005, p. 28). According to Micelli, notable individuals "...from the worlds of science, industry, literature, and politics, including George H. W. Bush, George Bush, and Jeb Bush, are alumni of the well endowed educational institution [that helped to establish Gay-Straight Alliance clubs in American public schools]" (p. 28).

The word about these clubs quickly spread outside the walls of the two private schools in Massachusetts and became of interest to students and some educators within the Massachusetts public school system. In the wake of the 1993, *Making Schools Safe for Lesbian and Gay Youth Report* and the Massachusetts Department of Education's Safe Schools for Gay and Lesbian Students Program, the first public school GSA club was organized at Newton South High School in Newton Centre, Massachusetts (Macgillivray, 2007). The cornerstone of the Safe Schools for Gay and Lesbian Students Program became the GSA clubs (Doppler,

2000). With the assistance of GLSEN, the number of GSA clubs in Massachusetts neared 200 by 1999 and spread throughout the country as students, non-heterosexual and heterosexual, sought out ways of making their schools safer (Doppler, 2000; Macgillivray, 2007).

The proliferation of GSA clubs throughout the country was primarily due to the need to advance the educational, social, and support networks available for non-heterosexual students and their allies. After leaving Concord Academy, Kevin Jennings went to New York to attend Columbia University, published a nationally known book entitled, *One Teacher in Ten* (1994), which addressed the number of non-heterosexual educators in the United States, and took the idea of the GSA club national. Mr. Jennings, initially forming the Gay Lesbian Straight Network, banded together many volunteers throughout the country, raised money from private donors and spread the word about his efforts to advance the educational, the social, and support networks within public education institutions. By 1990 the Gay Lesbian Straight Network became known as GLSEN. Word spread across the United States and from coast to coast many prominent individuals became supportive of the mission of GLSEN and the GSA club networks, including President Clinton, "the first president to openly embrace gay causes" (Jennings, 2006, p. 215). From coast to coast "...lesbian, gay, bisexual, and transgender ...students

[proclaimed] ...their identities ...demanding equal treatment from their schools" (Macgillivray, 2007, p. xiii).

However, at the same time, religious fundamentalists "were organizing themselves in opposition to what they perceived as a 'gay agenda' to 'promote homosexuality'" (Macgillivray, 2007, p. xiii). Opposition to non-heterosexual student groups grew concurrently and with the same fervor as the proponents of such educational efforts. In the winter of 1996 the two groups collided in the State of Utah and according to Jennings (2006) "...all hell broke loose ...once the East High Gay-Straight Alliance was announced" (p. 224). The Utah school board immediately attempted to prohibit the group from forming, "...only to be hoisted on their own, Mormon-made, petard" (Jennings, 2006, p. 224).

Ironically, Utah's U.S. Senator Orin Hatch, who championed the EAA a little more than a decade earlier, to ensure that student religious clubs could meet on school property, never contemplated that the very law the senator supported would be used, and in his own state no less, to promote the needs of non-heterosexual issues (Jennings, 2006). Gaining national attention, this case, and ultimately its eventual outcome, positioned the GSA clubs, as well as GLSEN, into the national spotlight.

Woodhouse (2009), in a recent law review asserted that GLSEN currently supports over 4,000 GSA clubs within the public schools throughout the United States, providing the support necessary to students around the country to create these youth empowering associations (GLSEN, 2009). Despite the judicial cases that have been heard in the federal courts within the last 12 years (as discussed in Chapter IV), the students organizing GSA clubs today have provided non-heterosexual and heterosexual students alike a newfound personal power; enabling them to face individual student differences, becoming more successful in their studies, and working to enhance the acceptance of non-heterosexual students within school systems (Conway & Crawford-Fisher, 2007). Even though educators have the primary responsibility to reduce the impediments that impede the learning of any student, non-heterosexual students have, with great fervor, have taken it upon themselves to deconstruct the notions of gender stereotypes. Conway and Crawford-Fisher (2007) believe that "queer theory, critical feminism, and critical humanism" is vital if non-heterosexuals in the educational milieu are to be heard (p. 128). Conway and Crawford-Fisher also have contemplated that "as education gives rise to the voice of marginalized students, it provides the critical backdrop for continued revolutionary change that brings about greater equality in schools" (p. 128).

Plummer (2005) contends that the modern GSA club provides the opportunity for non-heterosexual students to safely discuss topics that otherwise would not typically be able to be conveyed within the education milieu. Gay Straight Alliance clubs today are granted the forum to discuss topics such as critical humanism, providing "...the basis for growth and understanding of differences" (p. 361). Lee (2002) has conveyed that through student involvement by means of the GSA clubs students can acquire a sense of personal empowerment, gaining the understanding that they "...could be agents of change" able to make a difference in the world (p. 22). Today Conway and Crawford-Fisher (2007) maintains that GSA clubs provide the "...critical backdrop for continued revolutionary change that brings about greater equality in schools. ...Fostering the development of GSAs, schools can promote critical dialogue that confronts discrimination, thus balancing the scales of social justice" (p. 128).

As it has been the premise that GSA clubs assist to increase visibility of non-heterosexual students and address their issues while attending the public schools of the United States, recent evidence indicates that these organizations help make a difference in the climate of the school (Griffin, Lee, Waugh & Beyer, 2004; Micelli 2005; Russell, Muraco, Subramaniam, & Laub, 2009). As Lee (2002) emphasizes, when GSA clubs are

present in schools, non-heterosexual student members appear to have a better sense of belonging. Goodenow, Szalacha and Westheimer (2006) profess that students and school faculty where GSA clubs exist have reported that non-heterosexual students not only flourish, but that there are lower rates of victimization and suicide attempts among the population.

## CHAPTER IV

### An Analysis of Federal Cases Law Between School Officials and Students Wishing to Organize GSA Clubs in Public Schools (1998-2009)

Changes in educational policy and administrative leadership often occur as a result of systemic changes in the behavior and attitudes of the community at large (Mayberry, 2006). However, the research published since 1996 on non-heterosexual children, have emphasized that community attitudes have not been the impetus for such policy change, and that such change for the betterment of non-heterosexual students has been the result of litigation brought about by the students themselves (*Nabozny v. Podlesny*, 1996).

The failure on the part of school personnel to ameliorate the problems encountered by non-heterosexual students while attending school can have major implications for school districts (Essex, 2005; LaMorte, 1999). Since the 1996 U.S. Court of Appeals case *Nabozny v. Podlesny*, school policy decisions affecting non-heterosexual students have been the focus of a growing amount of judicial activity over the years. Such litigation has hinged on school personnel being party to the harassment and discrimination (*Flores v. Morgan Hill Unified School District*, 2003) or acting with deliberate indifference in curtailing the problem (*Davis v. Monroe County Board of Education*, 1999); religious and moral beliefs of school

personnel (*Colin v. Orange Unified School District*, 2000);  
flawed school policy (*Doe v. Brockton School Committee*, 2000);  
or ignorance of existing law and judicial precedent (*Board of  
Education of the Westside Community Schools v. Mergens*).

With the growing amount of litigation regarding non-heterosexual students that has taken place over the last decade, it would appear that judicial decisions have become the foundation for constructing schools that promote equity and welcome diversity (Buckel, 2000; Kosciw, 2004; Lamont, 2004).

#### Gay Straight Alliance Litigation

Almost 25 years after the enactment of the EAA, the judicial system has become a means of resolving conflicts between educational institutions and non-heterosexual students' seeking to organize clubs that public school system education leaders have found objectionable for a myriad of reasons (DeMitchell & Fossey, 2008). As early as 1996 students at Mauldin High School in Greenville, South Carolina; Smoky Hill High School in Aurora, Colorado; and West High School in Manchester, New Hampshire threatened their school boards with litigation if their GSA club applications were not approved. However, such a case did not reach the federal courts until late 1998 (Ritter, 2000). Beginning in 1998 and up to the conclusion of this study, 11 federal court cases, directly involving the intersection of GSA clubs and the EAA were heard by federal

district and appellate courts. To date, no case involving the intersection of GSA clubs and the EAA has been heard by the United States Supreme Court.

In this chapter, the following judicial cases will be analyzed using the legal research model developed by Perilli (1986):

1. *East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District* (1998-1999).
2. *East High School Prism Club v. Seidel* (2000).
3. *Colin v. Orange Unified School District* (2000).
4. *Franklin Central Gay/Straight Alliance v. Franklin Township Community School Corporation* (2002).
5. *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County* (2003).
6. *Caudillo v. Lubbock Independent School District* (2004).
7. *White County High School Peers Rising in Diverse Education (PRIDE) v. White County School District* (2006).
8. *Straights and Gays for Equality v. Osseo Area School* (2006).
9. *Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County* (2007).
10. *Gonzalez v. School Board of Okeechobee County* (2008).

11. *Gay-Straight Alliance of Yulee High School v. School Board of Nassau County (2009)*.

Perelli's model involves providing the facts of each case, developing a clear and concise statement of the legal issues, applying existing case law at the time the case was heard, summarizing the opinion of the court, and stating the major findings of the case.

Reiner (2006) has noted that while the Supreme Court sanctions school leaders having wide discretion to regulate student expression during the school day (*Bethel School District No. 403 v. Fraser*, 1986; *Hazelwood School District v. Kuhlmeier*, 1988), the Supreme Court has not bestowed upon educational leaders equivalent discretion to judge student expression when such expression is extracurricular and occurs beyond the confines of the school day (*Island Trees Union Free School District v. Pico*, 1982; *Widmar v. Vincent*, 1981). As long as school policy is unequally applied based on popularity or concern for what might occur, courts will continue to be called upon to act as referees in determining when monetary remedies are warranted for student-victims whose rights have been violated (Reiner, 2006).

*East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District (1998-1999)*

The first litigated case involving the EAA and a GSA club in the United States came before the District Court for the District of Utah, Central Division, in late November 1998 (*East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District*, 1998). The GSA at East High School, in Salt Lake City, Utah, was represented by students Ivy Fox, Keysha Barnes, and Leah Farrel, by and through their parents, who filed suit for *injunctive relief* in federal court against the Board of Education of the Salt Lake City School District for violations of their rights under the EAA. Their assertion was that the school board's policy was not equally applied and that the school board did in fact support clubs that were non-curricular as defined by the EAA and interpreted by the Supreme Court in *Mergens* (1990); hence the prohibition to promote non-heterosexual awareness, acceptance, and equal rights within the school violated student rights under said Act.

In claiming that a limited open forum within the meaning of the EAA existed, the students asserted "...that the Future Business Leaders of America..., the National Honor Society..., and the Improvement Council at East (ICE)..." were non-curriculum related student clubs; triggering EAA compliance (pp. 1359-1340).

Representatives for the school board argued before the court that the school district did not have a limited open forum as delineated in school board policy and within the meaning of the EAA, and any existing club at the high school was considered curriculum-related. Therefore, the students cannot establish an explicit right to injunctive relief under the EAA. In particular, school board personnel asserted that the students could not show a likelihood of success on the merits based upon their claim that non-curriculum related student groups existed as defined by the EAA. In addition, school district personnel claimed that such an injunction would undermine the school district's ability to "implement and enforce the district's closed forum policy," rendering them unable to serve "the public interest" (p. 1357).

The district court, concluding that a club determined to be directly related to a class under Mergens [1990] "...need not be identical to a class" [and] if at least part of a club's activities enhance, extend, or reinforce the specific subject matter of a class in some meaningful way, then the relationship between club and class is more than tangential. Where that is not the case, club and class have 'meaningfully diverged,' and the club may be 'non-curricular' under §4071(b)" of the EAA (pp. 1359-1360).

Cognizant that Mergens (1990) defined non-curriculum related student activities by a "school's actual practice rather than its stated policy" (p. 1360), the district court reviewed the premise of two of the three clubs currently in existence: the Future Business Leaders of America and the National Honor Society. In light of these two clubs, the court found that the students had failed to prove they would be successful on the merits of their claim that the Future Business Leaders of America and the National Honor Society created a limited open forum under §4071(b) of the EAA. The reason that the court failed to consider the ICE, which the students contended was a community service club, was due to the fact that the ICE had not yet been approved as a student group by the school, and as such the club "cannot serve as a basis for any finding of a limited open forum under §4071(b) [of the EAA] for purposes of preliminary prospective relief" (p. 1364).

Although the burden of demonstrating a showing that a student group is directly related to the curriculum rests upon the school board (*Pope v. East Brunswick Board of Education*, 1993), the students (as plaintiffs) bear the burden of showing a likelihood of success on the merits for a *preliminary injunction* to be granted (*Cannon v. Brown*, 1992). For this reason, the students initially failed to prevail because they fell short of showing that any non-curricular groups indeed existed at the

school. However, during the subsequent trial, which commenced in 1999, the court uncovered that a non-curricula group did indeed exist within the school district (*East High Gay/Straight Alliance v. Board of Education*, 1999).

Since early 1996, the Salt Lake City School Board had a policy that limited the parameters in which students may form extracurricular clubs. Specifically, the policy stipulated that only student groups or clubs that are directly related to the curriculum may "...organize or meet on school district property" (p. 1168). With the passage of the EAA in 1984 and the Supreme Court *Mergens* (1990) case, many school boards reevaluated their existing policies on the subject matter in an attempt to predict the impact the EAA would have on their schools. In 1996, the Board of Education of Salt Lake City School District decided not to permit a limited open forum as defined by the EAA, thus restricting school facility access to only curriculum-related student groups. Although the Salt Lake City School Board's 1996 decision appeared to be a direct result of preventing non-heterosexual groups from forming, school boards are permitted to set limitations on a group's subject matter when the reasons for doing so serve a reasonable school purpose and there exists no clear evidence that the board's intention was aimed at preventing the formation of unpopular groups (Byard, 1997).

In hearing the case the district court, relying solely on the students' statutory claim under the EAA, commenced with addressing the argument. Although the court stated that school boards are not exempt from the First Amendment, which limits conduct that seeks to "...control or restrict the content of human expression, or to favor or condemn a particular opinion or point of view..." the district court chose not to address the First Amendment issue as part of this suit (pp. 1169-1170), However, in *East High School Prism Club v. Seidel* (2000) this very issue was addressed.

Whether or not an unwritten policy existed at East High School prohibiting non-heterosexual students from expressing their viewpoint through a non-curriculum related club, the district court in *East High Gay/Straight Alliance v. Board of Education* (1999) stated that "Congress [in enacting the EAA] re-emphasized the importance of governmental neutrality in any public secondary school forum whose permissible subject matter embraces matters non-curricular in nature" (p. 1173). If it is the desire of a public school "...to avoid the issues of free access by student groups that may arise under the EAA," the school "...must avoid creating a 'limited open forum'" (p. 1173).

Although the school leaders claimed that existing school policy prohibited a limited open forum, the students' equal

access argument lay with the subject matter of the existing groups within the school district. The court needed to determine if all the extracurricular groups at the high schools in the district were "curriculum-related within the meaning of the Equal Access Act" (p. 1173). If one non-curriculum group existed within the district, the non-heterosexual students' claim would be validated. The district court, applying the Supreme Court standard arising out of *Mergens* (1990) viewed each of the five school-sponsored groups in question in light of:

a) whether the subject matter of the group is actually taught or will be taught in a regularly offered course; b) whether the subject matter of the group concerns the body of courses as a whole; c) whether the participation in the group is required for a particular course; or d) whether the participation in the group results in academic credit (*Board of Education of Westside Community Schools v. Mergens*, 1990, pp. 226-227).

In summarizing whether each group in question withstood the above litmus test in determining curriculum-related status, the court, citing *Pope v. East Brunswick Board of Education* (1993), placed the burden of proof on the school board for demonstrating that existing groups are directly related to the curriculum. In hearing the arguments from both parties, the court concluded

that the following four groups were curriculum-related: National Honor Society; Future Business Leaders of America; Future Homemakers of America; and Odyssey of the Mind. However, the ICE was determined to be a non-curriculum student group within the meaning of the EAA, consequently creating a limited open forum, triggering "the Act's guarantees of access by non-curricular student groups" (p. 1180).

The district court in finding at least one group in operation for any amount of time since the inception of the school board's 1996 policy found merit to the students' claim of a violation of the EAA. However, according to DeMitchell and Fossey (2008), "...the victory for the GSA was largely symbolic. Soon after the lawsuit was initiated the school district integrated ICE into the curriculum, thereby shutting down its limited open forum" (p. 99).

Rather than changing their policy to permit a GSA to organize on school property, the Salt Lake City School District once again attempted to eliminate student availability to the EAA by maintaining a closed forum, allowing only, through a strict review process, curriculum-related groups to exist on campus. "However, the controversy about recognition of a student group devoted to gay and lesbian students did not end when the Salt Lake City School District closed its limited open forum" (DeMitchell & Fossey, 2008, p. 99).

*East High School Prism Club v. Seidel (2000)*

In 2000, the Salt Lake City School Board once again found themselves in federal litigation defending the same school policy. This time, Jessica Cohen, Margaret Hinckley, and their peers represented collectively as the East High School People Recognizing Important Social Movements (PRISM) club filed suit in the District Court for the District of Utah, Central Division; this time claiming violations of their First Amendment rights as a result of school personnel denying their petition to form a curriculum-related club.

As a direct response to the recent decision in *East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District* (1999) the PRISM club, aware of the school's limited forum policy, circumventing the requirements of the EAA formed a curriculum-related club. The club's premise was to broaden and augment the school's American history and government classes currently being taught. The PRISM club desired to cover the following topics: "democracy, civil rights, equality, discrimination and diversity" (p. 1242). All the aforementioned topics were already being taught at East High School. It was the goal of the PRISM club for students to "gain hands-on experience in applying the concepts and skills taught in those courses" (p. 1243).

The sole issue heard by the district court was whether the school district equally applied their existing school policy governing access to the limited forum in its denial of PRISM club's application. Although judicial decisions should not "divest local school districts of their power to shape the educational environment of their schools," the courts are bound to act and cannot yield their "duty to uphold the Constitution (p. 1251).

The school district's policy governing curriculum-related clubs hinged on the Supreme Court's definition of what is means to be "directly related to the curriculum" (*Board of Education of Westside Community Schools v. Mergens* (1990)). In addition to the 1996 school board policy, a memorandum was disseminated to school administrators specifically defining the context for meeting the "directly related to the curriculum" standard (p. 1241). In part, the memorandum stated that a student club is curriculum related if: "...the subject matter of the group is actually taught or soon will be taught in a regular course; ...the subject matter of the group concerns the body of courses as a whole; ...participation in the group is required for a particular course, or results in academic credit (p. 1241). The actual activities of the club must also be related to the curriculum.

In their application, the students sponsoring the PRISM club stated that the club's charter "...will serve as a prism through which historical and current events, institutions and culture can be viewed in terms of the impact, experience and contributions of gays and lesbians" (p. 1242). PRISM representatives also made it explicitly clear that the club "is not about 'advocating homosexuality,' promoting a partisan platform, or discussing sexual behavior" (p. 1242). Finally, the students' application indicated that club activities would include "letter writing to public officials, keeping up and debating current events, tutoring, guest speakers, field trips, reviewing historical events, reports on influential GLBT persons ...[and] group discussions" (p. 1243).

School administrators in denying the PRISM club's application justified that the reason for the denial was that the curriculum related subject matter of the club narrowed the historical and current events topics to be discussed too far, thus limiting "the impact, experience, and contributions to that of 'non-heterosexual individuals' perspectives, and as such, constitutes content not taught at the school" (p. 1243). With the district's stance that the denial was due to the club's narrow focus of the curriculum taught at the school, the court looked to the standard applied by the district in making that determination. Referencing *Rosenberger v. Rector and Visitors of*

*University of Virginia* (1995) in pronouncing that "it is imperative that the school respect the lawful boundaries it has itself set by communicating coherent standards in some way to potential speakers and consistently and fairly applying its club approval standards" (p. 1244), the district court moved to examine the consistency of the application of the policy through an examination of existing club's applications.

Finding that the subject matter of the PRISM club was actually taught in a course offered by the school, the court moved to determine what school administrators meant by their implied "no narrowing rule" (p. 1246). After deposing school officials, the court understood the rule to reference a club's viewpoint. Unclear if such a rule even made sense, the court concluded that, all

clubs are, in a sense, viewpoint exclusive: French clubs are 'viewed' from the perspective of French-speaking students; science clubs are 'viewed' from the perspective of science-oriented students; all student clubs are 'viewed' from the perspective of Utah high school students" (p. 1246).

Nevertheless, the court examined whether the school board's implicit policy rule at issue was consistently applied since its enactment.

With no explicit evidence that a no narrowing rule existed, along with school administrators inconsistent application of their implied no narrowing rule, the court found that the school board and its agents failed to "respect the lawful boundaries it has itself set" (p. 1251). The court issued an injunction, ordering the school district to allow the PRISM club access to school facilities.

While the district court recognized the school administrators' argument that their "...power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults... the district court stated that their affirmation of this point does not abdicate students' rights within the schoolhouse" (p. 1244).

A spokesman for the ACLU of Utah pointed out that the school board's gambit had completely backfired: [after a six-year battle] not only were taxpayers out a quarter of a million bucks, but all the publicity helped launch nine Gay/Straight Alliance groups in the state (Gay and Lesbian Review Worldwide, 2002, ¶1).

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

Following the recent murder of Matthew Shepherd, a young man from Wyoming who was killed due to his non-heterosexual status, Anthony Colin and Shannon MacMillan resolved to organize a GSA at El Modena High School, located in Orange, California.

At the commencement of the 1999-2000 school year, the two high school students decided to "form the club to promote acceptance among and for gay and straight students at the school" (p. 1138). In accordance with school board policy, the two students submitted a club charter to the school administration during the first week of school. The students' application stated that the purpose of the GSA club was to facilitate "...interest in a supportive community amongst our peers..." (p. 1138). Following the submission for a club charter, Anthony Colin and Shannon MacMillan, on behalf of the GSA club, submitted to the school a mission statement for the club. It stated that:

Public schools have an obligation to provide an equal opportunity for all students to receive an education in a safe, nonhostile, nondiscriminatory environment. Our goal in this organization is to raise public awareness and promote tolerance by providing a safe forum for discussion of issues related to sexual orientation and homophobia. We wish to stress the need for people to put aside their personal prejudice and agree to treat everyone with respect when the situation calls for it. We invite ALL students, gay or straight, to join us in discussions, field trips, lectures, and social activities that will counterattack unfair treatment and prejudice. We

respect privacy and require NO one to make disclosures regarding his or her own sexual orientation. This is not a sexual issue, it is about gaining support and promoting tolerance and respect for all students (p. 1138).

In reviewing the application and supporting documents Principal Murray immediately forwarded the documents to Assistant Superintendent McKinnon, instead of making the decision to approve or reject the application; an action which was typically charged to the school principal. Principal Murray's decision to forward the request stemmed from a conversation she had with Assistant Superintendent McKinnon in 1998 in which McKinnon instructed Murray "to keep him informed of the formation of any gay-straight alliance-type group. She was told the Board may want to make a decision on the application, contrary to its custom of leaving the decision to the administration" (p. 1138-1139). Assistant Superintendent McKinnon then forwarded the application to Superintendent Van Otterloo, who in turn presented it directly to the school board.

The Orange County School Board made the decision to delay action on the GSA application, resulting in the GSA student organizers missing several school functions available to officially recognized student groups.

Weeks before the public forum, Principal Murray informed Colin that the name of his club was inappropriate and suggested alternate names such as the 'Tolerance Club,' the 'Acceptance Club,' or the 'Alliance'. ...No other club at El Modena has been approached by the Principal or the Board with suggestions to change the name that they chose for their club (p. 1139).

Following several delays by the school board to discuss the matter of the GSA club, the school board sponsored a public forum to hear arguments from both supporters and opponents. At the conclusion of the meeting the board unanimously voted to deny the students' application to organize the GSA club. The board's primary reason for the denial was that they regarded discussions of sexuality inappropriate. Although the sponsors of the GSA conveyed to the school board that the club's premise was not to discuss sexual issues, the board was not swayed.

In December 1999, the Orange Unified School Board unanimously denied the students' application to organize a GSA club at El Modena High School based on their perception that the club was inappropriate and a "sexually charged club" (p. 1139). The school board's decision was publicly announced and became a forum for opponents to picket outside of school grounds (Ritter, 2000). The school board claimed that the decision to deny the

club's petition for official status as a non-curriculum club was for the following reasons:

(1) the proposed GSA has a subject matter related to sexual conduct and sexuality; (2) the District and El Modena High School offer courses that address sex, sexual conduct, sexual abstinence, and sexual transmission of diseases; (3) the State of California in the Education Code imposes strict requirements on how, when and by whom sex education and related courses are taught; and (4) the Board should consider that unrestricted, unsupervised student led discussion of sexual topics is age inappropriate and is likely to interfere with the legitimate educational concerns of the District in this sensitive area of sex education (pp. 1139-1140).

Soon after being denied the right to organize the GSA club on campus and following an ill-fated attempt by Principal Murray to convince the students to reconfigure their entire organization down to even changing the name of their club, the students, through their parents, filed suit in federal court for the Central District of California against the school district, school board, and school administrators claiming violations of their rights under the EAA and the Fourteenth Amendment. While the burden fell upon the Anthony Colin and Shannon MacMillan to

show that they were entitled to a preliminary injunction, the two students "presented a considerable amount of evidence to show that Defendants [school board] denied them access to the 'limited open forum' based on the content of the proposed speech..." at GSA club meetings (p. 1148).

First, the students established, without rebuttal, that a limited open forum existed at El Modena High and that the GSA was indeed a non-curriculum related student group. Although the school board did not argue the non-curriculum status of the GSA, they alleged that the EAA was not applicable because the GSA was related to the required state curriculum, in that it addressed issues on human sexuality, sexual behavior and prevention of sexually transmitted diseases within the following classes: Health; Biology; and Life Science. However, the district court was not convinced of the board's claim as they found no tangible link between the curriculum and the mission of the GSA. In fact, the court stated that the GSA club "...seeks to end discrimination on the basis of sexual orientation [and therefore is] ...consistent with state public policy and in the public interest (p.1151). Second, the students successfully contested the school board's argument that the GSA is controlled by non-students merely due to the fact that GLSEN sanctions the use of the name: Gay Straight Alliance. Finally, the students successfully defended the fact that although the school board

conditionally denied the GSA application due to its name and mission statement, the application would have never been approved.

Stipulating that the condition to make such changes in the first place would violate the spirit of the EAA, and the fact that there is little reason "to believe that any club dealing with homophobia and discrimination based on sexual orientation [within the school district] would have been approved no matter what the title and the mission statement said" (p. 1149), the court granted the students their motion for preliminary injunction. It was the sentiments of the district court that "Congress passed an 'Equal Access Act' ...not ...an 'Access for All Students Except Gay Students Act' because to do so would be unconstitutional" (p. 1142). El Modena High School a

...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. ...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..., but [it] 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 (Mawdsley, 2001, pp. 27-28).

*Franklin Central Gay/Straight Alliance v. Franklin Township Community School Corporation (2002)*

Shortly after the commencement of the 2001-2002 school year at Franklin Central High School located in Indianapolis, Indiana, senior Amy Obermeyer decided to organize a GSA club in an effort to help create a gay-friendly climate at her school. However, her idea was initially thwarted by Franklin Central High School Principal Koers. In March, 2002, Ms. Obermeyer, by and through her parents, filed suit in federal court for the Southern District of Indiana, Indianapolis Division, seeking "*Declaratory and Injunctive Relief*" to compel Franklin Central High School to recognize the existence of the GSA club, entitling them to meet on the "same basis as other school clubs during the school day" (p. 1). Ms. Obermeyer's claim was that the school board violated her rights under the EAA as well as her free speech and free association rights. Later that month, Franklin Township Community School Corporation responded with its own cross-motion for *summary judgment*. On August 29, 2002, the district court ruled in favor of Ms. Obermeyer on behalf of the GSA club. The court found that the school board directly violated the EAA, as a limited open forum existed and the school

board was arbitrary and capricious in the decision not to recognize the Franklin Central High School GSA as a school sponsored club. The district court instructed the school administration at Franklin Central High School "to immediately instate the GSA as an official [sic] school club for the upcoming school year, 2002-2003, with all the rights and privileges of any other officially approved club..." (p. 2).

In an interesting turn of events, following the August 29, 2002 court decision, the school district subsequently filed a motion with the district court claiming that the court's decision was moot as Ms. Obermeyer had since graduated from the school, thus "no longer has an interest in forming a GSA club" (p. 2). The school board and its administrators further asserted that as "it does not appear that the GSA currently exists independent of Ms. Obermeyer's involvement..." the GSA had no legal standing to sue (p. 2). The court, in entertaining these questions arrived at the following:

First, even though the district court, recognized that the timing of its decision to grant injunctive relief to the GSA on did not have any realistic affect on Ms. Obermeyer, the court did not consider Ms. Obermeyer to be the only affected student in the case. The school board's argument that there was no longer a *live controversy*, making the court's decision moot, was not persuasive. Although the school board attempted to claim

that no other interested parties in the case existed, the court did not entertain this assertion, partly due to the fact that the school board did not assert this claim during the original hearing.

Second, according to the court, the GSA club, an unincorporated entity, had the legal standing necessary to sue the district based on the *Federal Rules of Civil Procedure*, which states that, "a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws" (Federal Rules of Civil Procedure, Rule 17(b)(3)(A)). As the EAA was the existing law at issue, the unincorporated association possessed legal standing to sue.

Finally the last point asserted by the school board, was that the GSA club no longer existed "...as evidenced by the fact that the GSA club did not fill out a club form or make an attempt to be represented at the school's annual club fair in September of 2002" (pp. 8-9). This assertion implies "that the only logical explanation must be that the GSA club no longer exists and no longer has any interest in meeting" (p. 9). However, Ms. Obermeyer's brother, a Franklin Central High School sophomore, provided testimony that he was also a founding member and that there were at least six other students that were part

of the unincorporated GSA club. He also asserted that had he known about the district court's decision in time to make application to the respective administrators, in order to be represented at the school's annual club fair in September of 2002, he would have. The district court conceived of at least two reasons why the students might not have applied for club status at the beginning of the 2002-2003 school year.

...The first is that the GSA believed that FCHS had already denied them the right to meet as a student club. Therefore, the GSA had no reason to believe that its club application would be successful, until it learned of the Court's Order. By that time, it was too late to respond to the school's request for club applications for the 2002-2003 school year. The second is that the GSA may have had difficulty finding a faculty sponsor for the 2002-2003 year. Neither of these reasons suggests that the GSA had ceased to exist prior to the Court's issuing of its Order on August 29, 2002. To the contrary, the uncontradicted testimony of D. Obermeyer shows that the GSA still exists and still has legal standing to sue and be sued (pp. 9-10).

In conclusion, the district court denied the school board's petition that the case was moot. Although the court did

stipulate that the GSA club did not possess "an automatic right to meet during the club period, just because it... [had] legal standing" (p. 10), the federal court for the Southern District of Indiana, Indianapolis Division, "directed that the GSA should be 'instated' with all the rights and privileges of any other officially approved club..." (p. 10). The Franklin Township School Board was instructed by the district court that they are barred from "...imposing any other obstacles to the GSA's right to participate in the student club forum that did not exist at the time of the GSA's original application for official student club status in August of 2001" (p. 11).

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

Soon after returning from Christmas break in 2002, seven students attending Boyd County High School (BCHS) in the State of Kentucky circulated a petition to create a GSA club at the school. The purpose of the group was to provide all BCHS students with a safe place to address issues surrounding anti-gay harassment and to work together to facilitate the understanding and acceptance of individual differences, regardless of sexual orientation or gender identity. In light of the present anti-gay harassment and use of anti-gay epithets occurring at the school on a daily basis, resulting in at least one student dropping out of school, the student group, known as

the Boyd County High School Gay Straight Alliance, applied for recognition as a non-curriculum club under the EAA. The policy at the high school for such clubs to organize required the sponsors to apply to the "Site-Based Decision Making Council ...for official recognition. The council consisted of six members: three teachers, two parents, and Principal Johnson" (p. 672).

In the spring of 2002, Principal Johnson discussed the petition with members of the counsel and his staff. In conversation with his staff, Principal Johnson discussed that fact that the students were aware of their rights to form such a group on campus and that to reject such could mean a legal battle. At the time "Principal Johnson's only concern ...was the need to approve the GSA Club in order to prevent a lawsuit against the School District" (p. 671). The school superintendent, in conversing with Principal Johnson, agreed that permitting the GSA club to meet "was the right thing to do for all students and that the School District needed the students to follow through with starting the GSA Club at BCHS" (p. 671).

However, once word got around the school about the impending establishment of the GSA club, problems started to arise within the school community. Students who were adamantly opposed to the formation of such a club commenced with

derogatory comments about the group, the sponsoring students, and the topic of *homosexuality* in general. On at least one occasion, opposing students adorned attire that said, "'Adam and Eve, not Adam and Steve' or 'I'm straight'" (p. 671).

Around early March 2002, the high school's "Diversity Awareness Council ...a special advisory group on diversity and equity issues..." met to discuss the pervasive harassment towards non-heterosexuals and the safety concerns of all students involved (p. 671). During these meetings it was suggested that perhaps the students sponsoring the GSA change the club's name, but the supporters of the GSA adamantly opposed the idea. One of the students sponsoring the GSA commented that "...if we were to exclude the word 'gay' from the name, then that would be a very defeatist thing to do" (p. 671). The very issue of the GSA club at Boyd County High School was to promote tolerance and acceptance of students who are or perceived to be non-heterosexual. Honoring Principal Johnson's request to wait a month before applying for club status, the students representing the GSA club submitted a formal application in March 2002. Claiming that the application was submitted too late in the school year, the Site-Based Decision Making Council denied their application.

In September 2002, the students sponsoring the GSA once again applied for club status in accordance with school policy.

During the approving council's first meeting all club applications with the exception of one were approved. The GSA club application was the only application, submitted on-time that was not approved. Among the clubs approved were organizations such as the Human Rights Club, Future Business Leaders of America, and the Fellowship of Christian Athletes; clearly non-curricula clubs. Following the denial of the GSA club application, the affected students contacted the American Civil Liberties Union who contacted the school council, on behalf of the GSA club, and informed them of the requirements under the EAA. On October 28, 2002, the school council approved the GSA club's application. Following the approval of the application, the reaction from GSA club opponents was quite hostile. During this time, Principal Johnson became fearful that someone was going to get hurt. School board members were also very concerned for the safety of everyone within the school building.

In response to the hostility demonstrated at the October meeting, the Site-Based Decision Making Council sent out a letter to all parents explaining the EAA and the school requirements under the Act. The council explained in the letter that "...it was doing the right thing based on the law and in light of the hostile environment in the school" (p. 673). However, the letter did not deter students from congregating

outside the school in the morning to protest the school's decision to approve the GSA club. Protesters shouted at students as they walked passed, "If you go inside, you're supporting the GSA. ...'If you go inside, you're supporting faggots'" (p. 674). At no time were students prevented from entering the school and classes proceeded as scheduled without disruption.

On November 4, 2002, one-half of the student body at the high school decided to boycott classes in protest of the administration's decision to permit the GSA club, however, classroom activities were not prevented, teachers were able to teach, and the students who came to school to learn were not prevented from doing so. About a week later the GSA faculty advisor's car was vandalized and she received threatening letters from students, but the harassment did not "disrupt classroom activities, prevent her from teaching or prevent students from learning" (p. 674). As the weeks progressed, some members of the community became more and more vocal, threatening to remove their children from the school. Nevertheless, no documentation existed that "a single student was taken out of the school district because the GSA Club was formally recognized" (p. 675).

By December 16, 2002, only one documented instance of classroom disruption caused by a GSA club member or supporter occurred. It involved an "incident where a student left a

particular classroom because of supposed pressure from GSA supporters" (p. 675). However, Superintendent Capehart proposed to the Site-Based Decision Making Council that the high schools ban all non-curricular clubs for the remainder of the school year. On or about December 17, 2002, Superintendent Capehart's proposal to ban all non-curricular clubs was rejected by the council. However, on December 20, 2002, the school board

held an emergency meeting and voted unanimously to suspend all clubs, both curricular and noncurricular, at BCHS for the remainder of the school year, effective immediately until July 1, 2003. [The school board's] ...decision to ban all clubs at BCHS was motivated by a desire, in part, to stop the disruption surrounding the existence of the GSA Club at BCHS (p. 675).

The disruptions that Superintendent Capehart referred to were the result of hostility on the part of the "...opponents of the GSA rather than by supporters of the GSA" (pp. 675-676). The surrounding school community was at the center of the disruption.

Despite the December 2002 school board meeting suspending all non-curriculum clubs, the high school administration permitted and continued to permit many student groups to meet

and to hand out flyers or make announcements outside of the normal school hours. However, the GSA club had been prevented from holding one meeting at school, prevented from making one announcement over the intercom, or posting even one notice about the GSA club in the school newspaper. As a result, the students and their parents on behalf of the GSA club, filed suit in early January 2003 for a preliminary injunction in the District Court for the Eastern District of Kentucky, Ashland Division. By denying the GSA club the same access to school facilities that other groups within the school were afforded, "including use of the school hallways and bulletin boards for posters and ...the intercom to make club announcements..." the students asserted that the school board and their administrators violated their rights under the EAA and the First Amendment. (p. 669).

During the judicial hearings, the district court addressed two claims made by the school board in its defense. First, the board asserted that it had closed its limited open forum in December 2002. As a result, no non-curriculum related groups were able to meet, to make use of the school hallways or bulletin boards, or to make use of the intercom. Second, the school administration alleged that they were within their right to deny the GSA from organizing in accordance with §§4071(c)(4) and 4071(f) of the EAA, as the GSA would substantially interfere with the orderly conduct of the school and would limit the

school administration's ability to maintain order and discipline.

In addressing the school board's first claim, the district court concluded that school administrators failed to demonstrate that they closed the limited open forum with their December 20, 2002 action, permitting, perhaps unofficially, numerous non-curriculum student groups' use of the public address system and the school newspaper paper. Accordingly, the court found that the school indeed maintained a limited open forum as defined by §4071(b) of the EAA.

In addressing the school board's second claim, the court determined that although §§4071(c)(4) and 4071(f) of the EAA permitted school administrators to limit student speech in order to ensure proper discipline and orderly conduct, the court did not arrive at the conclusion that such an action was warranted. "Other than one incident ...there have been no documented instances of disruptions caused by GSA members or GSA supporters. ...Additionally, there was no evidence presented during the hearing that either GSA members or GSA Club meetings were disruptive" (p. 691). The court, citing the Supreme Court decisions in *Tinker* (1969) and *Terminiello* (1949) stipulated that regardless of the aforementioned provisions in the EAA, school personnel cannot lawfully suppress speech the community,

school personnel, or the parents, find to be politically unpopular.

In conclusion, the district court granted the GSA club's motion for a preliminary injunction and ordered the school board to provide the GSA club equal access to those activities that other non-curriculum student groups were afforded, officially or not. Although the district court found that the school board violated the EAA, the court did not address the First Amendment claim. As the tenets of the EAA was established on First Amendment principles, if the court did address the First Amendment claim it would have also found that the school board likely violated such (Whittaker, 2009). Whittaker's (2009) aforementioned statement was predicated on the fact that

any potential disruption ...from those opposed to gay-friendly groups ...does not justify violations of the First Amendment. Determining whether potential counter-speech would be disruptive ought to be 'entirely divorced from actually or potentially disruptive conduct by those participating in it.' GSA meetings or GSA members themselves were not sufficiently disruptive to justify their exclusion (p. 53).

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

At the beginning of the 2002-2003 school year, Rene Caudillo and Ricky Waite, seniors at Lubbock High School (LHS) located in Lubbock, Texas sought permission to form a non-curriculum club called: Gay and Proud Youth Group. The two students had already established a website for their impending club. In an effort to be recognized by LHS the two students sought out the assistance of Mr. Schottland, a faculty member at the school. On or about September 9, 2002, Mr. Schottland wrote a letter, on behalf of the students, to the Assistant Superintendent, seeking permission for the Gay and Proud Youth group to advertise their new club by posting notices at the high school in accordance with the school board's policy regarding non-curriculum student related clubs. A few days later, students Rene Caudillo and Ricky Waite wrote to Mr. Grimes, a school board member asking for permission to advertise their group by the posting of fliers and using the public address system within the LHS facilities. On September 20, 2002, Caudillo and Waite, along with some of their relatives, met with the assistant superintendent and presented him with the reasons for the formation of the group and their request to make use of the school facilities in the same fashion as other non-curriculum student related clubs in existence at the high school.

Following the passing of almost two months without a response from the assistant superintendent, the two students submitted a formal written request to the Lubbock Independent School Board asking to be placed on the November 14, 2002 school board agenda in order for their application to be considered. The students' letter stated, in part, the following goals of the club:

Provide guidance to youth who come to us to the best of our ability...; Educate those willing about non-heterosexuals; Improve the relationship between heterosexuals and homosexuals; Help the community; Increase rights given to non-heterosexuals; Educate willing youth about safe sex, AIDS, hatred, etc.; and Enhance the relationship between youth and their families (p. 556).

Although the school board placed the request of the students desiring the formation of the club on the agenda for the upcoming November meeting, the Lubbock Independent School District Board of Trustees took no action on the students' petition. Just prior to the Christmas recess, Mr. Schottland, on behalf of the students, wrote the board president expressing his concern with the lack of a decision. Ricky Waite, one of the club's founders, concurrently submitted a request to LHS Principal Vogler and Assistant Superintendent Hardin to allow

the club to meet on campus. Both administrators subsequently denied the student's request. Sometime in the spring of 2003 the two founding students changed the name of their proposed club from Gay and Proud Youth to Lubbock Gay-Straight Alliance. Soon after the end of the school year, and after months of no progress in getting club's charter approved, the two students, by and through their parents, on behalf of their unincorporated association, the Lubbock GSA club, filed suit in the District Court for the Northern District of Texas, Lubbock Division, alleging violations of the EAA and the First Amendment.

In hearing the case, the District Court for the Northern District of Texas, Lubbock Division, was presented with an issue of first impression, as no case directly on point in its jurisdiction or the circuit in which the court resides had heard a similar case. Even though the students in this case cited all the existing cases decided before other federal jurisdictions prior to this case, the Lubbock district court believed that this particular case was distinguishable from existing cases as no previous case "involved a school that maintained an abstinence-only policy and banned any discussion of sexual activity on its campuses" (p. 559). Second, the district court in this case believed that no other case had specifically invoked the "well-being exception" to the EAA (p. 559). The well-being exception, contained within §4071(7) of the EAA

states, in part that, "Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to ...protect the well-being of students...". Third, no relevant case prior involved the promotion of the club through the school's public address system. Fourth, unlike any other GSA case before this one, the Lubbock GSA club's existing website contained links to sexually explicit material.

In March 2004, the District Court for the Northern District of Texas, Lubbock Division, became the first federal court to find in favor of the school district (defendants) when confronted with a GSA club and its members' rights under the EAA. In the judicial ruling, the court determined that the school district satisfied the specific requirements under §4071(c)(4) and §4071(f) of the EAA, showing a likelihood that they would succeed on the merits of demonstrating that the GSA club would substantially interfere with the orderly conduct of educational activities within the school and would hinder the school board's ability to maintain law and order on school premises and protect the well-being of students. The following key points were considered by the court:

First, as referenced in Mergens (1990), "schools and school districts maintain their 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 [EAA]...obligations, that result is not prohibited by the Act" (*Board of Education of the Westside Community Schools v. Mergens*, 1990, p. 241). The Lubbock Independent School District chose to implement an abstinence-only curriculum prior to the application of the GSA. As the GSA club stipulated, it would discuss topics such as safe sex and its existing website was linked to sexually explicit material, its goals clearly conflicted with the district's curriculum and accompanying policies. As stated in *Kuhlmeier* (1988), the Supreme Court noted that a "school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school" (p. 562).

Second, stemming from the Fifth Circuit Court of Appeals decision, *Shanley v. Northeast Independent School District* (1972), conduct by high school students can be prohibited when the facts would reasonably lead school authorities to forecast that such conduct would substantially disrupt the work of the school. The district court, applying the "screening regulation" argument, derived from the aforementioned case, ruled that the Lubbock GSA club was likely to hinder the school's ability to maintain law and order on school premises (p. 969). More specifically, the court recognized that school personnel were receiving many telephone calls regarding the safety of the

students in light of the GSA club's presence and it was foreseeable that school disruption could have occurred. The court also found credence in district personnel's decision to deny the GSA in accordance with §4071(f) of the EAA, stating "that they considered the then current criminal laws of Texas and determined that they could not allow a group to meet on campus that ...advocated the violation of state law [because]...to do so would be in contradiction of ...the students' well-being" (pp. 565-566). In addressing the district's well being claim contained within §4071(f) of the EAA, the court agreed that the well being of school children may be compromised if the GSA club was allowed to meet on campus. As stated in Fraser (1986), the Supreme Court concluded that it is within educators' purview to protect students from sexually explicit speech that "could well be seriously damaging to its less mature audience (p. 683). Thus, the district court concluded that school district administrators properly invoked §4071(f) of the EAA, namely the "well-being exception" (p. 571). The district court found that the school board properly considered Texas law and the effects of exposing minors to sexual subject matter and materials, and how that could be detrimental to students' physical, mental, and emotional well-being. In summation, the District Court for the Northern District of Texas, Lubbock Division, denied the GSA club and its

representatives the injunction they sought. It was the sentiment of the court that

...this case has nothing to do with a denial of rights to students because of their sexual viewpoints. It is instead an assertion of a school's right not to surrender control of the public school system to students and erode a community's standard of what subject matter is considered obscene and inappropriate. At some point, a line must be drawn that considers the proper subject matter allowed in the schools of this country. The effects of exposing minors to sexual material before they are mature enough to understand its consequences and far-reaching psychological ramifications compels a school district to step in and draw such a line (p. 572).

Within a week after the district court's ruling, the first to side with a school board in an EAA case involving a GSA club, lawyers for the Lubbock Independent School District were inundated with calls from school boards around the country regarding their victory. The lawyer for the school district commented that, "This is the first and only victory [to date in a GSA case] for a school district in the United States. It could be a pattern by which school

districts could maintain keeping clubs based on sex and sexual activity out of the purview of the Equal Access Act" (Glass, 2004).

*White County High School Peers Rising in Diverse Education (PRIDE) v. White County School District (2006)*

Following Christmas break in 2005, student Kerry Pacer met with the newly hired principal Mr. Dorsey of White County High School, located in Gainesville, Georgia. The meeting was to discuss the recognition of Kerry Pacer's request to form a GSA club on campus. In meeting with Principal Dorsey, Ms. Pacer was told to submit her request for school recognition in writing, explaining the reasons for desiring to form a GSA club on campus. Shortly after Ms. Pacer's submission of her reasons to organize a GSA club to "create a 'safe ground' for lesbian, gay, bisexual, or transgender students who experienced bullying at school" (p. 3), Principal Dorsey denied her request. Following the denial of the GSA club application, Ms. Pacer accompanied by some of her peers met with the principal and Superintendent Shaw to discuss the denial.

On January 31, 2005, Superintendent Shaw informed Ms. Dorsey and her peers on behalf of the GSA club that they could commence with the formation of their club, but that they should provide Principal Dorsey with "a list of

proposed members and proposed by-laws," before official recognition by the school (p. 4). Although no other non-curriculum student-sponsored group "was subjected to such a lengthy and formal process before recognition", the students were obliged to adhere to the administrations' request (p. 4).

In the weeks that followed, the students' request to organize a GSA club at the high school became the subject of community controversy. On occasion, public protests outside the school building occurred, including several White County High School students adorning "t-shirts with messages of opposition to the proposed GSA" club (p. 4). Perhaps as a result of permitting the GSA club to exist on campus, several students made their own request to the principal to "form potentially controversial clubs, including a 'Redneck Club,' a 'Wiccan Club,' and a 'Southern Heritage Club'" (p. 4).

In February 2005, students representing the GSA club decided to formally adopt the name Peers Rising in Diverse Education (PRIDE) and revised the club's mission statement to incorporate the need to acknowledge the undesired bullying and harassment of students occurring within the high school for whatever reason. In March 2005, the students representing PRIDE were informed that their club

was officially recognized by the school and that they were now permitted to meet on campus during non-instructional time. However, Principal Dorsey required that Assistant Principal Bales be required to be present at every meeting. For the remainder of the 2004-2005 school year, PRIDE met on school property approximately three times a week.

Although the GSA club was permitted to meet on campus for the remainder of the school year, Principal Dorsey, during a board meeting in March 2005, recommended to the board that for the upcoming school year only those student clubs directly related to the curriculum be permitted to be recognized and meet on school property. In response to this recommendation the board formed a committee to consider the matter. In June 2005, the committees charged with evaluating the future of non-curriculum clubs recommended to the school board that all non-curriculum student related organizations be abolished. Prior to the beginning of the 2005-2006 school year, Principal Dorsey evaluated all the clubs that he was aware of and determined that only four clubs were to be prevented from meeting on campus for the upcoming year: "Fellowship of Christian Athletes..., Key Club, Interact Club, and PRIDE..." (p. 5). With the new school board policy in place PRIDE was informed that they could no longer meet on campus nor be recognized as an

official student-sponsored club at White County High School.

On February 27, 2006, the students on behalf of PRIDE, and through their parents, filed suit in the District Court for the Northern District of Georgia, Gainesville Division, for violations of the Equal Access Act, as well as violations of their rights under the First and Fourteenth Amendments, and the Georgia Constitution. The students on behalf of PRIDE allege that "the decision to ban all noncurricular related student groups was motivated by a desire to ban PRIDE and to suppress the content and viewpoint of its members' speech" (p. 6). The students of PRIDE also asserted that White County High School continued to allow non-curriculum student related clubs to meet on campus, including the "Student Council, Youth Advisory Council..., Shotgun Club, Beta Club, a prayer group, Dance Team, the Family, Career and Community Leaders of America..., Cheerleaders, and sports-related teams..." (p. 6). In their suit the students, on behalf of PRIDE, requested a preliminary injunction ordering the school board to

recognize PRIDE as a noncurricular student group;  
...permit PRIDE to meet, at a minimum, on terms equal  
to those on which any other noncurricular student

group has met during the 2005-2006 school year, including enjoyment of school privileges; and ...not seek retaliation against PRIDE or its members (pp. 7-8).

Prior to the commencement of the judicial hearing, "the court ordered that the preliminary injunction request be consolidated with the trial on the merits of plaintiffs' [students] claims" (p. 8). During the judicial hearing on June 16, 2006, the district court initially analyzed each student-sponsored group that the students representing PRIDE claimed school administrators permitted to meet on school premises and make "use of the school's public address system to publicize their meetings" despite their new school board policy that allowed only curriculum-related clubs to exist on campus (p. 6). As noted by the Supreme Court in *Mergens* (1990), there only needs to be one non-curriculum club in existence within the school to conclude that the school has established a limited open forum. Even if school board policy prohibits non-curriculum clubs from organizing, what triggers the limited open forum under the EAA is when a non-curriculum club is operating in the school, even if it exists in contradiction with the established policy.

As the district court commenced with evaluating the seven clubs that the students of the GSA club claimed were non-curriculum groups, the school board bore the burden of showing that the groups identified by the students were directly related to the curriculum at the high school. Following judicial review of the following clubs: Beta Club; Dance Team; Student Council; Youth Advisory Council; Prayer Group; Shotgun Team/4-H Club; and the Prom Group, the court determined that the Dance Team, Student Council, Youth Advisory Council, Prayer Group, Shotgun Team/4-H Club, and the Prom Group were non-curriculum related student groups. With six out of seven clubs determined by the district court to be non-curriculum related, it was clear that a limited open forum existed at the school.

In concluding that the White County School District had established a limited open forum, and thus subjected the high school to the requirements of the EAA, the district court determined that the school board failed to comply with §4071(a) of the EAA. Even though the school administration contended that they made a "good faith effort to adhere to the requirements of the EAA" by making the decision to "...limit student groups to those related to the school's curriculum", the District Court for the Northern District of Georgia, Gainesville Division, declared "that a school system that chooses to evade the EAA's equal access requirements must do so within the confines of the

law" (p. 35). The court finding that the school board and its administrators have violated the EAA due to the denial of "equal access to PRIDE based on the content of its speech..." the court found it unnecessary to address the students' constitutional speech claims. Despite any good faith effort made by the White County School District administration, "they have run afoul of the EAA" (p. 36).

*Straights and Gays for Equality v. Osseo Area School District  
No. 279 (2006)*

Straights and Gays for Equality (SAGE), was an unincorporated association of students enrolled at Maple Grove Senior High School within the Osseo School District in the State of Minnesota. The club, operating for sometime at Maple Grove Senior High was premised on the desire to "promote tolerance and respect for Maple Grove Senior High students and faculty through education and activities relevant to gay, lesbian, bisexual, and transgender ...individuals and their allies" (*Straights & Gays for Equality v. Osseo Area School District No. 279, 2006a, p. 4*). The unincorporated association of students was one of about 60 groups in existence at the high school and one of nine groups considered non-curriculum related. Although the existing non-curriculum related student groups had access to school facilities, the clubs designated as curriculum-related had additional privileges, such as the use of the school's public

address system, bulletin boards and the ability to meet during school hours at non-instructional times. In addition, curriculum related clubs were permitted to take field trips and raise funds (*Straights & Gays for Equality v. Osseo Area School District No. 279, 2006a*).

Following requests by representatives of SAGE seeking an equal opportunity to access what was presently available to curriculum related student groups and their concurrently pointing out to the school administration that some of the curriculum related groups were in fact non-curriculum related and thus subject to the requirements of the EAA, school officials continued to deny SAGE the access it sought. As a result, students representing SAGE, by and through their parents, filed suit in the District Court for the District of Minnesota seeking a preliminary injunction; claiming that the school administration of Maple Grove Senior High School and Osseo Area School District No. 279 violated their federal rights under the EAA. The students representing SAGE asserted that under the EAA, SAGE was entitled to the same access to school facilities as the approved clubs enjoyed (*Straights & Gays for Equality v. Osseo Area School District No. 279, 2006a*).

In the district court's analysis, the following facts were uncontested. First, Maple Grove Senior High School, in receipt of federal funding and having a limited-open forum, was subject

to the requirements of the EAA. Second, Maple Grove Senior High administration recognized SAGE as a non-curriculum club; Third, SAGE was denied official recognition, privileges, and access to school facilities bestowed to clubs determined to be curriculum-related by the Maple Grove Senior High School administration. What was contested was that Maple Grove Senior High School personnel classified several non-curriculum clubs as curriculum-related clubs; giving rise to disparate treatment of SAGE. This became the essential issue for the district court to resolve (*Straights & Gays for Equality v. Osseo Area School District No. 279, 2006a*).

The school board was adamant "...that they have properly categorized as 'curricular' the groups Plaintiffs [SAGE] have identified and therefore... [were] ...not required by the EAA to grant SAGE the same access rights these groups are afforded" (*Straights & Gays for Equality v. Osseo Area School District No. 279, 2006a, pp. 9-10*). Although the EAA does not define what a non-curriculum related student group specifically consists of, the Supreme Court in *Mergens* (1990) provided such a definition. In *Mergens*, the Court reasoned that a non-curriculum student group is one in which the subject matter is not directly taught, or will soon be taught, does not require participation, and is non-credit bearing. Essentially this case rests on the difference in opinions between the school board and the students

of SAGE regarding the interpretation of curricular or non-curriculum related clubs as delineated in Mergens (1990). Although the school board and its administrators contended that they possessed the discretion to determine this difference, the students of SAGE disagreed (*Straights & Gays for Equality v. Osseo Area School District No. 279*, 2006a).

Applying the methodology of the Supreme Court in Mergens, and relying on the U.S. Court of Appeals for the Third Circuit case *Pope v. East Brunswick Board of Education* (1993), stating that:

...a few isolated club activities cannot be permitted to turn an otherwise noncurriculum related student group into a curriculum-related one. [as] ...the curriculum-relatedness of student activities must be determined by reference to the primary focus of the student activity measured against the significant topics taught in the course that assertedly relates to the group" (p. 1253).

Finding that the cheerleading and synchronized swimming clubs at Maple Grove Senior High School were non-curriculum related, the district court ordered that the representatives of SAGE be afforded all the rights and privileges given to the aforementioned groups, including greater access to school facilities, and granted the student representatives of SAGE the

preliminary injunction they sought (*Straights & Gays for Equality v. Osseo Area School District No. 279*, 2006a). Two days after the district court decision, the school board requested that the district court "stay the injunction pending appeal" (*Straights & Gays for Equality v. Osseo Area School District No. 279*, 2006b, p. 2). Concurrently, the student representatives of SAGE entered a motion "for civil contempt" on the part of the school district (*Straights & Gays for Equality v. Osseo Area School District No. 279*, 2006b, p. 2). The district court denied both motions.

Although the school board for the Osseo Area School District No. 279 filed an appeal with the U.S. Court of Appeals for the Eighth Circuit weeks later, the circuit court unanimously affirmed the district court's decision. Interestingly though, the appellate court did stipulate that nothing in the EAA would bar the school district from closing its limited open forum or "legitimately categorizing cheerleading, synchronized swimming, and any other athletic groups as 'curriculum related' by granting physical education academic credit to students who participate in such groups." If such were to occur, SAGE would not be entitled to the same rights as curricular clubs, and would no longer have a claim to the added facility rights (*Straights & Gays for Equality v. Osseo Area Schools*, 2006c, p. 913). In 2007, current members of

SAGE once again took the school board and its administrators to court succeeding in obtaining a permanent injunction (*Straights & Gays for Equality v. Osseo Area Schools*, 2007), and in 2008 the school board went before the U.S. Court of Appeals for the Eighth Circuit once again, failing in its last attempt to seek review of the district court's permanent injunction (*Straights & Gays for Equality v. Osseo Area Schools*, 2008).

*Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County (2007)*

Around September 2006, Yasmin Gonzalez, a senior and president of the newly formed GSA club at Okeechobee High School (OHS) in Okeechobee County, Florida sought official recognition of the GSA club as an officially recognized school organization. Ms. Gonzalez, on behalf of the GSA club, requested access to school property on an equal basis with other non-curriculum student related clubs. Around the beginning of the 2006-2007 school year, Ms. Gonzalez submitted her request to the appropriate school administrators in compliance with the rules and requirements necessary to gain recognition for the club at OHS. Following no response from the OHS administration over a period of several weeks, Ms. Gonzalez and several other students approached OHS Principal Wiersma and presented to her a document outlining the purposes of the GSA club, which the respective students ratified as their constitution.

On October 12, 2006, Principal Wiersma denied the GSA club the recognition the club sought. Assisting the students and their GSA club at OHS, Mr. Chris Stafford, an attorney, subsequently submitted a detailed letter to Principal Wiersma on October 19, 2006, outlying the rights of the students and their GSA club to be recognized. Contained in the letter, was a statement mentioning the need for OHS to comply with the requirements of the EAA. Following the receipt of the letter, Principal Wiersma on October 23, 2006, replied to Mr. Stafford that OHS does not permit "any clubs or organizations which are not related to the standard curriculum to organize or meet" on campus (p. 1248). Principal Wiersma copied Dr. Cooper, Superintendent of Schools of Okeechobee County and the school board attorney.

With the knowledge that the OHS administration had permitted and continued to permit many non-curriculum clubs to organize and meet on school grounds outside of the instructional day, the students representing the GSA club of Okeechobee High School, by and through their parents, filed suit in the District Court for the Southern District of Florida "seeking injunctive relief, a declaratory judgment, and nominal damages..." for violations of their rights under the EAA and 42 U.S.C. §1983 (p.1227). Principal Wiersma responded to the court that she was entitled to immunity and therefore could not be sued

individually under the EAA nor 42 U.S.C. §1983. After a court hearing on February 28, 2007, and discussion with opposing council, the students representing the GSA voluntarily revised their claim, proceeding with their suit solely against the School Board of Okeechobee County (SBOC).

In the district court's analysis, the following three facts were undisputed. First, the school, in receipt of federal funding and having a limited-open forum was subject to the requirements of the EAA. Second, school board members did not deny that the GSA was a non-curriculum club. Third, both parties agreed that the GSA was denied official recognition, privileges, and access granted other clubs at OHS. However, the dispute at issue was based on what the district considered the "safe harbor exceptions" (p. 1128), or rather their interpretation of §4071(f) of the EAA. This section states, in part, that nothing "...shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary" (20 U.S.C. §4071(f)). The school district administrators contend that their actions, regarding the denial of the GSA application, was due to the fact that school board policy prohibits "student-initiated sex-based clubs" in order to maintain order and

discipline and to protect the well-being of students and faculty.

The school board and their administrators, relying heavily on the GSA case in *Caudillo* (2004), (holding that a school could deny a GSA club when a school board has an abstinence only policy and when a club incorporates a website that includes links to "obscene and explicit sexual material" (p. 1228)) asserted that they were legally able to deny the GSA application. In addition to referencing *Caudillo* (2004), the school board cited several other cases including: *Bethel School District No. 403 v. Fraser* (1986); *Pyle v. South Hadley School Committee* (1994); and *Trachtman v. Anker* (1977). Referencing *Fraser* (1986), the school board and its administrators argued that the Supreme Court permitted schools to place limitations on speech when such speech is sexually overt and the audience consists of minors. Referencing *Trachtman v. Anker* (1977), the school board and its administrators emphasized that the U.S. Court of Appeals for the Second Circuit held that schools can prohibit the distribution of questionnaires to their peers that include questions addressing students' knowledge and experiences of such topics as sex, contraception, homosexuality, etc. Further, in *Pyle v. South Hadley School Committee* (1994), the district court permitted the school board to restrict the rights

of students when such actions involved adorning sexually suggestive slogans on clothing.

The District Court for the Southern District of Florida did not contest the school board's contention that they can prohibit student access to obscene sexual material. However, the district court failed to agree with the school board's assertions that the cases it cited related to the situation that was before the court. The district court concluded that the GSA club at issue is not a "sex-based" organization, as the students representing the GSA at OHS repeatedly asserted that the goals of their club were "to provide a safe, supportive environment for students and to promote tolerance and acceptance of one another, regardless of sexual orientation" (p. 1229). The students "further asserted that 'the OHS GSA did not discuss sex, let alone promote sexual activity'" (p. 1129). The school board's position, unable to provide any evidence that the GSA club was involved with accessing or sharing obscene or explicit sexual material, seemed "...to be an assumption or conclusion derived [exclusively] from the name of the club" (p. 1129).

Asserting the *Caudillo v. Lubbock Independent School District* (2004), case, the school board, argued the well being clause within §4071(f) of the EAA stating that due to the State of Florida and the school board's abstinence-based sex education curriculum, they were within their right to deny the GSA

recognition. The school board contended that allowing a sex related club would have been counterproductive to state and local policy, contrary to the well-being of students, and would have undermined the ability of school administrators to maintain order and discipline on school property. The district court, however, disagreed with the school board of Okeechobee County and distinguished the case before them from *Caudillo v. Lubbock Independent School District* (2004) "because the club in that case had a stated goal of teaching safe sex to students" (p. 1229). The district court elaborated that the GSA club at OHS may actually prevent "the very harassment and injury that the court in *Claudillo* [sic] was concerned would lead to lawsuits" (p. 1230).

Concluding that the argument espoused by the school board of Okeechobee County did not "...offer any clear reason to believe that the ...GSA club would hinder the teaching of the benefits of abstinence [and that] ...there is no apparent reason why the ...GSA might not be an advocate for abstinence in the school" (p. 1230), the District Court for the Southern District of Florida found in favor of the GSA club and its student representatives, granting the preliminary injunction sought. In addition, the district court ordered the Okeechobee County School Board, "so long as it maintains a limited open forum under the EAA, [to] grant official recognition and grant all

privileges given to other clubs at the school to the Okeechobee High School Gay-Straight Alliance club" (p. 1231).

Although the granting of the preliminary injunction by the court in April 2007 appeared to end the issue of the school board's denial of recognizing the GSA club as an official group, the GSA club never got a chance to establish itself. First, Ms. Gonzalez, the president of the GSA club and principal plaintiff at the time of the lawsuit, had since graduated. Consequently, the preliminary injunction was dissolved and the GSA case was ostensibly dismissed as it no longer appeared to have any student members at OHS. Second, during the litigation, the School Board of Okeechobee County established Board Policy Section 4.30(II)(D), which stated that:

To assure that student clubs and organizations do not interfere with the School Board's abstinence only sex education policy and the School Board's obligation to promote the well-being of all students, no club or organization which is sex-based or based upon any kind of sexual grouping, orientation, or activity of any kind shall be permitted (*Gonzalez v. School Board of Okeechobee County*, 2008b, p. 1259).

*Gonzalez v. School Board of Okeechobee County (2008)*

Two reasons prompted the filing of this suit. First the inability of the GSA club of Okeechobee High School (OHS) to

obtain official recognition following the aforementioned litigation, *Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County* (2007). The school board asserted that since Ms. Gonzalez, the primary plaintiff, graduated from OHS in 2007, the court's decision became moot. Second, Brittany Martin, a current OHS student was unable to persuade OHS Principal Wiersma to officially recognize the GSA club due to recent policy changes.

In April 2008, OHS student Jessica Donaldson, who joined the GSA club during "the period giving rise to the claims," was permitted to join Ms. Gonzalez as a plaintiff in this case, however, OHS student Brittany Martin "was denied permission to join as a plaintiff" (*Gonzalez v. School Board of Okeechobee County*, 2008a, p. 567). Challenging the court's decision to lift the injunction and the denial of allowing Ms. Martin to join as a plaintiff in the present case, Ms. Gonzalez and Ms. Donaldson filed suit, by and through their parents, in the District Court for the Southern District of Florida contesting the mootness of the case: *Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County* (2007), and to alter the order of the district court denying OHS student Brittany Martin to join as a plaintiff. Ms. Gonzalez and Ms. Donaldson's motion for the court to reconsider the denial of Ms. Martin joining as a plaintiff stemmed from the fact that OHS Principal Wiersma

refused her request in March 2008 to "gain recognition of the GSA as a student organization within OHS" (*Gonzalez v. School Board of Okeechobee County*, 2008a, p. 568). Ms. Gonzalez and Ms. Donaldson asserted that Ms. Martin attempted to gain recognition of the GSA club, but was denied based on a school board policy "denying recognition to any new student organization seeking recognition for the first time during the latter part of the school year" (*Gonzalez v. School Board of Okeechobee County*, 2008a, p. 568). Ms. Gonzalez and Ms. Donaldson asserted that this decision was arbitrary and capricious as "...the GSA was not a new student group seeking recognition for the first time" (*Gonzalez v. School Board of Okeechobee County*, 2008a, p. 568).

In considering the ramifications of the court's original decision to dismiss *Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County* (2007) "for lack of subject matter jurisdiction because of mootness", the District Court for the Southern District of Florida, in light of the facts presented before them by Ms. Gonzalez and Ms. Donaldson in the suit resulted in reconsideration by the district court (*Gonzalez v. School Board of Okeechobee County*, 2008a, p. 568). While the School Board of Okeechobee County asserted

...that its denial of recognition was based on a policy of denying recognition to any new student organization seeking recognition for the first time

during the latter part of the school year and that two other student groups had also been denied recognition based on this policy, [the court concluded that]...the GSA was not a new student group seeking recognition for the first time" (*Gonzalez v. School Board of Okeechobee County*, 2008a, p. 568).

Following this conclusion, as well as statements from school officials that the GSA club application submitted by Ms. Martin would continue to be denied were sufficient for the court to establish that a realistic danger of direct injury to Ms. Martin existed. Therefore, the court asserted that it possessed the ability to provide adequate resolution to Ms. Gonzalez's, Ms. Donaldson's, and Ms. Martin's disputes.

To that end, and given the facts that "...no meaningful difference between ...past refusals to recognize the GSA as a student organization within OHS and Ms. Martin's alleged injury caused by... [the board's] refusal of her request for GSA recognition..." as well as the potential for the issue to reoccur, the District Court for the Southern District of Florida, on May 16, 2008, concluded that Ms. Martin "was entitled to join as plaintiff to properly challenge the board's application of its policy" (*Gonzalez v. School Board of Okeechobee County*, 2008a, p. 565). With Ms. Martin party to the suit, Ms. Gonzalez's and Ms. Donaldson's suit was no longer moot

because Ms. Martin, at the time, was currently enrolled and entitled to seek relief.

On July 29, 2009, the District Court for the Southern District of Florida redressed the action arising from the inability of the GSA club to gain official recognition as a non-curriculum related student group within OHS. Following a review of the facts in the case: *Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County* (2007), the district court reviewed the school board's abstinence-only policies, specifically, §4.30(II)(D), and the school board's present assertion that approving the GSA application would compromise the state's abstinence education program and the federal funding that accompanied program participation.

Despite the paucity of specifics provided by SBOC on this matter, this Court infers that SBOC is suggesting that by recognizing the GSA, the abstinence only program would be compromised by 1) creating a risk that SBOC could lose the federal funding it receives for implementing the abstinence only program or contravene Florida law, 2) that the GSA's tolerance-based mission is inherently incompatible with SBOC's abstinence only program, or that 3) the abstinence-only program's heavy reliance on marriage as the only acceptable context for sexual relations is

fundamentally inconsistent with non-heterosexual identity because only heterosexual marriages are permitted in Florida (*Gonzalez v. School Board of Okeechobee County*, 2008b, p. 1263).

The district court, cognizant of the fact that there were more than 80 GSA clubs similar to the GSA at OHS presently in existence in the State of Florida and no evidence that any sponsoring school district had lost state or federal funding for recognizing a GSA club, the district court found no credibility in the school board's first assertion. The district court, acknowledged that the Supreme Court in *Mergens* (1990) had clarified that a school that officially recognizes non-curriculum student groups do not "...do not run afoul of the Establishment Clause" (*Gonzalez v. School Board of Okeechobee County*, 2008b, p. 1264).

Turning to the school board's second assertion that the GSA club's tolerance-based mission was incompatible with the district's abstinence only program, the court rejected the unsupported claim, and stated that

the crux of such a proposition appears to be that because the topic of tolerance relating to sexual identity is a subset of the topic of sexuality generally, the dialogue required to discuss tolerance towards non-heterosexuals is impossible to convey

without doing violence to the principle of abstinence. This conclusion, however, relies on the premise that discussing the subject of sexuality undermines the advocacy of abstinence. Yet, if such a premise were indeed true, then virtually any topic touching on sexual issues, including those already part of SBOC's curriculum such as pregnancy and sexually transmitted diseases, would also undermine an abstinence-only policy. SBOC has pointed to no special factor pertaining to tolerance towards non-heterosexuals that distinguishes that topic from other matters concerning sexuality generally (*Gonzalez v. School Board of Okeechobee County*, 2008b, p. 1264).

In analyzing the school board's last assertion that since the school board's abstinence-only program teaches that the only milieu for sexual relations is within the context of marriage and only marriages between a man and a woman are permitted in Florida, giving rise to any GSA club tolerance-based message as inconsistent with the district's abstinence-only program, the district court emphasized that the efficacy of the abstinence only program

is not at stake here and the program has received the imprimatur of Congress. ...Therefore, any inconsistency between SBOC's abstinence-only program

and the GSA's stated purpose is an insufficient ground upon which to invoke the EAA's well-being exception (*Gonzalez v. School Board of Okeechobee County*, 2008b, p. 1266).

In addition, the court stated that as §4074 of the EAA specifically states that, "the provisions of this subchapter shall supersede all other provisions of Federal law that are inconsistent with the provisions of this subchapter" if any inconsistency with another federal law exists, the EAA shall prevail.

The School Board of Okeechobee County, failed in its attempt to address issues of premature sexualization, access by non-faculty adults, and issues already purported in the prior case (*Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County*, 2007). The District Court for the Southern District of Florida permanently prohibited the School Board of Okeechobee County from denying equal access and recognition to the GSA club of Okeechobee High School.

*Gay-Straight Alliance of Yulee High School v. School Board of Nassau County (2009)*

Less than a year after the decision in *Gonzalez v. School Board of Okeechobee County* (2008b), another Florida school district denied the request of several students to establish a GSA club. Hannah Page and Jacob Brock, students at Yulee High

School, in Nassau County Florida, presented their application to establish a GSA club in order to combat the antigay harassment and discrimination they perceived as permeating the school for some time. Their plans were to educate the school community about these issues. The purpose of the Yulee High School GSA club as stated in its constitution was to:

...provide a social, emotional and educational safe environment for students who are gay, lesbian, bisexual, transgender, and their straight allies.

...To build awareness in the school community of issues concerning and affecting the lives of students who are lesbian, gay, bisexual, transgender, and their straight allies. ...To reduce violence, harassment, bullying and discrimination based on sexual orientation and/or gender identity. ...To encourage tolerance, acceptance and equality within the school community regardless of sexual orientation or gender identity; and... to promote pride in our community (p. 1235).

Following a meeting of the Yulee School Board, the board members denied Ms. Page and Mr. Brock's request for official recognition of their GSA club. However, the board would have reconsidered the matter if the students had changed the name of the club, as the denial was primarily based upon its choice of

the GSA name. Ms. Page and Mr. Brock maintaining that the board's denial violated the EAA as well as their First Amendment rights, filed suit, by and through their parents, in the District Court for the Middle District of Florida, Jacksonville Division, on behalf of their unincorporated association: Gay-Straight Alliance of Yulee High School. Ms. Page and Mr. Brock sought a preliminary injunction to prevent the school board from denying school recognition of their group in accordance with the EAA.

The School Board of Nassau County defended their decision to deny the GSA club application based upon §4071(f) of the EAA, which provides a school board the authority to maintain order and discipline on school premises and to protect the well-being of the students in their charge. First, the School Board of Nassau County claimed that "the use of the name Gay-Straight Alliance would have materially and substantially disrupted the operation of the school, or materially and substantially harmed the well-being, or otherwise have invaded the rights, of others" (p. 1236). Second, as an incident at the middle school involving one of the students in the suit previously occurred, there was the likelihood that the GSA would substantially disrupt the operation of the school. Third, the school board contended that the message of the GSA club violated Florida's abstinence only policy. Lastly, the school board's final assertion was that no

limited open forum existed at Yulee High regarding issues encompassing discussions of sexual orientation.

In refuting the first point purported by the school board, Ms. Page and Mr. Brock cited the recent Florida case *Gonzalez v. School Board of Okeechobee County* (2008b) in which a Florida federal district court concluded that a school board is prohibited from conditioning the approval of a GSA club "based on a name change" (p. 1235). In *Gonzalez v. School Board of Okeechobee County* (2008b), the court prevented the school board from placing restrictions on a GSA club that were not uniformly applied to all non-curriculum clubs at the school. Also, citing *Gonzalez v. School Board of Okeechobee County* (2008b), the court dismissed the school board's argument that the mere existence of a GSA club would violate its abstinence only policy and "discounted the board's position that the message would interfere with discipline in the operation of the school" (p. 1236).

In refuting the second point purported by the school board, Ms. Page and Mr. Brock disagreed that the school board was entitled to utilize the materially and substantially disruptive exclusion within §4071(f) of the EAA because of Ms. Page's actions last year at another school. Although Ms. Page's did engage in disruptive behavior last year at Yulee Middle School during a gay rights demonstration, the district court concluded

that one GSA club member's behavior at a different school regarding a different event does not amount to actual evidence the current high school club itself, or recognition of its name, would cause a material disruption. As argued by the students "the school cannot demonstrate any nexus between the [Gay-Straight Alliance] name and the incident last year." (p. 1237).

In addition, the district court, referencing *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County* (2003) purported that the mere fact that a GSA may cause disruption by gay rights opponents within and outside the school, was not a viable defense because the exclusion of any group, based upon what others would do if the group was granted approval, amounts to nothing more than a "heckler's veto" (p. 1237). Even if the district court entertained this argument, the school board had failed to demonstrate that this would have occurred. Ms. Page and Mr. Brock had emphasized to the court that on October 1, 2008, with the permission of the high school principal, the GSA club was announced throughout the school, by means of the school's public address system absent of any disruption. As no evidence of disruption occurred or may occur, the district court denied the school board's safe harbor exception claim within §4071(f) of the EAA.

Turning to the last argument of the school board, that the school board did not provide a limited open forum regarding

sexual orientation discussion, the district court adamantly rejected this argument without hesitation. The district court noted that "not a single case supports Defendant's [school board] position that it can avoid the EAA's dictates by excluding specific open forum subgroups of this type" (p. 1237). The district further stated that if this strategy was available to school boards, "a school board could, for example, refuse to provide a limited open forum for discussions regarding religion, totally defeating the EAA's goal of protecting school based religious groups" (p. 1238).

In sum, the Florida federal court found that the school board's position was not well conceived and the students representing the GSA club had indeed established a substantial likelihood of success on the merits of the case. The Court in its opinion stated, in part, that "...the public interest weighs in favor of having access to a free flow of constitutionally protected speech.

#### *Conclusion*

In considering the aforementioned cases from over a decade of litigation concerning the right of students to organize GSA clubs and a school board's attempt to thwart the existence of such, educational leaders and policy makers must be cognizant that the "...values of 'habits and manners of civility' essential to a democratic society must, of course, include

tolerance of divergent ...views, even when the views expressed may be unpopular" (*Hsu v. Roslyn Union Free School District No. 3*, 1996, p. 870). For school board policy or the implementation of such policy

...to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights (*Elrod v. Burns*, 1976, p. 363).

Since the enactment of the EAA in 1984, the judicial system has had to become referee in resolving conflicts between leaders of educational institutions and non-heterosexual students. Although the Supreme Court has provided school leaders with ample discretion to regulate student expression during the school day, the Supreme Court has not bestowed upon them equivalent discretion to judge student expression when such expression stems beyond the confines of the school day (*Island Trees Union Free School District v. Pico*, 1982 ; *Widmar v. Vincent*, 1981). As long as school board policy is unequally applied based on popularity or concern for what might occur, courts will continue to act as referee in determining when remedy for student victims whose rights are violated in the process (Reiner, 2006).

As discussed throughout this paper, the protection of students' free speech in school settings has been clearly established by *Tinker v. Des Moines Independent Community School District* (1969). In *Tinker* (1969), the Supreme Court stated that, a school may limit student speech only when "necessary to avoid material and substantial interference with schoolwork or discipline" (p. 511). Although Green (2004) claims that, subsequent Supreme Court decisions eroded this formerly broad protection, often accepting a school board's argument that quelling the speech is sometimes necessary to avoid disruption of their educational efforts, DeMitchell and Fossey (2008), assert that despite the perceived narrowing of protections of free speech afforded to students in school settings over the last 40 years.

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

and the basic constitutional principal of the right of  
free speech (p. 124).

## CHAPTER V

### Bringing to the Fore the Legal Standards and Themes Arising From the Jurisprudence of GSA Equal Access Act Cases

Published in November of 2004 by the National School Boards Association, as a joint endeavor with the American Association of School Administrators; the American Federation of Teachers; the American School Counselor Association; the Association for Supervision and Curriculum Development; the National Association of Elementary School Principals; the National Association of Independent Schools; the National Association of School Psychologists; the National Association of Secondary School Principals; the National Education Association; the National Student Assistance Association; the School Social Work Association of America; and the United Church of Christ Justice & Witness Ministries, the guidance document entitled: *Dealing with Legal Matters Surrounding Students' Sexual Orientation and Gender Identity*, offered some practical guidance on schools' legal obligations with respect to non-heterosexual students and their right to form GSA clubs within their schools (Underwood, 2004). As Underwood (2004) states, federal "court cases addressing legal issues regarding LGBT students and related issues have resolved many questions and can provide guidance for schools if and when conflicts arise. [However], not all issues have been resolved..." (p. 17).

In this chapter it is the researcher's goal to synthesize the federal EAA cases discussed in Chapter IV, expanding on the aforementioned work by the National School Boards Association (2004) and the work of DeMitchell and Fossey (2008) in an effort to identify implications for school policy and to provide recommendations for school leaders facing requests from students to establish GSA clubs on school campuses. Recommendations for further study are also provided.

With the exception of *Caudillo v. Lubbock Independent School District* (2004), non-heterosexual students attempting to organize GSA clubs on school property have prevailed in all the EAA litigation to date. However, only by comprehensively synthesizing all existing case law resulting from litigation over GSA's use of the EAA will educational leaders and policymakers be able to formulate a clear picture of the law to determine an appropriate solution when confronted with accepting or rejecting student applications to organize GSA clubs on school campuses (Gionfriddo, 2007). Romantz and Vinson (1998) assert that case synthesis "...requires extrapolating expressed [explicated] or unexpressed [implicated] rules from the various cases... [in order to construct] a single legal expression that covers the area" (p. 30). By constructing a "...holistic rule from its component parts..." the judicial rulings can be streamlined into a workable and comprehensive examination of the

issue at hand (p. 30). Romantz and Vinson also state that it is necessary to "...study the facts [of the cases] until some commonality is identified" (p. 46). Through such comprehensive synthesis of judicial decisions thematic lines in case law emerge (Wangerin, 1986).

#### Emerging Principles Ensuing from the Outcome of Federal Case Law

According to Gionfriddo (2007) to discover the emerging themes from a series of related judicial decisions "synthesis ...simply requires recognizing the thematic use of the same idea expressed in the same way in two or more cases" (p.11).

Gionfriddo also contends that by "picking out significant pieces of the overall analytical framework, which will be explicit in some cases, but not all ...a coherent description of the [judicial system's] ...overall approach" will be illuminated (pp. 12-13). To that end, a starting point for analysis in determining what educational leaders and policymakers can and cannot do when rejecting student applications to organize GSA clubs on school campuses is to analyze the thematic use of the same ideas expressed in the same way, explicitly and implicitly, in the GSA litigation that has taken place in the United States to date.

#### Synthesizing the Judicial Systems Explicitly Expressed Ideas

In the 11 cases involving students' rights to organize GSA clubs in accordance with the EAA, the federal courts have

explicitly analyzed whether and how school leaders may deny students (heterosexual or non-heterosexual) the opportunity to establish a GSA club within their school. Their analyses provide a legal foundation for determining whether students may utilize the provisions of the Equal Access Act in establishing clubs within U.S. public schools in the form of the following conclusions about the federal judicial system's present approach to the question.

1. The courts analyze whether or not the respective school in question has in existence non-curriculum clubs as stipulated in §4071(b) of the EAA and as defined by the Supreme Court decision in *Mergens* (1990), thereby triggering the requirement of a school board to comply with the EAA when in receipt of federal funding.

2. The courts analyze whether or not the school board can successfully demonstrate that the proposed GSA club materially and substantially interferes with the orderly conduct of educational activities within the school, qualifying for the substantially disruptive exclusion in accordance with §4071(c)(4) of the EAA.

3. The courts analyze whether or not the denial of the GSA club is due to non-school persons directing or regularly attending club meetings in accordance with §4071(c)(5) of the EAA.

4. The courts analyze whether the denial of the GSA is due to unlawful activity in accordance with §4071(d)(5) of the EAA.

5. The court analyzes whether the denial of the GSA is due to the content of the proposed speech (i.e. sexual conduct, sexuality, or age inappropriateness), thereby denying the constitutional rights of the students in accordance with §4071(d)(7) of the EAA and in light of the Supreme Court's decision in *Tinker* (1969).

6. The court analyzes whether the school board can successfully prove that the GSA club will impede the ability of school personnel to maintain order and discipline on school premises or compromise the well-being of students and faculty in accordance with §4071(f) of the EAA. Each conclusion is discussed in detail below.

*The existence of non-curriculum clubs within the school*

With the passage of the Equal Access Act in 1984 (20 U.S.C. §4071 et seq.) stating in part that "it shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access ... or discriminate against, any students who wish to conduct a meeting within that limited open forum ..."

(§4071(a)), many school boards re-evaluated their existing school policies in an attempt to avoid the EAA requirements. As long as §4071(b) of the EAA was not triggered, school boards

could avoid the Act entirely. However, as is evident in the EAA litigation regarding the establishment of GSA clubs in schools, educational administrators found it quite difficult to accomplish this endeavor (*East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District*, 1999; *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*, 2003; *White County High School Peers Rising in Diverse Education [PRIDE] v. White County School District*, 2006; *Straights and Gays for Equality v. Osseo Area School*, 2006; *Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County*, 2007). While some of the school boards and their administrations made the claim that no non-curriculum organizations existed on school campuses, other school boards and their administrations failed in subsequently attempting to disavow all non-curriculum organizations following an application from a GSA club (*Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*, 2003; *White County High School Peers Rising in Diverse Education (PRIDE) v. White County School District*, 2006). In these situations, school administrators attempted to represent clubs the courts found to be non-curricular as curriculum-related organizations (*White County High School Peers Rising in Diverse Education [PRIDE] v. White County School District*, 2006) or they officially attempted to ban all non-curriculum clubs.

Unofficially school administrators have appeared to allow clubs they considered desirable to continue to meet on school grounds in contrast to board policy (*Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*, 2003).

Supreme Court Justice Sandra Day O'Connor' in *Mergens* (1990) asserted that Congress had established a broad interpretation of the term non-curriculum and at the same time set out to narrowly define curriculum-related groups. The reasoning behind such a distinction, as stipulated by Justice O'Connor's opinion in *Mergens* (1990), was to "prevent school administrators from attempting to circumvent the regulations of the Act by claiming that all student groups are curriculum related and, therefore, outside the scope of the Act" (Morgenstein, 1991, p.246). Following a synthesis of all relevant judicial decisions, it appears that Justice O'Connor's opinion about Congressional intention was a valid one. The idea by school leaders to thwart the establishment of GSA clubs within the school, regarding this issue was indeed attempted, but in no case did a school board and its administrators prevail (*East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District*, 1999; *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*, 2003; *White County High School Peers Rising in Diverse Education (PRIDE) v. White County School District*, 2006; *Straights and*

*Gays for Equality v. Osseo Area School, 2006; Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County, 2007).*

*The substantially disruptive exclusion*

Section 4071(c)(4) of the EAA, essentially provides that a GSA club would materially and substantially interfere with the orderly conduct of the educational activities within the school, the school board and its administrators may deny the GSA club from meeting on school property. The substantially disruptive argument was put forward by school boards in three of the 11 GSA cases litigated (*Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County, 2003; Caudillo v. Lubbock Independent School District, 2004; and Gay-Straight Alliance of Yulee High School v. School Board of Nassau County, 2009*).

Although these school boards and their administrators had attempted to use the substantially disruptive argument to deny the formation of GSA clubs, school personnel in two of the cases encountered much difficulty proving such disruption rises to the test. However, in *Caudillo* (2004) the school board and their administrators did successfully use §4071(c)(4) of the EAA to prevent a GSA from organizing.

As discussed earlier in the study, the material disruption rule included within this subsection of the EAA has been narrowed by three leading Supreme Court cases since the landmark

Tinker (1969) decision: *Bethel School District No. 403 v. Fraser* (1986); *Hazelwood School District v. Kuhlmeier* (1988); and *Morse v. Frederick* (2007). These three Supreme Court cases have restricted students from claiming First Amendment rights and rights under the EAA to speak or hold discussions school boards and their administrators considered potentially disruptive or unlawful. In *Fraser* (1986) the Supreme Court held that "sexually suggestive speech at a school assembly" can be prohibited (p. 675). In *Kuhlmeier* (1988), the Supreme Court reiterated that public schools do not possess all of the attributes of other traditional public forums, and as such, school personnel possess a legitimate interest in restricting student speech during the school day or during an event sponsored by the school. In *Frederick* (2007), the Supreme Court stated that school administrators may restrict speech counterproductive to governmental interests in preventing unlawful activity. Whittaker (2009) has stated that these three Supreme Court cases add to the list of *Tinker* (1969) exceptions that can be applied to the substantially disruptive exclusion.

The federal courts have stated that school boards and their administrators must "...produce more than community controversy to prove that a GSA causes a disruption that rises to the level required by *Tinker* and subsequent cases" (Pratt, 2007, p. 393). In *Boyd County High School Gay Straight Alliance v. Board of*

*Education of Boyd County* (2003) "the school board argued that the proposed GSA created widespread community outrage that jeopardized the school's ability to maintain order and discipline in its classrooms" (Pratt, 2007, p. 393). However, the Boyd (2003) court concluded that although the community was outwardly outspoken on the existence of the GSA, the court concluded that the public uproar regarding the GSA club was insufficient to ban the GSA from organizing; for to do such would yield to no more than a "heckler's veto" (p. 690). The allowance of a heckler's veto to refuse such speech has been condemned by the Supreme Court for over 60 years (*Terminiello v. Chicago*, 1949).

Similarly in *Gay-Straight Alliance of Yulee High School v. School Board of Nassau County* (2009) the school board and its administrators attempted to justify denying the GSA club official status, invoking the substantially disruptive exclusion. Cognizant of existing precedent on the issue that disruption from parents, community members, or students not affiliated with the GSA club would not rise to the standard of §4071(c)(4) of the EAA, consequently permitting the school to deny the application of a GSA club, the school board made an ill-fated attempt to show a nexus between disruptive behavior on the part of a GSA supporter while in middle school during a gay rights demonstration the year prior and the potential of the

same person becoming disruptive during GSA club meetings. The court responded by stating, "...one incident involving one Alliance member's behavior at a different school regarding a different event does not amount to actual evidence the current high school club itself, ...will cause a material disruption" (*Gay-Straight Alliance of Yulee High School v. School Board of Nassau County*, 2009, p. 1237).

In *Caudillo v. Lubbock Independent School District* (2004) the federal court diverged from all prior GSA club cases, including *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County* (2003) which specifically addresses the substantially disruptive exclusion a year prior. Although the federal court in *Boyd* (2003), following existing judicial precedent by denying the school board's attempt to use what many federal courts dating back to the Supreme Court in *Terminiello v. Chicago* (1949) have referred to as a heckler's veto to demonstrate the existence of substantial disruption, the federal court in *Caudillo* (2004) acknowledged that "the school board and its administrators are "...caught in a conundrum" (p.569). The *Caudillo* (2004) court iterated that "if a school allows a group to meet under circumstances which the school reasonably knew or should have known would cause ...safety problems, then the school will be attacked through lawsuits... If a school denies activities in order to prevent such outcomes, then it faces a

suit similar to the instant suit before this Court (p.569). The Caudillo (2004) court held "...that a school that chooses to prevent activities that invite harassment, safety problems, and lawsuits has chosen the wiser of the two possibilities" (p. 569). Citing *Davis v. Monroe County Board of Education* (1999); a Supreme Court case that found a school board libel for its deliberate indifference to the problem of student harassment and *Gernetzke v. Kenosha Unified School District* (2001), a federal circuit court case that involved a school principal that denied the inclusion of a large cross in a religious club's mural because of fear that "conflicts among the students" would arise and may "...invite a lawsuit" (p. 466), the Caudillo (2004) court concluded that the school board met the burden of substantial disruption exception under §4071(c)(4) of the EAA. Unlike any of the other 11 GSA cases litigated, the Caudillo (2004) court in their decision relied heavily upon the fact that within their jurisdiction no precedent existed "...interpreting the bounds of the exceptions from coverage under the EAA in a situation such as the [Caudillo] Court confronts in this case" (p. 568). According to DeMitchell and Fossey (2008), the Caudillo (2004) court diverged from existing judicial precedent on the subject matter and relied heavily on the Lubbock school administrators' educational experience to make the "judgment call as to the safety of the students [and] ...that a potential

for ... disruptive and dangerous conditions for the students" existed (p. 119).

*Non-school persons directing club meetings*

Section 4071(c) (5) of the EAA essentially restricts individuals who do not attend the school from the ability to direct, conduct, control, possess oversight of the club, or regularly attend activities of any non-curriculum student organization. The restriction of non-school persons to direct or regularly attend club meetings has only been explicitly asserted in one of the 11 cases to date and therefore synthesis as defined by Gionfriddo (2007) to acquire an emerging theme is not possible regarding this point, as multiple judicial cases have not invoked the specific rule. However, the explicit attempt of a school board to use this requirement to justify the restriction of the GSA club within their school district it is worth including in the overall analytical framework of this research.

In *Colin v. Orange Unified School District* (2000), the school board denied the proposed GSA club, in part, due to the title of the club, "Gay Straight Alliance," claiming that GLSEN promotes the use of the name nationally and that GLSEN is in the business of proselytizing the GSA club name as well as GLSEN's mission statement to schools around the country. According to one of the school board members in *Colin v. Orange Unified*

*School District* (2000), "the use of the name suggests that this club is being directed and controlled to some extent by nonschool persons" (p. 1146). Not only did the district court conclude that "...far more involvement from an outside organization to justify denying a student group on the basis of §4071(c)(5)... [would be needed to] ...approach the level of control necessary to exempt a student group from the Act's protections," a school board would be required to apply such a policy uniformly to all of its non-curricular clubs (p. 1146). In *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County* (2003) and *Gay-Straight Alliance of Yulee High School v. School Board of Nassau County* (2009) the use of term Gay Straight Alliance within the name of the club was also an issue for the school administration. However, in these two cases the school boards did not explicitly attempt to invoke §4071(c)(5) of the EAA to deny the club's application.

*Sanctioning meetings that are otherwise unlawful*

Section 4071(d)(5) of the EAA, essentially provides that school boards are prohibited from sanctioning any non-curricular student related clubs that are unlawful or that engage in unlawful activity. In line with First Amendment protections, as illuminated by the Supreme Court in *Bethel School District No. 403 v. Fraser* (1986) and *Morse v. Fredrick* (2007), school boards can prohibit student related clubs that purport lewd or obscene

speech, or foster illegal activity. In *Fraser* (1986) the Supreme Court held that schools may prohibit lewd speech even if such speech might be protected in other arenas. In *Fredrick* (2007) the Supreme Court held that schools may prohibit speech which promotes illegal drug use. From these two Supreme Court decisions it is evident that "schools don't exist to facilitate free speech, but rather to educate students, and students' free speech interests must be tailored to a school's unique environment" (Cordes 2009, p. 660).

Using First Amendment principles as stipulated in at least one of the aforementioned Supreme Court cases, four school boards in a roundabout way attempted to assert the prohibition exclusion as delineated within §4071(d)(5) of the EAA: *Caudillo v. Lubbock Independent School District* (2004); *Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County* (2007); *Gonzalez v. School Board of Okeechobee County* (2008); and *Gay-Straight Alliance of Yulee High School v. School Board of Nassau County* (2009). Although these school boards and their administrators attempted to justify their denial of their respective GSA clubs, school personnel in all but one case failed to demonstrate that the GSA clubs engage in unlawful activity. Following the success of the school board and its administrators in *Caudillo v. Lubbock Independent School District* (2004) in asserting that allowing the GSA club to exist

would violate school board policy banning discussions of sexual activity, the school boards in *Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County* (2007), *Gonzalez v. School Board of Okeechobee County* (2008), and *Gay-Straight Alliance of Yulee High School v. School Board of Nassau County* (2009) attempted to do the same, but were unsuccessful. Unlike the Texas case, *Caudillo v. Lubbock Independent School District* (2004), where Texas had criminalized sex between same-sex individuals (at the time the denial of the GSA occurred) and the GSA's web site included links potentially exposing minors to obscene material, the school boards in other court cases, all of which took place in the State of Florida, were unable to show such a nexus. In the Florida cases, the school boards lacked any evidence that the GSA clubs violated any laws and failed to demonstrate that they were somehow sexually charged clubs; giving rise to the potential exposure of minors to obscene or lewd material. None of the Florida GSA clubs were shown to discuss sex, promote sexual activity, or link to a website containing sexual material, as was the case in *Caudillo* (2004). As the court in *Caudillo* relied upon existing state law to conclude that prohibiting a GSA to organize on school grounds did not violate the EAA, *Woods* (2008) states that if *Morse v. Fredrick* (2007)

...can be extended to grant schools increased authority to limit speech that can arguably constitutes [sic] promotion of illegal conduct, then it is possible that these statutes will lead courts to grant greater authority for schools to limit student expression in states that criminalize sexual conduct between minors" without violating the EAA and students' First Amendment rights (Woods, 2008, p. 308).

However, with the exception of the Caudillo case (2004), where the GSA intended to discuss topics such as safe sex, no other school board and their administrators, to date, have shown that GSA clubs promote such illegal activity. In fact, at least one federal court has concluded that GSA clubs would have the positive effect of assisting in deterring sexual harassment within the school milieu (*Gay-Straight Alliance of Yulee High School v. School Board of Nassau County*, (2009)).

*School personnel's interest in restricting student speech*

Section 4071(d(7) of the EAA, essentially prohibits a school board and its administrators from abridging the constitutional rights of its students. In determining what schools can and cannot do, one must recognize the distinction emphasized by the Supreme Court regarding when student speech is deserving of First Amendment protection. Student speech

deserving of First Amendment protection stemming from *Tinker* (1969) and speech that is less deserving of such protection, such as lewd and indecent speech as discussed in *Fraser* (1986) and speech advocating illegal drug use as discussed in *Fredrick* (2007) were argued and analyzed in much of the GSA litigation. However, four school boards and their administrators attempted to deny GSA club recognition, in part, based on school personnel's viewpoint of right and wrong, moral and immoral, appropriate and inappropriate (*Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*, 2003); *Caudillo v. Lubbock Independent School District*. 2004); *White County High School Peers Rising in Diverse Education, PRIDE) v. White County School District*, 2006) & *Gay-Straight Alliance of Yulee High School v. School Board of Nassau County*, 2009).

Even though the Supreme Court has stated that "...the classroom is peculiarly the marketplace of ideas" (*Tinker v. Des Moines Independent School District*, 1969, p. 512), and the "...protection of constitutional freedoms is nowhere more vital than in the community of American schools" (*Shelton v. Tucker*, 1960, p 488), the constitutional rights of non-heterosexual students have often been at odds with school boards and their administrators' viewpoints in restricting student speech (*Fricke v. Lynch*, 1980; *Gillman v. School Board for Holmes County*, 2008; *Henkle v. Gregory*, 2001). Although the school boards and their

administrators in the four aforementioned EAA cases attempted to justify, in part, their denial of their respective GSA clubs, school personnel in all but one case (*Caudillo v. Lubbock Independent School District* (2004) failed to show that GSA clubs' speech could be restricted in accordance with Supreme Court precedent in *Fraser* (1986) or *Fredrick* (2007). Cordes (2009), contends that although "...there will at times be difficult questions of what might qualify as lewd and indecent [or speech considered unlawful or violent], in most instances it is pretty clear" (p. 701).

In *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County* (2003) the Kentucky federal court concluded that regardless of §4071(d)(7) of the EAA, school personnel cannot lawfully suppress speech the school, parents, or community find to be politically unpopular. In *White County High School Peers Rising in Diverse Education (PRIDE) v. White County School District* (2006), a Georgia federal court concluded that the school board and its administrators violated students' constitutional speech claims in accordance with §4071(d)(7) of the EAA and therefore chose not to address the specific First Amendment issue regarding viewpoint discrimination. In *Gay-Straight Alliance of Yulee High School v. School Board of Nassau County* (2009) the Florida federal court concluded that the school board and its administrators' assertion that the denial

of the GSA club was, in part, due to the fact that the school did not provide a forum for discussion of sexual orientation issues was erroneous. As the court stated, "not a single [EAA] case" litigated in the United States supported such a claim (p. 1237). In fact, if this claim was at all plausible, the Florida federal court declared that such a claim would totally defeat the "EAA's goal of protecting school based religious groups" (p.1238).

In *Caudillo v. Lubbock Independent School District* (2004) the Texas federal court diverged from the other three cases. The court, concurrently considering the First Amendment rights of the students and the prohibitions of §4071(d)(7) of the EAA, denied the students' assertion that the school board and its administrators' actions violated the students' constitutional rights of speech. Referencing the Supreme Court decision in *Cornelius v. NAACP Legal Defense & Education Fund* (1985), the Texas federal court did not find that the school board and its administrators engaged in viewpoint discrimination since school board policy prohibited discussions of sexual activity on campus altogether, whether homosexual or heterosexual. For a finding of viewpoint discrimination, the school board and its administrators would have had to suppress the students' speech because they opposed the view of the students who represented the GSA club (*Police Department of Chicago v. Mosley*, 1972).

However, the court determined that the subject matter in its entirety was prohibited on campus, consequently siding with the school board and its administrators (*Caudillo v. Lubbock Independent School District*, 2004).

In addition, the Texas federal court, referencing the Supreme Court majority opinion in *Fraser* (1986), which asserted that lewd and indecent speech in a public school is not protected by the First Amendment and any school that denies such speech is not acting unlawfully, concluded that since the Lubbock GSA club website encompassed electronic links to sexually explicit material "...neither [the] First Amendment nor EAA rights trump the rights of a school district, who stands in the place of a student's parent, to reasonably prohibit sexual material and discussions of sexual acts from its campus (p. 572). Finally, the Texas court in referring to the Supreme Court decision in *Hazelwood School District v. Kuhlmeier* (1988), asserted that school personnel possessed the right to restrict student speech that runs counter to the educational mission of the school.

*Maintaining order, discipline, and the well-being of students*

Section 4071(f) of the EAA, essentially affords school boards and their administrators the authority to deny a non-curriculum club's use of school facilities in order to maintain order and discipline on school premises, and to protect

the well-being of the students in their charge. The ability to maintain order and discipline, as well as the safety of students and faculty was asserted in four of the 11 GSA cases litigated (*Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County, 2003; Caudillo v. Lubbock Independent School District, 2004; Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County (2007); and Gay-Straight Alliance of Yulee High School v. School Board of Nassau County, 2009*). Although these school boards and their administrators had attempted to use §4071(f) to deny the formation of GSA clubs, school personnel in three of the cases encountered much difficulty showing that the denial of the GSA was necessary to maintain order and discipline on school premises or to protect the well-being of the students in their charge. However, in *Caudillo (2004)* the school board and their administrators successfully used, in part, §4071(f) of the EAA to prevent a GSA from organizing.

As discussed in Chapter II, the maintenance of order, discipline, and the well being of students rule included within §4071(f) of the EAA was added to the Act during Congressional hearings for fear that that student members of religious cults would try to brainwash students into becoming members (Aaron, 1985). In order to provide school personnel the authority to deny such groups from organizing, Congress extrapolated language

from *Tinker* (1969) and *Terminiello* (1949) in forming §4071(f) of the EAA. Although the federal court in *Hsu v. Roslyn Union Free School District* (1996) stated that the EAA "...is not a set of federal handcuffs fitted to school principals" (*Hsu v. Roslyn Union Free School District*, 1996, p. 862), the Supreme Court in *Tinker* (1969) stated that:

undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk (*Tinker v. Des Moines Independent School District*, 1969, p. 508).

In *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County* (2003), the school board and its administrators were the first to invoke §4071(f) of the EAA to justify the denial of a GSA club, in part, claiming that the club would materially or substantially interfere with the orderly conduct of educational activities within the school. Although some upheaval did occur within Boyd High School, including student protests against the approval of the GSA club,

as well as uproar within the community, the Kentucky federal court denied this claim. As the court stipulated, to have justified the denial of the GSA club based upon §4071(f) of the EAA, school personnel would have to had demonstrated that the disruption to which school personnel were responding was caused by the proponents of the GSA, not the opponents of the club. Referencing *Tinker* (1969), the Georgia federal court concluded that, "...a school may not deny equal access to a student group because student and community opposition to the group substantially interferes with the school's ability to maintain order and discipline, even though equal access is not required if the student group itself substantially interferes with the school's ability to maintain order and discipline" (p 690).

In *Caudillo v. Lubbock Independent School District* (2004) the school board and its administrators also asserted §4071(f) of the EAA, in part, as the reason for their denial of a GSA application. They were also the first school board to claim, specifically, the "well being" aspect of §4071(f) of the EAA to justify the rejection of a GSA application. As far as §4071(f) of the EAA was concerned, the Texas court agreed with school personnel that they were within their right to deny the GSA club. Based on the fact that allowing "a group to meet on campus that promoted discussions which, "...would be encouraging [a] direct contravention of Texas [sodomy] laws" (p. 555), the Texas

federal court concluded that school personnel's' ability to maintain order was necessary. Although the Supreme Court in *Lawrence v. Texas* (2003) overturned Texas's sodomy laws (as well as the law in all other states that banned sodomy between consenting adults), the Texas court asserted that the *Lawrence v. Texas* (2003) decision concerned adults and as the State of Texas also banned acts of sodomy by minors, the court distinguished the *Lawrence v. Texas* (2003) case from the one before them and concluded that school personnel acted appropriately in denying the GSA club's application under §4071(f) of the EAA.

The most persuasive argument put forth by the school board and its administrators in their denial of the GSA club's application was that the school had "...a compelling interest in protecting the students' ...well-being" (p. 570). As the GSA club claimed that they would discuss topics such as safe sex and had linked to material on a website considered lewd and obscene, the court, consistent with Texas laws at the time, found that the school board and its administrators appropriately invoked the "well-being exception" to the EAA in denying the GSA club (p. 571). As school personnel appropriately considered the effect of exposure to sexually charged material, the Texas federal court concluded

...that students should not be exposed to the type of material that was available on the group's website.

...Moreover, discussing sexual activity, as was intended by the group from a review of its proposed goals, again leads to the logical conclusion that minors would be exposed to subject matter that is detrimental to their physical, mental, and emotional well-being (*Caudillo v. Lubbock Independent School District*, 2004, p. 571).

Following the school board's success in invoking §4071(f) of the EAA *Caudillo v. Lubbock Independent School District* (2004), the school boards and their administrators in *Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County* (2007) and *Gay-Straight Alliance of Yulee High School v. School Board of Nassau County* (2009) attempted to invoke the same type of defense, but were unsuccessful. In both cases, decided by Florida federal courts, school personnel attempted to assert that their denial of their respective GSA club's request for official recognition was justified under the safe harbor exception of §4071(f) used successfully in *Caudillo v. Lubbock Independent School District* (2004).

In *Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County* (2007), the school personnel asserted that the GSA was a sex-based club even though the GSA

club's stated objective had nothing to do with the discussion of sexual activity. In the most recent case (as of the date of this research) *Gay-Straight Alliance of Yulee High School v. School Board of Nassau County* (2009), the school board argued that the mere name of the club, Gay-Straight Alliance of Okeechobee High School would materially and substantially be disruptive, and its stated goals would compromise the rights of other students in the school. The Florida federal courts in both of these cases acknowledged the Texas court's decision to deny the respective GSA club due to inappropriate material on a website and evidence that the club ran counter to the relevant abstinence-only school board policy. However, neither of the Florida federal courts found that the same issues existed in their respective cases. In fact, both courts found that the school boards failed to demonstrate that the respective GSA club's mission of promoting tolerance towards gays was inconsistent with the State of Florida's abstinence only policy.

#### Synthesizing the Judicial System's Implicitly Expressed Ideas

The federal courts in seven of the 11 cases involving students' rights to organize GSA clubs in accordance with the EAA have, in addition to explicitly expressing their ideas, implicitly articulated their viewpoints. As stated by Gionfriddo (2007) federal courts occasionally "consider ideas that are not yet articulated in any of the relevant cases and therefore

...completely implicit" (p. 13). As stated by Romantz and Vinson (1998), "...implied rules are unspoken or unexpressed principles of law employed by a court to resolve a legal issue. These rules are embedded within the body of the opinion but are not articulated" (p. 26). In order to sufficiently synthesize existing case law, Gionfriddo contends that legal researchers "must evaluate the significance of each case in relationship to all other cases in the group and then hypothesize possible explanations of the court's implicit meaning" (p. 14). It is not uncommon that several "explanation[s] might reasonably be inferred from the cases" (p. 14).

In the 11 cases involving students' rights to organize GSA clubs, in accordance with the EAA, all of the federal courts cases with the exception of *East High School Prism Club v. Seidel* (2000) were decided on whether or not violations of the EAA occurred; avoiding explicit opinions on potential Constitutional violations. As the Supreme Court has stood fast for some time recommending that federal judicial courts should not "...decide questions of a constitutional nature unless absolutely necessary to a decision of the case" (*Burton v. United States*, 1905, p. 294), 10 of the 11 federal cases involving students' rights to organize GSA clubs were decided based on the EAA alone. However, aside from the fact that *East High School Prism Club v. Seidel* (2000) was decided on First

Amendment principles, six federal courts implicitly contemplated the structure of constitutional doctrine from the ostensibly sexual orientation bias that occurred in each of the school settings in the form of viewpoint discrimination under the First Amendment and the equal protection clause contained within the Fourteenth Amendment.

*Viewpoint discrimination and equal protection*

Generally not germane to the judicial verdict in the respective cases, but for the most part implicit, was a finding of material fact that viewpoint discrimination as stipulated in the First Amendment and equal protection included within the Fourteenth Amendment were addressed in the following judicial cases: *East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District* (1998-1999); *Colin v. Orange Unified School District* (2000); *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County* (2003); *Caudillo v. Lubbock Independent School District* (2004); *White County High School Peers Rising in Diverse Education (PRIDE) v. White County School District* (2006); and *Gay-Straight Alliance of Yulee High School v. School Board of Nassau County* (2009).

In order for ...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 (*Tinker v. Des Moines Independent School District*, 1969, p. 509).

Although the Supreme Court in 1969 clearly articulated the principle above, the Court in the last 40 years has refined the respective student liberty of speech, bestowing broader rights on school boards to restrict such; stating that "...the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings" (*Bethel School District No. 403 v. Fraser*, 1986, p. 682). As stipulated in *Fraser* (1986), "the undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior" (p. 681). As stipulated in *Hazelwood School District v. Kuhlmeier* (1988), "...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" are not offended by educators' First Amendment restrictions "...so long as their actions are reasonably related to legitimate pedagogical concerns" (p. 271). Most recently, in *Morse v. Frederick* (2007), the Supreme Court's latest undertaking into student viewpoint neutrality, the court

concluded that abandonment of viewpoint neutrality may be justified when the restriction involves advocating illegal drug use.

Commencing with Fraser (1986), school personnel's ability to depart from viewpoint neutrality as expressed by Tinker (1969) started to take root. However, following Hazelwood (1988), the circumstances surrounding student speech became critical to the constitutional inquiry of viewpoint suppression within the school environment; marking a shift in judicial interpretations involving secondary school students' viewpoints within the confines of a public school system (Garnett, 2008; Zouhary, 2008).

Hazelwood's distinction between the state's curricular speech and a student's independent speech constitutes the constitutional lynchpin enabling the Court to import viewpoint neutrality into public schools. This distinction, which hinges on the pedagogical interests of the government as educator and the expressive interests of students as citizens, reveals that school-sponsored expression and independent student expression merit different degrees of viewpoint protection. In the realm of school-sponsored speech, when the state communicates a curricular message or is perceived to be speaking, viewpoint neutrality is

neither necessary nor appropriate. However, when the government is not advancing a curricular message, viewpoint neutrality is essential (Zouhary, 2008, p 2268).

As stated in *Hazelwood School District v. Kuhlmeier* (1988), school-sponsored speech encompasses those "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" (p.271). However, in six of the federal EAA court cases involving students' rights to organize GSA clubs, the only case to successfully use a Hazelwood-type argument to assert that the GSA student-sponsored speech was within the realm of school-sponsored speech, and therefore able to be suppressed was *Caudillo v. Lubbock Independent School District* (2004).

In *East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District* (1998-1999), school personnel failed in their attempt to establish an entitlement that they "may regulate expression in a curricular setting, even if such regulation is not entirely viewpoint neutral" (p. 1195). In addition, the students representing the GSA club also failed to show the existence, as they claimed, of the unwritten policy prohibiting "gay-positive viewpoints" (p. 1195). However, an analysis of the Utah federal court's opinion, surrounding the existence of an unwritten policy that excluded gay-positive

viewpoints from club discussions, validated that such a policy existed. Although the court fell short of resolving this issue, the court might have been able to identify ambiguities in the school board policy requiring clarification as to school personnel's motives if the assistant superintendent's letter of May 21, 1999 was able to be articulated. The letter appeared to indicate that school personnel were in fact "preventing the expression of gay-positive viewpoints on the curriculum-related subjects" (p. 1196). Following a review of *East High School Prism Club v. Seidel* (2000), a subsequent case to *East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District* (1998-1999), it appeared that the personnel of East High School, from 1996 to 2000, attempted to thwart the First and Fourteenth Amendments rights of the non-heterosexual students as well as their rights under the EAA to organize a GSA club within the Salt Lake City school system.

Although in 2000 "...the school board of Salt Lake City ...ended its efforts to prevent students from organizing Gay/Straight Alliances in district schools..." (Gay and Lesbian Review Worldwide, 2002, ¶1), the State of Utah in 2007 enacted a law requiring parental consent for student participation in all curricular and non-curricular clubs (Utah Code Ann. § 53A-11-1210 (2009)). According to Whittaker (2009), this law was an

attempt to curtail the activities of GSA clubs in Utah public schools.

In *Colin v. Orange Unified School District* (2000), the federal court of California, finding that the school board violated the EAA, did not address the students' First Amendment claims. However, in addressing the "same presumption of irreparable harm" that arises from First Amendment violations, the California federal court implicitly addressed the issue of the First Amendment (p.1149). Although the school board, objecting to the appropriateness of what they claimed to be a "sexually charged club" (p. 1139), and their assertion that the "responsibility of inculcating moral and political values" (p. 1141) rests upon them, an analysis of the court's opinion in this case illustrates that the court would have indeed disavowed the school board's denial of the GSA club based on the First Amendment rights of the affected students.

The California federal court's opinion, referencing First Amendment precedent in *Tinker* (1969) commented that the job of educators is to pursue "tolerance for diverse viewpoints" (p. 1151) avoiding the position of "thought police" (p. 1141). The school board and its administrators

...may be uncomfortable about students discussing sexual orientation and how all students need to accept each other, whether gay or straight. As in *Tinker*,

however, when the school administration was uncomfortable with students wearing symbols of protest against the Vietnam War, defendants cannot censor the students' speech to avoid discussions on campus that cause them discomfort or represent an unpopular viewpoint (p. 1149).

In *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County* (2003), the federal court of Kentucky, finding that the Boyd County School Board violated the EAA, also chose not to address the First Amendment claims of the students. However, in addressing the presumption of irreparable harm that arises from First Amendment violations, the Kentucky federal court, similar to the California federal court in *Colin* (2000) inferred that the First Amendment was violated since the school board engaged in viewpoint discrimination. When the school board implied that "...the existence of a GSA club in high schools in certain areas of this country would cause great controversy, leading to potentially violent behavior on the part of students opposed to these clubs" they failed to hold inviolate viewpoint neutrality in direct opposition to Supreme Court precedent (Berkley, 2004, p. 1876). If a court was to permit school personnel to base their decision on whether or not to abridge students' Constitutional rights based on the school's geographical location within the country, the court would be

tolerating "...speech suppression, a result that is antithetical to free speech doctrine" (Berkley, 2004, p. 1877).

In *Caudillo v. Lubbock Independent School District* (2004) the Texas federal court, unlike any other respective case preceding it, disregarded all relevant EAA litigation in other federal jurisdictions and proceeded with their opinion based on case law that was legally binding solely within their jurisdiction; thus becoming the only court (as of the date of this research) to find in favor of a school board.

This case presents an issue of first impression for this Court and for this circuit. This Court has been unable to locate, nor have the parties directed this Court to, any case law directly on point in this circuit dealing with a gay-straight student group desiring to be recognized and to meet on a public secondary school campus (p. 559).

Perhaps "one of the most incongruous aspects of [the court's opinion in] *Caudillo* (2004) is its holding that the *Tinker* standard did not apply to the 'maintaining order and discipline' and 'protecting well-being' provisions in the EAA" (Orman, 2006, p. 242). Recognizing that the Texas court was "...aware that courts in other circuits have adopted the view that the EAA incorporated the *Tinker* rule that the disruption must 'materially and substantially interfere with the

requirements of appropriate discipline in the operation of the school,'" they diverged from such judicial reasoning and asserted that §4071(f) of the EAA did not require such a substantial showing of interference to deny the GSA application (Orman, 2006, p. 242). Orman asserted that the Texas court had overlooked the First Amendment, as interpreted by the Supreme Court in *Tinker* (1969), which "forms the background against which the EAA was enacted [but does not] imply legislative intent to grant an exemption ...allowing a 'heckler's veto' to influence students' right of free expression" (p. 243). By relying "...on a new standard of interference unsupported by precedent or legislative intent," the Texas court implied that a lower standard of the First Amendment was sufficient to deny the application of the GSA based upon the potential harm in their viewpoint; and in accordance with §4071(f) of the EAA was permissible (Orman, 2006, p. 241).

Inferring that a "reasonable forecast of disruption" existed, the Texas federal court asserted that it had a compelling interest in preventing such subject matter..." within the Lubbock schools (p. 560). The Texas court also stated that "listing as a goal the discussion of safe sex and advertising a website address with links to obscene and explicit sexual conduct go beyond the bounds of First Amendment protection in the public school setting" (p. 564). Although the Texas federal

court, referencing the Fifth Circuit Court of Appeals' (a controlling court in the State of Texas) decision in *Shanley v. Northeast Independent School District* (1972) asserted that the Constitution does not "...require a specific rule regarding every permutation of student conduct before a school administration may act reasonably to prevent disruption" (p. 568), the court failed to mention that *Shanley v. Northeast Independent School District* (1972) also stated "...that the school board's burden of demonstrating reasonableness becomes geometrically heavier as its decision begins to focus upon the content of materials that are not obscene, libelous, or inflammatory" (*Shanley v. Northeast Independent School District*, 1972, p. 971). Although the court referenced the discussion of safe sex and a website to sexual material they considered inappropriate for high school students, "it should be axiomatic at this point in our nation's history that in a democracy 'controversy' is, as a matter of constitutional law, never sufficient in and of itself to stifle the views of any citizen..." (*Shanley v. Northeast Independent School District*, 1972, p. 971).

The Texas federal court's First Amendment reasoning in their denial of the GSA club appeared to be precisely what the California federal court in *Colin v. Orange Unified School District* (2000) was fearful of, in that "it would be guilty of

the current evil of 'judicial activism,' implicitly carving out an exception from the bench to the statute enacted by the politically accountable Congress (p. 1149).

If this Court were to interpret the Equal Access Act differently than courts have in the past when applying the Act to Christian groups, it would be complicit in the discrimination against students who want to raise awareness about homophobia and discuss how to deal with harassment directed towards gay youth (*Colin v. Orange Unified School District*, 2000, p. 1149).

In *White County High School Peers Rising in Diverse Education (PRIDE) v. White County School District* (2006), the federal court of Georgia, finding that the school board clearly violated the EAA, did not explicitly address the students' Constitutional claims similar to the aforementioned cases. However, the court in addressing the presumption of irreparable harm that typically arises from First Amendment violations, implicitly addressed the issues surrounding the right to free association, equal protection, and viewpoint neutrality explicitly addressed within First Amendment jurisprudence.

Although the First Amendment does not require a school to create a forum for student organizations to meet on campus, when the school does permit such a forum it becomes subject to the First Amendment's obligations of free association, equal

protection, and viewpoint neutrality. The primary impediment to free speech and association in *White County High School Peers Rising in Diverse Education (PRIDE) v. White County School District* (2006) arose from the request of the school principal to require a list of proposed student members before official recognition by the school personnel was given, even though no other non-curriculum student-sponsored group "was subjected to such... before recognition" (p. 4). In doing so, the school principal was arbitrary and capricious in making the decision.

The Georgia federal court, in concluding that "public interest is certainly furthered when First Amendment freedoms are safeguarded", implicitly addressed that when a school board and its administrators remove all student groups in an attempt to prevent a particular viewpoint from a single group, they become suspect in suppressing speech protected by the Constitution (p. 40).

The most recent federal court to implicitly contemplate the structure of constitutional doctrine was *Gay-Straight Alliance of Yulee High School v. School Board of Nassau County* (2009). In this case, the Florida federal court, in its opinion, stated that "as a threshold matter, although this Order references First Amendment case law, it does not conduct a separate First Amendment analysis; in enacting the EAA, Congress effectively codified the First Amendment rights of non-curricular student

groups" (p. 1135). Although the school board objected to discussing sexual orientation in light of Florida's abstinence only policy and how all students need to be accepting of divergent views, the court stated that school personnel "...cannot censor the students' speech to avoid discussions on campus that cause them discomfort or represent an unpopular viewpoint" (p. 1236). An analysis of the Florida federal court's opinion in this case implicitly illustrates that the court theoretically would have, notwithstanding the EAA, ruled for the students representing the GSA club on Constitutional grounds.

According to Brown (1993), Congress "...could not have intended the Act to permit a state constitution to override the Act's requirements, since to do so would allow a state constitution to supersede what they believed was a federal constitutional requirement" (p. 1058).

Hazelwood set forth a low threshold for viewpoint-based restrictions of school-sponsored speech to meet constitutional muster - viewpoints can be restricted when the school has a legitimate pedagogical reason for restricting them. In contrast, Tinker set forth a high threshold for viewpoint-based restrictions of independent student speech - viewpoints can be restricted only when a school can prove that the speech would materially and substantially disrupt

classwork. By 'aligning the degree of school authority over student speech with the level of school sponsorship' giving administrators greater control over curricular activities in which the school's own speech is at stake, but less control over the personal expression of students taking place outside of a curricular context - the Tinker/Hazelwood doctrinal framework appropriately responds to the duality inherent in student speech cases (Zouhary, 2008, p. 2251).

Given the implicit substantive constitutional principles and adjudicative rules extracted from the federal courts cited in this research, it is evident that the judicial system has established "well-settled principles that frame any constitutional inquiry into the ...rights of secondary public school students" (Zouhary, 2008, p. 2236). For over 40 years the Supreme Court has held that the Constitutional rights of school children are not abandoned upon entering the public school (*Tinker v. Des Moines Independent School District*, 1969). Since 1969 students have "...been declared 'persons' deserving of rights and protections under the Constitution" (Ramos, 1996, p. 167). Although not coextensive with adults in other settings, students possess the constitutional protections of speech, equal

protection, and the freedom of association under the law (*Bethel School District No. 403 v. Fraser*, 1986).

*Freedom of association and parental consent laws*

“The legislative history of the EAA makes it clear that the purpose of the Act was to confirm students' rights to freedom of speech, freedom of association, and free exercise of religion” (*White County High School Peers Rising in Diverse Education (PRIDE) v. White County School District*, 2006, p. 37). “Despite the morass of jurisprudence on the subject of parental authority, courts are generally skeptical of states using parental authority as a means of enacting speech restrictions” (Whittaker, 2009, p. 61). Legal scholars such as Vandewalker (2009) and Whittaker (2009) have noted that in the past few years the discourse regarding GSA clubs and their proliferation in public schools has not only caught the attention of school boards and their educational leaders, but has reached many state legislative bodies. As of the publication of this research, two states: Utah and Georgia, have enacted parental consent laws predicated on the desire to afford educational leaders the capacity to curtail speech and association rights of their student population (Utah Code Annotated §53A-11-1210, 2009; Georgia Code Annotated §20-2-705, 2009). In recent years, state legislators in Florida, Idaho, Massachusetts, and Virginia have

deliberated over ways to ban such clubs altogether (Whittaker, 2009).

For example, in the Commonwealth of Virginia, the 2007 General Assembly considered House Bill 1727, which proposed to mandate that Virginia school boards, prior to a student participating in a non-curricular club inform their parents about the name of the club, its mission, and whether it is affiliated with any larger organization. The bill also required written parental permission or an opt-out provision before the student could participate in the desired club. The bill overwhelmingly passed the Virginia House of Delegates, but was defeated in the Virginia Senate (Virginia Legislative Information Services, 2010). Tommy Denton, a columnist with the *Roanoke Times*, a newspaper printed for the Roanoke Virginia area, stated that House Bill 1727 was “an attempt to open the door for bigoted parents to force schools to prevent gay teens from participating in gay-straight alliances...” (Denton, 2007)

Whether policy makers are well-intended, ill-informed, or overtly homophobic, when considering such requirements, prior to permitting students to participate in GSA clubs, legal scholars assert that such policies may run afoul of constitutional protections of freedom of association (Vandewalker, 2009; Whittaker, 2009). The Supreme Court has repeatedly held that, “the rights of association are within the ambit of the

constitutional protections afforded by the First and Fourteenth Amendments" (*Gibson v. Florida Legislative Investigation Committee*, 1963, p. 543).

Associations based on sexual orientation are already commonplace and uncontroversial in high schools: dating between boys and girls is ubiquitous, tolerated, and even officially sanctioned at many schools with homecoming king and queen competitions, for example. Opposite-sex dating is founded upon a shared heterosexuality, but it does not necessarily involve having sex, talking about sex, or even thinking about sex. Similarly, while GSAs are founded upon, *inter alia*, a shared tolerance of homosexuality, they need not involve sex at all. Thus, the fear of children engaging in sexual activity is a red herring in controversies over GSAs: the real issues are children's right to associate around shared values and the hostility toward homosexuality that motivates community opposition to such groups (Vandewalker, 2009, p. 24).

Although federal courts have espoused for over 80 years that parents possess liberty interest in the parenting of their children (*Meyer v. Nebraska*, 1923); *Pierce v. Society of Sisters*, 1925), the state's broad interest in a child's well

being, at times warrants the restriction of parental control. In *Prince v. Massachusetts* (1944) the Supreme Court concluded that compulsory attendance may be imposed by a state as receiving and education is a compelling state interest. In addition, the Supreme Court acknowledged that a state's "authority is not nullified merely because the parent grounds his claim to control the child's course of conduct" (p. 166). "Thus, Prince [1944] established that the state could limit the parents' ability to rear their child without violating the parents' constitutional rights" by compelling a school system to require parental consent prior to exposing students to certain material included in the school's curriculum (Levi, 2008, 767).

The Supreme Court of Massachusetts in *Curtis v. School Committee of Falmouth* (1995) held that student exposure to a school program that some parents might find objectionable did not violate the free exercise clause of the first amendment when the school failed to require prior parental consent or offer parents an opt-out procedure since the school program was not compulsory. In *Brown v. Hot, Sexy & Safer Prods.* (1995) the U.S. Court of Appeals for the First Circuit deciding a similar case to *Curtis v. School Committee of Falmouth* (1995) did not find that parents First Amendment protections were violated when the school held a school sponsored sex education program without seeking prior parent consent or offering an opt-out procedure.

The court determined that the program was not "conscience shocking" (p. 531) nor did it constitute "a significant governmental intrusion into ...parents' personal decisions as to rearing their children" (p. 531). In 2008, a federal case equivalent to *Brown v. Hot, Sexy & Safer Prods.* (1995), *Parker v. Hurley*, (2008) stated "that the constitutional right of parents to raise their children did not include the right to restrict what a public school could teach their children and that teachings which contradicted a parent's religious beliefs did not violate their First Amendment right[s]..." (p. 263).

According to Whittaker (2009), parental consent laws like the laws, in Utah and Georgia, compelling "...students to get their parent's consent to join a GSA is akin to [judicial cases in the 1950s through 1980s] involving revealing a membership list" (p. 66). Whittaker, maintains that such membership lists, as in the cases of *NAACP v. Alabama* (1958); *Buckley v. Valeo* (1976); and *Brown v. Socialist Workers '74 Campaign Committee* (1982) "...will likely have a chilling effect on GSAs and as a result such action may violate the First Amendment" (p.60). Lack of any judicial challenge to such parental consent laws, as the ones in place in Georgia and Utah, these indirect bans on GSA clubs afford parents the right to deny their child's desire to join a club that may, in fact, be beneficial to them; assisting them in dealing with potential bullying in school (Vandewalker,

2009 & Whittaker, 2009). Whittaker (2009) contends that a "compelling state interest" may soon be needed as more states, localities, and school systems put in place such restrictive requirements (p. 66). Whittaker contends that although "...lawmakers provided little support for the Utah and Georgia parental consent laws beyond extreme and overt animus towards gay-friendly student groups, states will be hard pressed to provide justifications for the restrictions to overcome exacting scrutiny" (Whittaker, 2009, pp. 66-67).

Although Vandewalker (2009) has asserted that proponents of parental consent policies argue that GSA clubs are harmful to children, while others overtly feel that these clubs are morally wrong, indoctrinating children to homosexuality, "...the Constitution demands more than suspicions about harm before expressive rights can be infringed (p. 49). According to the U.S. Court of Appeals for the Seventh Circuit, a state must present a "compelling and not merely plausible "justification for infringing on minors' rights for fear of harm (*American Amusement Machine Ass'n v. Kendrick*, 2001, p. 576).

#### Recommendations for School Leaders Facing Requests from Students to Organize GSA Clubs

In summarizing the emerging themes synthesized in this chapter from the existing judicial case law and analyzing the opinions of the legal scholars presented in this research, the

following tables are provided to guide educational leaders and policymakers when considering request from students to form GSA clubs on school property. In addition, a synopsis of the data contained within the tables and the opinions of relevant legal scholars are provided.

Table 1: Explicit outcomes in federal Gay Straight Alliance club cases

Federal Court Case /State	Prevailing Party	Facts of the Case
East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District (1998-1999)/UT	Students	School board violated §4071(b) of EAA Non-curricula club existed thus limited open forum created.
East High School Prism Club v. Seidel (2000)/UT	Students	School board policy not applied in a constitutionally permissible manner.
Colin v. Orange Unified School District (2000)/CA	Students	School board violated §4071(b) of EAA Non-curricula club existed thus limited open forum created. Section 4071(c)(5) not applicable, GSA not controlled by outside persons.
Franklin Central Gay/ Straight Alliance v. Franklin Township Community School Corporation (2002)/IN	Students	School board violated §4071(b) of EAA Non-curricula club existed thus limited open forum created. Case not moot merely because petitioner graduated.
Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County (2003)/KY	Students	School board violated §4071(b) of EAA Non-curricula club existed limited open forum created. Section 4071(c)(4) not applicable
Caudillo v. Lubbock Independent School District (2004)/TX	School Board	GSA determined to violate §4071(c)(4) and §4071(f) of EAA - authority of the school board to maintain order and discipline, protect the well-being of students maintain order
White County High School Peers Rising in Diverse Education (PRIDE) v. White County School District (2006)/GA	Students	School board violated §4071(b) of EAA Non-curricula club existed thus limited open forum created
Straights and Gays for Equality v. Osseo Area School (2006)/MN	Students	School board violated §4071(b) of EAA Non-curricula club existed thus limited open forum created
Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County (2007)/FL	Students	Section 4071(f) of EAA not applicable in case
Gonzalez v. School Board of Okeechobee County (2008)/FL	Students	Section 4071(f) of EAA not applicable in case
Gay-Straight Alliance of Yulee High School v. School Board of Nassau County (2009)/FL	Students	Sections 4071(c)(4) and 4071(f) of EAA not applicable in case

Table 2: Implicit outcomes in federal Gay Straight Alliance club cases

Federal Court Case/State	Viewpoint Discrimination	Freedom of Association	Equal Protection
	1 <sup>ST</sup> Amendment	1 <sup>ST</sup> Amendment	14 <sup>th</sup> Amendment
East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District (1998-1999)/UT	Implied		Implied
East High School Prism Club v. Seidel (2000)/UT	Case decided upon*		
Colin v. Orange Unified School District (2000)/CA	Implied		
Franklin Central Gay/ Straight Alliance v. Franklin Township Community School Corporation (2002)/IN			
Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County (2003)/KY	Implied		
Caudillo v. Lubbock Independent School District (2004)/TX	Implied		
White County High School Peers Rising in Diverse Education (PRIDE) v. White County School District (2006)/GA	Implied	Implied	
Straights and Gays for Equality v. Osseo Area School (2006)/MN			
Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County (2007)/FL			
Gonzalez v. School Board of Okeechobee County (2008)/FL	Implied		
Gay-Straight Alliance of Yulee High School v. School Board of Nassau County (2009)/FL			

\* Gay Straight Alliance club case decided on violations of First Amendment not EAA

Table 3: Section of Equal Access Act asserted by school boards to justify exclusion of Gay Straight Alliance clubs from organizing

Section of EAA asserted by school board to justify exclusion of GSA from organizing	Number of cases specific section of EAA was asserted by school board to deny GSA from organizing	Number of cases in which school board prevailed using respective section of EAA	Court opinion why school board prevailed (if applicable)
§4071(b)	6	0	
§4071(c)(4)	3	1	Safety concerns trumps viewpoint Sexually explicit material prohibited with an abstinence-only policy (Caudillo, 2004)
§4071(c)(5)	1	0	
§4071(d)(5)	4	0	
§4071(d)(7)	4	0	
§4071(f)	4	1	Discussion of or exposure to sexual material detrimental to well-being of students (Caudillo,2004)

*What guidance can be offered from the existing case law?*

As Table 3 indicates, a school board's tactic to keep GSA clubs from claiming access to school facilities by stipulating that their schools do not have in existence a limited open forum in accordance with §4071(b) of the EAA has been employed in six of the GSA cases litigated under the Act (*East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District*, 1998-1999; *Colin v. Orange Unified School District*, 2000; *Franklin Central Gay/Straight Alliance v. Franklin*

*Township Community School Corporation, 2002; Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County, 2003; White County High School Peers Rising in Diverse Education (PRIDE) v. White County School District, 2006; & Straights and Gays for Equality v. Osseo Area School, 2006*). In a few of the GSA cases that reached the courts, the school board intentionally attempted to remove all non-curriculum clubs within their district in an effort to avoid the requirement of §4071(b) of the EAA, preventing GSA clubs from organizing. However, not one of the school boards in the federal GSA club cases analyzed in this research was successful in using the removal of all non-curriculum clubs as a defense against the students seeking the protection of the EAA (*East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District, 1998-1999* and *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County, 2003*).

Following the outcome of the first case litigated in a federal court, *East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District (1998-1999)*, the Salt Lake City school board, in a second attempt to circumvent the EAA by shutting down all non-curriculum-related clubs, became faced with students attempting to gain recognition of their GSA club as a curriculum-related club (*East High School Prism Club v. Seidel, 2000*). As reflected in Tables 1 and 2, the

East High School Prism Club, represented by non-heterosexual students at East High School, described their organization "...as a prism through which historical and current events, institutions and culture can be viewed in terms of the impact, experience and contributions of gays and lesbians" (p.1243). Although the school board argued that it could deny the club on the grounds that their viewpoint was too narrow, the court determined that even if such an implicit school board rule existed, it appeared illogical as "...all clubs are, in a sense, viewpoint exclusive: French clubs are 'viewed' from the perspective of French-speaking students; science clubs are 'viewed' from the perspective of science-oriented students; all student clubs are 'viewed' from the perspective of Utah high school students" (p. 1246). Based on Constitutional grounds, specifically, First Amendment jurisprudence, the court concluded that the school board officials engaged in viewpoint discrimination; thereby ruling for the students. As the Supreme Court affirmed in *Rosenberger v. Rector and Visitors of the University of Virginia* (1995), an educational institution cannot restrict speech solely on the basis of its viewpoint; one could conclude from this case that a school board evading the requirements of the EAA may still be challenged on Constitutional grounds when attempting to prevent the rights of students from organizing GSA clubs on school campuses.

As Tables 1 and 3 illustrate, three school boards denied their GSA club recognition based on §4071(c)(4) of the EAA, which states that the club does not materially and substantially interfere with the orderly conduct of educational activities within the school (*Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*, 2003; *Caudillo v. Lubbock Independent School District*, 2004; *Gay-Straight Alliance of Yulee High School v. School Board of Nassau County*, 2009). In each of the three cases the school board used §4071(c)(4) concurrently with §4071(f) of the EAA to justify the denial of the GSA club's application. The *Caudillo v. Lubbock Independent School District* (2004) case was the only case included in the research to prevail. The school boards in the two Florida cases that followed *Caudillo* (2004), which was decided in Texas, attempted to use the same argument, even citing *Caudillo* (2004), but were unsuccessful. In *Caudillo* (2004), the court relied heavily upon the fact that since the mission of the GSA club was to discuss safe sex and included a website with a link to sexually explicit material, the court determined that the school board's abstinence-only policy would be compromised if the club was allowed to exist.

As shown in Table 3, one school board's attempt (*Colin v. Orange Unified School District*, 2000) to use §4071(c)(5) of the EAA in an effort to prevent a GSA club from claiming access to

school facilities by stipulating that “the use of the name [GSA] suggests that this club is being directed and controlled to some extent by nonschool persons” (p. 1146) was unsuccessful. In this case it was apparent that the school was suggesting that the GLSEN exercised control over GSA clubs nationally, thereby violating §4071(c)(5) of the EAA and giving the school board the right to deny the club’s application. The court in *Colin v. Orange Unified School District* (2000) stated that “...far more involvement from an outside organization [is warranted] to justify denying a student group on the basis of §4071(c)(5)” (p. 1146). Although two other cases litigated involved issues with the GSA name (*Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*, 2003; and *Gay-Straight Alliance of Yulee High School v. School Board of Nassau County*, 2009), neither attempted to assert that a violation of §4071(c)(5) of the EAA had occurred.

Although four school boards attempted to assert the prohibition exclusion as delineated within §4071(d)(5) of the EAA, as shown in Table 3, (*Caudillo v. Lubbock Independent School District*, 2004; *Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County*, 2007; *Gonzalez v. School Board of Okeechobee County*, 2008; *Gay-Straight Alliance of Yulee High School v. School Board of Nassau County*, 2009), all were unsuccessful. However, the school board in one case

(*Caudillo v. Lubbock Independent School District*, 2004) made a compelling argument. In *Caudillo* (2004), the school board claimed that the GSA club promoted unlawful activity in violation of §4071(d)(5) of the EAA. Since non-heterosexual sex between minors was illegal in the State of Texas, and the Supreme Court case *Lawrence v. Texas* (2003) addressed non-heterosexual sex between adults and not minors, the school board claimed that allowing the GSA to exist would violate Texas law. In addition, the school board cited the GSA club's mission to discuss safe sex and its website which included links to non-heterosexual information. The Texas federal court in addressing this particular issue, and in light of the Supreme Court decision in *Hess v. Indiana* (1973), which stated that "advocacy of illegal action at some indefinite future time" is considered free speech under the First Amendment (p. 108), decided not to resolve whether §4071(d)(5) of the EAA was violated. Instead the *Caudillo* (2004) court determined there was more compelling information to rule upon.

As Tables 2 and 3 illustrate, seven school boards unsuccessfully attempted to deny GSA club recognition based on the club's respective viewpoint; either in direct violation of §4071(d)(7) of the EAA or the First Amendment of the Constitution, or both. In four of the cases litigated, the court determined that the school board violated §4071(d)(7) of the EAA

and possibility (as the court implied) the First Amendment (*Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*, 2003; *Caudillo v. Lubbock Independent School District*, 2004; *White County High School Peers Rising in Diverse Education (PRIDE) v. White County School District*, 2006; *Gay-Straight Alliance of Yulee High School v. School Board of Nassau County*, 2009). In two of the cases litigated the court did not address §4071(d)(7) of the EAA, but implied that the school board may have engaged in viewpoint discrimination in direct violation of the First Amendment (*East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District*, 1998-1999; *Colin v. Orange Unified School District*, 2000). In one case the federal court based its decision entirely on First Amendment grounds, as the EAA was not applicable (*East High School Prism Club v. Seidel*, 2000).

As Tables 1 and 3 illustrate, four school boards denied their GSA club recognition based on §4071(f) of the EAA, which provides that a school board may deny a club's application if the club diminishes the ability of the school board to maintain order and discipline (*Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*, 2003; *Caudillo v. Lubbock Independent School District*, 2004; *Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County* (2007); *Gay-Straight Alliance of Yulee High School v. School*

*Board of Nassau County, 2009*). In three of the cases litigated the court determined that to have justified the denial of the GSA club based upon §4071(f) of the EAA, school personnel would have to had demonstrated that the disruption to which school personnel were responding to was caused by students representing the GSA club, not the opponents of the club. The three courts that denied the respective school boards the ability to use §4071(f) of the EAA to prevent the GSA clubs from organizing did so to prevent what would amount to a heckler's veto; something the Supreme Court has disavowed for more than 60 years (*Terminiello v. Chicago* (1949)).

The *Caudillo, v. Lubbock Independent School District* (2004) case was the only case included in the research in which the school board prevailed in using §4071(f) of the EAA. In this case, two unique circumstances existed that swayed the Texas court to rule in favor of the school board. First, the GSA club's mission, in part, was to discuss safe sex, in direct contradiction to the abstinence-only school board policy. Second, the court concluded that the denial of the club's application was justified because in permitting the club to have a website that included links to sexually explicit material would expose young students to subject matter detrimental to their well-being.

With the exception of *Caudillo v. Lubbock Independent School District* (2004) the outcome of the cases included in this research overwhelmingly favored students' right to organize GSA clubs when the school has provided a limited open forum. Absent the specific circumstances encountered in *Caudillo v. Lubbock Independent School District* (2004) involving the discussion of safe sex in a school district with an abstinence-only policy and the fact that a link containing explicit sexual material existed on the GSA club's website, the outcome of this research supports the conclusion that when a school board is faced with a GSA club desiring to organize on school property, it should consider the outcome of the judicial decisions in the last decade and approve the GSA club's application, less unique circumstances exist.

*What additional guidance can be gleamed from the opinions of legal scholars?*

On one hand, a school may have concerned parents that do not want their children attending GSA club meetings... On the other hand, the school has to contend with the EAA and may not want to take the drastic measures ...to circumvent the EAA (Berkley, 2004, p. 1852).

School Boards desiring to avoid the requirements of the EAA, for whatever reason, may have difficulty in doing so. However, legal scholars have recently purported ways to

accomplish this task in order to avoid the problems that may arise when students attempt to organize GSA clubs on secondary school campuses. The information below has been provided in this research, not to promote nor hinder school boards from accepting or rejecting GSA club applications, but to assist school boards and their educational leaders in making informed choices when contemplating such decisions.

According to Berkley (2004), a school board can avoid the EAA altogether if they incorporate the tenets of the GSA club within their curriculum. While Berkley has stated that "this approach may be the best option for schools faced with a tough decision" (p. 1851), the idea of incorporating discussions of acceptance toward homosexuality within the school curriculum may backfire inciting parental outrage to the point of litigation. In *Citizens for a Responsible Curriculum v. Montgomery County Public Schools* (2005), an organization called Citizens for a Responsible Curriculum (CRC) filed suit in a Maryland federal court against Montgomery County Public Schools for revising and distributing curricula materials that included issues surrounding homosexuality. The CRC alleged that the school board was endorsing homosexual lifestyles. The court ruled in favor of the CRC and prohibited the school board from implementing the curriculum.

As stated by Berkley "...school boards facing this situation have a dilemma. "Foregoing federal funding and eliminating the recognition of noncurriculum-related clubs are not popular decisions" (p.1852). However school boards wishing to follow Berkley's advice in making GSA club's curriculum-related must be cognizant of what the Supreme Court in *Mergens* (1990) has asserted about curriculum-related clubs. What may be considered curriculum related in one school may be considered non-curriculum related in another (Berkley, 2004; Vandewalker, 2009; & Whittaker, 2009). As stated by Pratt (2007) "...if a school adopts a policy closing the forum in order to prevent a GSA from meeting on campus, the school must ensure that any student club allowed to meet can successfully pass the *Mergens* test for curriculum-relatedness" (p. 386).

Two additional tactics used several times (often concurrently) by school boards in an attempt to evade the EAA is §4071(f) of the Act, as illustrated in Tables 1 and 3, and the "lewd, indecent, or offensive speech" exclusion, incorporated within the parameters of the First Amendment, described in *Bethel School District No. 403 v. Fraser* (1986, p 683). While Pratt (2007) has stated that the offensive speech tactic, as iterated in *Fraser*, may be "...the most potent defense a school board can use" to limit GSA club speech (p. 396), only the Caudillo (2004) case, as depicted in Tables 1 through 3, was

successful in applying the offensive speech defense concurrently with §4071(f) of the EAA. Under Hazelwood (1988), the "Supreme Court has held that [a] school must be able to set high standards for the student speech that is disseminated under its auspices ...and may refuse to disseminate student speech that does not meet those standards" (Pratt, 2007, p. 393). However, when the school board in *Colin v. Orange Unified School District* (2000), sought to assert "...a Hazelwood-type argument (lewd or indecent speech not protected within the school) to deny approval" of a GSA club, they were unsuccessful (Mawdsley, 2001, p. 27).

School boards have also attempted to ban GSA clubs justifying that by allowing the club to make use of school equipment and facilities, such as the public address system, the school is perceived as endorsing the club (Pratt, 2007). This presumption was postulated in *Colin v. Orange Unified School District* (2000). The school board claimed that by allowing use of its facilities by GSA club members it would be perceived as providing its imprimatur to the club. However, the federal court rejected the school board's argument in the same fashion as the Supreme Court iterated in *Mergens* (1990). Had the Supreme Court found in *Mergens* that the school board was sponsoring the religious club in question, the EAA would have been determined unconstitutional as the Act would have been construed as

violating the Establishment Clause of the First Amendment. A "school that permits a student-initiated and student-led religious club to meet after school, just as it permits any other student group to do, does not convey a message of state approval or endorsement" *Board of Education of the Westside Community Schools v. Mergens* (1990, p. 252). As Justice O'Connor emphasized in *Mergens* (1990) that when the student speech is extracurricular and outside the normal school day, the presumption of the school as imprimatur of a GSA club, due to the allowance of school facilities, "...appears to have a significantly narrower meaning than it had in *Hazelwood*" (Ingber, 1995, p. 471).

Finally school boards, and in some circumstances state legislators, have attempted to curtail the formation of GSA clubs within their schools by requiring parental consent prior to permitting a student to join a non-curriculum club.

No doubt some supporters of parental consent policies would argue that gay-positive student groups are harmful to children. Some people think that homosexuality is morally wrong and that GSAs 'recruit' children to be homosexual. But the Constitution demands more than suspicions about harm before expressive rights can be infringed (Vandewalker, 2009, p. 49).

Lacking any known judicial challenge to such parental consent laws (like the ones enacted in Georgia and Utah) regarding GSA clubs, this tactic may afford parents the right to deny their child's desire to join a GSA club within their school (Vandewalker, 2009; Whittaker, 2009). However, as discussed earlier in this research, the U.S. Court of Appeals for the Seventh Circuit, ruling on an issue involving prior parental consent for school condom distribution, concluded that a "compelling and not merely plausible 'justification for infringing on minors' rights for fear of harm" must be present (*American Amusement Machine Ass'n v. Kendrick*, 2001, p. 576).

Whittaker (2009), maintains that parental notification restrictions put in place by states or school boards, due to "animus towards gay-friendly student groups, ...will be hard pressed to provide justifications for the restrictions to overcome [judicial]...scrutiny" (pp. 66-67). The Supreme Court in *Romer v. Evans* (1996) specifically stated that "animus toward homosexuals lacks a rational relationship to legitimate state interests" (p. 632). Using parental consent requirements to inhibit the ability of GSA clubs to exist in the public schools of the United States will most likely continue to be a topic for discourse among educational leaders, legislators, lawyers, and parents, in the years to come. As stated by Ross (2000), "the appropriate relationship between government and parents in the

education of children is an issue that has created recorded controversy since Plato advocated the communal rearing of children" (p. 177).

#### Recommendations for Further Study

Although the rights of non-heterosexual students can be viewed from a purely legal perspective, we as educational leaders are compelled to consider the ethical, moral, and social needs of the rainbow of students we serve. As some states or regions of the country may be immersed in heterosexism and homophobia, certain states or regions of the country have evolved into a more tolerant, if not accepting, milieu (Fellmeth, 2008). It is within these areas of the country that educational leaders should lead, model, and support the needed research to assist their more hesitant neighbors in the effort to ensure that school leaders and policymakers not only do what is essential to avert unnecessary litigation, but to create "a system of public schools free and open to all" (Phi Delta Kappan, 2006, p. 54).

While this research has important implications for educational leadership and policy studies, the need for additional research encompassing non-heterosexual students and the benefits of GSA clubs cannot be understated. Given that the results of this study have shown that only one student-sponsored GSA club, among the 11 cases litigated, lost their EAA claim in

federal court (*Caudillo v. Lubbock Independent School District*, 2004), an in depth look at the particulars of the case, including interviewing the respective students and school personnel involved about their experiences before, during, and after the trial would be a worthwhile study. As revealed in this study that the EAA has a definitive relationship to students' First Amendment rights, and that *East High School Prism Club v. Seidel* (2000) was the only GSA case to be litigated on First Amendment grounds, a topic worthy of research would be to examine the likelihood that the *East High School Prism Club v. Seidel* case set a precedent for students to establish a GSA club as a curriculum-related club. As the EAA would not be applicable in making determinations for schools to accept or reject curriculum-related clubs, future research should examine students' first Amendments rights in achieving this endeavor.

Given the assumption from the literature review in this study that the presence of GSA clubs may help create safer educational environments for all students, and in an era of increasing school bullying, in and outside the classroom (e.g. Internet), additional research on the efficacy of GSA clubs may prove to be instrumental in curtailing such harassment (Harlow & Roberts, 2010).

Do GSA clubs improve the educational experience for non-heterosexual students? When a GSA is present, do non-

heterosexual students encounter derogatory remarks with less frequency? Do the students feel safer in school, attend more regularly, and experience an increased feeling of belonging when GSA clubs are available for students to join? Does the existence of GSA clubs have an effect on the attitudes and perceptions of school administrators and teachers regarding acceptance of divergent views?

To acquire answers to the aforementioned questions quantitative and qualitative research surrounding the experiences of students, and the perceptions and attitudes of administrators should be explored. For example, to study the differences in attitudes among students, teachers, and administrators in schools with and without GSA clubs could provide empirical evidence that such organizations do provide non-heterosexual students with a better sense of belonging and a more harmonious environment. Such research could also yield differences in the perceptions and attitudes of teachers and school leaders. Also worthy of exploration would be to delve into the reasons why school districts initially threatened with litigation for denying a GSA club school recognition, averted such legal action.

Additional qualitative research might explore the longitudinal effects on non-heterosexual students' sense of self as adults, resulting from the presence or absence of a GSA

within their high school and their affiliation with such. A case study of one or more of the participants (students or school leaders) in the 11 court cases researched in this study may also illuminate useful data for educators and policymakers when making decisions regarding the value of GSA clubs. Whatever the reason for further research, academic scholars should not conduct such research in the name of a cause, but perform such to better understand what is needed to further education, compassion, and harmony among humankind.

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## Appendix A

### IRB Approval Letter



Office of Research Compliance  
Institutional Review Board  
2000 Kraft Drive, Suite 2000 (0497)  
Blacksburg, Virginia 24060  
540/231-4606 Fax 540/231-0959  
e-mail [irb@vt.edu](mailto:irb@vt.edu)  
Website: [www.irb.vt.edu](http://www.irb.vt.edu)

#### MEMORANDUM

**DATE:** April 9, 2010

**TO:** Wayne Tripp, Danielle Crossley

**FROM:** Virginia Tech Institutional Review Board (FWA00000572, expires June 13, 2011)

**PROTOCOL TITLE:** The Equal Access Act Not the Access For All Students Except Gay Students Act: Federal Justice Decisions and Their Implications for School Systems' Policies and Practices

**IRB NUMBER:** 10-353

As of April 9, 2010, the Virginia Tech IRB Administrator, Carmen T. Green, approved the new protocol for the above-mentioned research protocol.

This approval provides permission to begin the human subject activities outlined in the IRB-approved protocol and supporting documents.

Plans to deviate from the approved protocol and/or supporting documents must be submitted to the IRB as an amendment request and approved by the IRB prior to the implementation of any changes, regardless of how minor, except where necessary to eliminate apparent immediate hazards to the subjects. Report promptly to the IRB any injuries or other unanticipated or adverse events involving risks or harms to human research subjects or others.

All investigators (listed above) are required to comply with the researcher requirements outlined at <http://www.irb.vt.edu/pages/responsibilities.htm> (please review before the commencement of your research).

#### PROTOCOL INFORMATION:

Approved as: **Exempt, under 45 CFR 46.101(b) category(ies) 4**

Protocol Approval Date: **4/9/2010**

Protocol Expiration Date: **NA**

Continuing Review Due Date\*: **NA**

\*Date a Continuing Review application is due to the IRB office if human subject activities covered under this protocol, including data analysis, are to continue beyond the Protocol Expiration Date.

#### FEDERALLY FUNDED RESEARCH REQUIREMENTS:

Per federal regulations, 45 CFR 46.103(f), the IRB is required to compare all federally funded grant proposals / work statements to the IRB protocol(s) which cover the human research activities included in the proposal / work statement before funds are released. Note that this requirement does not apply to Exempt and Interim IRB protocols, or grants for which VT is not the primary awardee.

The table on the following page indicates whether grant proposals are related to this IRB protocol, and which of the listed proposals, if any, have been compared to this IRB protocol, if required.

*Invent the Future*

VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY

*An equal opportunity, affirmative action institution*

Appendix B

Training in Human Subject Protection Certification



Appendix C

**20 USC 4071**  
**TITLE 20--EDUCATION**  
**CHAPTER 52--EDUCATION FOR ECONOMIC SECURITY**  
**SUBCHAPTER VIII--EQUAL ACCESS**

**Sec. 4071. Denial of equal access prohibited**

(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited

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

(b) "Limited open forum" defined

A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Fair opportunity criteria

Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that--

- (1) the meeting is voluntary and student-initiated;
- (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;
- (3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
- (4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
- (5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Construction of subchapter with respect to certain rights

Appendix C (cont.)

Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof--

- (1) to influence the form or content of any prayer or other religious activity;
- (2) to require any person to participate in prayer or other religious activity;
- (3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;
- (4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;
- (5) to sanction meetings that are otherwise unlawful;
- (6) to limit the rights of groups of students which are not of a specified numerical size; or
- (7) to abridge the constitutional rights of any person.

(e) Federal financial assistance to schools unaffected

Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Authority of schools with respect to order, discipline, well-being, and attendance concerns

Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

(Pub. L. 98-377, title VIII, Sec. 802, Aug. 11, 1984, 98 Stat. 1302.)

Short Title

Section 801 of title VIII of Pub. L. 98-377 provided that: ``This title [enacting this subchapter] may be cited as `The Equal Access Act!.'"

<http://www.justice.gov/crt/cor/byagency/ed4071.php>

Appendix D

Litigation Analysis Log

Title of Legal Case Analyzed	Federal Court/ Year	Crucial Terms	Procedural Stance	Case Summary	Outcome of Litigation
East High GSA v. Board of Education of Salt Lake City School District	UT federal district court (1999)	EAA, Summary judgment	Representatives of GSA club and school board cross-moved for summary judgment in students' action alleging school board violated EAA.	Non-heterosexual students sued school board alleging that they violated the EAA by denying students the opportunity to meet and access to school facilities.	Summary judgment granted to students for the 1997-98 school year. Summary judgment granted to school board following 1997-98 school year as school closed its forum.
East High School Prism Club v. Seidel	UT federal district court (2000)	1 <sup>st</sup> Amend., preliminary injunction	Students request preliminary injunction prohibiting school board from denying a school club access to the limited forum created for curriculum-related student clubs.	Non-heterosexual students sued school board alleging that they violated their 1 <sup>st</sup> Amendment rights.	Students request for preliminary injunction granted.
Colin v. Orange Unified School District (2000)	CA federal district court (2000)	EAA, preliminary injunction	Students request preliminary injunction prohibiting school board from denying a school club access to the limited forum created for curriculum-related student clubs.	Non-heterosexual students sued school board alleging that they violated the EAA by denying GSA application.	Students request for preliminary injunction granted.
Franklin Central GSA v. Franklin Township Community School Corporation	IN federal district court (2002)	EAA, motion to reconsider, summary judgment	After court finding for students EAA claim, school board requested court to reconsider compelling them to recognize GSA club claiming case now moot	Although school board violated the EAA by denying GSA application they now claim previous court decision is moot.	School board required to recognize GSA club. Motion to reconsider original decision denied.
Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County	KY federal district court (2003)	EAA, preliminary injunction	Representatives of GSA club claimed school board violated their rights under the EAA denying GSA equitable access to school facilities.	Non-heterosexual students sued school board alleging that they violated the EAA by denying GSA application.	Students request for preliminary injunction granted School board required to recognize GSA club.

Appendix D (cont.)

Case Title	Court And Date	Key Terms	Procedural Posture	Overview of Case	Outcome
Caudillo v. Lubbock Independent School District	TX federal district court (2004)	EAA, summary judgment	Representatives of GSA club claimed school board violated their rights under the EAA denying GSA club recognition.	Non-heterosexual students GSA club determined to create a material and substantial interference with school board's educational mission contravening the abstinence-only school policy.	School Board's request for summary judgment granted. Judgment for students denied.
White County High School PRIDE v. White County School District	GA federal district court (2006)	EAA, motion for injunctive relief	Representatives of GSA club claimed school board violated their rights under the EAA denying GSA club recognition.	Non-heterosexual students sued school board alleging that they violated the EAA by denying GSA application.	Students request for injunctive relief granted. School board required to recognize GSA club.
Straights and Gays for Equality v. Osseo Area School	MN federal district court (2006) 8 <sup>th</sup> Circuit (2006) MN federal district court (2007) 8 <sup>th</sup> Circuit (2008)	EAA, preliminary injunction	Representatives of GSA club claimed school board violated their rights under the EAA denying GSA equitable access to school facilities.	Non-heterosexual students sued school board alleging that they violated the EAA by denying students an equitable opportunity to meet and access to school facilities.	Students request for preliminary injunction granted. School board required to provide GSA club equitable access to school facilities.
GSA of Okeechobee High School v. School Board of Okeechobee County	FL federal district court (2006)	EAA, preliminary injunction	Representatives of GSA club claimed school board violated their rights under the EAA denying GSA club recognition.	Non-heterosexual students sued school board alleging that they violated the EAA by denying GSA club recognition.	Although school board asserted GSA club created a material and substantial interference with educational mission, district court disagreed and granted students' preliminary injunction request

Appendix D (cont.)

Case Title	Court And Date	Key Terms	Procedural Posture	Overview of Case	Outcome
Gonzalez v. School Board of Okeechobee County	FL federal district court (2008)	EAA, summary judgment 42 U.S.C. 1983	GSA club and one of its members sued school board under the EAA for equitable relief and nominal damages for refusing to recognize the club as a non-curricular high school student group.	GSA club and a member asserted that the school board's policy banning any sexually oriented group violated the EAA and was thus unenforceable.	Lack of any evidence that school board had lost its federal abstinence only program funding, district court granted GSA club and its members a permanent injunction from the school board denying recognition of the GSA club.
GSA of Yulee High School v. School Board of Nassau County	FL federal district court (2009)	EAA, preliminary injunction	Representatives of GSA club claimed school board violated their rights under the EAA denying GSA club recognition.	Non-heterosexual students sued school board alleging that they violated the EAA by denying recognition of GSA club based upon its choice of name of "gay-straight alliance."	District court granted students motion for preliminary injunction. The school board was to ordered to grant official and equitable recognition to GSA club without requiring the club to change its name.

*Curriculum Vitae*

**William G. Oglesby**  
VCU School of Mass Communications  
Bill Oglesby Media Consulting, Inc.  
11821 Bondurant Drive  
Richmond, VA 23236  
Phone: 804-379-1889  
VCU Phone: 804-827-2785  
Cell: 804-334-2105  
Fax: 804-897-5319  
bill@billoglesby.com

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OBJECTIVE

Administrative Communications Position  
Tenure or non-tenure track Professor, Mass Communications

EDUCATION

Juris Doctorate, Pepperdine University (1982)

Bachelor of Arts in Journalism and Communications, Washington  
and Lee University (1977)

PROFESSIONAL POSITIONS/APPOINTMENTS

Virginia Commonwealth University, School of Mass Communications  
Assistant Professor, 2008 - present; Adjunct Faculty Member,  
2003 - 2008. Teach Intro to Broadcast News writing (radio, TV,  
Internet), Introductory Journalism Lab and undergraduate  
Communications Law; also serving on Diversity and Student  
Affairs committees and international task force; faculty adviser  
to students.

Bill Oglesby Media Consulting, Inc., Richmond, VA, 2005 -  
present Founder and President of firm specializing in media and  
presentation training, video production, educational and legal  
media relations, on-camera and voice talent. Training  
encompasses both crisis and proactive media relations, and  
higher education clients include Virginia Tech and Bates  
College.

Appendix E (cont.)

University of Richmond, Journalism Department, 1997 - 1999.  
Adjunct Faculty Member. Taught Television News writing to  
undergraduate students.

Carter Ryley Thomas, Inc., Public Relations, Richmond, VA, 1995  
- 2005

Founding Co-owner and Director, Media Training and Video  
Production specializing in media and presentation training,  
video production, educational and legal media relations.

Richmond Times-Dispatch Radio News Service, 1997 - 2005  
Substitute Radio News Anchor for 6 - 8 radio stations in  
Richmond and Charlottesville, VA. Involved writing, producing  
and anchoring newscasts during morning primetime news  
broadcasts.

WWBT-TV (NBC affiliate), Richmond, VA, 1988 - 1994  
Weekend News Anchor/Producer/12 On Your Side and General  
Assignment Reporter. Supervised staff of 10 - 15 staff members  
involved in news, production and creative services on weekends.  
Duties included conceptualizing, reporting, writing, recording  
audio and supervising post-production of news stories.

WYFF-TV (NBC affiliate), Greenville, SC, 1985 - 1988  
Legal and General Assignment Reporter, Substitute News Anchor.  
Worked independently on law enforcement, legal and courtroom  
beats. Duties included conceptualizing, reporting, writing,  
recording audio and supervising post-production of news stories.

Furman University, Greenville, SC, 1987  
Adult Continuing Education. Taught special courses on mass  
communications.

WSET-TV (ABC affiliate), Roanoke, VA, 1982 - 1985  
Weekend News Anchor/Producer/Roanoke Bureau Reporter for  
Lynchburg, VA-based television affiliate. Supervised staff of 5  
- 10 staff members involved in news, production and creative  
services on weekends. Duties included conceptualizing,  
reporting, writing, recording audio and supervising post-  
production of news stories.

## Appendix E (cont.)

### Honors/Awards

- Rated *Faculty Star* by Council for the Advancement and Support of Education (CASE), March 2003
- Award of Merit, IABC Richmond Chapter, Total Communications Program, "StateFair Park" (2000)
- Bronze Anvil Award, Public Relations Society of America, Advertorial, "Coalition for Choice in Real Estate Closings" (1997)
- Award of Excellence, IABC-Richmond, Total Communications Program, "Coalition for Choice in Real Estate Closings" (1997)
- Medallion Award, Virginia Public Relations Association, "Coalition for Choice in Real Estate Closings" (1997)
- Certificate of Merit, Virginia Public Relations Association, "Eskimo Pie 75<sup>th</sup> Anniversary/Smithsonian Exhibit" (1997)
- Certificate of Merit, Public Relations Society of America, Richmond chapter, "Clearing the Air" (1996)
- Governor's Transportation Safety Award, Virginia Board of Transportation Safety (1993)
- Capital Region Emmy Nomination, The National Academy of Television Arts and Sciences, Best Information-Oriented Program, "Don't Talk to Strangers" (1992)
- Meritorious Award, Virginia Associated Press, Best Documentary or In-depth Report, "Don't Talk to Strangers" (1992)
- First Place Award for North and South Carolina, United Press International, Investigative Documentary category, "A Prison Without Bars," series on juvenile justice in South Carolina (1986)
- First Place Award, South Carolina Associated Press, Mini-Documentary Series category, "The Broken Connection," series on prosecution of drug kingpins in South Carolina (1985)

### RESEARCH

#### Print Articles/Blogs (not complete list)

Oglesby, Bill, "Media Tips for School Superintendents," VASS News, Volume XX, Number 4, Spring 2008, Virginia Association of School Superintendents (April 2008)

## Appendix E (cont.)

Oglesby, Bill "'Courting' the Media (and the Public)," an article detailing how effective relations in the court of public opinion is equally important to those in courts of law. (August 2003)

Oglesby, Bill "To Use or Not To Use," commentary on Virginia Tech massacre coverage, [www.billoglesby.com](http://www.billoglesby.com) (April 2007)

Oglesby, Bill "The Woodruff Juggernaut," commentary on ABC correspondent Bob Woodruff, [www.billoglesby.com](http://www.billoglesby.com) (March 2007)

Oglesby, Bill "Guys Not Wanted?" commentary on gender composition in TV news anchor roles, [www.billoglesby.com](http://www.billoglesby.com) (October 2006)

Oglesby, Bill "Katie In Charge Part 1," commentary on CBS Evening News Anchor Katie Couric, [www.billoglesby.com](http://www.billoglesby.com) (September 2006)

## SERVICE

### University Organizations

- Member, VCU Department of Mass Communications Student Affairs Committee (2008 - present)
- Member, VCU Department of Mass Communications Diversity Committee (2008 - present)

### Professional Organizations

- Founding Board Member, Richmond Broadcasters Hall of Fame (1993 - present)
- Association for Education in Journalism and Mass Communication (2007 - present)
- Public Relations Society of America (2006 - present)
- Licensed Member, Virginia State Bar (1982 - present)
- Member, American Bar Association (1982 - present)

### Community Organizations

- Member, Board of Directors, ChildSavers of Richmond (2007 - present); Marketing Committee (2007- present); Executive Committee (2008 - present); Chair, Board Development Committee (2008-present)

Appendix E (cont.)

- Member, AAA Safety Advisory Committee (1991 - 2007; 2009 - present)
- Board Member, Association for the Support of Children with Cancer (1992 - 1995); President (1994 - 1995)
- Emcee/auctioneer for Association for the Support of Children with Cancer, Carolyn Miller Memorial Fund Benefit (domestic violence), Noah's Children (children with serious/terminal illnesses) (1993 - present)