Students' Rights in Public Education

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With an Introduction by John W. Whitehead

Introduction

In April 2001, William Shepard's daughter, a fifth grader at a California elementary school, was reading her Bible during recess with some of her friends when a teacher ordered her to stop reading the Bible and refrain from bringing the book to school in the future. After attorneys for The Rutherford Institute informed the school of the young girl's right to freely exercise her religious beliefs at school, the school principal apologized to the Shepard family and reprimanded the teacher.

In the spring of 1999, a principal at a New York public school forbade kindergartner Emily Welisevich from passing out invitations to a musical being held at her church due to the religious nature of the event. However, school officials had allowed students to distribute invitations for other events, such as YMCA soccer registration, Girl Scout enrollment and Summer Camp. After being contacted by The Rutherford Institute, the superintendent of schools changed the school district's literature distribution policy.

Recently, a public school superintendent in Milford, New York, refused to allow a Christian youth club to meet in school facilities after hours, even though he allowed the Boy Scouts, 4-H club and other groups this privilege. The Christian club's meetings would constitute "religious instruction" in the public schools, forbidden by the "separation of church and state," according to the school official. Rutherford Institute attorneys took the case all the way to the Supreme Court of the United States, which ruled that the club had a right to meet and enjoy the same privileges as other non-religious clubs. Nonetheless, the superintendent still threatened to deny the club their right to meet, stating the school district would rather forbid all clubs from meeting than allow the religious club to use the schoolhouse.

These situations, which represent just a sampling of the cases handled by Rutherford Institute attorneys, illustrate the degree to which many school officials in this country are ignorant about the rights of religious people in public schools. As President Clinton stated in his July 1995 Directive discussing religion and the public schools, confusion about the state of the law creates many difficulties for religious people in public education. This booklet aims to clarify some of the ambiguities surrounding religion in the public schools and provide students the opportunity to exercise fully their constitutional rights in that environment.

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Principles Governing Religion in the Public School

The Free Exercise Clause

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[1] This provision is commonly known as the Free Exercise Clause. The Supreme Court has held that this measure safeguards all religious beliefs but not all the ways that individuals might act on those beliefs.2 For example, the Supreme Court held that the Constitution protected the right of 19th Century Mormons to believe in polygamy but not the right to engage in that practice.3

The historical controversy surrounding the Free Exercise Clause centers on whether the state must exempt individuals from laws or policies that conflict with their religious beliefs or simply treat religious people on an equal footing with nonreligious people.4 Until recently, the Supreme Court held that the Free Exercise Clause requires the government to accommodate religious persons when state law or policy burdened religious beliefs or actions.5 The government could refuse to accommodate such persons only if protecting a compelling government interest by the least restrictive means available.6

In 1990, the Supreme Court adopted a different position on the parameters of the Free Exercise Clause.7 In *Employment Division v. Smith*, the Court held that, as long as a government policy or law is neutral and generally applicable, the government need not accommodate religious people whose beliefs conflict with such policy or law.8 In other words, as long as the state does not intend to discriminate against religious people when it adopts a law or policy, the state does not offend the Free Exercise Clause.

The *Smith* approach differs drastically from the accommodation view of the Free Exercise Clause, under which courts found constitutional violations even where the government action or policy created only unintentional or incidental burdens on religious beliefs.9 Under the *Smith* approach, however, burdens must be direct and intentional to amount to constitutional problems.10

The Rise and Fall of the Religious Freedom Restoration Act

The *Smith* decision produced outrage among constitutional scholars and religious liberty practitioners. To bolster religious freedom, Congress enacted the Religious Freedom Restoration Act ("RFRA") in 1993.11 Until July 1997, this legislation reestablished the traditional accommodation framework for evaluating Free Exercise Clause cases. According to the statute, once an individual shows that a government action or policy burdens his religious beliefs, the government must demonstrate a compelling reason to justify that burden.12 Otherwise, the state must accommodate religious persons.13

In July 1997, however, the Supreme Court struck down RFRA as it applied to state and local actions, reasoning that Congress, in enacting the statute, had violated the separation of powers by attempting to broaden the Free Exercise Clause beyond what the Supreme Court had interpreted in the First Amendment; and that Congress had exceeded the scope of its enforcement power over the states under section 5 of the Fourteenth Amendment when it enacted RFRA.14

The Free Speech Clause

The First Amendment also provides that "Congress shall make no law . . . abridging free speech."15 As with many constitutional liberties, this right is not absolute.16 This principle holds particularly true in the public school context. Although the Supreme Court has held that neither teachers nor students shed their rights when they enter the schoolhouse gate,17 courts give school officials some latitude in regulating free speech on

their premises. Despite these limits, an increasing number of religious students and teachers are successfully invoking the Free Speech Clause to defend their religious freedom.

The Establishment Clause

Invariably, school administrators cite the Establishment Clause to justify any interference with religious speech or activity in the public schools. This constitutional measure provides that "Congress shall make no law respecting an establishment of religion."18

Since the early 1960s, when the United States Supreme Court decided the public school prayer cases, widespread misconceptions have existed concerning the role of religion and religious activity in public education. Often religious persons face discrimination or outright hostility in the public education system. School officials have told individuals that they may not pray or talk about religion while in school, even by themselves and on their own time. Supreme Court precedent, however, dictates otherwise.

Every United States Supreme Court decision condemning religious activity in public schools has involved state-directed and state-sponsored religious activity. While the Supreme Court has held that the state may not prescribe religious activities, it has never ruled that individual religious expression in public schools is unconstitutional. Courts have expressly acknowledged the difference between individual religious speech and government-endorsed religious expression: "[T]here 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."19

Government involvement in religion, however, raises concerns under the Establishment Clause. Courts use the often criticized but never overruled test articulated in *Lemon v. Kurtzman* to determine whether school interaction with religion is permissible.20 Under this framework, a school policy is constitutional if it: (1) has a secular purpose; (2) has a primary effect which neither advances nor inhibits religion; and (3) does not create an excessive entanglement with religion.21

The Supreme Court has identified only seven specific practices as unconstitutional establishments of religion in public schools:

1. State-directed and required on-premises religious training22
2. State-directed and required prayer23
3. State-directed and required Bible reading24
4. State-directed and required posting of the Ten Commandments25
5. State-directed and authorized "periods of silence" for meditation and voluntary prayer, where the legislative intent is to promote or advance religion26
6. State-directed and required teaching of scientific creationism27
7. State-sponsored prayer led by clergy or students at public high school graduation and promotion ceremonies28

The Presidential Directive

Because the Supreme Court has struck down only seven practices as impermissible religious activity in the public schools, there are many gray areas with which school administrators, teachers, parents, and students must wrestle. In an effort to minimize these clouded issues, the Clinton Administration directed the Department of Education to issue guidelines on religious activity in public schools to school superintendents across the country.29

The Department of Education Guidelines addressed many of the problem areas facing religious people in the public schools. Unfortunately, there has not been any evidence to show that the Guidelines have impacted the number of cases of religious discrimination in the public schools.

Despite the good intentions underlying the Guidelines, they contain several problems.30 The Guidelines fail to address several important issues such as the rights of teachers and the degrees to which elementary and junior high school students can form religious clubs.

Most importantly, the Guidelines do not have any legal effect, being simply a tool to guide individuals on these issues. The Guidelines do not provide any legal shield for school administrators who follow them.

Consequently, it is important for school officials, teachers, students, and parents to know the case law that supports these guidelines. This booklet provides complete legal information on issues facing students in public schools. When used in conjunction with tools such as the Guidelines, this booklet will help foster a better understanding of religious freedom in the public schools and, as a result, allow students to exercise their rights fully in that environment.

RIGHTS OF STUDENTS

Free Speech and Expression

The Supreme Court first applied the Free Speech Clause of the First Amendment to public school students in *West Virginia State Board of Education v. Barnette*.31 The Court held that public school students have a First Amendment right "to be free from ideological indoctrination."32

Several decades later, the Supreme Court, in a trilogy of cases, established the current framework for courts to use in evaluating free speech cases in the public schools. Courts have divided student speech into three categories: (1) "vulgar, lewd, obscene, and plainly offensive speech"; (2) school-sponsored speech; and (3) all other student speech.33

Vulgar, Lewd, Obscene, and Plainly Offensive Speech

As one court has noted, "school officials may suppress speech that is vulgar, lewd, obscene, or plainly offensive without a showing that such speech occurred during a school-sponsored event or threatened to 'substantially interfere with [the school's] work.'"34 *Bethel School District No. 403 v. Fraser* supplies the appropriate standard for vulgar, lewd, obscene, and plainly offensive speech.35.

In *Fraser*, the Supreme Court stated that "[t]he 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 accepted behavior."36 The Court found that "[t]he schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct."37 The Court recognized that while it had given adults substantial freedom to engage in plainly offensive speech, it would not afford that same latitude to students in the public schools.38

Courts are constantly defining the boundaries of decency. However, one court has recently held that "[s]peech need not be sexual to be prohibited by school officials; speech that is merely lewd, indecent, or offensive is subject to limitation."39 The age of the students also should factor into a court's evaluation.40

School-Sponsored Speech

This category involves speech or expressive activity that "students, parents and members of the public might reasonably perceive to bear the imprimatur of the school."41 Such speech includes school-sponsored publications, theatrical productions, and school elections.42

In these cases, schools have substantial latitude in regulating student expression.43 Federal courts must "defer to [any] school decision to 'disassociate itself' from speech that a reasonable person would view as bearing the imprimatur of the school"44 as long as that decision is "reasonably related to legitimate pedagogical concerns."45 In the constitutional scheme, most school decisions easily satisfy this standard.

All Other Student Speech

*Tinker v. Des Moines Independent School District*46 governs student speech that falls in neither of the above categories. *Tinker* applies to cases "address[ing] the educators' ability to silence a student's expression that happens to occur on the school premises."47

Under this framework, the Constitution guarantees a student's freedom of expression in public schools if the speech does not: (1) materially and substantially interfere with the requirements of appropriate discipline in the operation of the schools; or (2) invade or collide with the rights of others.48

Schools must offer more than just mere speculation that a disturbance will occur as evidence to justify any interference with this type of student speech.49 The First Amendment prohibits schools from banning student expression simply "because of an undifferentiated fear or apprehension of disturbance."50 School officials also must show more than a desire to avoid possible "discomfort and unpleasantness" accompanying a viewpoint.51

Determining whether student expression invades or collides with the rights of others is sometimes difficult.52 Evidence that other students objected to the speech is by itself insufficient to justify banning expression under *Tinker*.53 If courts were to accept that evidence, "absent any further justification, the officials would have a license to prohibit virtually every type of expression."54

In addition, according to one federal district court, a school policy prohibiting attire that depicts messages that harass other students does not survive the *Tinker* test.55 The court found that the policy attempts to regulate "the content of speech, not . . . its potential for disruption."56 The court noted that under the school's policy a student could not wear a T-shirt that bore a depiction objecting to homosexuality because it would demean his homosexual classmates.57 While the court recognized that the school wanted to teach students to tolerate different races, ethnic backgrounds, sexes, and sexual orientations, it could not ban speech simply because it conflicts with this objective.58 The court stated that schools cross "the 'constitutional line . . . when, instead of merely teaching, the educators demand that students express agreement with the educator's values.'"59

Religious Expression: An Overview

Both the Free Exercise Clause and the Free Speech Clause safeguard religious speech.60 In recent years, courts, using a free speech framework, have consistently held that public school authorities must protect religious expression to the same degree as nonreligious expression.61 To prohibit the expression of a particular opinion because of its religious nature would "strike at the very core of first amendment values."62

Many schools use the Establishment Clause to defend regulating student religious expression.63 The Establishment Clause, however, places a limitation on government power, not on individual rights.64 Nevertheless, school officials inevitably maintain that most students lack the maturity necessary to distinguish between government-sponsored and student-initiated religious expression.65

Courts have been reluctant to accept this argument. They generally agree that a content-neutral policy for expressive activity eliminates Establishment Clause concerns.66 As one federal court has stated, "ignorant bystanders cannot make censorship legitimate. . . . Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether . . . schools can teach anything at all. Free speech, free exercise, and the ban on establishment are quite compatible when the government remains neutral and educates the public about the reasons."67

Allowing exhaustive free expression in elementary and junior high schools troubles some courts and school officials.68 Yet other courts have held that "nothing in the first amendment postpones the right of religious speech until high school."69

Barring or restricting student-initiated religious expression in public schools also has significant "chilling effects" on students' First Amendment rights.70 The Supreme Court has stated that such bans prefer those who believe in no religion over those who are religious.71 In a recent decision, the Supreme Court reiterated this principle and held that the Constitution mandates that government treat religious speech the same as nonreligious speech.72 "[N]o arm of government may discriminate against religious speech when speech on other subjects is permitted in the same place at the same time."73

Religious Expression in the Classroom

A growing area of controversy involves religious expression in the classroom. These cases typically arise when an educator, for example, asks each student to draw a picture of something that makes him or her happy and a student sketches a church, drawing a reprimand from the teacher for bringing religion into the classroom. Constitutional common sense suggests that such action on the teacher's part is unconstitutional. Even the Department of Education Guidelines state that "students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submissions."74

For the courts, however, this issue is not so clear-cut. In *DeNooyer v. Livonia Public Schools*,75 for example, a federal district court held that a school could prohibit a student from showing a video of herself singing a religious song during a "show and tell" period.76 The court noted that the school's ban was reasonable for two reasons. First, the student wanted to use a video, and the teacher did not allow students to use videos for their presentations.77 Most importantly, however, the court based its ruling on the necessity for the school to protect the student's classmates from potentially offensive religious discussion.78 The court used this reasoning even though the school had previously allowed a student to discuss a Menorah in class.79 The Sixth Circuit Court of Appeals upheld the lower court's ruling,80 and the United States Supreme Court refused to hear the student's appeal.81

In another case, *Settle v. Dickson County School Board*,82 the Sixth Circuit Court of Appeals issued a similar ruling. In response to a school assignment to write a research paper on a topic that would be "interesting, researchable and decent," a student chose to do her paper on "A Scientific and Historical Approach to Jesus Christ."83 The teacher rejected this topic and offered many reasons for her decision, several of which focused on the religious nature of the report.84 The court held that all of the teacher's reasons fell within "the broad leeway of teachers to determine the curriculum and the grades awarded to students."85 The Supreme Court refused to review this decision.86

The Third Circuit Court of Appeals split evenly over whether a grade-school teacher infringed on the First Amendment rights of a student who wanted to read the Biblical story of Jacob and Esau, in spite of the fact that there was no mention of God or religious themes in the story.87 The court let stand a lower court

ruling that the right of a school to direct the content of classroom discussion required only that the teacher have a legitimate, nondiscriminatory reason for excluding the viewpoint, and that the desire to avoid divisive or potentially offensive religious content sufficed.88

Until the Supreme Court clarifies this area of constitutional law, these conflicting lower court rulings are the law within the states over which the respective courts have jurisdiction.89 Other federal appellate courts have not issued rulings involving students' religious speech in the classroom.90

Because expression in the classroom typically falls under the "school-sponsored" category, schools probably would only have to offer a reasonable justification for any restrictions on such speech and show that they have not based their restrictions on a desire to suppress a particular point of view.91 Unfortunately, this reasonableness standard is fairly easy for schools to satisfy because courts typically defer to the school's judgment on curriculum issues.92 Consequently, some students may have difficulties expressing their religious views in the classroom even though most attorneys agree that students may engage in religious expression in the classroom when such speech is relevant to the subject matter being taught.

Distribution of Religious Literature

The First Amendment guarantees students the right to distribute literature in a peaceful manner93 as long as the materials are not "libelous, obscene, disruptive of school activities, or likely to create substantial disorder, or which invade the rights of others."94 This constitutional protection extends to the distribution of religious literature.95

Courts have split over the appropriate standard to evaluate distribution of religious literature cases. Some courts have placed such speech in the school-sponsored category even though schools have nothing to do with this type of expression.96 In other challenges to school restrictions on distribution of religious pamphlets, courts have applied the *Tinker* standard.97

Regardless of their method of analysis, however, courts have treated school efforts to ban such conduct unfavorably.98 In *Hedges v. Wauconda Community Unit School District*,99 for example, the Seventh Circuit Court of Appeals struck down a school policy banning distribution of proselytory religious material and prohibiting any religious speech that might create the appearance of school sponsorship.

Courts have rejected Establishment Clause defenses to categorical bans like the one in *Wauconda*. They maintain that a content-neutral policy allowing the distribution of all leaflets in high schools satisfies Establishment Clause concerns.100 In addition, student distribution of religious literature represents private and not government conduct. One federal court summarized this principle:

> Clearly, simply because student speech occurs on school property does not make it government supported. It is undisputed in this case that the students are not government actors, are not acting in concert with the government, and do not seek school cooperation or assistance with their speech. Accordingly, the Establishment Clause simply is not implicated.101

Further, schools cannot curtail student speech simply to appear neutral in the area of religion.102 As one court has stated, "[s]tudents therefore may hand out literature even if recipients would misunderstand its provenance. The school's proper response is to educate the audience rather than squelch the speaker."103

However, schools may place reasonable time, manner, and place restrictions on distribution as long as the policy is reasonable and applies evenhandedly to all types of literature.104 According to courts, "[w]hen, where, and how children can distribute literature in a school is for educators, not judges, to decide 'provided [such choices] are not arbitrary or whimsical.'"105 One court has held reasonable a policy that requires "the

student and the principal to determine 'cooperatively' an appropriate time and place for the distribution."106 That same court also upheld the portion of the school's policy that required a disclaimer as a reasonable restriction.107

Courts have failed to produce a uniform rule regarding policies that require students to obtain prior approval before distributing leaflets. The Seventh Circuit Court of Appeals held that such a policy in the elementary schools was constitutional.108 The court held that the school had an interest in ensuring that obscene, vulgar, and racially and religiously bigoted material did not reach its students.109 Schools, however, must establish a reasonable prescreening process to avoid Free Speech violations.110

Several other courts, however, have struck down prior approval policies.111 The Ninth Circuit ruled unconstitutional a policy that required prior review of non-school-sponsored speech.112 The Court held that schools cannot require prior approval for such speech "on the basis of undifferentiated fears of possible disturbances or embarrassment to school officials."113 A federal district court ruled unconstitutional an elementary school's policy that required prior approval of both religious and non-religious literature.114

Freedom of Association

The Supreme Court has recognized an inherent general freedom of association within the First Amendment.115 The Supreme Court has acknowledged two types of association: private and expressive.116

The freedom of private association safeguards "an individual's choice to enter into and maintain certain intimate or private relationships" from unwarranted government intrusion.117 Such associations include marriage, child-rearing, and relationships that "presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.'"118

The freedom of expressive association allows "individuals to associate for the purpose of engaging in protected speech or religious activities."119 The Court has held that "[t]he Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties."120 Students meeting for a religious club would fall under this category.

Right to Know

A plurality of the Supreme Court has held that the right to know is an "inherent corollary of the right of free speech."121 The plurality held that students have the right "to inquire, to study and to evaluate, to gain new maturity and understanding."122

Courts, however, treat this right differently depending on the context. For example, courts typically disfavor school attempts to restrict student access to materials.123 These cases generally arise when schools seek to remove controversial books from their libraries. In *Board of Education v. Pico*,124 a plurality of the United States Supreme Court held that school administrators cannot remove books from the library "simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"125

Although plurality opinions of the Supreme Court do not serve as binding precedent, most courts examining similar fact patterns use the *Pico* plurality as their chief guideline. Under Pico, a school's underlying motivation for removing books should be the focus of any judicial inquiry.126 If schools remove books because of their "pervasively vulgar content" or unsuitable educational nature, courts will find their motivation constitutional.127 If school officials remove a book simply because they personally disapprove of it, courts

will find the removal unconstitutional.128 School officials who fail to follow established policy for removing books provide evidence of an improper motive,129 and courts will look unfavorably on such decisions in order to safeguard the students' right to know.

Courts use a different standard of review for schools' curriculum decisions.130 The Seventh Circuit Court of Appeals has held that students questioning the legality of curriculum decisions must "cross a relatively high threshold before entering upon the field of a constitutional claim suitable for federal court litigation."131 Courts typically defer to school judgment in these matters.132 For example, a federal district court upheld a school's decision not to add the film *Schindler's List* to its curriculum because of its R rating.133 The Eleventh Circuit Court of Appeals found constitutional a school's decision to stop using a textbook because of its vulgar nature.134

However, this deferential position does not invariably produce victories for schools. In *Pratt v. Independent School District No. 831*, the Eighth Circuit Court of Appeals invalidated a school's decision to remove a film from its curriculum.135 The court noted that although schools enjoy substantial discretion in curriculum matters, they do not have an absolute right to remove materials from their curricula.136 The court struck down the school's removal of the film because the school's administrators based their decision on their own personal values, not on the violent content of the film.137

EQUAL ACCESS

Access to Facilities

The University Setting

In *Widmar v. Vincent* the Supreme Court established the principle of equal access to facilities in the university context.138 There, the Court held that a university must allow a religious student group access to facilities on the same basis as all other groups. Although the university argued that denying religious student groups access avoided problems under the Establishment Clause, the Supreme Court rejected that argument.139 According to the Court, an open forum available to religious and nonreligious student groups removes any Establishment Clause problems.140

The Equal Access Act and Secondary School Students

In 1984 Congress enacted the federal Equal Access Act (EAA) to protect the religious rights of public school students.141 The EAA requires schools to grant religious student groups the same rights and privileges as nonreligious student groups.142 The EAA, however, applies only to schools that satisfy three basic conditions.

First, the school must have created a "limited open forum." 143 Under the EAA a limited open forum evolves when a school permits "one or more noncurriculum related student groups to meet on school premises during noninstructional time."144 The key phrases left for courts to define are "noncurriculum related student groups" and "noninstructional time."

The Supreme Court has defined a "noncurriculum related student group" as "any student group that does not directly relate to the body of courses offered by the school."145 According to one appellate court, such groups do not have to be student-initiated.146

The Ninth Circuit Court of Appeals considered the meaning of "noninstructional time."147 A California school argued that lunch time was not "noninstructional time" under the EAA and that it did not have

to allow religious clubs to meet during that period. The court, however, noted that the plain language of the statute made clear that when a school interrupts classroom instruction for a lunch period, it has created noninstructional time.148

School officials have the choice whether or not to permit noncurriculum related student groups to meet during noninstructional time,149 but once they give even one such group permission to meet, school authorities open the forum. Within the open forum, the school cannot discriminate against any student group based on the religious, political, or philosophical content of the group's speech.150

In addition, the EAA applies only to public secondary schools and does not discuss religious clubs in primary schools.151 The EAA gives each state the discretion to define the grade levels encompassed within the definition of "secondary school."

Finally, only public secondary schools that receive federal funding are subject to the EAA.152

Employees or agents of the school may be present at "religious meetings only in a non-participatory capacity."153 Teachers or other school employees may attend meetings to keep order or for other custodial purposes.154 According to the EAA, no school or government official may promote, lead, or participate in any student meeting in the school's limited public forum.155

The Supreme Court, in *Board of Education of Westside Comm. Schools v. Mergens*, held that the EAA does not violate the federal Constitution's Establishment Clause.156 Yet, some schools have resisted submitting to this federal statute's mandate.157 For example, some schools have insisted that the EAA does not override any conflicting state law provisions on this issue.158 However, in *Garnett v. Renton School District*,159 the Ninth Circuit Court of Appeals held that Congress intended, through the EAA, to "provide religious student groups a federal right," and schools must either permit such groups to meet or pay the consequences—loss of federal funding.160

Unfortunately, some public schools have decided to eliminate all noncurricular student organizations to avoid the requirements of the EAA.161 Such actions represent attempts to circumvent the purpose of the EAA.162 However, "[w]hile that option may be antithetical to progressive concepts of education, that cost, like the rejection of federal funds, is the burden that Congress imposed on school districts that do not wish to allow religious and other student groups equal access to their facilities."163 Schools cannot close a forum to noncurricular student clubs in order to prohibit certain clubs from meeting because of their content, e.g. religious clubs.164

The purpose of the EAA is plain: equal access to school facilities for religious student clubs. Schools must do more than merely allow student religious clubs to meet informally; the EAA demands official recognition.165 If other student clubs have "access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair," student religious clubs also must have such access.166 According to one court, "'it does not behoove a school board, or any court for that matter, to disregard a law duly enacted by a democratically elected Congress and upheld by the highest court of the land.'"167 The same court rejected a school's efforts to "'search the Act and scour the language of *Mergens* itself for loopholes that would allow it to continue discriminating against voluntary religious groups.'"168

While the Equal Access Act benefits student religious groups, a Second Circuit Court of Appeals decision indicates that equal access may sometimes exact a price. In *Hsu v. Roslyn Union Free School District No. 3*, [169] the appellate court considered whether a school could refuse to recognize a student religious group that refused to comply with the school's nondiscrimination policy.170 The school maintained a nondiscrimination policy that prohibits all student groups from discriminating against individuals because of their race, color, creed, sex, national origin, marital status, or disability.171 A student religious group indicated that

it could not comply with that policy because it required its officers to be Christians.172 Consequently, the school stated that it would not recognize the student group unless it removed that restriction from its by-laws.173

The court ruled that "[u]nder the Equal Access Act, the [group] may try to preserve the content of the religious speech at their meetings by discriminating in a way that ensures that the Club's leaders will be committed to both its cause and a particular type of expression."174 The court stated that "just as a secular club may protect its character by restricting eligibility for leadership to those who show themselves committed to the cause, the [religious group] may protect their ability to hold Christian Bible meetings by including the leadership provision in the club's constitution."175

On equality grounds, however, the court held that the religious group could not require all leaders to satisfy the Christian criterion. The court found that because a non-Christian could adequately carry out the duties of two positions—Secretary and Activities Coordinator—the student group could not require their holders to be Christians.176 The court found this holding necessary in order to treat religious groups the same as nonreligious groups.

Equal Access in Junior High and Elementary Schools

The EAA, as stated above, does not apply to junior high or elementary schools.177 Consequently, students in those schools must rely on the Constitution to protect their right to meet as religious clubs on school grounds.

Courts have acknowledged that the Constitution does not require students to postpone exercising their rights until high school,178 but they are divided over the breadth of these rights in pre-secondary schools. Some courts, for instance, have placed serious limitations on the rights of elementary students in particular to have religious clubs on school premises.179 For example, in *Quappe v. Endry*, the court held that a school could prohibit an elementary religious club from meeting immediately before school and instead require that it meet in the evening.180 A federal district court, however, recently held that elementary school students could attend a before school devotional meeting as long as they had parental consent.181

As for junior high schools, the Eighth Circuit Court of Appeals, in *Good News/Good Sports Club, et. al v. The School District of the City of Ladue*,182 held that a student-led junior high school group, the Good News/Good Sports Club, had a constitutional right to meet at a public middle school. As in *Widmar*, the court used forum analysis to rule that students had a First Amendment right to access, and that the school district had engaged in unconstitutional viewpoint discrimination by excluding the Bible club while allowing other clubs to meet. In response to the claim that junior high school students lack the maturity to discern that a school is not sponsoring such religious clubs by permitting them to meet, one court has said that "ignorant bystanders cannot make censorship legitimate . . . Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether . . . schools can teach anything at all."183 In *Good News Club v. Milford Central School*, the Supreme Court held that a Christian youth club for grades K through 8 must be permitted to meet in a public school building after the end of the school day, since the club's meetings constituted "moral instruction" like the instruction provided by other youth organizations that were allowed to meet, such as the Boy Scouts and 4-H club.184

Access to Funding

Eleven years after it first addressed the equal access to facilities question, the Supreme Court considered the next equal access issue: whether schools must give religious groups equal access to funding.

In *Rosenberger et al. v. Rector and Visitors of University of Virginia*,185 the Supreme Court held that under the Constitution, religious and nonreligious student groups had the right of equal access to the school's student activity fund. *Rosenberger* stemmed from the University of Virginia's decision to deny funding from its student activity fund to a Christian student newspaper because of the publication's religious perspective.186 In a 5-4 decision, the Court held that denying funding violated the students' right of free speech and that the University would not violate the Establishment Clause by granting funds. In its analysis, the Court equated a public university's student activities fund with one of its meeting rooms.187 According to the Court, the principles of equal access therefore apply to both situations and require that public universities apply the same funding policies to religious and nonreligious student publications.188

Rosenberger's exact reach is uncertain.189 Following the forum analysis under the *Rosenberger* decision, however, all public universities should fund secular and nonsecular student groups on an equal basis in the same manner as they provide all groups access to university facilities.190

Prayer in Public Schools

Students may, of course, pray privately over their lunch, before a test or in any number of situations that may arise during the normal course of a school day. Schools, however, may not direct prayer. For more detailed information concerning students' right of religious expression on campus, please consult The Rutherford Institute's publication *Baccalaureate Services* for information on religious graduation services, and *"See You at the Pole"* for information on the annual "See You at the Pole" and related events.

Conclusion

The classroom is a marketplace of ideas. Thus, as long as material is age-appropriate, relevant to the subject matter being taught, and presented objectively, school authorities should preserve the marketplace concept and maintain the freedoms essential to a proper administration of the education system.

We live in a nation today where young men and women are exposed to a great amount of information and, as a result, are maturing at a much earlier age. The time has passed where it can be validly argued that the young must be shielded from viewpoints different than their own. Instead, they must be provided with an adequate education, which they may use to confront a world that demands informed judgment and educated decisions.

One effective way to provide such an education is to allow the freedom of religious expression in the public schools. Granting this freedom provides a means not only to achieve important educational objectives, but to preserve precious and ancient liberties.

Endnotes

1 U.S. CONST. AMEND. I.
2 Reynolds v. United States, 98 U.S. 145, 164 (1878).
3 *See id.*
4 *See generally* Michael McConnell, *Origins of the Free Exercise Clause*, 103 HARV. L. REV. 1409 (1990).
5 *See generally* Sherbert v. Verner, 374 U.S. 398 (1963).
6 *Id.* at 406-07.

7 Employment Division v. Smith, 494 U.S. 872, reh'g denied, 496 U.S. 913 (1990).
8 *See generally id.*
9 *See* McConnell, *Origins of the Free Exercise Clause*, 103 HARV. L. REV. at 1418.
10 *See id.* For an application of this principle by the Supreme Court to strike down a municipal ordinance that was facially neutral but actually targeted at animal sacrifice by a disfavored religious sect, *see* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).
11 42 U.S.C. § 2000bb (1993).
12 *Id.* § 2000bb-1.
13 *Id.*
14 City of Boerne v. Flores, 521 U.S. 507 (1997). Although Boerne ended RFRA's application to state and local government actions in the educational context, RFRA still applies by its terms to the agencies of the federal government. *See* Christians v. Crystal Evangelical Free Church (In re Young), 141 F.3d 854 (8th Cir. 1998).
15 U.S. CONST. AMEND. I.
16 *See*, *e.g.*, Roth v. United States, 354 U.S. 476, 483 (1957).
17 Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969).
18 U.S. CONST. AMEND. I.
19 Board of Educ. v. Mergens, 496 U.S. 226, 252 (1990) (plurality opinion).
20 Lemon v. Kurtzman, 403 U.S. 602 (1971).
21 *Id.* at 612-13.
22 McCollum v. Bd. of Educ., 333 U.S. 203 (1948).
23 Engel v. Vitale, 370 U.S. 431 (1962).
24 Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).
25 Stone v. Graham, 449 U.S. 39, reh'g denied, 449 U.S. 1104 (1981).
26 Wallace v. Jaffree, 472 U.S. 38 (1985).
27 Edwards v. Aguillard, 482 U.S. 578 (1986).
28 Lee v. Weisman, 505 U.S. 577 (1992); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).
29 A copy of the Guidelines is available from The Rutherford Institute.
30 For a full analysis of the Guidelines, please contact The Rutherford Institute.
31 319 U.S. 624 (1943) (addressing whether mandatory flag salute violated student freedoms of speech and religion).
32 *Id.* at 642.
33 *See* Chandler v. McMinnville, 978 F.2d 524, 528-29 (9th Cir. 1992) (providing this useful overview of student speech).
34 Chandler, 978 F.2d at 529 (quoting Tinker, 393 U.S. at 509) (brackets in original).
35 478 U.S. 675 (1986).
36 *Id.* at 681.
37 *Id.* at 683.
38 *Id.* at 682-83.
39 Broussard v. School Bd. of Norfolk, 801 F. Supp. 1526, 1536 (E.D. Va.1992).
40 *See id.* at 1537.

41 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270-71 (1988); *see also* Lopez v. Tulare Joint Union High Sch. Dist. Bd. of Trustees, 40 Cal. Rptr. 2d 762 (1995) (upholding on state statutory and constitutional grounds school decision to force students to remove profanity from student film).

42 Hazelwood, 484 U.S. at 271; Poling v. Murphy, 872 F.3d 757 (6th Cir. 1989), cert. denied, 493 U.S. 1021 (1990).

43 Hazelwood, 484 U.S. at 271; *see also* Chandler, 978 F.2d at 529 (discussing the application of Hazelwood). But *see* Desilets v. Clearview Reg. Bd. of Educ., 647 A.2d 150, 152-54 (N.J. 1994) (finding that school had no legitimate educational purpose for removing movie reviews from that school based its decision on subject matter rather than grammatical or style problems).

44 Chandler, 978 F.2d at 529 (quoting Hazelwood, 484 U.S. at 271).

45 Hazelwood, 484 U.S. at 273.

46 393 U.S. 503.

47 Hazelwood, 484 U.S. at 271.

48 Tinker, 393 U.S. at 513.

49 *Id.* at 511.

50 *Id.* at 508.

51 *Id.* at 509.

52 The category of student speech dealing with vulgar and lewd expression is an offshoot of this standard.

53 Clark v. North Dallas Indep. Sch. Dist., 806 F. Supp. 116, 120 (N.D. Tex. 1992).

54 *Id.*

55 Pyle v. South Hadley Sch. Comm., 861 F. Supp 157, 159 (D. Mass. 1994), aff'd, 55 F.3d 20 (1st Cir. 1995).

56 *Id.* at 171.

57 *Id.* at 172.

58 *Id.*

59 *Id.* at 173 (quoting Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989, 994 (3d Cir. 1993)).

60 *See* Widmar v. Vincent, 454 U.S. 263, 269 (1981).

61 *See*, *e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Hedges v. Wauconda Comm. Unit Sch. Dist., 9 F.3d 1295 (7th Cir. 1993).

62 Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 84 (1983) (Stevens, J., concurring).

63 *See*, *e.g.*, Cole v. Oroville Union H.S. Dist., 228 F.3d 1092 (9th Cir. 2000) (holding that school district's need to avoid Establishment Clause violation required censorship of religious elements of valedictorian's graduation speech); Clark, 806 F. Supp. at 121; Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 294-95 (E.D. Pa. 1991).

64 Rivera v. East Otero Sch. Dist., 721 F. Supp. 1189, 1195 (D. Colo. 1989).

65 *See*, *e.g.*, Good News Club v. Milford Central School, 202 F.3d 502 (2d Cir. 2000), reversed, 121 S.Ct. 2093 (2001) (citing impressionability of young students in denying youth religious access to meeting room after instructional time); Hedges, 9 F.3d 1295; Slotterback, 766 F. Supp. 280; Thompson v. Waynesboro Area Sch. Dist., 673 F. Supp. 1379 (M.D. Pa. 1987).

66 Hedges, 9 F.3d 1295; Slotterback, 766 F. Supp. 280; Rivera, 721 F. Supp. 1189; Thompson, 673 F. Supp. 1379.

67 Hedges, 9 F.3d. at 1299-1300. Cf. Chandler v. James, 180 F.3d 1254 (11th Cir. 1999) (striking injunction that banned nearly all religious speech on public school campuses without regard to context)

and Chandler v. Siegelman, 230 F.3d 1313 (11th Cir. 2000) (on remand from Supreme Court, reaffirming earlier decision).

68 *See* Quappe v. Endry, 772 F. Supp. 1004 (S.D. Ohio 1991) (finding that elementary students lack maturity to make such distinctions), aff'd, 979 F.2d 851 (6th Cir. 1992); *see also* Hedges, 9 F.3d 1295 (school raises capacity argument for junior high school students); Thompson, 673 F. Supp. 1379 (same).

69 Hedges, 9 F.3d at 1298 (recognizing the free speech rights of junior high students); accord Thompson, 673 F. Supp. 1379; *see also* Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530 (7th Cir. 1996), cert. denied, 117 S. Ct. 1335 (1996) (recognizing the free speech rights of elementary school students); Herdahl v. Pontotoc County Sch. Dist. ,933 F. Supp. 582, 590 (N.D. Miss. 1996) (holding that as long as elementary school students have parental consent, they can participate in pre-school devotional meetings).

70 NAACP v. Button, 371 U.S. 415, 433 (1963); Slotterback, 766 F. Supp. at 293-94. *See generally* Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. REV. 685 (1978).

71 Schempp, 374 U.S. at 225.

72 Lamb's Chapel, 508 U.S. 384.

73 Hedges, 9 F.3d at 1297-98 (citing Lamb's Chapel, 113 S. Ct. at 2148; Doe v. Small, 964 F.2d 611 (7th Cir. 1992) (en banc); Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 48 (1986)).

74 Department of Education Guidelines (on file with The Rutherford Institute).

75 799 F. Supp. 744 (E.D. Mich. 1992), aff'd sub nom., 12 F.3d 211 (6th Cir. 1993), cert. denied, 511 U.S. 1031 (1994).

76 The message of the song was that she was saved by Jesus as a young child. *Id.* at 746.

77 *Id.* at 751.

78 *Id.*

79 *Id.* at 753.

80 DeNooyer v. Merinelli, 12 F.3d 211 (6th Cir.), cert. denied, 511 U.S. 1031 (1994).

81 511 U.S. 1031 (1994).

82 53 F.3d 152 (6th Cir. 1995), cert. denied, 116 S. Ct. 518 (1995).

83 *Id.* at 154-55.

84 *Id.*

85 *Id.* at 156.

86 Settle v. Dickson County Sch. Bd., 116 S. Ct. 518 (1995).

87 C.H. v. Oliva, 226 F.3d 198, 204 (3d Cir. 2000) (en banc), cert. denied, 121 S.Ct. 1653 (2001)

88 C.H. v. Oliva, 990 F.Supp. 341 (D. N.J. 1997).

89 For example, Settle v. Dickson is binding case authority within the Sixth Circuit Court of Appeals' jurisdiction, which encompasses Michigan, Ohio, Kentucky, and Tennessee. C.H. v. Oliva is binding in the Third Circuit's states, Pennsylvania, New Jersey, Delaware and the U.S. Virgin Islands.

90 One federal district court upheld a school's decision to prohibit a student from presenting an oral report because of its religious content. Duran v. Nitsche, 780 F. Supp. 1048 (E.D. Pa. 1991), vacated, 972 F.2d 1331 (3d Cir. 1992). The appellate court, however, vacated that ruling on procedural grounds. Duran v. Nitsche, 972 F.2d 1331 (3d Cir. 1992).

91 *See*, *e.g.*, Settle, 53 F.3d 152; Hedges, 9 F.3d 1295; Poling, 872 F.2d 757; DeNooyer, 799 F. Supp. 744; Hemry v. School Bd., 760 F. Supp. 865 (D. Colo. 1991); Nelson v. Moline Sch. Dist. No. 40, 725 F. Supp. 965 (C.D. Ill. 1989).

92 *See generally* Epperson v. Arkansas, 393 U.S. 97, 104 (1968); *see also* Settle, 53 F.3d 152; DeNooyer, 799 F. Supp. 744.

93 United States v. Grace, 461 U.S. 171, 176 (1983).

94 *See* Frasca v. Andrews, 463 F. Supp. 1043, 1050 (E.D.N.Y. 1979).

95 *See* Widmar, 454 U.S. at 269.

96 *See*, *e.g.*, Muller, 98 F.3d 1530; Hedges, 9 F.3d 1295; Hemry, 760 F. Supp. 856; Nelson, 725 F. Supp. 965.

97 *See*, *e.g.*, Clark, 806 F. Supp. 116; Slotterback, 766 F. Supp. 280; Rivera, 721 F. Supp. 1189; *see also* Muller, 98 F.3d at 1545-47 (Rovner, J., concurring in part & in result) (stating that courts should use Tinker in distribution of literature cases).

98 Hedges, 9 F.3d 1295; Slotterback, 766 F. Supp. 280; Hemry, 760 F. Supp. 856; Rivera, 721 F. Supp. 1189; Nelson, 725 F. Supp. 965; Thompson, 673 F. Supp. 1379; *see also* Bjorklun, *Distribution of Religious Literature in the Public Schools*, 68 EDUC. L. REP. 957 (1991).

99 Hedges, 9 F.3d 1295.

100 Hedges, 9 F.3d at 1298-1300; Slotterback, 766 F. Supp. at 294-96; Rivera, 721 F. Supp. at 1195-96; Thompson, 672 F. Supp. at 1391-92.

101 Rivera, 721 F. Supp. at 1195.

102 Hedges, 9 F.3d at 1298-1300.

103 *Id.* at 1299.

104 *See* Perry Educational Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983); Nelson, 725 F. Supp. 965; Hemry, 760 F. Supp. 856, 863.

105 Muller, 98 F.3d at 1543, (quoting Hedges, 9 F.3d at 1302) (brackets in original); Nelson, 725 F. Supp. 965.

106 *Id.* at 1543.

107 *Id.* at 1544-45.

108 *Id.* at 1534-35.

109 *Id.*

110 *Id.* at 1541 (suggesting that factors such as the nature of the leaflet and problems that might arise in evaluating its impact on recipients are relevant when considering a policy's reasonableness).

111 *See*, *e.g.*, Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988); Johnston-Loehner v. O'Brien, 859 F. Supp. 575 (M.D. Fla. 1994).

112 Burch, 861 F.2d 1149.

113 *Id.* at 1159.

114 Johnston-Loehner, 859 F. Supp. 575.

115 Roberts v. United States Jaycees, 468 U.S. 609, 622-23 (1984).

116 Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 544-45 (1987).

117 *Id.* at 544.

118 *Id.* at 545 (quoting Roberts v. Jaycees, 468 U.S. at 619- 20).

119 *Id.*; Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

120 Roberts v. Jaycees, 468 U.S. at 618.

121 *See* Board of Educ. v. Pico, 457 U.S. 853, 867 (1982) (plurality).

122 *Id.* at 868-69 (plurality opinion).

123 *See*, *e.g.*, Pico, 457 U.S. at 868-69 (plurality opinion); Campbell v. St.Tammany Parish Sch. Bd., 64 F.3d 184 (5th Cir. 1995); Case v. Unified Sch. Dist. No. 233, 908 F. Supp. 864 (D. Kan. 1995).

124 457 U.S. 853.

125 *Id.* at 872 (plurality opinion).

126 *Id.*; *see also* Campbell, 64 F.3d at 188-89.

127 Pico, 457 U.S. at 870-72 (plurality); *see also* Campbell, 64 F.3d at 188.

128 *See* Case, 908 F. Supp. 864 (applying Pico).

129 *Id.* at 876.

130 *See*, *e.g.*, Virgil v. School Bd., 862 F.2d 1517 (11th Cir. 1989); Zykan v. Warsaw Community Sch. Corp., 631 F.2d 1300, 1306 (7th Cir. 1980); Borger v. Bisciglia, 888 F. Supp. 97, 99-100 (E.D. Wis. 1995).

131 Zykan, 631 F.2d at 1306.

132 *See* Borger, 888 F. Supp. at 99-100.

133 Borger, 888 F. Supp. 97.

134 Virgil, 862 F.2d at 1525 (noting that students still had access to materials in library).

135 670 F.2d 771 (8th Cir. 1982).

136 *Id.* at 776.

137 *Id.* at 778.

138 Widmar, 454 U.S. 263.

139 *Id.* at 270-275.

140 *Id.* at 266-67.

141 *See* 20 U.S.C. §§ 4071-4074 (1984).

142 20 U.S.C. § 4071(a).

143 *Id.*

144 *Id.* § 4071(b).

145 Mergens, 496 U.S. at 239.

146 Pope v. East Brunswick Bd. of Educ., 12 F.3d 1244, 1249 (3d. Cir. 1993).

147 Ceniceros v. Board of Trustees, 66 F.3d 1535 (9th Cir. 1995).

148 *Id.* at 1537-38.

149 *Id.* § 4071(b); *see* Mergens, 496 U.S. at 241; Pope, 12 F.3d at 1254; *see also* Ceniceros, 66 F.3d at 1538 (suggesting that schools can disallow religious groups from meeting during lunch period by barring all noncurriculum-related student groups from gathering during that time).

150 20 U.S.C. § 4071(a).

151 *Id.*

152 *Id.*

153 *Id.* § 4071(c)(3); *see also* Sease v. School Dist., 811 F.Supp. 183 (E.D. Pa. 1993) (discussing this restriction).

154 *Id.* § 4072(2).

155 *Id.* § 4071(c); *see also* Sease, 811 F. Supp. 183 (discussing this restriction).

156 496 U.S. at 253.

157 *See*, *e.g.*, Pope, 12 F.3d 1244 (rejecting school's argument that allowing student religious club to meet sent a message of endorsement of religion).

158. *See* Ceniceros, 66 F.3d 1535; Hoppock v. Twin Falls Sch. Dist. No. 411, 772 F. Supp. 1160 (D. Idaho 1991); Garnett v. Renton Sch. Dist., 772 F. Supp. 531 (W.D. Wash. 1991), rev'd, 987 F.2d 641 (9th Cir. 1993), cert. denied, 510 U.S. 818 (1993).

159 987 F.2d 641 (9th Cir.), cert. denied, 510 U.S. 818 (1993).

160 *Id.* at 646; *see also* Ceniceros, 66 F.3d 1535 (reaffirming the Garnett holding).

161 *See Blade-Citizen Encinitas Edition*, Oct. 31, 1990, at A-1 (discussing such debate).

162 *See* Arval A. Morris, *The Equal Access Act After Mergens*, 61 EDUC. L. REP. 1139 (1990).

163 Pope, 12 F.3d at 1254.

164 Hopper v. City of Pasco, 241 F.3d 1067 (9th Cir. 2001); East High Gay/Straight Alliance v. Salt Lake City Sch. Distr., 81 F.Supp.2d 1166 (D.C. Utah 1999).

165 Mergens, 496 U.S. at 247.

166 *Id*.

167 Pope, 12 F.3d at 1247 (quoting district court opinion).

168 *Id.*

169 85 F.3d 839 (2d Cir. 1996), cert. denied, 117 S. Ct. 608 (1996).

170 *Id.*

171 *Id.* at 850.

172 *Id.* at 849-50.

173 *Id.* at 850.

174 *Id.* at 862.

175 *Id.* at 861.

176 *Id.* at 857.

177 The EAA would apply to a junior high school if state law defined junior high schools as secondary schools.

178 Muller, 98 F.3d at 1534-35 (elementary school students); Hedges, 9 F.3d at 1298 (junior high school students).

179 *See* Bell v. Little Axe Indep. Sch. Dist., 766 F.2d 1391 (10th Cir. 1985)(enjoining a school policy allowing elementary religious club to meet on same terms as nonreligious clubs); *see also* Quappe, 772 F.Supp. 1004 (upholding school's decision not to allow an elementary school religious club to meet immediately before or after school but to require the club to meet at 6:30 pm).

180 772 F. Supp. 1004, aff'd, 979 F.2d 851 (6th Cir. 1992).

181 Herdahl, 933 F. Supp. at 590.

182 28 F.3d 1501 (8th Cir. 1994); *see also* Thompson v. Waynesboro Area Sch. Dist., 673 F.Supp. 1379, 1380 (M.D. Pa. 1987).

183 Hedges, 9 F.3d at 1300.

184 121 S.Ct. 2093 (2001).

185 515 U.S. 819 (1995).

186 *Id.* at 2513-15.

187 *Id.* at 2517-19, 2523.

188 *Id.*

189 *See* Gay Lesbian Bisexual Alliance v. Sessions, 917 F. Supp. 1548 (M.D. Ala. 1996) (striking down policy for bidding use of university funds to condone or support any group that promotes homosexual lifestyle).

190 *See* Regents of University of Wisconsin v. Southworth, 529 U.S. 217 (2000) (requiring university student associations to adhere to viewpoint neutrality requirement in determining allocation of student association funds to various student organizations).