FIRST AMENDMENT ISSUES IN THE CONTROL AND USE OF
PUBLIC SCHOOL FACILITIES

by

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ABSTRACT

The passage of the Equal Access Act (1984) brought to light the legal conflict that had been building over the previous four decades over who should or should not have access to public school facilities. Following the passage of the Act, many student and community groups began to request use of school facilities. School leaders were called on to balance conflicting principles found in the Establishment Clause, the Free Exercise Clause, the Free Speech Clause, and the Equal Access Act.

This study examines these issues in light of legal cases resulting from these conflicting ideals. Legal cases from 1981 through 2009 relating to the control and use of school facilities were examined. Data from the cases were analyzed to determine guiding principles to aid school administrators in making decisions that will satisfy the principles of the Equal Access while balancing the demands of the First Amendment to the United States Constitution.
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CHAPTER I

INTRODUCTION

Introduction

Each year, school administrators around the country are approached with requests for use of school facilities by groups and individuals. Requests come from some affiliated with the school and some that have no such association. These requests may seem logical since the schools’ resources are the most visible symbol of the community at large and most accommodating to the needs of these groups. Those making the requests may also feel that, since the facilities were built and supported with taxpayer funds, their wishes should be automatically granted. In addition, groups of students may wish to use school facilities for purposes that fall outside the school’s curriculum. As the school is the natural gathering place for these students, the school building may seem to be the most reasonable meeting location for their group. The administrator, before granting such requests, must give thought to the implications such a decision would represent. Many factors come into play when considering whether to allow community or student use of school facilities. The topic of this research, the control and use of school facilities, falls under two very important and often contradictory legal areas. The conflict between these two areas of law places the school administrator in the position of having to chart a course through uncertain waters of unresolved legal conflict. The Establishment clause of the First Amendment to the Constitution of the United States conveys the idea that government and religious entities should not become involved to the point of entanglement (Hartman, Mersky, & Tate, 2007). The Equal Access Act (1984), however, makes it unlawful for a secondary school to
deny access to a student who wishes to conduct a meeting, even for religious purposes when the school is open to other similar groups (Equal Access Act, 1984). This also led to the debate about other uses of publicly funded school facilities. Careful study of the issues related to this area is needed to make informed decisions that comply with the current legal mandates related to the use of school facilities.

Statement of the Problem

The adoption of the Equal Access Act (1984) by the Congress of the United States spurred a debate about principles outlined in the First Amendment to the United States Constitution. At the heart of the debate is how much or how little government entities should interact with religious groups. The development of the *Lemon* test based on the *Lemon v. Kurtzman* Supreme Court decision of 1971 determined how subsequent church-state relationships could take place (Hartman et al., 2007). On the other hand, legislation in the 1980s opened the door for religious groups to have access to school facilities if the school received federal funds and allowed the existence of other noncurriculum groups during noninstructional time (Equal Access Act, 1984). The incongruity of these two legal concepts placed the school administrator in the difficult position of having to discern the intent of the legislation and related case law when faced with the decision to grant access to groups or individuals. The legislation has served as the basis for lawsuits against schools from a wide variety of groups ranging from religious organizations to the Boy Scouts of America to gay-straight alliances. There is a distinct need for clarification regarding the litigation subsequent to the 1984 legislation. In addition to clarification, school administrators need principles garnered from the study of these cases by
which they may effectively establish policies for the use of their facilities that will be in compliance with the law.

Significance of the Problem

Since the legal basis for the control and use of facilities is intertwined between a foundational principle from the United States Constitution and a contrasting principle from federal legislation, analysis and clarification are important for practicing school administrators. Guidance is needed for these administrators to ensure operation within the law. Also, the administrator should be equipped to provide a reasonable explanation to the local community of the reasoning behind policies enacted by the school district to adhere to the principles of the Establishment clause, the Equal Access Act, and other controlling legal precedent.

Purpose of the Study

The purpose of this study is to examine case law related to the control and use of school facilities. Furthermore, the research will be used to develop a deeper understanding of the issues related to the Establishment clause, the Equal Access Act, and the use of public facilities. With this deeper understanding regarding the control and use of school facilities, school administrators will be better equipped to make informed decisions on the subject and, thereby, avoid litigation over access to school resources.

Research Questions

1. What issues have evolved regarding the control and use of school facilities through case law in the state and federal courts from 1981 to 2009?
2. What decisional outcomes about the control and use of school facilities have been rendered by the state and federal courts from 1981 to 2009?

3. What trends are evident regarding the issue of control and use of school facilities in case law decisions from 1981 to 2009?

4. What principles for school administrators can be discerned from the courts’ decisions regarding the control and use of school facilities?

Limitations

This study will be conducted under the following limitations:

1. The cases represent litigation pertaining First Amendment issues regarding the control and use of school facilities from 1981 to 2009 in K-16 public educational institutions.

2. The study will be limited to cases pertaining to the control and use of school facilities litigated in the state and federal courts.

3. The study will be limited to cases categorized as control and use of school facilities litigation in West Education Law Digest, Key Number Schools 72, Control and Use.

4. The research is to be conducted by a doctoral student in an educational leadership program, not a lawyer.

Assumptions

The study will be grounded in the following assumptions:

1. It is assumed that all decisions in the court cases studied have been rendered in compliance with existing local, state, and federal laws.
2. It is assumed that all cases to be studied identified as Key Number Schools 72, Control and Use, will be recorded in full in the West Education Law Reporter.

3. It is assumed that all cases to be analyzed will pertain to the topic of control and use of school facilities.

4. It is assumed that the analyses of the cases to be studied will yield principles that may be generalized to the practices of school administrators.

Definition of Terms

The legal terms used in this study are defined as follows:

*Appeal:* “Resort to a superior court to review the decision of an inferior court or administrative agency” (Black, 1979, p. 88).

*Certiorari:* “A writ of common law origin issued by a superior to an inferior court requiring the latter to produce a certified record of a particular case tried therein” (Black, 1979, p. 88).

*Declaratory relief:* “A judicial ruling that determines the legal rights and duties of the parties” (Hartman et al., 2007, p. 541).

*Dissent:* “The term is most commonly used to denote the explicit disagreement of one or more judges of a court with the decision passed by the majority upon a case before them” (Black, 1979, p. 424).

*Forum:* “A place where free speech can be determined based on the nature of the environment where the speech actually occurs” (Essex, 2006, p. 138).

*Interlocutory injunction:* “[Injunction] issued at any time during the pendency of the litigation for the short-term purpose of preventing irreparable injury to the petitioner prior to the
time that the court will be in a position to either grant or deny permanent relief on the merits” (Black, 1979, p. 705).

*Irreparable injury:* “‘Irreparable injury’ justifying an injunction is that which cannot be adequately compensated in damages or for which damages cannot be compensable in money” (Black, 1979, p. 707).

*Limited public forum:* “Exists when agencies open an otherwise nonpublic forum, such as a school, to certain speakers or for certain topics” (Dowling-Sendor, 2005, p. 46).

*Noninstructional time:* “Interpreted by the courts to apply to before and after school, activity periods, and lunch time” (Mawsdley, 1998, p. 11).

*Nonpublic forum:* “The agency can control who engages in expression as well as the topics that are discussed as long as restrictions are viewpoint neutral and reasonable in light of the forum’s purpose” (Dowling-Sendor, 2005, p. 46).

*Precedent:* “An adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law” (Black, 1979, p. 1059).

*Public forum:* “Agency may impose reasonable regulations on the time, place, and manner of expression, but it can regulate a speech’s content only if necessary to serve a compelling public interest” (Dowling-Sendor, 2005, p. 46).

*Tort:* “A private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages” (Black, 1979, p. 1335).

*Viewpoint discrimination:* “Schools as agents of state government may not penalize students for expressing certain types of speech based on hostility to the expressed speech” (Essex, 2006, pg. 139).
**Writ of certiorari**: “An order by the appellate court which is used when the court has discretion on whether or not to hear an appeal. If the writ is denied, the court refuses to hear the appeal and, in effect, the judgment below stands unchanged. If the writ is granted, then it has the effect of ordering the lower court to certify the record and send it up to the higher court which has used its discretion to hear the appeal” (Black, 1979, p. 1443).

**Organization of the Study**

Chapter I served as an introduction to the study. This introduction presented statement of the problem, the significance of the problem, and the purpose of the study. Additionally, the research questions to be addressed were stated along with the limitations and assumptions relating to those questions. Finally, the definitions of relevant terms were introduced.

Chapter II relates the review of literature pertaining to the topic of the study. This review discusses the First Amendment’s three clauses that serve as the basis of conflict in the study. Additionally, the Equal Access Act (1984) and its relation to the First Amendment is addressed. Finally, the difficulties facing school administrators as they arrive at decisions regarding access to facilities are explored through the relevant literature.

Chapter III explains the methodology and procedure utilized in the study. The research materials and research questions are presented along with the means of data collection, including the case brief method, and data analysis.

Chapter IV contains the case briefs and analyses of data obtained from those briefs.

Chapter V includes a summary, guiding principles for school administrators, conclusions, and recommendations for further study.
CHAPTER II
REVIEW OF THE LITERATURE

Introduction

In the high-stakes culture of 21st century education, school administrators must balance increasingly demanding tasks. Hoy and Miskel (2008) described the work of administrators as spending long hours addressing diverse issues in brief encounters involving a variety of individuals and groups. In addition, “technological advances, demands for increased achievement and standards-based accountability, and environmental competition from new forms of schools are changing the nature of work for schools administrators” (p. 421). Adding to the demands of the job are the numerous outside influences trying to shape the policy and practice of the school. Spring (2005) listed the educational establishment; the politics of school finance; and politics at the federal, state, and local level as players in a bid to reshape local education. Spring discussed each of these at length and the impact they have on local school leadership. In comparing leadership in education to leadership in other fields, Abbate (2010) pointed out that like leaders in many industries, “school leaders always appear to have their hands full, and on any given day the challenges can seem never-ending” (p. 36).

Included in these challenges is the need to make decisions about the daily operation of the school. In developing the policies that will guide these decisions, the leader must carefully examine the implications of these decisions. Additionally, administrators must consider existing policy and whether it should be adapted to meet the fluid nature of oversight by federal, state and local officials. While these policies and the seemingly mundane decisions that accompany them
may seem harmless enough, careless execution may result in lawsuits. An administrator deciding whether to allow a student club to form, the Boy Scouts to meet in the school or to permit certain content on bulletin boards would not expect those decisions ultimately to be examined by the courts. Such decisions have, however, resulted in litigation. Epley (2007) related a situation in which a school superintendent urged a change in policy regarding the distribution of copies of the Bible by the Gideons. When the board decided to ignore the advice of the superintendent and the board attorney by leaving the policy in place, the superintendent resigned. Eventually, legal action was brought against the board and the district court held the board was in violation of the Establishment Clause. Similarly, Epley recounted a case in which a policy that was cited to disallow the distribution of literature regarding abortion and alternatives was struck by the Eleventh Circuit based on Free Speech principles. Whether the question deals with Free Speech principles or the Establishment Clause, understanding of the legal ramifications of the First Amendment is imperative. While many groups have begun to seek access to school facilities, the use of public school facilities by religious groups has been the nexus of the legal conflict in this area.

Two areas of U.S. policy regarding religion in public schools have been of particular legal interest in the latter half of the 20th century. According to McCarthy (2009) the Establishment clause of the First Amendment was first clarified in regards to education in a 1947 decision that set in motion litigation for more than 30 years following. This case, Everson v. Board of Education of the Township of Ewing et al., first established the standard based on the words of Thomas Jefferson that there should be a wall separating church and state activities (Hartman et al., 2007). Alternatively, legislation in the 1980s opened the door for religious groups to have access to school facilities if the school received federal funds and allowed the
existence of other noncurriculum groups during noninstructional time (Equal Access Act, 1984). McCarthy (2009) explained that ignorance of the law is not a justifiable excuse and educators must know which religious activities are prohibited in schools and which are protected. Violation in either direction could result in consequences for the district and teacher. The discussion of the control and use of school facilities generally falls within the debate between these two areas. This literature review examined the issues related to the administration of school facilities. The Lemon test, a First Amendment legal construct, was examined in relation to the Establishment clause and the conflict that developed as courts addressed new issues derived from the Equal Access legislation. In addition, issues consequential to the implementation of the Equal Access Act were included in the literature review. Development of forum analysis in the implementation phase as well as the incorporation of viewpoint discrimination concepts in the decision process for administrators were explored in the research. Finally, legislative and judicial attempts to shed light on the issues regarding the control and use of facilities have resulted in obfuscation rather than clarity. Highlights of the difficulties facing school leaders were also examined.

First Amendment Principles

The First Amendment to the Constitution of the United States reads in part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech” (U.S. House of Representatives, 2007, p. 21). Three important principles are established in this selection. The first principle, known as the Establishment clause, prohibits the government from becoming involved in religious activities. The second principle represented, referred to as the Free Exercise clause, asserts that while Congress may not be involved in the establishment of religion, it also may not prohibit citizens
from participating in religious activities. The final principle, referred to as the Free Speech clause, grants the citizens of the United States the right to voice their opinions in public venues without fear of government interference. With the 1947 Supreme Court decision that established the “wall of separation” between government and religious entities, these principles have served as the vehicle by which religious practice and symbols have been restricted in public schools (McCarthy, 2009).

Establishment and Free Exercise Conflict

The Establishment and Free Exercise clauses delineated in the First Amendment appear to set the stage for conflict. “The first clause seeks to promote freedom from religion by a principle of ‘separation,’ while the second clause seeks to promote freedom for religion by a principle of ‘accommodation’” (Valente, 1994, p. 86). This contradiction of purpose, neither supporting nor rejecting religious belief or practice, has resulted in several landmark legal cases as the courts have attempted to clarify the precepts. Haynes and Thomas (2007) pointed out that the courts were not asked to decide issues involving the religious clauses during the early part of the country’s history because the First Amendment had not involved the states. Following the Civil War, however, the passage of the 14th Amendment with its due process clause involved the states in litigation involving the Bill of Rights. According to Haynes and Thomas:

In the 1940 case of *Cantwell v. Connecticut*, the Supreme Court held that the free exercise of religion is one of the ‘liberties’ protected by the due-process clause. Seven years later, the Court added the Establishment clause to the list. (Haynes & Thomas, 2007, p. 29)

In 1947, the Supreme Court decided *Everson v. Board of Education of the Township of Ewing et al.* involving the reimbursement of bus fares for children attending a Catholic school which included religious instruction in the curriculum. According to Hartman et al. (2007), “This
case represented the first contemporary controversy concerning the meaning of the establishment clause” (p. 455). The first definition of what the Establishment Clause meant was developed in this case and the resulting wall-of-separation concept would influence subsequent court decisions. *Lemon v. Kurtzman* (1971) instituted the litmus test for determining whether the government had moved too far into the religious realm (Mawdsley, 1998). Raskin (2003) noted that another important case, *Engel v. Vitale* (1962), determined that school leaders must not endorse religion and, as a consequence, must remain strictly neutral to avoid that perception. As the first of several school prayer suits to appear before the Supreme Court, Hartman et al. (2007) stated this decision relegated prayer to church or home rather than public school and encouraged the growth of private schools espousing spiritual as well as academic development. Closely following *Engel v. Vitale*, the Supreme Court ruled in *Abington Township v. Schemp* (1963) that required reading of the Bible in the classroom was unconstitutional. Justice Clark, constructing the majority opinion, wrote:

> The recitation of the Lord’s Prayer over an intercom system or by a homeroom teacher and/or the reading of the Bible, whether in the King James or Douay or Revised Standard versions, or from the Jewish scriptures, interfered with the neutrality mandated by the federal Constitution. (Hartman et al., 2007, p. 303)

Another case highlighting the Establishment and Free Exercise clauses examined the use of taxpayer monies to buy instructional materials for parochial schools. In *Flast v. Cohen* (1968), it was argued that using tax funds for those purchases violated both the Establishment and Free Exercise clauses. While the major impact of this case dealt with whether or not taxpayers had standing to sue over how funds were being used, Hartman et al. (2007) regarded it as the most expansive reading of the Establishment clause. A similar case involved tax deductions for educational expenses. In *Mueller v. Allen* (1983), the Supreme Court ruled that allowing deductions for school expenses to include both public and private schools, was not a violation of
the Establishment clause. Plaintiffs maintained that allowing parents of religious school students to take the deductions gave disproportionate benefit to those parents. Additionally, the allowed deduction for textbooks could be viewed as an endorsement of religious materials. The court, however, sided with the defendants referring to the deduction as secular since all could benefit, the benefit went to the parents not the institutions, and the deduction was one of many available to the taxpayers (Hartman et al., 2007).

In a pivotal case involving Free Exercise principles, the Supreme Court examined whether compulsory attendance laws could compel parents to send their children to public or private school when it violated religious beliefs. In *Wisconsin v. Yoder* (1972), Amish parents believed that sending their children to public or private school would expose their children to influences that violated their beliefs. This, they claimed, violated the First Amendment on the basis of the Free Exercise clause and Fourteenth Amendment’s restriction of states’ due process principles. The Supreme Court upheld the Wisconsin Supreme Court’s ruling in favor of the parents. “Since *Wisconsin v. Yoder*, the Court has not had many opportunities to address the free exercise clause” (Hartman et al., 2007, p. 329).

Two cases signaled a growing trend away from the restrictiveness of previous precedent in this area. In 1976, the Supreme Court considered *Roemer v. Board of Public Works of Maryland*. In this case, it was alleged that state grants awarded to private colleges with religious affiliation violated the Establishment clause. Justice Blackmun wrote the majority opinion which upheld the district court’s finding that such was not the case. He summarized that the Maryland statute allowing the grants met the standards of the *Lemon* test. While the *Lemon* test was the standard used to determine the outcome, Hartman et al. (2007) concluded this case signaled a weakening of the *Lemon* test because the grants to religious schools were upheld. The case that
signified the greatest shift in Supreme Court opinion in this area, however, was *Widmar v. Vincent* (1981). Davis (2000) related that the Supreme Court ruled that a public university must grant the same access to religious-based student groups as other student groups. In this decision, the court viewed the case as primarily a free-speech-rights issue and found that exclusion of a religious club was discrimination based on content. The university argued they would be in violation of the Establishment clause if they allowed the club. The Supreme Court, using *Lemon*-test analysis, discounted that line of reasoning and pointed to the extensive array of student clubs permitted yet not endorsed by the university. As such, the Court determined the perception of endorsement of the religious club was not likely to occur. Valente (1994) summarized “the United States Supreme Court decided that once a state college opened its facilities to noncurricular student expressive activities, it created a public forum for First Amendment speech that could not be constitutionally closed to other students based on the religious content of their speech” (p. 87). Davis (2000) offered that later courts did not apply the same reasoning for similar issues involving high school students and “Congress reacted to the confusion created by the federal courts’ failure to extend *Widmar* to secondary public school by passing the Equal Access Act” (p. 228).

Amid the concern about the constraints imposed by the *Lemon* test, several Supreme Court justices proposed alternatives. Haynes and Thomas (2007) recounted several of these. Justice O’Connor suggested the “endorsement test” based on the “perception in the mind of a reasonable observer that the government is either endorsing or disapproving of religion” (p. 33). Justice Kennedy recommended the “coercion test” asserting the government does not violate the Establishment clause unless it “(1) provides direct aid to religion in a way that would tend to establish a state church, or (2) coerces people to support or participate in religion against their
will” (p. 33). While these alternative examinations of church-state involvement have served to shape analysis, ultimately the Supreme Court has returned to the *Lemon* test to adjudicate violations of the Establishment clause.

*The Lemon Test*

One of the most important decisions regarding First Amendment principles in education led to the development of the *Lemon* test. There is an incongruity between the Free Speech and the Establishment principles in the First Amendment lending to confusion about what religious speech is allowable in public schools. Because of this, religious speech within public schools did not, at one time, enjoy the same protection under the Constitution as other speech. Additionally, under the Free Exercise Clause, religious groups had to demonstrate a compelling reason for being in the school arena. This was difficult given that, in most cases, their purpose could equally be satisfied outside school hours. In *Lemon v. Kurtzman* (1971), additional precepts were developed that restricted access to public schools by religious entities. Most importantly was the development of the *Lemon* test that directly addressed the principles involved in the Establishment clause (Mawdsley, 1998).

The *Lemon* test set forth a three-prong test for determining if a religious activity violated the Establishment clause. To remain in compliance with the test, school leaders had to demonstrate that an activity served a secular purpose, did not advance or inhibit religion, and did not excessively entangle the government entity in religion. The *Lemon* test, as a consequence, also led to the development of underlying strains of thought by the courts to justify the restrictiveness of the test. First, school-age students are at a point in their development where they are very impressionable. The courts feared that students would be likely to readily accept
religious influence because of their vulnerable nature. In addition, because children are compelled by law to attend school, students and parents in most cases do not have the option to remove the child from the setting. This makes the child a captive audience and, therefore, subject to the influence of the school setting. Thirdly, conflict throughout many centuries due to religious teachings has established a certain political divisiveness in the religious realm. This brings forth the possibility of disruption of the educational process and setting (Mawdsley, 1998).

First Amendment Questions

Prior to the passage of the Equal Access Act in 1984, the courts considered some cases that signaled a change in opinion regarding the Lemon test. Sorenson (1984) pointed to three cases in particular that presaged the development and passage of the Equal Access Act. In Widmar v. Vincent (1981), the Supreme Court, for the first time, recognized that religious speech on a college campus should receive the same First Amendment protection as other forms of speech. The court reasoned that once an open forum was established, regulation of speech solely on the basis of content was a violation of key First Amendment principles. Additionally, in Bender v. Williamsport Area School District (1986), Sorenson noted the Supreme Court examined all three prongs of the Lemon test in ruling that the school district had established an open forum and that the student-led prayer group should be allowed access to that forum. The court, in both cases, rejected administrative concerns that such access would be a violation of the Establishment clause. Sorenson speculated that such findings could be the foundation for the development and implementation of Equal Access policies.
Sorenson (1985) related that litigation such as *Bender* also pointed toward a future showdown between Establishment clause ideals and the then newly enacted Equal Access Act. Just prior to the signing of the Equal Access Act into law, the Court of Appeals for the Third Circuit ruled that even though *Bender* and *Widmar* were factually similar, *Bender* could not be decided the same because of the age of the students involved. The very nature of secondary schools, a more controlled atmosphere and the maturity level of the students, pointed to the need for a different line of reasoning than was used in *Widmar*.

Confusion about the redefined roles of First Amendment principles as a result of litigation subsequent to the passage of the Equal Access was examined by McCarthy (1996). The author pointed out that separationism became the guiding ideal following the *Everson v. Board of Education* (1947) decision by the U.S. Supreme Court. This separationism began to fade in the 1980s after the *Widmar* case in which the court first regarded religious expression in the public forum to enjoy the same First Amendment guarantees as other expression. Subsequent lower court decisions granting the Equal Access Act preemptive power over state constitutions further bolstered the religious incursion into public institutions. With the courts establishing a hierarchy of speech rights over establishment principles, the author cautioned that religious influence would likely increase and public schools would begin to mirror the religious tendencies of the surrounding community. School administrators were also caught between conflicting factions seeking to further open the door to religious expression and exercise while others attempt to shut that door to prevent spiritual seizure of public education.
Equal Access Act Principles

Fearing that guidelines regarding First Amendment principles in the public school setting established through litigation had become too restrictive toward religious groups, Congress adopted the Equal Access Act in 1984. The pertinent part of the legislation states:

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 with that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meeting. (Equal Access Act, 1984, p. 4071)

This act brought a contrasting view of the relationship between government and religion, and, as a consequence, paved the way for other groups to have access to the schools. Bitner (2004) explained that the passage of the Equal Access Act of 1984 paved the way for disagreement and school administrators had to remain vigilant for changes in the law that would affect students. Additionally, a study of equal access litigation highlighted the demands educational leaders face from students and the community for the use of school facilities.

History of Equal Access Act

In oral arguments pertaining to the Equal Access Act before the United States Supreme Court, Kenneth W. Star, on behalf of the United States government, stated the intention of the bill was to provide student-initiated religious groups the same protections and rights as other groups. When questioned about the protection of religious groups in the legislative history, Starr affirmed, “the problem that presented itself to Congress was one of discrimination that was visited on the heads of students who wanted to participate in religious discussion” and further, “the purpose of this statute was to eliminate discrimination against students who were religious and who wanted to engage in religious discussion voluntarily” (Oyez Project, 1990, p. 11-12).
This testimony underscored the thread of legislative thought that lead to the passage of the Equal Access Act in 1984.

While some legal cases in the 1970s foreshadowed a changing tide of legal opinion regarding student religious activity, *Widmar v. Vincent* (1981) could be considered the seminal case in this area. “Some commentators regard the 1981 Supreme Court decision, *Widmar v. Vincent*, as marking the beginning of judicial support for private religious expression being treated the same as secular speech in terms of access to government fora” (McCarthy, 2001, p. 15). Jenkins (2003) recounted that, following *Widmar*, school and university policies regarding facilities usage were increasingly contested in the courts using the Free Exercise and Free Speech clauses of the First Amendment. The institutions typically defended these policies using Establishment clause principles. Jenkins concluded, “In an attempt to prevent discrimination in the use of school facilities against non-curriculum related groups with religious affiliations, and perhaps to relieve the courts of the duty to continually interpret the *Constitution* on this issue, Congress passed the *Equal Access Act* in 1984” (p. 445).

*Access to Facilities*

The legislation embodied three important principles, two of which had to be defined judicially. The first principle involves the use of facilities for meetings. The Equal Access Act was designed to be more permissive (Mawdsley, 1998) and granted students the conditional right to form non-curriculum groups as long as the school was a limited open forum (Dowling-Sendor, 2003). The intent of the Equal Access Act, to make it easier for religious groups to gain entry to public schools, was upheld in 1990 via the *Board of Education of Westside Community Schools v. Mergens* Supreme Court decision. This decision, known as *Mergens*, reinforced the right for
student-led religious activities to take place in public school facilities both during the day and after school hours. The decision stressed the point that such activities must take place during noninstructional time, described as before and after school hours, during the day set aside for activities, and during lunch times (Mawdsley, 1998). The No Child Left Behind Act also prohibited schools from restricting students’ religious expressions (Essex, 2006).

While the first round of litigation arising from the passage of the Equal Access Act dealt with religious groups, other groups began to seek access to the school setting because of the limited open forum concept. Dowling-Sendor (2003) described a case in which a group of students attempted to form a Gay-Straight Alliance in their school. The district school board, responding to public criticism, passed a rule prohibiting all curricular and noncurricular clubs from meeting. Despite this ruling, several of the school’s clubs continued to meet. In the ensuing litigation, the judge used several precepts from the Equal Access Act to support the decision to allow the Gay-Straight Alliance to use school facilities. First, as long as any noncurricular club is allowed to meet at the school, the limited open forum is established. Once the limited open forum is established, the school must allow all other groups to meet as well. Zirkel (2005), in an examination of the same case, related that the court examined the school’s actual practice rather than stated policy in reaching a decision. The court also discounted the administrator’s claim they did not have actual knowledge the other clubs continued to meet. Instead, the court decided that constructive knowledge was sufficient and the administrators reasonably should have known the other clubs were violating the ban on further meetings. Second, Dowling-Sendor (2003) recounted that the school board tried to argue the controversy and disruption caused by the formation of the club should preclude the club’s access to the school. The judge, however, noted that the disruption was caused solely by the opponents to the club, not the club members. As
such, the school board could not use the disruption standard from the *Tinker v. Des Moines* (1969) decision to deny access. Zirkel (2005) added that accepting the defendant’s argument in this instance would have violated the “heckler’s veto” concept found in *Tinker*. Finally, while community or school officials may not agree with foundational principles of a student club, once the limited public forum is established such clubs must receive treatment equal to that of other clubs.

Others have also sought to use the Equal Access Act to gain usage or limit such usage of school facilities depending upon the aims of the request. Horner (1989) explained that, in one case, a suit was brought by taxpayers to exclude a booster club from using the local facilities during the summer months. In other cases, teacher organizations have used litigation in attempts to gain access to buildings and school mail systems. Similarly, church groups have tested the boundaries established by the *Lemon* test through legal means. Courts have tended to grant considerable discretion to school districts in these cases as long as the established forum is administered consistently among like groups. However, one potential consequence resulting from Equal Access litigation was pointed out by Mawdsley (1995). In an investigation of the impact on access to facilities in light of forum analysis and viewpoint discrimination, the author concluded, “…the options available to public school districts to exclude those perceived as ‘hate groups’ may be limited” (Mawdsley, 1995, p. 548).

*Viewpoint Discrimination*

The second principle involved in Equal Access litigation deals with viewpoint discrimination. Until *Lamb’s Chapel v. Center Moriches Union Free School District* (1993), religious speech had not enjoyed the same protections as other speech. With the *Lamb’s Chapel*
decision, the Supreme Court established full protection for religious speech (Mawdsley, 1998). Since then, the Supreme Court has been reluctant to involve itself in litigation regarding viewpoint discrimination. Essex (2006) pointed out that, at the time, it had been left to lower courts to set further legal precedent in this area.

As a free-speech issue, viewpoint discrimination often deals with the basis on which decisions are made to disallow access to school facilities. Essex (2006) related that a principal in one school was passing judgment on what printed materials students could distribute and eventually denied all religious materials in the school. Dowling-Sendor (2005) detailed the case of an article in a student newspaper that was pulled from publication by a school district because it recounted a local lawsuit that presented an unfavorable view of the district. The lawyer for the district stated that had the article been more sympathetic towards the school district it would not have been pulled from publication. Such a statement demonstrated a classic example of viewpoint discrimination and weighed heavily in the judge’s decision against the district.

An additional issue arising in the area of viewpoint discrimination derives from the distinction between religious worship and religious speech. Litigants have attempted to determine through the courts if there is such a distinction and whether or not limiting access to facilities for worship is allowed under the law. Marker (2009) recounted three issues that were not addressed in the U.S. Supreme Court’s Good News Club decision. First, whether or not a restriction on worship in the limited public forum is constitutional. Second, if the restriction does not constitute viewpoint discrimination, whether there is judicial power to differentiate between worship and other types of religious speech. Finally, if the judicial power to differentiate is affirmed, what test could be used to determine the difference between the two? Marker used language from the Widmar decision to support an argument that there is a difference between
religious worship and other forms of religious speech. As such, Marker concluded that restriction of worship in a limited public forum is constitutional and proposed a two-pronged test to aid in the decision process. A differing view, however, was expressed by Deutsch (2008). After an examination of litigation in the Ninth Circuit Court of Appeals and precedents from the U.S. Supreme Court’s *Widmar* decision, Deutsch concluded that the Ninth Circuit Court of Appeals erred in allowing certain types of religious speech in a limited open forum while at the same time restricting worship. The conclusion, in this case, was that the restriction of worship in a limited public forum was unconstitutional.

*Forum Analysis*

A third principle school leaders must understand in dealing with Equal Access issues is that of forum analysis. This concept was birthed in the *Widmar v. Vincent* case involving higher education institutions (Mawdsley, 1998). For legal purposes, forums can be described in three ways. A public forum exists in places like public parks and sidewalks. In a public forum, the government may not intrude to restrict speech unless there is a “compelling public interest.” A nonpublic forum allows for restriction of the topic of speech as well as who is expressing it as long as it is reasonable. Public schools fall into this category in certain conditions. A limited public forum exists when a nonpublic arena is opened to outside speakers. In this case, the school could control the time, place, and means of speech but, as in a public forum, could not control the content unless a compelling public interest could be demonstrated (Dowling-Sendor, 2005). Dagley (1998) pointed out that forum analysis works to provide equilibrium between speech rights and the need to maintain the intended purpose for public facilities.
Sorenson (1984) described three pre-Equal Access Act cases that demonstrated the need for clarification on forum analysis. The *Brandon v. Board of Education* (1980) court ruled that high schools are not public forums and Freedom of Speech issues related to religious expression were not applicable. In *Bender v. Williamsport Area School District* (1983), the court ruled that a school had established a limited public forum during an activity period open to other student expression. The Supreme Court ruled in *Widmar v. Vincent* (1981) that the college campus had been administered as an open forum and religious expression could not be regulated on the basis of content without a compelling state interest.

**Allowable Restrictions**

According to Bitner (1996), school leaders have been granted authority by the courts to establish policies regarding speech on school property. Because the time, place, and manner can be determined by these officials, the schools themselves become forums. Thus, the definition and guidelines for these forums needed to be established. This took place in Section 802 of the Equal Access Act of 1984. In a public forum, school leaders may not regulate speech, including who has access to facilities for this purpose, unless it disrupts school work, discipline, or the rights of others. The nonpublic forum allows administrators the most control over access to facilities. In this area, leaders may impose restrictions on expression as long as they are related to legitimate pedagogical concerns. The limited public forum grants the use of school grounds to some outside groups. In this concept, administrators may not limit access to groups that are similar in nature to those allowed on campus. Dagley (1998) suggested that there is a distinct difference between the limited forum described in the Equal Access Act and the limited public forum conceptualized in Supreme Court decisions leading to the development of public forum doctrine. As a result,
especially when examining cases of student groups requesting the use of facilities, the type of limited public forum established becomes important. An Equal Access Act limited public forum generally favors student expressive rights. Conversely, administrators are usually granted more latitude to control expression in the public forum doctrine interpretation of a limited public forum.

Mawdsley (1998) pointed out that in forum analysis, administrators must remember that forum status could actual attach to a particular facility. Mawdsley furthermore reminded administrators that a public school’s forum status could change from nonpublic to limited public based not only on stated policy but also actual practice. A school with a stated policy of disallowing all noncurricular clubs to maintain a nonpublic forum but, in practice, allowed noncurricular clubs to meet would attach limited public forum status to the school. Taylor (2000) warned administrators that if the limited public forum is established, the school must allow access to all groups including religious groups as well as groups that might be deemed “hate” groups. In this scenario, the only groups that can be denied access to the facilities are those deemed unlawful or to substantially interfere with the educational process. To combat this, some schools have decided to ban all clubs. While this may be one remedy, Taylor noted this is contrary to the intent of both the First Amendment and the Equal Access Act.

Difficulties Facing School Administrators

School administrators balance a wide array of tasks daily in the operation of the local school (Hoy and Miskel, 2008). Since the period immediately preceding the passage of the Equal Access Act and the subsequent litigation after, administrators have faced an increasingly difficult job of balancing the demands of the legal requirements regarding control and use of facilities
with the concerns of the communities the schools serve. Since state and federal courts as well as state and federal lawmakers have addressed the control and use of public school facilities, it would stand to reason that administrators should be able to rely on the resulting laws and precedents for guidance. That guidance, however, is not easily discerned.

**Understanding Legal Implications**

One area in which school administrators are expected to be competent, often without the training experienced in other areas of education leadership study, is that of legal issues. Principals are often asked to offer advice to teachers about the legal implications of an issue. Militello, Schimmel, & Eberwein (2009) conducted a study examining the level of legal knowledge and the implications for principal practice. Administrators must adhere to legal principles at the federal, state, and local level as they make decisions regarding the operation of the school. The authors cited the likelihood of principal involvement in a lawsuit as a major reason for increased awareness of changes in legal issues. In addition, even though most school administrators receive minimal instruction in legal matters during leadership training, they typically have more training than the teachers they supervise and are seen as the building specialist in matters involving legal principles. In addition, the frequency with which principals are threatened with litigation over various issues keep the possibility of lawsuits on the minds of administrators as they shape aspects of school policy. The authors of the study conducted a survey of secondary school principals with respondents from all of the United States except Virginia. The instrument consisted of 34 questions about students’ and teachers’ legal rights that participants could answer as “true,” “false,” or “unsure.” The survey also included two open-ended questions involving advice given to teachers as well as the respondents’ concerns about
school law matters. Of the 8000 invitations to participate, 493 completed the survey. A simple statistical analysis was conducted of the data and descriptive statistics were generated with a reliability coefficient calculated for the knowledge questions (Cronbach’s alpha = .62). The results showed that a significant number of principals did not answer correctly concerning issues about school law that had been unmistakably defined by litigation or legislation. In one particular area, many principals did not have a clear understanding of students’ First Amendment rights. Additionally, 85% of the respondents stated they would change their practice if they knew more about the legal principles in the study. More than half of the respondents in the survey reported spending one to two hours per week doing things they felt would protect them from a legal challenge. Importantly, the threat of litigation had the power to shape the decisions school leaders make. Almost one-third of the participants stated they had changed discipline decisions based on the perceived threat of litigation. Respondents reported changing decisions in other areas of supervision as well. When advising teachers, the researchers found that, based on the respondents’ open-ended answers, the leaders were offering help that ranged from accurate to inaccurate to ambiguous. The findings of this study highlighted the need for legal education and guidance as administrators formulate policy at the building level.

Legislative Confusion

Following the passage of the Equal Access Act in 1984, Tatel, Mineberg, and Middlebrooks (1985) speculated about the many potential problems school administrators faced as a result of the legislation. First, school districts would have to determine which of their schools fell under Equal Access Act jurisdiction. If only some of the schools in the district received federal funds, a decision would have to be reached about whether all of the schools
would have to comply. Second, administrators would have to ensure some groups were not
discriminated against. Given the many factors in granting use of facilities, this could become
quite cumbersome. Third, school districts would have to balance the privileges granted in the
Equal Access Act against the guidelines of the Establishment clause without appearing to
endorse religious speech. Fourth, educators would have to decide how to maintain order and
discipline in the groups without becoming “entangled” in the purpose of the group, thereby also
violating the Establishment clause. Finally, school leaders would have to implement the Equal
Access Act while at the same time satisfying the previous rulings of the courts in this area. All of
these potential problems led the authors to conclude that litigation regarding the issues was
imminent and to caution school boards to act cautiously in their implementation of the
legislation.

Such caution was demonstrated in a study about the changes in school use policy as a
result of the Equal Access Act. In the study conducted soon after the passage of the bill, 435
public secondary schools, selected to proportionally match congressional representation in the
U.S. House of Representatives, were asked to complete a questionnaire. In all, 253 schools
representing all 50 states returned completed questionnaires for a response rate of 58 percent.
The instrument had been pilot-tested with a sample of 20 secondary administrators in the state of
Missouri. Data were analyzed using a frequency count of responses to each of the six-item
multiple-response questions in light of three categories: all responding schools, schools in federal
jurisdictions in which cases involving the student use of school facilities had been heard and
schools in federal jurisdictions in which cases involving the student use of school facilities had
not been heard. Chi square tests of independence were used to explore relationships between
jurisdictional litigation and responses to the items on the questionnaire. Results led the authors to
conclude that drastic changes in policies regarding facility use would not likely occur at that
time. They reasoned that, based on the data, schools granting use of facilities prior to the
legislation would continue to do so and those that did not would simply revert to a nonpublic
forum thus exempting themselves from the need to comply with the mandates of the statute
(Brandly & Delon, 1986).

This confusion was further demonstrated by Brown and Bowling (2003) in their study of
school policy manuals. The study examined the Internet manuals of 61 schools in eight states for
compliance with United States Department of Education guidelines on religion. The findings
indicated that within the sample there were “a handful of formal policies that were clearly
unconstitutional in light of Supreme Court precedent and the Equal Access Act” (p. 267). In
addition, a large number of districts in the sample did not have any policies governing religious
issues, disregarding United States Department of Education guidelines on the subject. Similarly,
Davis (2000) conducted a telephone survey of 241 school districts in Ohio to determine if
schools continued to allow a limited public forum and thereby allow religious clubs. The
findings indicated that while 32 schools reportedly did not know how their religious groups were
formed and 30 schools reported that students initiated religious clubs, 28 had clubs that were
started by various adults including teachers, coaches, ministers and even a Parent Teacher
Organization.

In a review of the status of the Establishment clause in relation to school policy, Epley
(2007) demonstrated the difficulties facing school administrators at that point in time. The
Lemon test had been called into question by at least two Supreme Court justices who believed the
test to be a misrepresentation of the First Amendment. The “Endorsement Test” was a different
take on the determination of church-state relations and was developed by Justice O’Connor in the
mid 1980’s. It, too, had yet to reveal a definitive standard to guide educators. Epley stated, “Thus, school leaders are without a singular test that can be universally applied” (p. 183). As such, Epley further pointed out that drawing the line between allowing groups access to the school, in this case to distribute materials, or not may be much more difficult than it seems. “In an effort to accommodate one group that has broad community support, a school could open its channels to other groups with less public support” (p. 189). If a school leader tried to let in a group with that community support while another, less popular group was kept out, claims of viewpoint discrimination are possible.

Conflicting Legal Opinion

In addition to misunderstanding how to implement policies that conform to the established legal principle, administrators must discern between conflicting legal outcomes. Mawdsley (1998) related a case in which the legal principles seemed contradictory. In *Hsu v. Roslyn Union Free School District* (1996), the school considered itself in compliance with the Equal Access Act because it did not allow discrimination of any kind in student clubs. When a proposed religious club included in its constitution the requirement that officers be professing Christians, the school denied permission for the club to form. The court, however, ruled in favor of the club giving the impression that the students’ free speech interests trumped the school’s nondiscrimination policy.

Even when a decision is rendered by the courts, administrators may not be able to generalize the outcome to their situation. Dowling-Sendor (2004), in reviewing *Caudillo v. Lubbock Independent School District*, pointed out that an unusual set of facts contributed to a decision. In this case, a subsequent change in state law, a slightly different change in the purpose
of the club, or a slight change in the guidelines of the district’s abstinence-only policy would likely have changed the outcome of the case. Dowling-Sendor concluded, “In the end, you can’t summarize Caudillo in a headline or a sound bite. The case turns on unique facts that distinguish it from other cases about gay-straight alliance clubs under EAA” (Dowling-Sendor, 2004, p. 62). Before administrators use this or any single case to justify a policy decision, they must make certain the facts of their case mirror those of the precedent they are using.

State Issues

Contributing to the confusion for school administrators is the fact that some states have weighed in on the issue in attempts to clarify through state law what is hopelessly clouded in federal legislation and jurisprudence. Texas enacted the Religious Viewpoints Antidiscrimination Act in 2007 as an attempt to clarify students’ rights on the subject of religious expression. Saccopoulos (2008) concluded that the results were mixed, with success in some areas, and failure in others. As far as attempting to clarify the constitutional principles, the legislation only clouded the issue further and would most likely not hold up under a challenge in the courts.

Additionally, once the Equal Access Act had been declared to be constitutional by the Supreme Court in 1990, another issue came to light regarding states. Tatel and Mineberg (1989) pointed out that some state constitutions were in direct conflict with the Equal Access Act. These state constitutions were more restrictive of church-state relations. The act could be interpreted to preempt these state constitutions or, emphasizing different sections, to acquiesce to the state restrictions. Eventually, courts in the Ninth District reached diverging decisions in cases with similar sets of facts less than one month apart. One court supported federal preemption and the other court ruled that state constitutions should take priority. Bartlett (1992) related that the
The federal district court in Idaho ruled that the federal mandates of the Equal Access Act should prevail over the Idaho state constitution. The court reasoned that states were within their rights to restrict an activity permitted by the Constitution. On the other hand, state constitutions could not supersede a federal mandate in the form of a statute. In Washington, the district court reached a different conclusion. Relying on language within the Equal Access Act itself, the court decided the federal mandate did not preempt state law. The court in this case also pointed out that there was no language in the legislation pointing to congressional intent to overrule state law. Bjorklun (1992) pointed out that approximately twenty states have provisions in their constitutions similar to the ones involved in these cases. Bjorklun (1994) later pointed out that the Ninth Circuit Court’s ruling that the intent of the Equal Access Act legislation was to preempt state law. This held the possibility of leading further federal intrusion in education practices in every state as well as other church-state related issues.

Summary

Administrators facing decisions regarding the use of their facilities by groups or individuals must carefully consider their courses of action. The First Amendment to the Constitution set up competing principles in the Establishment and Free Exercise clauses. The line separating the two had been the jurisdiction of the courts until legislative action in the 1980’s. The courts had moved toward a more permissive position toward student religious groups at the collegiate level as seen in the Widmar decision. The Equal Access Act legislation was intended to extend the Widmar principles for religious student groups to students in secondary schools. In passing the legislation, however, Congress may have created more confusion than it cleared up with the Act. Jurists at many levels, including the United States Supreme Court, have attempted
to clarify the *Lemon* test or create a suitable replacement that would be in keeping with the changes in societal opinion about access to facilities by religious groups as embodied in the Equal Access Act. Additionally, once the school forum was opened through the Equal Access Act, non-religious groups began to request access to school facilities. Whether the request is for religious or secular access, administrators have been subject to greater scrutiny in their decisions regarding the use of facilities. Most importantly, school leaders have been placed in the position of having to develop legally sound policies regarding the use of school facilities. This task is not easy since the courts often disagree on how the legislation should be implemented in the school. Courts in different districts arrived at different conclusions about the implications of the Act in cases with similar facts. As demonstrated in cited studies, some administrators do not fully understand the legislation or its implications. Other school leaders, based on the forum analysis used by the courts to establish access privileges, have chosen to completely close their school to student clubs in order to maintain control over their facilities. Contributing to the confusion for school leaders was the stance taken by some state legislators that the Equal Access Act impeded states’ rights.
CHAPTER III

METHODOLOGY AND PROCEDURES

Introduction

This study employed a qualitative, document-based, legal-historical research method. Case law in the state and federal courts for the time period 1981-2009 dealing with the control of use of school facilities was the focus of the study. These legal cases were analyzed for trends in the decisions rendered by the courts.

Research Materials

In addition to the literature review, the United States Code, the Constitution of the United States of America, specifically the First Amendment, and the Equal Access Act, 20 U.S.C. § 4071 (1984) served as the foundation of the study. Materials utilized in the study included legal cases dealing with issues related to the control and use of school facilities from the state and federal courts for the time period 1981-2009. This time period was chosen to allow for review of litigation involving the subject immediately prior and subsequent to the passage of the Equal Access Act (1984).

Research Questions

1. What issues have evolved regarding the control and use of school facilities through case law in the state and federal courts from 1981 to 2009?

2. What decisional outcomes about the control and use of school facilities have been rendered by the state and federal courts from 1981 to 2009?
3. What trends are evident regarding the issue of control and use of school facilities in case law decisions from 1981 to 2009?

4. What principles for school administrators can be discerned from the courts’ decisions regarding the control and use of school facilities?

Methodology

In order to conduct this document-based, legal-historical study, the researcher analyzed legal cases related to the control and use of school facilities. To locate these cases, the researcher used a law digest to facilitate the search. In particular, the West Education Law Digest sorts cases from the United States Judicial System by topics and identifies these topics by a key number. For the purpose of this study, all cases categorized by the West Education Law Digest contained in Key Number Schools 72, Control and Use, were analyzed for trends in the courts’ decisions. Since the West Education Law Digest includes only a brief summary of each decision, the full text of the identified cases was retrieved from the LexisNexis online law database. Use of the full case allowed for deeper analysis of the reasoning employed by the courts to render decisions as well as an opportunity to examine dissenting opinions from the bench.

Data Collection

Data were collected by first developing a list of relevant case law regarding the control and use of school facilities utilizing the West Education Law Digest. Once the list was developed, full reporting of the cases was obtained from LexisNexis online law database. The researcher used resources held at the Morgan County Law Library in Decatur, Alabama, the
Mervyn H. Sterne Library at the University of Alabama in Birmingham and the Bounds Law Library at the University of Alabama in Tuscaloosa.

Case Brief Method

Statsky and Wernet (1995) explain that briefing a case helps clarify the information presented to the crucial elements. This practice serves two purposes: “To help you clarify your thinking on what the opinion ‘really’ means and to provide you with a set of notes on the opinion to which you can refer later without having to reread the entire opinion every time you need to use it” (p. 39). The skill of briefing cases is difficult for many reasons. Those writing opinions often assume a complete familiarity with the legal system and that the reader will already know legal jargon. Additionally, it takes time and practice to sort through the information presented in a legal opinion to glean the essential elements. A third difficulty facing a writer is that legal opinions are often written in a way that are difficult to understand, organized poorly or even confusing in presentation. Lastly, for those opinions that are well-written, the points of law presented may be difficult to understand. The authors point out that the less-difficult cases rarely make it to court and that it is the complex issues that find their way into the court system.

To aid in the analysis of court opinion, Statsky and Wernet (1995) suggest the use of a formal brief format. This suggested format allows for thorough examination of pertinent information without becoming too cumbersome. For the purpose of this study, the researcher included the following elements from the format:

1. Citation: “Identifying information that will enable you to find a law, or material about the law, in a law library” (p. 450).
2. Key Facts: “A fact in an opinion is a key fact when a holding of the court would have been different if that act had been different or had not been in the opinion” (p. 74).

3. Issues: “A question of law (legal issue, legal question) is a question about how one or more rules of law apply to the facts” (p. 95).

4. Holdings: “A conclusion of law reached by a court in an opinion is called a holding” (p. 73).

5. Reasoning: “The court’s reasoning is its explanation for reaching a particular holding for a particular issue in the opinion” (p. 112).

6. Disposition: “The disposition is whatever must happen in the litigation as a result of the holdings that the court made in the opinion” (p. 128).

In addition to the elements of the formal brief format, Statsky and Wernet (1995) encourage an additional notes section be added to the brief to summarize concurring and dissenting opinions as well as what has happened to the opinion since it was written.

Data Analysis

For this qualitative document-based legal-historical study, case law regarding the control and use school facilities was analyzed for trends in the opinions rendered by the courts. Hatch (2002) indicated that data analysis is an organized way to discern meaning:

It is a way to process qualitative data so that what has been learned can be communicated to others. Analysis means organizing and interrogating data in ways that allow researchers to see patterns, identify themes, discover relationships, develop explanations, make interpretations, mount critiques, or generate theories. (p. 148)

Creswell (2007) suggested that a useful form of analysis for this type of study is a holistic approach. In this approach, the researcher examines the case or cases, provides a description of each, extracts themes from the data, and presents interpretations or assertions that can apply to
the whole. Using the case brief method discussed earlier, the researcher collected the data in several categories: year, issue, holding, reasoning, and disposition. The results were first organized relative to the primary legal issue. The data were then examined by means of the Data Analysis Spiral method described by Creswell, which aided with organization of the data, coding and classifying information, and interpreting emerging principles. By engaging in this process, themes began to emerge. These themes, along with the resulting dispositional themes, were the basis for the development of guiding principles for administrators.

Analysis of themes allowed the researcher to develop understanding within a complex and confusing area. Categories were developed based on the data gleaned from the analysis. From the categories, themes emerged that allowed for generalizations.

The dispositions of these cases were studied to determine the reasoning behind the courts’ decisions. It is in the reasoning behind the courts’ decisions that the researcher gained insight to aid school administrators dealing with the issue on a practical basis.
CHAPTER IV
DATA AND ANALYSES

Introduction

This chapter includes a description of 137 court cases concerning the control and use of public school facilities dating from 1981 to 2009. The data were collected through individual analysis of each case using a standard format as outlined by Statsky and Wernet (1995). The cases are listed in chronological order by date of decision. Each brief includes the case citation, key facts, issues, the holding of the court, the reasoning behind the court’s decision, and final disposition of the case.

Case Briefs

1981


Key Facts: Wishing to alleviate the problem of “latch key” children within the school district, Superintendent Dr. Mary E. Mayesky proposed adoption of an extended day enrichment program similar to others in the area. With the adoption of the proposal, the school board appointed a committee including staff, parents, and representatives from the Dilworth Ministerial Association to implement the program. The program, upon implementation, resided at Dilworth Elementary School, operated from 2:00 p.m. until 5:30 p.m. and was open to all students enrolled there. Attendance was not mandated and parents could choose which days their children would
attends the program. A $15.00 per week tuition was charged to cover operating costs, with arrangements made for students who were unable to pay the tuition. Transportation was provided by a local church. While there were costs associated with providing use of the building, the school board considered them an insignificant part of the budget.

Issue: At issue was whether a school should be allowed to use their publicly funded facilities to provide a tuition-based after-school program in competition with local daycare providers.

Holding: The North Carolina Court of Appeals found constitutional and statutory authority for the school board’s involvement in the extended day program.

Reasoning: The plaintiff offered several arguments opposing the lower court’s summary judgment in favor of the school board. First, the court was asked to decide if the after-school program violated the state constitution’s requirement of uniformity in the system of public schools. The court interpreted the North Carolina Constitution and pertinent case law to determine the concept of uniformity to relate to schools in total not individually. As such, the board was not in violation of the state constitution by implementing the program. The plaintiffs additionally argued that charging tuition violated the state constitution’s requirement of free public schools. The court reasoned that, based on legal precedent, the students were not paying tuition for their basic education but for a supplemental service that took place after regular school hours. The next objection stated by the plaintiffs was that the board had neither statutory nor delegated authority to maintain the program. Citing the North Carolina Constitution, several law cases and G.S. 115-27, the court disagreed. In particular, *Coggins v. Board of Education* (1944) was used to point out the North Carolina Supreme Court statement that each board was vested with the authority to determine the method of conducting the public schools that best
meets the needs of the children attending. Furthermore, G.S. 115-133 and the Community Schools Act allowed school boards to grant the use of school premises to community groups. The court also held that the costs associated with allowing the use of the premises for the after-school program could be absorbed by the school board because the program served a public purpose by improving the educational experience of the “latch key” children. The court finally discounted the plaintiffs’ claim that the program violated their personal and property rights through unauthorized competition, citing the previous analysis. Also, the court found there was no violation of the North Carolina or United States Constitutions because the plaintiffs had no vested property rights in the providing of school care for children of the area.

Disposition: The North Carolina Court of Appeals upheld the summary judgment granted in the school board’s favor.

1982

Citation: Linnens v. Christensen, 646 P.2d 1141 (Kan.App. 1982).

Key Facts: In December of 1977, the Kansas state fire marshal’s office made an inspection of the “old stone building” on the grounds at Florence. At the time of the inspection, the building was in use for first through sixth grades at the campus. The state fire marshal’s office issued a letter expressing structural concerns and requesting a professional engineering survey to determine the integrity of the stone building and, if the building were to continue to be used, that several improvements be made. The board reviewed the letter in regular session and held a later public meeting but took no action regarding the building at that meeting. In January of 1978, a special meeting was held at which plans for the Florence campus were adopted which included housing kindergarten, first, and second grades in a different building; holding third
through fifth grades at the Marion campus; and holding sixth through eighth grades on the Florence campus to be combined with students from Marion. Under the plan, the “old stone building” would not be used and suggestions for plans of what to do with the building were to be taken in writing until February 1980. In March of 1978, a class action suit was filed alleging that the board’s actions in effect closed the grade school at Florence in violation of Kansas law. The defendants sought an injunction preventing the board from implementing their plan. In August of 1978, a motion to dismiss was granted to the plaintiffs on the grounds of a lack of jurisdiction. Defendants appealed the district court’s decision. The Kansas court of appeals granted injunctive relief and remanded the case back to the district court for further proceedings. The district court denied a second motion for summary judgment and ordered the case to a hearing. At trial, the district court found for the plaintiff and granted a permanent injunction. The board appealed the findings of fact, conclusion of law, and relief granted by the lower court.

Issue: At issue was whether the resolutions adopted by the Board violated K.S.A. 72-8213.

Holding: The Court of Appeals of Kansas held that voter consent was not needed because the action in question was not a school closing but a restructuring of resources.

Reasoning: The court considered de novo the facts of the case in light of the statute in question, which governed the closing of school facilities. Using the state supreme court’s decision in Hand v. Board of Education (1967) to clarify terminology of K.S.A 72-8213, the court rejected the assertion that the board’s actions in effect closed the school and then considered whether the restructuring, especially busing third through fifth grade students to another campus, violated the statute. The question then became whether the restructuring and alteration of the number of grades offered at the facility violated subsection (e) of the statute.
Following the reasoning of the state Supreme Court’s ruling in *Meinhardt v. Board of Education* (1975), the appeals court stated that the common theme throughout the laws, regulations, and court opinions was to allow as much latitude as possible for school boards in the organization and operation of the local system. As such, elector consent was not needed and the board’s actions were deemed not to have violated K.S.A 72-8213. Additionally, the court understood the letter from the state fire marshal’s office to be an order to cease using the “old stone building” unless a certificate of safety was obtained and remodeling to meet safety standards was undertaken. Under subsection (g) (1) of 72-8213, elector consent was not needed to discontinue use of the building.

Disposition: The Court of Appeals of Kansas reversed the lower court’s finding and remanded the case to district court with directions to dissolve the injunction and dismiss the class action.

Citation: *Western Area Business and Civic Club v. Duluth School Board Independent District No. 709*, 324 N.W.2d 361 (Minn. 1982).

Key Facts: In October 1981, the Duluth School Board adopted a new long-range facilities plan that included the transfer of the approximately 250 high school students from Morgan Park to Denfield Senior High School and designated Morgan Park as a junior high school. Students at West Junior High School would transfer to Morgan Park and the West building would become an elementary school. These changes of designation would allow for the closure of Irving Elementary School, a building that had deteriorated beyond continued use. The board advertised and held a hearing to receive testimony for and against “the proposed closing of Morgan Park Senior High School,” citing a decline in pupil enrollment, the ability to provide programs and services at Denfield High School, and reduced maintenance and operating costs to the district as
reasons to justify the changes. Subsequent to the hearing in which parents, faculty members, community leaders, and others were allowed to express their views, the board adopted a resolution at a later meeting designating the Morgan Park School as a junior high school only and reassigning the high school students to Denfield High School. The plaintiffs petitioned the district court for a writ of certiorari to review the board’s decision. The writ was issued and the board was temporarily enjoined from further action in the matter. In a later hearing, the district court ruled the board had failed to provide a timely and procedurally adequate hearing. Also, the court held the Morgan Park closure was arbitrary, capricious, and unreasonable and accordingly issued a permanent injunction restraining the board from further action to close the Morgan Park School or implement the proposed changes. The school board appealed the court’s ruling.

Issue: At issue was whether the proposed restructuring of facilities was a violation of Minnesota statutes governing the management of school facilities.

Holding: The Supreme Court of Minnesota held that, notwithstanding the community’s objections to the proposed changes, the board was within established boundaries.

Reasoning: The Supreme Court of Minnesota first reviewed the Minnesota Statute 123.35, which grants the board broad powers to develop educational objectives and manage the resources in pursuit of those goals. This statute grants discretion in organizing the system’s resources to include the altering or discontinuing of grades and schools as well as assigning students to facilities within the district. The court concluded that such activities are administrative in nature and are at the discretion of elected board members. One noted exception was in the closing of a school. Because the closure of a school is a significant event in the life of a community, Minnesota Statute 123.36 prescribes procedures for school boards to follow. In an examination of this statute and related case law, the court determined that the board’s actions
were not, in fact, a closure of the Morgan Park School but a restructuring of the grades within the
district. As such, the court found that the board’s actions were administrative and did not fall
within the purview of the statute, making the requirements inapplicable. Even though certiorari
should not have been available, given that the Morgan Park School was not closed, the grant of a
hearing by the board created some difficulties relating to judicial review. As a result, the court
reviewed the plaintiffs’ claims from the perspective of certiorari. In such a review, a court may
only decide whether the board had jurisdiction, if it acted within those jurisdictional bounds, and
if the evidence provided a substantial basis for the action taken. It was noted that courts must
resist the temptation to review the case de novo and substitute its judgment for that of the board.
In this case, the court found extensive evidence supporting the board’s concern with the Morgan
Park facility and the district as a whole.

Disposition: The Supreme Court of Minnesota reversed the lower court’s decision and
remanded the case with instructions to vacate the permanent injunction.

1983

Citation: Perry Education Association v. Perry Local Educators’ Association, 460 U.S.
37 (U.S.N.Y. 1983).

Key Facts: The teachers of the School District of Perry Township elected as their union
representation the Perry Education Association (PEA). As part of the collective-bargaining
agreement, the board agreed that the PEA and no other union group would have access to the
interschool mail system. The board did not restrict access for other groups of communication
including school bulletin boards, meeting facilities after school hours, word of mouth, telephone,
and U.S. mail. Prior to the election, access to the mail system had been afforded to another union
group, the Perry Local Educators’ Association (PLEA). The PLEA brought suit claiming the restricted access to interschool mail violated the group’s First Amendment rights as well as the Fourteenth Amendment Equal Protection rights. The district granted summary judgment in favor of the defendants at which time the plaintiff PLEA appealed. The Court of Appeals for the Seventh Circuit reversed, stating that once the school district had opened its mail system to PEA it could not deny PLEA same access without violating the First Amendment and the Equal Protection Clause. The PEA appealed the finding of the Seventh Circuit Court of Appeals.

Issue: At issue was whether the school system could grant access to school mail facilities to a teacher union group while denying same access to another teacher union group.

Holding: In its analysis of the school’s forum status, the Supreme Court held that it was the nature of the plaintiff group that changed not the forum status. Following the election of a different organization for representation, the plaintiffs lost standing and could be denied access. Other means of communication were still available to the plaintiffs.

Reasoning: The court first examined its jurisdiction to hear the appeal. The PEA contended that the collective-bargaining agreement, because it had continued in force since their original election, had achieved the status of legislative action and, therefore, state statute. For the court of appeals to overrule the agreement was to invalidate Indiana state law, which gave the Supreme Court appellate jurisdiction. The Supreme Court disagreed, stating the court of appeals held that certain sections of the agreement were unconstitutional while the state statute authorizing collective-bargaining agreements was untouched. Furthermore, the court rejected the claim that the agreement had in essence become state statute. In examining the cases cited by PEA, the court found the facts to be dissimilar to the current case in that those cases had actually involved state legislative action rather than implied legislative action through
continuance in force. The court dismissed the appeal for lack of jurisdiction. However, the court, through review by writ of certiorari, rendered a decision. In considering the application of First Amendment rights within the context of this case, the court opined that right of access to a public property and the degree to which limitations may be imposed depend on the character of the property considered. As such, the forum status had to be established. The court defined three types of forums based on legal precedent: a traditional public forum established by tradition or fiat dedicated to assembly or debate (Hague v. CIO, 1939); a limited open forum which has been purposefully opened for expressive uses (Widmar v. Vincent, 1981); and public property that has not by tradition or designation been opened for public communication (United States Postal Service v. Council of Greenburgh Civic Assns., 1981). The court established in United States Postal Service v. Council of Greenburgh Civic Assns. that ownership by the government does not guarantee access to a property. The school mail facilities in Perry, according to the court, fell into the third category of forums. PLEA argued first that the district opened mail system access to the Girl Scouts and local Boys’ Club, thereby creating a limited open forum. The court reasoned that this access was not granted to all who sought access but at the permission of the school administrator. Such access did not reach the threshold to convert the facilities into a public forum. The court noted that even if a limited open forum had been established, it would be open only to groups of similar nature and, therefore, not applicable to PLEA. The group next argued that their access prior to the election established a limited open forum for employee organizations. The court, in answer, reflected that it was the nature of PLEA that changed, not the forum status of the facilities. Prior to the election, there was no exclusive representative organization for employees so the board allowed access to all such groups. After the employees elected PEA as their representative group, the PLEA lost standing and could be denied access to
the facilities. Additionally, alternative means of communication remained open to PLEA and the court reasoned that denied access to school mail facilities did not seriously impinge the group’s ability to communicate with teachers.

Disposition: The Supreme Court of the United States dismissed the appeal, granted certiorari, and reversed the judgment of the court of appeals.


Key Facts: Following a court ruling that the school district could not exclude the plaintiffs from the school’s forum without violating First Amendment protections, the defendant school district moved for a new trial and amended findings relevant to *Perry Education Association v. Perry Local Educators’ Association* (1983). The facilities of the Shawnee Mission School District were available to the community for meetings after school hours. The community members were not able to use the facilities for their “individual pursuits” nor were non-community groups allowed use of the facilities. The court had previously held that a public forum existed in the defendant’s facilities and the plaintiffs should not be excluded from use of the facilities because of the content of their speech. The defendant, in this action, made motion for a new trial in light of *Perry* and the possibility of a different outcome based on the limited public forum concept expressed in that case.

Issue: At issue was whether a change in the forum status of the school would yield a different result than that reached by the lower court.

Holding: In this case, the court held there was extensive evidence that all recognized community groups, absent an objection to the proposed speech, were granted access to the school’s facilities.
Reasoning: The court examined the defendant’s claim that the forum should be classified as a limited open forum such as found in *Perry*. The court reasoned that it was true the forum was limited in nature in that only recognized community groups are allowed access. The court concluded, however, that *Perry* did not apply to this situation as it was a case about selective access.

Disposition: The United States Court for the District of Kansas granted in part the motion to amend the findings of fact in the case. The court denied the defendant’s motions to amend the conclusions of law and further denied the motion for a new trial.

1984


Key Facts: The Student Coalition for Peace was a nonschool-sponsored student organization espousing world peace through nuclear disarmament. Even though the group was considered a nonschool sponsored group, its activities in the school had never been hindered. In December 1983, the group asked the principal for use of Arnold field for a peace exposition and was denied on the basis that the field was to be used for athletic or governmental purposes only. In appeal to the superintendent, the group also indicated alternate school facilities they could use including another athletic field or the boys’ gym. The superintendent denied all requests but offered the auditorium and lobby as an alternative. In an appeal to the school board, the Student Coalition for Peace stated the auditorium was not suited to the purposes of the fair and again requested use of either of the athletic fields or the gym and suggested another alternative site, the school courtyard surrounding the flagpole. After the board’s denial, the group sought declaratory
relief as well as preliminary and permanent injunctions in the district court claiming that the defendant school district allowed public use of two of the requested facilities and, therefore, should allow the group similar access. Subsequent to a 2-day hearing, the court, in a self-described overabundance of caution, granted a preliminary injunction and the fair was held in the boys’ gym. The court then examined the plaintiffs’ arguments to arrive at a final holding.

Issue: At issue was whether the school board improperly denied access to certain school facilities.

Holding: The District Court held the facilities in question were not public forums and that it was reasonable for the board to restrict access to the facilities to avoid becoming the center of political debate.

Reasoning: Because the plaintiffs’ arguments were grounded in the forum status of the school facilities, the court examined the facts in light of the reasoning found in *Perry*, that is, the manner in which the property had been permitted to be used in the past should determine the type of forum and that categorization determines the extent of speech restriction. The court examined the forum status of each of the four facilities the group wanted to use. Two of the facilities, the courtyard surrounding the flagpole and second athletic field, had never been used for nonschool-sponsored activities and could not be classified as public forums. The remaining two facilities, Arnold Field and the boys’ gym, had been used for community events in the past and the forum status of each was examined more closely. The court looked at whether these should be classified as limited public forums. The boys’ gym at the school had been used for an athletic event organized by students that raised money for charity. Even though the public was invited to attend the event, the court found that this facility should not be considered a public forum and, as a result, the remaining question for this facility was whether the district sought to
censor the group on the basis of viewpoint. Because there was no evidence indicating such
censorship, the denial of the use of the gym was ruled constitutionally valid. Finally, the court
looked to determine the forum status of Arnold Field, which was used primarily for athletic or
charity fundraising purposes except for an annual Memorial Day ceremony to which the public
was invited. The court also noted that requests similar to the Student Coalition for Peace had
been rejected in the past. In regard to the Memorial Day ceremony, permission was sought each
year for the use of the field. The court reasoned that, because the ceremony could only be
“tangentially” tied to politics, a limited public forum was not created, thereby maintaining the
nonpublic forum status of the field. The only factor left to consider was whether the denial was
grounded in a rational basis. Given the board’s stated desire not to become the battleground for
political ideas, the court found it reasonable for the board to restrict the use of the field.

Disposition: The United States District Court for the Eastern District of Pennsylvania
denied a permanent injunction.

Citation: Salinas v. School District of Kansas City, Missouri, 751 F.2d 288 (C.A.8. 1984).

Key Facts: In December of 1982, Salinas asked to use the auditorium of a Kansas City,
Missouri, elementary school to present a series of educational films on different types of
religions. The board’s policy allowed principals to open their facilities to the general public with
the exception that the board retained authority to make decisions about the use of facilities for
the most sensitive permit applications including religious group meetings for other than purely
social or recreational purposes. This retention of control was in place so that advice from counsel
could be sought to avoid violation of the Establishment Clause. Salinas was initially granted
permission by the principal to use the school auditorium for six consecutive Sundays in January
and February of 1983. After the third session, Salinas was informed by the superintendent that
the permit was withdrawn because the principal did not have the authority to grant the request. Salinas was then told he could present his request to the next board meeting. Rather than present his request to the board, Salinas filed suit in the federal district court claiming the board’s retention of authority to make decisions regarding religious group use of facilities infringed upon his freedom of religious exercise, association, and expression. He also contended the policy denied his group equal protection. The district court granted summary judgment in favor of the school district which Salinas appealed to the United States Court of Appeals, Eighth District.

Issue: At issue was whether the retention of decision-making authority regarding certain types of speech was unconstitutional.

Holding: The court held the school board’s authority to delegate some authority to make decisions regarding the use of school facilities to the building level while at the same time retaining the authority to make those decisions pertaining to certain issues was not a constitutional violation.

Reasoning: Salinas presented two claims to the court in this case. First, he asserted that the district’s policy of retaining decision-making control in regard to certain groups such as his was discriminatory and resulted in infringement upon the group’s First Amendment protections. The court reasoned that the school board had the option to delegate some decision-making authority and that retention of some of that authority did not violate federally protected rights. Second, Salinas contended that the policy denied access to the school facilities because of the nature of the speech in violation of First Amendment and due process rights. In fact, Salinas never submitted his claim to the board, as requested, and, as a result, the board never had the opportunity to make a decision regarding his group’s use of the school. There was also no indication from the district that it had ever intended to deny access.
Disposition: The United States Court of Appeals for the Eighth Circuit upheld the lower court’s grant of summary judgment in favor of the school district.

**1985**

Citation: *Jarman v. Williams*, 753 F.2d 76 (C.A.8 1985).

Key Facts: A group of parents requested that the Vilonia School District No. 17 hold more dances for the students. When the request was denied by the board, the parents attempted to rent the gymnasium in order to hold dances from time to time. When this request was denied, the group alleged pressure had been brought by religious groups who opposed dancing to influence the board’s decision. Because the board had a policy permitting the rental of facilities to civic organizations and school related groups, this group of parents brought suit alleging their First Amendment rights had been violated in that social or recreational dancing was a form of expression falling into the category of speech. Plaintiffs also held that they were deprived equal protection of the law.

Issue: At issue was whether the school district violated the plaintiffs’ First Amendment and Equal Protection rights by denying them access to rent school facilities in order to hold a dance for their children.

Holding: The court held that the board had not created a public forum simply because it allowed other groups and activities in the gym and that the type of dance in question was not covered under First Amendment speech protections. These findings by the court allowed the school to maintain control of the facilities and to deny the plaintiffs access for their proposed social dance.
Reasoning: The court examined the claim that the type of dance involved in the case should be considered to fall under First Amendment speech protections. The court reasoned that some forms of dance, particularly those performed for an audience or that express an art form, would be considered expressions of speech. The dance involved in this case, however, did not fall into this category. The parents wished the students to be afforded the opportunity to dance socially. The court deemed this to be for recreational purposes and that it was conduct rather than speech. Taking the line of thinking further, the court allowed that even some conduct can be expression that could require First Amendment protection. In *International Brotherhood of Teamsters, Local 695 v. Vogt, Inc.* (1957), picketing was judged to be conduct that conveyed a certain message and, consequently, fell under the First Amendment protection. Again, the court felt the conduct in the present case did not fall within these guidelines and that the board’s refusal to allow the parents to use facilities for this purpose did not violate First Amendment tenets. The court further judged that even if speech protections could be invoked, the case would still fail in that the plaintiffs had not established that the gymnasium had become a public forum. Following the *Perry* reasoning by the Supreme Court, selective access granted to some groups did not create an open forum for all who wished to use the facility. Finally, the court ruled it was within the board’s lawful discretion to deny the plaintiffs’ attempt to rent facilities and that such action did not violate the Equal Protection clause.

Disposition: The United States Court of Appeals for the Eighth Circuit affirmed the lower court’s ruling that the school district had not violated First Amendment and Equal Protection rights of the plaintiff.

Key Facts: Beginning in September 1979, the Findlay Board of Education rented use of elementary school buildings immediately before or after school hours to the Findlay Weekday Religious Education Council (WREC). The WREC distributed advertisement and registration materials to third and fourth grade students in the schools, in some cases through the students’ homeroom teachers. In some instances, contribution envelopes were disseminated at the same time through the same methods. As advertised, the classes were to teach children about God, Jesus, and how to get along with others. The WREC included in the advertisement that the Bible would be used as a resource to study God’s presence throughout history as well as many Bible characters and the parables of Jesus. Some of the PTO’s associated with Findlay schools contributed funds to the WREC. Prior to the 1984-1985 school year, the Findlay superintendent distributed an administrative policy outlining changes in the way that WREC could use facilities. Several changes were included: advertising, registration, and contribution materials were not to be handled by school personnel; principals were to make directory information available as requested; the WREC could use facilities only as outlined in board policies; school personnel would not supervise students in the WREC classes; those classes would not start less than 5 minutes after the dismissal of regular classes in the afternoon and would end at least 5 minutes prior to the start of regular classes in the morning. Plaintiffs brought suit contending the classes violated the Establishment Clause of the First Amendment by the appearance of endorsement of religion and excessive entanglement.

Issue: At issue was whether the allowance of religion classes by the Weekday Religious Education Council violated the Establishment Clause of the First Amendment.
Holding: The court held the school’s activities gave the impression of government endorsement of religion thereby disallowing the use of public school buildings for religious instruction at times close to the opening and closing of the school day.

Reasoning: The court examined the facts of the case in light of *Lemon v. Kurtzman* (1971) and the three prongs of the *Lemon* test. The court found the schools’ policy as it related to the WREC’s use of facilities to be unconstitutional. First, the policy advanced non-secular interests because it created the appearance of sanctioned support for religion. Despite the policy changes to define starting and ending times for the WREC classes, being so close to the times of regular classes gave the impression that those classes were part of the school curriculum. Also, teachers and administrators, although not involved in the classes themselves, were required to be on duty at times that the classes were offered by the WREC. This presence of school personnel, even if they were present at the school only in their capacity as school board employees, created the impression of school support of the religion classes. The court also noted that even though participation in the religion classes was voluntary, they ended or began at times when non-participating students were compelled to be at the school for regular classes. The court further noted that the use of facilities by religious groups on a weekend or weekday evenings would not present the same impression. The school district argued that the Findlay public schools were public forums and that prevented them from discriminating against the WREC. The court rejected the claim stating that the schools were not traditional public forums and, based on the stipulations before the court, determination could not be made if they could be classified as limited public forums. The court also responded to the defendant’s argument that Ohio statute allowed for the use of buildings for, among many things, religious meetings and entertainment. The court pointed out that the statute allowed such only when the building was not in use for
school purposes. Because the employees of the board were required to be present at times the classes were offered the court rejected the claim.

Disposition: The United States District Court for the Northern District of Ohio, Western Division, granted summary judgment in favor of the plaintiffs. The court ordered that the school personnel and anyone aiding them in the implementation of the religious classes cease their efforts to implement the policy at times closely situated to the beginning and ending of the regular school day.

1986

Citation: Student Coalition for Peace v. Lower Merion School District Board of School Directors, 633 F.Supp. 1040 (E.D.Pa 1986).

Key Facts: The Student Coalition for Peace, a nonschool-sponsored student organization espousing world peace through nuclear disarmament, requested use of Arnold Field in 1983 to hold a Peace Fair. The board denied access and the group held the fair at an alternate location not under board jurisdiction. In preparation for a similar fair for the following year, the group again asked the principal for use of the field and was again denied on the basis that the field was to be used for athletic or governmental purposes only. In appeal to the superintendent, the group also indicated alternate school facilities they could use including another athletic field or the boys’ gym. The superintendent denied all requests but offered the auditorium and lobby as an alternative. In an appeal to the school board, the Student Coalition for Peace stated the auditorium was not suited to the purposes of the fair and again requested use of either of the athletic fields or the gym. After the board’s denial, the group sought declaratory relief as well as preliminary and permanent injunctions in the district court. Subsequent to a 2-day hearing, the
court granted a preliminary injunction and the fair was held in the boys’ gym. Because the stated purpose of the group was to hold annual peace fairs until “the threat of nuclear annihilation had been eliminated,” the case was not rendered moot by the preliminary injunction and further hearings were conducted in the matter. The district court examined each of the requested facilities in terms of forum status and found that none should be considered a public forum or traditional forum. As a result, the court denied a permanent injunction. Following the passage of the Equal Access Act, the group asked the court to reconsider the case in light of the new statute. The court denied the motion and the Student Coalition for Peace appealed to the United States Court of Appeal for the Third Circuit. The court found some merit in the claim that Arnold Field was a traditional public forum and focused on that facility’s status in the action. The court also examined the Student Coalition for Peace’s claims in light of the newly enacted Equal Access Act. The court finally ruled that, since the original trial preceded the enactment of the Act, subsequent changes in policy that may have taken place should be examined by the district court. An amended complaint was submitted by the plaintiff in which it was noted that an “Activities Fair” had been held on the Pennypacker Field after the original ruling. The Activities Fair was held during instructional time and the general public, with the exception of vendors selling refreshments, did not attend. The fair was a school-sponsored event brought about, for the most part, by the students. The event was originally to be held on Pennypacker Field but, due to inclement weather, was held in the cafeteria. In addition, after the original ruling, a volleyball marathon, initiated by a student organization, was held in the boys’ gym and the general public was invited to attend.

Issue: At issue was whether the board improperly denied access to certain school facilities under the strictures of the Equal Access Act.
Holding: The court held that a limited open forum had been created in one of the venues in question.

Reasoning: The court considered anew the forum status of the original four venues requested for use by the student group in light of the Equal Access legislation. While the group had also named additional facilities in the amended complaint, the court found it inappropriate to broaden the scope of such requests at the time. It was incumbent upon the plaintiff to prove the creation of a limited open forum by the school district. In an examination of the four venues, the court concluded that a limited open forum had been created in the boys’ gym and that denying the use of this facility was in violation of the Equal Access Act.

Disposition: The United States District Court for the Eastern District of Pennsylvania granted an injunction in favor of the plaintiff, in part, with allowances for the school district to protect its property from physical damages. The court ordered that the school allow the Student Coalition for Peace to conduct its anti-nuclear rally in the boys’ gym on May 10, 1986. The court also ordered that any other relief for the plaintiff was denied.

Citation: Grattan v. Board of School Commissioners of Baltimore City, 805 F.2d. 1160 (C.A.4 1986).

Key Facts: On September 9, 1983, Grattan was distributing flyers on behalf of the Baltimore City Teachers Association in the parking lot of Greenspring Junior High School to teachers as they arrived for work. The flyer contained a blank membership application on one side and a cartoon depicting the city mayor with his arm around a member of the Baltimore Teachers Union, the representative union of the school’s employees, thanking that member for campaign contributions. The school principal ordered Grattan to leave the parking lot. Grattan refused to leave and, at a later time, was placed under arrest. He remained in custody at the
Baltimore City station house for 8 hours. After later acquittal of a charge of trespass, he brought suit against the school board and the principal.

Issue: At issue was whether the Board of School Commissioners of Baltimore City violated the plaintiffs’ Constitutional rights by not allowing him access to the school parking lot.

Holding: The court held the parking lot in question was a nonpublic forum for purposes of speech restriction. The court also held that the plaintiff’s speech claims were without merit because in both cases he did not have viable reasons for being on campus.

Reasoning: The court reviewed the plaintiffs’ claims in the case starting with the forum analysis of the parking lot. The plaintiff claimed the parking lot was a public forum in the way of traditional public forums such as public sidewalks. Based on the *Perry* decision, the court held the parking fell into the third type of forum, one that is not by tradition or designation a forum for public communication. Because the parking lot was deemed a nonpublic forum, the board could prohibit the “solicitational” activities. In response to possible classification according to state statute that Grattan was engaged in “lawful business,” the court found that Grattan’s activities were not related to the education of students. The court then turned to the plaintiffs’ second claim based on *Tinker v. Des Moines Independent Community School District* (1969) and *Kim v. Coppin State College* (4th Cir. 1981), that expressive activity on a school campus should not be denied unless it is disruptive to the educational process. The court noted that both of those cases involved individuals with authorization to be present on the school campus. Such was not the case with Grattan. Next, Grattan argued that he should be regarded in the same light as a textbook salesman conducting business on campus. The court again noted that the salesman’s activity could be regarded as educational in nature where Grattan’s would not. Additionally, the plaintiff contended that his activities were political in nature, based on the content of the flyer,
and deserved First Amendment protection. The court regarded the content of the flyer as a limited-audience organizational message that did not address concerns of the general public and, therefore, was not within the scope of the proposed argument. The court discounted the claims that union solicitation was protected by state statute on the grounds that such activity was only protected in the course of employee selection of an exclusive bargaining representative. The court finally denied a request by the plaintiff to give the Maryland Court of Appeals a chance to define union solicitation parameters in light of free speech guidelines set forth in the state constitution.

Disposition: The United States Court of Appeals for the Fourth Circuit affirmed the trial court’s grant of summary judgment in favor of the defendant school district.

1987


Key Facts: In 1980, the city of Yonkers received federal Community Development and Block Grants for which they were to construct 200 housing units. At the time of this hearing, the amount was estimated to be approximately $20 million dollars. The city had not met the terms of the agreement, and the court, in past action, had set forth that the 200 units had to be built or the grant monies would have to be returned. The Outside Housing Authority (OHA) had designated three sites that were suitable for constructing the units in fulfillment of the agreement. The sites were owned by the Yonkers Board of Education. New York Education Law Section 2556 (9) provides that when school property is no longer needed for educational purposes, the board should notify the common council so that they may sell or dispose of the property. The OHA contended the sites in consideration fell under jurisdiction of this law and control of the property
should have been returned to the city of Yonkers. The board disagreed and adopted on July 15, 1987, a resolution formalizing their refusal to return any school property to the city. It was left to the courts to resolve the dispute.

Issue: At issue was whether the Yonkers Board of Education could be required to give up tracts of unused property.

Holding: The court held that housing construction needed to satisfy the requirements of the Housing Remedy Order should begin immediately on the Lincoln High and School 30 sites. The court also noted that, should the city decide on different sites for construction of the requisite housing, it would consider the substitution of those alternates for the locations referenced in the ruling.

Reasoning: The court first considered the board’s contention that New York Education Law did not allow for judicial review with respect to the need of property for educational purpose. The court reasoned that, given the stipulation that a board is required to give notice when property was no longer needed the board had not followed the law, which rendered the matter open to court decision. The board next asserted that the matter should be subject to review only in a state court. The court pointed out the extensive history of federal litigation with respect to this case. In addition, the court noted that federal constitutional rights had been violated and the federal court sought to implement its order of remedy. The court then turned to the reasons presented by the board that the property in question should not be deemed “no longer needed.” In the case of the Lincoln High School property, the court judged the board’s wish, to hold the land for possible future use if enrollment should increase, to be vague and speculative. With respect to the Whitman property, the court concluded that the board’s proposed move of administrative facilities to the property was a new request for city-owned property since the court had ruled in
previous action that the property could be used by the city to build housing units. The court finally considered the board’s assertion that building 18 housing units adjacent to School 30 would disrupt the view of the wooded area behind the school. The court ruled that the stated use of the wooded area for nature walks and educational purposes occurred too infrequently to prevail.

Disposition: The United States District Court for the Southern District of New York granted the plaintiffs’ motion regarding two of the sites in question.

Citation: Thompson by Thompson v. Waynesboro Area School District, 673 F.Supp. 1379 (M.D.Pa 1987).

Key Facts: On April 28, 1986, plaintiff Thompson and another student were distributing copies of Issues and Answers, a publication by Student Action for Christ, in the hall before school. A teacher received a copy and gave it to the school principal. The principal consulted with the school superintendent about the paper and later had discussions with Thompson and his father. The principal reminded Thompson and his father that there was a policy prohibiting the distribution of literature until previewed by school officials. The next day, the principal wrote a memo to the Thompsons imposing restrictions on the distribution of the publication including the following: the publication could only be distributed prior to 7:50 a.m. outside the building and extra issues would have to be kept in the student’s locker. On May 8, Thompson and two other students were again distributing the publication in a hall before school. A teacher instructed them to stop. According to the teacher, the students continued to distribute the papers until the assistant principal arrived. Thompson and another student were assigned to in-class suspension and were later told they would not be allowed to distribute the papers anymore. On May 12, Thompson and another student were again distributing the publication in the hallway of the
school prior to class. They were again approached by a teacher, then escorted to the principal’s office at which time they were assigned in-school suspension for the entire day. On June 11, the plaintiffs filed a complaint, which was amended on February 23, 1987, citing four causes of action: violation of the students’ First Amendment rights of free speech and free exercise of religion, violation of the Equal Access Act, violation of the students’ Fourteenth Amendment rights to equal protection, and violation of the students’ ninth amendment to the state constitution rights.

Issue: At issue was whether the distribution of the religious newspaper in the halls during noninstructional time was protected by the Equal Access Act, whether the restrictions placed on the plaintiff with regard to said distribution were valid under the Constitution, and whether the restrictions violated the plaintiffs’ constitutional rights.

Holding: The court held that the students’ free speech rights had been violated. It was ordered that the school allow the distribution of the religious materials. The court also recognized the defendant’s authority to establish content-neutral time, place, and manner restrictions on that distribution. Finally, the court held that the school had not violated the students’ right to freely exercise their religion.

Reasoning: The court began by considering the Equal Access Act implications in the case. First, the court looked at the meaning of the term “meeting” in the legislation reasoning that, since the students did not attempt to obtain a place of meeting to gather with like-minded students for discussion, the activity engaged in by the students did not meet the definition. In addition, the court noted that by distributing the literature in the hallway the plaintiffs impinged on other students’ ability to choose to participate, or not, in the activity. The court next considered the free speech claims. Neither side contested the idea that the distribution of
literature by the plaintiffs fell into the area of protected speech. The court then needed to establish the type of forum presented by the defendant. Using principles from *Widmar v. Vincent* (1981) and *Perry Education Association v. Perry Local Educators’ Association* (1983), the court found that the school had created a limited open forum. Relying heavily on the defendants’ depositions, the court explored the reasoning behind the restrictions imposed. The principal voiced concerns about possible Establishment Clause violation if the religious material were allowed in the school. The court pointed out, however, that in this case, allowing the distribution of the paper would serve a secular purpose. At the same time, allowing the plaintiffs to meet and distribute materials would not be deemed to have the effect of advancing religion as feared. The school district’s restrictions were deemed to be inconsistent with the requirements within the limited open forum present in this case.

Disposition: The United States District Court for the Middle District of Pennsylvania found in favor of the plaintiff in part and for the defendant in part.

1988


Key Facts: During the 1984-1985 school year, Perumal and Read, students at different schools in the Saddleback Unified School District, were members of New Life groups. These organized groups of students met outside during the school lunch hour to study the Bible and have prayer. The schools’ principals had knowledge of the meetings but did not raise an objection. In February 1985, Perumal and Read asked their respective principals for permission to distribute flyers about their groups’ meetings but were denied. Read also attempted to
advertise in the school yearbook at his school but was denied. Both filed a petition for writ of mandate asking for an order from the Superior Court to permit the distribution of flyers and a yearbook advertisement but were denied. The judgment was appealed to the California Court of Appeal.

Issue: At issue was whether a school that was a closed forum must allow the distribution of flyers for a religious club and publish the club’s advertisement in the yearbook.

Holding: The court held the board’s policy regarding the distribution of literature by the New Life religious club and its advertisement in the school yearbook was constitutional as long as the district maintained a closed forum.

Reasoning: The district had in place a policy prohibiting off-campus groups from meeting or advertising on campus. The court disagreed with Perumal and Read’s contention that they were acting as individuals rather than part of a group because their proposed advertisement listed specific days, times, and locations for New Life to meet. The court found this to be more than a spontaneous gathering of students. In addition, the groups had a designated leadership structure with Perumal and Read acting as “president” of their respective groups. The court found this created the designation of off-campus group for New Life. In regard to the yearbook, the students cited the Equal Access Act of 1984 to support their wish to advertise in the school yearbook. The court, however, noted that the strictures of the Act only applied to schools that adopted a limited open forum. In this case, the school had, by policy, adopted a closed forum. The court also noted that viewing the facts in light of state or federal constitutional analysis yielded the same conclusions. The court therefore concluded that the board’s policy was constitutional.
Disposition: The Court of Appeal of California, Fourth Appellate District, Division Three, affirmed the lower court’s ruling in favor of the school district.

Citation: Deeper Life Christian Fellowship, Inc. v. Board of Education of City of New York, 852 F.2d 676 (C.A.2 N.Y. 1988).

Key Facts: Deeper Life Christian Fellowship applied for and received permission to use P.S. 60 because of renovations undertaken at the plaintiffs’ facilities. At the time, the group informed the school board it would need the facilities for an additional 6 to 8 months after the permit expired. After the group’s first meeting at the school, the superintendent received several complaints about the school’s use for religious services and related parking issues. When the plaintiffs applied for an additional permit, they were informed that their use of the facilities violated the New York Education Law and the request was denied. Deeper Life brought suit against the school board claiming the failure to renew the permit was a violation of constitutional protections.

Issue: At issue was whether the denial of access to a school facility for the purpose of holding religious services was a violation of the group’s First Amendment rights.

Holding: The court held the school district could not deny access to the church group. The court opined that Deeper Life’s need for a place to hold meetings during renovations, the hardship that it would be placed in if the facilities were not available, and the fair basis for litigation, led to the decision. The court took into consideration that the proposed use by the church group was well outside the timeframe that students might be influenced by their presence. In addition, the court considered the hardship placed on the church if it were not allowed to use the school facilities. The court stated this hardship tipped the scale in the church’s favor.
Reasoning: The court was asked to determine if the preliminary injunction granted by the district court should be allowed to stand. In order to receive such a ruling, the plaintiff had to show irreparable harm, likelihood of success, and a balance of hardships directed toward the requesting party. The court agreed with the district court’s finding of irreparable harm in that without the use of the facilities, the group would not be able to conduct services for a substantial period of time. The court also agreed with the district court’s finding in the analysis phase, but disagreed with the use of Widmar to reach that conclusion. The court cited instead Cornelius v. NAACP Legal Defense & Educ. Fund (1985) and Perry Educ. Ass’n v. Perry Local Educ’s. ’ Ass’n. (1983) in its opinion that nonpublic forum status attaches to property for unspecified purposes and exclusion from access need only be reasonable and viewpoint-neutral to meet the standards. In examining the forum status, the court found that the church’s activities did not fall within the activities allowed by state statute. The school, however, had a practice of granting access to church groups in the past thereby overruling the limited nature of the state’s policy. This actual practice of the school brought the action within the fair ground for litigation standard necessary to obtain a preliminary injunction. The court finally considered the school district’s assertion that allowing the church access to the facilities would violate the Establishment Clause. The court followed the reasoning of Brandon v. Board of Educ. (1980) in determining that the link between government and religious practice was lessened when the facility was used after school hours on a temporary basis.

Disposition: The United States Court of Appeals for the Second Circuit ruled in favor of the plaintiff allowing the preliminary injunction to stand.
Citation: Mergens By and Through Mergens v. Board of Education of Westside Community Schools, 867 F.2d 1076 (C.A.8 1989).

Key Facts: In January of 1985, the plaintiffs asked for permission to form a Christian Bible Study Club at Westside High School. The principal, Dr. Findley, denied the initial request. The students renewed their request in a meeting with Findley and Dr. Tangdall, associate superintendent, in February of 1985, at which time the principal consulted with the superintendent, Hansen. All three school officials felt denial of the request was in order because of a possible Establishment Clause violation. In March 1985, the group asked the school board to approve their request and was once again denied because the board policy governing the use of school buildings did not allow it. Suit was brought in April 1985 in district court alleging violation of First Amendment rights as well as the Nebraska Constitution and the Equal Access Act. In February 1988, the district court ruled in favor of the school board citing a closed forum that would render the Equal Access Act not applicable in this case. The student group then appealed.

Issue: At issue was whether the formation of a student Christian Bible study club would constitute a violation of the Establishment Clause.

Holding: The court held that formation of the student Bible club would not be a violation of the Establishment Clause. The court followed the reasoning of the Widmar decision and, in effect, pronounced that students in secondary schools were mature enough to discern the difference between state sponsorship of religion and a policy of allowing equal access.

Reasoning: In considering the plaintiff’s assertion that the school officials violated the Equal Access Act, the court first examined the nature of the forum in the school district. The
language of the act states that the parameters established within the legislation are only binding if, among other requirements, the school has established a limited public forum. In order to determine the type of forum in this case, the court had to establish what “noncurriculum related” meant in the act. After studying the legislative history and the nature of the many clubs already in existence at Westside High School, the court determined that a limited open forum had, in fact, been created at the school. The court then turned to the question presented by the defendants about a possible constitutional violation in regard to the Establishment Clause. Following the logic of *Widmar v. Vincent* (1981) and the language of the Equal Access Act, the court ruled that such was not the case. The court actually noted that even absent the Equal Access Act, it would have reached the same conclusion based on *Widmar* alone.

Disposition: The United States Court of Appeals for the Eighth Circuit, in a reversal of the lower court’s decision, ruled in favor of the plaintiff.


Key Facts: On October 19, 1987, a group of students at Moline High School was told by the assistant principal, who was acting principal for the day, that the distribution of political or religious literature was not allowed on school grounds. She then informed the school principal, Schwab, about the incident upon his return. Schwab did not inform the assistant principal or students of any disagreement with what she had stated the school policy to be. On November 19, 1987, the students met with Schwab at which time he informed them that the policy was and had always been, according to him, that distribution of materials was limited to the school office and at the discretion of the principal. The students challenged the policy as a violation of First Amendment rights. The matter was brought before the court with each side asking for summary judgment regarding the two regulations.
Issue: At issue was whether two rules concerning the distribution of literature at a school, one an oral rule disallowing the distribution of religious literature and the other an oral rule allowing distribution from a particular location at the unlimited discretion of the principal, were constitutional.

Holding: The court held that the two rules regulating the distribution of literature prior to November 24, 1987, at Moline High School were unconstitutional but noted that the regulations were no longer in effect. Since it also appeared the school did not intend to revert to the unconstitutional rule, there was no need to order injunctive relief.

Reasoning: In determining the constitutionality of the matter, the court first attempted to settle the disputed facts regarding the existent policy at the time it impacted the students. After an examination of the evidence, the court determined that the practice in place was consistent with what the assistant principal claimed, that political and religious materials were not allowed to be distributed. The court deemed this practice to be content-based restriction that prohibited targeted categories of speech and, because it was unwritten, could be rationalized through coincidental correlation. The court also noted that, even if the policy as stated by the principal had actually been in effect, it would have been deemed unconstitutional for the same reasons.

Disposition: The United States District Court for the Central District of Illinois granted summary judgment in favor of the plaintiffs.

Citation: Searcey v. Harris, 888 F.2d 1314 (C.A. 11 1989).

Key Facts: On February 21, 1983, the Atlanta Peace Alliance (APA) requested permission from the principals of the 22 public high schools in Atlanta to place literature concerning issues regarding military service in guidance offices. They also requested permission to set up tables to promote peace-making as a career and to be allowed to speak in forums where
pro-military addresses were made. Finally, the group wished to place paid advertisements in the school newspaper. The APA later submitted the requests to the board at a public meeting at which time the board took no action. In June 1983, representatives of the APA met with school superintendent Crim to discuss their requests. Crim agreed to allow the materials to be distributed to guidance offices, a table to be set up at Career Day, to make the list of APA speakers available to high schools, and to allow the paid advertisement to be placed in the school yearbook. In July 1983, Crim conducted a radio interview about the arrangements, which sparked an editorial in the Atlanta Journal characterizing the APA material as propaganda. The school board, after executive session, suspended the APA from Atlanta’s public schools and authorized Crim to develop a policy governing Career Days. In 1986, the district court granted a preliminary injunction against the board and advised the board to develop a written policy. In April 1987, the Court of Appeals for the Eleventh Circuit heard an appeal in the case and affirmed the partial summary judgment and preliminary injunctive relief. The court vacated the portion of the ruling stating the school had created a limited forum stating that issue should not have been addressed at the summary judgment stage. The appeals court remanded the case for further proceedings. In November 1987, Crim implemented a policy previously adopted by the board regarding Career Day. At trial in 1988, the district court conducted a thorough forum analysis and concluded that the Career Day and Youth Motivation Day programs were nonpublic forums. The board could make content-based restrictions on access to facilities as long as the restrictions were reasonable and viewpoint neutral. The district court concluded, however, that while the newly developed policy could be considered reasonable, the sections of the policy that required “direct knowledge” and “present affiliation or authority” with the career to be discussed as well as the restriction of criticism of other career choices as pointedly directed at restricting
access of the APA. As such, the policy was deemed to violate the plaintiffs’ First Amendment rights. The board subsequently appealed the court’s ruling about the Career Day policy.

Issue: At issue was whether the banning of the plaintiff from participating in Career Day and Youth Motivation Day activities by the school violated the plaintiffs’ First Amendment rights.

Holding: The court held that the school had excluded the APA from its Motivation and Career Days in violation of constitutional rights. Once it was determined the plaintiff had the right to participate in the event the school board changed its regulation pertaining to speech. The courts concluded these changes were specifically aimed at excluding the plaintiff. The courts held that such restriction was also a violation of the plaintiff’s rights.

Reasoning: Since the nonpublic forum status of the school as ruled by the district court was not disputed by the plaintiff, the appeals court examined first the reasonableness of the parts of the policy called into question by the district court. The court reasoned that it was acceptable to have a requirement that speakers have direct knowledge in order to present credible information. The problem arose with the requirement of current affiliation with the career field. The court agreed with the district court that such a requirement excluded groups including retired persons and professional career counselors. In regard to the “no criticism” policy, the court reasoned some information that might be considered negative would be necessary in order for students to make informed career decisions. The court judged that the regulations disallowing criticism were reasonable when prohibiting one group from denigrating the opportunities by another group. Conversely, the regulations were unreasonable when preventing a group from presenting negative factual information. The court then turned to the lower court’s ruling that the regulations were developed to suppress the plaintiffs’ viewpoint. The court opined that, once the
board determined students should learn about career opportunities, it could not exclude the APA because it disagreed with their message.

Disposition: The United States Court of Appeals for the Eleventh Circuit upheld the lower court’s ruling in favor of the plaintiff.

1990


Key Facts: In May 1987, voters in the Round Valley Unified School District passed four bond propositions for school construction projects. On the ballot, the voters had been informed that if a project called the Dome was approved, then the gymnasium would not be built. The Tucson Electric Power Company and its subsidiaries brought suit to enjoin the school district from building the Dome. The attempt failed and the company appealed. They argued that the Dome should not be classified as a school building as defined by Arizona statute, which would relieve them of their majority tax burden in the project. The company also argued that the election was unfair and that the ballot did not comply with election statutes because it informed the voters of alternatives to some of the projects listed. Finally, the company contended the trial court should have allowed an amendment of the complaint on the day of the trial and the refusal was an error.

Issue: At issue was whether a facility constructed for use by a school but has anticipated occasional use for non-school purposes should be classified as a school building for tax collection purposes.
Holding: The court held that the Dome should be considered a school building according to Arizona statute allowed for the construction of the facility. This finding made the Tucson Electric Power Company liable for its tax burden in the construction.

Reasoning: The court examined the classification of the Dome in regard to Arizona Statute A.R.S. § 15-491(A) (3) and concluded it met the qualifications because the primary use was as a school athletic facility. This left the company with the arguments that the facility was extravagant and would be used occasionally for non-school events. Both arguments were rejected by the court. The court examined the allegations of election irregularities. First, while the court noted that the superintendent violated a duty in not treating the company fairly by informing voters that it would bear 85% of the cost of the bonds, this violation of duty did not influence the election. While the plaintiff questioned this finding, the court responded that the remedy for “unfair” speech was not to silence the speaker but more speech. The court also rejected the contention that the ballot did not meet election standards. The plaintiffs suggested that statutes directed that a ballot should only allow a “yes” or “no” vote. By explaining on the ballot that the approval of one would cause another to be negated constituted a “maybe” category. The court rejected this argument and stated the statute did not preclude alternative bond proposals. The plaintiffs finally brought up the trial court’s refusal to allow amendment of a proposal on the day of the trial. The court stated that such an amendment would have caused a delay and the denial fell within the trial court’s discretion.

Disposition: The Court of Appeals of Arizona, Division Two, Department B, affirmed the trial court’s decision in favor of the school district.

Citation: Board of Education of the Westside Community Schools v. Mergens By and Through Mergens, 110 S.Ct. 2356 (U.S.Neb. 1990).
Key Facts: In January of 1985, the plaintiffs asked for permission to form a Christian Bible Study Club at Westside High School. The principal, Dr. Findley, denied the initial request. The students renewed their request in a meeting with Findley and Dr. Tangdall, associate superintendent, in February of 1985 at which time the principal consulted with the superintendent, Hansen. All three school officials felt denial of the request was in order because of a possible Establishment Clause violation. In March 1985, the group asked the school board to approve their request and was once again denied because the board policy governing the use of school buildings did not allow it. Suit was brought in April 1985 in district court alleging violation of First Amendment rights as well as the Nebraska Constitution and the Equal Access Act. In February 1988, the district court ruled in favor of the school board citing a closed forum that would render the Equal Access Act not applicable in this case. The United States Court of Appeals for the Eighth Circuit reversed, concluding that many of the clubs at the school were noncurriculum-related thereby invoking the guidelines of the Equal Access Act regarding limited public forums. That court also found no violation of the Establishment Clause in the guidelines of the Equal Access Act. The Supreme Court granted certiorari and heard the case.

Issue: At issue was whether the Equal Access Act presented Establishment Clause violations through its enactment.

Holding: The court ruled the school had created a limited open forum and the denial of the request to form a Christian club was a denial of equal access under the Equal Access Act. This decision by the Supreme Court certified the constitutionality of the Equal Access Act. As a result of the decision, student religious groups were accorded the same access to schools that other noncurriculum student groups enjoyed.
Reasoning: The Supreme Court first noted that their own rulings in *Widmar v. Vincent*, (1981) and *Lemon v. Kurtzman* (1971) set forth important precedents: students should not be prohibited from using university facilities for religious purposes on the basis of their speech and an “equal access” policy would not violate the Establishment Clause. The court next noted that it was necessary to define the language of the legislation regarding “noncurriculum related student groups.” In analyzing the statute, the court remarked that the consideration of legislative history was not helpful because the bill went through extensive debate and revision in its passage. The bill did, however, enjoy bipartisan support pointing to a broad purpose for the enactment, that is, students wishing to meet and discuss religion in the schools should not be subject to discrimination. The court, following the legislators’ lead, applied the same broad interpretation to the meaning of “noncurriculum related student group.” To be curriculum related, which would forestall invocation of the Act, a group had to show direct connection with a course offered or planned to be offered. Absent such direct connection, the court stated that a chess club or stamp collecting club would fall within the category of noncurriculum related, creating a limited open forum thus triggering the oversight of the Act. The court discounted the school district’s contention that allowing the club access as proposed would undermine their control over the school’s activities. The court pointed out language in the legislation preserving a school’s authority to maintain order and discipline on premises. It also pointed out that the school could avoid oversight of the Act by not accepting federal funds. The court discounted the dissent’s reliance on the legislative history to support its claims. The court reasoned the passing comments referenced by the dissent did not carry the weight they claimed it should. The last statutory question, according to the court, was whether the denial of the student group’s request constituted denial of equal access. Because the court ruled the school had created a limited open
forum they regarded the denial of the request to form a Christian club was a denial of equal access under the Act. The Supreme Court lastly considered the assertion that allowing the student religious club would amount to a violation of the Establishment Clause. The court disagreed with the main contention that the school risked the appearance of advancing religion. The court pointed out the difference between government speech endorsing religion, a violation of the Establishment Clause, and private speech endorsing religion, protected by the Free Speech and Free Exercise Clauses. The court reasoned secondary students were mature enough to understand the difference. The court pointed out the limits of school official participation with the group and the time constraints outlined in the Act. Finally, the plethora of student-initiated clubs at the Westside School also served to offset any possible appearance of official endorsement of religion.

Disposition: The Supreme Court of the United States affirmed the Court of Appeals judgment in favor of the plaintiffs.


Key Facts: In August 1987, Gregoire, the director of Student Venture for Delaware Valley, made application for use of the William Tennent High School auditorium on the evening of October 31, 1987. A check was subsequently submitted as deposit for the rental. On September 3, 1987, the school principal wrote plaintiff Miller a letter stating the application and check had been received. The letter also asked about the religious content of the program and stated that any religious content would violate the board policy. On September 11, 1987, White, the Supervisor of Secondary Education, wrote Gregoire to formally deny the rental request and return the deposit check. The plaintiffs brought suit alleging violation of Free Speech and Assembly Clauses of the First Amendment, violation of the Equal Protection Clause of the
Fourteenth Amendment, violation of the Free Exercise Clause of the First Amendment, and violation of the Establishment Clause of the First Amendment. The district court granted a preliminary injunction on the basis that the school had established an open forum. After this ruling, Centennial revised guidelines for facilities use. The new policy did not allow the use of high school facilities for religious services and also placed a ban on the distribution of religious literature. The plaintiffs in the suit, in expectation of the need for future requests for the use of the school’s facilities, sought to have the new policy enjoined and a permanent injunction from the court’s previous ruling. The district court granted permanent injunctive relief in November of 1988 following the same reasoning used earlier in the case. The school district appealed the final injunctive order. The plaintiff group also sought clarification from the court and asked that the order be amended to enjoin the school from prohibiting religious worship as well as speech. In July 1989, the district court denied the motion and the group appealed.

Issue: At issue was whether the school district violated the plaintiffs’ free speech rights by not allowing rental of the gym facilities on the basis of the proposed content of his speech.

Holding: The court concluded that an open forum did exist and the policy excluding the plaintiff had been too narrowly drawn. The school could not prohibit the plaintiff from using the facilities based on the content of the program. Additionally, the court ruled that the school could not disallow the distribution of all religious material.

Reasoning: The court turned its attention first to the nature of the forum presented in the case by reviewing three cases presenting important precedents on the subject. After considering the forum analyses presented in Perry, Cornelius, and Widmar, the court concluded the school had created an open forum for speech. The court turned its attention to the Establishment Clause questions in the case. To aid in analysis, the court considered each prong of the Lemon test. In
the plaintiffs’ appeal that worship, as well as speech, should be allowed, the court concluded that
the two were similar in nature and the district court’s permanent injunction had been too
narrowly drawn. The final consideration in the case was that of the school’s ban on the
distribution of religious literature. Given the ruling of a student limited open forum in the case,
the content-based restriction would have to show a compelling state interest in order to stand.
The court stated it recognized the difficulties schools face while trying to protect impressionable
young children while at the same time providing the freedom necessary for intellectual
development. The court, however, also noted that given the nature of the forum created, a ban on
the distribution of all religious materials was impermissible.

Disposition: The United States Court of Appeals for the Third Circuit affirmed the
district court’s grant of permanent injunction but remanded the case back to district court to
revise the injunction. The court ordered the revision of the injunction to include religious
worship and distribution of religious material to be in compliance with the court’s opinion.

Citation: Joki v. Board of Education of Schuylerville Central School District, 745 F.Supp.
823 (N.D.N.Y. 1990).

Key Facts: In 1965, Craig Martin, a senior at Shuylerville High School, painted and
donated a piece of artwork to the school. The piece had as its central focus a man nailed to a
wooden cross who was bleeding from the left side of his chest and had two intertwining lines on
his head. Also depicted in the work were two additional men nailed to crosses, a man tossing a
net into the water, a woman mourning, two men fighting, and a man carrying stone tablets with 1
through 10 written in Roman numerals. The art work, which was completed as part of a school
program for students aspiring to careers in art, was displayed in the auditorium with two
spotlights aimed at it. At the time of the complaint, neither spotlight worked. In April 1988,
Robert and Susan Joki attended a function at the school. They found the content of the painting objectionable because they claimed it depicted religious content and contacted the superintendent to have it removed. Following an initial denial to remove the work, the plaintiffs attempted many times to have the work removed. As a result, the board of education met in executive session in June 1989 and decided to let the display remain despite the plaintiffs’ many requests. The plaintiffs asked the court to permanently enjoin the school from displaying the piece of art. The action considered by the court was a request for summary judgment.

Issue: At issue was whether a painting, which allegedly depicted religious symbols, violated the Establishment Clause.

Holding: The United States District Court for the Northern District of New York found that the display of the artwork violated the Establishment Clause where it failed the second prong of the *Lemon* test and ordered the painting to be removed within 30 days of the court’s order.

Reasoning: The court considered the plaintiffs’ assertion that the painting violated aspects of the *Lemon* test, in particular the effects test, which gave the impression the school endorsed the religious message conveyed in the painting. The court used *County of Allegheny v. ACLU* (1989) as the basis for its analysis of whether the display had the effect of religious endorsement to the reasonable observer. Despite testimony from acquaintances of the artist that the theme was “man’s inhumanity to man,” the court noted the depiction of the crucifixion scene bore a striking resemblance to the one described in the Bible. The court also noted the painting was displayed by the school with no explanatory note to give it context, leaving the interpretation of what was depicted to the observer. The defendants claimed the secondary characters presented a context that could allow for the display as in *Allegheny*. The court rejected this claim as well as claims that other displays in the auditorium located away from this painting presented a similar
secular context. The court also noted the painting was displayed in an auditorium used by elementary school students on a daily basis. Given these facts, the court concluded the painting gave the impression of the school’s endorsement of Christianity.

Disposition: United States District Court for the Northern District of New York granted the plaintiffs’ motion for summary judgment.

1991


Key Facts: Letchworth Central High School had, for many years, sponsored a baccalaureate service as part of graduation ceremonies. In 1991, such a service had been scheduled for May 28 of that year. Maggie Randall and the New York Civil Liberties Union requested that school superintendent Pegan cancel the service because they alleged it violated their First and Fourteenth Amendment rights. Pegan first refused but later, in concert with the board, decided to cancel the service as requested. They board also adopted a resolution on June 10, 1991, announcing it would no longer sponsor the baccalaureate. Afterwards, a group of students involved in the nondenominational “Purposeful Life Club” study group asked to sponsor the service. The group decided to hold the service in the school auditorium and submitted the proper building request form and fee to the school board. The group made their own invitations to the event and delivered them to students and their families. The students planned to invite a number of speakers with at least one of them being nondenominational. The plaintiffs brought suit attempting to enjoin the school district from sponsoring, promoting, or influencing a baccalaureate service at the school.
Issue: At issue was whether a baccalaureate service sponsored by a student organization was in violation of the Establishment Clause.

Holding: The court held that since the school maintained an open forum policy that was viewpoint neutral, the student group was allowed to sponsor a baccalaureate service in the auditorium without violating the Establishment Clause.

Reasoning: In consideration of the plaintiffs’ requests, the court viewed the facts in light of the Lemon test and Board of Educ. of Westside Comm. Schools v. Mergens (1990). Based on principles from Mergens, the court concluded none of the prongs of the Lemon test were violated. The court also noted that the school maintained an open forum policy allowing access to all civic, private, and student groups. The nondiscriminatory policy in allowing use of the facility served a secular purpose as it conveyed a viewpoint neutral approach to granting access. The court also stated there was no risk of entanglement since the school board had publicly distanced itself from association with the baccalaureate service. Finally, the board and faculty were invited to attend but were not involved in any aspect of the program.

Disposition: The United States District Court for the Western District of New York denied the plaintiffs’ motion for preliminary injunctive relief and the defendants’ cross motion to dismiss.

Citation: Leonard v. Iowa State Board of Education, 471 N.W.2d 815 (Iowa 1991).

Key Facts: Dr. Clinefelter, superintendent of the Lamoni school district, developed the Annehurst Curriculum Classification System (ACCS) as part of a doctoral dissertation in the 1970s. During the hiring process for the position at Lamoni, Clinefelter made known his work with the project which, along with a former-professor associate, became an Iowa corporation. Upon his hire, the corporation donated a complete set of the system to the school district. In
addition, 10% of the net profit was given to the school district, 10% went to education, and the remaining 80% went toward further research efforts. Neither Clinefelter nor his associate benefitted financially from the project. Clinefelter stored some materials to be included in the project in the school. He also hired some school employees on a part-time basis to help in the project. Clinefelter submitted a printing request associated with the project along with school-related projects but paid for the ACCS printing with ACCS funds. A separate phone line for ACCS use was installed in Clinefelter’s office and was paid for with ACCS funds. Clinefelter made business contacts during seminar speeches on board-paid trips at the same time that he was conducting school district business. Plaintiffs alleged that Clinefelter used school resources in conducting this private business in violation of the state constitution. The board found no violation and the plaintiffs subsequently appealed.

Issue: At issue was whether the superintendent’s access to school facilities and resources for a private enterprise violated the Iowa Constitution.

Holding: The court held that the defendants had taken great care to separate the superintendent’s private business matters from public school business. As such, there was no violation of the Iowa Constitution.

Reasoning: The court first noted that it was reluctant to insert itself into administrative decisions other than to correct errors of law. The court stated that, in their opinion, Clinefelter and the board had been very careful to maintain the balance between Clinefelter’s private business and his duties to the school district. The court also stated that the board had found no violations in Clinefelter’s actions because of the benefit those actions brought to the district. The court found no reason to interfere with the administrative determination by the board.
Disposition: The Supreme Court of Iowa affirmed the lower court’s ruling in favor of the board’s administrative decision.


Key Facts: In August of 1990, the plaintiffs met with the vice principal of Robert Stuart Junior High School and requested permission to form a Christian religious club to meet during non-instructional time. They stated the purpose of this voluntary-membership club would be to have fellowship and pray together. The request was ultimately referred to the Board of Trustees who denied the request in December 1990. The plaintiffs filed an action seeking declaratory judgment and an injunction enjoining the school district from treating their group differently from other noncurriculum groups or clubs.

Issue: At issue was whether the Idaho Constitution, which prohibited religious clubs from meeting on school grounds, took precedence over the Equal Access Act.

Holding: The district court held the school district was in violation of the Equal Access Act by not permitting religious clubs to meet on school grounds. This ruling gave the Equal Access Act precedence over state constitutions. Also as a result, the school was ordered to allow the plaintiffs to form the student Christian club for their stated purposes and that it should enjoy privileges as other noncurriculum student groups.

Reasoning: The court noted that both parties in the case acknowledged the ruling by the Supreme Court in Westside Community Schools v. Mergens (1990) that the Equal Access Act was constitutional under the Establishment Clause of the First Amendment. Given this stipulation, the court was left to decide if the state constitution of Idaho could supersede the U.S. Constitution. The Idaho constitution was more prohibitive with regard to religious access to facilities. The court considered the school district’s contention that abiding by the Equal Access
Act would cause it to violate the prohibitions in the Idaho constitution. To arrive at a ruling, the court examined the Supremacy Clause, which allows that as long the Congress is acting in pursuance of the Constitution the laws made as a result would prevail over state statutes. The court noted that the receipt of federal funds by the school district made the district subject to the conditions placed on such receipts. The Equal Access Act stated the stipulation that schools receiving federal funds must abide by the guidelines of the legislation. The court concluded that the Equal Access Act was passed by Congress in pursuance of the Constitution bringing the Supremacy Act into play. As such, the strictures of the Idaho constitution do not overrule the Equal Access Act.

Disposition: The United States District Court for the District of Idaho granted the plaintiffs’ request for declaratory judgment.


Key Facts: The Good News Bible Club in Warranton, Missouri, was begun by teacher Roberta Penwell in the 1970s. The club applied for and received permission to hold meetings at the school each year. Penwell was the leader of the club until 1981 and remained active with the club until 1987. Penwell used her position as teacher to recruit students for the club and also recited prayers, permitted moments of silence following the Pledge of Allegiance, and displayed a variety of religious materials in her classroom. Additionally, she distributed Bibles to her students and invited them to attend meetings of the club. After complaints about the religious activities in her room, the board, in the summer of 1987, warned Penwell in writing against continuing her actions or her employment would be in jeopardy. Upon application for permission the following year, the club was denied the usual meeting time of 3:30 p.m. by superintendent Endry who offered, instead, to allow the club to meet at 7:30 p.m. After the club appealed, the
board offered to let the club meet at 6:30 p.m. instead. The plaintiffs in the case alleged content-based discrimination as well as free speech, freedom of association and assembly, and free exercise of religion violations.

Issue: At issue was whether a requirement by the school district for a religious organization to meet at a certain time after school was a violation of the organization’s First, Ninth, and Fourteenth Amendment rights.

Holding: The court found that, since the status forum of the school was inconclusive, the plaintiffs’ motion for summary judgment could not be granted. The court also allowed that had the determination been made that a limited public forum existed in the case, the school’s actions would still be considered constitutional based on an Establishment Clause and Lemon test analysis.

Reasoning: The court first examined the plaintiffs’ assertion that the school had created a limited public forum thus subjecting the school to a higher standard of scrutiny if limiting types of speech. According to the court, three factors affected this determination: the intent of the state, the nature of the property in regard to expressive activity, and the policy and practice of the school board. An examination of the relevant Ohio statute led the court to conclude that legislators intended for the schools to be public forums, even for religious activities. The court, however, also noted the reasoning in Ford v. Manuel (1985) that programs such as the one in question should not begin immediately before or immediately after school hours. In the second phase of analysis, the court noted the age of the school children involved. Even though the courts had progressively lowered the age that one could distinguish private versus government sponsorship of an activity, the court agreed with the ruling in Bell v. Little Axe Ind. School Dist. No. 70 (1985) that students in elementary school are more impressionable and less able to
differentiate between types of sponsorship. As such, the court noted that even if a limited open forum existed, the nature of the venue should not allow for “unfettered expressive activity.” The court found the third avenue of analysis inconclusive in that the written policy of the board indicated a limited public forum but the plaintiffs did not provide any evidence regarding this part of the analysis.

Disposition: The United States Court for the Southern District of Ohio, Eastern Division, denied the plaintiffs’ motion for summary judgment as being without merit and granted the defendant’s motion for summary judgment.

Citation: Deeper Life Christian Fellowship, Inc. v. Sobol, 948 F.2d 79 (C.A.2 1991).

Key Facts: Deeper Life Christian Fellowship applied for and received permission to use P.S. 60 because of renovations undertaken at the plaintiffs’ facilities. At the time, the group informed the school board it would need the facilities for an additional 6 to 8 months after the permit expired. After the group’s first meeting held at the school, the superintendent received several complaints about the school’s use for religious services and related parking issues. When the plaintiffs applied for an additional permit, the group was informed that their use of the facilities violated the New York Education Law and the group’s request was denied. Deeper Life brought suit against the school board claiming the failure to renew the permit was a violation of constitutional protections. The district court granted a preliminary injunction which was appealed by the defendant. While the appeal was pending, the plaintiff filed an amended complaint challenging the constitutionality of the state statute in question, Section 414, regarding access to public school facilities. The court of appeals only considered the original complaint in deciding the matter in favor of Deeper Life. In that decision the court pointed out the fair ground for litigation still present in other issues was not addressed. Subsequent to the original opinion,
Deeper Life and the defendant school district reached a settlement causing the judge to dismiss the remaining complaint as being moot. A motion by the plaintiff to reinstate the amended complaint against Sobol was denied with judgment rendered in favor of Sobol. The plaintiffs appealed.

Issue: At issue was whether an issue before the court regarding the constitutionality of a state statute pertaining to access to school facilities can be rendered moot if the conditions set forth in the original lawsuit are no longer present.

Holding: The court held that the conditions that led to the original suit had been settled rendering the action under consideration moot. The court did note, however, that such a ruling did not prohibit future action if the plaintiff were to apply and be denied use of the school facilities.

Reasoning: In considering the issue of mootness, the court stated it was only allowed under the Constitution to consider cases that are “alive” at all stages of the proceedings. The plaintiffs claimed that Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5 (1991) set a precedent for continuing a claim even though the original conditions had been settled. The court noted the cases were dissimilar in that the conditions cited by Deeper Life were not likely to continue. Deeper Life next argued this was a live case because Section 414 gave unfettered discretion to the school board to grant permits which, in turn, made the section subject to challenge facially without having first applied for and been denied a permit. The court disagreed because the group focused on the phrase “welfare of the community” as giving the board authority to grant access while other sections expressly prohibited fundraising or teaching promoting a particular religion. The court acknowledged that other related issues were presented
with relation to the Establishment Clause but ruled there was no live controversy and, therefore, the
appeal was moot before such questions were reached.

Disposition: The United States Court of Appeals for the Second Circuit ruled that the facts presented in the case rendered the action moot.


Key Facts: In September of 1987, Wallace, pastor of Northgate Community Church, asked to rent the facilities at McQueen High School for church services on Sundays. He was told by the assistant principal that the school district did not allow the use of school property for such purposes. Wallace spoke with the Director of Student Activities for the system who confirmed the policy. Wallace submitted a letter, through counsel, to the district superintendent Moss requesting the policy be changed to allow use of school facilities for purposes like he proposed. The school district did not respond and Wallace subsequently filed a complaint for declaratory and injunctive relief as well as a motion for preliminary injunction. In the action, the plaintiffs sought to have the school district’s policy declared unconstitutional and unenforceable, an order allowing them use of the McQueen facilities, an order prohibiting the discrimination of religious groups in non-school hours from using the facilities, and an order to prohibit the school from closing the open forum created by the district. The district stated in stipulations that if were Wallace to formally apply to use the school for his stated purposes, they would still deny the application because the Nevada Constitution, state statutes, and other authorities prohibited such uses and the policy in effect as of May 27, 1986, did not state a prohibition on uses of properties for religious purposes. In August 1988, the district court denied the plaintiffs’ motion on the grounds that Northgate might become “permanently institutionalized” at the school. In December 1988, the plaintiffs made a motion that the court reconsider and attached an affidavit expressing
that the church did not want to use the facilities on a permanent basis. The same district court denied the motion in the event the group submitted a written application indicating its intended use of the facilities. In March 1990, Wallace did submit a written application for one-time use of the school for Easter Sunday that year. The school, in an attempt to settle the case, approved the application and the church used the facilities as requested. The plaintiffs then moved for summary judgment alleging a content-based discrimination in regard to religious use of facilities. Upon denial of that motion in July 1990, the school district moved for summary judgment in January 1991, citing the stance voiced in the stipulation to which the plaintiffs filed a cross-motion for summary judgment.

Issue: At issue was whether the school district improperly denied the plaintiffs’ attempt to use the school facilities based on the content of the speech.

Holding: The court found that the school district had created a limited open forum and, absent a compelling state interest in limiting the plaintiffs’ speech, the school could not exclude the plaintiff from access if other similar groups were using the school’s facilities. The court issued an order directing the school district to make the McQueen School available to the defendant on the same basis as other groups’ access.

Reasoning: The court first had to determine whether the school had created an open forum. The school district argued they had created a limited open forum and, since it excluded all types of religious uses, did not discriminate among types of religious requests. Additionally, the district interpreted the United States and Nevada Constitutions as prohibitive toward religious use of school facilities. The court, in an examination of actual practice, noted that the district’s policy did not expressly prohibit religious use and almost all applications for use were granted, including Christmas parties and programs of possible religious content. The court agreed the

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school had created a limited public forum. Examining the assertion that in the limited public forum the school could not allow religious access without presenting the appearance of endorsement and entanglement, the court applied the three prongs of the *Lemon* test to determine the school’s policy was misaligned to the purposes of the First Amendment.

Disposition: The United States District Court for the District of Nevada granted summary judgment and injunction in the plaintiffs’ favor.

1992


Key Facts: In September of 1984, a group of students met outside the school’s cafeteria prior to the beginning of class. The students met for prayer and Bible reading. The school, once it found out about the activities, informed the plaintiffs that such meeting was not allowed under school district policy. Later in the year, plaintiffs distributed religious printed materials to students as they disembarked from school buses in front of the school. Again, the school prohibited further distribution of the materials by the students. Plaintiffs sought declaratory and injunctive relief as well as monetary damages and attorneys’ fees.

Issue: At issue was whether prohibiting the plaintiffs from religious meetings and distributing religious materials was a violation of their First Amendment freedom of speech rights.

Holding: The court held that the school district’s policy regarding the distribution of religious material violated First and Fourteenth Amendment rights but noted that the students’ actions, which may have been considered disruptive, kept it from ruling on oral speech and access for meetings.
Reasoning: The court first considered whether a change in the district’s policy regarding student religious expression rendered the case moot. The court found the change did render the motions for declaratory and injunctive relief moot but did not extend to the claims for damages. Neither did a claim that the graduation of the students from high school lead to a lack of standing for the challenge before the court. The court relied primarily on *Rivera v. East Otero Sch. Dist. R-1* (1989) in ruling that the school violated the students’ First and Fourteenth Amendment rights in regard to the distribution of religious literature. The court cited the same case in stating that the prohibition of speech simply to avoid the problems of determining if and what speech is constitutional resulted in a violation of the students’ expressive rights. However, because the school presented evidence that the students’ actions may have been disruptive in nature brought into play a question of fact that preempted a possible summary judgment with regard to the oral speech and access for meetings issues in question.

Disposition: The United States District Court for the Northern District of Texas, Dallas Division, granted in part the plaintiffs’ motion for summary judgment.

Citation: *Vukadinovich v. Board of School Trustees of Michigan City Area Schools*, 978 F.2d 403 (C.A.7 1992).

Key Facts: Plaintiff Vukadinovich served as a part-time teacher and volunteer basketball coach in the Michigan City Area Schools. In February 1986, Vukadinovich appeared at a board meeting and criticized the decision to hire Zeek as superintendent. After the meeting, Zeek met with Vukadinovich and told him it was inappropriate to appear before the board criticizing Zeek’s leadership and that continuing to do so would be a mistake. Vukadinovich continued his employment with the system and in August 1987, at the assistant superintendent’s recommendation, was given a full-time teaching contract. From December, 21 1987, through
January 19, 1988, Vukadinovich served 30 days of a 365-day sentence in LaPorte County Jail for a DWI conviction. Vukadinovich was also convicted in Jasper County, Indiana, of driving without a valid license. He was sentenced to serve 30 days of a 1-year sentence on weekends and was placed on probation for the remainder of the year. After learning of Vukadinovich’s time in jail, Zeek and assistant superintendent Whitlow met with the teacher to discuss the future of his employment with the system. On January 8, 1988, Zeek sent Vukadinovich a certified letter notifying him of a meeting on February 9, 1988, at which the board would consider cancelling the teacher’s contract on the grounds of “immorality, neglect of duty, and other good and just causes.” Vukadinovich requested a hearing before the board and was informed by the board in a February 4, 1988, letter of the date, time, and location of the hearing. At the hearing on March 5, 1988, testimony was heard for both sides. During the hearing, Vukadinovich did not allege that the proposed action was in retaliation for his earlier criticism of Zeek and the board. On March 22, 1988, the board terminated Vukadinovich’s contract for the reasons stated in the notice. In February 1989, it came to the attention of Rogers High School principal Gentile that Vukadinovich was often on school grounds and was still volunteer-assistant-coaching the basketball team. Gentile contacted Vukadinovich and told him not to come on school grounds anymore and demanded that he refrain from talking to local papers about the case. Vukadinovich sued the system for, among many things, violation of his First Amendment rights when Principal Gentile ordered him not to come on school grounds anymore.

Issue: At issue was whether the dismissal of an employee and subsequent denial of access to the school violated First Amendment speech rights.

Holding: The court held that since the school maintained a nonpublic forum the plaintiff had no right of access and First Amendment violations had not occurred.
Reasoning: The court examined Vukadinovich’s claim that his First Amendment rights had been violated because he was not allowed to enter Rogers High School property and to “speak publicly on matters of public concern.” The court noted that in *May v. Evansville-Vanderburgh School Corp.* (1986), that court reasoned that if a school is a nonpublic forum, the public is not only not invited to use facilities but has no invitation to be in the facilities at all. Because Vukadinovich made no claim that the school had become a public forum and he had become a member of the public after his termination, he had no right of access to Rogers High School.

Disposition: The United States Court of Appeals for the Seventh Circuit affirmed the lower court’s ruling in favor of the defendant school district.

1993


Key Facts: In October 1987, students at Central High School asked and received permission from a teacher and the director of the Central High Black Student Union to form a gospel choir. Once granted permission, the students asked Wilma Safford, secretary at the school, to be the director. The choir was considered a non-credit, noncurriculum student group. The group met during non-instructional hours each week and paid for its use of the school facilities. The group’s repertoire during the 1987 through 1990 time period consisted almost entirely of music that referenced God or Jesus Christ. In April 1988, Dr. Pavel, President of Central High, sent a letter to Safford summarizing concerns about the religious messages and content presented by outside speakers at the choir’s performances. In December 1990, Pavel wrote a memorandum reminding Safford of the district’s new policy and stating the group had
three options: move the group’s activities off-campus, change to be completely student-directed, or change the organization to comply with the new policy. Later that same month, Pavel again wrote a letter to Safford to gain compliance with the district policy. In that letter, Pavel instructed that the choir not rehearse until he had a chance to review the repertoire the choir was to perform. Safford ignored all of Pavel’s requests. She also rejected suggestions from other district officials who suggested adding spirituals and African American cultural music to the repertoire. Regional Superintendent Anne Waiters met with choir members and gave them three options similar to Pavel’s. The group brought suit alleging violation of Constitutional rights based on the First, Fifth, Thirteenth, and Fourteenth amendments. After a substantial period of discovery, both parties moved for summary judgment.

Issue: At issue was whether the activities of the employee-led Central High Gospel Choir violated the guidelines of the Equal Access Act.

Holding: The court held the students’ right of access to school facilities was not applicable unless the group was student-initiated and student-led.

Reasoning: In response to the plaintiffs’ assertion that restriction of the choir’s access to school facilities because of Safford’s participation was a rights violation, the school district claimed it was obligated to such action because of the Equal Access Act. The court examined the implications of the Act on the choir’s use of school facilities. While the Act does provide access for student groups of a religious nature, the court highlighted the requirement that employees may only be present in a “nonparticipatory capacity.” The court concluded, based on the language of the Act, that the students had right of access to the school’s facilities only if the activities were initiated and led by the students. The court also noted the inconsistency in the plaintiffs’ arguments, which contradicted themselves in several areas. Even when considering the
plaintiffs’ plenary arguments in best light, the court still found the group subject to the Equal Access Act.

Disposition: The United States District Court for the Eastern District of Pennsylvania ruled that the activities of the Central High Gospel Choir were in violation of the Equal Access Act.

Citation: *Garnett By and Through Smith v. Renton School District No. 403*, 987 F.2d 641 (C.A.9 1993).

Key Facts: In the fall of 1984, several students at Lindbergh High School asked for permission to form a religious club for the purpose of prayer, Bible study, and religious discussion. Even though the board allowed several other noncurriculum groups to meet on campus during noninstructional time, it denied such access to the religious group. The students began legal action and alleged the denial of access violated both the Equal Access Act and their Constitutional rights. The district court found in favor of the school district, ruling that the Equal Access Act did not apply in the case because the school had not created a limited open forum. It additionally stated the constitution of the state of Washington prohibited officials from allowing religious organizations to meet on campus. The Court of Appeals, Ninth Circuit, affirmed the ruling and stated the requested access to meet would violate the Establishment Clause of the United States Constitution. The Supreme Court vacated the decision and remanded the case to be reconsidered in light of its findings in *Board of Education v. Mergens* (1990). Upon remand to the district court, that court held that the school had created a limited open forum that would require the allowance of other noncurriculum-related student groups but the Washington State constitution prevented the application of the Equal Access Act in the case. The students appealed the district court’s decision.
Issue: At issue was whether the provisions of the Equal Access Act preempted the establishment provisions of the state constitution.

Holding: The court held that the state constitution, which prohibited the use of school facilities for religious purposes, did not supersede the Equal Access Act.

Reasoning: The court noted that the ruling in the case turned on the language of section 4071 of the Equal Access Act, specifically on the part that does not provide protection for speech that is deemed “otherwise unlawful.” The defendants asserted that, since the Washington State constitution prohibited the use of schools for religious meetings, it would be considered “unlawful” to permit the students’ religious speech in the school. The court considered the broader application of the section and noted that its intention was to prevent unconstitutional application of the Equal Access Act. Applying the Supreme Court’s reasoning in Mergens, the court noted that the Equal Access Act, in its entirety, was intended to grant access to school facilities by religious groups. The court also recognized that the only way to avoid this Congressional intent was to forego federal funds in the district or render the forum status of the school closed. The court concluded that state constitutions can be more protective of individual rights but cannot be restrictive of rights granted by federal law.

Disposition: In a reversal of the lower court’s ruling, the United States Court of Appeals for the Ninth Circuit found that the students’ religious club should be given the same access to facilities as other noncurriculum groups, notwithstanding the state constitution’s establishment provisions.

Citation: *Howard Jarvis Taxpayers Association v. Whittier Union High School District*, 19 Cal.Rptr.2d 109 (Cal.App. 2 Dist. 1993).
Key Facts: The schools in the Whittier Union High School District and Bonita Unified School District often served as recreation and civic centers to the general public in those areas after school hours. Because of the constant community use, the facilities in the district became in need of extensive maintenance and repairs. Because of a lack of funds, the districts began proceedings to form special assessment districts under the Landscaping and Lighting Act of 1972 (Act). With the establishment of these special districts in 1991, procedures were begun to levy and collect assessments to fund the repairs. Plaintiffs brought suit claiming school districts did not qualify for classification as special assessment districts. The trial court found they did qualify for such classification and the plaintiffs appealed.

Issue: At issue was whether access to school facilities by public for recreational use during noninstructional hours qualified the facilities as “special districts” within the meaning of the Landscaping and Lighting Act of 1972 for the purposes of assessing taxes.

Holding: The court held that the qualification of school facilities as special districts was not outside the state education code. The court concluded that the language of the act was broad enough that school districts could be included. The court also discounted the plaintiffs’ claim through legal precedent that inclusion of school districts in the act would result in constitutional violation.

Reasoning: The court began by examining the language of the Act in which a special district is any public corporation other than a county or city that locally performs government or proprietary functions within limited boundaries. The court stated that school districts are typically considered nonmunicipal public corporations authorized by the state legislature to establish schools within geographically limited boundaries. The court found the formation of the special districts in keeping with the Education Code and also helped ensure the schools could
provide adequate programs of recreation for the community. The court considered the plaintiffs’ argument that the authority to provide recreational facilities should stay within the educational functions of the school. While the court conceded that education was the main purpose of the school systems, they also served secondary roles as community centers. The court also examined the plaintiffs’ assertion that the absence of reference to school districts in the act precluded their classification as a special district.

Disposition: The Court of Appeal of California, Second Appellate District, Division Two, affirmed the trial court’s finding in favor of the school district.

Citation: Lamb’s Chapel v. Center Moriches Union Free School District, 113 S.Ct. 2141 (U.S.N.Y. 1993).

Key Facts: Lamb’s Chapel, an evangelical church, sought permission to use school facilities of the Center Moriches Union Free School District to show a six-part film series featuring lectures by Doctor James Dobson. Upon request, the church provided the district with a brochure outlining the content of the videos. The district denied the application because the content of the films appeared to be church related. A second application for the same use but described as a “family oriented movie from a Christian perspective” was also denied on the same basis. The church brought suit alleging the denial was a violation of First Amendment rights as well as the Fourteenth Amendment Equal Protection Clause. The district court rejected the church’s claims and granted summary judgment for the school district. On appeal, the district court’s ruling was affirmed by the Court of Appeals. It was agreed that when school property was not in use for school activity it should not be considered a traditional or designated public forum. The court reasoned that it was a limited public forum; therefore, exclusion from use
needed only to be reasonable and viewpoint neutral. The Supreme Court questioned these holdings and granted the petition for certiorari.

Issue: At issue was whether the school board’s denial to let the Lamb’s Chapel church use school facilities was a violation of First and Fourteenth Amendment rights.

Holding: The court held that the school had denied access to the church because of the proposed content of the video series. The court noted that other speakers had been granted access for similar topics but the church had been denied because of the religious content. The court further held that the school district’s fears of an Establishment Clause violation were unfounded.

Reasoning: The court examined the forum status of the facility in question. The court noted that the district did retain control over the property like that of a private owner. The court added that the school was not obligated to allow use of the facilities at all. However, once the district did begin to allow use, the cause for denial of access should be examined. The school district asserted Section 414 Rule 7 of the New York Education Law expressly prohibited the use of school facilities for activities of a religious nature. The church argued that the school had already opened the facilities for activities similar to the one they proposed including some of a religious nature. The school district argued, and the district court agreed, that the application of Rule 7 in this case was viewpoint neutral because it was, and would be, applied to all religious groups in the same way. The Supreme Court viewed the issue in a different light. Given the topic of the proposed series, the court reasoned that another lecturer might be granted access and the current denial was strictly because of the religious nature of the speech. Citing the May v. Evansville-Vanderburgh School Corp. (1986) opinion, the court noted that discrimination against a particular point of view does not pass the test of Cornelius. The court also rejected the district’s fear of Establishment Clause violation following the principles enumerated in Widmar v. Vincent.
The court also discounted contentions by the school district that allowing access for the church’s proposed purpose could lead to public unrest.

Disposition: The Supreme Court of the United States, in a reversal of the lower court’s ruling, found the school’s denial of access to facilities a violation of First Amendment rights.

Citation: Doe v. Duncanville Independent School District, 994 F.2d 160 (C.A.5 1993).

Key Facts: Jane Doe moved with her family to Duncanville, Texas, and started the seventh grade at Reed Junior High School. Doe became a member of the girls basketball team. The team’s practices regularly began or ended with a group recitation of the Lord’s Prayer. Prayers were also said at games, prior to travelling to away games, and before leaving the bus after the team returned to school. It was also revealed that prayers had been conducted in P.E. classes as a regular practice. Doe’s father, after seeing the team prayers, asked her how she felt about participating. Doe informed him that she would rather not and he told his daughter she did not have to join in the prayers. She decided to stop participating in the prayers, after which, Doe was made to stand outside the prayer circle. At away games, Doe could not return to the locker room alone after the game and had to stand apart while the rest of the team prayed. Doe was also subjected to criticism by fellow students and even one teacher. Doe’s father contacted the assistant superintendent, Parker, to register a complaint and was met with resistance. Later, Doe’s father contacted Parker’s replacement, Utrecht, about prayer at pep-rallies during school and prayer following basketball games. Utrecht stopped the prayer during pep rallies but told the plaintiff he could not do anything about prayer after the games. Mr. Doe presented his complaint to the school, which chose not to act. On August 15, 1991, the Does filed for a temporary restraining order and preliminary injunction. The temporary restraining order was denied but the court scheduled a hearing on the preliminary injunction request for September 16, 1991. A trial
ensued and the court entered a preliminary injunction on November 18, 1991. The school district appealed.

Issue: At issue was whether the district’s policy on student and teacher prayer was sufficient to invoke a limited open forum and the strictures of the Equal Access Act.

Holding: The court held that the limited open forum outlined in the Equal Access Act was not present in the Duncanville case. With no limited public forum, the school could not invoke the anti-discrimination defense to allow the prayer as it had in the past.

Reasoning: The court examined the facts of the case in light of Board of Educ. of Westside Community Sch. v. Mergens (1990) and the Equal Access Act. The court noted that while the Equal Access Act did not apply in this case, Mergens did provide some guidance in the parameters of the Establishment Clause. The school district invoked Mergens to support their assertion that permitting students and teachers to engage in spontaneous prayer simply accommodated religion in a constitutional way. The court disagreed with this application of Mergens. The analysis in that case involved noncurriculum-related activities not extracurricular. Also, the facts of this case pointed to teacher-led prayer rather than a student-initiated religious activity. The court observed that the oversight claimed by the Duncanville school district went far beyond the “custodial oversight” principle found in Mergens.

Disposition: The United States Court of Appeals for the Fifth Circuit affirmed the preliminary injunction granted by the district court in favor of the plaintiffs.

Citation: Sherman v. Community Consolidated School District 21 of Wheeling Township, 8 F.3d 1160 (C.A.7 1993).

Key Facts: In August 1992, Robert Sherman, an avowed atheist, approached the Community Consolidated School Board and requested the Boy Scouts of America (BSA) be
denied access to school facilities on the grounds that it practiced religious discrimination by requiring members to profess a belief in God. Sherman also met with the school superintendent, Descarpentrie, and James Whitcomb Riley School principal, Searing, to discuss the BSA’s use of the school facilities. Each request to change the policy was denied. In September 1992, Sherman and his son, Richard Sherman, attended a BSA Round Up and both joined, the son as a Cub Scout and the father as an adult volunteer. The meetings were held on school grounds. Their membership was later revoked because they refused to abide by the Scout oath requirement of a belief in God. The Sherman’s alleged the BSA’s use of the school facilities and the distribution of their flyers violated the Establishment Clause of the First Amendment. The Sherman’s appealed a denial of declaratory and injunctive relief as well as a dismissal entered in favor of the defendants.

Issue: At issue was whether the use of public school facilities and the distribution of flyers on school grounds by the Boy Scouts was a violation of the Establishment Clause and a violation of the plaintiffs’ equal protection rights.

Holding: The court held the school’s policy allowing the use of school facilities by the Boy Scouts of America did not violate the Establishment Clause. Additionally, the distribution of literature by the scouting group was not a violation.

Reasoning: The court began with analysis of the Establishment Clause claims. The court reasoned the plaintiffs’ claim lay within the second prong of the Lemon test by favoring, they contended, a religious organization, the BSA, over nonreligious causes. The court grounded their analysis of the group’s access to the facilities primarily in Lamb’s Chapel v. Center Moriches Union Free School District (1993). Using principles from this case, the court determined that not only did the policy regarding the BSA not violate the Establishment Clause, but to give
preference to nonreligious over religious groups would likely trigger such a violation. The court also examined the Sherman’s contention that distribution of BSA’s flyers also constituted an Establishment Clause violation. After an examination of the school’s practice regarding flyers and posters from all groups, the court concluded the school involvement was adequately removed from the BSA so that students would not likely confuse the two. In analysis of the Sherman’s Equal Protection Clause claims, the court determined the school was not liable for the BSA’s policy or action.

Disposition: The United States Court of Appeals for the Seventh Circuit affirmed the lower court’s ruling in favor of the defendant school district.

Citation: Clever v. Cherry Hill Township Board of Education, 838 F.Supp. 929 (D.N.J. 1993).

Key Facts: The Cherry Hill Township Board of Education adopted Policy JO regarding the display of cultural, ethnic, and religious themes in the district’s schools. The policy and accompanying guidelines outlined types of displays schools could allow including the display of classroom and central calendars mandated in elementary and junior high schools. The displays were optional in high schools at the principal’s discretion. The calendars included a large variety of holidays including national, cultural, ethnic, and religious observances. The calendars displayed, in some cases, written notice of the holiday on the specific day of the calendar and symbols to represent the day. Symbols used on the calendars were approved by leadership and had to fit in the square marking the specific day on the calendars. The plaintiffs brought action asserting the policy violated First and Fourteenth Amendment principles. The court was asked to settle cross-motions for summary judgment.
Issue: At issue was whether a school district policy allowing for the display of a plethora of religious, ethnic, cultural and national holidays, and symbols on calendars violated First and Fourteenth Amendment principles.

Holding: The court held that policy JO did not violate the First Amendment since it served the secular purpose of fostering understanding and respect for a wide range of cultures and religions.

Reasoning: To determine if there was an Establishment Clause violation, the court employed the three prongs of the Lemon test. With regard to the secular purpose prong, the court cited policy JO’s stated purpose of fostering an understanding and mutual respect for all individuals coupled with legal precedent stressing the importance of the context of a display to deem the prong satisfied. The court found no basis for a conclusion the policy endorsed any particular religion under the primary effect prong because it included such a diversity of religions. The court also explicitly rejected the excessive entanglement of the third prong based on the district’s effort to ensure it operated within the principles of the Establishment Clause.

Disposition: The United States District Court for the District of New Jersey ruled in favor of the school board.

Citation: Pope by Pope v. East Brunswick Board of Education, 12 F.3d 1244 (C.A.3 1993).

Key Facts: Pope attended East Brunswick High School from 1988 until her graduation in 1991. She and others met informally in the cafeteria each Wednesday before school and became known as the Bible Club. While the school officials were aware and tolerated the group’s meetings, they did not grant official recognition to the group. In 1988, the Bible Club attempted to gain official recognition from school authorities, which the school denied. In June 1989, the
school board adopted a policy governing extracurricular activities requiring all student groups to be curriculum related. The district again denied the Bible Club official recognition in 1989 for the new school year. Following a Supreme Court ruling in *Mergens*, which addressed the definition of “noncurriculum related student group,” the East Brunswick board changed the language of their policy to match the Equal Access Act and the *Mergens* opinion. The new policy resulted in several student organizations losing their official recognition by the school. The following year, however, several of the clubs were allowed to meet at the school. Pope brought suit seeking declaratory and injunctive relief, nominal damages, and attorney’s fees for violations of free speech and free exercise of religion rights as well as violation of the Equal Access Act.

**Issue:** At issue was whether the East Brunswick school district violated the Equal Access Act by declining to certify as a student organization as a religious club and refusing to grant that club treatment equal to other student groups.

**Holding:** The court held that the school district had, in fact, violated the Equal Access Act in refusing access to the school for the religious group.

**Reasoning:** East Brunswick put forth three arguments in its defense: that the Equal Access Act was not triggered because student-initiated groups were not allowed, that the Key Club cited by the district court was related to the school’s curriculum, and that following the guidelines in the Equal Access Act would cause the school to violate the Establishment Clause. The court examined each argument in turn. The court found the district’s reliance on the legislative history without merit and following the Supreme Court’s logic in *Mergens*, concluded broad latitude should be employed to implement Congress’ intent. Interpreting the Act to read that groups had to be student-initiated then developing a policy that did not allow student-
initiated groups was contrary to the Act’s intent. Secondly, the district had previously ruled that the allowance of the Key Club, a group the court regarded as noncurriculum related, created a limited open forum in the school. The school contended the Key Club was related the school’s curriculum. The court once again cited *Mergens* principle in finding the club to be too far removed from content to qualify as directly curriculum-related. The court finally examined the argument that compliance with the Equal Access Act would necessarily cause the school district to violate other existing statutes. The court applied extensive analysis to various statutes in question and found no such conflicts between the Act and other state or federal statutes.

Disposition: The United States Court of Appeals for the Third Circuit affirmed the lower court’s ruling in favor of the plaintiff.

1994

Citation: *Fairfax Covenant Church v. Fairfax County School Board*, 17 F.3d 703 (C.A.4 1994).

Key Facts: The Fairfax County School Board opened their facilities for a variety of uses outside of instructional time, including private, community, religious, and cultural organizations. The policy governing those uses, Regulation 8420, provided that churches had to pay a different rate than other entities to use the facilities. Under the policy, churches paid a noncommercial rate for the first 5 years and then a rate that escalated to the commercial rate over the next 4 years. The board conceded the purpose of the escalating rate was to encourage them to go to other places. This, according to the district, was to avoid possible Establishment Clause violations. The Fairfax Covenant Church began renting Fairfax School facilities in 1980. The church sought alternate arrangements from 1982 to 1984 to avoid surpassing the 5-year time limit. In 1984, the
church began renting from the school district again. In 1987, the church began paying the escalating rate and paid a total increased amount of $287,456 through February 1993. In May 1992, the church filed a complaint asserting the regulation violated First Amendment rights and requesting injunctive relief and damages for the rent paid in excess of the nonprofit rate plus interest. The district court found that the regulation violated the church’s First Amendment rights but declined to make its ruling retroactive. Both parties appealed the district court’s ruling.

Issue: At issue was whether a school’s policy of escalating rental rates for religious rates was a violation of the First Amendment.

Holding: The court held the school’s regulation violated the Free Speech and Free Exercise Clauses. In addition, the court ruled the school should reimburse the overpaid rent to the church.

Reasoning: Because both parties agreed that the school had opened a public forum with their policy for facilities use, the court examined the school board’s argument that the court must resolve the conflict between the Establishment Clause and the Free Speech Clause. The court applied the reasoning found in Supreme Court’s *Widmar v. Vincent* (1981) decision to the facts of the case. The court pointed out that in *Widmar* the Supreme Court stated there was no conflict between the Establishment Clause and a policy allowing equal access for religious uses. The court concluded the facts of the two cases were similar and, on that basis, the school’s Regulation 8420 violated the Free Speech Clause. In addition, the court found the regulation to violate the church’s rights under the Free Exercise Clause. The court then turned its attention to the church’s claim that the district court’s decision should have been made retroactive thereby awarding damages in the amount of the overpaid rents plus interest. The court first pointed out that retroactive applications of rulings were the accepted practice because judicial decisions
interpret and apply new rules or principles. The court applied principles from *Chevron Oil Co. v. Huson* (1971) to decide the school board should repay the overcharged rents. In consideration of the school board’s claim that its exposure to $1.1 million in potential claims if the court decided in the church’s favor, the court reminded the parties that since the plaintiff waited 11 years to make its claim the principles of laches and limitations would most certainly play a part in any awards.

Disposition: The United States Court of Appeals for the Fourth Circuit affirmed the district court’s ruling, which found the school’s regulation unconstitutional, vacated that court’s decision not to apply its findings retroactively, and remanded the case for further proceedings.

Citation: *Lloyd v. Grella*, 611 N.Y.S.2d 799 (N.Y. 1994).

Key Facts: In August 1984, New York enacted Education Law Section 2-a, which guaranteed access to branches of the military to educational institutions for the purposes of distributing information about military employment opportunities. In December 1991, the Rochester City School District Board of Education passed a resolution stating that no organization would be allowed in a school building to recruit if that organization had a policy of discrimination on the basis of any of several factors including sexual orientation. The resolution adopted by the board also required the secondary schools to notify students about the Armed Forces policy of discriminating on the basis of sexual orientation. Lloyd, a parent of a former student, brought suit seeking to compel the Rochester school system to follow the mandates of Education Law Section 2-a. The New York Supreme Court granted the petition. The Court of Appeals granted leave for appeal.
Issue: At issue was whether New York Education Law Section 2-a could preempt the local board’s resolution denying access to recruiters whose organization practiced discrimination.

Holding: The court held that Education Law Section 2-a only provided military recruiters access to the public schools on the same basis as other employment recruiters. This holding set aside the special standing for military recruiters that they had previously enjoyed under the prior ruling. The court also held that the law did not supersede the local board resolution disallowing access for organizations that practiced discrimination as a matter of policy.

Reasoning: The court began by examining the language of the statute in question. The law gave the military equal access to schools but stopped short of granting preferential or unqualified access. The court weighed whether the grant of preferential access would be in keeping with a law designed to provide equal access and decided that it would not. The court cited the legislative history of the bill to support its conclusion that the bill was not intended to give the military unfettered access to the schools. In particular, one state senator was quoted as having said he did not intend to tell schools what to do. The court also referenced the long-standing tradition of allowing local schools the final authority to control access to schools.

Disposition: The Court of Appeals of New York reversed, in favor of the school board, the ruling of the Supreme Court and dismissed the petition.

Citation: Good News/Good Sports Club v. School District of City of Ladue, 28 F.3d 1501 (C.A.8 1994).

Key Facts: The Good News/Good Sports Club was established to foster moral development of junior high students from a Christian perspective. The club started in 1988 at Ladue Junior High School and continued its activities through the 1991-1992 school year. The
club met 1 day a month from 3:00 p.m. until 3:55 p.m. and was open to students regardless of race, creed, religious denomination, or gender. Students had to obtain parent permission before being allowed to participate in club activities. The school district received several complaints about the school being used for religious meetings in February of 1992. In March, the board decided to let the club continue its activities through the end of the school year. In July, the board adopted a new policy restricting access to facilities for all community groups between 3:00 p.m. and 6:00 p.m. except for athletic activities and scout groups. The board stipulated that scout groups must not include any religious activity or speech during these hours as well. The club filed suit seeking injunctive and declaratory relief. At trial the district court ruled in favor of the school district finding the school had created a nonpublic forum for the hours in question, the exception for Scouts was reasonable based on the established relationship with the school, and that the school’s new policy did not constitute viewpoint discrimination. The club appealed the district court’s decision.

Issue: At issue was whether the school district’s new policy resulted in viewpoint discrimination.

Holding: The court held the school district’s revised policy did constitute viewpoint discrimination in violation of the First Amendment.

Reasoning: The court stated it needed only to examine one of the club’s grounds for dismissal, that of viewpoint discrimination. To aid in the analysis of the issue, the court utilized principals from Lamb’s Chapel v. Center Moriches Union Free School District (1993). The court first rejected the school’s claim that the issue of viewpoint discrimination was never raised by the plaintiff by examining documentation from the district court. In taking up the matter of viewpoint discrimination, the court pointed out the school felt it necessary to restrict the Scouts’
speech related to religion. In doing so, the court reasoned, the district pointed out the basis for restricting speech for all groups. The club also contended that the nature of speech in which they wished to engage was aligned with that of the Scouts. Following the reasoning of *Lamb’s Chapel*, the court agreed with the district court’s finding that the two groups were similarly situated with regard to speech content. In answer to the school’s contention that the plaintiff had to prove the board’s opposition to the plaintiff’s viewpoint in order to show discrimination, the court referenced the complaints from citizens about the religious activities at the school which led to the revised policy. The court reasoned this impetus for change clearly demonstrated the motivation for changing the policy to be content related. The school district finally argued that the revised policy was necessary for it to avoid an Establishment Clause violation. The court examined the claim by employing the three prongs of the *Lemon* test. The court concluded that because the policy met all three prongs of the *Lemon* test there would not be an Establishment Clause violation by permitting the club to meet. As such, there would also be no compelling government interest in restricting the club’s speech or access.

Disposition: The United States Court of Appeals for the Eighth Circuit reversed the district court’s ruling and remanded the case for the purpose of determination and remedy in line with the court’s ruling.


Key Facts: The Lancaster County School District had historically allowed school grounds to be used by the general public after school hours for a variety of purposes. These included Boy and Girl Scouts, musical concert series, a speech by a state senator, and gospel singers. The board had made this policy in an attempt to engender public support and loyalty to the school
system. The Gideons were permitted to distribute Bibles to students as long as they did so outside the school on the sidewalk. As a practice, the Gideons placed the Bibles on a table on the sidewalk and allowed students to pick them up if they chose. No proselytizing speech took place by the Gideons. Prior to dismissal from school, an announcement was generally made to let the students know what was taking place to avoid confusion. In the announcement, students were told they did not have to pick up one of the Bibles if they did not want one. The students were also accompanied by teachers after school. In the past, the superintendent had been notified that on one occasion the Bibles had been placed on a table in a hallway inside the school. The superintendent notified the principal that all distribution was to take place outside the school on a sidewalk. In January 1989, the Gideons sought permission to distribute Bibles to the students. The superintendent agreed and informed the board. The plaintiff, who also served on the board of education, had voiced concern when the superintendent announced this to the board but made no move to stop the action. In May of that year, Jace Schanou, son of the plaintiff, picked up a Bible inside the hallway of the school. The plaintiff resigned from the board and withdrew his son from the school district. In October 1990, the board passed a motion to formalize their stance on the distribution of Bibles by the Gideons in the schools. The plaintiff brought suit seeking injunctive relief as well as damages. Both parties in the action sought summary judgment from the court.

Issue: At issue was whether the school board’s policy regarding the distribution of Bibles by the Gideons constituted a violation of the Establishment Clause.

Holding: The court held the school board’s policy allowing the distribution of Bibles by the Gideons did not violate the Establishment Clause.
Reasoning: The court began by examining the school’s policy regarding the distribution of Bibles by the Gideons. The court pointed out that the policy and actual practice of the school was to allow the distribution but only when it happened on a sidewalk after school. The court also pointed out that the distribution that took place in the school hallway and impacted the plaintiff’s son was not authorized by the superintendent. The court next examined the policy in light of the three prongs of the \textit{Lemon} test. With regard to secular purpose, the court noted the primary purpose of opening access to the school to virtually all requests was to build a positive relationship with the community. This contributed to the finding that the policy was totally secular. In the area of primary effect, the court found that the school did not promote or inhibit religion either in general or with the specific policy regarding the Gideons. Additionally, the school did not show approval or disapproval of the distribution program and, the court ruled, school children would likely not perceive the school as endorsing religion. The court ruled that the last prong, excessive entanglement, was satisfied because each of the two entities, the school and the Gideons, retained its sphere of influence without interference from the other.

Disposition: The United States District Court for the District of Nebraska rendered summary judgment in favor of the school district.

Citation: \textit{Washegic v. Bloomingdale Public Schools}, 33 F.3d 679 (C.A.6 1994).

Key Facts: As a senior, Eric Pensinger brought suit to remove a painting titled “Head of Christ” from display in the school’s hallway. The portrait had been donated to the school and was displayed in the hall near a trophy case along with a painting of the school mascot and a bulletin board. The district court noted, however, that the painting in question seemed to have no relation to the other displays in the hall. The district court held the portrait to be in violation of the Establishment Clause. The school district appealed.
Issue: At issue was whether a student’s graduation from high school could render a case moot and whether the display of a portrait of Jesus Christ at the school was a violation of the Establishment Clause.

Holding: The court agreed with the district court that the displayed painting violated the Establishment Clause.

Reasoning: The court considered extensive legal precedent to settle the mootness issue and finally aligned its reasoning with *Hawley v. City of Cleveland* (1985), *cert. denied* (1986), and *Murray v. Austin* (1991). In these cases, like the case before the court, the injury would continue despite a change in circumstances such as graduation from high school. Therefore, the case was deemed not to be moot. In examination of the merits of the case, the court analyzed the facts in light of the *Lemon* test. The court found that the display violated all three prongs of the test: it had no secular purpose, it advanced religion, and it entangled the government in religion. The school’s claim that the picture had meaning for all religions was without merit because Jesus is considered a central figure in Christianity alone. The school district also asserted the hall was a limited public forum leading to a need to allow “equal access” for the display. The court agreed with the district court’s rejection of the argument and its ruling on the display on the basis of the Establishment Clause.

Disposition: The United States Court of Appeals for the Sixth Circuit ruled the case not to be moot and affirmed the district court’s ruling in favor of the plaintiff.

1995

Citation: *Cirelli v. Town of Johnston School District*, 897 F.Supp. 663 (D.R.I. 1995).
Key Facts: Cirelli had begun teaching in the Johnston School District in 1970. In 1980, she became the art teacher and later began to suffer skin rashes, difficulty breathing, and headaches. Cirelli filed a grievance in March 1994 alleging the administration did not provide a clean, safe working environment after a doctor suggested her symptoms might be the result of her working environment. The school contracted with a professional cleaning service to test the air quality which it deemed acceptable but made several suggestions to improve conditions. On November 20, 1994, Cirelli contacted the Rhode Island Department of Occupational Safety (RIDOL-DOS) to complain about conditions and registered a complaint with the union. After some of the improvements were made, including the installation of a ventilation system in the kiln room, RIDOL-DOS completed an inspection in December 1994 and January 1995 and cited several violations of the state’s Health and Safety Code. Cirelli videotaped conditions at the school during nonworking, nonschool hours. The principal ordered Cirelli to stop videotaping and prohibited her from releasing the tapes without administrative permission. In April 1995, RIDOL-DOS inspected the school facilities again and deemed the school to be 100% compliant. Following orders from the fire department to complete some maintenance-type items up to fire code, RIDOL-DOS once again inspected the school and found no health or safety violations. Cirelli brought suit alleging First Amendment violations. She asked the court to enjoin the school district from denying her access to the school for the purpose of videotaping and interfering with the release of the tapes.

Issue: At issue was whether the school could restrict an employee’s access to the facilities for the purpose of videotaping safety violations and prohibit the release of the resulting tape.

Holding: The court held that the school district could not interfere with the release of the video tape but also that, to the extent that members of the general public must apply for
admittance to the school at certain times, the plaintiff must follow procedures to gain admittance to the facilities.

Reasoning: The court first considered the alleged First Amendment violations. The court reasoned it first had to determine if the speech, in this case the videotaping of environmental conditions, was a matter of public concern and then determine the balance between the employee/public interest and the government employer interest. The court cited several legal precedents to support a conclusion that the health and welfare of the students and staff at the school was most definitely a matter of public concern. Using the test developed in Pickering v. Board of Educ. (1968), the court next sought to determine the balance of interests in the case. The defendant school district argued possible disruption to the educational process as well as student privacy concerns if they were photographed. They also hinted by their arguments that the negative image incidental to the plaintiff’s actions should prompt the court to rule in their favor. The court rebuffed this assertion, concluding that the response to negative publicity should not be to limit plaintiff speech but, rather, more speech by the defendant on their own behalf. The court then turned its attention to the right of access concerns, an issue the court deemed to be more complicated. The defendants cited D’Amario v. Providence Civic Center Auth. (1986), aff’d, 815 F.2d 692 (1st Cir.), cert. denied (1987) in asserting that the First Amendment does not guarantee a right of access. The court divided the access issue into two areas. First, the plaintiff was on campus at times as part of her employment. The court reasoned that at these times, as long as the plaintiff limited her activities to nonschool, nonworking hours, the defendant could not restrict the videotaping. Second, due to the defendant’s interest in the use of its administrative personnel, it did have a legitimate interest where the plaintiff’s access requests fell outside her normal employment access. The court reasoned that in these instances, the plaintiff
would have to follow the same procedures that other outside groups had to follow. The court finally concluded that the defendants could not prohibit the distribution of the videotapes.

Disposition: The United States District Court for the District of Rhode Island ruled for the plaintiff in part and for the defendant school district in part.


Key Facts: The Board of Education for the City of Newburgh developed Policy 7510 pursuant to New York Education Law Section 414 regarding the public use of school facilities. Under the policy, several community organizations were permitted to use the school’s facilities including the Amazing Grace Apostolic Church, which conducted a gospel concert. In July of 1992, the Trinity United Methodist Parish requested permission to use the school’s facilities in November of that year for a magic show featuring Christian illusionist Toby Travis. In addition to the magic show, the event was to include a religious service, prayer, music, and Christian testimony. The board denied the request because of the religious nature of the proposed program and conflicts with the board’s policy. In June of 1993, a second request was made for use of the facilities for the same purpose, which was again denied. The church filed suit seeking declaratory and injunctive relief as well as damages. In this action, the court was asked to consider cross-motions for summary judgment.

Issue: At issue was whether the denial of access to school facilities for a magic show incorporated in a religious worship service was a violation of constitutional rights.

Holding: The court, in considering past practice of the school district, held that granting access for a gospel concert that included a sermon and not granting access to the magic show that included a religious service was not reasonable.
Reasoning: The court began by examining the school’s policy and the school’s actual practice relative to the forum status of the school. After determining the school had created a limited open forum, the court reasoned that because a similar event had taken place, the gospel concert, the school board could not preclude the Trinity group from similar access. With regard to establishment concerns, the church asserted that enforcement of the school board’s policy would require intrusive oversight by school leaders. The court disagreed stating the policy would only require determination of religious content in a proposed program and monitoring of which nonprofit organizations would receive the funds collected. The court also rejected claims that the policy violated Free Exercise rights and that the policy should be rendered void because of vagueness in determining what “religious purpose” and “religious services and religious instruction” might have meant. Finally, the court considered the church’s Equal Protection claims and compared the group’s access to an allowance for a gospel concert that included a religious message. In comparing the two, the court concluded the church should have the same access.

Disposition: The United States District Court for the Southern District of New York granted summary judgment in favor of the plaintiffs on the basis of their Free Speech and Equal Protection claims.

1996

Citation: Local Organizing Committee, Denver Chapter, Million Man March v. Cook, 922 F.Supp. 1494 (D.Colo. 1996).

Key Facts: On March 13, 1996, a group of students, between 100 and 150, left George Washington High School in Denver, Colorado, and staged a 2-day walkout. The majority of the
students were African American and claimed the school administration was not responsive to their concerns. On March 14, a meeting was held between the principal and several students and adults to discuss concerns. At the meeting, plaintiff Simmons pointed at the principal and in a loud voice stated the students would stay out of school until their demands were met. Some of the other plaintiff adults were not present at this meeting. Following the meeting, it was alleged by the defendants that the plaintiffs made statements that were published characterizing the school as “the most racist high school in the DPS district.” On April 1, 1996, the plaintiffs, following the school district’s policy, applied for permission to hold an assembly on April 3 or April 22 in the auditorium of George Washington High School. The request was denied at the direction of the superintendent who claimed the denial was in the best interest of the school district. The plaintiffs filed suit seeking preliminary injunctive relief.

Issue: At issue was whether the school district’s refusal to allow an assembly sponsored by the plaintiffs at the school during nonschool hours was a violation of constitutional rights.

Holding: The court held that the school district’s actions violated the plaintiffs’ First Amendment rights.

Reasoning: The court centered its analysis of the facts on the first part of the four-prong test district courts must consider when a preliminary injunction is at issue. The first of the four prongs looks at the likelihood the issue will prevail based on the merits. In the case, the court considered whether the school board practiced unlawful prior restraint by denying the plaintiffs’ assembly. Using principles from *Southeastern Promotions, Ltd. v. Conrad* (1975), they reasoned the board’s permitting process gave it unregulated discretion to decide what was in the “best interest” of the community. The court found this authority in the context of superintendent’s denial based on anticipated speech content to be unconstitutional and therefore unlawful prior
restraint. The court also noted that the school had created a limited open forum invoking the requirements of narrowly tailored guidelines designed to realize a compelling government interest. The superintendent’s assertion that the proposed meeting might be disruptive to the educational mission of the school was discounted by the court. The court reasoned that the requested time was sufficiently removed from the school’s operational hours to ameliorate immediate disruptive influence. The court noted the superintendent’s testimony that he had never, prior to this incident, denied access to the school auditorium before and, on an earlier occasion, had permitted one of the plaintiffs to speak at a similar rally at a different school in the district that was peaceful. The court’s analysis led to the conclusion that the plaintiffs would likely prevail on the merits of the case at trial. The court stated the other prongs of the analysis test were also satisfied to reach preliminary injunctive relief.

Disposition: The United States District Court for the District of Colorado granted the plaintiffs’ motion for a preliminary injunction and ordered the school to approve the application for an assembly on April 22, 1996.


Key Facts: Murray was a high school English teacher in the Pittsburgh School District. As part of a classroom management for her students at the at-risk center, she used a technique activity called Learnball. This commercial management system required a membership fee, the purchase of symbols and logos, and the purchase of a certain type of basketball and goal for use in the classroom. As part of the motivational aspect of the system, students competed for opportunities to shoot baskets, play the radio, and earn merit certificates. Murray began using the system in 1976 but prior to the 1988 school year was informed by the principal that the system
would no longer be allowed because it did not have board approval and he felt it was not educationally beneficial. In August 1994, with the hire of a new principal, Murray began using the system again without permission from the new administration. At the same time, she began to organize a Learnball Superbowl, an after-school event using the same types of materials and techniques. Upon learning that Murray was using the system in her class, the new principal, Nicholson, informed her that Learnball would not be allowed in the school and ordered the removal of all materials from the school including the basketballs, goals, and literature. Nicholson also informed Murray he would not authorize a school-sponsored Learnball Superbowl but she, if she wished, could follow established procedures to apply for a permit to use the school for a private-sponsored event. Rather than follow this suggestion, Murray brought suit.

Issue: At issue was whether a classroom is a designated open public forum which would grant a teacher constitutional rights to use materials and displays without regulation unless such regulation passed strict scrutiny.

Holding: The court rejected Murray’s assertion that classrooms are a public forum. As such, the school’s decision to restrict the teacher’s speech needed only to meet the “reasonable” standard for a nonpublic forum. The court also found that the school’s policy met the test for reasonableness and did not violate Murray’s Constitutional rights.

Reasoning: The court examined the plaintiffs’ forum arguments in light of Gregoire v. Centennial Sch. Dist (1990). Under this ruling, a designated public forum occurs when public property is intentionally made available to the general public for any type of expressive activity. Conversely, a nonpublic forum occurs when government-owned property has not been made available for such activity. The court noted that the plaintiff did not produce any evidence that
the school ever intended to open classrooms for all types of expressive activity by the general public. Additionally, no legal precedent was presented to establish that any public high school has done so. The school administration’s practice of allowing teachers to decorate classrooms does not establish a designated open forum. The court also rejected the plaintiff’s same argument that such practice established a limited open forum. Having determined the classroom is a nonpublic forum, the court examined whether the restrictions imposed in the case were reasonable. According to Nicholson, there was no empirical evidence that Learnball was effective in increasing academic achievement. Also, he regarded the technique as unsuitable for high school students since the level of questioning was too low for their level of maturity. The system also required too much time away from instruction, a factor that Nicholson stated as particularly troublesome for at-risk students. Finally, Nicholson had received complaint from African American parents who felt the program stigmatized their children as only being able to learn using basketball techniques. The court deemed Nicholson’s reasons as ample justification for the restriction imposed. With regard to the plaintiff’s claims of free speech violations, the court noted that the school principal was given the authority to determine which events the school would sponsor. All others had to apply to the Executive Director of Business Affairs for a permit, which the plaintiff never did. The plaintiff additionally sought permission to advertise the event in the school’s hallways. The court reasoned that, like the classrooms, the hallways had remained a nonpublic forum and, therefore, the school was not required to allow the advertisements. The court rejected the plaintiff’s equal protection claims as not even meeting the basic requirement for such a claim, that is, a class membership by which she had been discriminated against.
Disposition: The United States District Court for the Western District of Pennsylvania ruled in favor of the defendant school that the policy did not violate First and Fourteenth Amendment rights.

Citation: *Hsu By and Through Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (C.A.2 1996).

Key Facts: In September of 1993, then senior Emily Hsu requested permission from Mark Weyne, Roslyn High School principal, to start an after-school Christian Bible Club. Weyne referred the matter to the superintendent’s office after which Marilyn Silverman, Assistant Superintendent for Curriculum and Instruction, met with Hsu and another student to gather more information about the proposed club. Hsu and other interested students attended a December board meeting at which the club was discussed. The board tabled the proposal to study the matter further but, Hsu alleged, the general tone of the discussion at the meeting was one of opposition to the formation of the club. Several weeks later, Hsu and another student met with Silverman and the new principal, Howard Rubin. The students were asked to submit a constitution outlining their proposed club so the board could make a “fully informed decision.” After the students submitted the requested constitution in January 1994, Silverman and Rubin met with the students to object to two provisions in the document: a description of the Christian fellowship as a gathering of Christians and the requirement that officers be “professed Christians.” Hsu, in the meeting, crossed out the word “Christian” in the fellowship portion but, while rewording the officer requirement, maintained the Christian eligibility requirement for officers. The administrators, in a later meeting, informed Hsu that the eligibility requirement for officers in the club was in violation of the district’s nondiscrimination policy. Hsu, soon after, submitted the constitution again, with her handwritten changes, and asked that it be submitted to the board for
consideration. The board met in early February and decided once again to study the matter. In mid-February, Hsu brought suit alleging violation of the Equal Access Act as well as the First and Fourteenth Amendments. In mid-March, the board offered to officially recognize the club if it remove the eligibility requirement for officers. Hsu maintained the requirement was essential to maintain the integrity of the club’s aim and included the points in an amended complaint. The district court, in May 1994, held the school had met the requirements of the Equal Access Act by providing access for the club to meet on the same basis as other clubs. The court also denied the plaintiff’s other arguments. Hsu appealed the court’s denial of preliminary injunction.

Issue: At issue was whether the school’s denial of access for the club was based on the club’s requirement the officers profess Christianity was a violation of the Equal Access Act.

Holding: The court held that when a group, such as the religious club in question, discriminates for the purpose of ensuring the character of its meetings, the school must allow it unless such discrimination would violate the equal protection rights of other students. The court noted that by claiming all instances of religious discrimination as “invidious” the school did not sufficiently examine the context of the proposed officer requirements. The context, in the court’s opinion, was important making such judgments and held the plaintiffs likely to succeed in that area of their Equal Access claim.

Reasoning: The court first examined the plaintiffs’ statutory claims in relation to the Equal Access Act and whether the school practiced viewpoint discrimination based on the content of the proposed speech. The court acknowledged that the Supreme Court’s Mergens decision, which determined that the Equal Access Act did not violate the Establishment Clause, did not provide much guidance in this case other than a brief statement asserting that denying recognition of a Bible club was a denial of equal access. The court framed the plaintiffs’ claims
in light of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) as it determined whether the officer requirements could be considered speech. The court reasoned that while some of the officer positions would not necessarily affect the club’s message, the president, vice-president, and music coordinator did have positions of influence and could impact the integrity of the club’s message. The court stated it was obvious the religious requirement for the officers was intended to maintain the focus of the club’s meetings and the school’s refusal to let the club ensure that Christians would be leading the Christian prayers brought free speech rights into play. The court stated such refusal by the school was based on the content of the speech. The court discounted the district’s argument that it was applying its nondiscrimination policy uniformly by noting that a policy against wearing hats might exclude Jewish students from participating in after-school activities. Additionally, claims that allowing the club to discriminate on the basis of religion would give it special rights not accorded to other clubs. The court, however, noted that these other clubs could reasonably expect their officers to have abilities based on that club’s focus in order to effectively lead the club. As such, the plaintiffs should not be asked to eliminate the leadership provision outlined in the proposed constitution to be in accordance with the Equal Access Act. In analysis of the Constitutional claims, the court found there to be no Establishment Clause violation were the school to recognize the club.

Disposition: The United States Court of Appeals for the Second Circuit affirmed in part, reversed in part, and remanded for the grant of a preliminary injunction in favor of the plaintiffs as well as additional proceedings if necessary.

Citation: *Herdahl v. Pontotoc County School District*, 933 F.Supp. 582 (N.D.Miss. 1996).

Key Facts: Lisa Herdahl, parent of five children in the North Pontotoc Attendance Center, filed suit requesting injunctive relief from several practices of the school she alleged
violated the Establishment Clause. The school had a practice of allowing student groups to
utilize the intercom to make announcements regarding club activities as a part of the morning
announcements. One such club, the Aletheia Club, was a student religious club that regularly
used the time to impart a devotional message and prayer to the entire school. During this time,
teachers generally had students sit in their seats and remain quiet. After the court’s preliminary
injunction, the club moved its activities to voluntary pre-class meetings at 7:50 a.m. for all
interested students. Students in Grades 4 through 12 met in the gym for devotional and prayer,
while students in kindergarten through third grade participated in similar activities in a separate
room. Students in Grades 7 through 12 were able to decide for themselves to attend the activities
but younger students had to present written permission from their parents to participate in the
groups’ devotions and prayers. Additionally, in 1995 the school’s principal had given a directive
to the teachers regarding the “Blessing for Lunch” practice at the school. According to this
directive, teachers should tell students they could conduct a blessing before leaving the
classroom for lunch and those who wished not to participate should wait in the hall with the
teacher. Next, for more than 50 years the school had allowed a committee of members from the
local Protestant churches to conduct Bible classes in the school. The committee selected and paid
teachers to conduct the classes. When the state board of education declined to recognize the
“Bible” class as an approved accredited course, the school changed the name to “A Biblical
History of the Middle East” then submitted the curriculum to be approved. Finally, Herdahl
alleged that a teacher was using religious videos in an American History class as a means of
proselytizing students.

Issue: At issue was whether school-wide prayer over the intercom, religious club
meetings prior to regular class, classroom prayers prior to lunch, a course for Bible instruction,
and the alleged use of religious materials in a history class were a violation of the Establishment Clause.

Holding: The court held that the prayers and devotionals over the intercom, group prayers in the classroom during school hours, the course for Bible instruction as it had been taught, and the use of religious videos in American History classes were contrary to the Establishment Clause.

Reasoning: The court first examined the use of the school intercom for devotion and prayer. The school contended that since they allowed all student groups access to the intercom, Equal Access principles required them to afford the same access to the Aletheia Club. The court, however, pointed out that the school was affording the club a different type of access. By allowing the club to give devotion and prayer over the intercom, the school was allowing the group to conduct club business. No other club, the court reasoned, had this type of access. The court opined that, as in Thompson v. Waynesboro Area Sch. Dist. (1987), by conducting club business over the school-wide intercom, the practice took away the opportunity for students to “volunteer” to attend the meeting. The court then examined the second issue, religious club activity prior to classes each day. The central contention in this issue was that elementary students, Grades Kindergarten through 6, were much too impressionable to be allowed participation in the club meetings. The court reasoned that since the school required those students to have written parental permission in order to participate they were placed on equal footing with secondary students and the “opt-in” nature of the permission lessened the compulsory participation found in the intercom prayers. Third, the court stated the practice of organized classroom prayer clearly violated the Establishment Clause because of the principal’s directive regarding the matter, the daily pause for the purpose of prayer before going to lunch,
and having the students not choosing to participate move apart from the rest of the group during that time. The fourth issue, the Bible class, was analyzed using the *Lemon* test, the Endorsement test, and the Coercion test. The court examined the school’s practices regarding this class in deciding this aspect of the case. The use of the committee to choose teachers and content served as an attempt to separate the school, or government entity, from the class, a distinctly religious course. The teachers were selected by the committee based on their religious background and were expected to teach the Bible as indisputable fact. Even after the class title was changed in an attempt to gain state accreditation, the singular Christian content remained the same. Based on these and similar facts, the court reasoned that the class failed all three prongs of the *Lemon* test.

The court pointed out the district was clearly favoring the Christian fundamentalist view in violation of the Endorsement test. By offering the class to elementary students in the regular classroom and forcing those who wished not to participate to leave the room, the practice failed the Coercion test as well. In addressing the final issue, the proselytizing video content in a history class, the court rejected the argument that the videos were meant to show the true reason for certain school holidays. The court ruled the content to be impermissible religious instruction.

Disposition: The United States District Court for the Northern District of Mississippi, Western Division ruled in favor of the plaintiff.


Key Facts: Clarice Jacobson, an infant, resided in the East Williston Union Free School District but attended a private school. The plaintiffs contended that Jacobson should not have been excluded from a Halloween party sponsored by the school for its students. The purpose of the Halloween party was to provide a safe alternative to traditional Halloween activities. The
plaintiffs asserted that, according the New York Education Law section 414, the school could not deny the child access to the party. The parent presented a motion for preliminary injunctive relief.

Issue: At issue was whether denial of access to an after-hours school-sponsored event to non-school children was permissible.

Holding: Because the facts of the case did not portend a likelihood of success at trial, the first prong of the test necessary for injunctive relief was not met. Because of this finding, the court eschewed further analysis and denied the plaintiff’s motion. The school retained the ability to close school functions and events to nonstudents.

Reasoning: The court began its analysis by determining if the case met the standards necessary to grant preliminary injunctive relief. The court noted that since the school was the sponsor of the program, the facilities were being used for a school purpose with regard to this function. The court concluded, based on Lloyd v Grella (1994), the plaintiff had not demonstrated a likelihood of success for the case. As such, the first prong of the test for injunctive relief was not satisfied.

Disposition: The Supreme Court of New York denied the plaintiff’s motion for injunctive relief.

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Citation: Ceniceros By and Through Risser v. Board of Trustees of the San Diego Unified School District, 106 F.3d 878 (C.A.9 1997).

Key Facts: Ceniceros, while a senior at University City High School, approached the vice-principal to obtain permission to form a student religious club that would meet in an empty
classroom during the lunch period. During lunch period, which lasted from 11:30 a.m. to 12:10 p.m. daily, students could leave campus if they wished since no classes were held during that time. Several other noncurriculum-related student groups used the lunch period as a meeting time. The vice-principal granted permission for the formation of the club but did not allow the use of a classroom. Ceniceros filed action seeking declarative and injunctive relief as well as damages for alleged violations of the Equal Access Act and First Amendment rights.

Issue: At issue was whether the lunch period at University City High School would fall under the definition of noninstructional time within the purview of the Equal Access Act.

Holding: In ruling for the plaintiff, the court held that the lunch period at the high school should be considered noninstructional time and the school could not deny Ceniceros’ group the opportunity to meet. The court noted, however, that the group’s rights in the situation reached only as far as those of other student groups. The court could not establish from the record if other student groups were allowed to use classrooms. If such were the case, Ceniceros’ group would have to be allowed the same privilege. The court also noted that if the school wanted to prohibit religious groups from meeting during the lunch period, it simply had to stop all noncurriculum-related student groups from meeting during that time.

Reasoning: The court, in de novo review of the issues of the case, began by looking at the meaning of the term “noninstructional time” found in the Equal Access Act. The court noted that no classroom instruction occurred during the school’s designated lunch time. Additionally, the students were not even required to stay on campus during that time. The court reasoned this time had been set aside from instructional time and that this set-aside time happened in the middle of the school day was inconsequential. The court also noted the line of reasoning in Board of Education v. Mergens (1990) that recognized Congress’ intent for the Act to be broad in nature.
to discourage discrimination against student groups based on the content of their speech. The court next addressed the school’s contention that allowing religious groups to meet because of the Equal Access Act would cause the school to violate the Establishment Clause of both the federal and state constitutions. The court referenced the decision in *Widmar v. Vincent* (1981) and *Mergens* to reach the conclusion that this was not the case.

Disposition: The United States Court of Appeals for the Ninth Circuit, in support of the plaintiff, reversed the district court’s ruling.


Key Facts: In April 1994, the Full Gospel Tabernacle filed an application with Public School 105 Queens to rent school facilities each Sunday in June for worship services because they had outgrown their facilities. The request was denied by Deputy Superintendent Grover on the basis of the district’s policy disallowing groups to conduct religious activities on school premises. The church applied again in May 1994 and was again denied. The church filed suit and, during the discovery phase, determined that other churches had been allowed use of district facilities. The district contended that this was due to flaws in the application process and a vacancy in the Director of Operations position. In light of the facts both pre- and post-discovery, the plaintiffs claimed the school district violated their First and Fourteenth Amendment rights.

Issue: At issue was whether the school district could deny a church rental of its facilities for the purpose of conducting religious activities.

Holding: The court held that the strictures in place in the New York Education Law and the school district’s policies precluded the use of facilities by religious groups, the two erroneous grants of access notwithstanding. The court held the exclusion of religious worship services to be
Reasonable and the restriction to be viewpoint neutral. The court stated the denial of the plaintiffs’ application did not violate free speech rights.

Reasoning: The court began with an examination of the forum status of the school. Both parties conceded that the elementary school was not a traditional public forum. The question to be decided by the court was whether the school had become a designated public forum or a limited public forum. An examination of New York Education Law Section 414 led the court to conclude the district had created a limited public forum. The court discounted the plaintiffs’ claim that the actual practice of the district created an open forum. Citing Perry, the court pointed out that allowing selective access to a public property does not necessarily create a public forum. With regard to the allowance of access to two other religious groups, the court pointed out that the permission was granted in error by a secretary and that the defendants were unaware of the grants until the plaintiffs made them aware. Subsequent to the filling of the vacant operations position, no more grants of access were made to religious groups.

Disposition: The United States District Court for the Southern District of New York denied the plaintiffs’ motion for summary judgment and granted the defendants’ cross-motion for summary judgment.

Citation: Hone v. Cortland City School District, 985 F.Supp. 262 (N.D.N.Y. 1997).

Key Facts: James Hone worked for the Cortland Standard newspaper in September of 1994 when he contacted Jamie Brown, a coach and physical education teacher at Cortland Junior Senior High School. Hone’s contacts were not related to his job as a reporter and Brown let him know that she was married and not interested in having a personal relationship with him. Hone persisted in his attempts to contact her causing Brown to enlist fellow employees to warn her when he came on school grounds so she could avoid encounters with him. In November, Brown
sent a written request to Hone and his supervisor at the Cortland Standard that Hone stop attempting to contact her or face legal action. At that time, Hone’s supervisor informed him that future attempts to contact Brown could result in his dismissal. In December 1994, Cortland High School notified Hone in a letter the conditions under which he would be allowed to continue to cover sports events at the school. Among the requirements was that he not have contact with Brown. Hone did not have further contact with Brown; however, in December 1995 he sent a letter to soccer coach and math teacher Amy Snow claiming he loved her. In January 1996, the school’s athletic director met with the newspaper’s editors to tell them Hone would not be allowed to attend events at the school any longer. Subsequent to the meeting, the Cortland Standard dismissed Hone. Hone filed complaint alleging free press, free speech, due process, and freedom of association violations.

Issues: At issue was whether the denial of access to school events by a school reporter based on personal problems violated the reporter’s rights.

Holding: The court held that the plaintiff’s federal claims should be dismissed with prejudice. The court decided not to rule on the state issues and dismissed the plaintiff’s claims without prejudice.

Reasoning: The court began by examining Hone’s free speech claims using the three prong test for government restriction of speech set forth in *Cornelius v. NAACP Legal Defense and Ed. Fund* (1985). Despite reservations that the speech in question met the guidelines of protection in the first prong, the court nevertheless proceeded with further analysis. The court determined the school to be a nonpublic forum for expressive activity allowing for time, place, and manner restrictions. The court determined the school’s restrictions were content-neutral since no mention was made of the content of the speech in question. With regard to the plaintiff’s
freedom of association claims, the court found these unfounded because both subjects of the claims stated they did not wish to associate with the plaintiff. Also, the court reasoned that the plaintiff had no right of access to the school property thus undermining the due process claim.

Disposition: The United States District Court for the Northern District of New York granted the defendants’ motion for summary judgment.

Citation: Chandler v. James, 985 F.Supp. 1068 (M.D.Ala. 1997).

Key Facts: In March 1997, the district court granted the plaintiff’s motion for summary judgment finding Alabama Code Section 16-1-20.3 to be in violation of the First Amendment of the United States Constitution. Following that ruling, the court set out to determine if the plaintiff was entitled to permanent injunctive relief. The court observed that the Dekalb County Schools had established a pattern of allowing impermissible religious activities during instructional time that, absent a permanent injunction, would likely recur. The court pointed to a letter by one principal stating he would resist the government in its rulings regarding state-sponsored prayer. The court also pointed to an agreement undertaken in 1996 between the plaintiff and the school system of activities that would cease if the plaintiff would agree not to seek preliminary injunctive relief until the court determined their constitutionality. Under the “Joint Agreement,” the schools agreed to cease prayers at school-sponsored sporting events using the public address system, prayers and devotionals held during the school day with the exception of noncurricular clubs meeting during noninstructional time, prayers and devotionals during classroom time during the school day, distribution of religious literature by school officials or other adults during the school day, prayers and devotionals at school-sponsored graduation ceremonies, and meetings of student religious clubs during instructional time. Subsequent to this agreement, however, the plaintiff alleged the schools continued the practices
and produced a plethora of evidence to support his claims. The plaintiff detailed instances of prayer at commencement ceremonies, compulsory Bible reading assigned by a teacher, prayers at athletic events over the public address system, Bible Club activities during instructional time, and other similar activities in violation of the Joint Agreement. The plaintiff also produced evidence that his son had been subjected to harassment by other students, and the principal and superintendent would not take steps to stop the behaviors. The court ordered the parties to meet and attempt to resolve nonfacial claims but the school system was reluctant to cooperate.

Plaintiff’s motions were before the court for consideration based on the facts.

Issue: At issue was whether the court should continue a permanent injunction on behalf of the plaintiffs where the schools’ actions had been judged unconstitutional.

Holding: The court held that the actions of the school system pointed to an entrenched custom of impermissible religious activity during school hours. The court also held that without a permanent injunction, it felt the school and its actors would return to the unconstitutional activities.

Reasoning: The court recounted its prior ruling that the statute regarding prayer in schools to be unconstitutional. The court also noted that had the plaintiff not agreed to participate in the Joint Agreement in hopes of resolving some of the issues, it would have moved to enforce orders sooner to regulate the school’s actions. The court also noted that the school’s representation to the court that it would abide by the agreement and then blatant violation of the terms pointed to the “pervasiveness” of religious activity in the school system. The court enumerated many instances that represented violations of the court’s order pending a decision of the Eleventh Circuit Court of Appeals.
Disposition: The United States District Court for the Middle District of Alabama, Northern Division, ordered its previous permanent injunction to remain in effect pending order from the Eleventh Circuit Court of Appeals or further order from the court based upon further motions. The court also ordered monitoring for compliance with its orders since, “simple declaratory relief would, in Dekalb County, be no relief at all.”

Citation: Davis v. Hillsdale Community School District, 573 N.W.2d 77 (Mich.App. 1997).

Key Facts: In March 1996, Meyer, Crall, and another student at Davis Middle School were in possession of a BB gun on the grounds. After an investigation and disciplinary hearing, Meyer and Crall were expelled. Suit was filed and the trial court permanently enjoined the school district from enforcing the expulsions. The school district appealed the trial court’s order.

Issue: At issue was whether the board could enforce its policy that stated a student would be permanently expelled if that student were found to be in possession of a weapon.

Holding: The court maintained that the school district should be allowed to set its policies regarding disciplinary matters and their sanctions. The school district’s actions were in the broad discretionary powers granted school boards. The court also held that the trial court had not sufficiently considered the plaintiffs’ due process arguments and remanded the case so that it could do so.

Reasoning: The court first pointed out that the trial court concluded the school’s policy expanded the Michigan laws which served as the basis for the policy. The court noted the reasoning in Davis v. Ann Arbor Public Schools (1970) and concluded the trial court’s conclusion erroneous. The court also cited, in support of this conclusion, Widdoes v Detroit Public Schools (1996), which preserved the local autonomy of the school board to define and
sanction disciplinary matters. Even though that case dealt with the discipline of teachers, the court concluded the principles should naturally extend to student matters as well.

Disposition: The Court of Appeals of Michigan reversed the trial court’s ruling and remanded the case for further proceedings.


Key Facts: Z.H., child of C.H., was a student at Haines Elementary School when, in 1994, he and fellow students were asked to make posters showing things that made them thankful. Z.H. made a poster depicting his thankfulness for Jesus. All posters were displayed in the hallway but, on a day the teacher was absent, Z.H.’s poster was moved to a less conspicuous location. In 1996, as a first grader, Z.H. was rewarded for achieving a certain reading level with the opportunity to read a story aloud to the rest of the class. Z.H. chose to read a story entitled “A Big Family” from *The Beginner’s Bible*. The teacher did not allow Z.H. to read the story aloud to the class because of the religious content. Instead, he was allowed read the story aloud to the teacher. C.H. requested that Z.H. be allowed to read the story to the entire class. After the school did not comply with the request, C.H. filed suit alleging First Amendment violations seeking monetary and injunctive relief. The school moved for dismissal.

Issue: At issue was whether the school violated Z.H.’s Freedom of Expression rights by moving his poster and refusing to let him read the story of his choosing to the class.

Holding: The court held that Z.H. had no constitutional right to display a poster with religious content. By moving the poster, the court stated the school neither advanced or inhibited religion and had no impact on Z.H.’s or other students’ religion. Also, the court held that the teacher having Z.H. read to her instead of the class was simply a teacher exercising “editorial control.”
Reasoning: Once determining that the case should proceed to the merits based on the threshold issues, the court determined whether the school officials were acting under the “color of law.” This was in response to the defendants’ claim that the plaintiffs’ allegations did not fall within the guidelines of 42 U.S.C. Section 1983. Since the actions were carried out by employees of an arm of the state, the court considered the action to be carried out within the guidelines of the statute making the plaintiffs eligible for relief. The court then turned to the Freedom of Expression claims with a look at the forum status of the classroom. The court concluded that, in accordance with prior legal precedent, the classroom was not a public forum. Because of this, the school could impose time, manner, and place restrictions as long as the restrictions were viewpoint neutral. The court also noted that in *Hazelwood School District v. Kuhlmeier* (1988), that court held that teachers could exercise editorial control over the content of school-sponsored speech as long as the control was reasonably related to pedagogical concerns. Following this and other *Hazelwood* principles, the court found both actions by the school to be related to pedagogical concerns. One area of concern for the court was the age of the students involved. The court stated that first grade students might have equated the permission to read Bible stories in class to state endorsement of religion. The court noted that, even though the actual content of the story did not necessarily contain religious content, the fact that it came from a Bible made it religious speech and subject to the allowable restrictions.

Disposition: The United States District Court for the District of New Jersey granted the defendants’ motion for dismissal.

Key Facts: After complaints from her son that he was being mistreated by his teacher and classmates because of his African American race, Naomi Ryans and her husband asked for a conference with the teacher, Charlene Gresham. Gresham refused to meet with the Ryans after which the district superintendent asked them to meet with the school principal, Charles Jeffrey. The Ryans instead requested a hearing before the district’s Board of Trustees but were rejected because the complaint did not fall within the parents’ rights under Texas law. After the Ryans filed state and federal complaints, Jeffrey began to monitor the student’s classes and granted permission for Naomi Ryans to observe her son’s classes on 3 days. After reporting to the school and receiving permission to proceed to the class, Ryans was given a seat, by Gresham, in the classroom away from her son. Gresham also told Ryans she could only stay an hour. Ryans asked to speak with Gresham in the hall after class started but Gresham declined because she was busy. After the hour was up, Gresham requested that Ryans leave. Ryans refused because Jeffrey had given her permission to be there for the entire period. Gresham sent for a counselor who was in charge during Jeffrey’s absence that day. Ryans left to conference with the counselor but later went back to the classroom. Gresham stopped the class and again sent for the counselor. Ryans told her son she was being asked to leave and he had to “stand up and be a man.” She then sat by her son. Gresham requested that Ryans return to her assigned seat which she did. After Ryans refused another request to leave the room, the police department was called and Officer Lyons responded. Lyons went to Gresham’s door but left after a few minutes. Ryans left the classroom at the end of class and met with the counselor and Lyons. Ryans was asked to leave the premises and refused stating she had permission to be there from the principal. Ryans was arrested for
trespassing and was transported to the police station where she posted a $100.00 bond. The
trespass charge was later dropped. The Ryans filed suit alleging First and Fourteenth
Amendment rights violations as well as false imprisonment. Additionally, Ryans claimed racial
discrimination under Section 1981. They sought damages, declaratory judgment, and enjoinment
of similar action in the future.

Issue: At issue was whether the arrest of Naomi Ryan for trespassing was a violation of
her First and Fourteenth Amendment rights, false imprisonment, and a Section 1981
discrimination violation.

Holding: The court held the plaintiffs’ numerous claims to be without merit and denied
them leave to amend their complaint further.

Reasoning: The court first examined Ryans’ claim that the refusal to acknowledge her
claims that she had permission to be in the school was a violation of free speech. The court
agreed with the defendants that the speech by Ryans fell outside the realm of the First
Amendment. Also, the defendants did not stop her from relating her belief she had permission,
they simply chose not to acknowledge her position. Ryans’ second claim involved a due process
claim under the Fourteenth Amendment that the school’s actions denied her the right to direct
her son’s education. The court noted that an extensive search of case law yielded no precedents
guaranteeing a right of access to a child’s classroom. The court reasoned that a denial of access
to the child’s classes did not represent a parental constitutional violation. With regard to false
arrest, the court held that the acting school leader’s request that Ryans leave and her subsequent
refusal presented the probable cause necessary to justify the arrest by Lyons. The court
discarded the Section 1981 claims noting the absence of proof other than Ryans’ subjective
claim that race was a motivating factor in the officials’ actions. The false imprisonment claim
failed because of sovereign immunity protection for the officials. Finally, the court disallowed an amended complaint by the plaintiffs regarding the arrest because, the court reasoned, there was no constitutional violation to begin with and adding to the charge would be “an exercise in futility.”

Disposition: The United States District Court for the Eastern District of Texas, Lufkin Division, granted the defendants’ motions for summary judgment and denied the plaintiffs’ motion for leave to file an amended complaint.

Citation: State v. Allen, 955 P.2d 403 (Wash.App.Div.3 1998).

Key Facts: After walking his fifth grade class to P.E., Rodney Burke returned to his classroom to find Corey Dejuan Allen crouched beside his desk. Allen had his hand on Burke’s jacket. When Burke demanded to know why Allen was there, Allen stated he was there to pick up a student named Autumn. Burke insisted Allen report to the office where he was questioned by the principal. Allen admitted that he did not have permission to pick up Autumn and could not recall her last name. Allen left claiming that Burke and the principal were treating him rudely. Burke later identified Allen from photographs and Allen was charged with second degree burglary. A jury convicted Allen of the second degree burglary charge which he appealed on the grounds that the school was a public building and the second degree charge required an unlawful entry on his part.

Issue: At issue was whether a charge of second degree burglary could exist when the action took place in a public school building.

Holding: The court held that Allen’s entry was unlawful and, given the criminal intent of his actions, the elements necessary for a second degree burglary charge had been met.
Reasoning: The court examined the claim that a school building, like other government buildings, is open to the public and, therefore, a necessary element of the second degree charge, unlawful entry, could not have been present. The court conducted analysis in light of the state code and reasoned that while the building was open to the public for entry and exit, all visitors were required to report to the administrative offices and obtain permission to be in other parts of the building. Because the state code states that a person’s permission to be in a building can be limited, Allen was in a place not open to the general public without permission.

Disposition: The Court of Appeals of Washington, Division Three, affirmed the trial court’s conviction of Allen for second degree burglary.

Citation: Saratoga Bible Training Institute, Inc. v. Schuylerville Central School District, 18 F.Supp.2d 178 (N.D.N.Y. 1998).

Key Facts: In October of 1997, Robert Carr, a member of New Covenant Community Church, applied for use of the Schuylerville High School auditorium for a religious lecture series to be held on May 10 and 11, 1998. In December 1997, Superintendent Reed informed Carr that the request was denied. In a later meeting, Reed stated the district’s policy only allowed facilities to be used for education, athletic events, and live plays. Outside groups were not permitted to use the auditorium for lectures, speeches, rallies, debates, or similar activities. The school board, in review of the decision, confirmed the superintendent’s position. The church filed suit alleging the denial of its request was religious discrimination in violation of First and Fourteenth Amendment rights.

Issue: At issue was whether the school district denied the New Covenant Community Church access to school facilities because of the religious content of the proposed program in violation of First and Fourteenth Amendment rights.
Holding: The court held that the New Covenant Community Church had not proven the district’s denial of permit to use the school facilities was based on the content of the proposed lecture. The church also did not prove that the type of program proposed had been allowed in the past. Finally, the church did not substantiate the likelihood of success on the merits.

Reasoning: The court had to settle which standard to utilize in determining whether a preliminary injunction should be granted. The court reasoned this case was one in which the more stringent standard should be employed, that is, the church had to demonstrate clearly that it would likely succeed on the merits of the case before a preliminary injunction should be granted. The court then rejected the school’s argument that the plaintiffs had not suffered harm because the school facilities were not the only place suitable to hold their event since, in its opinion, even the loss of First Amendment freedoms for a minimal amount of time constitutes irreparable harm. The court then turned its attention to the likelihood of success. Following forum principles garnered from Perry (1983), the court categorized the school’s auditorium as a limited public forum. The plaintiffs had to prove the school’s policy resulted in viewpoint discrimination or that the school’s practice had previously opened the forum to uses similar to the church’s proposed event. The court stated there was no proof that the denial of access was based on the content of the program allaying the viewpoint discrimination point. The court examined the policy and practice of the school system and stated there was nothing in evidence that pointed to a conflict between the two. The court also noted that the evidence presented by the plaintiff, a list of past users of the facility without a description of the program held, did not prove a departure from the stated policy of prohibiting lectures, rallies, or demonstrations.

Disposition: The United States District Court for the Northern District of New York denied the plaintiffs’ motion for a preliminary injunction.
Citation: Peck v. Upshur County Board of Education, 155 F.3d 274 (C.A.4 1998).

Key Facts: Prior to the summer of 1994, the Upshur County Board of Education had in place the practice of allowing groups such as Little League, Boy and Girl Scouts, and 4-H access to distribute literature to students in the schools. Other groups wishing to distribute religious literature were not allowed to do so in the schools. In the summer of 1994, Superintendent Westfall was approached by a group wanting to know if the board could legally allow the distribution of Bibles by setting up a table display and letting the students pick up one if they wished. After consulting with legal counsel, Westfall informed the board that, in light of recent Supreme Court decisions, passive distribution would not violate the Establishment Clause and that the continued discrimination based on the content could present a different kind of violation. In December 1994, the board considered the passive displays and instructed the superintendent to make arrangements to make Bibles available to students in a one-day event. Arrangements were made for tables to be set up in the schools in an area where students normally congregated. The Bibles were displayed on the tables with a sign inviting the students to take one. It was stipulated that no adult could be present at the tables and no announcement would be made over the school intercom about the displays in order to avoid the appearance of school endorsement of religion. School board employees were not allowed to participate in any manner in the distribution. In February 1995, suit was brought seeking an injunction enjoining the school district from the Bible distribution. The court granted a preliminary injunction until the trial could take place. At trial, in May 1995, the preliminary injunction was vacated and a permanent injunction was denied. The court cited Lamb’s Chapel (1993) in the ruling that making the Bibles available in the manner proposed by the school would not violate the Establishment Clause as it was private expression rather than government speech. The plaintiffs appealed the denial of injunctive relief.
Issue: At issue was whether the proposed distribution of Bibles in the school was a violation of the Establishment Clause.

Holding: The court held the school did not violate the Establishment Clause through the passive distribution of Bibles on a single day during the school year. The court noted that the crux of the case was not the Bible itself, but the Supreme Court precedents disallowing both the discrimination against and endorsement of religious groups.

Reasoning: The court began by summarizing numerous Supreme Court opinions affirming viewpoint-neutral allowance of private religious speech on school and other properties. The court stated that neutrality had become an important factor when examining Establishment Clause litigation. The court reasoned that Upshur acted not to promote religious speech but to open a forum for private speech. The school system had previously disallowed the distribution of Bibles because they feared it was a violation of the Establishment Clause. With the Supreme Court precedents noted by the court, especially Lamb’s Chapel and Mergens, the school system concluded that the new policy was not only unnecessary but not implementing it could itself constitute a violation of the First Amendment. The court also noted that the board’s discussion when clarifying the policy in question further affirmed the intent to avoid content-based discrimination. The court pointed out that even with the clarification, the board imposed restrictions concerning religious speech, causing it to remain somewhat at a disadvantage compared to other speech, mainly to avoid Establishment Clause problems. The court was not persuaded by the plaintiffs’ argument that because the Bible display took place during school hours it had, in effect, become unlawful state religious speech. The court reasoned the “message” conveyed by the passive distribution took place during noninstructional time and, based on Mergens, religious speech taking place during school hours does not automatically make it state
speech. The court also rejected the notion that all speech allowed to take place at the school should be considered to be endorsed by the board based on the school’s forum. Using *Mergens* principles, the court stated that the school’s failure to censor speech did not equate endorsement.

Disposition: The United States Court of Appeals for the Fourth Circuit affirmed the district court’s order in part and reversed in part.

1999


Key Facts: Sprint, a mobile communications provider, entered into a lease agreement with the Ossining School District for the use of space on the roof of the high school to place a tower as part of its Personal Communication Services network. The network was comprised of a grid of communications towers that needed to be placed in specific locations to provide optimal coverage for customers. The tower at the school was to be disguised as a flagpole similar to the one already located on the roof of the school. The district was to receive $30,000 in base rent with a 3% increase each subsequent year. Because the cost of installation exceeded a $10,000 threshold established by state regulation, application had to be made to the Education Department Office of Facilities Planning for approval. The Department denied the application in a written letter stating that it believed the rental arrangement would be a violation of the New York State Constitution as well as New York Education Law and that the district lacked the authority to enter into a contract with the company. Sprint brought suit against the State Department of Education alleging violation of the Telecommunications Act of 1996 as well as United States and New York Constitutional violations.
Issue: At issue was whether the denial of access to school property for a private mobile communications enterprise was a violation of the Telecommunications Act of 1996 and the United States and New York Constitutions.

Holding: The court held that the New York State Department of Education discriminated against Sprint when it denied the application to install communications equipment on the roof of the school.

Reasoning: The Telecommunications Act of 1996 was enacted to assist in the development of competitive telecommunications markets. The court pointed out that the purpose was aimed at developing services that by necessity operated across state boundaries. Furthermore, the development of mobile communications networks was viewed as vital to the national communications infrastructure. Provisions within the act required substantial evidence before a government agency could deny the placement of equipment needed for the development of that infrastructure. In examining the evidence, the court opined that the Department of Education relied on their stated beliefs about the issue rather than any evidence presented. The New York State Constitution provides that public property cannot be gifted or loaned to private parties. The court pointed out that leasing of public properties is not prohibited. In answer to the argument that the private company would derive a benefit from the proposed lease, the court regarded the greater benefit to the public, including the school, as more important. According to the court, Congress placed a high importance on the public benefit derived from developing wireless telephone services. In response to concerns that the proposed lease would infringe on needed accommodations for student safety, security, and protection, the court stated the department did not prove that the leased roof space would deprive the students of those needs. The court discounted claims that the school district did not have authority to enter into the lease.
Disposition: The United States District Court for the Southern District of New York ruled in favor of the plaintiff.

Citation: Lovern v. Edwards, 190 F.3d 648 (C.A.4 1999).

Key Facts: In February 1997, Lovern, a noncustodial parent of three children in Henrico County schools, moved from Texas to Virginia. After his son did not make the J.R. Tucker High School basketball team, Lovern contacted the coach at work and home to complain. Lovern also contacted the principal several times to complain. On November 26, 1997, Lovern attended a basketball practice to talk with the coaches about the decision. Afterwards, the school principal wrote a letter to Lovern explaining that the children’s mother requested to be present at discussions about the children and that Lovern would need to schedule meetings in advance for such discussions. Lovern then began to contact the employee who drafted the letter to complain about the contents. The principal sent another letter explaining that the requested procedure was intended to maintain an orderly environment and not to limit access to information about Lovern’s children. Lovern later attended a Board of Supervisor’s meeting and alleged that his Trial Management Associates, which specialized in “federal public interest cases” and maintained one full-time attorney and several volunteer attorneys on staff, had uncovered misuse of public funds by school officials. Lovern was referred to superintendent Edwards and was later informed by Edwards that he was barred from the system’s properties because of his abuse and threatening behavior towards staff and officials in the system. Lovern sent Edwards a letter threatening to expose the alleged corruption and legal action unless the school rescinded the trespass order. Lovern sent copies of the letter accusing Edwards and county officials of corruption to the County Attorney. Lovern continued to send letters to Edwards and other officials including principals of two schools scheduled to play Tucker High School in baseball.
threatening to involve them in the suit if Edwards did not rescind the trespass order. In June of 1998, Lovern filed a complaint against Edwards which was dismissed without prejudice in July. Lovern appealed the court’s decision.

Issue: At issue was whether the denial of access to the school was a violation of constitutional rights and a violation of 42 U.S.C. Section 1983.

Holding: The court held that Lovern’s claims did not meet the requirements under the substantiality doctrine to proceed.

Reasoning: The court based its analysis of the case on principles from *Hagans v. Lavine* (1974) and *Davis v. Pak* (1988). The court pointed out that school officials are granted the authority to control students and school personnel. Schools are also tasked with the responsibility of ensuring appropriate behavior of third parties on school property. The court stated that school leaders should never be intimidated into compromising the safety of those under their care. Examining the facts of the case, the court noted that the school officials initially notified Lovern of proper procedure and only resorted to a trespass order when he refused to comply. The court concluded that Lovern’s constitutional rights were not violated and his suit was insubstantial and frivolous.

Disposition: The United States Court of Appeals for the Fourth Circuit affirmed the lower court’s dismissal of the case.

Citation: *East High Gay/Straight Alliance v. Board of Education of Salt Lake City*, 81 F.Supp.2d 1166 (D.Utah 1999).

Key Facts: The plaintiffs brought suit alleging the school system wrongfully denied access to facilities including meeting opportunities during non-instructional time, bulletin boards, the school PA system, and the closed-circuit television system because of the content of the
views expressed by the club. Also, they alleged they were left out of school activities and the school yearbook for the same reason.

Issue: At issue was whether the school’s denial of access to meet for the East High Gay/Straight Alliance was impermissible viewpoint discrimination.

Holding: The court held that for the 1997-1998 school year, the school had maintained a limited open forum and, by denying the club access, violated the plaintiffs’ rights for that year. The court further held that since the 1996 policy change, the district had maintained a closed forum rather than a limited open forum as defined by the Equal Access Act. Additionally, the policy-based restrictions placed on speech in that forum were reasonable in the context of the forum. The court also held that the plaintiffs had not shown material fact that they were entitled to a judgment as a matter of law.

Reasoning: Because the plaintiffs argued that the school had created a limited open forum by allowing non-curricular as well as curriculum-related clubs to meet during noninstructional time, the court began by examining the nature of the clubs in question. Following principles established in Mergens (1990), the court sought to determine whether there was a connection to the curriculum for each of the clubs. The court rejected the plaintiffs’ attempts to quantify the purpose of each group through the statistical analysis of activities each undertook. The court stated it would be possible to color the purpose by intentionally categorizing some activities a certain way. The court chose to examine the full scope of each group’s activities in view of the curriculum offered in the related class. The Improvement Council at East was a club dedicated to creating a positive environment at the school. The court opined this club, during the 1997-1998 school year, was not curriculum-related but in subsequent years, when combined with the student government association, did become so. The court reasoned that the FHA and FBLA, while
participating in various social activities and community service projects, did so using skills learned in the classroom setting rendering them curriculum-related. The court rejected the notion asserted by the plaintiff that the National Honor Society could not be tied to the school’s curriculum. The court noted its earlier conclusion that an activity that promoted academic excellence was, in its opinion, more directly related to curriculum than activities already deemed to fall in the category such as the student government association. The court also noted that the Odyssey of the Mind group taught a set of skills that were directly related to content in the sponsor’s classroom and should not be mischaracterized, as the plaintiff would have, like the chess club discussed in \textit{Mergens}.

Disposition: The United States District Court for the District of Utah, Central Division, granted partial summary judgment in favor of the plaintiffs with respect to the 1997-1998 school year but denied in all other respects; granted the defendants’ motion for summary judgment with respect to the maintenance of a closed forum and the 1996 policy restricting forum access but denied summary judgment in regard to the 1997-1998 school year; and denied the plaintiffs’ cross motion for partial summary judgment with regard to First Amendment claims.

\textit{2000}


Key Facts: In September of 1999, Colin and MacMillan submitted a constitution for a proposed gay-straight alliance club at El Modena High School to the teacher in charge of student activities. That teacher forwarded the application to the school’s principal, Murray. Murray had been instructed by Assistant Superintendent McKinnon to inform him of any attempts to form a
club of this nature. Accordingly, Murray forwarded the application to him at which time it was forwarded to the superintendent and, finally, the board. While awaiting approval of their application, the plaintiffs sought permission to take part in the recruitment fair that took place in early October; however, they were denied permission. It was at this time that the plaintiffs were informed that their application had been given to the board for approval. The board held a public forum in November of 1999 to hear arguments for and against the proposed club but postponed making a decision until a later date. In December, the board denied the club’s application objecting to the sexual subjects that were to be part of the proposed club. The board stated it would consider the submission of a revised mission statement excluding the subjects of sex, sexuality, and sex education. The superintendent and principal met with some of the students in an attempt to reach a compromise. Talks broke down leading plaintiffs to bring suit alleging Equal Access Act, Civil Rights Act of 1871, and Fourteenth Amendment rights violations.

Issue: At issue was whether the school board’s denial of the Gay-Straight Alliance’s application was a violation of Equal Access Act, Civil Rights Act of 1871, and Fourteenth Amendment rights.

Holding: The court held that the school district had denied the club access to the limited open forum based on the content of the proposed speech. The court also held that the board delayed and discriminated against the plaintiffs because of sexual orientation. Additionally, the district’s contention that the application was only conditionally denied did not pass scrutiny.

Reasoning: The court applied the four prong test for determining entitlement to preliminary relief beginning with the likelihood of success on the Equal Access claims. The court first determined that the school had established a limited-open forum as stated in the board’s policy and in the school’s actual practice. The court then examined the district’s claim
that the club should not be granted access because it was not curriculum related. The court
determined that the proposed mission of the club was not tied to the curriculum of the school.
The court noted, however, that this connection to the curriculum only served to determine
whether the Equal Access Act’s guidelines were triggered. In the end, the school would be
tasked with proving that the club, if allowed, would be disruptive to the educational setting
before it could be denied. The court relied on testimony of the faculty sponsor, Colin, and a
representative of the Gay Lesbian Straight Education Network of Orange County to reject the
district’s claim that the club had formed under the influence of that outside organization. The
board next argued that it had not completely denied the club access to the school but was willing
to grant access with some changes. The court reasoned that requiring such changes when other
clubs were not required to do the same was an infringement. The court also felt that requiring the
club to incorporate a statement that it would not discuss sexual activities when other groups were
not to required to have such a statement was an infringement of expressive rights.

Disposition: The United States District Court for the Central District of California
granted the plaintiffs’ motion for a preliminary injunction.

Citation: Daugherty v. Vanguard Charter School Academy, 116 F.Supp.2d 897

Key Facts: Vanguard Charter School Academy was a public school in Michigan operated
by the National Heritage Academies. The school was open to students in Grades Kindergarten
through 8. The plaintiffs’ children attended the school for part or all of the 1998-1999 and 1999-2000 school years. The parents alleged in their suit that administrators, teachers, volunteers, students, and parents of other students attempted to influence their children through Christian practices and actions in violation of the Establishment Clause.
Issue: At issue was whether the school’s practice constituted violation of the Establishment Clause.

Holding: In analysis of each issue put forth by the plaintiffs, the court held that there was no Establishment Clause violation by the school. In each instance, the school did not exhibit endorsement of religion by policy or custom. The court concluded that for the issues for which the plaintiffs did have standing they had “presented no more than a mere scintilla of evidence to support a finding that any constitutionally impermissible conduct occurred pursuant to defendants’ policies or customs.”

Reasoning: The court examined each of the issues of the case in order to reach a decision about summary judgment. First, the court examined whether the plaintiffs had standing as taxpayers to bring a claim against the school. The court highlighted the plaintiffs’ history in the case of not claiming taxpayer standing then wishing to amend so as to include it. Considering that the challenged activities did not require expenditure of public funds above the operation costs, a necessary component of such a claim, the court found it useless to allow the plaintiffs to reinstate their claim in this area. The court rejected the plaintiffs’ claims of injured party parental standing because that category was only applicable in situations that directly affected their children. Next, since the plaintiffs’ disputes were with persons other than the named defendants, they had the burden of proving that the actions in question were so ingrained as to become institutionalized or part of the policy. The first of these was the allowance of a Moms’ Prayer Group in the parent room of the school building during school hours. The school highly encouraged parent participation in the school and set aside a room for their use during and after school hours. Although students were not allowed in the room, plaintiffs contended the students’ knowledge that the group met during school hours could lead to the conclusion it was school-
endorsed. The court applied each prong of the *Lemon* (1971) test to the issue and found the plaintiffs’ concerns to be misplaced. The court held the practice stood up under all three tests and that the school’s allowance of the parent group to meet, along with many others in the same room, did not amount to excessive entanglement. Second, the plaintiffs contended that teachers and staff were engaged in religious activities at school. Some of the faculty met together before school hours to engage in religious discussion and prayer. Since none of the children were aware of these meetings, the meetings did not constitute a violation. The plaintiffs also failed to produce evidence that two teachers gathered with a group of students at the flagpole were there for prayer or religious expression. The court found the policy regarding the distribution of literature, the plaintiffs’ third complaint, to be viewpoint neutral so that religious material did not receive preferential treatment. The court rejected the next two claims, religious content during a teacher inservice and religious music at staff Christmas party, because students were not present on either occasion. The plaintiffs next offered three circumstances in which they believed the school was unconstitutionally endorsing religion. In each case, the court found that when all the facts were determined there was no endorsement of religion as a matter of policy or custom. Lastly, the plaintiffs asserted the school endorsed creationism in violation of the Establishment Clause. Again, when the issue was examined in light of all the facts, the episodes followed particular circumstances that caused the topic to be broached. The court could find no evidence that creationism was taught as a matter of policy or custom.

Disposition: The United States District Court for the Western District of Michigan, Western Division, granted summary judgment in favor of the defendant school.

Key Facts: In February 1996, The Salt Lake City School District Board of Education adopted a policy stating the district would not allow a limited public forum and prohibiting student groups not directly related to the curriculum. As a result of the policy, groups wishing to obtain access to meet during noninstructional time at the school had to submit an application to Seidel, the district official in charge of approving such applications. A group of students proposed forming the People Recognizing Important Social Movements (PRISM) Club and submitted an application. On the application, the club claimed to be related to the curriculum in the areas of American history, government, law, and sociology. The application also stated explicitly that it was not its intention to advocate homosexuality. On March 1, 2000, Seidel wrote a letter to inform the students that their application for the PRISM club was denied because she found the subject matter to be too narrow where it did intend to focus on the contributions of gays and lesbians in historical context as well as the current culture. Seidel also stated the subject matter was not covered in the courses cited on the application. The plaintiffs filed suit seeking injunctive relief.

Issue: At issue was whether Seidel’s interpretation and application of the policy in denying the PRISM club’s application had been applied consistently.

Holding: The court held that while the district’s policy based on *Mergens* (1990) principles was constitutional on its face the policy had not been applied consistently, as a new requirement had been employed for the PRISM club and no others. The court’s analysis using the four-prong test for injunctive relief fell solidly in favor of the plaintiff.

Reasoning: In its analysis of the case, the court applied the four-prong test to determine injunctive relief should be granted. Since the school district had constructed its policy following principles developed in *Mergens* (1990), the court stated it only needed to determine if Seidel
had correctly applied the policy’s standards with regard to the PRISM club application to
determine likelihood of success on the merits. The court reviewed the courses and their
descriptions listed on the club’s application and decided the subject matter of the proposed club
was contained in the school’s curriculum. The defendants stated that the club’s proposed
message was narrowly construed to pertain only to gays and lesbians. The court determined that
the requirement by the district that the message not be “narrowed” had not been applied to any
other club and, furthermore, did not make sense since a French club would necessarily espouse
views from the standpoint of French-speaking students and a science club would speak from the
perspective of science-oriented students. The court also found that the district had not previously
employed a “no narrowing” rule until the PRISM club and that for the foregoing reasons, the
club was likely to succeed on the merits at trial. The remaining three issues, potential injury if
injunctive relief was denied, whether that injury outweighed damage to the opposing, and if the
injunction would be adverse to public interest logically fell in favor of the plaintiff based on the
court’s earlier analysis.

Disposition: The United States District Court for the District of Utah, Central Division
granted injunctive relief to the plaintiff student group.

Citation: Tamapa J. Nuding v. The Board of Education of Cerro Gordo Community Unit

Key Facts: In August 1999, in conjunction with a regular school board meeting, several
individuals completed a tour of the local high school. At the conclusion of the tour, the board
meeting took place in a classroom. During that meeting, Nuding voiced opposition to the newly
adopted student dress code. She asked board members to state whether her dress met the dress
code standards which, in their opinion, they did. After this, Nuding removed an object from her
blouse resembling a gun as well as a pocket knife from her pocket and placed both items on the table. It was later revealed that the gun-shaped object was a wooden replica of a gun and that Nuding also had a plastic toy gun in her purse that she did not reveal. In September 1999, the board banned the plaintiff from attending all school events and extracurricular activities for the remainder of the year after which Nuding filed a complaint seeking a preliminary injunction against enforcement of the ban. At a hearing by the trial court in October 1999, the witnesses, with the exception of Nuding’s friend, testified that when Nuding removed the gun-shaped object from her blouse she made a statement to the effect that she could have shot the board members and slammed the gun down on the table. Several of the witnesses were alarmed by the plaintiff’s actions.

Issue: At issue was whether the board’s ban of the plaintiff from school events and facilities was a violation of First and Fourteenth Amendment rights.

Holding: The court held the school’s policy that led to the ban of Nuding from school events was content-neutral and not a violation of First Amendment rights. The court also held that the board had the authority through state statute to establish policies management and government of school facilities and activities. The court finally held that the trial court had not abused its discretion when it declined to grant a preliminary injunction.

Reasoning: With respect to the First Amendment claim, the court looked at the district’s policy under which the action was taken to ban Nuding. The policy spoke to the actions of all members of the public while on school property. The court ruled that the policy, because it regulated everyone in the same way, provided content-neutral parameters. The court also pointed out that the policy met the standards established in *Tinker v. Des Moines Independent Community School District* (1969) for restriction of disruptive activity. In addition, the policy
allowed the plaintiff to communicate through other means even though she was banned from attending events. Next, the court looked at the claim that the board’s ban exceeded its authority. The court reasoned that the board did have the authority to establish rules for conduct at board meetings under the statute granting power to manage and govern the school system. The plaintiff finally challenged the trial court’s ruling against a preliminary injunction. In review of the trial court’s application of the four-prong test, the court concluded the evidence bore out the lack of likelihood of success on the merits that led to the denial of preliminary injunction.

Disposition: The Appellate Court of Illinois, Fourth District affirmed the trial court’s judgment in favor of the school district.

Citation: Embry v. Lewis, 215 F.3d 884 (C.A.8 2000).

Key Facts: On November 4, 1997, Embry and Delamater set up a table on the grounds of Adams Middle School, a designated polling place, to collect signatures for a petition. Around 8:00 a.m., Boland, the school principal, approached Delamater to find out if he had permission to be on the property. After finding out Delamater did not have permission, Boland contacted the school superintendent and subsequently asked Delamater to leave. Delamater left as requested. Embry, after learning that Delamater had been asked to leave the school, went back and began to collect signatures again at approximately 1:00 p.m. At about 3:00 p.m., Boland approached Embry and asked her to leave. She refused stating she had a right to be there as long as she remained at least 25 feet away from the polling place. Boland contacted Police Chief Lewis who told Embry she would be arrested if she did not leave the property. When Embry refused again, Lewis arrested her. Embry was later released without charges being filed. Embry and Delamater filed suit alleging First Amendment rights violations. The district granted summary judgment in favor of the defendants, which Embry and Delamater appealed.
Issue: At issue was whether the denial of access to a designated polling place, school property, for the purpose of circulating a petition was a violation of First Amendment rights.

Holding: The court held that while portions of the school had been declared as public forum by the state for the purpose of conducting elections, the remainder of the property remained a nonpublic forum.

Reasoning: The court reviewed the particulars of school property that had been designated as a polling place and concluded that while portions of the property became a public forum for the purpose, the remainder remained a nonpublic forum. Further, the court, in consideration of the plaintiffs’ argument that they were more than the requisite 25 feet away, noted that the prohibition of electioneering within 25 feet does not guarantee a right to activity outside that range. The area where Embry and Delamater had set up to collect signatures was in a zone that the court ruled to be nonpublic. Because of this, the school’s exclusion of them from the property was a reasonable exercise of board discretion to protect the safety and welfare of the students. In addition, neither Embry nor Delamater attempted to secure permission to be on the school grounds in the office, as was the school’s policy. Finally, the court discounted claims that Boland asked the plaintiffs to leave because of the content of their petition since there was no indication of this in any of the testimony.

Disposition: The United States Court of Appeals for the Eighth Circuit affirmed the district court’s grant of summary judgment in favor of the defendants.

Citation: Downs v. Los Angeles Unified School District, 228 F.3d 1003 (C.A.9 2000).

Key Facts: In May 1997, the Los Angeles Unified School District issued a memo outlining expectations and material support for the board’s designated Gay and Lesbian Awareness Month in June of each year. Among the material support, posters, which had been
approved by several groups to avoid controversial representations, were provided to be displayed in the schools. Downs, a teacher at the school, objected to the designated observance and erected bulletin boards of his own in June of 1997 and June of 1998. Each of his displays included materials refuting the recognition of Gay and Lesbian Awareness and contained references that some considered offensive. Both years, the principals of the school either removed or had Downs remove parts of his display. In the 1997 year, Downs was informed by the school’s legal counsel that the bulletin boards were not “free speech zones.” Downs filed suit and the district concluded that the bulletin boards were a nonpublic forum subject to the *Hazelwood* (1988) “school-sponsored speech” rubric. Downs appealed.

**Issue:** At issue was whether the school could deny a teacher access to bulletin boards to post rebuttal to a district policy recognizing Gay and Lesbian Awareness Month.

**Holding:** The court held that speech undertaken by the district through bulletin boards did not render those displays free speech zones. The court further held that the district could express its message without the “constraint of viewpoint neutrality.” Accordingly, there was not a First Amendment violation by the school district.

**Reasoning:** The court first discerned that Downs’ speech did not fall under First Amendment protections since the bulletin boards in question solely contained “government speech.” The court then moved to an analysis of the forum and the attendant speech rights. The court pointed to the fact that only school faculty and staff could post materials on the bulletin boards. The principals had ultimate authority over what could remain on the boards. The approval or disapproval of postings by the principal was equated to the school board itself speaking. The court concluded that in this instance the government did not open a forum for types of speech but that the government was expressing itself within its on confines. As such, the
control of this government speech was not subject to constitutional safeguards and forum analysis. Additionally, the government could take steps to be sure its message did not become distorted. The court reasoned that Downs’ speech was such a distortion.

Disposition: The United States Court of Appeals for the Ninth Circuit affirmed the district court’s grant of summary judgment in favor of the school district.

Citation: *Campbell v. St. Tammany Parish School Board*, 231 F.3d 937 (C.A.5 2000).

Key Facts: The St. Tammany’s School District employed a written policy regarding the use of its facilities for nonstudent groups that restricted use for partisan political activity, for-profit fundraising, religious services, and religious instruction. In 1998, Campbell requested use of the facilities for a meeting that would include worship, discussion of family and political issues, prayer, and religious instruction. The school district denied the request citing its policy. The district court granted summary judgment in favor of Campbell in its holding that the policy was overly vague. The school district appealed. The court of appeals, in its analysis, held that the policy was not overly vague because it prohibited specific activities. Furthermore, such restrictions were viewpoint-based because it did not restrict speech on general topics that happened to contain a religious perspective, just religious services, and instruction. The Court of Appeals for the Fifth Circuit reversed the district court’s ruling. Campbell filed a petition for rehearing en banc.

Issue: At issue was whether the school’s policy disallowing use of facilities for religious services or religious instruction constituted a First Amendment violation.

Holding: The court held that the school’s policy restricting use of facilities was facially valid as written as well as in its application. The court further held that the policy did not
constitute viewpoint-based discrimination because the religious uses were not the only ones prohibited.

Reasoning: The court again examined the forum issues attached to the facts of the case. The district’s policy intended to create a limited-public forum that would make facilities available for civic or recreational uses. By restricting access for a range of uses rather than one, religious purposes, the district avoided the problems presented in *Good News Club v. Milford Central School* (2000). The court reasoned that even if the policy were to be questionable in the extremes of its regulation, the intent was valid and there was no evidence that the written or applied policy was intended to exercise viewpoint discrimination.

Disposition: The United States Court of Appeals for the Fifth Circuit denied the Petition for Rehearing En Banc.

Citation: *In re Joseph F., the People v. Joseph F.*, 85 Cal.App.4th 975 (Cal.App. 1 Dist. 2000).

Key Facts: On February 25, 1998, Joseph and another person were walking on the campus of Golden West Middle School at around 3:00 p.m. Assistant principal Fink went outside to ascertain what they were doing on campus. When Fink attempted to stop them, Joseph ignored Fink and continued walking. Fink motioned to School Resource Officer Salas, who was watching through a window from inside the building, to come outside. Fink told Salas to detain Joseph because he had not complied with Fink’s instructions. Fink wanted to determine whether Joseph was trespassing because he was not a student in the school. Salas approached Joseph and told him to stop to which Joseph responded, “Fuck you, I don’t have to listen to you. You’re a son of a bitch.” Salas attempted to arm-lock Joseph but Joseph pulled away and struggled with the officer. During the struggle, Joseph attempted to grab Salas’ baton and did manage to grab
the officer’s wrist and hyperextend it. Salas was eventually able to handcuff Joseph. Joseph was placed on indeterminate probation, which required that he not associate in any way with gangs or gang activity. Joseph appealed from the probation assignment and contended there was not enough evidence that he committed attempted battery on a police officer or that he resisted arrest.

Issue: At issue was whether the arrest, stemming from trespass on school grounds, for battery on a police officer, and the resultant probation were justified.

Holding: The court held that the officer was justified in detaining Joseph since the school official was attempting to determine whether Joseph had sufficient reason to be there. Joseph was uncooperative with the school official and the school resource officer. Joseph’s actions against the officer were held to be simple battery against the officer.

Reasoning: The court examined claims that Salas was not acting lawfully when detaining Joseph. The court sought to determine whether Salas’ actions were reasonable, given the circumstances. The court cited the California Constitution’s provisions that visitors to a school must register to be present on school grounds. The law also states that persons who do not register and who refuse to leave immediately at the request of an appropriate official are guilty of a misdemeanor. The same provisions are also outlined in the state’s Education Code. The court reasoned that the statutes gave the officer authority to stop Joseph in order to determine his identity and purpose for being on the campus. The court noted that Joseph’s refusal to comply with Salas’ order to stop and his belligerent response to Salas justified the escalating actions by Salas to detain the suspect. With respect to Joseph’s argument that Salas had to articulate a specific violation before detaining him, the court pointed out that Salas was acting under the direction of a school official, Fink, who had asked that Joseph be detained to find out if he had
proper reason to be on the campus. Because Salas was acting under Fink’s direction, the statutes regarding school safety were invoked and a different standard justifying detention of a suspect applied. The court also rejected claims that since the incident occurred outside of school hours the arrest was unjustified. The court stated it would be unreasonable to conclude that student safety was not an issue just because the offense was outside “artificial time parameters.” The court finally discounted Joseph’s claim that he felt justified in resisting Salas’ efforts because Joseph believed the officer was using excessive force.

Disposition: The Court of Appeal of California, First Appellate District, Division Five, affirmed the orders appealed from by Joseph.

2001

Citation: Van Schoick v. Saddleback Valley Unified School District, 104 Cal.Rptr.2d 562 (Cal.App.4 Dist. 2001).

Key Facts: In 1993, the Saddleback Valley Unified School District developed a policy regarding student clubs based on principles garnered from Mergens (1990). The board adopted a closed forum and required that all student clubs be curriculum-related to obtain access to school facilities. The board also adopted a requirement that all students perform 8 hours of community service or write an extensive research paper on the topic of community service in order to graduate. The board allowed participation in a community service organization, such as Key Club or Girls League, to suffice for the community service requirement. In the spring of 1996, Van Schoick, several students, a football coach, and another teacher met off-campus with a Fellowship of Christian Athletes organizer to discuss forming an FCA club at Mission Viejo High School. Eventually, the students began to gather informally at the school during
noninstructional times. These meetings at the school were student-initiated and attended by students only. In May of 1996, the students applied for official recognition as a student club and were denied by the principal, Duffy Clark, because he feared violation of the United States and California constitutions. The plaintiff brought action alleging violation of Equal Access Act rights since the school allowed the Key Club and Girls League to meet. The plaintiff asserted those two clubs were not curriculum-related and allowing them to meet created a limited public forum in which his club should be allowed. The Superior Court of Orange County granted summary judgment in favor of the school district holding that the club was not eligible for access because the teacher-sponsors would be involved in officer selections. Additionally, the superior court held that since the Key Club and Girls League satisfied graduation requirements, the clubs did not open the school’s forum. The plaintiff appealed.

Issue: At issue was whether the school’s denial of access to school facilities for the Fellowship of Christian Athletes club was a violation of the Equal Access Act.

Holding: The court held that the attempt to establish a connection to the school’s curriculum through a graduation requirement did not hold up under analysis. Additionally, the school’s claim that having teacher-sponsors monitor the group’s meetings at school invoked Establishment Clause concerns was not validated by the court.

Reasoning: The court began by analyzing the Equal Access Act and the principles established in Pope by Pope v. East Brunswick Bd. of Educ. (1993) and the Supreme Court’s Mergens (1990) decision. The court observed that in both cases, the courts did not consider community service clubs as being curriculum-related. Despite the assertion by the defense that a community-service graduation requirement established a connection to the curriculum, the court pointed out that such a connection would make it possible to evade the Equal Access Act
requirements by allowing boards to make similar requirements for groups they favored and leaving out the ones not wanted. The court also remarked that the school failed to produce evidence of their actual actions consistent with the stated policy. The court also discounted the teacher-sponsor involvement with the group since that involvement was undisputedly off-campus. In on-campus meetings, they had attended meetings but were not leaders.

Disposition: The Court of appeal of California, Fourth Appellate District, Division Three, found in favor of the plaintiff and reversed the lower court’s decision.

Citation: Boy Scouts of America, South Florida Council v. Till, 136 F.Supp.2d 1295 (S.D.Fla. 2001).

Key Facts: In 1998, the Broward County School District and the South Florida Council of the Boy Scouts of America entered into a partnership agreement. This agreement recognized the contributions that the scouting program brought to the district and outlined arrangements for use of facilities including school buildings and transportation. The agreement provided that neither party should discriminate for a variety of reasons including sexual orientation and that the agreement could be terminated by either party after a 30-day notice. After the Supreme Court decision in Boy Scouts of America v. Dale (2000), an advisory committee tasked to examine diversity in the system recommended that the Boy Scouts not be allowed to use the Broward County facilities any longer. On September 20, 2000, Superintendent Till wrote to remind the South Florida Council Executive, Jeff Herman, of the nondiscrimination provision in the Partnership Agreement. Herman responded that the policy did not dictate membership policies to the Scouts and litigation would follow any attempts to treat the group differently than other similarly-situated programs making use of the school’s facilities. In November 2000, the board voted to have Till send a letter terminating the partnership agreement via the required 30-day
written notice. In the meeting regarding this termination, members of the board made clear the purpose was to “send its own expressive message to the community.” On December 4, 2000, the scout group brought suit alleging violation of the First and Fourteenth amendment rights. The group alleged that other groups that practice discrimination for membership purposes in violation of the board’s cited policy had not been subjected to the same treatment by the board.

Issue: At issue was whether the denial of access to facilities for the South Florida Council of the Boy Scouts of America because of discriminatory membership practices regarding sexual orientation was a violation of the group’s First and Fourteenth Amendment rights.

Holding: The court held that the Boys Scouts met all four prongs of the test necessary to earn a preliminary injunctive ruling. The court held that the school district’s action amounted to viewpoint discrimination because the enforcement of the policy restricted the Scouts’ access on the basis of their view regarding sexual orientation.

Reasoning: Citing Perry (1983), the court noted the school must not regulate speech when the central idea of the speech is the rationale for the restriction. In addition, the school board had created a limited-open forum for facilities use by outside groups and, once created, could not discriminate on the basis of viewpoint when restricting speech, according to Lamb’s Chapel (1993). The court cited, as an example, Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board (1978), where a school sought to deny use of a school gym for a “patriotic rally” by the Ku Klux Klan. The court pointed out that the solution in that case should not be to shut down that group’s right of speech, but to counter it with other speech. The court stated that the same principle was true in this case and that “freedom of speech and association has its costs, and tolerance of the intolerant is one of them.” The court concluded that the board’s efforts to end discriminatory practices was ineffective at best and would not likely withstand constitutional
scrutiny at trial. Thus, the court reasoned the plaintiffs had met the first prong of the preliminary injunction standard. The other prongs, though not as thoroughly discussed, were met as well.

Disposition: The United States District Court for the Southern District of Florida granted a preliminary injunction in favor of the Boy Scouts and enjoined the defendant school district from restricting access to facilities for the group.

Citation: Good News Club v. Milford Central School, 121 S.Ct. 2093 (U.S. 2001).

Key Facts: In 1992, the Milford Central School District adopted a policy for community use of its facilities in keeping with New York Education Law Section 414. The policy, among other things, allowed for the use of facilities for any branch of education and for meetings and entertainment events as long as they were nonexclusive and open to the general public. Stephen and Darleen Fournier, residents in the district, were sponsors of a local Good News Club, a Christian club for elementary age students. In September 1996, they requested permission from the interim superintendent to use the school cafeteria for weekly meetings after school. The superintendent denied the request on the basis that the proposed activities amounted to religious worship and the policy excluded use of facilities for religious purposes. Later, the board affirmed the superintendent’s denial after reviewing materials clarifying the activities in which the club wished to engage. In March 1997, the club filed action alleging the denial violated First and Fourteenth Amendment rights as well as violation of the Religious Freedom Restoration Act of 1993. In April 1997, the district court granted a preliminary injunction and the club was able to use school facilities through June of 1998. In August 1998, the District Court ruled in favor of the school district granting its motion for summary judgment and vacating the previous preliminary injunction. That court reasoned that, since the school had not permitted other religious instruction groups, denial of the club was not unconstitutional viewpoint.
discrimination. The Good News Club appealed the ruling and the Court of Appeals for the Second Circuit, in a divided panel, affirmed that the denial of access to school facilities was not unconstitutional viewpoint discrimination. The Supreme Court granted certiorari.

Issue: At issue was whether the school district’s denial of access to facilities on the basis of the content of the club’s activities was unconstitutional viewpoint discrimination.

Holding: The Supreme Court held that denying access to the limited public forum in the school because of the religious nature of the club’s activities was viewpoint discrimination and amounted to First Amendment free speech violation.

Reasoning: The court began its analysis by examining the nature of the school’s forum as defined in *Perry* (1983). Both parties agreed that the school had established a limited open forum invoking requirements that speech restrictions be reasonable and not discriminate on the basis of viewpoint. To determine whether this was the case, the court used principles from *Lamb’s Chapel* and *Rosenberger*. In both cases, the court had held there were Free Speech violations because the restriction had been based on the content of the speech expression. Like the group in *Lamb’s Chapel*, the Good News Club intended to address subjects otherwise permissible under the policy were it not for the religious viewpoint. Accordingly, the Supreme Court concluded that Milford had practiced viewpoint discrimination as well. The court next turned to the claim that the school was attempting to avoid an Establishment Clause violation. The court recalled that in two previous cases, *Lamb’s Chapel* (1993) and *Widmar* (1981), it had rejected this same argument. Based on principles established in these two cases, the court concluded there was no danger of Establishment Clause violation, even given the young age of the elementary students involved.
Disposition: The Supreme Court of the United States reversed the judgment of the Court of Appeals and remanded the case for further proceedings.

Citation: *Linnemeir v. Board of Trustees of Purdue University*, 260 F.3d 757 (C.A.7 2001).

Key Facts: A student theater major at the Fort Wayne campus of Indiana University-Purdue University intended to produce the play *Corpus Christi* as part of course requirements. The play depicted Jesus Christ as a homosexual and had many “blasphemous” references throughout the work. The theater in which the play was to be produced was open to any group wishing to use it as long as it was in keeping with the university’s educational mission. Three Indiana citizens sought a preliminary injunction to block the production on the basis that it would amount to school endorsement of an anti-Christian message in violation of the First Amendment. When the district court declined to grant a preliminary injunction, the citizens moved for a stay pending their appeal of the court’s decision.

Issue: At issue was whether the allowance of an anti-Christian production by a school equated violation of the First Amendment.

Holding: The court held that the university’s provision of facilities for the production that was antagonistic towards Christianity was not a violation of the First Amendment. Based on the facts of the case, the production was undertaken by a student as a course requirement, not employees of the school, and did not amount to government endorsement or antagonism. Furthermore, the court held that teachers should determine the appropriateness of content in a classroom or, in this case theater, setting.

Reasoning: The court examined the nature of the claims. It reasoned that it could not deny the teaching of material simply because it was contrary to Christian beliefs. To do so would
preclude the study of the works of many mainstays in the college curriculum. The court did recognize that if the school had a policy of promoting particular beliefs that were antagonistic to Christianity, that policy would be in violation of the First Amendment. The program for the production stated the selection and performance of the play did not constitute endorsement of the viewpoints by the school. Furthermore, the student who was producing the play as a course requirement was not an employee and chose the play of his own accordance. The court, in examining the forum status, stated that classrooms, to include the university theater, are not public forums but it is the teachers who should decide whether a work is suitable for study. While the court acknowledged the radical nature of the proposed play, it concluded that it was the school, not the court, who should decide the appropriateness.

Disposition: The United States Court of Appeals for the Seventh Circuit denied the motion for a stay.

Citation: *Culbertson v. Oakridge School District No. 76*, 258 F.3d 1061 (C.A.9 2001).

Key Facts: Oakridge School District No. 76 had adopted a policy conforming to state statutes which allowed for the use of school buildings by the community for educational and recreational purposes. The Child Evangelism Fellowship of Oregon applied for use of facilities to sponsor a Good News Club, a Bible-based education program for children aged 4 to 12. Permission was initially granted in October 1995 but was later rescinded after the district’s counsel delivered an opinion that the group’s use of the facilities was a violation of both the United States and Oregon Constitutions. In August 1996, the group brought suit against the district alleging free speech and free exercise of religion violation of both constitutions and requesting preliminary and permanent injunctive relief. The district court granted preliminary injunctive relief in favor of the plaintiff, which the appeals court affirmed. In January 1999, the
district court granted a permanent injunction in favor of the plaintiff requiring the school district to provide the same access to facilities enjoyed by other similar groups without regard to the religious content of the proposed activities. The district court also ordered that the school allow distribution of printed materials including brochures and parental permission slips. The court ordered the permission slips be distributed in the same manner as materials of other community groups. The school district appealed.

Issue: At issue was whether the denial of access to school facilities was a violation of free speech and free exercise of religion rights under the United States and Oregon Constitutions.

Holding: The court held that once the school had created a limited open forum for community groups, it could not exclude the plaintiffs because of the religious nature of the club’s meetings. The court also agreed that the allowance of the club would not constitute a violation of the Establishment Clause. Lastly, the court did hold that the district court’s requirement that teachers distribute parental permission slips did give the appearance of school endorsement of the religious club.

Reasoning: The court aligned its analysis with principles garnered from Good News Club v. Milford Cent. Sch. (2001). First, the court established that while the school building was not a traditional public forum, the district created a limited public forum for community education and recreation programs. Once created, the school would not be allowed to disallow use of facilities because of the viewpoint of the speech. The court reasoned that the restrictions placed on the club were because of the religious nature of the group. The court pointed out the school’s defense to the point was that the club in this case was different than others because it taught religion and the Bible. The court reasoned this argument conceded the point that the club was educational in nature and that it was the religious content that caused the exclusion of the club. In
answer to the defense that allowance of the club violated the Establishment Clause, the court pointed once again to Good News and the Supreme Court’s rejection of this argument. The district also argued that the district court’s requirement that teachers distribute permission slips risked the appearance of school endorsement of the club. The court agreed that this requirement stepped over the boundaries and placed the teachers in service of the club.

Disposition: The United States Court of Appeals for the Ninth Circuit affirmed the district court’s grant of an injunction with one modification, the teachers should not distribute the parental slips to students.

Citation: Hazleton Area School District v. Zoning Hearing Board, 778 A.2d 1205 (Pa. 2001).

Key Facts: In February 1990, the Zoning Hearing Board of Hazleton Township granted a zoning exception allowing the Hazleton Area School District to construct a high school in a residential zone. In 1993, the zoning board granted variances to allow construction of athletic fields as long as the construction complied with several restrictions. In April 1994, the school district applied for a waiver to some of those restrictions so they could add dugouts, water fountains, a scoreboard, and backstop to the baseball field. The zoning board agreed but limited the use of the field to team practice and interscholastic competition. In April 1996, the school district once again applied for a waiver to allow use of the baseball fields for non-school-related games so the school could rent use of the fields to other organizations. After concerns were raised by neighbors and the zoning board conducted a public hearing on the matter, the board denied the school district’s request. The decision was appealed to the Court of Common Pleas of Luzerne County which upheld the zoning board’s denial. That decision was appealed to the Commonwealth Court which also affirmed. The school district again appealed, this time to the
Supreme Court of Pennsylvania asserting that the Public School Code of Pennsylvania superseded the zoning board’s prohibitions in the matter.

Issue: At issue was whether Public School Code of Pennsylvania granted the school authority above that of the local zoning to use its facilities as the school deemed proper.

Holding: The court held that the competing authority of the two governing entities were subject to plenary review. On such review, the court did not discern a defined preemptive power for either side. As such, the court held the school district did not have discretion to decide facilities use without oversight of the local zoning board.

Reasoning: The court examined the school’s claim that the Public School Code gave it sole authority to decide how facilities could be used. The zoning board offered the argument that the code only provided authority to regulate property for school-related activities and since the purpose in question was rental to outside groups, there was no preemptive power. The court employed a two-step process to determine which should prevail. First, the court tried to determine whether the General Assembly intended one entity to be preeminent. Second, absent such legislative guidance, the court would look to the statutory construction rule to ascertain legislative intent. The court cited several legal precedents to aid in its analysis. The court also observed that it had, in the past, ruled that schools were not exempt from zoning considerations with regard to manner of construction noting that the schools’ mission was to deal with the quality of the education experience rather than the structure in which it was to be provided. Conversely, local zoning boards could not prevent the construction of appropriate facilities for schools to carry out their mission of educating the state’s children. The court observed the language of the ruling statutes to be too similar to determine legislative intent. The court reasoned that the authority to manage its facilities as granted by the statute was only preemptive
where its educational mission was concerned. In this case, the proposed use was not at the heart of the school’s mission and, therefore, not outside the regulation of the local zoning board. The court rejected the school district’s assertion that the input from the zoning board was only recommendations that were not binding on the school. Examining the state’s Statutory Construction Act, the court ruled that the school district’s plans were, in fact, subject to zoning restrictions.

Disposition: The Supreme Court of Pennsylvania affirmed the order of the Commonwealth Court in favor of the Zoning Hearing Board of Hazleton Township.

Citation: *Gernetzke v. Kenosha Unified School District No. 1*, 274 F.3d 464 (C.A.7 2001).

Key Facts: When the Kenosha Unified School District invited all student groups to paint murals in the main hallway of the school, members of the Bible Club submitted a design for approval. The design showed a heart, two doves, an open Bible depicting a passage of New Testament scripture, and a large cross. The principal approved the design as long as the cross was left out of the design. At the same time, the principal disallowed the depiction of a swastika by a group of skinheads and a particular brand of beer in a Students Against Drunk Driving mural. The students brought suit claiming violation of constitutional and statutory rights and when summary judgment was granted in the defendants favor, appealed that finding.

Issue: At issue was whether the denial of the display of a cross in the plaintiffs’ mural was a violation of constitutional and statutory rights.

Holding: The court held the plaintiffs did not meet the burden of proving the principles according to *Monell* (1978) doctrine to attach government liability to the defendants’ actions. The court reasoned that if it accepted the plaintiffs’ arguments under the doctrine, a situation
would be created where a government entity and its employees could never win in this type of litigation.

Reasoning: The court began by stating that it would not reach the merits of the constitutional and statutory claims because the plaintiffs based their claims on 42 U.S.C. Section 1983. The court noted that under *Monell v. Department of Social Services* (1978), liability could not be attached to local government entities because of the actions of employees. The burden on plaintiffs in such a case would be to prove that the official decision-making body, in this case the school board, was directly responsible for the action in question. The court examined the plaintiffs’ claim that by delegating authority to the principal the board made him the ultimate decision-maker. The court cited a multitude of cases in its analysis of this situation and concluded the assertion by the plaintiffs did not hold up. The plaintiffs argued that the board’s refusal to direct the principal to acquiesce to their demand was ratification of his decision, making the board liable. The court stated that accepting this premise would place all government entities in a no-win situation. They would either have to give in to all demands to change an employee’s decision or face litigation for having ratified the decision.

Disposition: The United States Court of Appeals for the Seventh Circuit affirmed the lower court’s grant of summary judgment in favor of the defendant school district.

2002


Key Facts: In the spring of 1998, Daniel Walz was in a pre-kindergarten class that was having a school-sponsored holiday party. Daniel attempted to distribute pencils that had been
purchased by his mother and bore a religious message. The teacher took up the pencils and consulted superintendent Kelpsh as to whether the pencils could be given to the students. Kelpsh informed the teacher the pencils should not be distributed because of a risk of perceived endorsement of religion. The teacher also later stated that the school had a practice of not allowing any gifts bearing messages of any kind of endorsement to include commercial or religious interests. In October of 1998, the school system adopted a policy regarding the recognition of religion in schools. In December of 1998, Walz’s mother contacted the school to get permission for her son to distribute candy canes with a religious message attached at the upcoming holiday party. She was informed that he could distribute them before or after school and during recess. In December 1999, Walz’s mother once again contacted the school for permission to distribute the candy canes with the religious message attached and received permission for Daniel to give them out before or after school and during recess. Walz’s mother stated that generic gifts were allowed to be distributed. In May of 2000, Walz, through his mother, brought suit alleging First Amendment free exercise and freedom of expression rights violations as well as Fourteenth Amendment Equal Protection rights violations.

Issue: At issue was whether the district’s refusal to allow the plaintiff to distribute items with religious message in school-sponsored parties during class time was a violation of First and Fourteenth Amendment rights.

Holding: The court held that the defendant school district did not engage in viewpoint discrimination since it disallowed all messages on gifts to be distributed to students.

Reasoning: The court, in review of First Amendment precedent, observed that in a school setting First Amendment rights considerations require special attention. The court discounted the plaintiff’s claim that distribution of generic gifts by other students while the religious gifts were
disallowed proved a viewpoint-based restriction. The court recounted that the generic gifts were allowed to all students and the forum was not open to promote any point of view whether religious or secular. The generic gifts were donated to the school’s PTO, which distributed them so some students would not be left out. The plaintiff offered no proof that other children were allowed to distribute gifts with messages on them. The plaintiff next argued that the class parties were purely social events absent any educational elements and, therefore, opening the way for distribution because it was non-instructional time. The court disagreed stating the events were meant to be educational, were designed to impart a set of social skills, and were closely regulated. In examining the plaintiff’s Establishment Clause claim that the school was hostile to his religious message, the court concluded the defendant’s restriction of all messages on gifts undermined the argument. The court found the plaintiff’s claims under the New Jersey Law Against Discrimination were without merit.

Disposition: The United States District Court for the District of New Jersey granted the defendant’s motion for summary judgment, dismissed the plaintiff’s motion for summary judgment, and dismissed the plaintiff’s complaint with prejudice.

Citation: Fleming v. Jefferson Community School District R-1, 298 F.3d 918 (C.A. 10 2002).

Key Facts: After the killing of several students and one teacher at Columbine High School in 1999, the school district searched for a way to help students cope with the reopening of the facility. At the suggestion of two teachers, a tile project was begun in which those directly affected by the tragedy could paint abstract art on a 4-inch-by-4-inch tile. The tiles were to be glazed, fired, and hung throughout the school as a means of allowing students to participate in the “reconstruction of their school” as well as help the community as a whole to heal from the
tragedy. To make sure the effect of the project would be a positive one, guidelines were
instituted that excluded references to the attack, names of those killed, religious symbols, and
anything obscene or offensive. Funds for the project were derived from donations to two
memorial accounts. As the tiles were decorated, supervisors screened out those that did not meet
the project’s guidelines. These were fired separately and given back to the individuals who
decorated them for their own use. In all, 2,100 tiles were hung on the walls of the school. Upon
examination, however, it was determined that approximately 80 of those hung did not meet with
the guidelines for a variety of reasons and were removed. Plaintiffs brought suit alleging First
Amendment rights violations because they wanted the option of including religious content on
the tiles. The district court ruled in favor of the plaintiffs holding the school had violated free
speech rights. The school district appealed that decision.

Issue: At issue was whether the restrictions imposed by the school district violated the
plaintiffs’ First Amendment free speech rights.

Holding: The court held that the school district’s restrictions regarding the tile project
were reasonable and related to a legitimate pedagogical concern.

Reasoning: In consideration of the facts de novo, the court stated it disagreed with the
district court’s conclusion that the tile project was not school-sponsored speech. In a review of
Hazelwood (1988) and related principles, the court stated it felt anything that affected learning,
even a desire to avoid controversy in the learning environment, became a legitimate pedagogical
concern, expanding the extent of control over school-sponsored speech as long as the imprimatur
test was also satisfied. The court concluded that Hazelwood allowed for viewpoint-based control
over school-sponsored speech. Following these guidelines, the court conducted its analysis of the
tile project. The court observed the school district’s intent, in policy and in action, was to retain
editorial control over the content of the tiles. Because the school retained control over those allowed to participate and the content that could be expressed, the project was a nonpublic forum. The court next examined imprimatur in the case. The court reasoned that since the tiles would be permanently affixed to the facility, they would reasonably be seen as having the school’s approval. The court concluded that the casual observer would no doubt realize the level of school involvement in the project and convey this to an endorsement of messages contained in the tiles. The court reasoned that the tiles did bear the imprimatur of the school and next turned its attention to the pedagogical concerns. The court reiterated the purpose of the project, the attempt to help the students heal, fell under the area of pedagogical concerns according to Hazelwood (1988). The court reasoned that while some community members participated in the project it should still be categorized as school-sponsored. Since the tiles would be posted throughout the school, retention of control over the speech the tiles contained becomes more important than if they were, like other memorials, confined to one certain area. The school also formed the guidelines with the advice of psychologists and retained control over the speech because of a concern about the potential impact on the students of unrestricted expression on the tiles. The court also reasoned that if the school did not have control over the content of speech on the tiles, they could be required to post speech that was offensive and divisive. In such a case, the objective of the project could be subverted by ill-meaning persons and the school might choose to disallow the project in total because of the potential disruption to the school.

Disposition: The United States Court of Appeals for the Tenth Circuit reversed the district court’s judgment in favor of the plaintiffs and vacated the injunction ordering the district to allow the plaintiffs to paint what they wished on a tile and the school to mount those that had been disallowed.
Key Facts: In October 1998, the newly hired network administrator for Springer High School discovered video clips on the school laptop containing obscenities and sexually explicit language. Upon investigation, Superintendent Cardenas discovered that Jake McCook, a student at the school, had downloaded the material to the computer. Based on McCook’s admission that he had downloaded the material to the computer, Cardenas suspended McCook for 5 days with the understanding with McCook and his mother that the student could not attend school activities during the suspension. On the morning following, McCook returned to the school with his father for the purpose of attending a homecoming pep rally. Cardenas saw the two and, because of the suspension, asked them to leave. A confrontation ensued and Mr. McCook asked those present, “which one of you sons of bitches wants to take me on?” Cardenas grabbed Mr. McCook in an attempt to escort him outside and the son involved himself in the altercation. Cardenas sent a letter that same day to the local police department stating the McCook’s were not allowed to attend Springer Municipal School’s functions or to be on school property. At the end of McCook’s suspension, Cardenas sent a letter to the family stating that Mr. McCook was not permitted on campus at any time and that the son might be subject to further disciplinary action due to his actions in the prior incident. The board eventually voted to expel the son for his actions. Following the expulsion, McCook returned to campus to get information from the school counselor. Cardenas asked the board’s attorney to send a letter to the McCook’s attorney asking them to honor the expulsion. The McCook’s brought suit alleging retaliation for exercise of their First Amendment rights and violation of other First and Fourteenth Amendment rights. The district court granted qualified immunity to the defendants in the case and dismissed the McCook’s action in its entirety. They appealed the district court’s decision.
Issue: At issue was whether the superintendent’s denial of access to the school for the plaintiff was retaliation for exercising First Amendment rights and a violation of other First and Fourteenth Amendment rights.

Holding: The court held the plaintiffs did not reach the threshold burden of proof in any of the alleged violations.

Reasoning: The court applied the three prong Worrell (2000) test to determine whether the plaintiff was engaged in constitutionally protected activity, if the defendant’s actions would have had the effect of chilling a person of ordinary firmness, and if the defendant’s actions were a response the plaintiff’s exercise of the constitutionally protected activity. The court concluded in the plaintiffs’ favor on the first two prongs of the test. While not all of the actions by the McCook’s were protected speech, at least some of them were sufficient to satisfy the first prong. Similarly, while some of the evidence was controvertible, the court reasoned the plaintiffs would likely prevail on this prong of the test. To reach a conclusion on the third prong of the test, the court considered the assertions by the plaintiffs that the actions were retaliatory and in response to their protected actions. The court only considered those allegations that the McCook’s attempted to explain. The district court, in considering the complaint, had held that the student McCook admitted he was responsible for the objectionable material on the computer and the network administrator had discovered the material of his own accord. The court found there to be no credible evidence to support the plaintiffs’ claims. The plaintiffs pointed to the timing of certain actions as proof of retaliation but the court stated they failed to prove any constitutional violation. The McCook’s remaining claims, freedom of assembly and association violation along with equal protection violation, failed, according to the court, because sufficient evidence was not presented.
Disposition: The United States Court of Appeals for the Tenth Circuit affirmed the district court’s ruling in favor of the defendants.

Citation: *Prince v. Jacoby*, 303 F.3d 1074 (C.A.9 2002).

Key Facts: In June 1994, the Bethel School District instituted a policy with regard to religious organizations modeled after provisions in the Equal Access Act. Policy 5525 allowed the formation of student religious clubs as long as they met several criteria. Tausha Prince and several other students formed a Christian Bible club with the purpose of addressing interests of students from a religious perspective. Prince attempted to gain official recognition for the club as an Associated Student Body. The school denied the request twice and then informed Prince the club could only be formed pursuant to Policy 5525. Prince brought suit claiming that denying the religious club official recognition as an Associated Student Body group was a violation of the Equal Access Act. The district court found in favor of the school district holding that the Equal Access Act did not require absolute equality of student groups. The district court held the school was a nonpublic forum and that distinguishing between Associated Student Body groups and Policy 5525 groups did not create violations of the Act. The plaintiff appealed.

Issue: At issue was whether having a different standard of access for student religious groups was a violation of the Equal Access Act and the Establishment Clause.

Holding: The court held that the school district violated the plaintiff’s rights under the Equal Access Act and the Free Speech Clause of the First Amendment.

Reasoning: The court considered the case *de novo* and attempted to determine whether there were genuine issues of fact and if the district court applied the substantive law correctly. The court first noted that the purpose of the Equal Access Act was to grant student religious groups in the secondary level access to limited open forums similar that of college students in
The court also noted that both sides agreed that the Act was applicable in this case. The court then proceeded to an analysis of the language of the Act as it applied to this case. The court concluded the term “equal access” in the language of the act was intended to convey that religious student activities should be allowed under the same conditions as other student groups. Following principles garnered from *Mergens* (1990), the court found support for their conclusion that providing “fair opportunity” was not the same as providing “equal access.” The court next considered the school’s argument that recognition of the club as an Associated Student Body group would create a Washington State Law and Establishment Clause violation. Applying *Mergens* and *Garnett v. Renton School District* (1993), the court concluded that the state law would not preempt the federal statute and that once the limited open forum was created the student religious group had to be allowed the same access. For individual claims that were not covered by the Equal Access Act, the court applied First Amendment analysis to determine whether that avenue proved to grant further access. The court concluded the school’s denial of equal standing for the student religious group was based on the content of the club’s activities. This viewpoint-based restriction was in violation of the First Amendment. The court examined whether the distribution of school funds to the religious group on the same basis as other student groups invoked Establishment Clause restrictions. The court aligned with *Rosenberger* (1995) to conclude that such a distribution that came from a general fund and went to all student groups would not be viewed as an Establishment Clause violation.

Disposition: The United States Court of Appeals for the Ninth Circuit reversed the district court’s judgment and remanded the case for proceeding consistent with its opinion.
Key Facts: The Olathe National Education Association (ONEA) became the official representative organization and exclusive collective bargaining representative for teachers in Johnson County, Kansas, in November 1970. In the mid-1990s, several teachers in the district became members of the Association of American Educators and its affiliate, the Kansas Association of American Educators (KANAAE). In February 1996, members of the local group asked for permission to use the district’s mail system to distribute membership information. The district declined because of a stipulation in the collective bargaining agreement with ONEA. In August 1998, Barnett, president of KANAAE, again asked for permission from the district superintendent to use the district’s mail system to distribute membership information. In the information, prospective KANAAE members were encouraged to drop their ONEA memberships. In May 2000, another request was made on behalf of KANAAE for use of the mail system, which was again denied because of the collective bargaining agreement. The school district became the subject of allegations from both employee organizations. The KANAAE alleged violation of constitutional rights stemming from the refusal to allow access to the district’s mail system. The ONEA alleged that if the district allowed the proposed distribution it would constitute violation of the Negotiations Act. After a hearing, the district court decided in favor of the school district and ONEA. The KANAAE appealed the decision.

Issue: At issue was whether the school district’s refusal to allow KANAAE access to the district mail system was a violation of constitutional rights.
Holding: The court held that KANAAE was a professional employee’s organization as defined by the *Negotiations Act* and that, under the statute’s provisions, could not be allowed access to the mail system because it was not the designated representative organization. The court also held that, as in *Perry* (1983), the school could differentiate access to the mail system.

Reasoning: The court determined it should answer three questions in order to reach a conclusion in the case: (1) Was KANAAE a professional employee’s organization? (2) Was the district’s denial of access to the mail system proper? (3) Did the denial of access to the mail system violate constitutional rights? To answer the first, the court examined the *Negotiations Act*. Provisions in the act allow more than one such organization in a district but only one can become the exclusive representative in negotiations. Based on the evidence, the court determined that 80% to 90% of the members of KANAAE were professional employees and the organization was mainly concerned with those employees’ compensation. This qualified the organization as a professional employee’s organization. Second, the court determined that the *Negotiations Act* allowed only one professional employees’ organization access to a district’s mail system at any given time. Finally, the court considered *Perry* (1983) to arrive at its conclusion that, as in *Perry*, the school’s differentiated access to the mail system was constitutional.

Disposition: The Supreme Court of Kansas affirmed the district court’s ruling in favor of the school district and ONEA.

Citation: *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County, KY*, 258 F.Supp.2d 667 (E.D.Ky. 2003).

Key Facts: In January or February of 2002, several students at Boyd County High School started a petition asking for the creation of a Gay Straight Alliance club. The students approached teacher Kaye King, who agreed to act as sponsor of the club. After the students
began circulating the petition, a pattern of harassment from other students began. In February 2002, some of the students applied for club status at the school. The school’s Diversity Awareness Council held meetings to discuss the formation of the club and, because of safety concerns, suggested the group change their name. The members declined and the application proceeded to the Site-Based Decision Council for approval. The application was denied because it was too late in the school year for approval. The school principal, Johnson, assured King that if the club applied the following year it would be approved. In September 2002, the club resubmitted its application, which was again denied. The American Civil Liberties Union wrote a letter to the school as a reminder of the requirements of the Equal Access Act. The club asked the committee to reconsider their decision and in October 2002, the Council held a meeting to consider the application. The committee ultimately approved the application causing a hostile reaction in the community as well as from other students at the school. Several students staged protests against the formation of the club. King reported receiving threatening notes and her car was vandalized. School Superintendent Capehart, board members, and the school’s administrative staff received many calls from angry parents expressing dissatisfaction with the decision to recognize the club. During all of this, the students in favor of the club did not display any disruptive behavior. In December 2002, the board decided to ban all clubs. In January 2003, at the urging of Principal Johnson, King applied for permission for the club to meet as an outside organization in her classroom after school hours. That application was denied and King was told no groups were being allowed access to the school. After the school’s ban on clubs, the Gay Straight Alliance did not meet but many other student organizations were allowed to meet. The plaintiffs brought suit alleging violation of the Equal Access, First Amendment rights, and the
Kentucky Education Reform Act. They sought a preliminary injunction requiring the school to grant them the same access as that enjoyed by other student groups.

Issue: At issue was whether denying the Boyd County High School Gay Straight Alliance access to school facilities was a violation of the Equal Access, the First Amendment, and the Kentucky Education Reform Act.

Holding: The court concluded that the school district had violated the Equal Access by not allowing the plaintiffs access to the school’s facilities while allowing other noncurricular student clubs to meet.

Reasoning: To determine whether the plaintiff should be granted a preliminary injunction, the court applied the four prong test described in *NHL Players’ Ass’n v. Plymouth Whalers Hockey Club* (2003). First to be considered was the plaintiffs’ Equal Access claims. The court first examined whether any of the other clubs allowed to meet were not related to the curriculum. This examination revealed four clubs that the court deemed were not related to the curriculum. The Equal Access Act was thereby triggered. The only way to disallow the club under the Act’s provisions would be to show that the club would “substantially interfere with the orderly conduct of educational opportunities within the school.” The court observed that, according to the record, any disruptions in the case had been caused by those opposed to the club’s recognition. As the plaintiffs had not instigated any of the disruptive actions, the court reasoned that to disallow the club because of others’ actions would amount to the “heckler’s veto” of *Tinker v. Des Moines Independent Community School Dist.* (1969). The court also noted that the school administration had already displayed the ability to continue school undisrupted despite the community and student protests. The court concluded that the plaintiff had shown the likelihood to succeed on the merits of the Equal Access claim. Having reached this conclusion,
the court expressed it did not need to address the First Amendment or Kentucky Education Reform Act claims. The court succinctly concluded the remaining three prongs of the test in favor of the plaintiffs.

Disposition: The United States District Court for the Eastern District of Kentucky, Ashland Division, granted the plaintiff’s motion for a preliminary injunction.

Citation: Reeves v. Rocklin Unified School District, 135 Cal.Rptr.2d 213 (Cal.App. 3 Dist. 2003).

Key Facts: In May of 1998, members of the Sanctity of Human Life Network (SOHLNET) arrived on the grounds of Rocklin High School to distribute anti-abortion literature. They were instructed by their attorney to register in the school’s office for permission to be on campus. The group intended to leave when the first bell rang for class at 7:45 a.m. Upon arrival at the school, representatives went to the office to register. The assistant principal informed them that the principal would have to grant permission for the group to be on campus. Principal Spears informed the group they had to leave campus because the group had no legitimate business there. The group stationed themselves on the public street leading to the school to hand out literature to drivers and students. One of the members constantly activated the pedestrian signal causing traffic to stop so they could hand out the leaflets. At one point, the traffic was backed up for almost two miles causing many students to be late to class. The plaintiffs filed a complaint alleging violation of constitutional rights because the school would not let them register and have access to the campus. At trial, the court found in favor of the defendant school district holding that the school officials had acted reasonably and that the school had reasonably concluded that the group’s presence on campus would cause a disruption.
Issue: At issue was whether the denial of the group to register for access to the campus was a violation of constitutional rights.

Holding: The court held that the denial of registration for the SOHLNET group was not a violation of the group’s constitutional rights. The court held that the school was a nonpublic forum and that restricting access to the campus was appropriate.

Reasoning: The court first reviewed the statutory basis for the school’s requirement that visitors register in order to have access to school facilities. The court recounted that the California legislature enacted law specifically designed to aid in the regulation of who had access to school facilities. The court also noted the plethora of legal precedents regarding the nonpublic forum status of a school campus. In addition, Rodriguez v. Inglewood Unified School Dist. (1986) highlighted the responsibility school officials have in protecting students. The court reasoned that the school was a nonpublic forum and that restricting access to the campus was appropriate. The court also upheld the denial of access on the basis that SOHLNET’s presence on campus might be a disruption. The court pointed to prior attempts by the group to gain access to campus in which they had videotaped students. This action was deemed by the court to be potentially threatening to those students. The interference with traffic on the day in question also caused a disruption to the orderly operation of the school because many students were late to school. The court finally highlighted its conclusion that the school had not discriminated against types of demonstrations, it had simply not created a limited open forum to allow demonstrations at all.

Disposition: The Court of Appeal of California, Third Appellate District, affirmed the lower court’s ruling in favor of the school district.
Citation: Donovan ex rel. Donovan v. Punxsutawney Area School Board, 336 F.3d 211 (C.A.3 2003).

Key Facts: Punxsutawney Area High School held an activity period daily in which students could choose from a variety of activities. In addition to making-up tests, tutoring, free time in the library and gym, study hall, and student government meetings, the students could attend club meetings. Student clubs that wished to gain official recognition had to go through an informal process. Once a club was officially recognized and had obtained a faculty sponsor who monitored the group, it was allowed to post signs about upcoming meetings and use the school’s public address system. The school allowed noncurriculum-related clubs to meet during the activity period. Melissa Donovan, who was a senior at the school, led a Bible club which focused on community service and student issues from a Christian perspective. Each meeting of the club began and ended with a prayer. Donovan never asked permission for the club to meet during the activity period because she speculated it would not be allowed access. At some point, the school principal, district superintendent, and school board decided the club should not be allowed to meet during the activity period because of the religious nature of the club. The board did allow the club to meet in the mornings before school. No other club, however, met at this time. In January 2002, Donovan brought suit alleging First and Fourteenth Amendment violations as well as violation of the Equal Access Act. After a hearing, the district concluded that Donovan would not likely succeed on the merits. Additionally, it held that the Equal Access Act oversight was not invoked with regard to the activity period because it did not consider the period to be noninstructional time. The district court also concluded the school’s interest in avoiding an Establishment Clause violation outweighed the plaintiffs’ First Amendment claims. Donovan appealed the district court’s decision.
Issue: At issue was whether the denial of access to facilities during the activity on the same basis as other student clubs was a violation of the Equal Access Act, the First Amendment, and the Fourteenth Amendment.

Holding: The court held that allowing other noncurriculum-related clubs to meet during the activity period while restricting Donovan’s Bible club was a violation of the Equal Access Act. The court further held that the school’s reasoning, that it would not allow the club to meet during the activity period because it was a religious club, constituted viewpoint discrimination. Lastly, the court disagreed that the school’s Establishment Clause concerns trumped the plaintiffs’ First Amendment protections.

Reasoning: The court first analyzed the case for mootness. While most cases are rendered moot when the circumstances that served as the basis of litigation are no longer present, there can arise situations the court would consider exceptions. In considering those exceptions, the court declared that the plaintiff’s claims for declaratory and injunctive relief were moot. The court also ruled, however, that the claims for damages and attorney’s fees were still open for decision and reviewed the district court’s decision in this regard. The court next looked at the term *noncurriculum* as related to the Equal Access Act. By examining the types of clubs allowed by the school, some of which were not related to the curriculum as defined by legal precedent, the court concluded the school began to open the limited open forum. The next issue to be considered was whether the activity period at the school was noninstructional time as well. The court noted that some students could choose to participate in classroom instruction, making-up tests, or attending tutoring, but many others did not. The court reasoned that the choice of a select few to be academically engaged did not render the period as instructional time. As such, the court concluded the school violated the Equal Access Act. The court then turned to
Donovan’s First Amendment claim. Relying on *Good News Club v. Milford Cent. Sch.* (2001) as well as other legal precedents, the court concluded that to exclude the club because of the religious content of its mission was viewpoint discrimination. Citing the same legal principles, the court also rejected the school’s Establishment Clause concerns.

Disposition: The United States Court of Appeals for the Third Circuit vacated the district court’s ruling in regard to declaratory and injunctive relief and reversed and remanded that court’s ruling in regard to money damages.

Citation: *Montana Vending, Inc. v. The Coca-Cola Bottling Company of Montana*, 2003 MT 282 (Mont. 2003).

Key Facts: In July of 2000, the Great Falls Public School District established policies regarding revenue enhancement from “nontax sources.” Pursuant to the policies, in March 2001, the school district entered into exclusive agreements with Coke and Pepsi to provide vending machines and drink products for the school facilities. After these arrangements were made, the school district terminated its relationship with Montana Vending. On August 28, 2001, Montana Vending brought suit against Coke and Pepsi alleging violation of Montana’s Unfair Trade Practices Act and caused Montana Vending economic injury. After an attempt by Coke and Pepsi to have the case removed to federal court, Montana Vending dismissed its claim without prejudice and refiled in the state district court adding the school district as a defendant. In a hearing in January of 2002, the district court certified two questions for the Supreme Court of Montana.

Issue: At issue was whether the school district’s act of entering into exclusive sales agreements was immune from suit and whether the school district can be subject to a suit under the Montana Unfair Trade Practices Act.
Holding: The court held that the school district was not entitled to immunity since its act of constructing a policy did not equate to creating law. The court also held, however, that the school district could not be subject to suit under the Montana Unfair Trade Practices Act because it was not a “person” as defined by the act.

Reasoning: The court first considered the school district’s assertion that it was entitled to immunity because the enactment of policies leading to the exclusive agreements was legislative actions. The court reviewed its opinion in *Dagel v. City of Great Falls* (1991), in which it held that government agencies could not avail themselves to the immunity statute for nonlegislative actions. The court also noted that legislative action should be defined as an action that results in the creation of law. The court reasoned that the actions of the school board in entering the exclusive contracts were administrative and that the school district was not entitled to immunity from suit. The court next considered whether the school district could be subject to suit under the Montana Unfair Trade Practices Act. The court, in an analysis of the language of the act, observed that school districts are not specifically mentioned in the act and the court must determine if they could be considered “a person engaged in business.” The court reviewed two previous rulings and 82 C.J.S. Section 311 to determine whether there was a distinction between a “person” and a government entity. The plaintiffs asserted that the school district fell in the category of person because it was an association of people gathered for a common purpose. The school countered with the argument that a school district is a territory organized to provide educational services. The court reasoned that the school district did not in fact fall into the category of person as defined by the act in question. Finally, because the court had already determined the school district could not be categorized as a person under the act, any business under consideration would not fall within the purview of the act.
Disposition: The Supreme Court of Montana concluded that the school district was not entitled to qualified immunity in the case but that it was not subject to suit under the Montana Unfair Trade Practices Act.


Key Facts: The Antietam School District owned a property that formerly housed Mount Penn High School until 1989. In 1989, the property was sold to a private company. At the time of the action, the property was vacant and in disrepair. The school district, because of growth in the student population, considered many options to expand classroom capacity one of which was to purchase and renovate the property it formerly owned. In November 2001, the school district entered into a sales agreement with the owner of the property contingent upon obtaining the proper zoning allowances for a school on the property. The school district proposed to renovate the building to use for lower elementary classes. In addition, the gym and auditorium would be renovated for use by schools throughout the district as well as those in the community for a variety of purposes. The school district sought zoning allowances to parking restrictions because, according to its architects, extensive structural changes to allow for more on-campus parking would make the costs restrictive in the project. During hearings, the Zoning Hearing Board heard several statements for and against the school district’s proposal. The zoning board granted the exceptions requested by the school district. That decision was appealed to the trial court which affirmed with some modifications. The trial court limited the use of the gym and auditorium to students who would be attending the elementary school. Both the school district and those who objected to the project appealed the trial court’s decision.
Issue: At issue was whether the trial court should restrict access to the school’s facilities to only students of the school.

Holding: The court held that the local zoning board was within its authority to restrict the school’s intent to use the auditorium and gym for all students in the district and community events. The court also held that the state’s Public School Code did not preempt the authority of the local zoning board as long as the board’s restrictions did not interfere with the school’s core function.

Reasoning: The court began by examining Section 202 of the Mount Penn Zoning Ordinance, which regulated accessory use of facilities. The court observed that the school’s stated intent to primarily use the full-sized gym and auditorium as a play area for elementary students was within the guidelines of the ordinance. The further intended use for all students within the district and some community groups did not fall within the allowed classification. The court then considered the school district’s argument that the Public School Code granted the school board the authority to decide the uses of the district’s facilities. The court, however, cited Hazleton Area School District v. Zoning Hearing Board of Hazel Township (2001) in concluding the state’s school legislation did not preempt the local authority of the zoning board as long as the zoning board did not interfere with the school’s core function.

Disposition: The Commonwealth Court of Pennsylvania affirmed the trial court’s order.

Citation: Nichols v. Western Local Board of Education, 805 N.E.2d 206 (Ohio Com.Pl. 2003).

Key Facts: In September 2001, Nichols entered a school locker room and had a verbal altercation with her daughter’s coach. Two days later, the principal and athletic director of the school contacted Nichols to inform her she would not be allowed to attend any activities of the
school district for a 3-month period. Nichols appealed to the school superintendent who upheld
the ban. The parent then requested to be placed on the agenda at the next school board meeting.
At the meeting, Nichols brought counsel to address the ban. After hearing statements from
administrators, the parent, and members of the public, the board voted to uphold the ban. Nichols
filed an appeal to the court of common pleas.

Issue: At issue was whether the school board’s ban of Nichols at school district activities
without having adopted formal rules and granted a due process hearing was a violation of that
parent’s constitutional liberty interest.

Holding: The court held that even though the school had not adopted a formal policy
regarding the issue under consideration, the board still had statutory authority to carry out the
ban. The court held that the plaintiff did not have a constitutional right of access to the school
property. Finally, because the issue was deemed not to fall under constitutional protections, the
school did not have to conduct a due process hearing in the matter.

Reasoning: The court began by examining the Ohio statutes that granted school boards
authority to govern schools. The court considered the plaintiff’s argument that the board failed to
adopt rules regarding the issue under consideration and, therefore, could not enforce a policy it
had not enacted. The court reasoned that the statute granted sole authority to manage and control
the school, absent an abuse of discretion. Therefore, the failure of the board to adopt a policy for
any possible issue did not negate its authority in the decision to ban Nichols from the campus.
The court next considered the plaintiff’s assertion that she was denied a constitutional freedom to
participate in her child’s education. The court cited several cases, including Lovern v. Edwards
(1999), in support of its conclusion that while a parent does have a recognized interest in the
education of their child, that interest does not guarantee right of access to the school’s facilities.

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Disposition: The State of Ohio, Court of Common Pleas, Pike County ruled in favor of the Western Local Board of Education.

2004

Citation: Van Deelen v. Shawnee Mission Unified School district #512, 316 F.Supp.2d 1052 (D.Kan. 2004).

Key Facts: In October 2000, Matt Van Deelen sustained a broken leg while participating in a football practice at Shawnee Mission West High School. Michael Van Deelen, his father, complained to the school administration because, according to him, his son did not receive any medical attention. The father also complained that the administration did not conduct an investigation into the incident. In 2002, while playing in a football game, Matt became sick and a doctor was called on to check on him. Despite the doctor’s conclusion that Matt had an elevated heart rate, he was asked by the coach to continue playing. The father again expressed his displeasure over the coach’s actions and the alleged refusal of the school administration to investigate. Van Deelen threatened to file a lawsuit. On October 28, 2002, the school principal prohibited Van Deelen from being on any school district property except to transport his son to and from school. In November 2002, the school held an academic awards banquet. The principal believed the plaintiff attended and, according to the plaintiff, issued a memo accusing Van Deelen of that and several other disorderly behaviors. The plaintiff also accused the principal of sending out another letter stating that Van Deelen had engaged in disorderly behavior in a meeting. In December 2002, Van Deelen brought suit alleging negligence, defamation, invasion of privacy, and infliction of emotional distress. On January 7, 2003, Matt and his father attended a wrestling meet at a nearby high school. While at the meet, the plaintiff was reported to have
engaged in disorderly behavior and Matt mooned students at the meet. On January 9, the assistant principal suspended Matt for 5 days but signed paperwork that stated he would be in good standing upon returning to school afterwards. On January 10, the plaintiff filed another lawsuit alleging his son was suspended without the benefit of due process and asserted several counts of misconduct by the administration. On that same date, a letter was sent to Van Deelen stating that Matt was not allowed to participate on the wrestling team because of his conduct at the wrestling meet. Van Deelen accused the principal of sending the letter in retaliation because the plaintiff filed the lawsuits.

Issue: At issue was whether the school district’s ban of Van Deelen from being on the school campus was a violation of constitutional rights.

Holding: After an examination of each issue asserted by the plaintiff, the court concluded the allegations were not based on constitutional claims. As such, the court held the defendants were entitled to qualified immunity in their individual capacities. The court also held that the lack of a constitutional basis for the plaintiff’s allegations meant the claims against the school district were invalid.

Reasoning: Because the plaintiff brought suit against the school district and several individuals employed within the school district, the court began by applying the qualified immunity test to the facts beginning with the first part, whether a constitutional rights violation took place. The court first pointed out that part of the allegations involved the plaintiff’s son and that in a civil rights suit the claim must be based on an action that occurred against the rights of the plaintiff, not someone else. The court next observed that in the plaintiff’s allegation he was banned from campus and he did not assert a constitutional right to be there. Similarly, the plaintiff did not assert a constitutional violation when he claimed he was defamed leaving the
only charge to be assessed the alleged retaliation because of the plaintiff’s legal actions. The
court pointed out the basis for a First Amendment suit involving retaliation must center on
constitutionally protected activity. Since the plaintiff alleged retaliation for previously filed
lawsuits and those lawsuits had been deemed to not involve constitutional allegations, the
allegation of retaliation was without foundation. The court concluded that the defendants, in their
individual capacities, were entitled to qualified immunity. While the school district could not
claim qualified immunity, the court noted it had already concluded there to be no constitutional
basis for the plaintiff’s allegations. This led the court to reject the plaintiff’s claims against the
district. The plaintiff’s remaining motions and state claims were dismissed as well.

Disposition: The United States District Court for the District of Kansas denied the
plaintiff’s motions in all respects and granted the defendants’ motions to dismiss thereby
dismissing the case.

Citation: Caudillo ex. Rel. Caudillo v. Lubbock Independent School District, 311

Key Facts: On September 9, 2002, Lubbock High School teacher Joseph Schottland
requested permission in a letter to Assistant Superintendent Hardin for the Gay and Proud Youth
Group to advertise their off-campus meeting at the school. At approximately the same time,
student members of the group wrote to Board of Trustees member Waite for permission to post
flyers regarding the club at the school and use of the school’s public address system. On
September 20, the request was made again in a presentation. On November 6, the two student
members of the group formally requested in writing the permission they sought. On that day,
Deputy Superintendent Havens notified the students they would be placed on the board’s agenda
for November 14, 2002. At the meeting, the students addressed the board but no action was taken
to grant permission. Teacher Schottland later contacted the board president with his concerns that permission had not been granted and suggested the group be allowed to post flyers but not use the public address system. On December 19, one of the student members requested permission from the principal for the group to meet on campus. The request was denied. The request was then made of Hardin who also denied. The school district stated that the group’s website at the time the requests were made contained direct links to websites containing graphic and explicit sexual content. The defendants also stated that the denial of the students’ requests followed the district’s abstinence-only policy regarding any sexual activity. Also, the defendants pointed out that at the time the requests were made, Texas law banned sexual acts between same sex partners and made it a crime for minors of the same sex to engage in sex. Plaintiffs brought suit seeking declaratory relief alleging violation of the Equal Access Act, the First Amendment, and the Civil Rights Act of 1871, 42 U.S.C. Sections 1983 and 1988.

Issue: At issue was whether the refusal to allow the Gay and Proud Youth Group access to school facilities was a violation of the Equal Access Act, the First Amendment, and the Civil Rights Act.

Holding: The court held that the Gay and Proud Youth Group violated the school district’s policies banning the discussion sex and sexual acts. Since the group’s requests for access came at a time when its literature promoted links to sexually explicit material, the court held the school was within its rights to exclude the club to maintain order as well as protect student well-being. The court finally held that the case did not represent a denial of student rights but, rather, a school’s right to maintain the community standards of what subjects are deemed appropriate.
Reasoning: The court began by examining the plaintiffs’ assertion that the First Amendment violation resulted because the exclusion was based on the viewpoint of the speech. The court observed that the school district had banned the subject matter of sexual activity entirely from the forum. As such, any group seeking to form a club, whether homosexual or heterosexual, with sexual activity as its foundation would have been disallowed. The plaintiffs also put forth that no other student group had been subjected to a website screening. The court considered the defendants’ argument that the web address was printed on the group’s flyers. The court also stated that the links to sexually explicit material on the group’s website gave the impression it was content offered by the club. Applying the three-prong test from *Miller v. California* (1973), the court ruled the content of the links to be lewd, indecent, and obscene and, further, it would be “highly inappropriate” to allow the school to promote such content on a student-sponsored website. The court rejected the plaintiffs’ claim that the requirement by the national association of the Fellowship of Christian Athletes that its ministers declare their stance regarding sex outside of marriage and homosexual relationships opened a door that should provide access for the Gay and Proud Youth Group. The court declared that the requirement of its ministers did not mean the student members had to make a similar declaration. The plaintiffs also did not provide any evidence that sexuality had been discussed at any of the Fellowship of Christian Athletes meetings. The court, in support of the school’s assertion that some of the students at the school were too young to be exposed to the sexual content presented by the club, referred to the Supreme Court’s *Tinker* (1969) opinion stating it would be justified for educators to protect students from sexually explicit or indecent speech. The court also cited *Hazelwood* (1988) in supporting the school’s right to disallow the club based on its abstinence policy. The court found the school’s reasoning for the exclusion to be in line with the requirements of
Cornelius and therefore permissible. With regard to Equal Access claims, the court began with the defendants’ claim that it denied the club in order to avoid disruptions to the educational setting and to be in compliance with state law. The plaintiffs countered with the argument that they intended to discuss the illegal conduct, not participate in it. The court considered congressional record regarding the formation of the Equal Access Act but was reluctant to form its opinion solely on that basis. The court found a similar precedent in Shaney v. Northeast Indep. Sch. Dist., Bexar County, 462 F.2d 960, 970 (5th Cir. 1972) as the basis of its conclusion that school could “reasonably forecast” disruption in limiting the club’s access. The court also aligned with Gernetke in stating that, with regard to the potential disruption, it should be left to experienced educators to control the normal operations of the school, not judges and juries inexperienced in such matters. In concordance with its conclusions, the court found it reasonable to exclude the club in question in order to maintain order and discipline on campus. Finally, the court considered the school’s responsibility in overseeing the protection and well-being of the students. Citing the Supreme Court’s Veronia decision, the court found it important to closely monitor the educational environment of the school children. Examining the defendant’s assertion that it had a compelling interest in protecting the students from a variety of harms that could result in exposing the students to sexual content that was beyond their level of maturity, the court found the school district was within reasonable bounds to exclude the club.

Disposition: The United States District Court for the Northern District of Texas, Lubbock Division denied the plaintiffs’ motion for summary judgment and granted the defendants’ motion for summary judgment.

Citation: Cina v.Waters, 9 A.D.3d 550 (N.Y.App. D3 2004).
Key Facts: Mary Cina, a probation officer licensed to carry a firearm, entered John F. Kenney Elementary School in Kingston, New York. At the time, she was carrying a pistol in a holster and was stopped by the school’s security officer. When Cina refused to leave her weapon in her car, the security officer escorted her to the school office. The principal also refused Cina entry as long as she was carrying a weapon. Cina became very loud and left the building. She returned still carrying the weapon and still acting loud and emotional. Cina finally left the building. Her behavior alarmed the school principal to the point that a letter was issued banning Cina from the school until further notice. Cina filed a petition seeking the right to enter the school building on the same basis as other parents. The Supreme Court of New York dismissed the petition holding that the principal’s actions were neither arbitrary nor capricious. The plaintiff appealed.

Issue: At issue was whether the school principal impermissibly denied Cina access the school.

Holding: The court held that, because the conditions leading to the petition and appeal had been resolved, the case was moot.

Reasoning: The court noted that neither party disputed the fact that the conditions of the restriction had been lifted and Cina had been granted access to the school on the same basis as other parents. The court reasoned that the case was therefore rendered moot. The court also observed that had it addressed the merits of the case it would have supported the Supreme Court’s ruling.

Disposition: The Supreme Court of New York, Appellate Division, Third Department dismissed the action as moot.
Key Facts: In the fall of 2002, Pinnacle Peak Elementary School’s Parent Teacher Organization began a fundraising program in which parents could purchase tiles on which they could place a message. The tiles were to be permanently displayed in the school halls. Applications for the purchase of tiles stated the school reserved the right to make modifications before displaying the tiles. Several parents submitted applications for tiles with messages referencing God. These parents were contacted and asked to remove religious messages. All did except for the Seidman family. When the school rejected their initial application with religious messages for their children, the Seidman’s submitted a second application requesting the message, “In God We Trust, the Seidman Family.” In February 2003, the application was accepted by the school and the tile was placed in the school. In March 2003, the Seidmans filed a complaint in district court alleging violation of federal and state constitutional rights as well as Arizona’s state law. Both parties submitted motions for summary judgment.

Issue: At issue was whether the school violated federal and state constitutional rights as well as Arizona law when it asked the plaintiff to alter the religious content of the message to be displayed.

Holding: The court held that the message proposed by the Seidmans’ fell within the same category of encouraging message allowed to other participants. The school asked the Seidmans to edit their message because of the religious content and the court concluded that to be viewpoint discrimination.

Reasoning: After deciding it would restrict its analysis to the United States Constitution issues, the court began with a forum analysis. The court observed that the school had reserved
the right to edit messages before display. Both parties agreed that all applications were screened and messages that were potentially controversial were required to be edited. Also, it was clear that the tiles were to become a permanent fixture in the school. Given the location inside the school and that the tiles were to be permanently affixed, the court rejected the claim that the school had created a designated public forum. The court then turned its attention to the speech, whether private or school-sponsored. Aligning its reasoning with *Hazelwood* (1988), the court recounted that the school district authorized the fundraising event, maintained control over the messages, and intended to permanently display the tiles in the hall of the school giving them the imprimatur of the school. This led to a conclusion that the program was school-sponsored speech. The court then examined whether the speech restriction in question was viewpoint discrimination. The court considered the context of the allowed expressions. The court concluded that the Seidmans’ proposed message fell into the category of praise and encouragement offered by other strictly secular messages. The court stated there was no question the excluded messages were restricted because of their religious content and once the religious references were removed the messages they were deemed acceptable. Such a distinction was viewpoint discrimination according to the court. In examining the school district’s argument that they were trying to avoid an Establishment Clause violation by disallowing the tiles with religious content, the court noted that the phrase “God Bless” had, through a variety of uses and meanings, become a fairly benign phrase in American culture. The court also observed that a reasonable observer would not attach the phrase to any one faith or church. The court also stated that the displays would not be considered coercive representation of religion. For all the reasons given, the court rejected the Establishment Clause defense and concluded the school district had violated Free Speech rights.
of the plaintiff. The court also concluded the exclusion based on religious content of the message was a violation of the plaintiffs’ rights under the Equal Protection clause.

Disposition: The United States District Court for the District of Arizona granted the defendant’s motion for summary judgment with respect to free exercise, due process, and Establishment Clause complaints. The Court granted the plaintiffs’ motion for summary judgment with respect to the freedom of speech and Equal Protection Clause complaints.


Key Facts: Marilyn Harper, an African-American parent of two children in the Crestwood school district, expressed concerns about one of her daughter’s educational experience for the 1998-1999 school year. She met with the teacher and principal to express discontent with the curriculum, mode of instruction, the teacher’s disciplinary methods. After the meeting, Harper sent letters to the principal and assistant superintendent Baum. Harper also requested that her child be moved to a different classroom and in October 1998, her request was granted. Harper became unhappy with the new teacher as well. After a meeting with the new teacher, the principal, and Harper, the new teacher expressed to the principal that Harper’s requests would take away from the other children and asked that the child be moved to another classroom. The principal denied the teacher’s request. Several Crestwood teachers, the principal, and a representative of Madison Teachers, Inc. met with Baum to complain that Harper was intimidating them. They also reported Harper had a practice of coming to classrooms unannounced where she took extensive notes. The teachers also stated they thought Harper was having a negative impact on the new teacher’s health. Subsequently, the principal requested that Harper phone ahead before visiting the school. Harper responded with an “emphatic letter”
stating her objection to the request. Baum supported the principal’s request. Harper visited the school without phoning ahead and was asked to leave by the principal. Harper eventually complied with the request after the principal stated there would “be a response” if she did not leave. In the same school year, the principal informed Harper she had received some parent complaints about Harper’s actions at Parent-Teacher Organization meetings and asked her to not participate in future meetings. In the 1999-2000 and 2000-2001 school years, Harper continued similar communications to the school staff about her child’s education. In the 2001-2002 school year, Harper once again requested a meeting with her daughter’s teacher and the new principal of the school. After a meeting in which Harper was particularly acrimonious, the principal sent a letter to the parent in February of 2002 stating any meetings between Harper and teachers had to be attended by the principal. The principal had given Harper permission to have an outside observer, a retired math professor, observe the classroom but revoked the arrangement because the professor was a critic of the school’s curriculum. Harper brought suit alleging under Section 1983 alleging racial discrimination and violation of the Equal Protection Clause because her access to the school was restricted in a way White parents’ access was not. The district court granted summary judgment in favor of the school district holding that Harper had not shown that the white parents in question were similarly situated. Harper appealed the district court’s summary judgment.

Issue: At issue was whether the school’s restrictions on Harper’s access were racially motivated violation of the Equal Protection Clause under Section 1983.

Holding: The court held that none of the White parents presented by Harper as proof of her allegation were similarly situated and, as a result, had not established a prima facie case of discrimination in the matter.
Reasoning: The court first observed that to prove an Equal Protection violation under Section 1983, the plaintiff had to show, either directly or indirectly, that she had been subjected to intentional discrimination. Since Harper offered no proof using the direct method, she had to show that she was a member of a protected class, that she was similarly situated to members of an unprotected class, and that she was treated differently than those of the unprotected class. The court quickly concluded that the parents to whom Harper compared herself were not similarly situated. Those parents, the court stated, had not complained in the “strident fashion” that Harper had or been the subject of parent complaints. Those parents had not made repeated requests to have their children moved to other rooms, gone into classrooms without permission, or asked for outside evaluation of the teachers. The court concluded that, failing to prove she was similarly situated, Harper had not established a *prima facie* case.

Disposition: The United States Court of Appeals for the Seventh Circuit affirmed the district court’s grant of summary judgment in favor of the defendants.

Citation: *Bannon v. School District of Palm Beach County*, 387 F.3d 1208 (C.A.11 2004).

Key Facts: A high school in the Palm Beach County School District was undergoing renovations that were expected to take up to 4 years. The school undertook a beautification project to mask some of the construction. Students were invited to paint murals on a series of wooden panels in the school. Participants were instructed that the content could not be profane or offensive. Members of the school’s Fellowship of Christian Athletes decided to participate in the project and painted three murals depicting Christian symbols and referencing God and Jesus. On Monday following the Saturday session in which the murals were painted, there was a commotion on campus involving vocal students and teachers over the content of the murals. Later the same day the school received media attention from several local print and television
news representatives. School principal Ed Harris directed the student leader, through a teacher, to paint over the religious symbols and words on the murals but allowed the remaining images to stay. The student chose to repaint the murals. Other murals containing profanity, gang symbols, and satanic images were similar directed to be changed by Harris. The plaintiff brought suit alleging violation of First Amendment rights. The district court granted summary judgment in favor of the school district. The plaintiff appealed.

Issue: At issue was whether the school district improperly engaged in viewpoint discrimination by asking the plaintiff to edit a mural containing religious expression.

Holding: The court held that the school was a nonpublic forum and the murals were deemed school-sponsored expression. Citing principles garnered from *Hazelwood* (1988), the court held the murals were subject to restriction.

Reasoning: The court began analysis by determining the forum status of the school. Citing legal precedent from *Perry*, the court reasoned the school had maintained control over the content because participants were given guidelines not to include profane or offensive material. Also, the project was under the oversight of a faculty member. The court stated this control maintained the nonpublic forum status of the school. The court then turned to the regulation of expression within the nonpublic forum. The court set aside the plaintiffs’ assertion that the district court should have applied the *Tinker* (1969) standard rather than *Hazelwood* (1988). The court concluded the activity had occurred in a curricular context placing it in the realm of *Hazelwood* because it was under the supervision of the school faculty. Also, the activity allowed the students to express themselves artistically for fellow students’ benefit and appreciation and at the same time promote school spirit. Because the activity bore the imprimatur of the school, the court finally regarded the manner of the restriction. The court pointed out that the plaintiffs’ use
of Lamb’s Chapel and Rosenberger was not on point because the murals in question were not expressing a religious perspective of a secular topic. The court also noted that the school had a legitimate pedagogical concern in avoiding the disruption of the learning environment as experienced at the initial display of the murals. Following the guiding principles of Hazelwood (1988), the court concluded the decision to disallow the religious content of the mural was not a constitutional violation.

Disposition: The United States Court of Appeals for the Eleventh Circuit affirmed the district court’s ruling in favor of the school district.

Citation: Child Evangelism Fellowship of New Jersey v. Stafford Township School District, 386 F.3d 514 (C.A.3 2004).

Key Facts: In 2002, the Child Evangelism Fellowship of New Jersey applied for permission to use a classroom at McKinley school for weekly meetings of a Good News Club. The form was approved by the school principal and the superintendent in March of the same year. At the same time, the superintendent verbally rejected a request to have literature and permission slips distributed in the school. In May 2002, the group again asked permission to have literature and permission slips distributed at the school and also to be allowed a table at the school’s Back-to-School nights. These requests were denied. In the summer of 2002, the group applied for the use of classrooms in McKinley and Ocean Acres schools for the next school year and requested permission again to distribute literature. In September 2002, the district failed to give the group a final decision and, since the Back-to-School night was fast approaching, Child Evangelism Fellowship brought suit and requested a temporary restraining order. The plaintiffs alleged violation of freedom of speech, free exercise of religion, and equal protection rights. Despite denying a temporary restraining order, the district court later granted a preliminary
injunction holding the group was likely to succeed on the merits of at least one of its claims. The school district subsequently appealed.

Issue: At issue was whether the school district’s denial of access to the Child Evangelism Fellowship of New Jersey was a violation of freedom of speech, free exercise of religion, and equal protection rights.

Holding: The court held that the school district had engaged in viewpoint discrimination against the group. The court also held that the school’s claim that the discrimination was necessary to avoid a violation of the Establishment Clause did not hold up under scrutiny.

Reasoning: Because the plaintiffs’ claim involved First Amendment rights, the court examined the record as a whole in reaching its determination. The court first examined the school’s claim that the speech in question was school-sponsored and, therefore, subject to the restraints of Hazelwood (1988). The court disagreed by chronicling the differences between Hazelwood and the current case. Unlike Hazelwood, the school had not taken part in the construction of the printed material. Neither could the case be compared to Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 147 L. Ed. 2d 295, 120 S. Ct. 2266 (2000) in which a pre-game prayer was considered school-sponsored because it was carried out by the school’s student chaplain. The court next considered the school’s assertion that regardless of the nature of the speech, the forums to which the group wished to gain access were closed. The court, however, considered the school’s practice of opening the forums to a wide range of groups. Once the limited forum was established, the school could not unreasonably restrict access nor discriminate on the basis of the content of speech. The court further reasoned that even if the forums were closed, Lamb’s Chapel instructed that restrictions must still be viewpoint neutral. The court next examined whether the school’s restrictions were indeed viewpoint neutral. The court first
observed that Child Evangelism and its materials satisfied all of the district’s policy requirements for acquiring permission to use facilities. The court next dissected the additional reasons offered by the school for restricting the club’s access: it excluded groups representing special interests, it only allowed mundane recreational activities, it excluded groups that were divisive or controversial, it restricted any speech that promoted a point of view, it restricted any group that proselytized, and it restricted all religious speech. The court discounted each in turn and considered the entirety to be rationalizations to discriminate based on certain content. The court also pointed out the Supreme Court’s rejection of similar claims in *Good News Club v. Milford Cent. School*. Aligning with that decision, the court reasoned that the school district’s treatment in this case was viewpoint discrimination because of the religious content of the club’s focus.

The court also described the similarities in the club’s moral teachings and those of other authorized groups, namely the Boy Scouts and Girl Scouts. The only distinction between the two was the religious perspective on an otherwise acceptable topic. Finally, the school district offered that to allow access to the religious club would cause the school to violate the Establishment Clause. The court employed *Mergens* and *Lamb’s Chapel* to support its conclusion that the recognition of a religious club would not necessarily constitute an Establishment Clause violation. The court also reasoned that granting equal access to the club would not violate the *Lemon* test nor would it be a coercive attempt to engage the students in religious practice.

Disposition: The United States Court of Appeals for the Third Circuit affirmed the ruling of the district court in favor of the plaintiff and remanded the case for issuance of permanent injunctive relief and other relief as appropriate.

Citation: *Demmon v. Loudon County Public Schools*, 342 F.Supp.2d 474 (E.D.Va. 2004).
Key Facts: In 2001, a parent group began a fundraising project for Potomac Falls High School. The project would allow for the purchase of commemorative bricks bearing personalized messages to be placed in a walkway on school property. The parent group oversaw the project in all aspects including the advertising, collecting money, taking the orders, selecting the symbols to be used, and installing the bricks. Included in the symbols that patrons could choose was a Latin cross. In January of 2003, the school principal received complaints about the bricks that displayed the Latin cross. After talking to legal counsel and representatives from the parent organization, the decision was made to remove the bricks bearing the symbol, pay for replacement bricks, and refund the extra amount that had been paid by those patrons for the graphic image. The bricks were removed in February 2003. On March 25, 2003, the board adopted a new policy that any permanent attachments to school property would be limited to a student or staff member name, class, grade, or year that person was in the school. Plaintiffs filed suit against the school district alleging that the removal of the cross symbol was a violation of federal and state constitutions and seeking declaratory relief. The defendant school district responded with a motion to dismiss. The court granted the defendants’ motion with regard to the free exercise claim but declined to dismiss freedom of speech and establishment clause claims. The parties filed cross-motions for summary judgment agreeing that the issue could be resolved as a matter of law in this manner.

Issue: At issue was whether the removal of a Latin cross from a commemorative display at a school was a violation of the freedom of speech and establishment clauses of the Constitution.

Holding: The court held that the Latin cross was protected speech for First Amendment purposes and, since the school had established a limited open forum, to disallow the cross but no
other secular images was impermissible viewpoint discrimination. The court additionally held that the presence of a Latin cross on the few bricks purchased by patrons would not constitute a violation of the Establishment Clause.

Reasoning: The court first considered the school’s assertion that the case was rendered moot when the forum was closed. The court reasoned that the issue of the removal of certain speech because of its religious content did not completely settle the issue because the secular expressions remained in place. The court next considered the plaintiffs’ assertion that school engaged in viewpoint discrimination. The court first reasoned that the display of a Latin cross was protected speech. After an extensive forum analysis, the court reasoned the school had created a limited public forum that was opened to certain groups. In that context, the court had to determine what types of speech were allowed within the forum. The court found that several of the symbols chosen by patrons represented meaning outside the school realm. The project, when advertised, allowed students to choose symbols which best represented them. The court sided with the plaintiff that the school had opened the forum for expression that was important to the student. The court reasoned that the restriction of the Latin cross was viewpoint discrimination and, therefore, impermissible. The court considered Hazelwood (1988) and Fleming in reaching a conclusion that the bricks in this case did not bear the imprimatur of the school nor did it represent a type of pedagogical interest and could not be considered school-sponsored speech. The court then applied the Lemon Test to determine if the defendants would have violated the Establishment Clause had they not removed the bricks. The court concluded that the presence of the Latin cross on some of the bricks in the display would not violate the Establishment Clause.
Disposition: The United States District Court for the Eastern District of Virginia, Alexandria Division granted the plaintiffs’ motion for summary judgment and ordered the original bricks to be returned to the display.

2005


Key Facts: In November 1997, Scalise, father of third grader Ben Scalise, attended a Cub Scout meeting at Fancher Elementary School. Scalise volunteered to become a den leader for the organization at the meeting. After reviewing Boy Scout literature, Scalise realized leaders in the organization were required to endorse the Boy Scouts’ declaration of religious principle. In January of 1998, Scalise sent a letter detailing his objection to the requirement because of his personal beliefs and asked for an exemption to the requirement. Rather than grant an exception, the Boy Scouts revoked Scalise’s membership causing him to remove Ben from the group. Scalise contacted the school to relate his concerns about the religious nature of the organization and requested that future flyers contain a disclaimer stating that the group had a religious component. In May 1999, Boy Scout flyers were sent home that did not include the requested disclaimer. Scalise again contacted the school and, at the school’s request, the disclaimer was included on the flyers. Even though the disclaimer was included in a distribution in December 1999, Scalise continued to complain that flyers were given to the students at school. In October 2000, Scalise brought suit alleging that the Boy Scout’s use of the school amounted to excessive entanglement with religion in violation of the equal protection and free exercise of religion clauses of the Michigan constitution. After both parties filed cross-motions for summary disposition, the circuit granted in favor of the defendants on claims except for the establishment
The circuit court held that recruiting for the Boy Scouts during the school day created a liability for which the defendants were responsible. In February 2002, the defendants moved to dismiss that portion of the circuit court’s ruling contending that, since the court had already ruled the scout organization was not a state actor, absent a state action, the Boy Scouts were should not be liable for damages and the action should be dismissed. The court granted the motion to dismiss after which the plaintiffs appealed.

**Issue:** At issue was whether allowing the Boy Scouts to use school facilities was a violation of the establishment, equal protection and free exercise clauses of the Michigan state constitution.

**Holding:** The court held that school’s policy of allowing the scout organization to use the school on the same basis as other groups did not constitute an establishment clause violation. The court additionally held that the scout’s requirement of religious endorsement could not be equated with a school endorsement of religion. Finally, the court held that the scout’s banning of the plaintiffs from meetings did not keep them from enjoying access to facilities in other ways.

**Reasoning:** The court began by examining the establishment clause claim asserted by the plaintiff. The court stated that the *Lemon* test was the appropriate standard of analysis because of the similarity between the state and federal establishment clauses. The school’s policy was developed for the purpose of opening the facilities to the public. That purpose proved to be a secular purpose thus satisfying the first prong of the test. The court considered assertions by the plaintiffs that the school’s policy advanced religion. First, the plaintiffs argued that the policy’s hierarchy of group use gave the Boy Scouts special privilege over other groups. According to the plaintiffs, this, coupled with the religious component, amounted to advancement of religion. The court, however, disagreed stating that the Scouts’ use of the school which was allowed by a
policy deemed to be secular did not create a violation of the state’s establishment clause. The scouting organization was simply one of many types of groups taking advantage of the school’s policy allowing use of facilities. Second, the plaintiffs alleged that allowing the Scouts to hang posters and use school personnel to distribute literature violated the establishment clause. The court again noted that several organizations were allowed that same access to distribute literature through personnel and to hang posters. The teachers distributing literature did not talk about the literature or use the content as part of the curriculum. The court also pointed out that it wasn’t until the plaintiffs required a disclaimer noting the religious aspect of the group that the literature contained any reference to religion. The court added that this request by the plaintiffs made them ineligible to claim injury on the basis of the religious content of the flyers and, furthermore, the policy still did not violate the state’s establishment clause. The court also rejected the circuit court’s original ruling that Boy Scout visits during school hours represented a violation. The Scout Oath, which contains some reference to religion, was not recited during the school visits. It was used at private meetings after school hours which were attended voluntarily by the students. The court discounted arguments by the plaintiffs that the school violated the third prong of the Lemon test stating the school’s involvement with the group was to monitor the literature for compliance with the school’s policy. The court next turned to equal protection claims by the plaintiffs. For the plaintiffs to succeed on this count, the school’s actions had to be deemed discriminatory state action. In other words, the Boy Scouts’ requirement of religious endorsement would have to be equated with the school requiring that endorsement. To determine this relationship, the court examined several factors and found that the Boy Scouts was not a state actor and was not performing government functions. The court finally considered the public accommodation claims. The court rejected plaintiffs’ assertion that, because the scout meeting
had become closed to them, they could not exercise the “full enjoyment” of the facilities. The court reasoned the plaintiffs had shown no attempts to exercise those rights and, even if not allowed in the scout meetings, they could still enjoy access to the facilities in other ways.

Disposition: The Court of Appeals of Michigan affirmed the circuit court’s grant of summary disposition in favor of the defendants.

Citation: *Crowley v. McKinney*, 400 F.3d 965 (C.A.7 2005).

Key Facts: Daniel Crowley was the noncustodial parent of two children in Hiawatha Elementary School. As part of his divorce decree, he was entitled to access to records maintained by third parties including the school. The divorce decree also stated that the parties should inform the school to send duplicate records so the parents would not have to communicate about school issues. Crowley complained to the school that his son was being bullied and that he was not receiving the records to which he was entitled. Crowley wrote letters to school principal McKinney about the issues and asked for increased supervision of his son. He also provided the school with self-addressed envelopes so he could receive the records. After another incident involving his son, Crowley went to the playground to observe his son during recess. When he was told he could not be on the playground, Crowley volunteered to be a playground monitor but was turned down by McKinney. The school also did not allow Crowley to attend a book fair at the school. Crowley brought suit alleging violation of a constitutional right to participate in his son’s education as well as equal protection and freedom of speech violations.

Issue: At issue was whether the school violated the plaintiff’s constitutional rights when it denied him access to the school and did not provide extra copies of school communication.

Holding: The court held that the plaintiff did not present evidence that a noncustodial divorced parent had a constitutional right to participate in a child’s school experience to the
extent he wished to be involved. The lack of a constitutional violation led the court to hold that McKinney was entitled to immunity. The court also held that Crowley’s First Amendment and Equal Protection claims should not have been dismissed by the district court.

Reasoning: The court noted the crux of Crowley’s case was the claim that the school interfered with his constitutional right to participate in the education of his child. The court observed that the cases cited by Crowley in support of his claim were not on point because they dealt with issues different than his claim. They also involved parents acting in concert for the benefit of their child, not a noncustodial parent seeking greater involvement in his child’s school experience. The court also pointed out the impossible position schools must navigate when they are brought into custody issues that are the result of divorce. The court stated that judges lack the experience to order the level of involvement schools should have in such matters. The court looked to *Troxel v. Granville*, 530 U.S. 57, 65-73, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000) and *Santosky v. Kramer*, 455 U.S. 745, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982) for guiding principles pertaining to limits on a noncustodial relative’s rights. The court concluded that a noncustodial situation rising from a divorce did not present a constitutional right to participate in the child’s school experience to the extent that Crowley wished and, as a result, McKinney was entitled to immunity. While the school district itself could not access immunity, the court ruled the extent of the school’s involvement was that it did not act to overrule McKinney’s actions. This failure to act did not make the district liable under a Section 1983 claim. With regard to the equal protection claims, the court reasoned the plaintiff had shown in his pleadings that he had been publicly critical of the school administration and he was later denied access to the school’s facilities. The court noted that there may have been sufficient reason for keeping Crowley off-campus, but it had to go by the facts presented and the plaintiff had met the burden to proceed.
The court concluded the lower court had dismissed the case prematurely. That claim and the First Amendment claim should have been allowed to go forward because the public nature of Crowley’s criticisms prior to the current incident gave rise to the possibility of violations. These should have been resolved at trial.

Disposition: The United States Court of Appeals for the Seventh Circuit affirmed the district court’s ruling with regard to dismissal against the principal and reversed the dismissal of one Equal Protection claim and the First Amendment claim. The court also ordered the reinstatement of the plaintiff’s state claims.


Key Facts: Cole brought a Section 1983 complaint against school superintendent Worman, Sussex County Sheriff’s Officer Loevlie, and the Montague School Board of Education because of events that led to Reginald Cole being removed from school property. Cole alleged the school improperly removed him without a court order and falsely imprisoned him. Additionally, Cole alleged the school improperly banned him and his wife from school facilities without a hearing and refused to grant a request for a hearing. The district court, when superintendent Worman did not answer the plaintiff’s amended complaint, entered a default judgement against him. Later, Worman moved to dismiss and the district court granted because there were no federal or state laws implicated in Cole’s allegations. The district court also granted summary judgments for all of the remaining defendants. Finally, the district court vacated its previous default judgment against Worman. The plaintiff appealed.

Issue: At issue was whether the removal of the plaintiff from campus and subsequent denial of access to the school was a violation of constitutional rights.
Holding: The court held that the arguments put forth by the plaintiff lacked merit to proceed.

Reasoning: The court first noted, in support of the district court’s dismissal, that the plaintiff’s allegations against Worman did not specify action that could be classified as a constitutional violation. Second, the record reflected that Officer Loevlie did not use physical force to remove Cole from school premises and, lacking a constitutional claim, the district court’s grant of summary judgment was proper. Additionally, the plaintiff did not show legal precedent to support the assertion that a court order was necessary to validate the plaintiff’s removal from campus. Citing *Lovern v. Edwards, 190 F.3d 648 (4th Cir. 1999)*, the court stated the allegation of improperly banning the Cole’s from campus without a hearing was without merit. Finally, the court concluded the district court did not abuse its discretion when it found good cause to set aside the previous default judgment against Worman.

Disposition: The United States Court of Appeals for the Third Circuit affirmed the district court’s judgment in favor of the defendants.

Citation: *Carpenter v. Dillon Elementary School District 10, 149 Fed.Appx. 645 (C.A.9 2005)*.

Key Facts: Jaroy Carpenter had been asked to speak at a school assembly for Dillon Elementary School. Carpenter was to be paid $1000.00 by the Dillon Ministerial Association for speaking at the assembly and for serving as master of ceremonies at a religious rally to be held the same evening. The school later decided that it would not allow Carpenter to speak. Carpenter brought suit alleging the district “denied him a valuable government benefit” and that it “infringe[d] on constitutionally protected interests.”
Issue: At issue was whether the cancellation of a speaking engagement constituted a Section 1983 violation.

Holding: The court held that since Carpenter was not to be paid by the school district for his speaking engagement, he was not denied a “valuable government benefit” when the event was cancelled.

Reasoning: The court focused its attention on whether Carpenter had a constitutional right to speak at the school assembly. Considering the plaintiff’s use of Perry v. Sindermann, the court pointed out that Carpenter was not to be paid by the school for the speaking engagement. Because of this, the value allegedly denied by the school district was not the same as in Perry v. Sindermann. Because the school district’s denial did not result in the withholding of a “valuable government benefit,” the court determined the plaintiff’s claim failed.

Disposition: The United States Court of Appeals for the Ninth Circuit affirmed the district court’s grant of summary judgment in favor of Dillon Elementary School.


Key Facts: In the 1999-2000 school year, Antonio Peck was in Susan Weichert’s kindergarten class. As a part of a two-month environment unit, students were asked to create posters depicting what they had learned about the environment to presented to the class and displayed at an assembly. Parents were encouraged to work with their children to create the posters and Peck’s mother assisted him. According to the mother, Antonio wished to convey that Jesus was the only way to save the environment. The two used pictures and art materials to create a display including a likeness of Jesus kneeling with arms raised toward the sky, a picture of a rock with the word “Savior” on it, and the Ten Commandments. The poster also included the
phrases, “the only way to save our world,” “prayer changes things,” “Jesus loves children,” “God keeps his promises,” and “God’s love is higher than the heavens.” When Antonio turned in the poster, the teacher took it to the principal who directed the teacher to tell Antonio to redo the assignment. The principal then contacted school superintendent Gilkey who agreed with the principal’s directive. Antonio and his mother prepared a second poster this time depicting the likeness of Jesus as before, a church with a cross, people placing trash in a recycling can, children holding hands encircling the globe, clouds, trees, a squirrel, and grass. Upon submission, the principal told Weichert it was acceptable to display the poster but to fold the part containing religious content back since it did not relate to the content taught. The plaintiffs filed suit and the district court granted the school district’s motion to dismiss. The court later ruled that the decision was made without the Peck’s having an opportunity to present evidence on key disputed facts, vacated the judgment and remanded to case to district court. On remand, the district granted summary judgment in favor of the school district again. The plaintiffs appealed.

Issue: At issue was whether the censoring of part of Antonio Peck’s poster was a violation of the Establishment Clause and First Amendment rights.

Holding: The court agreed with the district court that Hazelwood (1988) was the appropriate standard but disagreed that there was no issues of material fact. The court held that summary judgment should not have been granted with regard to the free speech claim.

Reasoning: The court reviewed the district court’s ruling de novo attempting to determine if there was an issue with any material fact and if judgment as matter of law was warranted. After an analysis of the forum, the court concluded the ruling standard in the case was Hazelwood (1988), not Tinker (1969). The court proceeded with an analysis of the speech restriction according to Hazelwood. The court relied on testimony by the teacher and principal
that they were concerned about the consequences if they displayed the religious content of the poster. Additionally, if there had been secular images that were not related to the unit, the two stated they probably would not have censored the content. Accordingly, the court conjectured that in trial the school district’s action would be deemed viewpoint discrimination. The court then examined whether the restriction was related to pedagogical concerns under Hazelwood (1988). The court observed that both Perry and Cornelius established that in a nonpublic forum viewpoint discrimination was unconstitutional. The court reasoned that the Supreme Court would not likely overturn these decisions without extensive discussion. As such, the court concluded that even if the school could show legitimate pedagogical reason, it should not deviate from those precedents without allowing such a discussion to take place at trial. With regard to the Establishment Clause claim, the court stated the Lemon test was the appropriate standard of analysis and the district court’s dismissal of the claim on that basis was proper.

Disposition: The United States Court of Appeals for the Second Circuit vacated the district court’s dismissal of the free speech claim and affirmed the dismissal of the Establishment Clause claim. The court remanded the case for further proceedings.


Key Facts: In September 1994, the Board of Education of the City of New York denied a request by the Bronx Household of Faith to rent the use of Anne Cross Merseau Middle School. The church wanted to use the facilities for Sunday morning meetings. Upon denial of the request because of board policy and New York Education Law, the plaintiff brought suit in district court. The court held that the school had created a limited open forum but that the restriction was legitimately related to the school’s business and reasonable. The plaintiff appealed that grant of
summary judgment in favor of the defendants which the Court of Appeals affirmed. Following the Supreme Court’s ruling in *Good News Club v. Milford Central School*, the plaintiffs renewed their request for access to the school facilities. The church wished to use the school each Sunday to “engage in singing, the teaching of adults and children from the viewpoint of the Bible, and social interaction among members of the Church to promote their welfare and that of the community.” After the board again refused, the plaintiffs filed a complaint and the court granted their motion for preliminary injunction. The court later concluded the plaintiffs would likely succeed on the merits. The Court of Appeals upheld the preliminary injunction and concluded that allowing the church to meet in the school would not constitute an Establishment Clause violation. Subsequently, the plaintiffs reapplied for use of the school’s facilities. The school board announced plans to modify its policy to specify that permits would not be granted to groups wishing to use a school as a place of worship. Both parties were later granted permission to file cross-motions for summary judgment which they did.

Issue: At issue was whether the denial of access to school facilities to a church group was a violation of the group’s constitutional rights.

Holding: The court held the school’s restriction to be impermissible viewpoint discrimination. It additionally held the updated policy that disallowed use of facilities by any group wishing to hold a worship service was unconstitutional.

Reasoning: The court first related that it had previously determined and still considered the forum created by the school to be a limited public forum. The court next considered whether the school engaged in viewpoint discrimination in light of *Good News Club* principles. The court reasoned that the activities proposed by the church could be considered moral and character development from a particular perspective, that is, a secular topic from a religious viewpoint.
According to *Good News*, to limit the church’s speech on this basis was unconstitutional viewpoint discrimination and a violation of First Amendment rights. The court then analyzed the school board’s argument that it was attempting to avoid an Establishment Clause violation. The court applied the three prongs of the *Lemon* test to the district’s policy and concluded the policy was secular, it neither advanced nor inhibited religion, but would require excessive entanglement to monitor speech that was religious and speech that was not during a four hour session each Sunday. The court also concluded that the updated policy of disallowing use by any group wishing to hold religious services unconstitutional.

Disposition: The United States District Court for the Southern District of New York granted the plaintiffs’ motion for summary judgment and enjoined the school district from enforcing its revised policy excluding the church from access similar to other groups.

Note: The record indicates this ruling was subsequently vacated by *Bronx Household of Faith v. Bd. of Educ.*, 2007 U.S. App. LEXIS 15797 (2d Cir. N.Y., July 2, 2007). While that date falls within the range of this research, the case was not listed by the West Education Law Digest. Consequently, the above case has been briefed but the resulting data was not included in analyses.

2006

Citation: *Skoros v. City of New York*, 437 F.3d 1 (C.A.10 2006).

Key Facts: Skoros’ children were in school in the New York Public School System during the 2001-2002 and 2002-2003 school years. Because of the diversity of the student population, the school system instituted a policy allowing the observance of holidays including Christmas, Chanukah, Ramadan, and Kwanzaa to encourage respect for the many cultures of
students in the system. The school system’s Office of Legal Services developed a policy for which symbols of those holidays could be displayed in order to avoid religious endorsement violations. In December of 2001, Nicholas Tine, son of Skoros, attended Public School 165 where a holiday display included a Christmas tree, menorah, star and crescent, and kinara. In December of 2002, Christos Tine, Skoros’ other son, attended Public School 184 which had a similar holiday display of a Christmas tree, several dreidels, three menorahs, two kinaras, and a sign that read “Happy Hanukah.” The child’s classroom was decorated with several student art projects containing similar objects. There was also a December calendar with several holiday displays marking the days of the month. Christos’ teacher gave each child a Chanukah explaining the origin of the dreidel and containing pictures the students could color. Skoros commented in a letter that her son had colored the images and they had played the dreidel game together. Skoros also commented in the letter that she considered the dreidel a religious symbol and wanted to know if the children would be coloring other religious symbols. The teacher sent Skoros a copy of the district’s guidelines in which the dreidel was identified as a secular symbol that could be displayed. At Nicholas Tine’s school in December 2002, the school office displayed several of the permissible symbols and the classroom had wall displays describing each of the four holidays and their cultural significance. Skoros brought suit in February 2003 alleging the district’s policy endorsed Judaism and Islam while disapproving of Christianity. She further alleged First Amendment violations because the policy forced students to accept the Jewish and Islamic religions. Finally, Skoros alleged the district violated her right to control the religious upbringing and education of her children in violation of the First and Fourteenth Amendments. The district court granted summary judgment in favor of the school district. Skoros appealed the district court’s decision.
Issue: At issue was whether the policy developed by the New York Public School System allowing the display of certain secular holiday symbols violated the First and Fourteenth rights of Skoros’ children who were students in the system.

Holding: The court held the school district did not violate the Establishment Clause because the policy intended to develop respect for the many cultures represented in the school’s population. The court also held there was evidence that the plaintiff’s children were not forced to accept Judaism or Islam nor were they asked to give up their Catholic beliefs. The court finally held the school did not violate Skoros’ right to control the religious upbringing of her children.

Reasoning: The court first noted the wide-ranging rulings and the confusing landscape of legal precedent in similar cases. The court turned to its analysis and employed the three-prong Lemon to aid in the task. The court examined the stated aim of the policy, namely to encourage respect for the diversity of cultures present in the school system. The court stated that given the multitude of beliefs present and the fact that some of those cultures did not teach respect of others’ beliefs, the aim of the policy was sufficiently secular. The court next considered the plaintiff’s claim that the expressive means of that policy was not secular. She contended that the use of the menorah, a representation of the Jewish religious holiday, while excluding the crèche, a representation of the Christian religious holiday, amounted to the promotion of one religion of the other. The question became whether the symbols for each were exclusively religious or contained secular meaning to the objective observer. In the end, the court concluded that such distinctions did not detract from the main purpose of the policy, to create an appreciation for the diversity of beliefs in the school, and, since all of the symbols were required by the policy to be displayed in concert, the assertion that the actual practice of the school promoted one religion over another was unfounded. In short, the defendants satisfied the first prong of the Lemon test.
The court then considered whether the primary effect of the policy advanced or inhibited religion. In consideration of this “endorsement test,” the court had to decide if a reasonable observer would see the policy as government endorsement of religion. The court observed that, in the case of elementary schools, the age of the students brought special consideration when determining what the reasonable observer would perceive. In considering the total breadth of the policy and the thousands of displays it regulated throughout the district, the court concluded that the policy did not promote one religion above another. This conclusion was bolstered by the requirement that the elements of the displays not appear alone but along with the others. Thus, the second prong of the Lemon test was satisfied. For the final prong, the court considered whether the policy fostered excessive entanglement with religion. The court reasoned that the school’s policy did not try to assert government control into a private religious institution and, conversely, did not grant control to a religious entity of a government agency. With the plaintiff’s free exercise claim, the court remarked that the evidence did not show a preference of one religion over another in the allowable displays. The court stated the plaintiff also failed to show how the secular displays influenced her children’s ability to practice their faith. The court finally rejected the parental rights claim stating any such assertion had been settled in the Establishment and Free Exercise claims.

Disposition: The United States Court of Appeals for the Second Circuit affirmed the district court’s ruling in favor of the defendant school district.

Citation: Kiesinger v. Mexico Academy and Central School, 427 F.Supp.1d 182 (N.D.N.Y. 2006).

Key Facts: In the 1996-1997 school year, members of the Class of 1999, with permission of school superintendent Havens and the school board, began selling commemorative bricks as a
fundraiser for the 1999 senior class trip to Florida. The bricks were to be inscribed with messages from the purchasers as long as those messages were not obscene, vulgar, or stating “love interests.” Ronald Russell, pastor of a local church, purchased several bricks from his son, a member of the class, and had them inscribed with religious messages referencing Jesus. Robert Kiesinger also purchased a brick and had it inscribed with a religious message and a scripture reference. After the installation of Kiesinger’s brick, the high school assistant principal called Havens questioning whether the brick should be allowed. After consulting counsel, Havens decided to leave the brick in place because of a concern that removal might cause a problem with community members. After the bricks were installed, the school did receive complaints from a community member, Ms. Passer, about the display of religious messages in the display. United States Senator Charles Schumer also questioned the display of religious messages by the school. In an attempt to stave off further controversy, the school placed its own inscription on the walkway stating that the displayed messages were personal expressions of individuals from within and outside the school. Nevertheless, Ms. Passer complained about the continued display of the messages and contacted the American Civil Liberties Union. That group threatened to bring suit against the school if action was not taken to remove the messages. The school, after consulting counsel, decided to remove bricks that made reference to a specific God, for instance Jesus, but left messages that made reference to a general God. The school also removed messages containing political messages. Following the implementation of the policy, the school refused an attempt to display a political message about abortion and an attempt by Russell to again display a brick with a religious message. Kiesinger and Russell brought suit claiming violation of the Establishment Clause and First Amendment to Freedom of Speech and Free
Exercise of Religion rights. They also claim rights violations under the New York Constitution. The court was asked to consider motions for a preliminary injunction and summary judgment.

**Issue:** At issue was whether the removal of bricks bearing religious messages and the refusal to allow participation of patrons who wished to display religious messages were a violation of the plaintiffs’ First Amendment and New York Constitutional rights.

**Holding:** The court held that the school had created a limited open forum with the initial restrictions related to obscenity, vulgarity, and “love interests” messages. The court held the removal of bricks referencing Jesus but allowing those referencing God to be unallowable viewpoint discrimination. The court finally held, in light of the analysis provided by the *Lemon* test, that there was not a potential Establishment Clause violation if the bricks in question were allowed to be displayed.

**Reasoning:** The court first determined the type of forum presented by the commemorative display to be a limited public forum as defined by *Perry*. The court noted that the initial restrictions placed on the forum by the school dealt with obscenity, vulgarity, and love interest messages. The school argued that even if it had created a limited open forum, the display would reasonably be perceived to bear the imprimatur of the school and should not be allowed. Citing *Hazelwood* (1988), the school asserted that the restrictions placed on the forum needed only to be reasonably related to pedagogical concerns rather than the *Perry* and *Cornelius* standard of reasonableness and viewpoint-neutrality. In an examination of the facts, the court reasoned that the school’s actions could be connected to a legitimate pedagogical concern in that the administration was attempting to avert controversy and trying to avoid the appearance that it was endorsing a particular type of religious expression. The court, however, stated that it was necessary to consider whether viewpoint discrimination had taken place to settle the case. The
court pointed out that the school had allowed references to God to remain but removed
references to a specific view of God, namely references to Jesus. The removal of only the bricks
referencing Jesus was discrimination of speech expressing a particular viewpoint. The court next
considered the school’s Establishment Clause defense. The court applied the three prongs of the
Lemon test and concluded the purpose was secular, the expressions would be perceived by the
casual observer to be individual expression, not school-endorsed speech, and the display of
bricks with personalized religious messages did not represent an entanglement issue.

Disposition: The United States District Court for the Northern District of New York
granted a preliminary injunction and the plaintiffs’ motion for summary judgment.

Citation: Golden v. Rossford Exempted Village School District, 445 F.Supp.2d 820
(N.D.Ohio 2006).

Key Facts: In November 2004, two members of the Christian music group Pawn, who
were also students, approached Rossford High School principal, Ronald Grimm, about the
possibility of performing for a school assembly. School board member Kleeberger, also father of
one of the band members, contacted school superintendent Gernot to get her thoughts about the
group performing at the school. Initially, Gernot was supportive of the idea for the entertainment
value and artistic effort of the students involved. Kleeberger told Grimm that the concert had the
support of Gernot and arrangements were made for a school assembly on December 21. Grimm
did not state a theme for the assembly so Kleeberger decided it would be an anti-drug gathering.
Attendance by students was not mandatory with those wishing not to attend remained in the
school cafeteria under teacher supervision. In early December, Grimm received a complaint
about the upcoming assembly and the religious nature of the group to perform. After Grimm
informed Kleeberger and Gernot, Kleeberger asked the board treasurer to consult the board’s
counsel about the matter. At that time, Gernot and the board’s counsel reviewed the band’s website which stated its purpose was to “spread the word of God,” that “all of the band’s music has a Christian message,” and “the music’s first purpose is to deliver a message.” On advice of the board’s counsel, Kleeberger stated on December 14 it would be best to cancel the concert to avoid legal trouble for the district. Gernot was contacted that same day by a local news reporter to ask about the cancelled concert which surprised the principal since she had not informed any school personnel of the decision. The cancellation of the concert appeared on the front page of the local paper the next day. At a later board meeting, Gernot explained the rationale for the decision and stated the board would consider allowing the performance after school hours.

Kleeberger stated in the meeting he disagreed with the decision and asked principal Gernot to appear on Fox News with him in an attempt to “bring religion back into the school.” Despite the band members’ assurance that they would not proselytize during the concert, the school feared the band’s performance would result in an Establishment Clause violation. Subsequently, another student band that performed secular music was allowed to perform instead. Gernot stated the second band’s performance was acceptable as long as it did not have a religious mission.

Plaintiffs brought suit alleging violation of federal and state constitutional rights.

**Issue:** At issue was whether the decision to disallow the band Pawn’s performance during school hours was a violation of federal and state constitutional rights.

**Holding:** The court held that the school had not created a forum for expressive speech and could regulate speech that would bear its imprimatur. Because of this, the court found the plaintiffs’ free speech claims to be without merit. The court held that the plaintiffs’ equal protection claims failed for the same reasons.
Reasoning: The court first considered the plaintiffs’ claims that the exclusion from the assembly violated the band’s freedom of speech rights. The court stated the plaintiffs were misapplying the cited principles from *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 131, 121 S. Ct. 2093, 150 L. Ed. 2d 151 (2001). Based on *Hazelwood* (1988), the court reasoned that the school had not opened a forum for speech but had only intended to allow a single performer at a school assembly. Since that assembly could not be considered a forum of any kind, the district had the authority to exercise editorial control over the content since it might convey the idea the school endorsed the content of the speech. The court stated the assembly, to be held during school hours with one musical performer, would have born the imprimatur of the school, further strengthening the editorial control of the content. The court finally stated that even if the performance did not constitute an Establishment Clause violation, the school had the right to regulate the speech since no forum existed. The court also concluded that the plaintiffs’ equal protection claims failed based on the same reasoning.

Disposition: The United States District Court for the Northern District of Ohio, Western Division denied the plaintiffs’ motion for partial summary judgment, granted the defendants’ motion for summary judgment, and dismissed the plaintiffs’ state law claims without prejudice.

Citation: *Child Evangelism Fellowship of Maryland, Incorporated v. Montgomery County Public Schools*, 457 F.3d 376 (C.A.4 2006).

Key Facts: In 2001, the Child Evangelism Fellowship attempted to notify parents of elementary students in Montgomery County Schools about its Good News Club by several means including a take-home flyer. The group sought relief which the district court granted for all means except for the distribution of the flyer. That court held that while the while the denial to allow distribution of the flyer might constitute a First Amendment violation, the school
interest in avoiding an Establishment Clause violation would trump the plaintiffs’ claim. The
Fourth Circuit Court of Appeals reversed the district court’s ruling and remanded concluding that
the distribution of the flyers would not violate the Establishment Clause. The school district
implemented a new policy that limited the types of groups that could have access to the school’s
limited nonpublic forum. This prohibition included the plaintiffs’ group. The school district then
moved to dismiss the plaintiffs’ complaint as being rendered moot by the new policy. The district
court denied the plaintiffs’ request for permanent injunction and dissolved its previous
preliminary injunction with regards to forums previously accessible. The court also granted the
defendant’s motion to dismiss the remaining claim regarding distribution of flyers as moot. The
Child Evangelism Fellowship appealed.

Issue: At issue was whether the policy disallowing the distribution of the Child
Evangelism Fellowship’s take-home flyer was a violation of the plaintiffs’ First Amendment
rights.

Holding: The court held that the district court had wrongly applied the legal precedents
from Perry and Cornelius in holding the speech restriction needed only to be reasonable. In
examining whether the school’s policy was also viewpoint neutral, the court held that the
reservation of unbridled power to reject flyers from the forum left open the possibility of
viewpoint discrimination. The policy, therefore, violated the plaintiffs’ First Amendment rights.

Reasoning: The court began by conducting a forum analysis regarding the distribution of
take-home flyers. In its analysis, the court noted the difference between a limited public forum
and a designated public forum. In the limited public forum, the government creates access for
certain speech or types of groups where there was none before and may limit access to the forum
as long as the restriction is viewpoint neutral and reasonable. In a designated public forum, the
government makes property that normally would not be open to access available to all speakers and may restrict speech only if it meets strict scrutiny. The court then observed that the district court wrongly based its forum analysis on the assumption that in a nonpublic forum the regulation needed only to be reasonable. According to the legal precedents cited by the district court in *Perry* and *Cornelius*, the regulation also had to be viewpoint neutral. The court then sought to determine whether the district’s new policy was viewpoint neutral. The plaintiffs contended that by allowing itself unbridled authority to deny the distribution of a flyer for any reason, the school opened the possibility that it could discriminate on the basis of a flyer’s viewpoint. In examining the language of the district’s new policy, the court concluded the policy did not sufficiently address the possibility of viewpoint discrimination. The court concluded that the failure to ensure viewpoint neutrality in its policy regulating the take-home flyer forum was a violation of the group’s First Amendment rights.

Disposition: The United States Court of Appeals for the Fourth Circuit reversed the district court’s ruling with regards to the take-home flyer and remanded the case for further proceedings.

Citation: *Powell v. Bunn*, 341 Ore. 306 (Or. 2006).

Key Facts: Remington Powell was a first-grade student at Harvey Scott Elementary School in 1996. The Boy Scouts organization was allowed to make a presentation to students during that year and subsequent school years in an attempt to recruit new members. During the presentations, the representatives informed students where to obtain more information and where off-campus meetings would later take place. Even though members of the scout organization were required to profess a belief in God, the representatives did not present religious content, either verbally or in print, during the presentations at the school. Nancy Powell, Remington’s
mother, contacted the school and complained that allowing the Scouts to recruit on campus put her son at a disadvantage since, because of their atheistic beliefs, he would be ineligible to participate. Powell filed a discrimination complaint under Oregon State Law. After the school board rejected Powell’s complaint, she appealed to the superintendent. The superintendent, under Oregon Administrative Rules, conducted an investigation of the complaint and issued an order that there was no evidence of discrimination and no further action would be taken. Powell asked for review in circuit court which concluded the superintendent had abused his discretion and remanded the matter back to him for further action. The superintendent and school board appealed the circuit court’s decision and while the court of appeals held the circuit court erred in its review of the superintendent’s order, it nevertheless affirmed the circuit court’s judgment. The superintendent and school board further appealed to the Oregon Supreme Court.

Issue: At issue was whether the allowance of the Boy Scouts organization to recruit on the school campus amounted to discrimination against a student who held atheistic beliefs.

Holding: The court held that the school district’s allowance of the Boy Scouts organization to recruit in the school by providing information to all students did not amount to discrimination under Oregon State Law. Further, the court held the superintendent did not err in finding no basis for the discrimination complaint.

Reasoning: The court aligned its analysis with principles from PGE v. Bureau of Labor and Industries, 317 Ore. 606, 859 P.2d 1143 (1993) and first examined the language of the law. The court examined the use of the word discrimination in the statute and its relevance to the allegation by Powell. The court observed the definition of discrimination in the statute meant to differentiate treatment of an individual. The court pointed out that the information presented by the Boy Scouts representative, both verbally and in print, was given to all children without the
mention of religious affiliation. This similar treatment for all students, the court concluded, undermined Powell’s claim. Powell contended that allowing a club to present that her child, because of his belief, would not be able to join amounted to discrimination under the statute. In effect, it is the activity itself, not the recruitment, that was the basis for the allegation. The court reasoned, however, that the school did not allow the scout organization to discriminate in any activity at the school and conduct by the group later and off-campus was not the responsibility of the school.

Disposition: The Supreme Court of Oregon reversed the decision of the Court of Appeals and the judgment of the circuit court.

Citation: Child Evangelism Fellowship of South Carolina v. Anderson School District Five, 470 F.3d 1062 (C.A.4 2006).

Key Facts: The Child Evangelism Fellowship of South Carolina applied for permission to use school facilities for its Good News Club meetings for the 2003-2004 school year. At the time of its application, the group also requested a fee waiver based on the district’s stated policy that it could waive such fees if it were in the “district’s best interest.” The district granted permission for the group to use school facilities but declined to waive its fee. The school district stated it only allowed groups that had been in place before the fee structure was enacted to use facilities for free and to allow the Child Evangelism Fellowship free use would set a precedent the school it wished to avoid. The group held its meetings for two school years and paid the required fees. After two years, the group stopped meeting at the school, in large part, because of the financial burden caused by the fee. The group filed suit alleging First and Fourteenth Amendment violations. The school revised its policy to remove the provision allowing waivers that were in the district’s best interest. The district court held that while the “best interest” phrase left open
the possibility of viewpoint discrimination, the school had, in practice, applied the policy from a viewpoint-neutral standpoint. The Child Evangelism Fellowship appealed alleging the policy allowed for First Amendment violation.

Issue: At issue was whether the school district’s policy that allowed for fee waivers in the district’s best interest allowed for First Amendment violation through viewpoint discrimination.

Holding: The court held that while a school district may grant access to groups and charge fees to cover costs for such use, the policy in question allowed for impermissible First Amendment violation on the basis of speech content.

Reasoning: The court first observed that the Supreme Court had consistently upheld through its decisions that the reservation by the government of the authority to ban speech at will was impermissible viewpoint discrimination. The court examined the school district’s policy and found that the “best interest” provision left open the possibility for school leaders to grant or deny access based solely on their personal perception of what constituted “the good of the community.” The school district countered with the argument that actual practice sufficiently defined the best interest provision and proved a viewpoint-neutral application of the policy. The court reasoned, however, that the actual practice was not as neutral as purported. The county Democratic and Republican parties, for instance, had been allowed use of school facilities for free. Furthermore, since the Child Evangelism Fellowship had been the only group to request a best interest waiver, the court stated there was insufficient evidence to support a “past practice” of even-handed application of the policy. The court also noted that correspondence with the group did not support a self-imposed limit to granting waivers only to those groups who had been using facilities for free before the fee schedule was implemented. In short, if the intended practice was to grant waivers only to those users who had a long-standing relationship with the
school, there was nothing to indicate this in writing or in practice. The court finally noted that the construction of the policy lacked the standards necessary to avoid First Amendment violation as established in legal precedent.

Disposition: The United States Court of Appeals for the Fourth Circuit reversed the district court’s ruling and remanded for a refund of the Child Evangelism Fellowship’s fees and other relief in keeping with the court’s decision.

2007

Citation: Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County, 477 F.Supp.2d 1246 (S.D.Fl. 2007).

Key Facts: The Gay-Straight Alliance of Okeechobee High School requested official recognition and access to Okeechobee High School on the same basis as other student clubs from school principal Wiersma. The group secured a faculty advisor then developed and ratified a constitution for the group. On October 12, 2006, Wiersma refused to officially recognize the club and denied the group access to the school. On October 19, an attorney representing the group sent a letter to Wiersma to which the principal replied that the school did not allow access to groups that were not related to the school’s curriculum. Wiersma’s reply was copied to school superintendent Cooper and the district’s counsel, Conley. Plaintiffs brought suit seeking injunctive relief, declaratory judgment, and nominal damages not to exceed twenty dollars. Defendants filed a motion to dismiss asserting the plaintiffs did not have standing to bring a Section 1983 and Equal Access Act claim.
Issue: At issue was whether the school’s refusal to officially recognize the Gay-Straight Alliance of Okeechobee High School and grant the club access to school facilities was a violation of the 42 U.S.C. Section 1983 and the Equal Access Act.

Holding: The court held that the Gay-Straight Alliance could act as an association and represent its members in the action. The court also held that the group satisfied all requirements to have standing to bring suit under 42 U.S.C. Section 1983.

Reasoning: The court first pointed out that it was tasked with testing the “sufficiency of the complaint” not deciding the merits of the case. The court then examined whether the school was entitled to a claim under 42 U.S.C. Section 1983. The court observed that the statute was originally enacted to protect unincorporated associations that had been subject to discrimination. The court stated that the defendant’s claim that the group lacked standing under the statute to bring suit was in effect saying that the group wanting to be formally recognized and given the right to assemble was being told by the government it could not seek legal intervention because it was not a recognized group. The court also noted that the Eleventh Circuit Court of Appeals, in *Ouachita Watch League v. Jacobs (2006)*, held an association could bring suit on behalf of its members if they would have had standing to sue on their own, the issue at stake was part of the group’s purpose, and the claim does not require the participation of the individuals in the suit. In light of this holding, the court reasoned the Gay-Straight Alliance could represent the members of its organization in the suit. The court concluded the plaintiffs satisfied all requirements and had standing to bring suit under Section 1983.

Disposition: The United States District Court for the Southern District of Florida held that the plaintiffs’ first amended complaint could proceed against the defendant school district.
Citation: Florida Family Association, Inc. v. School Board of Hillsborough County, 494 F.Supp.2d 1311 (M.D.Fl. 2007).

Key Facts: In 2005, after the school board voted to remove some religious holidays from the 2006-2007 school calendar, the Florida Family Association, a religious advocacy group, began an email campaign to voice their desire to have the holidays retained. The supporters of the group were contacted via email and, through a link in the email, could click on a different link to send an email to all school board members, the superintendent, and the district’s general email account. When school board chair, Olson, started receiving the emails, she became concerned that the district’s email system had become infected with a virus or worm. She asked her assistant to contact someone in the technology department about the potential problem. Graber, a systems analyst for the district, asked that some of the emails be sent to him so he could determine what might be causing the emails. Graber determined that all of the emails were coming from the same IP address and at a rate the might indicate they were being automatically generated. After discussing the situation with his supervisor, the decision was made to block that IP address. After learning that the emails from the IP address were being blocked, the president of the Florida Family Association began urging members to copy the text of the automatic email into an email from their personal account and send it that way. The next day, after it was revealed that the emails were not the result of a virus but were legitimate contacts about the calendar issue, the technology department was asked to remove the block. Graber was not in the office at the time and an unsuccessful attempt was made by a different person to remove the block. The following day, it was discovered the attempt to remove the block had failed and Graber took steps to unblock the IP address. That same day, the Florida Family Association brought suit against the school board alleging First and Fourteenth Amendment violations.
plaintiffs sought declaratory judgment that the district’s mail system was an open forum and sought temporary and permanent injunctive relief enjoining the school district from blocking the plaintiffs’ political speech via email.

Issue: At issue was whether the blocking of the plaintiffs’ emails amounted to First and Fourteenth Amendment violation.

Holding: The court held that the plaintiffs’ original theory was without merit because the evidence showed that the emails were blocked because of a concern about viral infection of the system. The court also held that the plaintiffs lacked standing with regards to the amended complaints and, even if they had standing, the evidence showed the policy in question to be directed to internal supervision of email not regulation of outside senders.

Reasoning: The court first noted that the plaintiffs’ original argument, that the emails were blocked because of the content, was without merit. The court then began its examination of the plaintiffs’ new claim that the board’s policy of prohibiting unwanted or unsolicited email was a constitutional violation. The court noted that this new claim came in an amended motion that had been accepted after the time that all motions were to be completed. Nevertheless, the court decided to entertain the notion put forth. The court began by looking at whether the plaintiffs could demonstrate standing in the new claim. The court reasoned that the policy in question had not caused injury to the plaintiff in the past and was not the reason that the emails had been blocked. The court also stated the plaintiffs had not provided significant evidence to prove their standing in the claim. The court noted that the original emails were not blocked because of the political content but because of other concerns. Furthermore, the persons involved in the block were technicians who had no political agenda in effecting the block. The court also pointed out that no similar incident had taken place in the time between the first block and the date of the
opinion being rendered. The court also observed that the policy in question was intended to
govern the actions of those inside the school system, not regulate the actions of those outside.
The court concluded that the plaintiffs’ claims failed in each of the theories they presented.

Disposition: The United States District Court for the Middle District of Florida, Tampa
Division denied the plaintiffs’ motion for summary judgment, granted the defendants’ motion for
summary judgment, and dismissed the case.

Citation: Cunningham v. Lenape Regional High District Board of Education, 492

Key Facts: Thomas Cunningham’s son was a student and member of the wrestling team
at Shawnee High School in the Lenape Regional High School District. Cunningham had been
very vocal in his opinions about the coaching of the wrestling team beginning in the fall of 2003.
In December 2005, the school district counsel sent a letter to Cunningham informing him that he
could not enter any of the district’s facilities for any reason and failure to honor the ban would
result in trespass charges being brought against him. At the time, Cunningham’s son was still a
member of the school wrestling team and Cunningham also coached a youth wrestling team that
used school facilities. On January 18, 2006, Cunningham and his counsel met with the school
board, school counsel, the school superintendent, and school administrators to discuss the issue.
The superintendent stated that Cunningham had been banned from school facilities because of a
pattern of abuse and harassment toward staff members and cited specific examples of the
behavior. Cunningham denied the allegations and stated the administrators effected the ban
because of an “undifferentiated fear of him.” At the meeting, a compromise was reached that
allowed Cunningham limited access facilities to coach the youth wrestling team and attend his
son’s wrestling matches. While on school property for his son’s matches, however, he was
directed to have no communications with team members or staff during a match. Cunningham filed a complaint alleging the restrictions were a violation of First Amendment rights. Cunningham also sought damages and injunctive relief from actions alleged to have been in retaliation for protected speech under 42 U.S.C. Section 1983. The school filed a motion to dismiss.

Issue: At issue was whether the restrictions placed on Cunningham by the school district violated his First Amendment rights.

Holding: The court held that the school had the authority to guard against disruptive conduct in the school given the current environment of violence in schools.

Reasoning: The court set out to determine whether there was sufficient evidence based on the facts to support a constitutional violation that would place the issue in federal court. The court determined that while a school has a right to ban a person from school facilities for disorderly behavior, the plaintiff’s claims were sufficient to bring the matter to federal court. In further examination of the facts, the court found that as a free speech claim, there was no evidence the school acted inappropriately. The court cited Gregory v. Chicago, 394 U.S. 111, 118, 89 S. Ct. 946, 22 L. Ed. 2d 134 (1969) to point out that government entities have grounds to guard against disruptive conduct in public places. The court also noted that the school attempted to address the plaintiff’s initial concerns while at the same time asking him to abide by safety procedures with regards to access to the school and staff. After Cunningham disregarded the request, the school undertook the measures to restrict his access. The court considered the allegation that the defendants’ actions were in retaliation for his vocal opinions. The court observed, however, that he failed to produce any evidence to that effect. The court also pointed
out that while parents do have the right to be involved in the education of their children, the current climate of school violence warrants caution in protecting the safety of students and staff.

Disposition: The United States District Court for the District of New Jersey granted the defendant school district’s motion to dismiss.

Citation: Myers v. Loudon County School Board, 500 F.Supp.2d 539 (E.D.Va 2007).

Key Facts: Edward Myers was the father of three children in the Loudon County School System. He was a member of the Anabaptist Mennonite faith, which condemns the mixture of church and state, and took issue with the school’s patriotic curriculum. In March 2004, Myers submitted a request to place an ad that offered an alternative pledge in the Sugarland Elementary yearbook. Sugarland principal Ostrowski informed Myers his request was untimely and inappropriate for an elementary school yearbook. She returned his payment for the advertisement. In September 2005, Myers began handing out leaflets on the sidewalk next to Dominion High School. After being told by a security guard that he could not pass out leaflets on the sidewalk, Myers complained to school officials. Deputy Superintendent Waterhouse notified principal Brewer that Myers could use the sidewalk in question after which Myers was not further prevented from his activity. In July 2006, Myers attempted to purchase an ad in the 2006 Dominion High School athletic program including a link to “www.CivilReligionSucks.com” which advertised “flag desecration products.” The school denied his ad stating the word “sucks” was not appropriate for the publication. In September 2006, Myers asked for permission to give a flyer to every student at Sugarland Elementary School, Seneca Ridge Middle School, and Dominion High School. The request was denied on the grounds that the schools did not provide forum access for the distribution of outside flyers in any of the schools. In March 2007, Myers brought suit alleging violation of his right to direct the upbringing of his children as well as
violation of his First Amendment right to free speech and to petition the government. Defendants filed a motion to dismiss or for summary judgment.

Issue: At issue was whether the school district’s actions caused a violation of the plaintiff’s right to direct the upbringing of his children and his First Amendment rights to free speech and to petition the government.

Holding: The court held the plaintiff did not have standing to advocate on behalf of his or other children. The court also held that the request to force the school to restructure its curriculum was beyond its purview. In each of the freedom of speech claims, the court held that, based on Hazelwood (1988), the school had the authority to regulate speech that would bear its imprimatur.

Reasoning: After pointing out that the purpose of the review in a motion to dismiss was to determine the sufficiency of the complaint, the court examined each claim asserted by the plaintiff. First, the court rejected the plaintiff’s standing to advocate on behalf of his and other children because of the Fourth Circuit’s prior decision in the matter. With respect to claims the school interfered with his right to direct the upbringing of his children because it would not change its curriculum to suit his demands, the court reasoned that Myers’ rights did not extend to forcing the school to restructure as requested. The court stated that such a request was beyond its purview and, by the plaintiff’s own admission, the school had not forced his children to stand and recite the Pledge of Allegiance but allowed them the option of not participating. The court rejected the plaintiff’s claim of a right to petition violation on the basis of a lack of evidence that such an infringement took place. In the first of three freedom of speech claims, the court examined the plaintiff’s allegation that the school violated his rights with regards to the distribution of leaflets on the sidewalk adjacent to the school. The court observed that the
infringement was a one-time incident that was immediately rectified by the deputy superintendent and no further interference had occurred. The court observed it was unnecessary to grant relief on the issue because it had already been resolved. The two remaining freedom of speech claims involved forum issues: access to distribute flyers in the school and access to advertisement space in school publications. With respect to distribution of flyers in the schools, the court determined the school had not opened a forum for commercial distributions as proposed by the plaintiff. Given the nonpublic forum status, the school’s restrictions were deemed reasonable and viewpoint neutral. Furthermore, the court noted that even if the school had created a limited open forum, the plaintiff’s claims would still not succeed. Regarding the school publications, the court reasoned the school’s ability to regulate the speech fell under principles set forth in Hazelwood (1988). Accordingly, the school had authority to regulate speech that would be perceived to bear the imprimatur of the school. As such, the defendants’ actions in each instance were constitutionally permissible.

Disposition: The United States District Court for the Eastern District of Virginia, Alexandria Division granted the defendants’ motion to dismiss the individual action against school superintendent Hatrick and all claims asserted on behalf of the Myers children. The court also granted the defendants’ motion for summary judgment on the right to petition and the free speech claims.

Citation: Cole v. Buchanan County School Board, 504 F.Supp.2d 81 (W.D.Va. 2007).

Key Facts: Cole was the publisher and reporter for a local newspaper in the Buchanan County area of Virginia. Cole had published a series of reports and editorial opinions that were critical of the school board members. Just prior to October 23, 2006, Cole was on the campus of a school in the area to gather news. Cole observed a board member dropping his children off at
the school which was outside the area represented by the member. On October 23, the board met and passed a resolution that Cole would not be allowed on school property in the future except to attend public board meetings. Not long after, the board met and passed an amended resolution stating the reasons for the ban and reinforcing the ban from the campus while students were present except for written invitation, to attend a public board meeting, or to exercise his right to vote. Cole filed a complaint against the four board members who supported the resolution under 42 U.S.C. Section 1983 and also filed a state cause of action alleging defamation. The defendants moved to dismiss based on several grounds.

Issue: At issue was whether the school board’s ban of the plaintiff from campuses in the districted represented a First Amendment retaliation violation.

Holding: The court held that the resolution, because it served to single out an individual in a distinct set of circumstances, was administrative, rendering the defendants ineligible for legislative immunity.

Reasoning: The court examined whether the board members were entitled to legislative immunity by determining whether the resolution was a legislative or administrative action. The court reasoned that the resolution was designed to impact one person involved in one set of circumstances and therefore was administrative in nature. The court opined that had the resolution banned all reporters from school property the action would have been legislative. Because the action was administrative the court reasoned the defendants were not entitled to legislative immunity. The court next applied the three-prong test to determine whether the plaintiff had standing to bring the First Amendment retaliation claim and concluded that the standard had been met for such a claim. The court found reasonable evidence that an equal protection claim existed as well.
Disposition: The United States District Court for the Western Division of Virginia, Abingdon Division denied the defendants’ motion to dismiss.

Citation: Kazanjian v. School Board of Pam Beach County, 967 So.2d 259 (Fl.App.4D 2007).

Key Facts: In November 2003, five students decided to leave school without a pass and go get breakfast after their first period class. The students left campus in two separate cars but later joined up to ride in one car. On the way to one of the student’s house, the driver was speeding at over double the speed limit in a residential neighborhood and, while adjusting the radio, did not navigate a curve in the road. The car hit two trees and killed Kaitlin Kazanjian. Because of the nature of the school campus and curriculum, students often left during the day for legitimate reasons. If students were caught leaving without permission, they were taken to the campus police or a school administrator and their parents were called. Student attendance was taken in every class on a computerized form which allowed for automatic calls reporting absences on the evening the absence occurs. Attendance was also recorded on student report cards. Habitual truancy was defined as more than 15 unexcused absences in a 90 day period. Plaintiff brought suit claiming he was never notified of his child’s truancy and that he did not give permission for her to leave campus with anyone except family members. The school board moved for summary judgement arguing it was not responsible to supervise a truant student, a vehicle accident could not be attributed to breach of preventing students from leaving campus, and that they were immune to suit.

Issue: At issue was whether the school’s failure to prevent students from leaving campus without permission constituted negligence on the part of the school.
Holding: The court held that the students in question were not habitually truant as defined by the board policy. Additionally, the court held the board was not negligent in its supervision since the students left campus without permission. Finally, the court held the board was entitled to sovereign immunity with respect to the claims against it.

Reasoning: The plaintiff argued that the students were habitually truant and the school board failed to follow its policies to ensure their attendance. The court examined the school’s policy and concluded the students were not habitually truant as defined by the policy. The plaintiff’s argument that the school was duty bound to supervise the students was rejected because precedent principles established that once the students were off-campus and not involved in school-related activity the school’s responsibility to supervise ended. The court also noted legal precedent that once a student leaves campus without permission, a negligence claim would not be supported. Finally, the court concluded that the school board was entitled to sovereign immunity which barred the plaintiff’s suit against them.

Disposition: The Court of Appeal of Florida, Fourth District affirmed the lower court’s ruling in favor of the school district.

Citation: Madrid v. Anthony, 510 F.Supp.2d 425 (S.D.Texas 2007).

Key Facts: On Monday, March 27, 2006, about 300 students, most of whom were Hispanic, staged a walkout at Cypress Ridge High School in protest of upcoming congressional legislation dealing with immigration. The same day, school principal Garcia gathered the students in the school auditorium and allowed them to voice their opinions about immigration. Afterwards, he told the students that they would not be disciplined for the walkout that day but there would be consequences for any future walk out. Throughout the day, Garcia heard rumors of another walkout planned for the next day. He also heard rumors about plans by Caucasian and
African-American students to wear t-shirts bearing messages intended to inflame the issue. The next day, Garcia announced that students wearing inappropriate t-shirts should be sent to the office. Teachers were also asked to keep students out of the halls as much as possible for the day. Some of the students claimed teachers retaliated for their participation in the protest. Two students claimed teachers would not let them go to the restroom during class but allowed other students to go. Despite the warning not to stage another walkout, approximately 130 students left the school on Tuesday, March 28, 2006. Upon their return to school on Wednesday, the students were informed they were to be suspended for 3 days. The administration began to call parents to come pick up their children. As the parents arrived at the school, many of them demanded to meet with Garcia. Because of the volume, he asked them to make appointments. Some of the parents began to cause a disturbance so Garcia asked them to move outside. When the failed to comply, the Harris County Constable assigned to the school asked them to leave. The plaintiffs brought suit alleging violation of the First Amendment rights because the students were denied access to the restroom in retaliation for their political protest. Additionally, the plaintiffs claimed Fourteenth Amendment violation because the students were denied access to the restroom based on race and national origin. Plaintiffs claimed the parents’ First Amendment right of peaceable assembly was violated. Finally, the plaintiffs requested relief under 42 U.S.C. Section 1983. The defendant moved for summary judgment contending there was no Section 1983, First Amendment, or Fourteenth Amendment violations.

Issue: At issue was whether the defendant’s actions denied the plaintiffs’ First and Fourteenth Amendment rights entitling the plaintiffs to relief under 42 U.S.C. Section 1983. Holding: The court held there to be no municipal liability established in the plaintiffs’ claims because of a lack of supporting evidence. The court also held that the school principal
was within the guidelines of *Tinker* (1969) to prohibit students from wearing shirts that would worsen the controversy on campus. The court additionally held that the plaintiffs’ retaliation claims were unsubstantiated by the evidence. Finally, the court held that the parents’ claim of a right to assemble violation was not in keeping with principles garnered from *Lovern v. Edwards* (1999).

Reasoning: The court first reviewed the standard for summary judgment and noted that the non-moving party must provide evidence to substantiate claims to overcome a summary judgment ruling. Having so noted, the court proceeded to its analysis. Citing *Monell v. New York City Dep’t of Social Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), the court stated parties agreed that in order for the school district to be liable, the plaintiffs had to state a claim for municipal liability. In such case, a policy or custom must be identified that caused the alleged constitutional violation. Additionally, the plaintiff must prove deliberate conduct that resulted in the alleged injury. While the defendant conceded it did not allow students to wear certain t-shirts and asked teachers to cut down on hallway traffic during class, he argued that the restrictions were enacted pursuant to the situation at hand and in the interest of preventing a disruption of the educational process. The defendant also stated the request of parents to leave campus was to allow for the orderly process of the 130 suspensions and in the interest of student privacy as mandated by statute. The court noted that the plaintiffs did not produce any evidence to support a claim that these practices were the custom of the school and, therefore, there was no municipal liability. The court noted, however, that it was bound to determine the second element of municipal liability, whether there was a violation of plaintiffs’ constitutional rights. The court first examined the free speech claim. Examining the claims in light of *Tinker* (1969), the court concluded that while the students demonstrated standing to bring a free speech claim based on
the restriction of speech regarding the t-shirts, the principal was justified to prohibit the wearing of shirts with sayings that would likely exacerbate the conflict already present at the school. The court next examined the retaliation claims. In wearing shirts expressing their political view, the students were engaged in a protected activity. The court held, however, that the plaintiffs did not meet the other two requirements to establish a retaliation claim. The denial of permission to leave the room to go to the restroom would not “chill” a person from wearing a shirt to express a political opinion and the plaintiffs failed to produce evidence that their wearing the shirts was the motivating factor for the teachers to deny permission to leave the class. Finally, the court examined the parents’ claim of a right to assemble violation. Citing Lovern v. Edwards (1999), the court reasoned that school officials have the authority to demand that individuals act appropriately on school property. The court rejected the notion that the defendant’s actions amounted to a constitutional violation. The court noted that students had been given ample opportunity without penalty to express their opinions on the first day of protests and were warned of consequences for subsequent action. When those consequences were imposed for the second offense, the parents acted contrary to the administration’s attempts to maintain order at the school.

Disposition: The United States District Court for the Southern District of Texas, Houston Division granted summary judgment in favor of the defendant and dismissed the plaintiffs’ claims against him.

Citation: Bowler v. Town of Hudson, 514 F.Supp.2d 168 (D.Ma. 2007).

Key Facts: Christopher Bowler formed the Hudson High School Conservative Club in the fall of 2004 for the purpose of providing a speech venue for pro-American, pro-conservative students. After securing a faculty sponsor, school principal Stapelfeld formally recognized the
group as a Hudson High School student club and expressed approval that the students were becoming politically involved. The group was allowed access to meeting space and was permitted to invite speakers to club meetings. Bowler had aligned the club with the High School Conservative Clubs of America and on Friday, December 3, 2004, displayed ten posters advertising the club and its upcoming first meeting. Included on the poster was the web address of the national organization. On December 6, the school’s technology director was notified by email that the website listed on the posters included links to several videos of actual beheadings. The director, after viewing the videos, immediately blocked access to the link for all computers on the school network and informed the assistant principal about the content. After consulting with principal Stapelfeld, the posters were removed on December 7. The assistant principal confronted Bowler about the posters, the content of the video links, and the content of the website itself. In early January 2005, after being informed by the faculty sponsor that posters with the web address could be put back up, the club displayed new posters in the school. After this, principal Stapelfeld viewed the videos for himself and determined to disallow the web address on posters in the school. Stapelfeld did allow the club to black out the web address and write the word censored in its place. The conflict between the club and the school administration gained local and national media attention. The club continued to hold its meetings at which a banner displaying the web address was displayed. Also, an article was printed in the school newspaper that contained the web address. An additional article about the debate containing the web address appeared in the local newspaper. Bowler claimed that he suffered harassment from faculty, staff, and administration as well as students of the school because of his political views. Because of the publicity, school superintendent Berman met with the club members and, because of concern over the problematic content of the website, told the members they could not include
the web address of the national organization of its posters and signs. Christopher stated that students at the school had been shown *Fahrenheit 9/11* and *Schindler’s List*, movies he contended were equally graphic. The club held its final meeting in April 2005, citing harassment and intolerance as reasons to discontinue the club. The school system later enacted new policies requiring prior approval to post any material in the school and disallowing any web addresses on posters. The plaintiffs brought suit alleging that school officials violated First Amendment rights in censoring their speech. The defendants moved for summary judgment claiming the web address was disallowed because of the graphic nature of the videos depicting beheadings.

**Issue:** At issue was whether the school district violated the plaintiffs’ First Amendment rights when it disallowed the display of a web address for the national arm of its club.

**Holding:** The court held that the content of the website in question was only accessible through intentional student action outside of school hours. Since this speech was not taking place at the school, the court held the school’s attempt to censor the plaintiffs’ posters was unacceptable.

**Reasoning:** The court began by recounting the well-established Supreme Court precedents involving student speech including *Tinker, Fraser, Hazelwood*, and *Morse*. The court then began to apply these precedents to the defendants’ arguments in response to the plaintiffs’ First Amendment claims. First, the school claimed it censored the posters in keeping with *Tinker* (1969) because of the graphic content available on the website, The court noted that for students to access the contents, they would have to navigate to the website outside of school hours, since the website had been blocked at school, find the offending videos, ignore an express warning, and click on a link to view the video. Most importantly, the students were not a captive audience for the videos since they had to choose to view them at a time they were not in school. The
school district next claimed that the content could lead to a disruption and should be censored. The court noted that the web address had been available from a variety of sources including the posters and the school newspaper, such a disturbance had yet to break out. The school district next invoked Fraser to claim the censorship was allowable because the content was plainly offensive. The court, however, reasoned that the speech content in question did not actually occur at the school and, therefore, was not subject to Fraser. The school district next argued that, according to Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006), the Tinker (1969) principle of “right to be left alone” should include the content in question. The court pointed out that the court in Harper limited its holding to remarks regarding minority status.

Disposition: The United States District Court for the District of Massachusetts denied the defendants’ motion for summary judgment.

2008


Key Facts: On March 13, 2002, a memo was placed in the teacher mailboxes at Tenafly High School. The memo, which was in regards to a labor dispute between teachers and their union, caused a commotion among some of the teachers. Policastro, a teacher at the school, was one of teachers who signed the memo. Because of the reported commotion, school principal Kontogiannis decided to have the remaining memos removed from teacher boxes to avoid a disruption of school activities. A teacher shortly placed new copies in the mailboxes. Kontogiannis order the memos removed again and locked the mailroom door for the remainder of the day. Policastro brought suit alleging First Amendment free speech violation and that the school board’s teacher mailbox policy, which required prior approval from an administrator
before distribution of materials, as unconstitutional. The school filed a motion to dismiss which the district court granted for failure to state a claim. Policastro appealed and the appeals court vacated the dismissal and remanded back to the district court. At trial, the court heard testimony on both sides and ruled in favor of Kontogiannis and the school board. Policastro again appealed.

Issue: At issue was whether the school’s policy regarding the use of teacher mailboxes was unconstitutional and amounted to a First Amendment free speech violation.

Holding: The court held that Policastro’s overbreadth challenge was disproved since the removal of the one memo was not customary and was not attributed to the school’s policy but the unique circumstances presented on that occasion. The court also held that Policastro’s First Amendment free speech claim had been rendered moot in light of the facts entered into the record at trial.

Reasoning: The court reviewed Policastro’s claim that the school’s mailbox policy was facially unconstitutional. Since the district court classified the claim as an overbreadth challenge, the court examined the claim from that perspective. The court recounted that many teachers, including the plaintiff, had been allowed to distribute materials in the past. Also, after the incident in question, teacher use of the boxes had continued as usual. The court also pointed out that Kontogianni’s reason for removing the memo was to prevent further disruption to the school day and had nothing to do with the challenged policy. In examining the plaintiff’s claim a violation occurred in how the policy was applied to him, the court reasoned Policastro did not show any injury he suffered or that the policy’s restrictions had ever been applied to him. With regards to his First Amendment free speech claim, the court noted that Policastro had not sought damages, but rather asked for declaratory and injunctive relief which the court was not in position to provide. The court stated it had earlier reasoned Policastro had standing because the
record did not include the facts of the case and his pro se complaint was given the latitude of assuming the memo removal could be attributed to the district’s policy. After the trial in which the facts of the case became part of the record, it became clear that the removal was not based on the district’s policy, Policastro’s claim was rendered moot.

Disposition: The United States Court of Appeals for the Third Circuit affirmed the district court’s denial of the plaintiff’s challenges to the school’s mailbox policy. The court also dismissed the plaintiff’s claim of First Amendment free speech violation.

Citation: Krestan v. Deer Valley Unified School District No. 97, of Maricopa County, 561 F.Supp.2d 1078 (D.Ariz. 2008).

Key Facts: In January of 2008, Krestan submitted a video to be played during announcements at Mountain Ridge High School to recruit participants for Common Cause Club’s weekly prayer meeting at the school flagpole. The school did not show the video claiming that doing so would have violated the Establishment Clause. Krestan also asked permission to hand out a leaflet inviting students to a Prayer at the Pole meeting on the morning of February 15, 2008. The school also denied permission for the leaflets citing its policy to restrict all leaflet distribution to certain time periods in the year. Two additional announcements were submitted by Krestan to be read over the school public address system. The first was read on February 8, 2008 announcing the weekly prayer meeting at the flag pole. The second proposed announcement was not read because its content, according to the school, would violate the Establishment Clause. Krestan filed a complaint alleging violation of the Equal Access Act and First Amendment rights and seeking preliminary injunctive relief.
Issue: At issue was whether the school’s refusal to air the plaintiff’s video, allow distribution of leaflets, and allow an announcement on the plaintiff’s behalf amounted to a violation of Equal Access Act and First Amendment rights.

Holding: The court held that the plaintiff was entitled to have the recruiting video to be aired on the same basis as other student club videos under the strictures of the Equal Access Act. Additionally, the school was obligated to make the club’s announcements on the same basis as other clubs for the same reason. The court held, however, that since the limitations on the distribution of leaflets was applied to all student clubs, the school’s policy did not constitute a First Amendment rights violation.

Reasoning: The court quickly noted that one requirement for injunctive relief, possibility of irreparable injury, was easily determined in the plaintiff’s favor since the loss of First Amendment freedoms for any amount of time has been deemed such in previous precedent. The court then turned to the plaintiff’s probability of success on the merits in the case. With regard to the video, the court observed that a similar video intended to recruit members for another student club had been allowed by the school. Since the Equal Access Act requires student religious groups the same privileges as those enjoyed by other student groups, the court reasoned the school was required to air the video unless it could be proven to violate the Establishment Clause. Applying the Lemon test to the video, the court reasoned that such an airing would not violate the Establishment Clause because, as purported in Mergens, the average high school student would be able to distinguish between school endorsed speech and the proposed video announcement. Therefore, the court concluded the plaintiff would likely succeed at trial with regard to the video. The court reached the same conclusion regarding the disallowed announcement following the same reasoning. In examining the issues surrounding the leaflet
distribution, the court observed that the school’s policy of limiting such distribution to certain times of year was applied to all student groups. The court reasoned the limitations were reasonable and content-neutral leading to a conclusion that the plaintiff would not likely succeed on this First Amendment claim.

Disposition: The United States District Court for the District of Arizona granted in part and denied in part the plaintiff’s motion for preliminary injunction. The defendants were required to display the club’s video to the same extent granted other student videos. The defendants were also required to make announcements over the school public address system consistent with the same access granted other student clubs. The defendants’ policy limiting leaflet distribution to certain times of the school year was not enjoined.

Citation: Doe v. Wilson County School System, 564 F.Supp.2d 766 (M.D.Tn. 2008).

Key Facts: James Doe was a student at Lakeview School during the 2005-2006 school year. Near the end of the school year Doe’s parents made an appointment to meet with the principal. On the day of the meeting, the principal was not available so the parents met with assistant principal Smith instead. The primary purpose was to discuss Doe’s education but they also voiced concerns about the National Day of Prayer, the See You At The Pole event, and the Christmas Program. Smith related that the school had the reputation of being a religious school but they did not teach religion. Smith also told the Does their concerns would be related to principal Marlowe. In later conversations, Smith informed the Jane Doe that Marlowe had no intention of changing the activities despite their concerns. In the summer of 2006, the Does wrote a letter to Marlowe and Director of Schools Duncan but did not hear from either. In the fall of 2006, the Does met with Marlowe and the meeting became heated. As a result of that meeting, the Does removed James from the school and decided to teach him at home under the Heritage
Christian Academy homeschool program. The Does could not find a nonreligious school in the state to credential the homeschool courses and sought to re-enroll him in Lakeview. They were concerned, however, that they should be able to direct the spiritual development of their child. They felt Lakeview should eliminate the emphasis on Christianity and treat people of different faiths equally. As such, they brought suit seeking to enjoin the school from the religious events and activities prevalent in the school.

Issue: At issue was whether the school’s actions and activities represented excessive entanglement in violation of the Establishment Clause.

Holding: The court held the actions and activities of the school violated the Establishment Clause and the Does’ constitutional rights.

Reasoning: The court first considered the defendants’ assertion that circumstances had changed since the inception of the suit and the case was therefore moot. The court did acknowledge several changes had been made but there were no assurances the activities would not return once the case was settled. The court reasoned that the issues had not been rendered moot. The court next rejected the assertion that the Does lacked standing to bring the suit since they were not directly impacted by the events in question. The court concluded, however, that the advertising for the events was prevalent throughout the school in many forms and, therefore, did impact them and their child. The court next considered the Establishment Clause issues. First, the activities of a parent group known as Praying Parents violated all three prongs of the *Lemon* test. While students did not participate and were not allowed to be present during their activities, the court observed that the school gave the appearance of endorsing the group’s activities. Second, the court observed the kindergarten teachers taught a Thanksgiving unit in which students were taught a prayer. The court noted that parents should have been given notice of the intent to teach
a prayer to the students and the chance for their children to be excused from the exercise. In the school’s Christmas program, the Does objected to a nativity scene displayed at the end. The court noted, however, that the presence of many secular depictions and songs in the same assembly mitigated the effect of potential endorsement. The court next considered the See You At The Pole and National Day of Prayer events. The court denoted several problems with the way the events were presented at the school. First, the events were clearly presented from a Christian, not non-denominational, perspective. Second, advertisements created by the Praying Parents incorporated Christian symbols in the displays. Third, several staff members, including principal Marlowe, participated in the event. The court concluded that the Does had produced a “preponderance” of evidence they had been subjected to a constitutional rights violation.

Disposition: The United States District Court for the Middle District of Tennessee, Nashville Division granted a limited permanent injunction in favor of the plaintiffs.

Citation: Gray v. Kohl, 568 F.Supp.2d 1378 (S.D.Fla. 2008).

Key Facts: In early January 2007, Gray, a member of Gideons International, contacted the Monroe County Sheriff’s Office to inform them of plans to distribute Bibles at Key Largo School later in the month. The school was situated on the only thoroughfare in the town and the road included a public bike and walking path which members of the public used regularly during the school day. The group planned to distribute Bibles from that path even though it fell inside a 500 foot school safety zone as designated by Florida State Law. Since the group had participated in a similar distribution without incident at another school in the area the month before, Deputy Williams gave permission and informed him that, even thought the school resource officer would not be there that day, they should have no problem. In keeping with Gideon protocol, Gray arrived at the school at approximately 2:00 p.m. on January 19, 2007 to inform the
administration of the planned distribution that day. The school principal was not available but
Gray informed Florida State Patrol Officer Glenn of their plans to which no indication of a
problem was given. Gray went to the bike path with the rest of his group and took up positions
for the distribution. Shortly after, the principal came outside to see what was going on but did not
speak with Gray. At approximately 3:20 p.m., Deputy Williams stopped by to ask Gray how the
distribution was going. At 3:30 p.m., Gray received a phone call from a fellow Gideon member
who said he was being arrested. Gray made his way to the location at another entrance to the
school and asked why the member was being arrested. The officer in charge stated Gray could
find out in 48 hours when the arrest report was made available. Gray called Williams for support
who said he would email the officer in charge. The fellow Gideon member was charged with
violation of the School Safety Zone statute but never convicted. On April 20, 2007, Gray filed a
complaint alleging First and Fourteenth Amendment rights violations as well as violation of the

Issue: At issue was whether the school’s denial of the Gideon International members to
distribute Bibles from a public thoroughfare inside the designated School Safety Zone was a
violation of First and Fourteenth rights and the Florida Religious Freedom Restoration Act.

Holding: The court held that the language of the statute designating a School Safety Zone
was poorly defined and that subsections (2)(a) and (2)(b) were unconstitutionally vague. The
court also held that Monroe County Sheriff Roth was not liable in the actions of the arresting
officer and did not fail to provide proper training to deputies with regard to the statute.

Reasoning: The court conducted an analysis of the School Safety Zone statute because of
Gray’s claim that the statute’s vagueness was a violation of his Fourteenth Amendment due
process rights. The court noted that in the case of Key Largo School, the 500 foot safety zone
encompassed several businesses, a residential neighborhood, and sidewalks on both sides of U.S.
1, the only road to transverse the city. The court observed that anyone without “legitimate
business” could be convicted under the statute. Because the statute did not delineate the meaning
of the phrase “legitimate business” and the court could envision several instances where persons,
both associated with and not associated with the school, could unintentionally violate the law, the
court reasoned that subsection (2)(b) was unconstitutionally vague. The court reasoned that
subsection (2)(c) was not vague because the law made it a criminal offense to remain in the
school safety zone after being directed to leave by the principal or designee. The court reasoned
that the direction by a school administrator to leave the area served as notice as to the conduct
that was not acceptable. The court pointed out that since subsection (2)(a) called on the school
administration to employ law enforcement to remove those in the safety zone without “legitimate
business” and therefore relied on subsection (2)(b) for its meaning, it was unconstitutionally
vague for the same reasons as subsection (2)(b). The court also observed that the vagueness of
the statute opened the door for arbitrary enforcement since the terms of the legislation were
vague. The court next examined the scope of municipal liability presented in the case. Roth, as
sheriff of Monroe County, asserted he could not be held liable in his official capacity. The court
reasoned that the actions of the arresting officer were at his discretion and were not ratified by
the sheriff, either in action or statement. Therefore, the officer’s actions did not render Monroe
County liable. The court also rejected the plaintiffs’ claims that the sheriff failed to properly train
the arresting officer with regard to enforcement of the school safety statute. The court stated that
the lack of previous incident with regard to Bible distribution did not give rise to the need of
such training and, given the confusing language of the statute, the court could not find the sheriff
to be deliberately indifferent.
Disposition: The United States District Court for the Southern District of Florida granted the plaintiff’s motion for summary judgment in part in that Florida Statutes Section 810.0975 subsections (2)(a) and (2)(b) were unconstitutionally vague and enjoined the state from enforcing those sections. The court also granted the defendant’s motion for summary judgment.

Citation: Page v. Lexington County School District One, 531 F.3d 275 (C.A.4 2008).

Key Facts: In December of 2004, the Board of Trustees of Lexington County School District One passed a resolution stating its opposition to pending legislation that would give tax credits for private and parochial school tuition as well as home schooling expenses. After the resolution was adopted by the board, the Director of School/Community Relations for the system communicated the board’s concern through a variety of means including the district website, email communications, and printed circulars. The emails and printed circulars included some previously printed material written by persons outside the district. On March 1, 2005, Page, a resident of Lexington County who supported the upcoming legislation, communicated with the district via letter his dissatisfaction with the district’s efforts to campaign against the legislation and demanded equal access to the school’s distribution system for the various ways it had communicated its opinion. The district superintendent responded with his belief that the district’s actions were not improper and that the school had not created a situation in which Page would have a right of equal access. The superintendent denied Page’s request in his letter. Page filed a complaint under 42 U.S.C. Section 1983 alleging violation of First Amendment rights and seeking declaratory judgment and an injunction requiring the school to provide the access he requested. The district granted the school’s cross motion for summary judgment holding the school had not created a forum for speech that would allow Page access and that the district had
engaged in allowable government speech that had been entirely controlled by the school. Page appealed.

Issue: At issue was whether the school’s denial of access to the plaintiff constituted viewpoint discrimination, a violation of his First Amendment rights.

Holding: The court held that the speech engaged in by the school was considered government speech and not subject to First Amendment challenge. The court also held that Page was not entitled access to the forums requested. Finally, the court held that the legal precedent supported the school’s right to campaign for or against a particular issue to be decided by the voters.

Reasoning: The court determined its first task was to decide whether the speech in question was government speech. The court recounted that government speech is not subject to First Amendment scrutiny because, even though the government is supported by all through taxes, its policies are not supported by all. The determinant factor for government speech is the extent of the government’s ownership and control of the message. Aligning with Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550, 553, 125 S. Ct. 2055, 161 L. Ed. 2d 896 (2005), the court reasoned that the government could advocate a particular position and adopt and utilize the opinions of outside writers in advocating that position while maintaining control and ownership of the message. Page challenged that the district may have intended to maintain control of its channels of communication but private persons’ access to them created a limited public forum to which he should have access. The court cited Perry’s conclusion that an outside entity could be excluded from internal communications that had maintain a nonpublic forum status. As before, the court concluded the district had maintain control of its channels of communication and was solely responsible for content in support of its position in keeping with the Johanns conclusions.
Disposition: The United States Court of Appeals for the Fourth Circuit affirmed the district court’s judgment in favor of the school district. The court also rejected Page’s assertions he should have been allowed access to the P.T.A. newsletter as well as flyer distribution at the schools. In these cases, the court reasoned they were limited open forums at best and the restrictions of access were reasonable in light of the public school’s mission. Finally, the court examined Page’s contention that a government entity should not attempt to influence legislation. The court rejected this assertion citing numerous precedents supporting government speech regarding ballot issues.


Key Facts: In September 2006, John Wholey attended a meeting of the Hull School committee regarding the hockey team budget. Wholey, who had a litigious history with the Hull School District, asked to speak with Athletic Director Sullivan. After the encounter, Sullivan contacted the Hull Police who sent an officer to Wholey’s house and warned him to stay away from Sullivan. Later that month, Wholey approached Sullivan at a high school field hockey game and asked to “speak with” Sullivan after which, Sullivan again contacted the police. The police again warned Wholey to stay away from Sullivan. The following day, school superintendent Daley sent Wholey a notice that he was temporarily restricted from school property because of the encounters with Sullivan. The superintendent did include in the notice an invitation to set up an appointment to discuss the issue and provided Wholey could get prior approval to enter facilities if needed from her office. In August 2007, the new superintendent issued a “Notification of Restriction from Property” because of Wholey’s disruptive conduct; because he represented a threat to property, personnel, and students; because of the previous cited incidents; and because Wholey had been seen on campus without prior permission twice since the previous
warning. In October 2007, Wholey brought suit alleging First Amendment Ninth Amendment 
Fourteenth Amendment, Section 1983, and Title IX violations. He sought preliminary injunction 
enjoining the district from enforcing the restriction. The defendants’ filed a motion to dismiss.

Issue: At issue was whether the school district’s restriction of Wholey’s access to school 
facilities violated 42 U.S.C. Section 1983 and 20 U.S.C. Section 1681 Title IX.

Holding: The court held that in each of the claims, the plaintiff had not presented 
sufficient evidence to proceed. The court further held that the plaintiff would not likely succeed 
on the merits of his case.

Reasoning: The court considered each allegation in turn beginning with the First 
Amendment free speech claim. The court noted that Wholey did not present any facts to back up 
his claim in this area. Also, the school’s restrictions were narrowly constructed to avoid further 
encounters between Wholey and Sullivan. The court also noted that the school encouraged 
Wholey to contact the superintendent’s office to discuss the matter which he did in December 
2006 after which he was allowed access to campus with prior permission. Wholey’s Ninth 
Amendment claimed failed because he presented no precedent or theory as to how the facts of 
the case presented such a violation. The court observed that the due process claim failed for the 
same reason. With regard to the Title IX claim, the court stated the Wholey’s assertion failed on 
two of the four standards required to prove such a claim. The court concluded that the plaintiff 
would not likely succeed on the merits of his case leading the court to deny his motion for a 
preliminary injunction.

Disposition: The United States District Court for the District of Massachusetts granted 
the defendants’ motion to dismiss while denying the plaintiff’s motion for a preliminary 
injunction.
Citation: *Gonzalez v. School Board of Okeechobee County*, 571 F.Supp.2d 1257 (S.D.Fl. 2008).

Key Facts: In 2006, the Gay-Straight Alliance of Okeechobee High School brought a complaint seeking recognition of the group and access to school facilities on the same basis as other groups. The court granted a preliminary injunction in favor of the group. Gonzalez, the member of the group who filed the complaint, graduated at the end of that school year. The preliminary injunction was later dissolved because the group had no more student members at the school. After her graduation, Gonzalez’s claim for relief was rendered moot but claims for damages remained live. On May 19, 2008, a student currently enrolled at the high school was allowed to join as a plaintiff because of recent denials by the school to officially recognize the group which revived the relief claims. Subsequent to the revival of the complaint, the school board adopted a new policy disallowing access to facilities for any club or organization based on sexual activity. The parties filed cross-motions for summary judgment.

Issue: At issue was whether the school’s refusal to officially recognize the club and grant access equal to that or other groups was a violation of the Equal Access Act and First Amendment rights.

Holding: The court held that the school had created a limited open forum and, in keeping with *Mergens*, should allow the group access to the school.

Reasoning: The court observed that the school had created a limited open forum since it sanctioned noncurriculum student groups and allowed them to meet during non-instructional time. The court next pointed out that in keeping with *Mergens*, the group must be allowed access to the school unless there was proof that restricting that access was necessary to maintain order in the school, to protect students and faculty, and ensure that attendance at the club’s meetings
was voluntary. The court next examined the school’s claim that the club’s mission was contrary to the newly adopted abstinence-only policy. The school also asserted that the abstinence program had federally funded support and was mandated by the State of Florida. The court discounted the school’s claims in this area and concluded that the Equal Access Act’s guidelines obligated the school to grant access to the group. As to the First Amendment claim, the court reasoned that the proposed tolerance-focused message of the group would not create a disruption. The school’s contention that the group’s message would cause discomfort and unpleasantness for a majority of the student body highlighted, the court stated, the core precept of guaranteeing expressive activity for minority entities found in the First Amendment.

Disposition: The United States District Court for the Southern District of Florida granted the plaintiffs motion for summary judgment and enjoined the school district from denying access and recognition to the Gay-Straight Alliance of Okeechobee High School.


Key Facts: In May of 2008, plaintiffs asked for permission to form a Bible Club at Esperanza High School with the purpose of studying the Bible and other literature as well as discussing a variety of issues affecting students. As part of its mission, the group intended to supply volunteers at soup kitchens for Thanksgiving and Christmas. The students secured a faculty advisor to sponsor the group. On May 28, 2008, the school’s Activities Director denied the club’s charter stating board policy did not allow for the formation of groups not related to the school’s curriculum. Plaintiffs brought suit seeking a preliminary injunction.

Issue: At issue was whether the school’s denial of the Bible Club’s charter was a violation of First Amendment and Equal Access Act rights.
Holding: The court held that the school had practiced viewpoint discrimination in its inconsistent application of Mergens principles. The court also held the plaintiffs met all requirements necessary to gain a preliminary injunction.

Reasoning: The court assessed the facts of the case in light of the four-part requirement for the issuance of a preliminary injunction. To determine the likelihood of success on the merits, the court applied principles garnered from the Supreme Court’s Mergens decision. The court observed that one club allowed at the school was not sufficiently related to the school’s curriculum to meet the Mergens test. Conversely, part of the Bible Club’s proposed mission was clearly connected to topics within the school curriculum. The court concluded that the school district was applying Mergens principles inconsistently and was, therefore, practicing viewpoint discrimination. The determination that the school’s practice amounted to a probable rights violation satisfied the second requirement. The court next determined that the balance of hardships favored the plaintiffs. With regard to public interest, the court determined that the district’s wish to maintain a closed forum, even if it had to discontinue clubs that offered a public benefit was not in the public interest.

Disposition: The United States District Court for the Central District of California, Southern Division issued a preliminary injunction and directed the school to provide access to the Bible Club on the same basis as other student clubs.

Citation: Straights and Gays for Equality v. Osseo Area Schools-District No. 279, 540 F.3d 911 (C.A.8 2008).

Key Facts: The Straights and Gays for Equality student club was classified by the Student Group Framework at Maple Grove Senior High School as a noncurricular student group. As a noncurricular group, the club could place posters on a community board but was restricted from
using the school’s public address system, appearing in the yearbook, using the scrolling screen, or other avenues of communication. Student clubs classified as curricular were not under those same restrictions. Plaintiffs brought suit seeking a preliminary injunction seeking the same access to communication means as curricular groups because, they contended, some of the curricular groups were not actually related to the school’s curriculum. The district court granted the preliminary injunction holding the plaintiffs were likely to succeed on the merits and that they met the other requirements for such a judgment. On appeal, the court of appeals affirmed the district court’s grant of preliminary injunction. On remand, the student club sought partial summary judgment to convert the preliminary injunction to a permanent one. The district court granted a summary judgment with respect to the club’s Equal Access Act claim and held that several of the clubs classified by the school as curricular actually were not. The permanent injunction gave the Straights and Gays for Equality club the same access to facilities, including communication means, and rights as curricular groups. The school district appealed.

Issue: At issue was whether the school’s classification of the Straights and Gays for Equality club as a noncurricular group and restricting its access to school communications venues was a violation of the Equal Access Act.

Holding: The court held that the school had allowed some noncurricular clubs to be categorized as curricular granting them greater access to facilities than the access afforded the Straights and Gays for Equality club. As such, the court held the school’s actions were in violation of the Equal Access Act.

Reasoning: The court recounted the principles from the Mergens ruling as it examined the facts of the case at hand. The court reasoned that the school had created a limited open forum in which it allowed noncurricular groups to meet. It did not, however, allow the Straights and
Gays for Equality club the same access as some of those clubs. The court noted that it had previously held that cheerleading and synchronized swimming, groups the school categorized as curricular, were actually noncurricular. The court ruled that the district court’s ruling that the Straights and Gays for Equality should be granted the same access as those groups was proper under the Equal Access Act.

Disposition: The United States Court of Appeals for the Eighth Circuit affirmed the ruling of the district court.

Citation: M.A.L. ex rel M.L. v. Kinsland, 543 F.3d 841 (C.A.6 2008).

Key Facts: On October, 24, 2006, Michael L. arrived at Jefferson Middle School with the intent of participating in the “3rd Annual Pro-Life Day of Silent Solidarity” by wearing red duct tape on his mouth and wrists, wearing a sweatshirt displaying the phrase “Pray to End Abortion”, and handing out leaflets before school that contained abortion statistics. During the first hour class, he was sent to the office because the teacher claimed his shirt and tape were causing a classroom disruption. Since the principal was not in, the school counselor spoke with Michael, contacted the school superintendent, then informed Michael of the superintendent’s decision that he must remove the duct tape and either take off the sweatshirt or turn it inside-out. After he was sent back to class, the counselor later observed Michael turning his sweatshirt right-side-out and sent him to the office to see the principal. Even though Michael claimed he was turning his sweatshirt right-side-out so he could carry his binder in the pocket, the principal stated Michael had to follow the superintendent’s directive. While he was speaking to the principal, Michael brought up his intent to distribute leaflets in the hallway. The principal reminded Michael that all leaflets had to be pre-approved before they could be distributed and because his had not been done Michael would not be able to distribute them that day. No disciplinary action was taken that
day. On January 24, 2007, Michael, through his parents, brought suit requesting injunctive and declaratory relief so he could participate in a similar demonstration of January 31. On January 29, the parties agreed to stipulations that would allow Michael to participate in the protest until the matter could be settled by the court. The agreement did not allow for the distribution of the leaflets in the hall. The leaflets were not submitted in accordance with the district’s policy for approval prior to the proposed January 31 distribution date. The school offered, however, to let him post his leaflets on the school bulletin board and hand out the material during lunch. Michael did not like this arrangement and pushed to be allowed distribution in the halls. The district court, applying the *Tinker* (1969) standard, issued a preliminary injunction, which it later made a permanent injunction, which enjoined the school from restricting Michael’s access to distribute leaflets in the school halls. The court held that the school had violated First Amendment rights and that the district’s distribution policy was overly broad since it could be reasoned the policy might restrict students from handing notes or magazines to a friend without prior approval. The court also awarded Michael damages of one dollar. The school district appealed.

**Issue:** At issue was whether the school’s restriction on the time, place, and manner of the distribution of leaflets was a First Amendment violation of the student’s rights.

**Holding:** The court held that the facts of the case were dissimilar to *Tinker* (1969) and the school had not violated the student’s First Amendment rights.

**Reasoning:** The court, in analysis of the facts, observed that the school had not created an open forum in the halls for use by the public. In fact, the hallways in the school had remained a nonpublic forum and the school was entitled to restrict the time, place, and manner of distributions as long as the restrictions were viewpoint neutral and reasonable. The court stated the court applied the *Tinker* (1969) standard in error because, unlike *Tinker*, the school in this
case was not trying to suppress the student’s opinion. The court further noted it was reasonable for the school to require students submit literature prior to its distribution to ensure it was appropriate. The court also stated that a reasonable reading of the school’s policy would show that it defined what was considered distribution and the policy would not preclude a student passing a note or magazine to a friend without prior approval. Thus, the policy was not overbroad in the court’s opinion. The court finally cited *Perry* in its conclusion that time, place, and manner restrictions may be enforced as long as they are content neutral, tailored to serve a significant government interest, and leave open other channels of communication. The court concluded such was the case in this suit.

Disposition: The United States Court of Appeals for the Sixth Circuit reversed the district court’s ruling in favor of the plaintiff and reversed the award of nominal damages.

2009

Citation: *Child Evangelism Fellowship of Minnesota v. Elk River Area School District* #728, 599 F.Supp.2d 1136 (D.Mn. 2009).

Key Facts: In August 2007, District Director for Child Evangelism Fellowship Sharilyn Nydam, met with Elk River Assistant Superintendent Jana Hennen-Burr to request permission to participate in open house nights in the district to recruit participants for a Good News Club. Hennen-Burr related that the only groups allowed to participate in open house events were those designated as patriotic organizations under the No Child Left Behind Act. Since the Child Evangelism Fellowship was not so designated, the request to participate was denied. In 2008, the request was renewed for upcoming open house events and was again denied. Child Evangelism Fellowship filed a motion for preliminary injunction requesting the court to enjoin the
enforcement of the school’s policy of only allowing patriotic organization to participate in open house events. The school district filed a motion to dismiss.

Issue: At issue was whether the school district practiced impermissible restriction of access by denying the Child Evangelism Fellowship of Minnesota access to open house events.

Holding: The court held that the school district had practiced viewpoint discrimination against the Child Evangelism Fellowship group. The court also held that the plaintiffs were likely to succeed on the merits.

Reasoning: The court analyzed the facts of the case to see if the plaintiffs satisfied the four requirements necessary for a preliminary injunction. To determine likelihood of success on the merits, the court examined the plaintiff’s argument that under Good News Club v. Milford Central School, 533 U.S. 98, 121 S. Ct. 2093, 150 L. Ed. 2d 151 (2001) the school practiced viewpoint discrimination. The defendants countered that, based on 20 U.S.C. Section 7905(b)(1), it allowed patriotic organizations because it was required but did not allow others. The court pointed out that in the Milford decision, the Supreme Court ascertained that groups of a religious nature often teach the same morals and character development as nonreligious groups except from a particular perspective. The court also noted that the statute cited by the school provided that patriotic groups had to be allowed access only if the school had created an open or limited open forum. In reconciling the two, the court reasoned that, notwithstanding the school’s contention they were required to allow patriotic organizations, the school had practiced viewpoint discrimination when it allowed the Boy Scouts organization to participate in open house events but not the Child Evangelism Fellowship. As such, the court concluded the plaintiffs’ were likely to succeed on the merits. The court further reasoned that the potential loss of First Amendment freedoms represented irreparable harm, the balance of harms fell in favor of
the plaintiffs, and the protection of constitutional rights would always be in the public’s interest. With regard to the defendants’ motion to dismiss, the court reasoned that the school district incorrectly read the act to mean they were required to recognize patriotic groups. In fact, the groups were required to have access if the school opened its forum.

Disposition: The United States District Court for the District of Minnesota granted the plaintiffs’ motion for a preliminary injunction and denied the defendants’ motion to dismiss.

Citation: Quatroche v. East Lyme Board of Education, 604 F.Supp.2d 403 (D.Conn. 2009).

Key Facts: Quatroche was a special education student who was “profoundly deaf” and had an identified specific language learning disability. He began receiving services under IDEA at age three. His IEP included a provision that captioning for all classes be provided. At East Lyme High School, the morning announcements were broadcast via the school’s internal television network. Some of the 5 to 10 minute program was typically subtitled but not all. In meetings with the East Lyme Planning and Placement team for 3 academic years, Quatroche, through his mother, requested captioning for the morning announcements show. While assurances were made that administrators were working to satisfy the request, complete captioning of the morning show did not occur. In July 2007, Quatroche filed a due process complaint and requested an impartial due process hearing. At the hearing, the appointed hearing officer announced before proceedings began that she did not have jurisdiction to hear a matter that was a Section 504 issue only. Quatroche, after a grant to proceed in Forma Pauperis, requested a second hearing. The officer appointed to that hearing also dismissed on the basis that a previous hearing officer had heard the complaint and decided the issue. Having exhausted administrative remedies under IDEA, Quatroche filed suit against the East Lyme Board of
Education, the Salem Board of Education, the Connecticut State Board of Education, and the Connecticut Department of Education. Quatroche alleged violation of IDEA as to all defendants, systemic violations of IDEA as to state defendants, violation of IDEA Free Appropriate Public Education as well as Section 504, ADA, and Section 1983 as to East Lyme and Salem Boards of Education. Finally, Quatroche claimed violation of equal protection rights under the Connecticut State Constitution.

Issue: At issue was whether the failure to provide captioning for the morning news program violated the plaintiff’s rights enumerated above.

Holding: The court held that the plaintiff could proceed with respect to IDEA and state equal protection claims.

Reasoning: The court considered each of the plaintiff’s claims in turn. The court noted the local boards’ reasoning behind motions to dismiss the IDEA violations claims to be based on inapplicable case law and, therefore, unpersuasive. With regard to the state defendants in these claims, the court concluded they correctly argued they were not the proper parties to the suit because none of the actors involved were state employees. With regard to the systemic IDEA violations claim, the court concluded that the plaintiff had failed to show evidence of such a violation. In Quatroche’s claim that he had a right to receive all information and ideas presented in the school’s morning announcements broadcast, the court concluded the show to be a nonpublic forum leading to grant of the defendants’ motion in this area. With respect to the state constitutional violations, the court denied the defendants’ motions to dismiss without prejudice.

Disposition: The United States District Court for the District of Connecticut granted the East Lyme and Salem Boards’ motion to dismiss Section 504 claims but denied their motion to dismiss IDEA violations, Section 1983, and equal protection violation claims. The court granted
the state defendants’ motion to dismiss IDEA violations claims but with leave to replead the systemic IDEA violations claim.

Citation: Gold v. Wilson County School Board of Education, 632 F.Supp.2d 771 (M.D.Tenn. 2009).

Key Facts: This case was an extension of Doe v. Wilson County School System, 564 F.Supp.2d 766 (M.D.Tn. 2008) already briefed in this document. Following the decision in that case, that court ordered that any future posters or announcements advertising the See You At the Pole (SYATP) or National Day of Prayer events had to include a disclaimer stating the school and its administration did not endorse or sponsor the events. On September 19, 2008, school parents Walker, Gold, and Miller arrived at Lakeview School to display posters prepared to advertise the upcoming SYATP event. When they arrived at the school office, the school secretary informed them they would not be able to display the posters because they contained the word “God” on them. During the exchange, school principal Moss, who was out of state on personal leave, called and was informed by the secretary about the posters. Moss had already contacted Director of Schools Davis about some earlier submissions from other parents that he felt violated the court’s decision in Doe. Davis had informed Moss that any advertising for the event should be limited to the name, date, time, and location of the event. Upon hearing about the conflict on the morning of September 19, Moss asked to speak to recently-appointed assistant principal Alligood. Alligood informed Moss that the posters had Bible verses on them to which Moss requested that Alligood ensure that complied with the board policy and the Doe decision. He also asked Alligood to contact Davis for his opinion. The court reconciled two opposing accounts to arrive at the remainder of the facts. Alligood met with the parents and expressed her concerns about the religious language on the posters. While the meeting was taking place, one of
the parents attached required disclaimers to the posters stating SYATP was a student initiated event and was not endorsed by the school or district. When Alligood called Davis, she neglected to tell Davis that, in addition to the scripture references, the posters contained common patriotic expressions such as “In God We Trust,” and “God Bless America.” Davis, who was also out of town, was reliant on Alligood’s description in making a decision about the display of the posters. Davis related to Alligood that the posters should be limited to the name of the event, date, time, and location. The parents used paper obtained from Alligood to cover all religious words, phrases, and Bible verses on the posters because they were told the posters could not be displayed unless all religious speech was covered so only the name, time, date, and location remained. On the same day, one of the plaintiffs, Walker, contacted Davis and asked if the patriotic phrases had to be covered. Davis referred Walker to the board attorney. Walker had his attorney attempt to contact the board attorney. The two exchanged emails but did not reach agreement. When Moss returned to school the following week, he was asked by one of the parents if the green paper could be removed. When he declined, the parents removed the posters from the school prior to the SYATP event. The plaintiffs filed a motion for preliminary injunction alleging First and Fourteenth Amendment rights violations.

Issue: At issue was whether the restriction of the display of posters containing some religious content violated the plaintiffs’ First and Fourteenth Amendment rights.

Holding: The court held that the school had practiced viewpoint discrimination in restricting the speech of the posters based solely on the religious content. The court further held that the district’s policy left open the possibility of viewpoint discrimination because of the broad discretion bestowed on administrators to regulate displays.
Reasoning: The court began its determination of whether the plaintiffs should be granted a preliminary injunction by analyzing the likelihood they could succeed on the merits. The court observed that the school district had a policy creating a limited open forum for use by certain groups. Additionally, the plaintiffs’ parent group, Praying Parents, fell within the groups granted access by the policy. Citing Lamb’s Chapel, the court concluded that the school administration could only restrict the group’s speech if the restrictions were viewpoint neutral and reasonable.

In looking at whether the school’s restrictions were viewpoint neutral, the court examined the district’s policy and concluded the posters fell within two areas of the policy, violation of the rights of others and the possibility that the posters would be construed to be school-endorsed speech. The court acknowledged that the school administration must balance the free speech rights of students and parents against the possibility of violating the Establishment Clause. The court also acknowledged the heightened concerns of the administration in this case caused by the Doe suit which alleged the school intentionally allowed proselytizing speech in similar posters. The court, however, opined the school misapplied the legal principles. Once the school created the limited public forum, the plaintiffs had to grant the same access as secular users of that forum. According to Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Pub. Sch., 373 F.3d 589, 596 (4th Cir. 2004), the school could regulate the content of the posters if doing so was a reasonable attempt to preserve the forum’s purpose and was not done based on the speech’s point of view. In this case, the defendants admittedly regulated the posters because of the religious content of the speech. The court concluded the district’s policy granted discretion to school administrators that was too broad because it failed to define “appropriate” in its language. This, the court reasoned, left open the possibility of viewpoint discrimination and the
policy itself would not likely hold up under scrutiny. The court concluded the other three elements necessary for a preliminary injunction fell on the plaintiffs’ side as well.

Disposition: The United States District Court for the Middle District of Tennessee, Nashville Division granted the plaintiffs’ motion for preliminary injunction and enjoined the school from enforcing its policy regulating the content of posters unless the restriction placed on the religious posters was deemed reasonable, viewpoint-neutral, and in keeping with federal law.

Citation: San Leandro Teachers Association v. Governing Board of the San Leandro Unified School District, 209 P.3d 73 (Ca. 2009).

Key Facts: The San Leandro Teachers Association (SLTA), the exclusive bargaining representative of San Leandro Unified School District certified employees, distributed newsletters on October 11 and 12, 2004, which included endorsements for the upcoming school board election. On October 15, 2004, assistant superintendent Martinez communicated with SLTA president via letter that the union could not use the mailboxes to distribute political endorsements per Education Code section 7054. On November 16, 2004, SLTA filed a charge with the Public Employee Relations Board alleging violation of Educational Employment Relations Act. On June 28, 2005, the Relations Board dismissed the charge after which, SLTA filed a petition for peremptory writ of mandate on September 30, 2005. The petitions called for the school to stop enforcing the policy disallowing the distribution of political endorsement materials. The school demurred claiming the policy was constitutional and required by the state’s Education Code. On May 3, 2006, the trial court overruled the school district’s demurrer and grant SLTA’s writ of mandate. On appeal, the Court of Appeal reversed the trial court’s ruling and held the district’s policy was required by the state’s education code and that the policy was constitutional. The Supreme Court of California granted review.
Issue: At issue was whether the school district’s policy of disallowing the distribution through teacher mailboxes materials containing political endorsements was constitutional.

Holding: The court held the district’s policy restricting the use of school mailboxes for the purposes of political endorsement to be lawful. The court stressed, however, that its finding was narrowly constructed to pertain only to internal school mailboxes and the endorsement of political candidates.

Reasoning: The court began by examining Education Code Section 7054. The court observed its duty was to determine the intent of the law by first looking at the language of the statute itself as a whole to determine the context of the legislative aim. The court also cited its Stanson v. Mott (1976) 17 Cal.3d 206 decision as it analyzed whether the mailboxes in question constituted a service or equipment. The court concluded that the statute and the cited opinion supported the conclusion that the use of internal communications for political endorsements was not allowable. The court next examined whether the restriction amounted to a state constitution infraction. Even though the federal First Amendment free speech rights were not invoked by the plaintiff, the court analyzed the facts based on First Amendment forum doctrine because the Court of Appeals broached the subject in its opinion. Comparing the facts at bar with the Supreme Court’s Perry decision, the court concluded that school district, as in the present case, granted selective access to the mailboxes and, therefore, maintained a nonpublic forum. Further citing Perry, the court remarked that the concept of the nonpublic forum contains the authority to restrict access based on the subject matter as well as speaker identity as long as the regulation is viewpoint-neutral. Turning to the state constitution, the court concluded the district had a legitimate interest in protecting the mailbox venue from becoming a “one-sided endorsement of political candidates by those with special access.”
Disposition: The Supreme Court of California, in favor of the defendant school, affirmed the Court of Appeal’s reversal of the trial court’s grant of a writ of mandate.

Citation: Williams v. Underhill, 337 Fed.Appx. 688 (C.A.9 2009).

Key Facts: Cornelius Perry and Terry Rollins, both African-American former students at Hug High School, were arrested for remaining on campus after being repeatedly warned to leave. During the course of their arrest, Officer Underhill allegedly referred to the Perry and Rollins using racial epithets. Williams, guardian of both, brought suit alleging unconstitutional arrest and race discrimination at the school.

Issue: At issue was whether the arrest of Perry and Rollins was a Fourth Amendment violation and a Title VI violation.

Holding: The court held that Nevada law and school district regulations supported a conclusion that the arrest of Perry and Rollins did not constitute a Fourth Amendment violation. Additionally, the court held the school was not responsible for Officer Underhill’s alleged racial discrimination.

Reasoning: The court first reviewed the claims of unconstitutional arrest. The court observed that Nevada law and the Washoe County School District regulations provide that the refusal to leave property after being warned is regarded as criminal trespass. The court also noted that both Perry and Rollins had notice that they could not be on campus and refused to comply when asked to leave. Accordingly, their arrests did not constitute a Fourth Amendment violation. With regard to the Title VI claim, the court noted that Williams had not presented evidence to support the claim. The conduct of the arresting officer did not impute to the school because the district had no prior notice of Underhill’s alleged discriminatory conduct. The court also concluded that Williams did not present evidence of an alleged lack of training and supervision.
Disposition: The United States Court of Appeals for the Ninth Circuit affirmed the district court summary judgment in favor of the school district.

Citation: Triplett v. Board of Elementary and Secondary Education and the Louisiana Department of Education, 21 So.3d 401 (La.App.1 Cir. 2009).

Key Facts: In January of 2009, the Louisiana State Board of Elementary and Secondary Education approved the recommendation of Superintendent of the Louisiana Department of Education that eight schools be transferred from the East Baton Rouge Parish to the Recovery School District effective July 1, 2009. Plaintiffs brought suit alleging the State Board of Education and the Recovery School District were in violation of Louisiana state law because an alternative school had not been established for those students who might be suspended or expelled. Plaintiffs sought a permanent injunction enjoining the transfer of the schools and declaratory judgment that state statutes allowing for the creation of the Recovery School District to be unconstitutional. The State filed a peremptory exception of no cause of action stating it should be dismissed from the suit because the suit alleged the unconstitutionality of a state statute. Additionally, the defendants together filed a declinatory exception and peremptory exception stating that there was no cause of action, no right of action, and failure to join an indispensable party. After a hearing on February 26, 2009, at which the plaintiffs unsuccessfully attempted to amend their petition, the trial court issued judgments on March 12, 2009, sustaining the exceptions of no cause of action, the exception of lack of jurisdiction, and the exception of no right of action to file. The trial court dismissed the plaintiffs’ suit with prejudice. The plaintiffs appealed the judgment sustaining the State Board of Education’s exceptions and the dismissal of the case with prejudice.
Issue: At issue was whether the State Board of Education’s actions to transfer schools from one school district to another violated Louisiana state law and whether statutes allowing for the creation of the Recovery School District were unconstitutional.

Holding: The court held that State Board of Education’s actions to transfer schools from one district to another were not in violation of Louisiana state law. The court additionally held that the plaintiffs’ petition for declaratory judgment declaring unconstitutional the statutes that allowed for the creation of the Recovery School District failed to state a cause of action for declaratory judgment.

Reasoning: The court began by examining the plaintiffs’ demand for injunctive relief. The court noted that the trial court relied on the Louisiana Code of Civil Procedure to arrive at the ruling that it had no jurisdiction where the plaintiffs’ request would cause the creation of a deficit for the school board. The plaintiffs contended they wished to amend their petition to allow for compliance with the Louisiana Code without incurring a budget deficit. The court concluded, however, that the trial court did not err in refusing the plaintiffs the opportunity to amend since it saw no way for the grounds of the objection, the creation of a deficit, to be removed. The court next considered the plaintiffs’ demand for declaratory judgment. The court noted that the plaintiffs’ claims of the unconstitutionality of the statutes creating the Recovery School District were without merit. In one case, the court noted a mechanism in the statute that specifically addressed the plaintiffs’ concerns that monies would not be allocated equitably. In both cases, the plaintiffs’ petition failed to state a cause of action for declaratory judgment.

Disposition: The Court of Appeal of Louisiana, First Circuit affirmed the trial court’s judgment in favor of the defendants.

Citation: *Commonwealth of Virginia v. Doe*, 278 Va. 233 (Va. 2009).
Key Facts: In 1999, John Doe was convicted of and sentenced for charges related to sexually violent offenses. After his release, he completed his supervised probation and, subsequent to a hearing, his requirement to re-register as a sex offender every 90 days was terminated. He did, however, have to register each year with the Virginia State Police as a sex offender. In August 2007, Doe filed a petition for permission to enter Charlottesville City Schools properties to attend events involving his stepson which the circuit court granted. The circuit court required Doe to contact the school principal 48 hours prior to any visit to the school, that he enter the school only for a specific activity, and that he leave immediately after the activity ended. Included in the court’s order was the stipulation that the principal could refuse permission for Doe to attend activities if there was a specific reason why his presence would be inappropriate. The court also stated that the school’s “permission shall not be unreasonably withheld.” The superintendent, school board, and the Commonwealth of Virginia appealed the court’s decision on the grounds it undermined the authority of the school, as granted by Commonwealth Code Section 18.2-370.5(B), to determine whether such an offender should be allowed in the school. Doe countered that the code in question gave the General Assembly power to let the courts determine sanctions and conditions to impose on sex offenders for the crimes they committed.

Issue: At issue was whether the circuit court’s ruling allowing a convicted sex offender access to the school was in keeping with Commonwealth Code Section 18.2-370.5(B).

Holding: The court held that the schools should retain authority to determine the extent to which a convicted violent sex offender should have access to the schools.

Reasoning: The court acknowledged that the statute in question could be interpreted in the two ways. The court, however, expressed that Doe’s view of the language created a
constitutional question about the ability of the General Assembly to limit authority given to schools in the state’s constitution. Doe’s construct, the court noted, could lead to absurd results if extended to furthest limit. Such reasoning would allow the circuit court to force access to a daycare of private school without the owner’s consent. Conversely, the Commonwealth’s theory stated the court should determine the extent to which the ban should be lifted then allow the school board to determine whether to grant the offender access to the school. The court concluded that the Commonwealth’s construct was more in keeping with statute and the state constitution, the court then rejected Doe’s remaining arguments.

Disposition: The Supreme Court of Virginia reversed the circuit court’s judgment and remanded the case for clarification of whether the ban of Commonwealth Code Section 18.2-370.5(B) should be lifted in part or in whole.

Citation: DeFabio v. East Hampton Union Free School District, 658 F.Supp.2d 461 (E.D.N.Y. 2009).

Key Facts: On April 26, 2004, two days after a Hispanic student from East Hampton High School was killed in a motorcycle accident, Daniel DeFabio was walking down the hall and said to a friend he heard someone say, “one down, 40,000 to go.” As the day progressed, rumor spread that DeFabio had originated the comment and several students became angry. One student told school counselor Naglieri that DeFabio had made the comment. Later in the day, DeFabio was in the cafeteria when four or five Hispanic students approached him yelling about his racist comment and one of the students threw an object at him. DeFabio was afraid the students were going to beat him up so he complied when the counselor came by and made him leave. DeFabio was taken to the nurse’s office where the counselor and an assistant principal questioned him about the statement. While in nurse’s office, several Hispanic students looked in the window and
made threatening statements while waiting in the hallway for him. Because of the disturbance, school principal Farina called the police to escort DeFabio from the building. As DeFabio left, several Hispanic students were yelling and some threatened to kill him and bomb his house. Farina called DeFabio’s mother and told her that her son should stay home a few days until the situation abated and it was safe for him to return. The next day, DeFabio asked if he could read a letter he had written over the intercom or at a school assembly to let the students know he had not originated the comment. Farina declined because he was afraid it would make the situation worse. On April 28, at a meeting with DeFabio’s parents, Farina, a guidance counselor, and the assistant principal, the principal expressed his feeling that DeFabio should not yet return to school until the situation further abated. On April 20, DeFabio and his parents were informed that he was being suspended from school for 5 days and the possibility of a superintendent’s hearing regarding the incident. On May 7, a hearing was held and two students testified, one that DeFabio made the comment and was the originator while the other stated she did not hear the comment made. DeFabio continued to deny he originated the comment. The superintendent concluded DeFabio had made the racist comment and suspended him for the remainder of the year. After the hearing, DeFabio was allowed to meet with student representatives of the Latino community. DeFabio contended the students did not believe his story and commented that his failure to make a statement earlier coupled with his not returning to school gave the appearance that he was lying. DeFabio was home tutored to the end of the year. Throughout the ordeal, DeFabio continued to receive threats to his home and cell phone. Also, throughout the summer, DeFabio was accosted several times as he worked. During that summer, DeFabio’s parents met with school officials about his return the following year and at some point, his parents decided it would be better for him to go to California to school. They later, however, appealed the decision
to the school board who denied the appeal. The parents then petitioned the New York State Commissioner of Education who reversed the superintendent’s decision and ordered the incident expunged from DeFabio’s record. Plaintiffs filed a complaint on April 25, 2007 under 42 U.S.C. Section 1983 alleging First and Fourteenth Amendment rights violations and on November 10, 2008, the school district filed a motion for summary judgment.

Issue: At issue was whether the school’s decision to suspend DeFabio for the remainder of the school year was a violation of First and Fourteenth Amendment rights.

Holding: The court held that under the Tinker (1969) standard, the school was justified in its actions against the plaintiff. The court also held that the remaining claims failed due to a lack of evidence presented by the plaintiffs, immunity on the part of the defendants, or a lack of jurisdiction for the court.

Reasoning: The court reasoned it should examine each of the plaintiffs’ allegations in turn with respect to whether they showed a deprivation of constitutional rights by a person acting under the color of state law. The court began with the freedom of speech claim when the school declined to let him present his prepared statement. The court analyzed the facts to determine whether the applicable standard was Tinker (1969), as the plaintiffs asserted, or Hazelwood (1988), as claimed by the defendants. The court concluded that the school’s refusal to let DeFabio return to school where he could have addressed the issue with other students on his own invoked the Tinker standard regarding his restricted speech. The court observed that the record indicated continued threats long after DeFabio was removed from the school the day the incident happened. These threats represented a genuine concern for his safety and his mere presence at the school could have sparked an incident. In answer to the plaintiffs’ contention that the school should have distributed DeFabio’s letter to the student body, the court concluded that under both
Hazelwood (1988) and Tinker (1969) the school was justified in restricting such access. The court also concluded that had there been a First Amendment violation, the school officials would have been entitled to summary judgment through qualified immunity. The court next examined the plaintiffs’ freedom of association claim. Since the claim had at its basis the right to associate for the purposes of First Amendment speech, the court reasoned the lack of a First Amendment violation invalidated the freedom of association claim as well. The court noted that the plaintiffs presented no credible evidence with respect to the substantive due process and that the school followed correct procedures in granting DeFabio procedural due process. The court next observed that the individuals the plaintiffs claimed were similarly situated were, in fact, not in similar circumstance. One, the alleged originator of the comment, had not been identified by DeFabio or others and the others, the two students who had testified against DeFabio in the superintendent’s hearing, had not been accused of making the statement. The court concluded that the remaining claims were not available under the Section 1983 or failed because of immunity. The court finally decided not to retain jurisdiction on the state claims.

Disposition: The United States District Court for the Eastern District of New York granted the defendants’ motion for summary judgment with respect to the Section 1983 claim.

Citation: Morgan v. Plano Independent School District, 589 F.3d 740 (C.A.5 2009).

Key Facts: Plaintiffs brought suit alleging that the school impermissibly denied them the access to distribute a variety of religious materials at the school including pencils with a religious inscription, candy canes with a card describing their origins from a Christian perspective, tickets to a religious musical, and tickets to a religious play. These distributions were restricted under the district’s 2004 rules. While the suit was in process, the district adopted a new policy regarding the distribution of materials that did not require prior review by the school.
administrator. The new policy did contain guidelines for the content that was acceptable for
distribution. After hearing input from employees about the new policy, the district added a
description detailing the justification for the updated policy. The updated version stated the
district’s intention was to decrease distractions or disruptions, preserve time available for
learning, improve the experience of students without colliding with the rights of others.

Subsequent to the adoption of the new policy, the plaintiffs moved for summary judgment
claiming the policies to be facially invalid. The district court found the challenge to the old
policy to be moot because there was no indication the school would revert to the old policy. The
court further found the new policy to facially valid except where it restricted distribution of
materials during the elementary lunch period. Plaintiffs appealed the findings of the district court
with regard to mootness of the old policy and the validity of the new policy. Defendants
appealed the district court finding that the new policy was not valid where it restricted the
distribution of materials during the elementary lunch period.

**Issue:** At issue was whether the policies restricting access to distribute materials at the
school were constitutionally valid.

**Holding:** The court held that the district’s current policy regarding the distribution of
materials to be facially constitutional in all respects.

**Reasoning:** The court began by examining the plaintiffs’ contention that *Tinker* (1969)
should be the controlling standard and that restrictions should only be allowable if they are
necessary to avoid substantial disruption of the school setting. The court concluded that the
district court’s reliance on the *O’Brien* test was not misplaced. The court agreed with the district
court that, based on *O’Brien*, the district’s new policy was facially valid. The policy allowed all
students access to distribute materials at set times during noninstructional time. The court also
noted that elementary students, because they are less mature, require more supervision during the lunch period to maintain order. Since those elementary students have other means available to distribute materials, the court concluded the new policy facially constitutional as it stood. With regards to the district’s old policy, the court declined to address its merits and remanded the claims to the district court for further proceedings.

Disposition: The United States Court of Appeals for the Fifth Circuit affirmed the district court’s ruling with regards to the validity of the defendants’ policy and reversed the ruling with regard to distribution of materials in the elementary lunch period.

Analyses of Cases

The purpose of this study was to examine constitutional issues related to the control and use of school facilities in public schools. The data were retrieved from case law classified by West Education Law Digest as belonging to Key Number Schools 72, Control and Use, from the years 1981 through 2009. In order to distill the trends and patterns of the courts’ decisions, the cases were outlined to determine key facts, issues, holdings of the courts, reasoning for the holdings, and disposition. The data were analyzed using the Data Analysis Spiral described by Creswell (2007). Creswell described the first step of the process to be data management. In keeping with this model, the researcher listed each case to be briefed in a computer spreadsheet. As each case was briefed, the researcher added notes to the spreadsheet generalizing the topic of each case, key issues presented by the case, the basis of analysis used by the courts, and the key outcomes of the courts’ decisions. Creswell’s next step involved reading information and developing memos that contain key ideas about the material. Following the completion of the case briefs, the researcher reviewed the notes to discern initial broad concepts found in the data.
This review led to the development of two broad categories regarding the control and use of school facilities, religious issues and secular issues. (See Table 1)

Table 1

*Primary Category of Cases Briefed*

<table>
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<tr>
<th>Year</th>
<th>Case</th>
<th>Primary category</th>
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<tr>
<td>1982</td>
<td>Linnens v. Christensen</td>
<td>Secular</td>
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<tr>
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<td>Western Area Business and Civic Club v. Duluth School Bd</td>
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<tr>
<td>1982</td>
<td>Independent Dist.</td>
<td>Secular</td>
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<td>1983</td>
<td>Perry Educ Ass'n v. Perry Local Educators Ass'n</td>
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<td>Student Coalition for Peace v. Lower Merion School District Bd. Of</td>
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<td>1984</td>
<td>School Directors</td>
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<td>1985</td>
<td>Jarman v. Williams</td>
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<td>1985</td>
<td>Ford v. Manuel</td>
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<td>Student Coalition for Peace v. Lower Merion School District Bd. Of</td>
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<td>1986</td>
<td>School Directors</td>
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<td>1986</td>
<td>Grattan v. Board of School Com'rs of Baltimore City</td>
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<td>U.S. v. Yonkers Bd of Educ</td>
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<td>1987</td>
<td>Thompson by Thompson v. Waynesboro Area School Dist.</td>
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<td>Deeper Life Christian Fellowship, Inc. v. Board of Educ. Of City of</td>
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<td>New York</td>
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<td>Mergens by and through Mergens v. Board of Educ. Of Westside</td>
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<td>1989</td>
<td>Community Schools</td>
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<td>1989</td>
<td>Searcey v. Harris</td>
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<td>Board of Educ of Westside Community Schools v. Mergens by and</td>
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<td>1991</td>
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<td>Leonard v. Iowa State Bd of Ed</td>
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<td>Hoppock by and through Hoppock v. Twin Falls School Dist</td>
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<td>Garnett by and through Smith v. Renton School Dist.</td>
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<td>Howard Jarvis Taxpayers Assn v. Whittier Union High School Dist</td>
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<td>Lamb's Chapel v. Center Moriches Union Free School Dist.</td>
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<td>Schanou v. Lancaster County School Dist.</td>
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<td>Washegesic v. Bloomingdale Public Schools</td>
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<td>Trinity United Methodist Parish v. Board of Educ. Of City School Dist</td>
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<td>1995</td>
<td>City of Newburgh</td>
<td>Religious</td>
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<td>1996</td>
<td>Local Organizing Committee, Denver Chapter, Million Man March v. Cook</td>
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<td>Hsu by and through Hsu v. Roslyn Union Free School Dist. No. 3</td>
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<td>1996</td>
<td>Herdahl v. Pontotoc County School Dist.</td>
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<td>Unified School District</td>
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<td>1997</td>
<td>Hone v. Cortland City School Dist.</td>
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<td>1997</td>
<td>Chandler v. James</td>
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<td>1997</td>
<td>Davis v. Hillsdale Community School Dist.</td>
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<td>1997</td>
<td>C.H. v. Oliva</td>
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<td>Ryans v. Gresham</td>
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<td>2009</td>
<td>DeFabio v. East Hampton Union Free School District</td>
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Following the initial categorization, the case briefs and accompanying notes were again examined to refine subtopics within the two main categories. To aid in this process, additional information was noted to develop secondary and, in some instances, tertiary categories within the data. Representative cases of these areas are discussed.
Religious Issues

Of the 136 cases briefed, 68 of the cases involved issues of a religious nature. The cases in this area involved religious issues regarding the control and use of school facilities. After the initial categorization of the cases as involving religious issues in some manner, each case was reexamined to further stratify the data. This stratification led to the discovery of subcategories within the data. Those 68 cases were further categorized as follows: 18 of the cases involved the recognition of religious clubs at schools, 14 dealt with churches using school facilities for after-hours assemblies or worship services, 13 concerned commemorative and other types of displays on school grounds, 12 encompassed activities that gave the possible appearance of religious endorsement by schools, and 11 cases covered the distribution of religious literature at schools.

(See Table 2)

Table 2
Subcategories of Religious Issues

<table>
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<tr>
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**Religious Clubs**

The most heavily litigated issue in the religious area of the control and use of school facilities was that of religious clubs in schools. The litigation regarding religious clubs typified the issues regarding the control and use of school facilities. In many of the cases, school administrators attempted to avoid an Establishment Clause violation by denying access to any club that contained a religious component. With the changing tide of legal opinion regarding religious access to school facilities and the passage of the Equal Access Act, the wholesale denial of religious access for clubs in schools became a source of controversy. The courts were called
upon to settle many of those controversies. Most prominent among the cases in this area was the
Supreme Court’s decision in Board of Education of the Westside Community Schools v. Mergens
By and Through Mergens, 110 S.Ct. 2356 (U.S.Neb. 1990). In Mergens, students asked for
permission to form a Christian Bible Study Club. After refusals by the principal, the
superintendent, and the school board, the students brought suit. The district court ruled in favor
of the school and held the school had maintained a closed forum that made the Equal Access Act
inapplicable. The United States Court of Appeals for the Eighth Circuit reversed that decision
and held that several of the allowed clubs were not related to the curriculum thereby invoking the
oversight of the Equal Access Act. The Court of Appeals also held that the guidelines of the
Equal Access Act did not represent a violation of the Establishment Clause. The Supreme Court
granted certiorari and heard arguments in the case. In its decision in the case, the Supreme Court
reached several conclusions that impacted later litigation in this area. First, the court pointed out
that Congress, through enactment of the Equal Access Act, had extended the reasoning of its
ruling in Widmar v. Vincent (1981) to students in the secondary level. In Widmar, the Supreme
Court held students should not be denied use of university facilities on the basis of their speech.
The Congress, according to the court, extended this right to younger students. Second, the court
offered an interpretation of the language of the act regarding “noncurriculum related student
group.” The court concluded that for a school to claim all of its clubs were curriculum related,
each club had to have a direct connection with a course that was offered or one that would be
offered in the immediate future. Finally, the court considered whether the allowance of a
religious club in a public school would equate a violation of the Establishment Clause. The court
pointed out that school administrators were misclassifying the type of speech involved. School
leaders tended to view the allowance of student religious clubs at school as giving the
appearance of the government endorsing religious speech. A student religious club, the Court opined, would represent private speech endorsing religion. This type of speech was protected by the Free Speech and Free Exercise Clauses. The Court also pointed to two other factors that served to mitigate potential Establishment Clause violation when allowing a religious club. Since school officials were limited to monitoring club meetings but not participating, the restriction served to delineate the student speech from government speech. Additionally, the court stated the prevalence of secular student clubs at the school alleviated the appearance of religious endorsement. The most important aspect of the Supreme Court’s decision in the case was the determination that the Equal Access Act did not violate the Establishment Clause. In effect, this decision certified the constitutionality of the Equal Access Act.

Another important decision regarding the Equal Access Act in the area of student clubs was *Hoppock v. Twin Fall School District No. 411*, 772 F.Supp. 1160 (D. Idaho 1991). In this case, the District Court for the District of Idaho was asked to settle whether the Idaho State Constitution could overrule the Equal Access Act. The court began by referencing the Supreme Court’s *Mergens* decision to confirm that the Equal Access Act was not a violation of the Establishment Clause. The court next determined that the Idaho constitution was more restrictive of religious access to school facilities and considered the school’s assertion that abiding by the Equal Access Act would cause it to violate the state’s constitution. The court resorted to the Supremacy Clause to make its determination in the case. The court held that the passage of the Equal Access Act took place in the pursuance of the U.S. Constitution which, according to the Supremacy Clause, overruled the restrictions of the Idaho constitution.

A similar conclusion was reached in *Garnett By and Through Smith v. Renton School District No. 403* (1993). In *Garnett*, the court was asked to consider whether the provision in the
Equal Access Act that did not protect speech considered “otherwise unlawful” would preclude religious speech in a school if the state constitution forbade the use of schools for religious meeting. The Court of Appeals for the Ninth Circuit reasoned that the broader purpose of the section was to prevent unconstitutional application of the Equal Access Act. The court concluded that a state constitution could be more protective of individual rights but could not be more restrictive of rights granted by federal law.

Viewpoint discrimination was also addressed in the litigation regarding religious clubs. In *Good News/Good Sports Club v. School District of City of Ladue*, 28 F.3d 1501 (C.A.8 1994), the school district received complaints about a religious club. The school board allowed the club to continue meeting until the end of the school year but, during the following summer, adopted a policy restricting community groups from meeting until after 6:00 p.m. except for scout groups. The board also stipulated that scout groups could not include religious activities during the restricted time. The Court of Appeals for the Eighth Circuit concluded that the complaints about religious activity at the school and the revised policy that restricted religious activity pointed to viewpoint discrimination by the school district.

Of the 18 cases addressing religious clubs in schools, the only case not decided in favor of a plaintiff religious club was *Quappe v. Endry*, 772 F.Supp. 1004 (S.D.Ohio 1991). In this case, a teacher started a student religious club in the 1970s and had used her position as a teacher to recruit students for the club. She also said prayers, displayed religious material in her classroom, and distributed Bibles to her students. After receiving complaints about these activities, the Board notified the teacher she should stop the activities or she could lose her job. When the teacher applied for permission for the club to meet the following year, the superintendent would not let the club keep its usual 3:30 p.m. meeting time. He offered to let the
club meet at 6:30 p.m. instead. The court was asked to settle whether a requirement to meet at the later time was a violation of rights. The court concluded that Ohio law intended for schools to be public forums even with regard to religious activity. The court pointed out, however, that based on a decision in the Northern District of Ohio, *Ford v. Manuel*, 629 F. Supp. 771 (N.D. Ohio 1985), programs of this nature should not begin immediately before or after school hours. The young age of the children involved influenced the court to conclude that students in an elementary school are more impressionable and less able to differentiate between government speech and private speech. Finally, the plaintiffs did not provide any evidence to support a conclusion that the school maintained a limited public forum and even if they had, the court stated the elementary school should not become a place of “unfettered expressive activity.”

*Church Use of Facilities*

Another important issue in the control and use of facilities with regards to religion was church use. The issue was further broken down into the use of facilities for assemblies or programs and the use of facilities to conduct worship services on a recurring basis. The case of *Gregoire v. Centennial School District* (1990) highlighted an important concept when a school looks at granting permission for a religious assembly. Gregoire had applied for use of the high school’s auditorium. The request was denied and the district court eventually granted a preliminary injunction citing the school’s open forum. The school changed their policy to disallow use of the facilities for religious services. The district court granted permanent injunctive relief but declined to enjoin the prohibition of religious worship along with its ruling about religious speech. The Court of Appeals for the Third Circuit concluded in its decision that religious worship and religious speech were similar in nature and the district court should have enjoined the school district from prohibiting both. With this case, the court granted religious
worship the same protections as speech when school leaders must decide whether to grant access.

The most important case in the area of religious use of facilities for assemblies was the Supreme Court’s decision in *Lamb’s Chapel v. Center Moriches Union Free School District* (1993). In this case, a church requested permission to use a school to show a six-part film series about family values featuring a well-known Christian speaker. The school denied the request which the district court and Court of Appeals upheld citing a limited public forum. The Supreme Court, because it questioned the reasoning behind the decisions, granted certiorari to hear the case. The court began its analysis with a look at the forum status of the school. The court pointed out that school districts retain control of their properties the same way a private property owner do. However, once a school began to allow use of facilities, the reasoning for denial of use must be examined. In this case, the court reasoned that the content presented in the film series would have been allowed in the school if it had not contained the religious content as well. A secular presentation of the same content would have been allowed by the school but, because the film contained reference to religion, the church was denied access. The Supreme Court held this proved viewpoint discrimination on the part of the school district in its conclusion that the school had violated the church’s First Amendment rights.

The courts also provided some input on religious assemblies during the day. In *Golden v. Rossford Exempted Village School District*, 445 F.Supp.2d 820 (N.D.Ohio 2006), a group of students who had formed a band requested permission to perform for a school-wide assembly during the day. While initially garnering the support of the school administration, a complaint caused a closer look at the nature of the group. It was determined that the student group had a decidedly religious purpose and proclaimed on its website intentions to proselytize through
performance. The school administration decided to cancel the group’s performance and another student was allowed to perform as long as, the superintendent stated, it did not have a religious mission. In examining the issue, the District Court for the Northern District of Ohio concluded the school had not created a forum for speech because it intended the event to be a one-time assembly with only one performer. The court also cited *Hazelwood* (1988) in its conclusion that the assembly during the day would have born the imprimatur of the school. As such, a religious concert would have given the appearance of government endorsement of the speech and, based on *Hazelwood*, the school had the authority to exercise editorial control.

In looking at the use of school facilities by churches to conduct worship services, the overriding theme was the way the actual practice of a school district impacted the court’s decision. The decisions in the cases were evenly split between those found in favor of plaintiffs and those found in favor of defendant school districts. In both, however, the way a school enforced its policy was as important as any other factors in the case. This was demonstrated in *Deeper Life Christian Fellowship, Inc. v. Board of Education of City of New York* (1988). In this case, a church group had received permission to use school facilities for a worship service with the understanding they would need the school for an additional six to eight months while their building was being renovated. After some complaints from the community, the school denied further use of the school by the church. In deciding the case, the Court of Appeals for the Second Circuit concluded that a nonpublic forum status attached to the school that would preclude the church’s further use of the facility. The school, however, had granted access to church groups in the past and this practice opened the school to use by the church. Similarly, in *Wallace v. Washoe County School District* (1991), the school district argued that it had created a limited open forum that excluded all religious activity. In examining the claim, however, the court
concluded the school had created a limited open forum, in actual practice, which included use of facilities for Christmas parties and programs containing possible religious content. This examination of actual practice also led to decisions in favor of defendant schools. In *Full Gospel Tabernacle v. Community School District 27* (1997) and *Campbell v. St. Tammany Parish School Board* (2000), the courts’ examination of the schools’ forums led to the conclusion that the schools had maintained closed forums through written policy and actual practice. In both cases, the closed forums precluded use by church groups. The court in *Campbell* noted that because the written policy restricted other types of activities along with religious activities, the school had not practiced viewpoint discrimination.

**Religious Displays**

The area of religious display brought up litigation by individuals for different reasons. Some brought suit against schools in an attempt to remove the display of religious material they considered to be a violation of the Establishment Clause. Others brought suit against schools to force the display of religious material they deemed acceptable. Typical of the first kind of suit were *Joki v. Board of Education of Schuylerville Central School District* (1990) and *Washegic v. Bloomingdale Public Schools* (1994). In both cases, Christian-themed paintings had been completed by students and donated to the schools for display. In later years, different individuals brought suits to remove the paintings. In both cases, the courts deemed the paintings to be in violation of the Establishment Clause and ordered removal of the artwork. In the remaining cases, the determining factor, whether the court ruled in favor of the plaintiff or the defendant school district, was the amount of control the school leadership exhibited in the development of displays. In *Fleming v. Jefferson Community School District R-1* (2002), the school undertook a
memorial project at Columbine High School to help students cope with the re-opening of the school. The school began a tile project that would allow students to decorate tiles that would be glazed and hung in the school. The school outlined detailed guidelines for participation in the project including the exclusion of references to the attack, names of those killed, religious symbols, and anything obscene or offensive. Teachers supervising the project screened out those that did not meet the restrictions in the project. When plaintiffs who wanted the religious content included in the display brought the matter to court, the court cited the retention of control in the project placed the issue under the guidance of *Hazelwood* (1988). The court also reasoned that since the tiles would be permanently affixed to the school, they would be seen as bearing the school’s imprimatur. Finally, without the ability to edit the speech contained in the tiles, the school might be required to post offensive and divisive speech. Since this would be contrary to the purpose of the project, the court concluded the school had a legitimate pedagogical concern in maintaining a *Hazelwood*-based editorial control of the content. Conversely, *Demmon v. Loudon County Public Schools* (2004), a case with similar facts, yielded different conclusions. In the case, a parent group began a fundraising project that allowed patrons to purchase commemorative bricks bearing personalized messages that would be placed in a walkway outside the school. Some of the patrons purchased bricks and had them inscribed with a Latin cross. After complaints about bricks displaying crosses, the school eventually removed the bricks and adopted a policy limiting messages on permanent attachments to school property to a student or staff member name, class, grade, or year that person was in the school. The court held that the removal of bricks with a Latin cross but not removing bricks with secular images amounted to impermissible viewpoint discrimination. In this case, the court also concluded the bricks would
not bear the imprimatur of the school, did not represent a pedagogical interest, and could not be considered school-sponsored speech.

School Endorsement of Religion

Despite the well-established legal precedents regarding the endorsement of religion in schools, several of the cases in the study involved schools engaged in activities that crossed the “wall of separation.” In *Doe v. Duncanville Independent School District* (1993), the girls basketball team was regularly led in prayers by the coach at games and on the bus while travelling to away games. The coach also conducted prayers during P.E. classes during school hours. When Doe expressed concerns to her father about the practice, he advised her against participating. Doe became the subject of disparate treatment by fellow students and at least one teacher. When Doe’s father addressed the situation with the school leadership, he was told that the prayers would be stopped during school hours but that nothing could be done about team prayers after basketball games. At trial, the school district asserted they had created a limited public forum and, based on *Mergens*, allowing spontaneous prayer by teachers and students was necessary. The court, however, stated this was a misapplication of the precedent since this case involved extracurricular activities and teacher-initiated, not student-initiated, religious activity. Similarly, in *Chandler v. James* (1997), the court was asked to address religious activities in Alabama’s Dekalb County Schools. The school system had established a pattern of allowing impermissible religious activities. The religious activities were so pervasive that the court ordered monitoring for compliance because, “simple declaratory relief would, in Dekalb County, be no relief at all.” While these cases represented schools engaged in impermissible activities that endorsed religion, other cases shed a different light on the issue. For instance, in *Randall v.*
Pegan (1991), a complaint by Maggie Randall and the New York Civil Liberties Union about an upcoming baccalaureate service, normally sponsored by the school, caused the school to cancel the event. After the cancellation, a group of students submitted a building request form and paid the fee to the school board to be able to sponsor the event themselves. The students planned the event, made all the arrangements, and invited a number of speakers. The plaintiffs brought suit attempting to enjoin the school district from sponsoring the event. The court held that the school’s open forum policy and the nondiscriminatory policy in allowing use of the facility rendered the allowance of the facility for the student-sponsored event viewpoint neutral and in compliance with the Establishment Clause. In Sease v. School District of Philadelphia (1993), the school district suspended a student gospel choir’s use of school facilities. The administration was concerned because the group was led by a school employee and that the choir’s repertoire was entirely religious music. Additionally, guest speakers at the choir’s performances presented religious messages. The school administration gave the group the options of moving off-campus, becoming entirely student-directed, or changing to comply with a newly developed policy. Suit was brought and the court was asked to settle whether the employee-led group violated the Equal Access Act. In its decision, the court pointed out that language in the Equal Access Act required that school employees could only be present in a nonparticipatory capacity. In this case, legal action was brought against the school because it would not allow an activity that could be considered a government endorsement of religion.

Religious Literature Distribution

The issues presented by the distribution of religious literature are exemplified in Thompson by Thompson v. Waynesboro Area School District (1987). In this case, the plaintiff
and a classmate were distributing copies of a religious publication to students in the hallway. After being warned by the principal about the school’s policy prohibiting the distribution of literature that had not been previewed by school officials, Thompson once again distributed the newspaper on a later date. Thompson was assigned in-class suspension and was told he could not distribute papers anymore. Once again, Thompson distributed the papers without permission at which time he was assigned in-school suspension. The court was asked to settle the issues in the case. First, the court determined that the students, contrary to the Equal Access Act, had not attempted to secure a place to gather for a “meeting” with like-minded individuals. Additionally, their distribution of the literature in the hallway impinged on other students’ ability to choose to participate in the activity. As a free speech issue, the court held the school had created a limited open forum and that allowing distribution of the religious materials would have served a secular purpose. The court held that the school had violated the students’ free speech rights but that the school did have the authority to define time, place, and manner restrictions on the distribution of the literature in the future.

Secular Issues

Of the 136 cases briefed, 67 of the cases involved issues of a secular nature. These cases did not have religion as a component of the legal issue. Once the initial determination was made that the cases did not involve religion, further analysis was conducted to ascertain commonalities between the cases. These commonalities led to the development of several subcategories within the group of cases identified as secular in nature. The 67 cases were further categorized as follows: 23 involved permission to be on school property, 12 involved nonreligious student activity, 10 dealt with communication within a school or system, 8 were concerned with how a
district utilized or classified its properties, 4 dealt with outside groups wishing to use school facilities for nonschool-related activities, 4 involved business or contract issues, 3 concerned the distribution of secular literature on school grounds, 1 involved a nonstudent resident accessing school programs, 1 involved a teacher’s right to decide curriculum within a classroom, and 1 involved supervision of students who left campus without permission. (See Table 3)

Table 3

*Subcategories of Secular Category*

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<th>Year</th>
<th>Case</th>
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<td>2003</td>
<td>Triplett v. Board of Elemntary and Secondary Education</td>
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<td>Jarman v. Williams Local Organizing Committee, Denver Chapter</td>
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<td>Million Man March v. Cook</td>
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<td>East High School Prism Club v. Seidel Boyd County High School Gay Straight</td>
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<td>Alliance v. Board of Educ of Boyd County Caudillo ex rel. Caudillo v. Lubbock Independent School Dist</td>
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<td>State v. Allen</td>
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<td>Michigan City Area Schools</td>
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<td>In re Joseph F.</td>
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<td>Nichols v. Western Local Bd of Edn</td>
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<td>Cina v. Waters</td>
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<td>2005</td>
<td>Crowley v. McKinney</td>
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<td>Cunningham v. Lenape Regional High Dist.</td>
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Trespass

Of the secular issues regarding the control and use of school facilities, the control over who has permission to be on school campus is the largest subcategory. In most of the cases analyzed, schools were upheld in their right to control who could or could not be on their campuses. The majority of the cases involved individuals who engaged in conduct that was disorderly or presented a potential hazard to students or staff. In *Lovern v. Edwards* (1999), the plaintiff, a non-custodial parent of three students in Henrico County schools, began a pattern of harassing behavior after the school principal informed him by letter that he would have to schedule meetings in advance because the custodial mother wished to be present when the children were discussed with school personnel. After being informed by the superintendent that he was barred from campus for his threatening actions, Lovern began to threaten legal action and also threatened to expose alleged misuse of public funds by public officials unless the trespass order was rescinded. Lovern also sent letters to two area schools scheduled to play the local high school in baseball, threatening to involve them in the litigation unless the superintendent rescinded the order. The Court of Appeals for the Fourth Circuit observed that school officials were given authority to ensure appropriate behavior of outside individuals on school property and stated school leaders should not be intimidated into compromising the safety of those under their care. In a similar case, *Cunningham v. Lenape Regional High District Board of Education* (2007), Cunningham, the father of a student on the school’s wrestling team, was banned from the school after displaying verbally abusive behaviors towards the wrestling team coach. In its opinion, the court stated the school had tried to address the parent’s concerns about the coach but requested Cunningham abide by the school’s safety procedures. The ban was put in place after the requests were ignored. The court further stated that parents have a right to be involved in the
education of their children but the reality of violence in the schools necessitated caution to protect the safety of students and staff.

While the court employed similar reasoning in the majority of the cases in this subcategory, four cases came to a different resolution. First, in *Cina v. Waters* (2004), a parent who was a probation officer entered the school wearing her sidearm and was banned from campus when she refused to leave it in her car. The Appellate Division, Third Department of the New York Supreme Court dismissed the case as moot because the parties had resolved the issue and Cina had been granted access to the school on the same basis as other parents as a result. The court did note, however, that had it addressed the issue, it would have upheld the prior ruling in favor of the school principal since the ban was neither arbitrary nor capricious. In *Cirelli v. Town of Johnston School District* (1995), the courts addressed whether an employee should have access at will to videotape conditions of the school because of her safety concerns. Cirelli, who had been teaching in the district for a number of years, became the art teacher in 1980. Later, she began to suffer from skin rashes, difficulty breathing and headaches. Cirelli filed a grievance and the school administration responded by hiring professional services to address her complaints. Despite the attempts to resolve the situation, Cirelli continued to complain and began videotaping conditions during working and nonworking hours in the school. The state department of occupational safety certified the facilities as compliant after the school addressed some minor infractions. At the time, the school principal ordered Cirelli to stop videotaping the school facilities and prohibited her from releasing the tapes. Cirelli claimed the school could not restrict her access to videotape. The court held that the school could not prohibit the release of video made by Cirelli. Additionally, she had to restrict her activities to non-school, non-working hours and she would have to follow the same procedures as the general public to gain access for
the purposes of videotaping inside the school during her non-working hours. In *Crowley v. McKinney* (2005), Crowley had alleged constitutional violation of his right to participate in his child’s education when he was not allowed to stay on the playground to observe his son after an alleged bullying incident. The school also did not allow him to attend a book fair at the school. While the court held the school principal was entitled to immunity, it also noted that the lower court had acted prematurely when it dismissed one of the plaintiff’s equal protection claims and a First Amendment claim. While the court stated there may have been good reason for the school’s actions, the matter should have proceeded to trial rather than to have been dismissed. Finally, in *Cole v. Buchanan County School Board* (2007), Cole, a reporter for a local paper, had published a series of articles that was critical of school board members. In one instance, Cole observed a board member dropping off their child at a school that was not in the district the member represented. The board passed resolutions restricting that reporter’s access to school property except to attend board meetings or vote. The court held that the resolutions passed by the board, since they were intended to single out an individual, represented a possible First Amendment retaliation violation.

In the cases analyzed, the courts repeatedly recognized their obligation to uphold the authority of school personnel to ensure the safety of students and staff while at the same time protecting the constitutional interests of those who have business with the school. While eleven of the plaintiffs asserted a constitutional right under the First Amendment, the Fourteenth Amendment, or both to have access to school facilities and six more made claims based on their state’s laws, in all but three of the cases analyzed, the courts upheld the school administrators’ decisions. The other three cases represented potential rights violations. School administrators, like the courts, must balance safety concerns and the rights of the individual.
Student Activity

With regards to secular student activity and access to facilities, the courts have relied heavily on forum analysis to arrive at determinations. In most of the cases, the essence of the issue became whether or not student groups of a similar nature were allowed access that plaintiffs were not. Most of the cases in this area were grounded in the Equal Access Act law enacted in 1984. In Student Coalition for Peace v. Lower Merion School District Board of School Directors (1984), students had applied for permission to use school facilities to hold a peace rally and were turned down. The court initially held the facilities in question to be nonpublic forums and allowed the board to restrict access for the group. After the passage of the Equal Access Act, the plaintiffs asked the court to reconsider its ruling. In reconsidering the forum status of the facilities, the court concluded that the school had created a limited open forum in one of them and denying the group access to that particular facility would be in violation of the Equal Access Act. Similar rulings followed in most of the cases in this area. In Colin by and through Colin v. Orange Unified School District Board of Education (2000), the school board denied a student-club’s application for a gay-straight alliance club at El Modena High School. The board stated it would reconsider if the club would revise its mission statement to excluded sex, sexuality, and sex education. The court held that the board’s stipulations for recognizing the club while not requiring the same of other clubs to be an infringement of expressive rights. The court also concluded, based on its policy and actual practice, that the board had created a limited open forum from which it had excluded the plaintiffs on the basis of the content of their speech.

While the courts ruled in favor of the proposed student activities in most of these cases, some important distinctions were made. In East High Gay/Straight Alliance v. Board of
Education of Salt Lake City (1999), the court held that the school board had engaged in impermissible viewpoint discrimination during the 1997-98 school year because it had maintained a limited open forum from which it denied the club access. The court also held, however, the school had changed its policy and the new restrictions based on the closed forum policy were reasonable. These conclusions led to a judgment for the plaintiff with respect to the one year and judgment for the defendant school district with respect to the new closed-forum policy. In Caudillo ex. rel. Caudillo v. Lubbock Independent School District (2004), students and a teacher in the system requested permission to form a Gay and Proud Youth Group. The request was denied because of the district’s abstinence-only policy with regard to sexual activity and because the club included links to graphic and sexually explicit material on its website. The court upheld the school’s decision and stated the content of the website moved the case from a student rights issue to a school’s right to maintain community standards regarding appropriateness of subject matter. One other case in this area presented a slightly different issue. In this case, Madrid v. Anthony (2007), a student protest regarding upcoming immigration legislation created tension between groups of students in the school. After hearing that students from both sides of the issue were planning to wear t-shirts with potentially offensive slogans, the principal announced students wearing those shirts would be sent to the office. The court concluded in this case that the students had standing to bring a suit but the principal’s decision to prohibit the shirts was within the guidelines of Tinker (1969) because of the racial tensions already present in the school and the probability that the slogans would provoke an altercation between the groups.

With regard to secular student activity in the schools, the courts have consistently ruled that student groups must be afforded the same privileges under the Equal Access Act that
similarly-situated groups enjoy. Failure to abide by this tenet is a violation of those students’ rights.

Communication

For cases that dealt with different forms of communication, the courts used forum analysis in each to reach a conclusion. These types of communication involved school bulletin boards, school internal mail systems, printed distributions, and electronic media. The United States Supreme Court decided *Perry Education Association v. Perry Local Educators’ Association* (1983) which became one leg of a three-part standard of analysis, along with *Widmar v. Vincent* (1981) and *Cornelius v. NAACP Legal Defense and Education Fund* (1985), in cases dealing with forum analysis. In *Perry*, a rival union representative group sought access to school mail boxes claiming that restricting access to only the teacher-elected union representation group was a violation of First and Fourteenth Amendment rights. The Supreme Court conducted an extensive analysis of forum doctrine precedent in concluding that three types of forums existed: the traditional public forum, the limited open forum, and public property that had not been opened for public communication. Since *Perry* fell under the third, the mail system was not open to access by all but only to those granted permission by the school administrator. The counts employed principles derived from Perry to reach a determination in most of the remaining cases.

One case made use of *Perry* and *Hazelwood School District v. Kuhlmeier* (1988) to resolve a dispute regarding access to school publications. In *Myers v. Loudon County School Board* (2007), Edward Myers did not like the school’s patriotic curriculum. Myers attempted to purchase advertising space in the elementary school yearbook and the high school athletic
program. Both of these advertisements contained offensive language. In addition, Myers sought permission to distribute flyers to all students in the elementary, middle, and high schools. The school denied the request on the grounds that they had not created a forum for outside flyer distribution. The court concluded that Perry was the ruling precedent that precluded the plaintiff’s access to distribute flyers to all the students. Hazelwood (1988) was cited by the court as the ruling precedent granting the school authority to regulate speech that would bear the imprimatur of the school.

Facilities Utilization

Cases in the area of facilities utilization establish principles guiding the authority to control how district buildings are categorized for school use. All of the cases in this area were based on state law for each respective district. Linnens v. Christensen (1982) typified the issues in this area. In this case, the school board reclassified how some of the buildings were to be utilized to make better use of the district’s resources. The plaintiffs in the case brought suit asserting the board had to have voter approval to take action that effectively closed a school. The court, however, concluded that legal precedent allowed school leaders considerable latitude to determine the best use of district facilities. As such, the board had the authority to make the changes without seeking voter approval. Two cases, however, pointed to a hierarchy of control with regards to facilities utilization. The court in Hazleton Area School District v. Zoning Hearing Board (2001) concluded that school boards did not have the authority to decide facilities utilization without the oversight of the local zoning board. In U.S. v. Yonkers Board of Education (1987), the school district had been reluctant to return unused property to the state. The district court ruled that despite the school board’s desire to keep the property for potential future growth
in the area, the city’s need to satisfy a federal Housing Remedy Order took precedent and ordered the property to be made available for that use.

Non-school Activity

The cases in this area involved groups not associated with the school requesting use of the school’s facilities for different purposes. The courts were evenly split in their decisions for plaintiff or defendant. Each court, however, employed principles from *Perry* to conduct a forum analysis to arrive at the decisions. In *Jarman v. Williams* (1985), a group of parents wished to rent the school’s gym to hold more social dances for the children of the school. When the school refused, the parents brought suit claiming the dance was expressive speech and the school should not deny the students that privilege. The court concluded that the social dance in this case did not represent an expressive activity for First Amendment purposes and even if it did, the school, according to *Perry*, had not created a forum for this type of activity. Conversely, in *Local Organizing Committee, Denver Chapter, Million Man March v. Cook* (1996), the court followed the reasoning of *Perry* to conclude the school had never previously denied access to other group and to deny the plaintiffs similar access to the limited open forum was impermissible.

Literature Distribution

While most of the cases regarding literature distribution in the study involved religious materials, a few cases fell in the area of secular issues. In *Searcey v. Harris* (1989), the court considered whether a school’s denial of permission for a group to distribute anti-military service literature was a violation of rights. The court concluded that once the school opened a forum for career information, it could not exclude the plaintiff group because it disagreed with their
message. In *Reeves v. Rocklin Unified School District* (2003), the court completed a similar forum analysis and concluded the school maintained a nonpublic forum and, because the plaintiff group had demonstrated the potential for disruption to school activities, the school was justified in denying access. In both cases, the court employed an analysis of the school’s forum status to arrive at a decision.

**Decisional Analysis**

Further analysis of the 136 cases in the study yielded subcategories based on how the courts reached their decisions. While the cases presented a wide range of issues to be addressed, the basis of reaching a determination in each case fell into a smaller grouping of analyses. In examining the issues before the courts, the rationales used by the judges to reach a decision fell into seven areas: forum analysis; viewpoint discrimination; endorsement of religion; permission to be on campus; free speech; free exercise of religion; and time, manner, and place restrictions. In many of the cases, the courts employed more than one of these lenses to focus their analysis in reaching a decision. Table 4 presents each case and its accompanying basis of analysis:
## Table 4

**Basis of Outcomes**

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<thead>
<tr>
<th>Year</th>
<th>Case</th>
<th>Basis of analysis</th>
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<tr>
<td>1982</td>
<td>Linnens v. Christensen, Western Area Business and Civic Club v. Duluth School Bd Independent Dist.</td>
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<td>1982</td>
<td>Perry Educ Ass'n v. Perry Local Educators Ass'n</td>
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<td>Perry Educ Ass'n v. Perry Local Educators Ass'n</td>
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<td>1984</td>
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<td>1985</td>
<td>Jarman v. Williams</td>
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<tr>
<td>1985</td>
<td>Student Coalition for Peace v. Lower Merion School</td>
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<td>1986</td>
<td>District Bd. Of School Directors</td>
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<td>1986</td>
<td>Student Coalition for Peace v. Lower Merion School</td>
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<td>1990</td>
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<td>Year</td>
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<td>Morgan v. Plano Independent School District</td>
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Summary

The seemingly innocuous decision to grant access to school facilities may be taken for granted by both members of the community and school leaders. However, examination of case law related to these decisions should give pause to leaders faced with making such decisions. Careless application of principles surrounding the control and access of school facilities may cause a loss of local control over how such facilities are utilized. The school leader may also face pressure from the local public who do not understand why access should not be automatically granted to groups that community supports. For these reasons, school leaders must become aware of the many varied issues that are broached when making decisions about who should be granted access to the school. Additionally, these leaders should also make themselves aware of the lines of reasoning the courts have employed in making their decisions in the attendant litigation. Finally, the school administrator should be able to explain to those community members in their district the reason behind their decisions to grant or deny access to various groups and individuals. Principles garnered from the analysis of data in this study can aid school leaders at all levels in addressing each of these areas.
CHAPTER V
SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

Introduction

The purpose of this study was to examine issues related to the control and use of school facilities. The research included the identification of court cases from West Education Law Digest Key Number Schools 72, Control and Use, 1981 through 2009 and analyzing data from those cases to develop guidelines to aid practicing administrators in making informed decisions regarding the use of school facilities. This chapter summarizes the research in light of the research questions, presents conclusions based on the analysis of the data garnered from the cases, and outlines recommendations for future studies.

Summary

The following research questions were the focal point of the research and led data collection and analysis:

1. What issues have evolved regarding the control and use of school facilities through case law in the state and federal courts from 1981 to 2009?

   The researcher determined through analysis of case law that the following issues have been addressed by the courts regarding the control and use of school facilities: church use of schools, religious and secular distribution of literature in schools, the display of religious symbols, school-endorsed activities, religious and secular student club access to facilities, business access to schools, access to communication venues in schools, school board’s utilization
of district properties, and trespass on school grounds. In some instances, the issues represented an attempt by schools to limit access to entities outside the school. In these cases, the courts had to decide if the schools had overstepped their authority by limiting such access. In other instances, the issues represented attempts by the schools to allow access to facilities that was objectionable to outside entities. The courts were called upon to decide whether the access granted in these cases was in keeping with the law. An analysis of the data revealed several guiding principles to aid school administrators in dealing with the confusing issues in the area of access to school facilities.

2. What decisional outcomes about the control and use of school facilities have been rendered by the state and federal courts from 1981 to 2009?

The cases in this study decided prior to the passage of the Equal Access represented issues that were business-type issues. These cases represented decisions about how the school district made use of property. One case, *Perry Education Association v. Perry Local Educators’ Association* (1983), addressed the rights of a group to access school mail facilities. Once decided, the Supreme Court’s reasoning became a cornerstone of later legal decisions representing access to facilities for a wide variety of reasons. Post-Equal Access Act, the litigation decidedly shifted to address more speech-related issues. While there were some additional cases representing the former type of litigation, the majority of the remaining cases addressed the schools’ attempts to navigate the confusing ramifications of the principles enacted by the legislation. While the cases themselves represented a myriad of issues regarding the control and use of school facilities, the outcomes of the courts’ decisions fell into seven areas: forum analysis; viewpoint discrimination; endorsement of religion; permission to be on campus;
free speech; free exercise of religion; and time, manner, and place restrictions. In many cases, the courts examined more than one of these areas in a single case to reach a decision.

3. What trends are evident regarding the issue of control and use of school facilities in case law decisions from 1981 to 2009?

In general terms, the data reveal that the courts recognize the importance of school officials maintaining control over access to local schools. In several of the cases reviewed, the courts cited a reluctance to overstep the power entrusted to local leaders in the supervision of facilities. Because of this, in cases involving the schools’ power to regulate business transactions, control how resources are utilized, and control access for those whose conduct has been unacceptable on campus, the courts have overwhelmingly ruled in favor of school officials and their capacity to control access to facilities. Following the passage of the Equal Access Act, the courts were called upon to decide the extent to which religion should be allowed into the public schools. Subsequently, the decisions of the courts were geared toward setting limits or granting rights to achieve the intentions of the politicians who crafted the legislation. As these decisions were reached, nonreligious access to facilities for certain groups also came into question and were decided by the courts. In general, the decisions, both religious and secular, after the passage of the Equal Access Act served to set limits for school leaders and outside entities in the control and use of facilities.

4. What principles for school administrators can be discerned from the courts’ decisions regarding the control and use of school facilities?

School leaders are faced with a confusing challenge when regulating the control and use of school facilities. While the courts have recognized the need for administrators to have local control over facilities, politicians have seen fit to open those facilities to certain community uses.
The data in this research yielded several guiding principles regarding the control and use of school facilities to aid the school administrator in navigating this confusing issue.

Guiding Principles

The following guiding principles were developed using data garnered from the case briefs in the study.

1. Courts allow latitude for school boards in the organization and operation of the local system (Linnens v. Christensen, 1982; Triplett v. Board of Elementary and Secondary Education and the Louisiana Department of Education, 2009; Western Area Business and Civic Club v. Duluth School Board Independent District No. 709, 1982).


3. A school board policy designed to restrict the access of one particular individual invalidates the board members’ legislative immunity (Cole v. Buchanan County School Board, 2007).
4. Denial of access to a child’s classes does not represent a parental constitutional violation (Nichols v. Western Local Board of Education, 2003; Ryans v. Gresham, 1998).

5. Where there is a genuine concern for a student’s safety, Tinker (1969) does not guarantee access to campus for speech about a topic that has caused student unrest (DeFabio v. East Hampton Union Free School District, 2009; Madrid v. Anthony, 2007).


7. A single incident of blocking access to mail facilities does not support an over-breadth challenge (Policastro v. Kontogiannis, 2008).

8. Union access to teacher mailboxes can be limited to the elected representative union (Perry Education Association v. Perry Local Educators’ Association, 1983; Unified School District No. 233 Johnson County v. Kansas Association of American Educators, 2003).

9. A school district maintains control over property like that of a private owner until it allows use of the facilities for other purposes. Once access is granted for any use, denial of access for a group must be examined closely (Lamb’s Chapel v. Center Moriches Union Free School District, 1993).

10. Providing “fair opportunity” is not the same as providing “equal access.” Granting recognition of a student religious club, i.e. fair opportunity, without granting the full privileges that other student clubs enjoy, i.e. equal access, is contrary to the Equal Access Act (Prince v. Jacoby, 2002).

11. The courts will look at a school district’s written policy and actual practice to determine the forum status of the facilities (Campbell v. St. Tammany Parish School Board,

12. School property that is not by tradition or designation a forum for public communication can be restricted for solicitational activities (Grattan v. Board of School Commissioners of Baltimore City, 1986; Myers v. Loudon County School Board, 2007; San Leandro Teachers Association v. Governing Board of the San Leandro Unified School District, 2009).


14. Selective access granted to some groups does not create an open forum for all who wish to rent a facility (Jarman v. Williams, 1985).
15. When a school creates a limited open forum, that forum is only open to groups of a similar nature (*Perry Education Association v. Perry Local Educators’ Association*, 1983; *Saratoga Bible Training Institute, Inc. v. Schuylerville Central School District*, 1998; *Unified School District No. 233 Johnson County v. Kansas Association of American Educators*, 2003).


18. If a school maintains a limited open forum under the Equal Access Act and allows some noncurriculum-related student clubs, it must allow other noncurriculum-related student clubs as well, including student religious clubs. These clubs must enjoy the same rights and privileges as other similar clubs (*Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County, KY*, 2003; *Ceniceros By and Through Risser v. Board of Trustees of*

19. A school board may delegate some authority to make decisions regarding the use of school facilities to the building level while at the same time retaining the authority to make those decisions pertaining to more sensitive issues (Salinas v. School District of Kansas City, Missouri, 1984).

20. A community-service graduation requirement does not establish a sufficient link to a school curriculum to render student service clubs curriculum-related. As such, these service clubs are noncurriculum-related and their existence invokes the requirement that other noncurriculum-related clubs be allowed as well (Van Schoick v. Saddleback Valley Unified School District, 2001).

21. Once a school has created a limited public forum, the school must grant the same access as secular uses to religious use of that forum (Gold v. Wilson County School Board of Education, 2009).

22. Once a school has determined students should be exposed to a particular type of activity, participants cannot be excluded from the activity because the school disagrees with their message (Bible Club v. Placentia-Yorba Linda School District, 2008; Boy Scouts of America, South Florida Council v. Till, 2001; Child Evangelism Fellowship of New Jersey v. Stafford Township School District, 2004; Donovan ex rel. Donovan v. Punxsutawney Area School Board,
23. If a school maintains a limited open forum, imposing requirements on some student clubs to gain access while not imposing the requirements on others is impermissible viewpoint discrimination (*Colin By and Through Colin v. Orange Unified School District Board of Education*, 2000; *East High School Prism Club v. Seidel*, 2000).


26. The restriction of several types of groups from use of school facilities in addition to religious groups allays a viewpoint discrimination violation (*Campbell v. St. Tammany Parish School Board*, 2000).
27. The reservation of unbridled power to accept or reject speech creates the possibility of viewpoint discrimination (Child Evangelism Fellowship of Maryland, Incorporated v. Montgomery County Public Schools, 2006).

28. In a limited open forum, to disallow a cross but no other secular images is impermissible viewpoint discrimination (Demmon v. Loudon County Public Schools, 2004; Seidman v. Paradise Valley Unified School District No. 69, 2004).

29. The removal of commemorative bricks referencing Jesus but allowing those referencing God is unallowable viewpoint discrimination in a limited open forum (Kiesinger v. Mexico Academy and Central School, 2006).


31. The presence of staff members while religious classes are taking place, even if they are on duty as part of their job requirement, gives the appearance of school endorsement of the classes (Ford v. Manuel, 1985).

32. Voluntary religious classes that begin or end at a time when nonparticipating students must be present for regular classes gives the appearance of school endorsement of religion (Ford v. Manuel, 1985; Quappe v. Endry, 1991).

33. If a school maintains an open forum policy that is viewpoint neutral, a student group can sponsor a baccalaureate service in the school’s facilities without violating the Establishment Clause as long as school staff are not involved in the service (Randall v. Pegan, 1991).

34. For student religious organizations or activities, school employees may only be present in a nonparticipatory capacity (Doe v. Duncanville Independent School District, 1993;

35. If a school is adequately removed from association with an outside group, the likelihood of an Establishment Clause violation is lessened (Scalise v. Boy Scouts of America, 2005; Schanou v. Lancaster County School District No. 160, 1994; Sherman v. Community Consolidated School District 21 of Wheeling Township, 1993).

36. The passive distribution of Bibles by an outside organization at school during noninstructional time does not violate the Establishment Clause (Peck v. Upshur County Board of Education, 1998; Schanou v. Lancaster County School District No. 160, 1994).

37. Discriminatory practices by an organization allowed to recruit on a school campus do not implicate the school in the discrimination (Powell v. Bunn, 2006).

38. To give preference to nonreligious groups over religious groups would likely trigger an Establishment Clause violation (Sherman v. Community Consolidated School District 21 of Wheeling Township, 1993).

39. Allowing a student club to offer prayer over the school intercom is a violation of the Establishment Clause even if other clubs have access to use the intercom (Herdahl v. Pontotoc County School District, 1996).

40. Removing the opportunity for students to exercise choice in whether or not to participate in religious activity at schools may cause an Establishment Clause violation (Doe v. Wilson County School System, 2008; Herdahl v. Pontotoc County School District, 1996; Thompson by Thompson v. Waynesboro Area School District, 1987).
41. The use of religious content taught as “indisputable fact” without other mitigating content constitutes an Establishment Clause violation (Herdahl v. Pontotoc County School District, 1996).

42. Schools may not allow student religious clubs to meet during instructional time (Chandler v. James, 1997).

43. Promoting or sponsoring religious activities by the school or its staff during instructional time is a violation of the Establishment Clause (Chandler v. James, 1997; Doe v. Wilson County School System, 2008).

44. A project or production undertaken solely by a student as a course requirement does not equate to government endorsement of the student’s speech (Linnemeir v. Board of Trustees of Purdue University, 2001).

45. The presence of a parent religious group on campus during school hours, even if students are not allowed to be present when they meet, gives the impression of government endorsement of religion (Doe v. Wilson County School System, 2008).

46. The use of religious symbols from a particular religion in printed advertisements gives the impression of school endorsement of religion (Doe v. Wilson County School System, 2008).

47. The display of religious artwork with no accompanying secular displays or no explanatory note is a violation of the Establishment Clause (Joki v. Board of Education of Schuylerville Central School District, 1990).

48. A policy that calls for the equal representation of national, cultural, ethnic, and religious observance for the purpose of fostering understanding and mutual respect mitigates an

49. The phrase “God Bless” has, through a variety of uses and meanings, become a fairly benign phrase in American culture that a reasonable observer would not attach to any one faith or church mitigating the possibility of an Establishment Clause violation (Seidman v. Paradise Valley Unified School District No. 69, 2004).


51. When the government does not open a forum for types of speech, it can take steps to ensure its message does not become distorted (Downs v. Los Angeles Unified School District, 2000).

52. Based on Hazelwood (1988), a school has the authority to regulate speech that would bear its imprimatur given the school has a legitimate pedagogical concern for restricting the speech (Bannon v. School District of Palm Beach County, 2004; Fleming v. Jefferson Community School District R-1, 2002; Golden v. Rossford Exempted Village School District, 2006; Myers v. Loudon County School Board, 2007).

53. A restriction on certain topics of speech for student clubs is allowable if all clubs are under the same restriction (Caudillo ex. Rel. Caudillo v. Lubbock Independent School District, 2004; Krestan v. Deer Valley Unified School District No. 97, of Maricopa County, 2008).

54. A restriction on the distribution of materials containing religious speech is permissible when the school restricts distribution of all speech for the same type of materials


56. Offensive content that is not accessible at school and only available to students through intentional effort and decision should not serve as the basis to deny a club access to school facilities (Bowler v. Town of Hudson, 2007).

57. Religious speech and religious worship are similar in nature (Gregoire v. Centennial School District, 1990).

58. Restricting speech to avoid having to determine if the speech is constitutional is a violation of free speech rights (Clark v. Dallas Independent School District, 1992).

59. A plaintiff’s graduation from high school does not render an injury claim arising from an Establishment Clause violation moot (Washegic v. Bloomingdale Public Schools, 1994).

60. A policy establishing different rental rates for religious group access is a rights violation (Child Evangelism Fellowship of South Carolina v. Anderson School District Five, 2006; Fairfax Covenant Church v. Fairfax County School Board, 1994).

61. A school determined to be a nonpublic forum for expressive activity may impose time, place, and manner restrictions to speech activities as long as the restrictions are viewpoint neutral and reasonable (C.H. v. Oliva, 1997; Hone v. Cortland City School District, 1997; M.A.L. ex rel M.L. v. Kinsland, 2008; Thompson by Thompson v. Waynesboro Area School District, 1987).
62. Included in the broad discretionary powers granted school boards is the authority to set policies regarding disciplinary matters and their sanctions (Davis v. Hillsdale Community School District, 1997).


64. State constitutions can be more protective of individual rights but cannot be more restrictive of rights granted by federal law (Garnett By and Through Smith v. Renton School District No. 403, 1993).

65. A nondiscrimination policy for student clubs that limits the ability of clubs to ensure its leaders are practitioners of the club’s mission and allows for dilution of the club’s focus impinges on the rights of those students (Hsu By and Through Hsu v. Roslyn Union Free School District No. 3, 1996).

66. Teachers can exercise editorial control over the content of school-sponsored speech as long as the control is reasonably related to pedagogical concerns (C.H. v. Oliva, 1997).

Conclusions

School administrators face a confusing challenge navigating the legislative and legal principles governing the control and use of school facilities. Leaders must balance the rights of access granted in the Equal Access Act and attendant court decisions while at the same time maintaining the “wall of separation” between church and state. This delicate balancing act is most evident in two cases briefed in the study. In Doe v. Wilson County School System (2008), suit was brought against the school system alleging violation of the Establishment Clause. The plaintiffs alleged the school endorsed religion by allowing a Praying Parents group to meet
during the school day, allowing the teaching of a prayer to students as part of a Thanksgiving unit, and by permitting staff participation, including the principal, in the See You at the Pole and National Day of Prayer events. The courts agreed these constituted a violation of the Establishment Clause. The same school system was again involved in litigation in *Gold v. Wilson County School Board of Education* (2009). In this case, parents brought posters to the school to advertise the upcoming See You at the Pole event. The school principal was out of town and the newly appointed assistant principal was left to decide if the posters met the guidelines established in the previous litigation for advertising the event. When the Director of Schools was contacted, the assistant principal was directed to limit the posters to information regarding the name, date, time, and location of the event. The parents used paper to cover all religious words, phrases, and Bible verses on the posters. In its holding that the school had engaged in viewpoint discrimination, the court stated the school leaders had misapplied the legal principles from the *Doe* (2008) case. The school was in violation of the Establishment Clause because it allowed too much religious access in the first case and guilty of viewpoint discrimination because it limited religious access in the second.

Following the passage of the Equal Access Act, the courts were called upon to sort through issues regarding the implementation of the legislation. The confusion exhibited by the school in the *Doe* (2008) and *Gold* (2009) decisions was mirrored by many administrators across the country. The courts have shown in their decisions that schools are now called upon to balance the interests of those who wish to gain access to school facilities while at the same time maintaining that wall of separation. One main area of concern in this issue is the forum status of the school. The courts have first demonstrated that they will no longer accept the written policy of the school district in making a determination. The courts, in several of the cases, made in-
depth investigations of the actual practice of the schools in question to determine the forum status. A school that claims to maintain a closed forum but turns a blind eye to certain practices it favors cannot continue to exclude those practices it finds objectionable. Opening the forum on a limited basis for student clubs paves the way for other student clubs to gain access.

In resolving the issues regarding forum status, the courts had to reconcile the inherent conflict between the Establishment Clause and the Equal Access Act. The Supreme Court’s decision in *Board of Education of the Westside Community Schools v. Mergens By and Through Mergens* (1990) rendered two important principles regarding forum. First, the court reasoned that secondary students in today’s society are mature enough to discern the difference between religious speech by an individual and religious speech by a government official. This ruling extended the *Widmar* (1981) principle of allowing student use of university facilities for religious purposes to secondary students. Second, the Supreme Court reasoned that this extension of rights to use school facilities for religious purposes by students was within the parameters outlined in the Act did not violate the Establishment Clause. This decision in effect established the constitutionality of the Equal Access Act. Following this certification by the Supreme Court, further legal decisions granted access to facilities for student religious groups on the same basis as other student clubs. These religious clubs, according to the courts, had to be granted the same rights and privileges as secular student clubs of a similar nature. Additional cases also established that other, sometimes controversial, student clubs that had in the past been excluded should be granted access as well. In particular, in a limited forum, student clubs that addressed the issues of gay and straight lifestyles were granted access to school facilities on the same basis as other student clubs.
Along with decisions establishing forum principles, the courts investigated viewpoint discrimination in connection with decisions to allow or disallow access. In this area, the Supreme Court’s decision in *Lamb’s Chapel v. Center Moriches Union Free School District* (1993) set forth an important principle about religious access to facilities. In this case, the court held that speech on a topic that would be allowed if it were not for the religious content cannot be disallowed. In this case, a church applied for the use of school facilities to present a film series about the family from a Christian perspective. The court reasoned that other speakers presenting information on the family from a secular perspective would have been allowed. To disallow the church’s access because of the Christian nature of the presentation on a topic that otherwise would have been allowed was viewpoint discrimination. Other decisions clarified principles within the framework of this principle. The courts determined that to disallow certain religious symbols, such as a cross, in a context of secular images in a display could constitute viewpoint discrimination. Additionally, schools that impose certain restrictions on student clubs in order to gain access to a forum but do not impose those same restrictions on secular student clubs practice viewpoint discrimination.

While determining the extent to which religious access should be granted, the courts were also called on to clarify when schools had crossed the threshold into Establishment Clause violation. An interesting dichotomy emerged in the data in this area. First, the courts determined in *Ford v. Manuel* (1985) that religious classes offered immediately after school gave the impression that the school endorsed the content. The court reasoned that because school personnel were required to be present during the time, even though they were there as part of their school duties and not participating in the classes, the impression was created of official support of the activity. Also, the court noted that nonparticipating students were present because
they were compelled to be present for regular classes. At the other end of the spectrum, in *Randall v. Pegan* (1991), a school decided not to hold a school-sponsored baccalaureate service for fear of violating the Establishment Clause. Following the leaders’ decision, a group of students in a student club asked to be allowed to sponsor the service themselves. The students filed the proper applications and handled all arrangements for the service themselves. When suit was brought to enjoin the student group from holding the service, the courts held the access granted to the club did not violate the Establishment Clause. The court reasoned that the school’s open forum policy was viewpoint neutral and was administrated in a nondiscriminatory manner to all civic, private, and student groups. Since the school board had publicly distanced itself from the service and school staff were not involved in the program, other than to be present at the service, the risk of entanglement was alleviated. The court ruled students should be granted the permission to hold the service as planned. In general, the context of the school’s association with the activity in question tends to determine whether there is an Establishment Clause violation. Passive distribution of Bibles by Gideons during noninstructional time is not a violation if both entities maintain their sphere of influence without interference from the other. Allowing a student club to offer prayer over the school intercom during morning announcements, however, is a violation. In the end, schools must monitor their involvement with the group or activity to avoid a violation of the Establishment Clause.

While speech is not a main focus of this area, some important concepts did come to light in the study. In *Downs v. Los Angeles Unified School District* (2000), a teacher who was opposed to the district’s recognition of Gay and Lesbian Awareness Month erected bulletin boards of his own expressing his opinions. The courts were asked to decide if the teacher had the right to create his own display in opposition to the school’s message. The court held that as long as the
venue in question contained only government speech, the teacher did not have individual speech rights. Also, since the forum had not been opened to types of speech, the school could take steps to ensure its message did not become distorted. In the same vein, several cases cited *Hazelwood* (1988) in concluding that a school has authority to regulate speech that bears its imprimatur as long as there is a legitimate pedagogical concern for doing so. As with other areas, the context is a determining factor in the courts’ decisions. A school can restrict certain types of speech for student clubs, such as the distribution of leaflets, as long as all student clubs are under the same restrictions. Conversely, restricting speech as a means of avoiding the task of determining if the speech is constitutional is a violation of free speech rights.

In considering general access to school facilities, once again context is an important factor. Following the court’s decision in *Perry Education Association v. Perry Local Educators’ Association* (1983), a series of cases were decided regarding general access to facilities. In *Perry*, the court decided that access to faculty mailboxes could be restricted for a union group that was not the duly elected representative union. The court held that with the election by members of a delegated representative union, it was the nature of the plaintiff group that changed, not the forum status of the school. Since other forms of communication were available to the plaintiff group, the restriction of access to mailboxes was not a violation. A later decision regarding mailboxes held that a single incident of temporarily closing union access to mailboxes did not violate free speech rights. The accompanying unrest that a memo was causing justified the restriction of access since, according to the courts, this was a one-time event and normal operation policies were restored immediately after the incident.

Finally, the courts have exhibited a high level of support for school districts in two distinct areas. First, the courts have overwhelmingly upheld school leaders’ attempts to provide a
safe environment by restricting individuals from the school environment who pose potential threats. The need, if not responsibility, to regulate the conduct of students and visitors, including parents, while they are on campus has been reinforced by decisions regarding trespassing on school grounds. School violence was cited in several cases as a reason to support administrators in exerting control over access when safety is an issue. Second, when a school district has a need to reassign the use of some facilities for a more efficient use of resources, the courts have shown a reluctance to interfere. The courts allow broad latitude for school boards in the organization and operation of the school system. The only caveat being that those decisions and policies cannot preempt the policies of other government agencies.

For administrators facing decisions about granting access to school facilities, the first task would be to identify all of the contributing factors in the situation. While the decision to grant access can be confusing, careful analysis of the situation can lead to a successful resolution. By taking into account the full context of the situation, the administrator should be able to make decisions that will satisfy the requirements of the Equal Access Act, avoid violation of the Establishment Clause, and avoid costly, time-consuming litigation.

Recommendations for Further Study

Based upon the findings and conclusions in this study, the following recommendations for further study are suggested:

1. Research should be conducted to examine decisions regarding the control and use of school facilities after *Morgan v. Plano Independent School District* (2009) to determine their impact on the conclusions of this study.
2. Research should be conducted to further clarify issues regarding forum status of facilities through the examination of new decisions in this area as they are reached.

3. Research should be conducted to further clarify issues regarding types of speech access to facilities through the examination of new decisions in this area as they are reached.
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