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As former Supreme Court Justice Felix Frankfurter wisely stated, "if facts are changing, law cannot be static."[2] This maxim keenly describes the Equal Access Act of 1984, a 28-year-old law that was designed to protect the free speech rights of Christian clubs within the public school system but has become increasingly ambiguous as the facts surrounding it continue to change.[3] These changes, instituted in 1991 by the formation of the first public school Gay-Straight Alliance (GSA) club in Newton Centre, Massachusetts, have resulted in increasing confusion about how schools should handle the emergence of controversial clubs.[4] In the midst of this confusion, the GSA and similar clubs continue to grow rapidly; since their small beginning in 1991, 30% of Massachusetts schools now have GSA clubs and over 1,000 GSA's have formed nationwide within the last 10 years.[5] On the coattails of this emerging student group, other controversial clubs have sought formation

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2 Felix Frankfurter, et al, Law and Politics: Occasional Papers of Felix Frankfurter, 1913-1938 (Harcourt Brace and Company 1939)

3 Equal Access Act, 20 U.S.C. §4071-4074 (1984).

4 *See* Ann Banks, *Teaching Tolerance: Meet the Teacher Who Started Gay-Straight Alliances*, Edutopia (Feb. 26, 2010), http://www.edutopia.org/teaching-tolerance-gay-straight-alliance.

5 *See* Am. Civil Liberties Union & Gay, Lesbian and Straight Education Network, *Q&A About Gay-Straight Alliances*, GSA Network (2001), http://www.gsanetwork.org/files/resources/GSA.QA_.ACLU_.pdf; *See Gay/Straight Alliances*, Massachusetts Dep't of Elementary & Secondary Educ., http://www.doe.mass.edu/cnp/gsa/resGSA.html (last visited Mar. 6, 2012); Educ. Bug.

under the same auspices.[6] These clubs include groups based on racial discrimination, reproductive issues, and anarchic political views, among others.[7]

As such clubs emerge, school administrators face the difficult task of interpreting the antiquated Equal Access Act (EAA), despite the Act's failure to treat these contemporary issues. A revision of the Equal Access Act of 1984 is necessary to provide realistic legal standards for dealing with the emergence of controversial and divisive clubs while protecting the free speech rights of students. I address the legal issues surrounding the EAA by (A) outlining the background of the act, (B) identifying its weaknesses, and (C) positing prescriptive solutions, after which I will offer a brief conclusion.

A. Background

The courts first addressed the issues relating to controversial clubs in *Windmar v. Vincent*, which eventually led to Congress' Equal Access Act. *Windmar v. Vincent* involved the University of Missouri at Kansas City's refusal to allow a student religious group to use its facilities for club functions, citing a conflict with the Establishment Clause. The students sued, citing a violation of their First Amendment rights, and eventually prevailed. The Court, in an 8-1 decision, ruled that student-led religious clubs were entitled to protections under the Free Exercise Clause outweighing any potential Establishment Clause concerns.[8] In an effort to canonize the Court's ruling, the 98th U.S. Congress enacted the Equal Access Act in 1984, which prevented schools from discriminating against student-led organizations based on the content of the club's curriculum.[9]

6 For the purposes of this article, controversial clubs will be defined as any student-led group that cannot realistically expect to receive the full-fledged support of students, parents, or administrators within the school.

7 James J. Faught, *An Approach to Dealing with Controversial Student Organizations*, 78 Marq. L. Rev. 313, 320-22 (1995).

8 Widmar v. Vincent, 454 U.S. 263 (1981).

9 Susan Broberg, Note, *Gay/Straight Alliances and Other Controversial Student Groups: A New Test for the Equal Access Act,* BYU Educ. & L.J. Summer, 1999, at 97.

The EAA focuses on clubs unrelated to the core curriculum of the school. It holds that any school allowing at least one non-curriculum related club to form is thereby prohibited from preventing the formation of any additional non-curriculum related club based on content. Schools are either to prohibit all non-curriculum related clubs or to allow all such clubs; they are not permitted to pick and choose which clubs they will accept or reject. Schools with at least one non-curriculum related club are labeled as limited-open forums for discussion. Schools that choose to ban all non-curriculum related extracurricular activity are termed closed forums.

This new legislation was first tested in 1990, when the Supreme Court heard *Westside Schools v. Mergens*.[10] The Court again ruled that a religious club should be entitled to the same rights as any other club. Because Westside Schools already supported such non-curriculum related organizations as a scuba club and a chess club, the Court said the school could not prohibit the formation of any other non-curriculum related club, religious or otherwise. The Court highlighted Westside School's scuba and chess clubs as evidence that the school created a "limited open forum" for student expression.[11] Because Westside School allowed for a "limited open forum," they could no longer prevent any subsequent non-curriculum related clubs from forming. If Westside had disallowed all clubs that do not relate directly to the school curriculum, they would have retained the right to stop any non-curriculum related student group from forming, regardless of its content.[12] The Court's decision left schools with a difficult choice: disallow all non-curriculum related clubs and retain the freedom to stop controversial clubs from forming (creating a so-called closed forum), or allow at least one club not directly related to the curriculum, and thereby become bound to allow any

10 *See* Bd. of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990).

11 *Id.* at 243.

12 Brian Berkley, *Making Gay Straight Alliance Groups Curriculum Related: A New Tactic for Schools Trying to Avoid the Equal Access Act,* 61 Wash & Lee L. Rev. 1847, 1849 (2004).

non-curriculum related club to form (creating a so-called "limited open forum").

B. Weaknesses of the EAA

Since the *Mergens* case, the Act has been a magnet for controversy and is vulnerable to criticism on several grounds. (1) The vague language that comprises the EAA invites conflict among schools, students, and parents who may have different interpretations of their rights. (2) Controversial and divisive clubs, citing the protections offered by the Equal Access Act, have sought acceptance in public school systems, creating additional conflict. (3) Because the EAA contains no means for enforcement, the previously stated sources of conflict often lead to expensive and time-consuming litigation for injunctive relief and, in some cases, punitive damages. (4) In light of the threat of expensive litigation, administrators are shown strong incentive to seek the protection offered by the EAA to schools which disallow all non-curriculum related clubs.[13] This ironically results in blanket suppression of the same free speech the Act was created to protect.

Nonspecific Language in the Act

The Equal Access Act relies on a nuanced taxonomy of words to classify individual cases, yet it is surprisingly nonspecific in defining these concepts.[14] For example, the Act offers no guidelines or definitions with which to classify a club as curriculum related or non-curriculum related. This presents problems as the Act continues because the critical distinction of how to classify a "limited open forum" is defined in terms of an undefined curriculum related distinction. Thus, schools unfamiliar with the extensive jurisprudence surrounding this issue find it difficult to know whether or not they have created a limited open forum. Such organizations as the library

13 Jordan Blair Woods, *Gay-Straight Alliances and Sanctioning Pretextual Discrimination Under the Equal Access Act,* 34 N.Y.U. Rev. L. & Soc. Change 373, 385 (2010).

14 See *Id.*

club, key club, and even the student council blur the already hazy line between curriculum related and non-curriculum related student groups. As Justice John Paul Stevens said regarding the vagueness of the act, "every high school football program [is now a] borderline case."[15] Consequentially, schools may realistically believe they have created a "closed forum" by disallowing all clubs they believe to be "non-curriculum related." Yet, if the courts disagree with the school's interpretation of what clubs are related to the curriculum, the school is open to legal liability.

The nonspecific wording also saddles schools with vaguely defined powers to control or discipline clubs. The EAA states that schools have the authority to "maintain order and discipline . . . to protect the well being of students and faculty . . . ." and to ensure that club meetings "[do] not materially and substantially interfere with the orderly conduct of educational activities within the school."[16] Under this indistinct standard, schools do not have the ability to stop dangerous clubs from forming, only to discipline them if they misbehave. Therefore, schools are forced to allow the formation of clubs such as Students Against Faggots Everywhere (S.A.F.E.). This example demonstrates the difficult situation faced by schools under the current nonspecific rendition of the EAA.

Emergence of Controversial and Divisive Clubs

In its broadest sense, the EAA provides that every club within a public school should have the same set of rules and opportunities, irrespective of the individual platform or message of the club. Yet the Supreme Court has supported censorship in the public school "in light of the special characteristics of the school environment."[17] In *Bethel v. Fraser*, the Supreme Court sent a strong message that the rights of students in public schools are not the same as the rights of adults in other settings, by upholding the suspension of a student

15 Bd. of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226, (1990).

16 Equal Access Act, 20 U.S.C. §4071-4074 (1984).

17 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

for "indecent speech and lewd conduct in [a] school assembly."[18] The Court also allowed censorship of a school newspaper in *Hazelwood v. Kuhlmeier*, stating "a school need not tolerate student speech that is inconsistent with its basic educational mission."[19]

However, the issue of extracurricular education invites some gray area. The most controversial clubs are generally unrelated to the curriculum of the school and take place outside of instructional time. This is an entirely different circumstance than a disruption during a compulsory class or assembly, and school boards should be careful not to over assert their censorship power. However, the school is the body granting legitimacy to the club and therefore school boards should have more oversight than if the students were meeting off campus, in a park or a friend's basement.

These controversial clubs have provoked parental concern across the nation, which creates distraction and conflict within the public school system. Although the views of parents should not be an authoritative factor in school board decisions, these frustrated parents often push lawsuits and organize campaigns, both for and against controversial clubs. Attention is needed to mitigate this parental uproar on both sides of controversial issues.

Incentive Toward Litigation

The Act falls short in another key category: it contains no independent means for enforcement. Because Part A states that the Act applies to all schools who receive federal funding, some are under the impression that this funding will be withheld from schools found to violate the Act. In fact, Part E specifies no federal funds will be withheld from any school with relation to this Act.[20]

This lack of enforcement shifts the burden to our judicial system. When a student thinks their school is in violation of the Act, they have very few options before bringing a lawsuit against their school; there is no federal provision for mediation, no appeal process, and no

18 Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 680 (1986).

19 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).

20 Broberg, *supra* note 8 at 97.

outside means of addressing the disagreement. In an effort to bolster students' rights, organizations such as Lambda Legal and the American Civil Liberties Union (ACLU) frequently offer free and reduced cost legal services to students fighting these battles making litigation all the more likely. Such litigation can be very expensive for the state, creating long delays in the correct enforcement of the law.

The case of *East High School GSA v. Board of Education* provides a textbook example of the penalties schools can face for being on the wrong side of an Equal Access Act conflict.[21] In this case, the Court ordered the Board of Education of the Salt Lake City School District to pay the plaintiff's legal fees in addition to paying for their own legal defense despite East High having successfully brought itself into compliance with the Act during the process of the trial. Additionally, in *Sharon Gernetzke v. Kenosha School District*, the plaintiffs sought damages against the school in addition to injunctive relief.[22] These types of financial penalties could negatively affect the quality of education within the entire district and demonstrate another example of why a revision to the EAA is necessary.

Incentive toward Blanket Suppression of Expressive Speech

The cost and distraction associated with circuit, appellate, and Supreme Court conflict serve as strong motivations for schools to err on the side of caution with respect to the Equal Access Act. This influence can provide incentives for schools to act with interests other than what is best for their students by encouraging administrators to disallow all non-curriculum related clubs entirely.

Schools wanting the assurance of avoiding such conflict must select from two options. They can choose to cancel their receipt of Federal Aid to rid them of the jurisdiction of the EAA, or stop all non-curriculum related clubs.[23] Waiving public funds would leave schools in a difficult financial predicament and would not be a practical solution. Stopping all clubs would create a de facto

21 East High Gay/Straight Alliance v. Bd. of Educ. Of Salt Lake City Sch. Dist. No. 2:98-CV-193J, 1999 U.S. Dist. LEXIS 20254, (Nov. 30, 1999).

22 Gernetzke v. Kenosha Unified Sch. Dist. No. 1, 535 U.S. 1017 (2002).

23 Woods, *supra* note 12 at 385.

(albeit equal) ban on expressive student speech, which would provide legal protection for the school. The Act holds that schools must treat all non-curriculum related clubs equally, and equally prohibiting all non-curriculum related clubs is considered equal treatment. Schools that pursue this choice would find themselves without such organizations as the National Honor Society, the Key Club, and Future Business Leaders of America.

Stopping the non-curriculum related clubs has the ironic effect of suppressing the expression which the EAA was designed to protect. This scenario curtails the Act and negates the benefits it was created to provide. While stopping all non-curriculum related clubs should be an option for school boards to consider, the current structures create an atmosphere where this choice will be utilized more and more by schools unless the effects of the Act are negated. Justice John Paul Stevens shared this sentiment and lamented that schools preventing the formation of student-versions of "the Ku Klux Klan" or "gay rights advocacy groups," will be forced to close down groups that are "[no] more controversial than a grilled cheese sandwich."[24]

C. Prescriptive Ideas

Revisions to the Act can provide clear guidelines to school administrators while insulating schools against frivolous lawsuits and ensuring that students receive prompt responses to complaints. These revisions should include: (1) Provisions which mandate alternate dispute resolution (ADR) in certain cases to promote fair and efficient dispute resolution; (2) required parental consent for any student under the age of 18 to join any extracurricular organization within the school; (3) increased specificity in language; and (4) a definitive list of clubs that are detrimental to the educational surroundings of a school.

24 Bd. of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 276 (1990).

Mandatory Provisions for Alternate Dispute Resolution

First, a new rendering of the Act should include a provision for arbitration and other alternate dispute resolution (ADR) techniques in the event of a conflict. While the current system offers only civil litigation, a revised Act could include mediation procedures in an effort to avoid trial or mandatory arbitration provisions. Such techniques can save time and money for both parties.

ADR has already been successfully implemented by Congress in other federal arenas. In the 2004 revision of the Individuals with Disabilities Education Act, schools are instructed to create individual education plans for students with disabilities. In the event parents are not satisfied with the efforts of their school, they are legally bound to seek resolution through ADR before suing the school in open court. This provision has secured significant savings of time and money, while promoting fair dispute resolution.[25]

Mandatory mediation for EAA conflict would require that students and school administrators have the opportunity for face-to-face dialogue before further action is pursued. Both parties would meet in the presence of an impartial third party and attempt to reach an agreeable decision. There would not be much room for bargaining because the school's position would be dictated by federal law, yet students would be given an opportunity to state the merits of their clubs, make assurances that they would operate within the scope allowed by law, and answer any questions or concerns put forth by the school officials. This could also serve as a formal venue for each party to be apprised of their rights and instructed about further pursuance of grievances.

If mediation does not resolve the conflict, arbitration procedures should follow. Arbitration will allow both sides to present their case before an impartial group of arbitrators with experience in state and federal education law and Supreme Court precedent. The ruling of the arbitrators is a legally binding decision, and the Act should specify that this ruling is only reviewable by the United States Supreme Court. Arbitration services can be secured through the American Arbitration Association, the National Academy of Arbitrators, the

25 104 Stat. 1142.

Federal Mediation and Conciliation Service, or a new arbitration branch created under the Department of Education. Schools found to be in violation of the EAA will forfeit one-half the salary of the school board and school administrators until they are ruled in compliance. This will provide enforcement power to the arbitrators and promote swift compliance with rulings.

ADR is a better solution than civil litigation because it saves state resources and promotes an efficient timetable for resolution. Under the current system, large numbers of students who brought grievances against their school had graduated before the conflict was resolved. ADR also promotes the government's interest in protecting the education and free speech rights of the rising generation.

Mandatory Parental Consent

The state of Utah's policy of requiring parental consent to join extracurricular clubs should be included in a new version of the Act.[26] This will solve many of the issues raised by divisive clubs and will provide an alternative to the blanket ban of clubs that can be imposed by school officials.[27] Parents or guardians who feel strong opposition to particular clubs, be they Christian themed, GSA, or any other, will feel confident in their ability to limit the exposure of their minor child to clubs they deem detrimental.[28] Additionally, parents will have the opportunity to be better informed of their children's participation in school and can use this information to help their students.

Parental consent will provide a gatekeeper effect, ensuring that only clubs which can garner support of parent and student will be allowed to form. A student may believe it would be fun to create a cannabis club or a tagging club, but it is likely their parents will think otherwise and will refuse to provide their consent for their student to get involved in such an organization. Parental consent can filter some conflicts before they reach the school level.

26 Utah Code Ann. § 53A-3-419 (1997).

27 Broberg, *supra* note 8, at 105.

28 Broberg, *supra* note 8, at 112.

Additional Specificity in Language

A revision of the Act would be incomplete without providing additional specificity in defining main concepts. Of special importance is the concept of noncurricular clubs, a concept undefined by Congress in this Act.[29]

In the *Mergens* case, the Supreme Court acknowledged a loophole in the Act which could allow a school to structure their definition of noncurricular in such a way that would enable the school to strategically label student groups to avoid conflict with the Act.[30] Thus, by labeling every student club of which they approved as curriculum related they would not be forced to allow the creation of other student-led groups. In considering the ambiguity invited by the current wording of the Act, the Court placed prohibitions on such behavior.[31] This clarification in the jurisprudence provides the legal ability to close some loopholes, but creating specific language within the Act would greatly simplify the burden on schools as they attempt to follow the laws.

A canonized definition of "curriculum related" should highlight the need for such organizations to be (1) expressly created or approved by the school (2) for the primary purpose of re-enforcing the content of at least one school class or institution, (3) open to all students, and (4) non-compulsory.

Explicit Prohibition of Dangerous or Detrimental Clubs

Finally, despite the sensitive nature of censorship in public schools, a revision of the Act should provide general guidelines about what clubs are acceptable for membership by minors. The language of the Act should provide against the formation of any club

29 *Id.* at 91.

30 Bd. of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 239 (1990); Broberg, *supra* note 8, at 92.

31 *Id*. at 92.

that encourages violence, criminal activities, drug use, discrimination, or that contains explicit content related to human sexuality.[32]

In congruence with the current version of the EAA, school administrators have the right to attend any meeting they desire with the exception of religious meetings. No administrator will be compelled to attend a club meeting if the content is contrary to their personal beliefs, and no nonschool person will be able to regularly attend any club meeting.[33]

The Act should allow the school the power to regulate the actions of clubs, so long as their regulations are consistent and impartial. This will strengthen the school's ability to protect students and preserve a peaceful atmosphere.

It should be noted that, as the court stated in *Healy v. James*, schools cannot "restrict speech or association simply because it finds the views expressed by any group to be abhorrent."[34] The sole purpose for the explicit prohibition of dangerous clubs is to promote the safety of students and faculty members. This is a compelling state interest and is critical to the success of the public school system.

D. Conclusion

Much has been written about the controversy and legal battles surrounding the Equal Access Act of 1984, yet few have proposed any real solutions to correct the current and future problems invited by this piece of legislation. By integrating ADR techniques, requiring parental consent, increasing the specificity of language, and explicitly prohibiting dangerous clubs, Congress can stop short sided incentives and protect schools from harmful lawsuits while safely guarding students' rights to free speech and expression. Realistic

32 Banning sex based clubs will only take effect on clubs that are organized with sexual practices as a main tenant—This definition is designed to protect gay straight alliances, which have been largely upheald by courts. *See* Jordan Blair Woods, *Gay-Straight Alliances and Sanctioning Pretextual Discrimination Under the Equal Access Act,* 34 N.Y.U. REV. L. & SOC. CHANGE 373 (2010).

33 *See* Equal Access Act, 20 U.S.C. §4071-4074 (1984).

34 Healy v. James, 408 U.S. 169, 187-88 (1972).

and uniform legal standards, coupled with effective enforcement, can protect the reputation of the public school system and ensure students are kept safe from physical and mental dangers. This can also appease worried parents and encourage an open family dialogue that will benefit students and parents. As controversial student clubs continue their advancement into schools, clear guidelines are the only way to ensure that administrators and students retain their constitutional liberties without infringing upon the liberties of others.