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## **MOTHER, MAY I? NO, YOU MAY NOT!**

### **PARENTAL CONSENT REQUIREMENTS FOR STUDENTS TO PARTICIPATE IN STUDENT-LED CLUBS AT PUBLIC SCHOOLS**

*By: KELLY SHERRILL LINKOUS, ESQ., J.D., PH.D.\**

#### **INTRODUCTION**

The tension between the parent's rights to direct the upbringing of his or her child and the students' constitutional rights while within the schoolhouse gate comes to a head when the parent does not support, or allow, his or her children to join an extra-curricular club at school. That tension escalates when the child's religious and speech preferences conflict with the parent's, and when the child's choice to participate in a faith-based club conflicts with those of the parent's wishes. So, who wins? Does a parent always get to determine whether or not her minor child may or may not join a club? What if a child holds a different religious belief system than his parent and wants to explore that belief system through participation in a faith-based, student-led club at school? Must he ask, "[m]other, may I?" And what if she says, "[n]o, you may not?" In Georgia, as well as in other states and local school districts around the nation, a parent's word is the final decision on whether or not a child may join a student-led club.<sup>1</sup>

This article considers the constitutionality of laws or policies requiring parental consent for student participation in school-based clubs or organizations, as well as their consistency with the federal Equal

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<sup>1</sup>See, e.g., GA. CODE § 20-2-705 (2006) (parental permission for participation); OKLA. STAT. TIT. 70 § 24-105 (2009) (student club and organization—regulation—notifications); UTAH CODE §§ 53A-11-1209, 1210 (2007) (parental consent).

Access Act (“EAA”).<sup>2</sup> This article utilizes the Georgia “parental consent for participation in clubs”<sup>3</sup> law as a vehicle to analyze the constitutionality of comparable participation policies.<sup>4</sup> This article

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<sup>2</sup> Compare *id.* (states requiring parental consent) with, The Equal Access Act, 20 U.S.C. § 4071–74 (2011).

<sup>3</sup> Ga. Code § 20-2-705 (2006).

<sup>4</sup> See, e.g., OKLA. STAT. TIT. 70 § 24-105 (2009) (student club and organization—regulation—notifications, provides:

The policy adopted by each board of education shall provide parents or guardians of students with an opportunity to notify school administration that the parent or guardian is withholding permission for a student to join or participate in one or more clubs or organizations. . . .

The policy shall only apply to participation in clubs and organizations that are extracurricular and shall not apply to participation in clubs and organizations that are necessary for a required class of instruction. Parents or guardians shall be responsible for preventing their student from participating in a club or organization in which permission is withheld. . . .

Parents or guardians shall also be responsible for retrieving their student from attendance at a club or organization in which permission is withheld. Nothing in this subsection shall prevent a club or organization from meeting when a student who is not authorized to be in the club or organization is present at such meeting.);

Utah Code §§ 53A-11-1209 (2007) (provides:

(1) A school shall require written parental or guardian consent for student participation in all curricular and noncurricular clubs at the school.

(2) Membership in curricular clubs is governed by the following rules:

(a) (i) membership may be limited to students who are currently attending the sponsoring school or school district; and

(ii) members who attend a school other than the sponsoring school shall have, in addition to the consent required under Section 53A-11-1210, specific parental or guardian permission for membership in a curricular club at another school;

(b) (i) curricular clubs may require that prospective members try out based on objective criteria outlined in the application materials; and

(ii) try-outs may not require activities that violate the provisions of this part and other applicable laws, rules, and policies.);

*id.* at § 53A-11-1210 (provides:

(1) A school shall require written parental or guardian consent for student participation in all curricular and noncurricular clubs at the school.

(2) The consent described in Subsection (1) shall include an activity disclosure statement containing the following information:

(a) the specific name of the club;

(b) a statement of the club’s purpose, goals, and activities;

(c) a statement of the club’s categorization, which shall be obtained from the application for authorization of a club in accordance with the provisions of Section 53A-11-1204 or 53A-11-1205, indicating all of the following that may apply:

(i) athletic;

(ii) business/economic;

(iii) agriculture;

(iv) art/music/performance;

(v) science;

tackles the central question of whether requiring parental notification and permission prior to students joining school clubs or organizations, such as the Gay Straight Alliance (“GSA”)<sup>5</sup>, the Bible Club, or other viewpoint or content-related activities, violates the First Amendment’s freedom of speech provision<sup>6</sup> or the EAA.

At the outset, the article examines Georgia’s statute mandating parental consent for participation in clubs, its impetus, and its legislative history. This section uses Georgia’s parental consent for participation statute as a proxy to examine similar state and local policies. Next, the article reviews the EAA, the First Amendment, and case law involving parent’s fundamental rights to direct and control the education of their children. This section discusses two relevant decisions—the Eleventh and Third Circuits split on the constitutionality of whether a parental notification or consent requirement for students to opt-out of the Pledge of Allegiance and other “patriotic” activities is required. Finally, this article analyzes the legality of the Georgia “parental consent for clubs” statute under the EAA and the First Amendment, concluding that it, and similar parental consent for participation policies, violates the EAA and could unconstitutionally infringe on students’ First Amendment rights.

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- (vi) gaming;
  - (vii) religious;
  - (viii) community service/social justice; and
  - (ix) other;
  - (d) beginning and ending dates;
  - (e) a tentative schedule of the club activities with dates, times, and places specified;
  - (f) personal costs associated with the club, if any;
  - (g) the name of the sponsor, supervisor, or monitor who is responsible for the club; and
  - (h) any additional information considered important for the students and parents to know.
- (3) All completed parental consent forms shall be filed by the parent or the club’s sponsor, supervisor, or monitor with the school’s principal, the chief administrative officer of a charter school, or their designee.);

*see also*, Kate Royal, *Proposed LGBT club prompts new Rankin school policy*, THE CLARION-LEDGER, Jan. 15, 2015, available at <http://www.clarionledger.com/story/news/local/2015/01/14/rankin-schools-gay-club-policy/21745481/> (a report by the Clarion Ledger newspaper about a 2015 policy modification by the Rankin County School Board in Mississippi that adopted a parental consent policy for students to participate in clubs with the alleged intention to prevent students from joining gay-straight alliance type clubs).

<sup>5</sup> *See What is a GSA?*, GSANETWORK, <https://www.gsanetwork.org/resources/building-your-gsa/what-gsa> (last visited Sept. 7 2015).

<sup>6</sup> U.S. Const. amend. I.

GEORGIA'S STATUTE REQUIRING PARENTAL CONSENT FOR  
STUDENT PARTICIPATION IN CLUBS

In the mid-2000s, the Georgia legislature enacted a law codifying a long-standing school district practice requiring students to obtain parental consent prior to participation in clubs, organizations, sports, and other extracurricular activities.<sup>7</sup> While not dispositive of a statute's constitutionality,<sup>8</sup> understanding its impetus and legislative history, including the motivations of the legislator(s) who introduced the legislation, sometimes foreshadows whether a court will uphold the statute or find it unconstitutional.<sup>9</sup>

*The Statute, as Codified, Requires Parental Consent for a  
Student's Participation in Clubs and Organizations Sponsored by  
the School*

In 2006, after many drafts, committee reports, and amendments, the Georgia General Assembly adopted Senate Bill 413, "Parental consent for participation in school clubs and organizations."<sup>10</sup> The bill was codified as the Official Code of Georgia Section 20-2-705.<sup>11</sup> The Bill provides:

(a) As used in this Code section, the term:

(1) "Clubs and organizations" means clubs and organizations comprised of students who wish to organize and meet for common goals, objectives, or purposes and which is directly under the sponsorship, direction, and control of the school. This term shall include any activities reasonably related to such clubs and organizations, but shall not include competitive interscholastic activities or events.

(2) "Competitive interscholastic activity" means functions held under the auspices or sponsorship of a

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<sup>7</sup> Ga. Code § 20-2-705 (2006).

<sup>8</sup> *See, e.g.,* Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.").

<sup>9</sup> *See, e.g.,* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (utilizing the text alongside the history and background of a school board prayer policy to determine its constitutionality).

<sup>10</sup> Ga. SB 413 (2006).

<sup>11</sup> Ga. Code § 20-2-705 (2006).

school that involves its students in competition between individuals or groups representing two or more schools. This term shall include cheerleading, band, and chorus.

(b) Each local board of education shall include in the student code of conduct distributed annually at the beginning of each school year pursuant to Code Section 20-2-736 information regarding school clubs and organizations. Such information shall include without limitation the name of the club or organization, mission or purpose of the club or organization, name of the club's or organization's faculty advisor, and a description of past or planned activities. On the form included in the student code of conduct, as required in Code Section 20-2-751.5, the local board of education shall provide an area for a parent or legal guardian to decline permission for his or her student to participate in a club or organization designated by him or her.

(c) For clubs or organizations started during the school year, the local board of education shall require written permission from a parent or guardian prior to a student's participation.<sup>12</sup>

The language ultimately adopted by both houses and signed by the governor, however, was not a part of SB 413 as introduced.<sup>13</sup> It was not until Georgia Senator Nancy Schaefer proposed a second amendment to the bill, including language similar to the final draft that the parental consent provision became part of SB 413.<sup>14</sup> As discussed below, Senator Schaefer was particularly interested, on behalf of her White County constituents, in the adoption of a parental consent for clubs statute.<sup>15</sup>

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<sup>12</sup> Ga. SB 413 (2006).

<sup>13</sup> The Compulsory School Attendance Law, S.B. 413, 2006 Sess. (Ga. 2006), available at <http://www.legis.ga.gov/legislation/en-US/display/20052006/SB/413> (introduced, Jan. 12, 2006, without the parental consent requirement, by Senators Moody of the 56th, Weber of the 40th, Douglas of the 17th, Thomas of the 2nd, Fort of the 39th, and others; signed by governor on May 5, 2006)

<sup>14</sup> Compare *id.* with SB 413, 2006 Sess. (Ga. 2006), Floor Amend. I AM 33 0426 available at <http://www.legis.ga.gov/Legislation/20052006/58338.pdf> (amendment offered by Senators Schaefer of the 50th, Rogers of the 21st, Williams of the 19th, and Seabaugh of the 28th)

<sup>15</sup> See *infra* note 45.

*White County P.R.I.D.E. v. Board of Education of White County:  
Conflict over a Gay/Straight Alliance Student Group*

White County is a small county in the northeast Georgia mountains, primarily comprised of Cleveland, the birthplace of the Cabbage Patch Kids, and Helen, a “Bavarian” tourist town chock full of Christmas stores, candy stores, and arts and crafts galore.<sup>16</sup> The White County school board is located in Cleveland, as is the only high school in the White County Public School System (White County High School).<sup>17</sup> All totaled, White County schools have approximately 3,700 students between the High School (grades 9–12), the Ninth Grade Academy (grade 9), the Middle School (grades 6–8), the Intermediate School (grades 3–5), two elementary schools (grades K-5), and a primary school (grades K-2).<sup>18</sup>

In January 2005, a student plaintiff met with the new principal of White County High School (“WCHS”) to request recognition of a GSA.<sup>19</sup> She submitted her request in writing, stating that she wished to form a GSA to “create a ‘safe ground’ for lesbian, gay, bisexual, or transgender students who experienced bullying at school.”<sup>20</sup> The principal denied the request at first, but later informed plaintiff students that they could form the GSA if they provided the principal with a list of proposed members and by-laws.<sup>21</sup> The principal did not require any other noncurricular student group to comply with these requirements prior to school recognition.<sup>22</sup>

In the meantime, the White County community began to protest the GSA formation.<sup>23</sup> Several students wore t-shirts with opposition messages printed on them. Other students pushed the envelope by requesting formation of a “Redneck Club,” a “Wiccan Club,” and a

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<sup>16</sup> See WHITE COUNTY GEORGIA, <http://whitecounty.com/> (last visited Sept. 7, 2015); *Visiting White County*, WHITE COUNTY CHAMBER OF COMMERCE, [http://www.aboutnorthgeorgia.com/ang/White\\_County](http://www.aboutnorthgeorgia.com/ang/White_County) (last visited Sept. 7, 2015).

<sup>17</sup> See WHITE COUNTY SCHOOL DISTRICT, *White County Schools, Board of Education*, available at <http://www.white.k12.ga.us/?DivisionID=9933&ToggleSideNav=> (last modified Mar. 21, 2013).

<sup>18</sup> WHITE COUNTY SCHOOL DISTRICT, *White County Schools*, available at <http://www.white.k12.ga.us/> (last modified Mar. 21, 2013).

<sup>19</sup> *White Cnty. High Sch. Peers Rising in Diverse Educ. v. White Cnty. Sch. Dist.*, 2006 WL 1991990 at \*1 (N.D. Ga. July 14, 2006).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

“Southern Heritage Club.”<sup>24</sup> Notably, under the EAA, any of these clubs should be approved in the absence of disruption to the school.<sup>25</sup>

To appease the school, the GSA adopted the name “Peers Rising in Diverse Education” (“PRIDE”) and altered the group’s mission statement to accommodate bullying or harassment of any student for any reason.<sup>26</sup> In late March 2005, the school formally recognized PRIDE and the group met on campus three times during the remainder of the 2004-2005 school year.<sup>27</sup>

In March 2005, the White County board of education created the clubs and organizations committee, which recommended elimination of all noncurricular-related clubs and organizations.<sup>28</sup> The board of education adopted those the recommendation.<sup>29</sup> Accordingly, the WCHS principal reviewed the existing clubs and organizations, disbanding those he considered “noncurricular-related.”<sup>30</sup> The disbanded clubs included the Fellowship of Christian Athletes (“FCA”), the Key Club, the Interact Club, and PRIDE.<sup>31</sup>

However, the school did not disband the Student Council, the Youth Advisory Council (“YAC”), the Shotgun Club, the Beta Club, a prayer group, the Dance Team, and the Prom Group.<sup>32</sup> As discussed below, the existence of these noncurricular-related clubs on school campus invoke the EAA, thereby requiring the school to give access to all noncurricular-related clubs.<sup>33</sup> Because the school did not give equal access to PRIDE as it did the other noncurricular-related clubs, it denied the club equal access and a fair opportunity to conduct meetings on school premises under the EAA.<sup>34</sup>

Accordingly, on July 14, 2006, the court enjoined White County School Board and WCHS from: (1) denying students of PRIDE equal access or fair opportunity to conduct a meeting on school premises during non-instructional time; and (2) discriminating against student groups on the basis of religious, political, philosophical, or other content of their speech.<sup>35</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> *White Cty.*, 2006 WL 1991990 at \*3.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at \*2.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *White Cty.*, 2006 WL 1991990 at \* 2.

<sup>32</sup> *Id.* at \*4.

<sup>33</sup> *Id.* at \*3-4, 13-14.

<sup>34</sup> *Id.* at \* 13-14.

<sup>35</sup> *Id.*



*White County Legislators Push for a Parental Consent Provision*

During the course of the *White County PRIDE* litigation, White County Senator Nancy Schaefer and others were working to find another route to preclude students from joining PRIDE or any other GSA.<sup>36</sup> In fact, prior to Senator Schaefer's introduction of Senate Bill 149<sup>37</sup> ("School/Extracurricular Activities; written notification; withhold permission"), in February 2005 she stated, "she believes many parents need to be involved in deciding what school activities their children attend, especially those involving sexuality."<sup>38</sup>

Senate Bill 149 (and accompanying House Bill 661) did not go forward during the 2005 General Assembly.<sup>39</sup> However, in exchange for pursuing the law, legislators put the pressure on the Department of Education to pass a rule containing the "parental consent for clubs" mandate.<sup>40</sup> Plaintiffs in the already-filed *White County PRIDE* case were concerned with the implementation of such a rule.<sup>41</sup> Regarding the impetus for the rule and response to PRIDE, one plaintiff's father stated, "[a] lot of children are afraid . . . . That's one of the problems. Orientation is not something you choose. Being gay is an orientation. And a lot of parents don't understand."<sup>42</sup> Another plaintiff commented on the parental consent requirement, "I know kids, they've told things to their parents, and they've pretty much kicked them out of the house . . . . Some people won't say anything to their parents."<sup>43</sup>

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<sup>36</sup> Brandon Larrabee, Schools' gay-straight clubs feel targeted by new Board of Education proposal; Rule would require students to get their parents' permission before joining select organizations, FLORIDA TIMES-UNION, May 31, 2005, at A-1 (Senator Schaefer tried to dispute the rule's targeting gay-straight alliances, stating that "some parents might not want their children involved in more than two or three clubs at the same time, though she concede[d] that the White County controversy added some immediacy to the issue."); Dyana Bagby, Schools weigh parental permission policies; Districts urged to act before state mandates rules for student clubs, SOUTHERN VOICE ONLINE (Jan. 27, 2006), (this source is no longer available online, but a hard copy of the online newspaper is on file with the author). (Additionally, as reported in Southern Voice Online in January 2006, Senator Schaefer said publicly "she opposes gay-straight alliances.").

<sup>37</sup> Ga. SB 149 (2005), available at <http://www.legis.ga.gov/legislation/en-US/Display/20052006/SB/149>.

<sup>38</sup> Brian Basinger, Bill calls for parent consent in school activities; Opponents say measure puts undue burden on school staff, FLORIDA TIMES-UNION, Feb. 10, 2005, at B-5.

<sup>39</sup> Ga. SB 142 (2005); Ga. HB 661 (2005), available at <http://www.legis.ga.gov/legislation/en-US/Display/20052006/HB/661>.

<sup>40</sup> Mary MacDonald, *Rule aimed at gay clubs would make all students get approval*, THE ATLANTA JOURNAL-CONST., Mar. 18, 2005, at 1D.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

At a hearing before the Georgia Department of Education, Senator Schaefer testified, “[c]hildren today are swimming in a sea of drugs and pornography and violence and abortion, and we can go on and on and on. Children in high school cannot be expected to make lifetime decisions.”<sup>44</sup> Despite the State Superintendent’s support and months of delays, committee re-writes, and debate,<sup>45</sup> the Georgia Board of Education rejected the rule in a 10-3 vote.<sup>46</sup>

Nancy Schaefer and other supporters did not wait long to reintroduce the parental consent bill in the State Senate.<sup>47</sup> When Senate Bill 413 came before the Senate in January 2006, it did not contain any reference to the parental consent provision.<sup>48</sup> However, in a Floor Amendment, Senator Schaefer inserted the language almost exactly as codified in existing law.<sup>49</sup> Despite attempts by the Georgia School Board’s Association to “stave off” the Parental Consent Bill,<sup>50</sup> and throughout reviews by both the Senate and the House education

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<sup>44</sup> Brandon Larrabee, *Club proposal called discriminatory*, *The Augusta Chronicle*, Apr. 14, 2005, at B06 available at [http://old.chronicle.augusta.com/stories/2005/04/14/met\\_450257.shtml](http://old.chronicle.augusta.com/stories/2005/04/14/met_450257.shtml).

<sup>45</sup> Brandon Larrabee, *Hot debate delays vote on school club consent; Critics: Plan hurts gay-straight groups*, *FLORIDA TIMES-UNION*, Apr. 15, 2005, at B-1; Brandon Larrabee, *It’s club rule vs. children’s freedom at Board of Education hearing; Rule would require parental permission to take part in extracurricular organizations*, *FLORIDA TIMES-UNION*, June 9, 2005, at A-1; Mary MacDonald, *School clubs’ parental OK due for vote*, *THE ATLANTA JOURNAL-CONST.*, June 9, 2005, at 1C; Mary MacDonald, *Looking ahead: Decision Tuesday; State school board to vote on parental permission for students joining organizations*, *THE ATLANTA JOURNAL-CONST.*, June 12, 2005, at Northside, 11ZH.

<sup>46</sup> Brandon Larrabee, *Club permission rule rejected*, *THE AUGUSTA CHRONICLE*, June 15, 2005, at B01; Paul Donsky, *Board rejects rule to require parental OK for school clubs*, *THE ATLANTA JOURNAL-CONST.*, June 15, 2005, at 1D; Staff and Wire Report, *Permission not needed to join clubs in schools*, *CHATTANOOGA TIMES FREE PRESS*, June 19, 2005, at NG1; Staff, *Parental permission not required*, *EDUC. WEEK*, June 22, 2005, at p. 25, Vol. 24, No. 41.

<sup>47</sup> See SB 413, 2006 Leg. Sess, Floor Amendment 1 (Ga. Feb. 2006).

<sup>48</sup> Ga. L. 2006, p. 851, § 4/SB 413 (introduced, Jan. 12, 2006, without the parental consent requirement, by Senators Moody of the 56th, Weber of the 40th, Douglas of the 17th, Thomas of the 2nd, Fort of the 39th, and others; signed by governor on May 5, 2006).

<sup>49</sup> SB 413, 2006 Leg. Sess, Floor Amendment 1 (Ga. Feb. 2006) (amendment offered by Senators Schaefer of the 50th, Rogers of the 21st, Williams of the 19th, and Seabaugh of the 28th); see also Vicky Eckenrode, *Democrat calls vote for school bill abrupt*, *THE AUGUSTA CHRONICLE*, Jan. 25, 2006, at B02, available at [http://chronicle.augusta.com/stories/2006/01/25/met\\_49153.shtml#.Ve4C8vZViko](http://chronicle.augusta.com/stories/2006/01/25/met_49153.shtml#.Ve4C8vZViko).

<sup>50</sup> Dyana Bagby, *Schools weigh parental permission policies; Districts urged to act before state mandates rules for student clubs*, *SOUTHERN VOICE ONLINE* (Jan. 27, 2006), (source is no longer available online, but a hard copy is on file with the author).

committees, the Senate passed the bill.<sup>51</sup> Governor Sonny Perdue signed the legislation in May 2006.<sup>52</sup> The Bill became effective July 1, 2006.<sup>53</sup>

To date, no parties have filed a lawsuit on the basis of the statute;<sup>54</sup> however, it is just a matter of time. The statute, for many reasons, is an unconstitutional violation of students' First Amendment rights and of the EAA.<sup>55</sup>

#### PARENTAL CONSENT REQUIREMENTS FOR PARTICIPATION IN STUDENT CLUBS VIOLATE THE EQUAL ACCESS ACT

##### *The Equal Access Act*

In 1984, Congress enacted the EAA on the basis of anecdotal evidence that, despite the protections students enjoyed under the First Amendment as set forth above, "secondary school students suffered discrimination at the hands of school administrators, sanctioned by federal district courts, who believed that the First Amendment precluded equal access for religious student groups to the public school."<sup>56</sup> The

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<sup>51</sup> Ga. SB 413 (2005).

<sup>52</sup> GEORGIA GENERAL ASSEMBLY LEGISLATION, 2005-2006 Regular Session - SB 413 Compulsory School Attendance Law; exemptions; provide local board of education policies; minimum annual attendance; change provisions, Status History, available at <http://www.legis.ga.gov/legislation/en-US/Display/20052006/SB/413>.

<sup>53</sup> *Id.*

<sup>54</sup> *See generally*, GA State Court dockets.

<sup>55</sup> *See* U.S. CONST. amend. I.

<sup>56</sup> Prince v. Jacoby, 303 F.3d 1074, 1078-1079 (9th Cir. 2002) (*citing* 130 CONG. REC. S8331 (daily ed. June 27, 1984) (statement of Sen. Hatch)), *cert. denied* 540 U.S. 813 (2003) (As further explained in the Senate Report, The standard of 'equal access' was used by the Supreme Court in *Widmar v. Vincent*, to describe the free speech principle safeguarded by Section 2(a). In Section 2(a), as in the Supreme Court decision, the guarantee of equal access means that religiously oriented student activities of an extracurricular nature would be allowed under the same terms and conditions as other extracurricular activities. Under Section 2(a), it would be unlawful to single out a voluntary student religious activity for discriminatory treatment based on the fact that the form or content of its expression is religious. The opportunity for an extracurricular religious group to meet and have access to public school facilities could not be restricted solely because the activity included religious speech or prayer. This provision follows the Supreme Court decision in *Widmar v. Vincent*, which held that religious speech is entitled to the same First Amendment protections as non-religious speech.); S. Rep. No. 98-357, at 38-39 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2348, 2384-85 (*cited by* Prince v. Jacoby, 303 F.3d 1074, 1080-1081 (9th Cir. 2002), *cert. denied* 540 U.S. 813 (2003)) (As noted in Prince v. Jacoby, *supra*, at 1081, n.1, "Senate Report 98-357 was written by the Senate Committee on the Judiciary to accompany the committee's favorable recommendation to the Senate of Senate Bill 1059, a proposed Equal Access Act. See S. Rep. No. 98-357, at 1. Although Senate Bill 1059 was not the bill that ultimately became the Equal Access Act, much of the Act was derived from Senate Bill 1059, and the Senate report accompanying that bill is relevant to our analysis.").

legislative history of the EAA “makes it clear that the purpose of the Act was to confirm students’ rights to freedom of speech, freedom of association, and free exercise of religion.”<sup>57</sup> The legislative history also reveals that the main purpose of the EAA was to “address student involvement in religious activities during extracurricular periods of the school day.”<sup>58</sup>

As enacted, however, the Act differs from the original bill because it concerns religious, political, philosophical, and other activities.<sup>59</sup> Since its inception, the EAA has been applied in cases involving Bible clubs,<sup>60</sup> other Christian clubs,<sup>61</sup> and—in the most recent and controversial cases—GSA<sup>62</sup> or other similar clubs.<sup>63</sup>

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<sup>57</sup> *White Cnty.*, 2006 WL 1991990 at \*12 (citing H.R. Rep. No. 98-710; S. Rep. No. 98-357).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at \*12 (citing 20 U.S.C. § 4071(a) (schools cannot discriminate against student groups based on “the religious, political, philosophical, or other content” of the group’s speech)).

<sup>60</sup> *See, e.g.*, *Board of Education v. Mergens*, 496 U.S. 226 (1990) (the EAA’s effects of allowing Bible club on school campus does not violate the Establishment Clause); *Prince v. Jacoby*, 303 F.3d 1074, 1079 (9th Cir. 2002), *cert. denied* 540 U.S. 813 (2003) (preclusion of Bible Club violated EAA); *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211 (3d Cir. 2003) (preclusion of Bible Club violated EAA).

<sup>61</sup> *See, e.g.*, *ALIVE v. Farmington Pub. Schs.*, 2007 WL 2572023 (E.D. Mich. Sept. 5, 2007) (holding that preclusion of the Christian group ALIVE violated EAA); *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98 (D. Mass. 2003).

<sup>62</sup> *See, e.g.*, *Gay-Straight Alliance of Yulee High School v. Sch. Bd. of Nassau County*, 602 F. Supp. 2d 1233 (M.D. Fla. 2009) (preliminarily enjoining school district from declining recognition of GSA); *Gay-Straight Alliance of Okeechobee High Sch. v. School Bd. of Okeechobee County*, 477 F. Supp. 2d 1246 (S.D. Fla. 2007) (finding that the GSA’s purpose was to promote tolerance and equality among students, regardless of sexual orientation); 483 F. Supp. 2d 1224 (S.D. Fla. 2007) (court granted GSA’s request for preliminary injunction and ordered school board to officially recognize the GSA with the privileges granted to other school clubs); 242 F.R.D. 644 (S.D. Fla. Apr. 25, 2007) (granting protective order for discovery); 571 F. Supp. 2d 1257 (permanently enjoining school board “from denying equal access and recognition to the GSA at OHS as a noncurricular student group which shall be afforded all rights and privileges granted to other noncurricular student groups”); *Caudillo v. Lubbock Indep. Sch. Dist.*, 2003 WL 22670934 (N.D. Tex. Nov. 10, 2003); 311 F. Supp. 2d 550 (N.D. Tex. 2004) (holding that the entire subject matter of sexual activity was banned at the school, that the information on the group’s web site was lewd and offensive, the group’s existence and message created a material and substantial interference with the district’s educational mission, and therefore preclusion was not based on the group’s viewpoint); *Boyd County High Sch. Gay Straight Alliance (GSA) v. Board of Educ. of Boyd County*, 258 F. Supp. 2d 667 (E.D. Ky 2003) (court enjoined school board to give GSA equal status as other student groups); *Colin by and through Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135 (C.D. Cal. 2000) (holding that existence of other noncurriculum-related clubs established limited open forum and preclusion of GSA violated EAA); *East High Gay/Straight Alliance v. Board of Educ. of Salt Lake City Sch. Dist.*, 30 F. Supp. 2d 1356 (D. Utah 1998) (holding that the school did not have any “noncurriculum related” clubs and the EAA did not apply); 81 F. Supp. 2d 1199 (D. Utah 1999) (finding that the

The Equal Access Act (“EAA”) provides as follows:

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

....

(c) Fair opportunity criteria. Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that –

(1) the meeting is voluntary and **student-initiated**;

(2) there is **no sponsorship of the meeting by the school**,

**the government, or its agents or employees**;

... and

(5) **nonschool persons may not direct, conduct, control**,

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school’s accommodation of only curriculum related clubs does not result in viewpoint discrimination against GSA); 81 F. Supp. 2d 1166 (D. Utah 1999) (holding that “if” another noncurriculum related club existed at the school, then precluding the GSA would violate the EAA); 1999 WL 1390255 (D. Utah Nov. 30, 1999) (court dismissed plaintiffs’ second amended complaint for injunctive relief because defendant’s resounding affirmation that “gay-positive” viewpoints could be freely expressed in curriculum-related student groups, coupled with the fact that no student was reprimanded for expression of “gay positive” views, dispelled any inference that an unwritten policy forbade “gay-positive” views).

<sup>63</sup> See, e.g., *Straights and Gays for Equality (SAGE) v. Osseo Area Schs*, Dist. No. 279, 2006 WL 983904 (D. Minn. Apr. 4, 2006) (granting SAGE’s motion for preliminary injunction and holding that preclusion of SAGE, when school has at least nine other noncurricular groups, violates EAA); 2006 WL 890754 (D. Minn. Apr. 6, 2006) (denying school district’s motion to temporarily stay the order of April 4, 2006); 471 F.3d 908 (8th Cir. 2006) (upholding district court’s order granting SAGE’s motion for preliminary injunction); 2007 WL 2885810 (D. Minn. Sept. 25, 2007) (court grants SAGE’s motion for partial summary judgment, holding that preclusion of SAGE, when school has at least nine other noncurricular groups, violates EAA), aff’d by 540 F.3d 911 (8th Cir. 2008).

**or regularly attend activities of student groups.**

(d) Construction of title [20 USCS §§ 4071 et seq.] with respect to certain rights. Nothing in this title [20 USCS §§ 4071 et seq.] shall be construed to authorize the United States or any State or political subdivision thereof-

....

**(7) to abridge the constitutional rights of any person.**<sup>64</sup>

The three factors triggering application of the EAA are, (1) a public secondary school that (2) receives federal funding, and (3) has established a “limited open forum” by allowing other “noncurricular related” student groups to meet on school premises.<sup>65</sup>

The EAA guarantees secondary school students the right to voluntarily participate in noncurricular<sup>66</sup> groups dedicated to religious,

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<sup>64</sup> 20 U.S.C. § 4071 (2007) (emphasis supplied) (The Act defines “limited open forum” as follows: “A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time” *id.*; additionally, the Equal Access Act prohibits school employees from:

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

<sup>65</sup> *Prince*, 303 F.3d at 1079 (*cert. denied* 540 U.S. 813 (2003)).

<sup>66</sup> See 20 U.S.C. § 4071 (2007) (Whether a club is “curriculum-related” or “noncurriculum” related is debatable. In *Board of Education v. Mergens*, 496 U.S. 226, 240, 110 S. Ct. 2356 (1990), Justice O’Connor defined “curriculum related” as: (1) if the subject matter of the group is actually taught or will soon be taught, in a regularly offered course; “a French club would directly relate to the curriculum if a school taught French in a regularly offered course or planned to teach the subject in the near future”; (2) if the subject matter of the group concerns the body of courses as a whole – “A school’s student government would generally relate directly to the curriculum to the extent that it addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses offered by the school”; (3) if participation in the group is required for a particular course – “If participation in a school’s band or orchestra were required for the band or orchestra classes”; or (4) if participation in the group results in academic credit – “If participation in a school’s band or orchestra . . . resulted in academic credit, then those groups would also directly relate to the curriculum.”

political, philosophical, or other expressive activities protected by the First Amendment of the United States Constitution.<sup>67</sup> The EAA defines the term “secondary school” with reference to state law to determine what grade levels are covered by the Act.<sup>68</sup> Undoubtedly, the EAA applies to students in high school; the question generally arises regarding state law’s treatment of middle school or “junior high” school and whether these are considered “secondary schools.”<sup>69</sup> Once a school is deemed to be a “secondary school,” the EAA applies when the school gives at least one noncurriculum-related student group (e.g., the Beta Club or Fellowship of Christian Athletes) access to its facilities, equipment, or the like during non-instructional time.<sup>70</sup>

Notably, for this article there are two provisions in the EAA. First, the Act states that schools are deemed to offer a “fair opportunity” to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that the meeting is voluntary and student-initiated and that “nonschool persons [do] not direct, conduct, control, or regularly attend activities of student groups.”<sup>71</sup> To be voluntary and student-initiated, the *individual student* must make the decision to initiate or join the club.<sup>72</sup> The EAA does not provide that students must obtain parental permission to initiate or join clubs; to do so

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The Mergens court specifically rejected the argument that “‘curriculum related’ means anything remotely related to abstract educational goals,” such as “promoting effective citizenship.” Mergens at 240. The required relationship depends much more on the specific course’s subject matter compared with the activities of a specific group. “The difficult question,” stated Justice O’Connor, “is the degree of ‘unrelatedness to the curriculum’ required for a group to be considered ‘noncurriculum related.’” *Id.*

Some courts interpret “curriculum related” strictly. *See, e.g., Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244 (3d Cir. 1993) (holding that “curriculum-related” clubs are the obvious groups, such as the math team. Other courts, however, go to great strides to classify the school’s clubs as “curriculum-related.” For instance, in *East High Gay/Straight Alliance v. Board of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166 (D. Utah 1999), the court held that the Odyssey of the Mind, Future Business Leaders of America, Future Homemakers of America, and the National Honor Society were “curriculum-related.” The attempt to classify all student groups as “curriculum-related” is important because, if the school does not have any noncurricular related clubs, then the EAA is not invoked. (The First Amendment’s general prescription against discrimination on the bases of content or viewpoint still would apply.)

<sup>67</sup> Compare *id.* with U.S. CONST. amend. I.

<sup>68</sup> See 20 U.S.C. § 4072 (2007) (“As used in this subchapter – The term ‘secondary school’ means a public school which provides secondary education as determined by State law.”).

<sup>69</sup> 20 U.S.C. § 4071 (2007).

<sup>70</sup> See *id.* (the plain meaning of the term “noninstructional time” under the EAA includes meetings during lunchtime); see *Ceniceros by and through Risser v. Board of Trustees*, 106 F.3d 878 (9th Cir. 1997).

<sup>71</sup> 20 U.S.C.A. § 4071(c).

<sup>72</sup> See *id.*

would be contrary to the voluntariness and student-initiation provisions set forth in the Act.<sup>73</sup> Furthermore, the EAA's mandate against the involvement of nonschool persons specifically prohibits *parents* of students from directing, conducting, controlling, or regularly attending activities of student groups.<sup>74</sup>

*The Equal Access Act and Gay Straight Alliance Groups*

Students desiring to initiate groups such as the GSA, or other such tolerance groups, have inundated the courts with claims under the EAA.<sup>75</sup> Generally, courts have held that, if a school contains at least one noncurriculum-related club, then it must accommodate the GSA with the same access afforded to other school clubs.<sup>76</sup> While the focus of this

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<sup>73</sup> *See id.*

<sup>74</sup> *See id.*

<sup>75</sup> *See, e.g.*, White Cnty., 2006 WL 1991990.

<sup>76</sup> *See, e.g.*, Gay-Straight Alliance of Okeechobee High Sch. v. School Bd. of Okeechobee County, 477 F. Supp. 2d 1246 (S.D. Fla. 2007) (finding that the GSA's purpose was to promote tolerance and equality among students, regardless of sexual orientation); 483 F. Supp. 2d 1224 (S.D. Fla. 2007) (court granted GSA's request for preliminary injunction and ordered school board to officially recognize the GSA with the privileges granted to other school clubs); 242 F.R.D. 644 (S.D. Fla. Apr. 25, 2007) (granting protective order for discovery); 571 F. Supp. 2d 1257 (permanently enjoining school board "from denying equal access and recognition to the GSA at OHS as a noncurricular student group which shall be afforded all rights and privileges granted to other noncurricular student groups"); Straights and Gays for Equality (SAGE) v. Osseo Area Schs, Dist. No. 279, 2006 WL 983904 (D. Minn. Apr. 4, 2006) (granting SAGE's motion for preliminary injunction and holding that preclusion of SAGE, when school has at least nine other noncurricular groups, violates EAA); 2006 WL 890754 (D. Minn. Apr. 6, 2006) (denying school district's motion to temporarily stay the order of April 4, 2006); 471 F.3d 908 (8th Cir. 2006) (upholding district court's order granting SAGE's motion for preliminary injunction); 2007 WL 2885810 (D. Minn. Sept. 25, 2007) (court grants SAGE's motion for partial summary judgment, holding that preclusion of SAGE, when school has at least nine other noncurricular groups, violates EAA); Boyd County High Sch. Gay Straight Alliance (GSA) v. Board of Educ. of Boyd County, 258 F. Supp. 2d 667 (E.D. Ky 2003) (court enjoined school board to give GSA equal status as other student groups); Colin by and through Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135 (C.D. Cal. 2000) (holding that existence of other noncurriculum-related clubs established limited open forum and preclusion of GSA violated EAA); *but see*, Caudillo v. Lubbock Indep. Sch. Dist., 2003 WL 22670934 (N.D. Tex. Nov. 10, 2003); 311 F. Supp. 2d 550 (N.D. Tex. 2004) (holding that the entire subject matter of sexual activity was banned at the school, that the information on the group's web site was lewd and offensive, the group's existence and message created a material and substantial interference with the district's educational mission, and therefore preclusion was not based on the group's viewpoint); East High Gay/Straight Alliance v. Board of Educ. of Salt Lake City Sch. Dist., 30 F. Supp. 2d 1356 (D. Utah 1998) (holding that the school did not have any "noncurriculum related" clubs and the EAA did not apply); 81 F. Supp. 2d 1199 (D. Utah 1999) (finding that the school's accommodation of only curriculum related clubs does not result in viewpoint discrimination against GSA); 81 F. Supp. 2d 1166 (D. Utah 1999) (holding that "if" another noncurriculum related club existed at the



article is *not* the application of the EAA to GSA-type clubs, it is important to understand the sometimes-hostile political climate in which GSA or similar clubs seek formation.<sup>77</sup> Furthermore, court decisions holding that local school boards may not preclude these GSA-type clubs from formation without violating the EAA,<sup>78</sup> have resulted in state legislation or local policies attempting to limit membership to GSA by requiring parental permission to join.<sup>79</sup>

*The Georgia “Parental Consent to Clubs” Statutes Conflicts with Language in the Equal Access Act*

Before considering the constitutionality of Georgia’s “parental consent to clubs” statute, we must address the incompatibility of the statutory language between the Georgia statute and the EAA. Specifically, the Georgia statute requires parental consent for “[c]lubs and organizations,” which “means clubs and organizations comprised of students who wish to organize and meet for common goals, objectives, or purposes and which is [sic] *directly under the sponsorship, direction, and control of the school.*”<sup>80</sup> However, the EAA states that “[s]chools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that . . . there is *no sponsorship of the meeting by the school, the government, or its agents or employees . . .*”<sup>81</sup> Per the EAA, “‘sponsorship’ includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.”<sup>82</sup> “The term ‘meeting’ includes those

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school, then precluding the GSA would violate the EAA); 1999 WL 1390255 (D. Utah Nov. 30, 1999) (court dismissed plaintiffs’ second amended complaint for injunctive relief because defendant’s resounding affirmation that “gay-positive” viewpoints could be freely expressed in curriculum-related student groups, coupled with the fact that no student was reprimanded for expression of “gay positive” views, dispelled any inference that an unwritten policy forbade “gay-positive” views).

<sup>77</sup> See, e.g., GEORGIA GENERAL ASSEMBLY LEGISLATION, 2005-2006 Regular Session - SB 413 Compulsory School Attendance Law; exemptions; provide local board of education policies; minimum annual attendance; change provisions, Status History, available at <http://www.legis.ga.gov/legislation/en-US/Display/20052006/SB/413>; SB 413, 2006 Sess. (Ga. 2006), Floor Amend. I AM 33 0426 available at <http://www.legis.ga.gov/Legislation/20052006/58338.pdf>.

<sup>78</sup> See, e.g., *White Cnty.*, 2006 WL 1991990. (litigation which gave rise to the insertion of the “parental consent to student clubs” language into already-existing SB 413 by Georgia Senator Nancy Schaefer, who represents White County).

<sup>79</sup> See *id.*

<sup>80</sup> O.C.G. § 20-2-705 (a)(1) (2006) (emphasis supplied).

<sup>81</sup> 20 U.S.C. § 4071 (c)(2) (emphasis supplied).

<sup>82</sup> 20 U.S.C. § 4072.

activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum."<sup>83</sup>

The EAA trumps all conflicting state legislation.<sup>84</sup> Under the Georgia statute, only clubs and organizations "directly under the sponsorship" of the school are subject to the parental consent requirement.<sup>85</sup> Yet, since the EAA forbids school "sponsorship" of a noncurricular student club, then any noncurriculum-related student club (*i.e.*, one which the school shall not sponsor without violating the EAA) *cannot* be subject to the Georgia parental consent statute.<sup>86</sup> In other words, noncurriculum-related clubs and organizations (such as the GSA and Bible clubs),<sup>87</sup> which, per the EAA, cannot be sponsored by the school, are not subject to the Georgia parental consent statute, which applies to clubs or organizations sponsored by the school.<sup>88</sup> Accordingly, applying the Georgia parental consent statute to any noncurriculum-related club would violate the EAA.<sup>89</sup>

#### PARENTAL CONSENT REQUIREMENTS FOR PARTICIPATION IN STUDENT CLUBS MAY VIOLATE THE FIRST AMENDMENT

##### *Students' First Amendment Rights to Free Speech and Expression at School*

To fully deconstruct and analyze the constitutionality of the Georgia "parental consent to clubs" statute, it is necessary to review several tenets of the First Amendment law, and how these are applied to students in public schools. The First Amendment of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."<sup>90</sup>

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<sup>83</sup> 20 U.S.C. § 4072.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Compare *id.* with U.S. CONST. amend. I. (in addition to the constraints placed on school-sponsorship of student clubs in the EAA, schools may not affirmatively sponsor Bible clubs or other religious clubs (although they must accommodate them) in order to avoid the appearance of establishing or endorsing religion in contravention of the First Amendment's Establishment Clause)

<sup>88</sup> 20 U.S.C. § 4071.

<sup>89</sup> *Id.*

<sup>90</sup> U.S. CONST. amend. I.

The First Amendment applies to all “people,” thus, students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>91</sup> The Court has held that religious worship and discussion “are forms of speech and association protected by the First Amendment.”<sup>92</sup> Additionally, “[t]he First Amendment protects [individuals’] right[s] not only to advocate their cause, but also to select what they believe to be the most effective means for so doing.”<sup>93</sup> Accordingly, the First Amendment protects an individual’s right to join groups and associate with others holding similar beliefs.<sup>94</sup> Justice Powell has written, “[a] stereotypical reaction to particular characteristics of a disfavored group cannot justify discriminatory legislation.”<sup>95</sup> It is nevertheless important to remember that the First Amendment protects an individual’s right to entertain unsound and unpopular beliefs . . . and to expound those beliefs publicly . . . [f]resh air and open discussion are better cures for vicious prejudice than are secrecy and dissembling.”<sup>96</sup>

In the seminal case *West Virginia State Board of Education v. Barnette*, Justice Frankfurter wrote:

[W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.<sup>97</sup>

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<sup>91</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1967).

<sup>92</sup> *Widmar v. Vincent*, 454 U.S. 263, 269 (1981).

<sup>93</sup> *Nixon v. Shrink Missouri Government Pac.*, 528 U.S. 377, 417 n.5, 120 S. Ct. 897 (2000) (*quoting* *Meyer v. Grant*, 486 U.S. 414, 424, 108 S. Ct. 1886 (1988)).

<sup>94</sup> *Dawson v. Delaware*, 503 U.S. 159, 163-64, 112 S. Ct. 1093, 1096-97 (1992) (*citing* *Aptheker v. Secretary of State*, 378 U.S. 500, 507 (1964); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460, (1958)).

<sup>95</sup> *Rogers v. Lodge*, 458 U.S. 613, 648 n.31 (1982) (*citing, e. g.*, *Mathews v. Lucas*, 427 U.S. 495, 520-521 (Stevens, J., dissenting)).

<sup>96</sup> *Id.* at 648.

<sup>97</sup> *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943) (court held that the action of the local authorities in compelling the flag salute—a form of

Long after the *Barnette* decision, the Supreme Court has had several occasions to scrutinize the speech and association rights of students.<sup>98</sup> The Court has stated “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”<sup>99</sup> The Court also has held that First Amendment rights “must be ‘applied in light of the special characteristics of the school environment.’”<sup>100</sup>

In its examination of student speech rights and limitations, the Court held that a school may censor student speech if it reasonably threatens to materially and “substantially interfere with the work of the school or impinge upon the rights of other students.”<sup>101</sup> To exercise this censorship, however, the school “must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>102</sup> Speech that is merely offensive to the listener does not constitute “imping[ing] on the rights of other students.”<sup>103</sup>

Additionally, a school may regulate “plainly offensive” speech, or speech that is “sexually explicit, indecent, or lewd,” as part of its mission to instill those “fundamental values of ‘habits and manners of civility’ essential to a democratic society.”<sup>104</sup> The Court explained that “[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially-appropriate behavior.”<sup>105</sup>

Furthermore, a school may censor “school-sponsored” speech that is inconsistent with the school’s “basic educational mission.”<sup>106</sup> The United States Supreme Court in *Hazelwood School District v. Kuhlmeier* explained, “[t]he question whether the First Amendment requires a

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utterance protected by the First Amendment—and pledge transcended constitutional limitations on their power and invaded the sphere of intellect and spirit which was the purpose of the First Amendment to reserve from all official control).

<sup>98</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

<sup>99</sup> *Id.*

<sup>100</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

<sup>101</sup> *Tinker*, 393 U.S. at 509.

<sup>102</sup> *Id.* (students wore black armbands to school in protest of Vietnam war; school could not censor the black armbands simply because it had an “undifferentiated fear” of classroom disruption).

<sup>103</sup> *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (Alito, J.); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.5 (1988).

<sup>104</sup> *Bethel*, 478 U.S. at 681, 683–84, (school allowed to ban sexually-suggestive student speech delivered to a “captive audience” of six hundred students in connection with a student government campaign).

<sup>105</sup> *Id.* at 681.

<sup>106</sup> *Hazelwood*, 484 U.S. at 266.

school to tolerate particular student speech [i.e., the question addressed in *Tinker*] is different from the question whether the First Amendment requires a school *affirmatively to promote* particular speech.”<sup>107</sup> The Court held, “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>108</sup> Therefore, the *Tinker* decision controls a school’s ability to censor non-school-sponsored speech, while *Hazelwood* governs a school’s ability to regulate what “is in essence the school’s own speech, that is, articles that appear in a publication that is an official school organ.”<sup>109</sup>

*Parental Notification Provisions for Student Opt-Out of the Pledge of Allegiance: A Split in the Circuits*

The Third Circuit Court of Appeals addressed the constitutionality of requiring parental consent for a student to opt-out of the Pledge of Allegiance in *Circle School v. Pappert*.<sup>110</sup> In *Pappert*, a Pennsylvania statute mandated that all public, private, and parochial schools within the Commonwealth display the United States flag in every classroom and provide for recitation of the Pledge of Allegiance or the National Anthem every school day.<sup>111</sup> The Pennsylvania statute gave students the option of refraining from participation in reciting and saluting the flag on religious or personal grounds.<sup>112</sup> It also required the school to notify, in writing, parents or guardians of those students who exercised the option of refraining from participation in reciting and saluting the flag.<sup>113</sup> The Third Circuit held that the parental notification provision of the Pennsylvania statute violated students’ First Amendment right to free speech and was unconstitutional.<sup>114</sup> The court found disturbing testimony by a Pennsylvania Representative’s testimony that, if a high school senior decided he did not want to say the Pledge of Allegiance, and if his parent would not give him permission to opt out, then the student could be compelled to say the Pledge and, further, could be *disciplined* for

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<sup>107</sup> *Id.* at 270–71 (emphasis added).

<sup>108</sup> *Id.* at 273.

<sup>109</sup> *Morse v. Frederick*, 551 U.S. 393, 423 (2001) (Alito, J., concurring).

<sup>110</sup> 381 F.3d 172 (3d Cir. 2004), *aff’g* *The Circle School v. Phillips*, 270 F. Supp. 2d 616 (E.D. Pa. 2003).

<sup>111</sup> *Pappert*, 381 F.3d at 174 (allowing private and parochial schools to opt out on religious grounds).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 174–175.

<sup>114</sup> *Id.* at 174 (also holding that certain of the statute’s provisions violated private schools’ First Amendment right to free expressive association).

noncompliance.<sup>115</sup> The court found convincing the plaintiff-student's argument that the parental notification portion of the statute served as a deterrent to his exercise of free expression right not to participate in such recitation.<sup>116</sup> Citing *Tinker*, the court reminded us that it "can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>117</sup> The court then examined the student speech cases discussed above, including the *Fraser*, *Hazelwood*, and *Barnette* cases.<sup>118</sup>

The court found that a parental notification provision "limited only to parents of students who refuse to engage in such recitation may have been purposefully drafted to 'chill speech by providing a disincentive to opting out of [the Act].'"<sup>119</sup> Indeed, the legislative history for the Pennsylvania Act provided "some evidence that such disincentive was indeed part of the Commonwealth's motivation in adopting the parental notification scheme."<sup>120</sup> While acknowledging that one legislator's motivation in drafting a statute is not dispositive, "the view of the legislator who introduced the bill sheds some light on its underlying motivation."<sup>121</sup> Citing the Supreme Court, the court reiterated "'constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.'"<sup>122</sup>

The Third Circuit agreed with the district court's characterization of the parental notification requirement as a "viewpoint-based regulation that operates to chill student speech," and that this provision:

cannot survive strict scrutiny required for such viewpoint discrimination because it is not the most narrowly tailored method to achieve the government's interest in notifying the parents of the administration of the [statute], an interest that is, in any case, not sufficiently compelling to infringe on students' free speech rights.<sup>123</sup>

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<sup>115</sup> *Id.* at 175.

<sup>116</sup> *Pappert*, 381 F.3d at 175–76.

<sup>117</sup> *Id.* at 174 (citing *Tinker*, 393 U.S. at 506 (1967)).

<sup>118</sup> *Id.* at 177–78.

<sup>119</sup> *Id.* at 181 (citing *The Circle School v. Phillips*, 270 F. Supp. 2d 616, 624 (2003)).

<sup>120</sup> *Id.* at 181 n.3 (citing Representative Egolf's suggestion that if a student refuses to recite the Pledge of Allegiance or the national anthem and the student's parents do not agree with the student's decision, then the school may impose "'whatever sanctions the school does for other disciplinary things,'" quoting *The Circle School v. Phillips*, 270 F. Supp. 2d 616, 624 (2003)).

<sup>121</sup> *Id.*

<sup>122</sup> *Pappert*, 381 F.3d at 181 (quoting *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996), quoting *Laird v. Tatum*, 408 U.S. 1, 11, 92 S. Ct. 2318 (1972)).

<sup>123</sup> *Id.* at 176–77, 181.

The Pennsylvania parental notification provision “clearly discriminates among students based on the viewpoints they express; it is ‘only triggered when a student exercises his or her First Amendment right not to [engage in recitation of the Pledge of Allegiance or national anthem or in flag salutation].’”<sup>124</sup> Accordingly, the court struck down the provision as unconstitutional.<sup>125</sup>

More recently, the District Court for the Southern District of Florida, in determining the constitutionality of a Florida statute, similar to the Pennsylvania notification act discussed above, held that, while a parent has a fundamental right to control the upbringing and direct the education of their children,<sup>126</sup> this right “does not translate into a requirement that a parent must give prior approval of a child’s exercise of First Amendment rights in a school setting.”<sup>127</sup> Accordingly, the court ruled that a Florida statute requiring parental consent to opt out of the Pledge of Allegiance unconstitutionally infringes upon students’ First Amendment rights.<sup>128</sup>

On appeal, however, the Eleventh Circuit affirmed in part and reversed in part the district court’s decision. In reversing the district court’s holding that requiring parental consent for a student to opt-out of saying the Pledge, the Eleventh Circuit wrote:

Although we accept that the government ordinarily may not compel students to participate in the Pledge, *e.g.*, *Barnette*, 63 S. Ct. at 1187, we also recognize that a parent’s right to interfere with the wishes of his child is stronger than a public school official’s right to interfere on behalf of the school’s own interest.<sup>129</sup> And this Court and others have routinely

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<sup>124</sup> *Id.* at 180.

<sup>125</sup> *Id.* at 183.

<sup>126</sup> *Frazier v. Winn*, 535 F.3d 1279 (11th Cir. 2008) (*overruling Frazier v. Alexandre*, 434 F. Supp. 2d 1350, 1367-1368 (S.D. Fla. 2006) (*citing Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Meyer v. State of Nebraska*, 262 U.S. 390, 400 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972)).

<sup>127</sup> *Id.* (disagreeing with the holding in *Circle School* because, unlike the Florida statute requiring parental consent, the court found that the Pennsylvania parental notification act did not infringe upon students’ First Amendment rights; however, the Florida statute was “far more restrictive,” p. 1365, and violated the First Amendment rights of students).

<sup>128</sup> *Alexandre*, 434 F. Supp. 2d at 1350.

<sup>129</sup> *Frazier*, 535 F.3d at 1285, *citing Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 2391-92, 132 L. Ed. 2d 564 (1995) (discussing public school official’s more limited role vis-a-vis parents with respect to infringing on a student’s fundamental rights).

acknowledged parents as having the principal role in guiding how their children will be educated on civic values.<sup>130</sup>

We conclude that the State's interest in recognizing and protecting the rights of parents on some educational issues is sufficient to justify the restriction of some students' freedom of speech. Even if the balance of parental, student, and school rights might favor the rights of a mature high school student in a specific instance, Plaintiff has not persuaded us that the balance favors students in a substantial number of instances—particularly those instances involving elementary and middle school students—relative to the total number of students covered by the statute.<sup>131</sup>

In sum, the Eleventh Circuit ruled that the parent's right to control her child's upbringing<sup>132</sup> outweighs the student's First Amendment rights.<sup>133</sup> In doing so, however, the court emphasized that it evaluated only the face of the statute, and not the statute as applied: “[t]o the degree that the district court’s judgment invalidates the ‘written request by . . . parent’ requirement of the Pledge Statute, the judgment is reversed. We stress that we decide and hint at nothing about the Pledge Statute’s constitutionality as applied to a specific student or a specific division of students.”<sup>134</sup>

#### *Policies Requiring Parental Consent for Participation in Clubs Infringe upon Students’ First Amendment Rights*

Students—particularly secondary school students—do not shed their constitutional rights to free speech and expression at the schoolhouse gate.<sup>135</sup> None of the limitations on student speech, including the *Tinker* “substantial disruption” test, the *Bethel* lewd and offensive language test, nor the *Hazelwood* “school-sponsored speech” test applies

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<sup>130</sup> *Id.*, citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (refusing to enforce a compulsory education requirement beyond the eighth grade where doing so would infringe upon the free exercise of the Amish religion and intrude on the “fundamental interest of parents . . . to guide the religious future and education of their children”); *Arnold v. Bd. of Educ. of Escambia County*, 880 F.2d 305, 313 (11th Cir. 1989) (“Within the constitutionally protected realm rests the parental freedom to inculcate one’s children with values and standards which the parents deem desirable.”).

<sup>131</sup> *Id.*, citing *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1538 (7th Cir. 1996) (“Age is a critical factor in student speech cases.”); see also *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (“[T]he over breadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.”).

<sup>132</sup> See *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (discussing the liberty interest of parents “in the care, custody, and control of their children”).

<sup>133</sup> U.S. CONST. amend. I.

<sup>134</sup> *Frazier*, 535 F.3d at 1286.

<sup>135</sup> See *Tinker*, 393 U.S. at 506.



to the parental consent provision.<sup>136</sup> As with spoken or written speech by students at school, students' decisions to initiate or join a club clearly are protected by the First Amendment as free speech, free expression, and free association. While the Eleventh Circuit's *Fraser v. Winn* decision "hinted" at its inclination when asked to weigh the rights of parents versus the First Amendment rights of students, it was very clear that the decision involved a very narrow holding about the facial constitutionality of the Florida pledge statute.<sup>137</sup> Accordingly, the "jury is still out" in the Eleventh Circuit on whether the Georgia parental consent for participation statute, as applied to students such as those interested in joining a religious club, violates some students' First Amendment rights.<sup>138</sup>

Contrary to the Eleventh Circuit's holding, the Third Circuit held that requiring parental notification prior to a student's opting out of saying the Pledge of Allegiance at school, has a chilling effect on their speech and violates their First Amendment rights.<sup>139</sup> By analogy, requiring students to obtain parental consent to participate in clubs—particularly clubs based on religious, philosophical, or political beliefs—also has a chilling effect on their speech in violation of the First Amendment. Consider the student who holds a belief in Christianity, yet comes from a Muslim family. In parental-consent states and school divisions, this child would not be able to exercise her religious beliefs and religious speech rights to explore her Christian faith without gaining parental permission. Furthermore more, it would not matter if this child were eighteen years old. Under the Georgia (and similar) statutes, an eighteen-year-old student's parent still must consent prior to her joining a club.<sup>140</sup> As such, a parent can hinder the religious practice and religious speech of a student.

Further, the Georgia statute cannot apply to religious clubs without running afoul of the First Amendment's Establishment Clause. The Georgia statute requires parental consent for a student's participation in clubs or organizations which are "directly under the sponsorship, direction, and control of the school."<sup>141</sup> The Establishment Clause prohibits schools from affirmatively *sponsoring* (promoting) religious clubs.<sup>142</sup> Accordingly, the Georgia parental consent statute, which only

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<sup>136</sup> *Id.*; see *Hazelwood*, 484 U.S. 260.

<sup>137</sup> *Frazier*, 535 F.3d 1279.

<sup>138</sup> To date, neither the Ninth nor the Tenth Circuits has addressed the constitutionality or EAA conflict of the Utah or Oklahoma parental consent for clubs statutes.

<sup>139</sup> See U.S. CONST. amend. I.

<sup>140</sup> *Id.*

<sup>141</sup> O.C.G. § 20-2-705 (a)(1) (2006).

<sup>142</sup> U.S. CONST. amend. I.

applies to those clubs or organizations directly sponsored, directed and controlled by the school, *cannot* apply to religious clubs because a school cannot sponsor, direct and control religious speech.<sup>143</sup> As such, the mere act of applying Georgia parental consent requirements to student participation in religious clubs violates the Establishment Clause.<sup>144</sup> Therefore, Georgia schools may not subject student participation in religious organizations to the parental consent statute.<sup>145</sup>

By logical extension, the effect of excluding only religious-based clubs from the Georgia statute (because applying the statute to religious clubs would suggest that the school directly sponsored, directed and controlled the religious club) would be favoring religious clubs.<sup>146</sup> Excluding Bible or religious clubs from parental consent, but not other clubs—such as the GSA—potentially discriminates against other clubs in favor of religious clubs in violation of the First and Fourteenth Amendments.<sup>147</sup> In other words, requiring parental consent for *all but* religious clubs constitutes preference for religious clubs, which similarly violates the Establishment Clause and amounts to viewpoint discrimination against non-religious clubs (i.e., subjecting non-religious clubs to different standards than religious clubs).<sup>148</sup>

#### A PARENT'S RIGHT TO DIRECT THE UPBRINGING OF HER CHILD DOES NOT JUSTIFY INFRINGEMENT ON STUDENTS' RIGHTS

Crucial to a parent's position favoring a parental consent requirement for student participation in clubs is the assertion of the parent's right to direct the education and upbringing of their child.<sup>149</sup> Importantly, courts have generally construed this right to protect a parent's right to direct the *religious* education of his or her child.<sup>150</sup> While parents do have the right to direct and control the education and upbringing of their children, this right is not absolute and should not interfere, absent a compelling interest, with students' exercise of First Amendment rights.<sup>151</sup> Moreover, when this right conflicts with a school district's curricular choices, so long as the district's choices do not infringe upon another constitutional principle, the school district's right

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<sup>143</sup> O.C.G. § 20-2-705 (a)(1) (2006).

<sup>144</sup> Compare O.C.G. § 20-2-705 (a)(1) (2006) with U.S. CONST. amend. I.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> See *Troxel*, 530 U.S. 57.

<sup>150</sup> See *id.*

<sup>151</sup> *Id.*

to select the curriculum trumps a parent's right to direct the education of his or her child.<sup>152</sup>

The issue here is whether a parent's right to direct the religious education of his or her child, as exercised through parental non-consent for her child's participation in a club, outweighs the student's individual rights guaranteed under the First Amendment and the EAA even at the "schoolhouse gate."<sup>153</sup> The question may be closer if the state were *requiring* student participation in an activity in which the parent did not want his or her child to participate; yet, even in this circumstance, courts have held that parents do not have the right to opt their children out of curriculum and instruction even when the materials reference viewpoints inconsistent with the parents' beliefs.<sup>154</sup> Here, however, the student (at her own behest and not at the direction of the school) desires to express himself or herself through association with a particular club, yet the state only allows the student to join the club upon his parent's permission.<sup>155</sup> Were the parent to withhold his or her consent for the student's

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<sup>152</sup> See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 232-33, 92 S. Ct. 1526, 1541-42 (1972).

<sup>153</sup> *Tinker*, 393 U.S. at 506.

<sup>154</sup> See *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003) (In *Leebaert*, the Second Circuit held that a parent's constitutional right to direct the upbringing and education of his child under "Meyer, Pierce, and their progeny" does not "begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught." *Id.* at 141); see, also, *Mozert v. Hawkins Cty Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (requiring students to read stories from a basal textbook with themes contrary to some parents' religious beliefs does not amount to infringement on the parents' or the students' right to freely exercise their religious beliefs); *Virgil v. Columbia County Bd. of Educ.*, 862 F.2d 1517 (11th Cir. 1989) (upholding the right of the school district to determine its curriculum); *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680, 689 (7th Cir. 1994) (upholding the school's right to select textbooks: "It is not enough that certain stories . . . strike the parents as reflecting the religions of Neo-Paganism or Witchcraft, or reference religious holidays. The Establishment Clause is not violated because government action happens to coincide or harmonize with the tenets of some or all religions"); *Brown v. Woodland Unified Sch. Dist.* 27 F.3d 1373 (9th Cir. 1994) ("[i]f an Establishment Clause violation arose each time a student believed that a school practice either advanced or disapproved of a religion, school curricula would be reduced to the lowest common denominator, permitting each student to become a 'curriculum review committee' unto himself or herself"); *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (parents' right to direct the upbringing of their children does not "encompass[ ] a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children. . . . If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter.").

<sup>155</sup> See O.C.G. § 20-2-705 (a)(1) (2006).

participation, the parent would do so in contravention of the student's viewpoint, placing a hindrance on the student's otherwise-protected free speech and association rights.<sup>156</sup> Moreover, since a parent's rights to direct the education of his or her child does not trump a school district's authority to set the curriculum, it seems unlikely that it would trump an individual student's First Amendment rights that are protected through her associations and expressions at school.

### CONCLUSION

In this article, the author reviewed the Georgia "parental consent for clubs" statute, including the White County litigation over a proposed GSA and such litigation's ties to the Georgia statute's legislative history.<sup>157</sup> The Georgia statute serves as a proxy for all similar state laws and local school district policies.<sup>158</sup> This article has explored the current law on student speech, on the EAA as contrasted with the Georgia statute, and on two recent decisions regarding whether parental notification and consent requirements for students opting out of the Pledge were unconstitutional, viewpoint-based discrimination in violation of students' First Amendment rights. In applying the aforementioned law to the Georgia statute (and similar state laws and school district policies), the author argues that requiring parental consent for a student to participate in a school-based (although, not necessarily school-sponsored or curriculum related) club violates students' First Amendment rights.

It is only a matter of time before some plaintiff challenges O.C.G.A. § 20-2-750 (or a similar law or policy, such as 70 Okla. St. § 24-105 or Utah Code Ann. § 53A-11-1210) as being both in conflict with the EAA and an unconstitutional infringement on student speech, association, expression, and—sometimes—religious rights. In the interest of avoiding liability for violation of a "clearly established" constitutional right, it would behoove school districts to obtain an opinion from the Georgia Attorney General, from their school board counsel, or thwart implementation of the statute and await further guidance from the courts.<sup>159</sup> Otherwise, what generally would result in, at most, a preliminary injunction against the school for imposing the statute may result in damages levied against the school districts.

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<sup>156</sup> Compare O.C.G. § 20-2-705 (a)(1) (2006) with U.S. CONST. amend. I.

<sup>157</sup> See *White Cnty.*, 2006 WL 1991990 at \*1.

<sup>158</sup> See, e.g., OKLA. STAT. TIT. 70 § 24-105 (2009)

<sup>159</sup> This author offers no opinion on whether implementation of the statute would constitute violation of a "clearly established" constitutional right; however, when in doubt, good advice is to err on the side of caution.