

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Straights and Gays for Equality, et al.,)	Civil Action No. 05-2100 (JNE/FLN)
)	
Plaintiffs,)	
)	MEMORANDUM OF LAW IN
v.)	SUPPORT OF PLAINTIFFS'
)	MOTION FOR PARTIAL
Osseo Area Schools – District No. 279, et)	SUMMARY JUDGMENT
al.,)	
)	
Defendants.)	
)	

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INTRODUCTION

The central issue raised by the instant motion has been before this Court before: Are defendants, by granting certain school groups more access to their facilities than plaintiff Straights and Gays for Equality (SAGE), in violation of the Equal Access Act, 20 U.S.C. § 4071 *et seq.*? In April 2006, this Court determined that the likely answer was yes and issued temporary injunctive relief. In December 2006, the U.S. Court of Appeals for the Eighth Circuit agreed and upheld the injunction. No new evidence has come to light since to undermine this determination. If anything, both the applicable burden of proof and the evidence make the violation more clear now. It is time for the Equal Access claim – and a related First Amendment claim – finally to be resolved.

PROCEDURAL HISTORY

Suit in this matter was brought in September 2005. In their complaint, plaintiffs contend among other things that the differential treatment accorded to SAGE by defendant Osseo Area Schools – District No. 279 (the “District”), as well as an accompanying ban on plaintiffs’ distribution of literature and fundraising, were violations of the Equal Access Act and the free speech and due process clauses of the U.S. Constitution.

Following early discovery, plaintiffs moved in December 2005 for a preliminary injunction on the Equal Access Act claim. In April 2006, this Court granted the request. It determined that plaintiffs had shown a substantial likelihood that at least two of the groups receiving favorable access, synchronized swimming and cheerleading, have no direct relationship with the school’s curriculum and thus no justification for favorable

treatment.¹ It also found that SAGE satisfied the remaining factors for issuance of a preliminary injunction and ordered the District to provide SAGE with a level of access equal to that provided to the favored groups.² Issuance of the injunction was upheld in December 2006 by the United States Court of Appeals for the Eight Circuit.³ There is no evidence that, in the nearly fifteen months since the temporary injunction was issued, the equal treatment received by SAGE has been disruptive or burdensome to the school in any way. Plaintiffs are now requesting that the temporary injunction be made permanent.

STATEMENT OF MATERIAL UNDISPUTED FACTS

I. STUDENT GROUPS AT MGSB

A. Certain Student Groups Receive Favorable Treatment.

Maple Grove Senior High School (“MGSB”) is a senior high school controlled by the District. The District recognizes approximately sixty student “teams, groups, clubs, and organizations” at the school.⁴ It divides these groups – pursuant to a District policy document entitled the “Student Group Framework”⁵ – into two categories: “curricular” and “noncurricular.”

The label received by each group is of high importance, for it determines the level of access to school facilities that the group receives.

¹ April 4, 2006 Order (Docket #82) at 8.

² *Id.* at 9-12.

³ *Straights and Gays for Equality (SAGE) v. Osseo Area Sch. – District 279*, 471 F.3d 908, 913.

⁴ *See* Aff. of David P. Pinto dated July 2, 2007 (hereinafter “Pinto Aff.”), Ex. A (student group list).

⁵ Pinto Aff., Ex. B (Student Group Framework).

The groups labeled “curricular” are permitted access to a variety of means of communicating with the school community. These include the use of the school’s public address (“PA”) system, scrolling television announcement system, and yearbook, as well as “other avenues of communication” such as the placement of posters and signs in school hallways.⁶ These favored groups are permitted to distribute leaflets and information fliers pursuant to another District policy document, Procedure 923.⁷ They are allowed to engage in fundraising activities and may benefit from the expenditure of school funds on their behalf.⁸

The groups labeled “noncurricular,” on the other hand, are barred from the use of any of these means of communication, other than the posting of District-approved signs under strictly limited circumstances.⁹ These groups may not distribute leaflets or informational fliers; the District’s Procedure 923 does not apply with respect to them.¹⁰ And – unlike the groups labeled “curricular” – these disfavored groups may not engage in fundraising activities or receive the benefit of school funds.¹¹

⁶ *See id.*

⁷ Pinto Aff., Ex. C (Procedure 923). Procedure 923 permits curricular groups to distribute literature so long as they apply for permission first through a central District office. *See also* Pinto Aff., Ex. B.

⁸ Pinto Aff., Ex. B.

⁹ Groups labeled “non-curricular” may place a poster on the “community bulletin board,” a glass-enclosed box located outside of the principal’s office. *Id.* In addition, they may place one poster of a specified size outside of their meeting space. *Id.*

¹⁰ *Id.*; Def.’s Mem. Supp. Summ. J. (Docket No. 24) at 25 (terms of “Procedure 923 only pertain to curriculum-related groups”).

¹¹ Pinto Aff., Ex. B.

B. Many Groups Receive Favorable Status.

The vast majority of student groups at MGSB – nearly 85% – are afforded favorable “curricular” status by the school. The following chart identifies the groups, with the school’s classification of each, based on the most recent information provided by defendants:¹²

Fifty-three groups labeled “curricular:”

Adapted Floor Hockey	Federal Reserve Essay Contest	Nordic Ski – Boys and Girls
Adapted Softball	Football	One Act Play
Adapted Soccer	French Club	Ovetones
Art Club	Future Educators of America	Pastiche
Baseball	Future Problem Solvers	Pep Band
Basketball – Boys	GLBTQ	Productions
Basketball – Girls	Golf – Boys and Girls	Recognition Committee
Black Achievers	Gymnastics – Girls	SADD
Cheerleading	Harbinger (School Newspaper)	Soccer – Boys
Commodity Challenge	Hockey – Boys	Soccer – Girls
Crimson Cabinet and branches:	Hockey – Girls	Softball – Girls
• Crimson Council	Jazz Band	Super Mileage Team
• Diversity Council	Link Crew	Synchronized Swimming
• Service Council	Marching Band	Tennis – Boys
• Spirit Council	Math League	Tennis – Girls
Crimson Harmony	Musical	Three Act Play
Cross Country	National Honor Society	Track & Field – Boys and Girls
Dance Team	Native American Group	Volleyball
DestiNation Imagination		Wrestling
Drama Club		

Ten groups labeled “non-curricular:”

Anime	Cliché (hip hop dance troupe)	SAGE
Bible Study	Fellowship of Christian Athletes	Third Floor Salon
Chess Club		Teenage Republicans
Computer Games Club		

¹² Pinto Aff., Ex. A and ¶2.

Young Democrats

Specific evidence relating to the groups at issue in the instant motion is set forth herein at pages 14-25.

C. School Sponsorship and Lack of “Advocacy” Are the Keys to Receiving Favorable Status.

The District’s framework provides that whether a group is labeled “curricular” or “non-curricular” depends on two factors: (1) its relationship with the curriculum and (2) its sponsorship by the school.¹³ But in practice the “sponsorship” factor appears to be the key determinant. As the school’s principal testified:

Q: Curricular groups are sponsored by the school; is that correct?

A: Yes.

Q: Non-curricular groups are not sponsored by the school; is that correct?

A: No, they’re lead [sic] – student lead.¹⁴

An example of this distinction in practice involves two groups which, among other things, provide support to gay and lesbian students at the school. One is SAGE – plaintiff in this matter – and the other is Gays, Lesbians, Bisexual, Transgender, Questioning, and Allies (GLBTQ-A). SAGE engages in events and activities at the school; GLBTQ-A is a

¹³ See Pinto Aff., Ex. B (curricular group is one “related to the school’s curriculum” and “sponsored by the school”).

¹⁴ See Tr. of Dep. of Wendy Loberg, attached as Ex. C to Aff. of Michael D. Okerlund dated Dec. 14, 2005 (Docket No. 17) (hereinafter Docket No. 17, Ex. C (Loberg Dep.) at 288:13-289:3. See also Pinto Aff., Ex. B.

confidential counseling group. The District labels the former “noncurricular” and the latter “curricular” based on the level of control exerted by the school over each:

[T]he distinction between SAGE and GLBTQ and other curricular versus non-curricular groups [is] that SAGE is student lead [sic], it is lead by students, initiated by students. GLBTQ is not student lead, it is lead by a paid faculty member. . . .¹⁵

Another factor identified by school officials as important is whether a group provides “support” (curricular) or promotes “advocacy” (noncurricular).¹⁶ The school’s principal says that GLBTQ-A is “curricular” because it is “a support group we provide for those kids to have a safe place . . . to discuss safely with others that would be able to listen to their concerns,” while SAGE is “noncurricular” because it advocates on behalf of its members’ beliefs – “promot[es] knowledge” regarding “the issues, the rights, the – the difficulties” faced by gays and lesbians.¹⁷ Advocacy groups are apparently barred labeled “noncurricular” even if they have a clear relationship with the curriculum. The District’s 30(b)(6) designee testified, for example, that though the school teaches about politics in its classes, student Democratic and Republican groups are “noncurricular” because of their advocacy activities.¹⁸ (Note, however, that the support vs. advocacy distinction seems inconsistent with the labeling of individual groups. The principal

¹⁵ Docket No. 17, Ex. C (Loberg Dep.) at 234:1-11. Note, however, that SAGE has a faculty advisor as well. Pinto Aff., Ex. B.

¹⁶ Docket No. 17, Ex. C (Loberg Dep.) at 210:25 to 211:16.

¹⁷ *Id.* at 58:3-11, 211:3-12.

¹⁸ Pinto Aff., Ex. E (Loberg 30(b)(6) Dep.) at 214:23 to 215:8.

acknowledges, for example, that SAGE provides its members with support.¹⁹ And several groups labeled curricular – Students Against Destructive Decisions (SADD), the Diversity Council, and others – advocate on behalf of their members’ beliefs.²⁰)

In any case, under these standards as applied student groups involving any controversy or unpopularity – Bible Study, young Democrats or Republicans, a hip-hop dance troupe (Cliché), SAGE, etc. – are labeled “noncurricular” and sharply restricted, while most others are termed “curricular” and granted favorable access.

II. SAGE

A. The Mission of SAGE is to Promote Tolerance and Lessen Discrimination.

Plaintiff SAGE is a student-led group whose purpose is to “promote tolerance and respect for Maple Grove Senior High students and faculty through education and activities” related to gay and lesbian issues.²¹ Its goals are both educational — to teach tolerance and respect in the school community — and supportive — to provide student members with the necessary help to survive and even thrive in a sometimes-hostile school environment.²²

¹⁹ Docket No. 18 (N.R. Aff.), ¶ 4. Docket No. 17, Ex. C (Loberg Dep.) at 238:17-22, 286:20-22 (principal acknowledging that, “SAGE provides a safe environment for gay and lesbian students . . . a safe place to discuss concerns related to gay and lesbian students’ sexuality”).

²⁰ SADD promotes seatbelt use and the responsible use of alcohol, and the Diversity Council promotes diversity, both through various events at the school. *See* Docket No. 17, Ex. C (Loberg Dep.) at 141:12-24 (SADD), 250:8-12 (Diversity Council).

²¹ Docket No. 18 (N.R. Aff.), ¶ 2.

²² *Id.* at ¶ 5.

B. SAGE Has Suffered Due to the Lack of Equal Access.

SAGE is labeled noncurricular by the District but has sought the same rights of access as those afforded to curricular groups. Prior to issuance of preliminary relief by the Court, for example, SAGE was denied permission to have its members distribute literature to their fellow students in advance of the yearly “Day of Silence” – an event calling attention to discrimination against gays and lesbians.²³ SAGE was further prohibited from distributing literature on the Day of Silence itself, except to those who expressed an interest, and was barred from using an informational table regularly used by groups labeled curricular.²⁴

The limits placed on SAGE have greatly hampered its ability to accomplish its goals.²⁵ SAGE cannot effectively reach out to the MGSB community and adequately broadcast its message of tolerance and mutual respect if it is denied equal access to the same means other student groups use to communicate their mission. Education requires access to adequate means of communication. Indeed, the fact that an organization supportive of gays and lesbians is limited to the use of a small bulletin board while other groups have access to the PA system, hallway posters, and leaflets *undermines* its message of tolerance and respect.

²³ On the “Day of Silence,” supporters of GLBT individuals remain silent in order to protest the forced silence of that community.

²⁴ Docket No. 33 (A.R. Aff.) ¶¶ 3, 5, 6; Pinto Aff., Ex. E (Loberg 30(b)(6) Dep.) at 135:13 to :22.

²⁵ Docket No. 18 (N.R. Aff.), ¶ 6.

Moreover, this lack of access also makes it difficult for SAGE to fulfill its mission to provide support to the GLBT community. SAGE's meetings are one of the few places available where students can safely discuss GLBT issues in a supportive and non-judgmental atmosphere.²⁶ Students needing help are less likely to reach SAGE, however, when the organization is so limited in its ability to advertise. Again, the school's treatment of SAGE only furthers the perception that gay and lesbian students are not worthy of the same support as others.²⁷

ARGUMENT

I. STANDARD OF DECISION

Summary judgment is appropriate when there is “no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law.”²⁸ The opposing party may not rest upon mere allegations or denials, but must set forth specific facts showing that a genuine issue for trial exists.²⁹

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR EQUAL ACCESS ACT CLAIM.

The Equal Access Act (the “Act”) generally bars public secondary schools from denying equal access to school facilities to certain student groups on the basis of the content of their speech. The provisions of the Act are triggered when a school receiving federal financial assistance creates a “limited open forum” – an opportunity for a

²⁶ *Id.* at ¶ 7.

²⁷ *Id.* at ¶ 8.

²⁸ Fed. R. Civ. P. 56(c). *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

²⁹ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

“noncurriculum related student group” to use school facilities.³⁰ If so, then the school may not discriminate in the access it grants to the student groups within that limited open forum.³¹

By its terms, the Act was enacted in order to protect any “religious, political, philosophical, or other” speech — any speech, that is, that is controversial or challenging enough that a school might seek to limit it in favor of the speech of groups with a more “administration-friendly” agenda.³² The Act therefore operates much like a “most favored nations” clause: Once a school receiving federal funding has permitted one noncurricular group to meet, and thus created a limited open forum, then the access provided to any student group within that forum must be made available to *all* groups within the forum on an equal basis.

The parties here agree that the Act is in effect at MGSB: the school receives federal financial assistance and has a “limited open forum.”³³ Defendants acknowledge that they have an obligation under the Act at least to treat all noncurricular groups

³⁰ 20 U.S.C. § 4071(b).

³¹ 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.

§ 4071(a) .

³² *Id.* See *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 238 (1990) (“the purpose of granting equal access is to prohibit discrimination between religious or political clubs” and other student groups).

³³ Docket No. 1 (Complaint) at ¶ 14, ¶ 70; Docket No. 5 (Answer) at ¶ 12, ¶ 59.

equally. And they acknowledge that the groups labeled “curricular” are afforded favorable treatment. If even one of these favored groups has been misclassified by the District, therefore, plaintiffs’ Equal Access Act claim succeeds.³⁴

A. To Defeat Plaintiffs’ Claim, Defendants Must Prove That the Subject Matter of Each Group is *Directly* Related to Course Content.

The test for determining whether a student group is noncurricular was first set forth in the seminal opinion interpreting the Act, *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*.³⁵ The *Mergens* Court held that the Act must be read expansively, consistent with a “broad legislative purpose” to “end discrimination” on the basis of students’ speech.³⁶ To that end, the term “noncurriculum related student group” is interpreted broadly as well, with “a low threshold for triggering the Act’s requirements.”³⁷ Under *Mergens*, “any student group that does not *directly* relate to the body of courses offered by the school” is “noncurriculum related” (emphasis in original).³⁸ A group does not *directly* relate unless either:

- (1) participation in the group is required for a particular course;

³⁴ Once “a limited open forum has been created, it contains all student groups at the school. Therefore, “the access afforded must not be equal to that provided for all groups, both curricular and noncurricular.” *Boyd County High School Gay Straight Alliance v. Bd. of Educ. of Boyd County*, 258 F. Supp. 2d 667, 667 (E.D. Ky. 2003).. Under this view, defendants are undoubtedly in violation of the Act, regardless of whether the group classifications are supported by law. In any case, so long as at least one of the favored groups is noncurricular, plaintiffs prevail even on a more narrow reading of the Act.

³⁵ 496 U.S. 226 (1990).

³⁶ *Id.* at 239.

³⁷ *Id.* at 240.

³⁸ *Id.* at 239.

- (2) participation in the group results in academic credit;
- (3) the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; or
- (4) the subject matter of the group concerns the body of courses as a whole.³⁹

1. Defendants Face a High Standard.

As the *Mergens* Court points out, this is a high standard, one under which a group must have far “more than just a tangential or attenuated relationship” to the curriculum.⁴⁰ The standard’s strictness is made clear in its first two elements, under which participation in the group is so closely tied to coursework that it is either required for, or results in, academic credit.

But the other elements, too, require a similarly tight relation to coursework.⁴¹ The examples provided by the *Mergens* Court make this point clear. The Court explains that the third element (subject matter actually taught in a regularly offered course) would be satisfied by a French club “if the school *taught French* in a regularly offered course or planned to teach the subject in the near future.”⁴² Subject matter and curriculum content must overlap one-to-one (French:French) in order for a group to have the *direct*

³⁹ *See id.* at 239-40.

⁴⁰ *Id.* at 238.

⁴¹ *Cf. Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989) (fundamental canon of statutory construction that words must be read in their context and in consideration of the overall statutory scheme).

⁴² *Mergens*, 496 U.S. at 240 (emphasis added).

relationship required. Or, as the Court of Appeals put it in this case, “*all* of the subject matter performed in” the group must be taught in class in order for the group to qualify.⁴³

Similarly, the only group which the *Mergens* Court indicated would satisfy the fourth element (subject matter concerns the body of courses as a whole) is a student government group, and only “to the extent that it addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses offered by the school.”⁴⁴ A group’s connection with the overall school community or general academic success are irrelevant; only if it has an impact on the *curriculum* offered by the school does it have the *direct* relationship required.⁴⁵

2. Defendants Bear the Burden of Proof.

Though the Equal Access Act claim was brought by plaintiffs, it is defendants who bear the burden of proof on this issue.⁴⁶ If defendants fail to advance sufficient evidence to indicate that a group is *directly* related to the curriculum by way of one of the four factors above, the group is considered noncurricular, and plaintiffs prevail on their claim.

⁴³ *SAGE*, 471 F.3d at 912 (emphasis added) (re cheerleading).

⁴⁴ *Mergens*, 496 U.S. at 240.

⁴⁵ *See SAGE*, 471 F.3d at 912 (cheerleading and synchronized swimming do not concern the body of courses as a whole because neither “address[es] concerns or formulate[s] proposals relating to the body of courses”).

⁴⁶ *Pope v. E. Brunswick Bd. of Educ.*, 12 F.3d 1244, 1252 (1993) (“burden of showing that a group is directly related to the curriculum rests on the school district”). *See also Mergens*, 496 U.S. at 240 (“unless a school could show” that a specific group qualified as curricular, it would be classified as noncurricular under the Act).

B. The Subject Matter of Several of the Favored Groups is Not *Directly Related to Course Content*.

Put simply, defendants have failed to meet their burden to prove that *every one* of the groups receiving favorable status is in fact “curriculum related.” The first two elements of the *Mergens* test are not at issue here: (1) participation in none of the favored groups is required for a particular course;⁴⁷ and (2) participation in none of the favored groups results in academic credit.⁴⁸ With respect to at least the following groups, the third and fourth factors are absent as well: the subject matter of each such group is neither taught in class nor concerns the body of courses as a whole.

1. Cheerleading is Noncurricular.

a. Subject matter of the group.

Defendants state that “taught in physical education class as dance, gymnastics, and tumbling” is the “subject matter” of cheerleading.⁴⁹ Defendants have failed to provided any further evidence that the group’s subject matter is anything other than the obvious: leading cheers and training to do the same.

⁴⁷ Docket No. 17, Ex. C (Loberg Dep.) at 190:16-20.

⁴⁸ *Id.* at 190:9-13. The school’s principal has stated firmly under oath that students do not receive academic credit for participating in any of the student groups. *Id.* Defendants have recently denied that this is true, Docket No. 193 (Am. Answers to Pls.’ Req. for Admissions) at 7-8, but have provided no evidence to contradict the school’s principal – someone who should know – on this point.

⁴⁹ Pinto Aff., Ex. D (Answers to Interrog.) at 3. The District’s 30(b)(6) designees confirmed that defendants will not add to this or other nonsensical answers to plaintiffs’ interrogatories. Pinto Aff., Ex. F (Maguire Dep.) at 121:21 to 122:14 (“This constitutes the district’s ... best and complete efforts at answering these interrogatories....”)

b. *Extent to which subject matter is taught in class or concerns the body of courses as a whole.*

The school's principal admits that it offers no class in cheerleading,⁵⁰ and the Court of Appeals has already found that none of the courses offered at MGSB actually teaches the subject matter of cheerleading.⁵¹ Cheerleading is noncurricular.

2. Synchronized Swimming is Noncurricular.

a. *Subject matter of the group.*

Synchronized swimming is a varsity sport at MGSB. Defendants state that "taught in physical education class" is the "subject matter" of the group.⁵² Defendants have provided no further evidence that the group's subject matter is anything other than the obvious: training and competing in the sport of synchronized swimming.

b. *Extent to which subject matter is taught in class or concerns the body of courses as a whole.*

The school's principal admits that it offers no class in synchronized swimming; indeed it does not even have a pool.⁵³ And the Court of Appeals has already found that none of the courses offered at MGSB actually teaches the subject matter of synchronized swimming.⁵⁴ Synchronized swimming is noncurricular.

⁵⁰ Docket No. 17, Ex. C (Loberg Dep.) at 199:4-8.

⁵¹ *SAGE*, 471 F.3d at 912.

⁵² Pinto Aff., Ex. D (Answers to Interrogs.) at 3.

⁵³ Docket No. 17, Ex. C (Loberg Dep.) at 245:3-8.

⁵⁴ *SAGE*, 471 F.3d at 912.

3. Gymnastics is Noncurricular.

a. Subject matter of the group.

Gymnastics is a varsity sport at MGSB. Defendants state that “taught in physical education class” is the subject matter of the group.⁵⁵ Defendants have provided no further evidence that its subject matter is anything other than the obvious: training and competing in the sport of gymnastics.

b. Extent to which subject matter is taught in class or concerns the body of courses as a whole.

The school’s principal readily admits that gymnastics is not taught in class:

A: We don’t teach gymnastics in the school day.

Q: Oh you don’t teach gymnastics in the school?

A: We do not.⁵⁶

Gymnastics is noncurricular.

4. DanceTeam is Noncurricular.

a. Subject matter of the group.

DanceTeam is a varsity sport at MGSB. Defendants state that “taught as part of physical education class and self-defense classes” is the subject matter of DanceTeam.⁵⁷ Defendants have provided no further evidence that its subject matter is anything other than the obvious: training and competing in dance.

⁵⁵ Pinto Aff., Ex. D (Answers to Interrogs.) at 3.

⁵⁶ Docket No. 17, Ex. C (Loberg Dep.) at 222:18-20. Any citation to the contrary in the school’s registration handbook, *see SAGE*, 471 F.3d at 912 (gymnastics identified in connection with physical education classes), is apparently incorrect.

⁵⁷ Pinto Aff., Ex. D (Answers to Interrogs.) at 3.

b. *Extent to which subject matter is taught in class or concerns the body of courses as a whole.*

Again, the school's principal admits that DanceTeam is not taught in class.⁵⁸ The Court of Appeals found that the school's registration handbook indicates that "dance" is an element in the "theme" of "body control" within physical education class.⁵⁹ But defendants provide no evidence that the dance taught in class is related in any way to the dance conducted by DanceTeam or comprises any significant portion of the class – anything, that is, satisfying the very high standard set forth in *Mergens*. In other words, the reference in the handbook is simply too general to be helpful, particularly when weighed against the specificity of the principal's testimony.⁶⁰

Note, moreover, that another group having dance as its subject matter – Cliché, a hip-hop dance group – is labeled *noncurricular* by the school.⁶¹ The only apparent explanation for the differential in treatment is that DanceTeam is a varsity sport, and Cliché is not – a distinction simply irrelevant under *Mergens*. If the subject matter of Cliché is not taught in class, defendants offer no reason to believe that the subject matter of DanceTeam is any different.

⁵⁸ Docket No. 17, Ex. C (Loberg Dep.) at 201:20-22.

⁵⁹ *SAGE*, 471 F.3d at 912.

⁶⁰ *Mergens* and subsequent courts have made clear that curriculum relatedness is determined by reference to the actual subject matter of the group and the actual content of school courses. *See Mergens*, 496 U.S. at 246 (“[O]ur definition of ‘noncurriculum related student activities’ looks to a school’s actual practice rather than its stated policy.”).

⁶¹ Pinto Aff., Ex. E (Loberg 30(b)(6) Dep.) at 212:21 to 213:5 (re Cliché).

In short, defendants either cannot or will not meet their burden, and DanceTeam is therefore noncurricular.

5. Track and Field is Noncurricular.

a. Subject matter of the group.

Track and field is a varsity sport at MGS. Defendants state that “taught as part of running and field events in physical education class” is the subject matter of the group.⁶² Defendants have provided no further evidence that the subject matter of the group is anything other than the obvious: training and competing in typical track and field events.

b. Extent to which subject matter is taught in class or concerns the body of courses as a whole.

Though running is apparently taught in physical education class, the school’s principal admits that field events such as shotput, discus, and javelin are not.⁶³ In order for a group to qualify as curricular, *all* of its subject matter must be taught in class.⁶⁴ Track and field is noncurricular.

6. Student Government is Noncurricular.

a. Subject matter of the group.

The student government at MGS is comprised of five separate entities: the Crimson Cabinet, Crimson Council, Diversity Council, Service Council, and Spirit

⁶² Pinto Aff., Ex. D (Answers to Interrogs.) at 3.

⁶³ Docket No. 17, Ex. C (Loberg Dep.) at 246:6-11.

⁶⁴ *SAGE*, 471 F.3d at 912 (because no course “actually teach[es] *all* of the subject matter performed in cheerleading,” the group is noncurricular (emphasis added)).

Council. The District states that “concerns the body of courses as a whole” is the subject matter of these groups.⁶⁵

The Crimson Cabinet and Crimson Council, which consist of student representatives, address and facilitate communication regarding noncurricular issues of concern to students.⁶⁶ Specifically, these groups pursue initiatives regarding the school’s environment, such as vending machines, clean hallways, water machines, locks on bathroom doors, and police searches of students and cars.⁶⁷ They have never offered recommendations to the administration regarding changes in the school’s curriculum.⁶⁸

The other three groups play similar “student life”-type roles at the school. The purpose of the Diversity Council is “to promote diversity” at the school “with respect to various ethnic groups.”⁶⁹ It helps to integrate members of these ethnic groups and sponsors events showcasing ethnic diversity in music, food, etc.⁷⁰ The Service Council works with the Crimson Council to coordinate service activities such as “Adopt a Hallway, donating books, donating coats, mitten drives,” etc.⁷¹ Finally, the role of the

⁶⁵ Pinto Aff., Ex. D (Answers to Interrogs.) at 5.

⁶⁶ Docket No. 17, Ex. C (Loberg Dep.) at 181:22-23, 182:6-183:13 (“facilitate communication between the student government elected officials and all of the Foundations [homeroom] classes”).

⁶⁷ *Id.* at 185:16-188:10.

⁶⁸ *Id.* at 184:23-185:10.

⁶⁹ *Id.* at 250:8-12.

⁷⁰ *Id.* at 250:13-23.

⁷¹ *Id.* at 251:1-9.

Spirit Council is “to plan the school events of Homecoming, Snow Daze, Spring Fling, and Prom.”⁷²

b. Extent to which this subject matter is taught in class or concerns the body of courses as a whole.

Defendants appear to acknowledge that their only claim with respect to the student government groups is that they concern the body of courses as a whole (rather than that their subject matter is taught in class).⁷³ But none of these groups “address[es] concerns or formulate[s] proposals relating to the body of courses” – the curriculum – so as to justify such a finding.⁷⁴ This situation is consistent with prior cases; each time any student government group has been evaluated under the Act, it has failed to satisfy the high standard in *Mergens*.⁷⁵ As in these other cases, the student government groups at MGSB are noncurricular.

⁷² *Id.* at 251:13-24.

⁷³ *See* Pinto Aff., Ex. D (Answers to Interrogs.) at 5 (identifying “concerns the body of courses as a whole” as the subject matter of the groups). Defendants have advanced no evidence in any case that the subject matter of any of the government groups is taught in class.

⁷⁴ *SAGE*, 471 F.3d at 912. *See, e.g.*, Docket No. 17, Ex. C (Loberg Dep.) at 184:23-185:10.

⁷⁵ *See Franklin Central Gay / Straight Alliance*, 2002 WL 32097530 *15 (S.D. Ind. Aug. 30, 2002) (unpub.) *Boyd County High School Gay Straight Alliance v. Bd. of Educ. of Boyd County*, 258 F. Supp. 2d 667, 687 (E.D. Ky. 2003).

Note that this is so not only with respect to the traditional student government groups, Crimson Cabinet and Crimson Council, but also with respect to the Service Council, Diversity Council, and Spirit Council. Groups specializing in service, racial and cultural diversity, and school spirit have been uniformly found to be “noncurriculum related” in other cases. *See, e.g., Mergens*, 496 U.S. at 245 (service); *Garnett v. Renton Sch. Dist.*, 772 F. Supp. 531 at 533-534 (W.D. Wa. 1991) (service, diversity); *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1252-54 (3rd Cir. 1993) (service), *East High*
Footnote continued on next page . . .

7. Students Against Destructive Decisions (SADD) is Noncurricular.

a. Subject matter of the group.

Defendants state that “taught in Foundations and Health/Abstinence classes” is the subject matter of SADD.⁷⁶ The group, which is the local affiliate of a national organization, specializes “in two main areas, chemical abuse and seatbelts.”⁷⁷ It is organized “to promote safety and promote healthy decisions.”⁷⁸ In that role, its members advocate that their fellow students not use illegal drugs, be responsible with alcohol, and wear seatbelts.⁷⁹

b. Extent to which this subject matter is taught in class or concerns the body of courses as a whole.

MGSB, of course, teaches “as a general rule to all students about being safe and making good decisions,” and the issues supported by SADD are apparently “in line with what [the school] tr[ies] [to] teach in [sic] health curriculum.”⁸⁰ But again, the burden here is a high one: defendants must prove that *all* of the group’s subject matter is taught in class in order for it to have the substantial and direct overlap with course content

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Gay / Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist., 81 F. Supp. 2d 1166 at 1180 (D. Utah 1999) (service); *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135 at 1143 (C.D. Ca. 2000) (service, diversity); *Boyd County High School Gay Straight Alliance v. Bd. of Educ. of Boyd County*, 258 F. Supp. 2d 669, 686-87 (E.D. Ky. 2003) (service, school spirit).

⁷⁶ Pinto Aff., Ex. D (Answers to Interrogs.) at 6.

⁷⁷ Docket No. 17, Ex. C (Loberg Dep.) at 113:21-22.

⁷⁸ *Id.* at 141:10-11.

⁷⁹ *Id.* at 141:12-24.

⁸⁰ *Id.* at 115:12-15.

required under *Mergens*.⁸¹ Defendants simply offer no evidence that the full content of SADD is actually taught in Foundations (the school's homeroom class), Health/Abstinence, or any other class at the school. Note once more that each time SADD has been considered by prior courts, it has been found to be noncurriculum related.⁸² SADD is a group with admirable goals. In this case, however, SADD is noncurricular.

8. National Honor Society is Noncurricular.

a. Subject matter of the group.

Defendants state that the following is the subject matter of the National Honor Society:

[S]elected students who have accumulated a 3.5 GPA and exhibit qualities of leadership, scholarship, character, and service make application, receive recommendations and meet all criteria of selection committee. Group concerns the body of courses as a whole. Beyond this, the subject matter of service is taught in Community Based Internship and Service Learning classes.⁸³

Membership in the group, another local affiliate of a national organization, is based on a student satisfying criteria in four areas: academic (including grade point average),

⁸¹ *SAGE*, 471 F.3d at 912 (re cheerleading)

⁸² *Franklin Central*, 2002 WL 32097530 at *15; *Donovan v. Punxsutawney*, 336 F.3d 211, 221 (3d. Cir. 2003) .

⁸³ *Pinto Aff.*, Ex. D (Answers to Interrogs.) at 4-5.

scholarship, citizenship, and leadership.⁸⁴ Members of the group perform a variety of community service activities, both at school and at churches and food shelves.⁸⁵

b. Extent to which this subject matter is taught in class or concerns the body of courses as a whole.

Defendants have provided no evidence that the subject matter of the National Honor Society is actually taught in class. The District points out that the concept of “service” is apparently taught in Community Based Internship and Service Learning classes at the school.⁸⁶ But once more, this is insufficient evidence that *all* of the group’s subject matter is taught in either of these courses.⁸⁷ And courts, starting with *Mergens* itself, have held unanimously that service groups are not “curriculum related.”⁸⁸

Nor have defendants provided any evidence that the National Honor Society “address[es] concerns or formulate[s] proposals relating to the body of courses as a whole” at the school, so as to justify a finding of curriculum-relatedness under that element.⁸⁹ Its sole relationship with the curriculum is that limited portion of its admission policy relating to grade point average.

Because defendants have failed to establish that the National Honor Society satisfies the high standard enunciated in *Mergens*, it too is noncurricular.

⁸⁴ Docket No. 17, Ex. C (Loberg Dep.) at 228:3-12.

⁸⁵ *Id.* at 228:23-229:9.

⁸⁶ Pinto Aff., Ex. D (Answers to Interrogs.) at 4-5.

⁸⁷ *SAGE*, 471 F.3d at 912.

⁸⁸ *Mergens*, 496 U.S. at 245. *See also* Garnett, 772 F. Supp. at 533-534; *Pope*, 12 F.3d at 1252-54; *Colin*, 83 F. Supp. 2d at 1143; *Boyd*, 258 F. Supp. 2d at 686-87.

⁸⁹ *SAGE*, 471 F.3d at 912.

9. Black Achievers and Native American Group are Noncurricular.

a. Subject matter of the group.

Black Achievers and Native American Group are counseling and support groups for students at MGSB. The District describes the “subject matter” of these groups as follows:

These groups were created and advanced by the [] District’s Department of Cultural Integration in response to Minnesota Rule 3535.0160 of the Minnesota Department of Education, which required [the] District to implement a desegregation and integration program. In addition, with respect to Native American Group, a proposal has been made to offer a course entitled “History and Cultures of Native America” beginning in the 2006-07 school year.⁹⁰

The school’s principal indicates that these groups and other cultural support groups afford their members:

the opportunity . . . to learn from each other, support each other, share concerns, work together in a positive way, alleviate stress or anxiety that they may have experienced due to their subgroup status, “subgroup” meaning a certain population, like African American, Asian, gay/lesbian, Native American.⁹¹

b. Extent to which this subject matter is taught in class or concerns the body of courses as a whole.

Defendants have provided no evidence that the subject matter of either of these groups is actually taught in class. Defendants’ reference to a course entitled “History and Cultures of Native America” is irrelevant, for the school’s principal has made clear that though the groups might touch on history, for example, their focus is to serve “as a

⁹⁰ Pinto Aff., Ex. D (Answers to Interrogs.) at 5.

⁹¹ Docket No. 17, Ex. C (Loberg Dep.) at 110:17-24.

support group for those kids.”⁹² Nor could the principal name even one course to which Black Achievers relates.⁹³ In addition, there is of course no evidence that either group provides input as to the curricular at the school, so as to justify a finding of relatedness to the body of courses as a whole.⁹⁴

Indeed, courts following *Mergens* have held with uniformity that racial, cultural, and other student support groups are “noncurriculum related” under the Act.⁹⁵ This is so even if such a group “enhances some things taught in” a portion of the curriculum, such as the social studies program.⁹⁶ And the fact these groups may be mandated by state regulation is beside the point: the only relevant inquiry is whether the specific subject matter of the particular group is *directly* related to course content at the school. In short, these two support groups may be laudable, but they may not serve as an excuse for discrimination. Each is noncurricular.

⁹² *Id.* at 230:2-6.

⁹³ *Id.* at 197:19-23.

⁹⁴ *SAGE*, 471 F.3d at 912 (to qualify, group must “address concerns or formulate proposals relating to the body of courses as a whole”).

In the past, defendants’ have advanced the argument made by the school’s principal, who claimed that the connection between these student support groups and the body of courses as a whole is that such groups contribute to “the integration of [these students] into the school so that they will be more comfortable and so they will be more successful.” Docket No. 17, Ex. C (Loberg Dep.) at 198:4-7. Such a connection is, however, precisely the “remote[] relationship to abstract educational goals” that was clearly rejected by the Court in *Mergens*. 496 U.S. at 244 (claim was that favored groups “further[ed] the School’s overall goal of developing effective citizens,” enabled students “to develop lifelong recreational interests,” and supplemented math and science courses by enhancing “students’ ability to engage in critical thinking processes”).

⁹⁵ *See, e.g., Colin*, 83 F. Supp. 2d at 1143; *Garnett*, 772 F. Supp. at 533-534.

⁹⁶ *Garnett*, 772 F. Supp. at 534.

C. Labeling Favored Groups as “Curricular” Is a Cover for Content Discrimination.

1. School Sponsorship is No Justification for Discriminatory Treatment.

The foregoing review makes clear that defendants’ classification of certain groups as “curricular” bears no relationship to the demanding framework laid out in *Mergens*. Rather, defendants have substituted their own test: Does the school have control over the group? Are its activities noncontroversial? If so, then the group is curricular and receives favorable treatment.⁹⁷

Not only is this contrary to the express language of *Mergens*, it turns the Equal Access Act on its head. The Act was intended to prevent schools from discriminating on the basis of speech.⁹⁸ Permitting discrimination on the basis of school “sponsorship” amounts to the same thing. It puts power of the group’s speech in the hands of the school, not the student members.

At the heart of defendants’ desire for control appears to be a fear of controversy. The school’s principal expressed the concern that if SAGE were permitted to use school facilities, “how would I then be able to say, if a group came to me and wanted to host on my school site pro abortion, or antiabortion, or the Ku Klux Klan, or white supremacy or,

⁹⁷ The desire for control here is so strong that the school prohibits any student group from forming unless the group finds a willing “staff advisor.” Docket No. 17, Ex. C (Loberg Dep.) at 158:2-5. In effect, a particularly controversial group may be barred from meeting at all for lack of support from school staff. This is exactly what happened to a student-proposed “Atheist Club.” *Id.*

⁹⁸ *Mergens*, 496 U.S. at 238 (“the purpose of granting equal access is to prohibit discrimination between religious or political clubs” and other student groups).

you know, rifle, you know, whatever. . . .”⁹⁹ This fear of controversy may be based on real concerns over negative reaction in the community.¹⁰⁰ But avoiding controversy can serve as no basis for discrimination under the Act, which was of course intended to protect the content of speech—whether on abortion, race relations, sexual orientation or any other controversial topic.¹⁰¹

It is not surprising that a school’s administration would prefer to control the activities of student groups conducted on its premises. But the Act is clear: School officials may not demand that students relinquish their freedom of speech in exchange for favorable access to school facilities.

2. The Subject Matter of SAGE is At Least as Related to Course Content as That of Many Favored Groups.

That the school’s classification system is a mere cover for content discrimination is particularly clear when one examines the evidence regarding the connection between SAGE and the curriculum. A number of courses at MGSB teach students respect for

⁹⁹ Docket No. 17, Ex. C (Loberg Dep.) at 214:2-20.

Note that the Act expressly permits schools to regulate access by groups in order to maintain order and discipline on school premises and protect the well-being of students and faculty. § 4071(f). If, for example, a white supremacy group at a school were disruptive, the school could certainly limit the group’s activities or perhaps even bar it altogether. Defendants have made no allegation that SAGE represents any such concern.

¹⁰⁰ Pinto Aff., Exs. H, I (fliers entitled “Straight Awareness” and “Straight Pride”). See also Docket No. 17, Ex. C (Loberg Dep.) at 131:21-134:18 (leaflets in the community containing “harsh and vitriolic [language] against gays and lesbians, and mentioning SAGE by name) - 119:5-121:3 (calls from parents concerned about the promotion of “gay and lesbian lifestyles.”

¹⁰¹ See *Mergens*, 496 U.S. at 259 (Kennedy, J., dissenting) (“one of the consequences of the statute, as [the Court] now interpret[s] it, is that clubs of a most controversial character might have access to the student life of high schools...”).

others and promote the lessening of discrimination.¹⁰² One course entitled “Analyzing Contemporary Issues” involves “critical thinking and problem solving by analyzing . . . gender issues, protest/dissent, and various social problems.”¹⁰³ The curriculum for the homeroom class (Foundations) incorporates “locat[ing] and utiliz[ing] resources for combating harassment” and “demonstrat[ing] the qualities of good citizenship.”¹⁰⁴

At the same time, gay and lesbian issues are present in the content of such courses as science, sociology, English, and biology.¹⁰⁵ The health curriculum in particular contains a vast array of information relating to issues such as sexual orientation, homosexuality, and discrimination — plaintiff’s counsel spent nearly 40 pages’ worth of a deposition walking the District’s 30(b)(6) designee through only a portion of this information.¹⁰⁶ Indeed, the health curriculum even includes the following lesson for students, under the heading “Strategies for Students to Prevent Sexual Harassment:”

If you have tried talking to the appropriate people and nothing has been done, you might consider seeking help from someone outside the school such as the U.S. Department of Education’s Office for Civil Rights. As a last resort, pursue other avenues such as *filing a lawsuit against the school* in either state or federal court.¹⁰⁷

¹⁰² Pinto Aff., Ex. E (Loberg 30(b)(6) Dep.) at 115:18 to :22 (principal as District’s 30(b)(6) designee).

¹⁰³ Docket No. 17, Ex. F (2004-2005 Registration Handbook).

¹⁰⁴ Pinto Aff., Ex. E (Loberg 30(b)(6) Dep.). at 78:15 to 80:4.

¹⁰⁵ *Id.* at 67:25 to 68:3.

¹⁰⁶ *Id.* at 141:7 to 166:25; 220:19 to 232:18.

¹⁰⁷ Pinto Aff., Ex. G at DEFT 1375 This item was produced directly from the District’s curriculum center. Pinto Aff., ¶8. The District now denies that this is part of the school’s curriculum. Docket No. 193 (Am. Answers to Pls.’ Req. for Admissions) at *Footnote continued on next page . . .*

Mergens warns that schools should not be permitted to manipulate application of the Act by “strategically describing” favored groups – tying their purposes “to some broadly defined educational goal” while ignoring others.¹⁰⁸ A finding that every one of the favored groups is “curricular” while SAGE is not would be precisely this kind of strategic gamesmanship. Because *at least one* of the favored groups is in fact “noncurricular,” plaintiff’s respectfully submit that judgment should issue on their Equal Access Act claim, and a permanent injunction should be issued.

III. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR FIRST AMENDMENT CLAIMS.

Plaintiffs have advanced two separate claims regarding their rights to freedom of speech under the First and Fourteenth Amendments of the federal Constitution. The first such claim involves pure student speech, in the form of literature distribution and fundraising. The second such claim involves school-facilitated speech – speech which uses school resources such as the hallways and public address (P.A. system).

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11-15. However, the principal, as 30(b)(6) designee for the District, has confirmed that *any* materials produced from the curriculum center are taught at MGSB:

Q: Would anything that comes from the district curriculum center, can we assume that what is there will be taught in your high school?

A: Yes.

Pinto Aff., Ex. E (Loberg 30(b)(6) Dep.) at 140:21 to :25.

¹⁰⁸ 496 U.S. at 244-45.

A. Defendants’ Actions Were and Are Under Color of State Law.

As a preliminary note, defendants must have been acting under color of state law in order to support plaintiffs’ constitutional claims.¹⁰⁹ A school official acts under color of state law whenever he or she acts within the capacity of his or her role within the school district.¹¹⁰ All of the actions challenged herein were taken within the capacity of the individual defendants’ roles within the school district; defendants have not contended otherwise.

B. Defendants Have Unconstitutionally Barred Plaintiffs From Distributing Constitutionally Protected, Non-Disruptive Literature and Raising Funds.

1. Pure Student Speech may be Barred Only if it Interferes with the Work of the School or Impinges on Others’ Rights.

It is well-settled constitutional law that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹¹¹ Student speech that is not school-sponsored – pure student speech – may be barred by school authorities only if it is likely to “materially and substantially interfere with the work of the school or impinge on the rights of other students.”¹¹²

¹⁰⁹ *S.J. v. Kansas City Missouri Public School District*, 294 F.3d 1025 (8th Cir. 2002).

¹¹⁰ *See Dossett v. First State Bank*, 399 F.3d 940 (8th Cir. 2005).

¹¹¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* 393 U.S. 503, 506 (1969). “Though the state education system has the awesome responsibility of inculcating moral and political values, that does not permit educators to act as ‘thought police’ inhibiting all discussion that is not approved by, and in accord with the official position of the state.” *Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1141 (C.D. Cal. 2000).

¹¹² *Tinker*, 393 U.S. at 509.

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2. Literature Distribution and Fundraising are Pure Speech Activities.

In the case at bar, plaintiffs have been prohibited, except in limited circumstances, from distributing literature regarding their organization and the Day of Silence to their fellow students.¹¹³ In addition, plaintiffs are barred under school district policy from raising funds from their fellow students. Both activities qualify as pure speech entitled to “comprehensive protection.”¹¹⁴ In particular, distribution of literature is a form of constitutionally protected speech.¹¹⁵ Charitable solicitation is a form of constitutionally protected speech as well.¹¹⁶ Fundamentally, the free speech rights of students include intercommunication with their fellow students.¹¹⁷

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Note that the U.S. Supreme Court’s recent ruling in *Morse v. Frederick* (the so-called “Bong Hits 4 Jesus” case) has no bearing on the issues herein. In *Morse*, the Court made clear that schools may “take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use” but did not consider restrictions on speech concerning political or social issues. 2007 U.S. LEXIS 8514 at *8 (2007).

¹¹³ Docket No. 33 (A.R. Aff.) ¶¶ 3, 5, 6; Pinto Aff., Ex. E (Loberg 30(b)(6) Dep.) at 135:13 to :22. The sole exception is that plaintiffs have been permitted to distribute literature to other students who first express an interest, and on the Day of Silence only; plaintiffs have not been permitted to *initiate* contact or to distribute literature in advance of the Day of Silence. *Id.*

¹¹⁴ *Tinker*, 393 U.S. at 505-06.

¹¹⁵ See *U.S. v. Grace*, 461 U.S. 171, at 176 (1983) (leafleting constitutes expressive activity involving constitutionally protected speech); *Martin v. City of Struthers*, 319 U.S. 141, at 143 (1943) (right to distribute and receive literature).

¹¹⁶ See *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632-33 (1980); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988).

¹¹⁷ *Tinker*, 393 U.S. at 512.

3. Plaintiffs' Actions Neither Interfere with the School's Work nor Impinge on the Rights of Others.

There is no evidence, and defendants make no allegations, that literature distribution and fundraising by plaintiffs would be likely to “materially and substantially interfere with the work of the school or impinge on the rights of other students,” a very high bar in any case.¹¹⁸ Plaintiffs therefore have a constitutionally protected right to engage in this speech. Nevertheless, a District policy promulgated and applied by defendants, Procedure 923, bars plaintiffs from engaging this right.

These restrictions would be unconstitutional even if it applied to all student groups equally. Here, however, the violation is even more egregious, for they limit only the groups labeled noncurricular — those identified as “not sponsored by the school” under the District’s own policy.¹¹⁹ The *school-sponsored* groups face no such restrictions. Such content-based regulation was rejected as long ago as *Tinker*, the seminal case to consider the application of the First Amendment in schools, where the Court noted that schools could not confine student expression to “those sentiments that are officially approved.”¹²⁰ The relevant inquiry is not whether the content of the speech is sponsored

¹¹⁸ *Id.* at 508-09, 514.

¹¹⁹ Pinto Aff., Ex. B (Student Group Framework).

¹²⁰ *Tinker*, 393 U.S. at 511. *Cf. Bystrom v. Fridley High Sch.*, 822 F.2d 747, 755 (1987) (upholding school policy governing distribution of “unofficial” written material, in part on the basis that all of the grounds specified for refusing permission were aimed at unprotected and/or disruptive speech).

by the school, but rather whether the speech at issue is reasonably likely to cause disruption.¹²¹ Here, no such disruption is – or could be – alleged.

C. Defendants Have Unconstitutionally Restricted Plaintiffs’ Access to the School’s Public Forum for Student Speech.

A school’s regulation of speech which uses hallways, the P.A. system, and other school facilities is accorded somewhat more deference by the courts than the pure speech of leafleting or fundraising. This deference is not unlimited, however. The precise degree of deference depends on whether the school has created a public forum – making its facilities available to a segment of the public – or kept its forum closed. A school’s regulation of a public forum must be content- and viewpoint-neutral, unless the school can show that the regulation is both “necessary to serve a compelling state interest” and “narrowly drawn to achieve that end.”¹²² Even regulation of a “closed forum” must still be “reasonably related to legitimate pedagogical interests.”¹²³

1. Defendants Have Created a Forum Generally Open For Use by Student and Community Groups.

School facilities are public forums when school authorities “by policy or by practice” make those facilities available to a segment of the public, including student organizations.¹²⁴ Through the promulgation and application of Procedure 923 and the

¹²¹ *Westfield High School L.I.F.E. Club v. City of Westfield*, 249 F.Supp. 2d 98 (D. Mass. 2003).

¹²² *Prince v. Jacoby*, 303 F.3d 1074, 1091 (9th Cir. 2002) (citing *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981)).

¹²³ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

¹²⁴ *Id.* at 267.

Student Group Framework, defendants have created at MGSB a forum for communication that is generally open for use by student and community groups. Under these school district policies, most of the student groups at the school may distribute literature, mount posters, and use the P.A. system.¹²⁵ In addition, several kinds of community groups are permitted to distribute literature and mount posters under limited circumstances as well.¹²⁶

2. Regulation of this Forum is Not Content-Neutral.

Under Procedure 923 and the Student Group Framework, plaintiffs are barred from full participation in the public forum at MGSB. Plaintiffs may not distribute literature or mount posters (except under limited, preapproved circumstances) nor may plaintiffs use the P.A. system. Again, defendants' sole rationale for this distinction is that they have not labeled SAGE "curricular" – that is, that SAGE is not sponsored by the school.¹²⁷ There could be no argument that this regulation is content-neutral.

3. The Restrictions On Plaintiffs Neither Serve a Compelling State Interest Nor are Narrowly Drawn.

Since restrictions in the public forum at MGSB is not content-neutral, they may stand only if they are both "necessary to serve a compelling state interest" and "narrowly

¹²⁵ *Cf. Prince*, 303 F.3d at 1091 (extracurricular clubs).

¹²⁶ Public agencies and non-profits are permitted to distribute materials weekly. Fraternal organizations and churches may distribute materials under certain circumstances – e.g., with respect to scholarships or upcoming events. *Pinto Aff.*, Ex. C (Procedure 923). Again, noncurricular student groups such as SAGE are barred entirely from the use of these procedures. Docket No. 24 (Def.'s Mem. Supp. Summ. J.) at 25 (terms of the Procedure 923 "only pertain to curriculum-related groups").

¹²⁷ Docket No. 24 (Def.'s Mem. Supp. Summ. J.) at 25.

drawn to achieve that end.”¹²⁸ But defendants have advanced no interest in support of their denial of access to SAGE and the other disfavored groups other than the fact that SAGE and others are not sponsored by the school but are, in defendants’ words, “advocacy” organizations.¹²⁹ While refreshing in its candor, this reason – which simply turns the inquiry back to the content of plaintiffs’ speech – cannot possibly serve as justification. Prohibiting core political speech because it constitutes core political speech, and because the authorities do not sponsor it, is hardly a legitimate government interest – let alone a compelling one.¹³⁰

4. Even Had Defendants Not Created a Public Forum For Student Speech, The Restrictions Would Not Reasonably Relate to Legitimate Pedagogical Interests.

Even if it were the case that the District has not created a “public forum” at MGSJ, still its regulation of use of facilities at the school would need to be “reasonably related to legitimate pedagogical interests.”¹³¹ Defendants cannot meet this test. Again their reason for excluding plaintiffs is that SAGE is a non-school sponsored, so-called “advocacy” organization. It is true that SAGE seeks to promote tolerance and respect. But the “advocacy” label could be applied as readily to a group such as SADD, which

¹²⁸ *Prince*, 303 F.3d at 1091.

¹²⁹ “[I]f you ... open access to one advocacy group, you have to open to all...” Pinto Aff., Ex. E (Loberg 30(b)(6)) at 214:23 to 215:8) (District’s 30(b)(6) designee) (citing teenage Republicans, young Democrats, etc.).

¹³⁰ A school’s regulation of constitutionally protected speech cannot be justified merely by a “desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Tinker* - 393 U.S. at 509.

¹³¹ *Hazelwood*, 484 U.S. at 273.

advocates seatbelt use and good decision-making. The fact that access to the forum is granted to one “advocacy” group while denied to another is a sign that the restriction is not in fact tied to any “legitimate pedagogical interest,¹³²” and defendants have failed to advance any such interest.

Even more important is the nature of the speech which SAGE seeks to advance. Again, SAGE seeks to have students learn about issues of importance to gays and lesbians in order to promote tolerance and respect.¹³³ MGSB has a history of intolerance and lack of respect, and current students feel this hostility acutely. Given defendants’ acknowledgment that “promoting tolerance and respect for students through education and activities relevant to gays [is] a worthy goal,¹³⁴” one would think that defendants would be eager to have the assistance of SAGE in educating the school community. Ironically, harassment of students perceived to be gay occurs in the very hallways and classrooms to which defendants deny access to SAGE.¹³⁵ While other organizations place posters throughout the school, SAGE is restricted to one small box outside of the principal’s office – a sadly ironic spot for a group representing a community that often lives “in the closet.”

¹³² *Id.*

¹³³ *See* Docket No. 17, Ex. C (Loberg Dep.) at 144:17-21 - 169:18-20; 170:16-21).

¹³⁴ *See* Docket No. 24 (Def.’s Mem. Supp. Summ. J.) at 6.

¹³⁵ Docket No. 33 (Aff. of A.R. dated Feb. 6, 2006) at ¶¶ 8-15; Docket No. 31 (Aff. of N.R. dated Feb. 6, 2006) at ¶¶ 3-8 (each describing harassment).

CONCLUSION

This case has been in suit for several years, and the parties were in negotiations for a considerable length of time prior to that. In all of this time, defendants have never pointed to any disruption or burden posed by a grant of equal treatment, other than the impermissible concern that “[I]f you ... open access to one advocacy group, you have to open to all....”¹³⁶ The facts are now fully developed, and the law is clear. It is time for judgment to issue. Plaintiffs respectfully request that their motion be granted.

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s/ David P. Pinto

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¹³⁶ Pinto Aff., Ex. E (Loberg 30(b)(6)) at 214:23-25.