

COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT
OCTOBER 1, 2007

QUEER-STRAIGHT ALLIANCE,)
et al.)
Plaintiffs-Appellants)
v.)
NEW TEXICO SCHOOL DISTRICT)
BOARD OF EDUCATION)
Defendant-Appellee)

**JUDGMENT ON APPEAL
FROM THE DISTRICT COURT
OF NEW TEXICO**

Before Carter, C.J., Robinson, J., and Goodridge, J.

Chief Judge Carter delivered the opinion of the Court.

INTRODUCTION

Appellants contend that the appellee has violated the Equal Access Act, Title 20 U.S.C. § 4071, *et seq.*, and the First Amendment to the United States Constitution by denying them the same access to school facilities and resources that it grants other student organizations.

STATEMENT OF FACTS

New Texico High School (NTHS) is a public high school in New Texico that receives financial assistance from the federal government. In March 2003, parents of NTHS students influenced the high school to adopt a strict abstinence policy barring any discussion of sexual activity on school grounds.

NTHS formally recognizes a variety of student organizations. In September 2005, the New Texico School Board of Education adopted a formal written policy concerning student organizations:

The New Texico School District Board of Education desires to promote curriculum related student organizations. The District does not permit student organizations not directly related to the curriculum to organize or meet on school property. It is the express desire of the school district not to allow a limited open forum as defined in the Equal Access Act, 20 U.S.C. § 4071, *et seq.*

The New Texico School District Board of Education has allowed all student organizations that existed prior to the policy's adoption to continue to meet on school grounds. Two of these organizations are the NTHS Student Council and Christian Athletes Alliance (CAA).

The NTHS Student Council meets every Thursday after school hours to plan social events. Every April, the NTHS student body elects a new student council executive board. To increase participation, civics teachers at NTHS sometimes grant extra credit to students who submit essays explaining how they voted and why. The president of the student council also serves as a non-voting member of the New Texico School District Board of Education. This year, the Board has differed over what changes should be made to the school curriculum.

Christian Athletes Alliance (CAA) uses the NTHS athletic facilities every weekday after school hours. By participating in CAA and writing a research paper at the end of the year, students are exempt from taking a physical education class required by the state of New Mexico. Once a month, CAA holds an evening gathering in a NTHS classroom where CAA students and parents can socialize. The record shows that at the September 2006 gathering, a CAA student member and his parent distributed "Vote for the Family Amendment" flyers to influence other CAA parents to vote for a proposed amendment to the New Mexico state constitution banning same-sex marriage. According to the record, a teacher who attended the September 2006 gathering heard multiple CAA students and their parents discussing the immorality of homosexuality. The next morning, mathematics teacher Tom Collura found one of the flyers in his classroom, where the gathering had taken place the previous night. There is no evidence that the NTHS administration responded after Collura complained to the school principal that he found the flyer to be inappropriate.

In October 2006, the "NTHS 2005-2006 Summary Report" was released by the New Mexico School District Board of Education. The report revealed that there had been a substantial increase in the number of lesbian, gay, bisexual, and transgender (LGBT) students who reported being verbally harassed on school grounds. No LGBT student or faculty member at NTHS has ever reported being physically assaulted on school grounds. However, in September 2006, a group of NTHS students followed another student as he was walking home from school, called him a "faggot," and beat him so badly that he had to be hospitalized overnight. The incident occurred four blocks from NTHS.

In January 2007, NTHS students and faculty formed Queer-Straight Alliance (QSA). The stated mission of QSA is to promote respect and tolerance through programming and education on LGBT issues. QSA is predominantly comprised of NTHS students, whose ages range from fourteen to seventeen years old. There are three openly gay and lesbian NTHS faculty members who planned on supervising QSA meetings. Although a majority of QSA members identify as gay, lesbian, bisexual, transgender, or questioning, a significant number of QSA members identify as straight allies to the LGBT community. Collura agreed to be QSA's faculty advisor after meeting with the student co-founders, Chris Wong and Alecia Harris. Besides providing a safe space for LGBT students, faculty, and allies on campus, Collura intended to hold regular discussions on how discrimination has historically burdened and currently burdens LGBT people in marriage, employment, and the military. Collura planned for the first QSA event, "The Stonewall Riot and its Aftermath," to be a student forum dedicated to historical perspectives on the importance of Stonewall to the LGBT rights movement.

In March 2007, the New Mexico School District Board of Education rejected QSA's application to be recognized as a student organization. Its rejection letter stated that QSA's request was denied because "QSA's mission does not directly relate to the school curriculum and allowing QSA to meet on campus would violate the school's abstinence policy."

Appellants filed this action in federal district court, seeking a determination that the New Mexico School District Board of Education violated the appellants' rights under the Equal Access Act and the First Amendment to the U.S. Constitution. However, Judge Richardson of the District Court of New Mexico rejected appellants' claims, holding that the appellee's decision to refuse to recognize QSA as a student group did not infringe on appellants' Equal Access or First Amendment rights. In this appeal, the appellants ask us to reverse that ruling. The appellants contend that the appellee's decision not to allow QSA to meet on campus or use school resources violates both the Equal Access Act and the First Amendment.

We affirm.

Discussion

A. The Issues

In 1984, Congress enacted the Equal Access Act (EAA) to prevent school districts from denying religious student organizations the same access to school facilities as other extracurricular student groups. *See* H.R. Rep. No 98-710; S.Rep. No. 98-357. The operative rule of the EAA provides:

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.

20 U.S.C. § 4071(a). As opposed to the meaning of “limited public forum” for First Amendment purposes, a public secondary school creates a “limited open forum” under the EAA when it allows one or more noncurriculum related student groups to meet on school premises during noninstructional time. 20 U.S.C. § 4071(b). Congress defined “meeting” to include activities of student groups which are permitted under a school’s limited open forum and are not directly related to the school curriculum. 20 U.S.C. § 4072(3). Congress also defined “noninstructional time” to include time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends. 20 U.S.C. § 4072(4). Generally, the EAA is triggered if a school receiving federal financial assistance allows one noncurriculum related student group to meet on school grounds during noninstructional time. *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 239 (1990).

Public secondary schools are not required to allow a student group to meet pursuant to the EAA if a student organization’s meeting “materially and substantially interfere[s] with the orderly conduct of educational activities within the school.” 20 U.S.C § 4071(c)(4). Moreover, 20 U.S.C. § 4071(f) provides: “Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.” Therefore, a public secondary school may exclude a student organization from having access to its facilities and resources if (1) the organization’s meeting materially and substantially interferes with the orderly conduct of educational activities; (2) the organization’s meeting prevents the school from maintaining order and discipline; or (3) the organization’s meeting prevents the school from protecting the well-being of students and faculty.¹

The appellants challenge the appellee’s decision to exclude their student organization from having access to school facilities and resources, claiming that the decision violates (1) their rights under the Equal Access Act by not granting their student group the same access to school facilities and resources as it grants other student organizations; and (2) their First Amendment

¹ As noted above, 20 U.S.C. § 4071(f) provides: “Nothing in this subchapter shall be construed to limit the authority of the school, its agents, or employees...to assure that attendance of students at meetings is voluntary.” Although this is a valid exception under the EAA, it is irrelevant to the issues before this Court.

rights of expression and association by impermissibly excluding LGBT-positive viewpoints on school grounds.

B. Equal Access

1. Triggering the Equal Access Act

The parties disagree over whether the EAA is triggered. To determine whether the EAA is triggered, this court must assess whether NTHS maintains a “limited open forum” as defined under the EAA. A school creates a “limited open forum” under the EAA if it allows one noncurriculum related student group to meet on school grounds during noninstructional time. *Mergens*, 496 U.S. at 239. We hold that the EAA is triggered because NTHS maintains a “limited open forum” by allowing the NTHS Student Council to meet on school grounds during noninstructional time.

Congress did not define the term “noncurriculum” when it enacted the EAA. However, in *Mergens*, the Supreme Court defined the term to mean any student organization that does not directly relate to the body of courses offered at the school. 496 U.S. at 227. The *Mergens* Court held that a student organization directly relates to the curriculum if one of the following four criteria are met: (1) the subject matter is actually taught, or will soon be taught, in a regularly offered course; (2) the subject matter of the group concerns the body of courses as a whole; (3) participation in the group is required for a particular course; or (4) participation in the group results in academic credit. *Id.* To determine whether a student group is noncurriculum related, this court must look to the school’s actual practice rather than its stated policy. *Mergens*, 496 U.S. at 246; *Straights and Gays for Equality v. Osseo Area Schools-District No. 279*, 471 F.3d 908, 912 (8th Cir. 2006) (concluding from a school’s practice that the EAA is triggered because the school’s cheerleading and synchronized swimming groups were noncurriculum related student groups allowed to meet on school grounds during noninstructional time). This court must also compare the primary focus of the organization to the significant topics taught in the course that the organization asserts it directly relates to. *Pope v. East Brunswick Board of Education*, 12 F.3d 1244, 1253 (3d Cir. 1993).

We reject the appellants’ argument that Christian Athletes Alliance (CAA) does not directly relate to the NTHS curriculum. So long as they complete a research paper, participation in CAA exempts student participants from fulfilling their physical education course requirement and therefore clearly meets the *Mergens* standard.

However, we agree with the appellants that the NTHS Student Council is a noncurriculum related group. Other courts have similarly concluded that student councils are noncurriculum related groups. *See e.g., White County High Sch. Peers in Diverse Ed. v. White County Sch. Dist.*, No. 2:06-CV-29-WCO, 2006 WL 1991990, at *7-8 (N.D. Ga. July 14, 2006) (holding that a high school’s student council was noncurriculum related because its purpose was to raise concerns with regard to facilities and planning noncurricular activities and the group’s subject matter was not taught in a specific course within the high school). We reject the appellee’s argument that the student council is a curriculum related group because some students receive extra credit for explaining how they voted in the group’s elections. Students who receive extra credit do not automatically receive course credit for participating in elections; even those students who receive extra credit may fail their civics course by not completing other assignments. Moreover, the student council is a noncurriculum related group because its primary purpose is to plan student social events, not to teach students about civics. *See Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*, 258 F. Supp. 2d 667, 678

(E.D. Kan. 2003). Even if the electoral process is a topic covered in NTHS civics classes, we do not think that the Supreme Court in *Mergens* intended for every student organization which holds regular elections to fulfill the *Mergens* standard. Although the NTHS student council president is a non-voting member of the New Mexico School District Board of Education, the record does not show that the student council actually discussed curriculum changes during any of its general membership meetings.

Since the NTHS Student Council is a noncurriculum related group allowed to meet on school grounds during noninstructional time, we conclude that NTHS maintains a “limited open forum” and that the EAA is triggered.

2. EAA Exceptions

Courts have taken different approaches to interpret the bounds of the EAA exceptions, specifically as to whether the exceptions under §§ 4071(c)(4) and (f) incorporate the United States Supreme Court’s First Amendment standard from *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 509 (1969), where the Court held that public schools may only limit student expression when it “materially and substantially interferes with the requirements of appropriate discipline in the operation of the school.” Most courts have viewed §§ 4071(c)(4) and (f) in conjunction, holding all exceptions to the high standard of *Tinker*. See *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 870 & n.30 (2d Cir. 1996) (applying the “materially and substantially interferes” language from *Tinker* to the maintaining order and discipline exception); *Boyd County High School Gay Straight Alliance v. Bd. of Educ. of Boyd County*, 258 F. Supp. 2d 667, 689-91 (E.D. Kan. 2003) (“Incorporation of the *Tinker* rule into 20 U.S.C. § 4071(f) means . . . equal access is not required if the student group itself substantially interferes with the school’s ability to maintain order and discipline.”); cf. *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1146 (C.D. Cal. 2000) (focusing solely on § 4071(c)(4) and finding the inquiry guided by *Tinker*). Other courts have distinguished between § 4071(c)(4) and § 4071(f), finding that the latter does not incorporate the *Tinker* standard, thus allowing school districts to avoid EAA obligations by satisfying a lower burden than potentially embodied by § 4071(c)(4). See *Caudillo*, 311 F. Supp. 2d at 569 (“Although § 4071(c) somewhat tracks the *Tinker* language, this Court does not believe that the EAA requires such a substantial showing of interference under other exceptions. For instance, § 4071(f) does not track the *Tinker* language.”); cf. *Gernetzke v. Kenosha Unified Sch. Dist.*, 274 F.3d 464, 467 (7th Cir. 2001). We agree with the majority view, and therefore believe that school districts may only invoke the EAA exceptions under 20 U.S.C. § 4071(f) when a student group’s expression “materially and substantially interferes” with the school’s ability to maintain order or to protect the well-being of students. See e.g., *Boyd County High School Gay Straight Alliance*, 258 F. Supp. 2d at 689; see also *Hsu*, 85 F.3d at 870 & n. 30.

Furthermore, because we read § 4071(c)(4) – material and substantial interference “with the orderly conduct of educational activities within the school” – as implicating concerns and considerations very similar to those embodied by the first exception under § 4071(f) – “maintaining order and discipline” – we see no need to conduct a separate analysis under § 4071(c)(4). Rather, our analysis below applies with equal force to the school’s ability to prohibit QSA from meeting because it would “materially and substantially interfere with the orderly conduct of educational activities within the school.” 20 U.S.C. § 4071(c)(4).

i. “Maintaining Order and Discipline” Exception

We agree with the appellee that allowing QSA to meet on campus would inhibit the NTHS administration’s ability to maintain order and discipline over students. First, allowing QSA to meet on campus would interfere with the maintenance of order and discipline at NTHS in light of the school’s abstinence policy. The Court’s decision in *Tinker* supports the legitimacy of banning student expression when the school’s ability to maintain order within the school is compromised by those who directly engage in disorderly expression. 393 U.S. 503, 538 (1949). In this case, QSA members directly interfere with the appellee’s ability to maintain order and discipline in the school because the content of QSA discussions violates the school’s abstinence policy. Plaintiffs contend that QSA discussions will focus on tolerance and respect. However, we believe that QSA is a sexuality-based club; the essential quality that binds QSA together is rooted in the sexual conduct of its members. Other courts have sympathized with this view. *See e.g., Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 550, 561 (N.D. Tex. 2004) (“Affidavits and deposition testimony indicate that Defendants would have clearly denied *any* group access to school facilities if such a group had chosen to violate the school’s policy regarding discussion of sexual activity and the group was, at its core, based upon sexual activity.”). The abstinence policy is central to maintaining order and discipline at NTHS.

Second, we agree with the appellee that allowing QSA to meet on school grounds would disrupt order and discipline at NTHS because it would increase the harassment experienced by LGBT students. Judicial precedent establishes that schools can be held liable for student harassment if they are complacent in letting it occur. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 641 (1999). However, the Supreme Court in *Tinker* was critical of the view that school officials may ban student expression solely on the grounds that they fear that such expression will lead to disruptive conduct. 393 U.S. at 505-06. Lower courts have held that unfounded fears of anti-LGBT harassment cannot serve as a justifiable basis for school districts to prohibit LGBT student groups from meeting on school grounds. For instance, in *Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County*, the court questioned whether LGBT harassment lawsuits would arise given that the defendant had presented no evidence that LGBT harassment was pervasive at the school. 483 F. Supp. 2d 1224, 1229-30 (S.D. Fla. 2007).

Tinker did not clarify whether schools could prohibit student expression if they reasonably anticipate that the expression would cause a disruption or if the schools had to wait for a disruption to actually occur. However, other federal Courts of Appeal have held that public secondary schools may curtail student expression when school district officials have reason to believe from prior incidents of violence that such expression would lead to disruption within the school environment. *See e.g., West v. Darby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th Cir. 2000). Unlike the situations in both *Tinker* and *Gay-Straight Alliance of Okeechobee High School*, the evidentiary record supports that LGBT harassment at NTHS is widespread. The “NTHS 2005-2006 Summary Report” unquestionably establishes that harassment against LGBT students is pervasive at NTHS. Moreover, the violent beating of a student only four blocks from NTHS supports the validity of the appellee’s concern that QSA members will be victimized when they leave school grounds after meetings. Consequently, we agree with the federal district court in *Caudillo* that the law should enable school administrators to “prevent activities that invite harassment, safety problems, and lawsuits.” 311 F. Supp. 2d at 569.

ii. “Well-Being of Students” Exception

We also hold that the school district may avail itself of the “well-being of students” exception under 20 U.S.C. § 4071(f). Minors should not be exposed to conditions that endanger their physical or emotional well-being. The appellee has a compelling interest to prevent the harassment of its students because such victimization endangers their emotional well-being. Although the appellants contend that QSA’s mission is to counteract such victimization, we defer to the NTHS school administration’s judgment that allowing QSA to meet on campus will perpetuate LGBT-related harassment. Moreover, we agree with the appellee that it has a legitimate interest in preventing students from the harms associated with minor sexual activity, including sexually transmitted infections and teen pregnancy. *Caudillo*, 311 F. Supp. 2d 550, 570 (N.D. Tex. 2004). Therefore, any student group that is predominately based in sexuality is detrimental to students’ well-being on campus.

C. *First Amendment*

The parties disagree over whether the appellee’s decision to exclude QSA from having access to school facilities and resources violates the First Amendment. The appellants contend that the appellee has violated their rights of expression and association and impermissibly excluded LGBT-positive viewpoints from school grounds. The appellee asserts that its decision to prohibit QSA from meeting on school grounds furthers various compelling governmental interests and does not constitute viewpoint discrimination.

The Supreme Court has announced that public school students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). However, students’ First Amendment rights “are not automatically coextensive with the rights of adults in other settings,” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), and must be “applied in light of the special characteristics of the school environment.” *Tinker*, 393 U.S. at 506. In light of these guiding principles, we affirm the District Court of New Mexico’s holding that the appellee has not violated the appellants’ First Amendment rights.

In *Morse v. Frederick*, 127 S. Ct. 2618 (2007), the Supreme Court recently articulated its position on students’ First Amendment rights in public secondary schools. There, the Court upheld a school’s ability to suspend a student for holding a banner stating “BONG HiTS 4 JESUS” at a school sponsored event. 127 S. Ct. at 2622. In its reasoning, the Court noted that the mode of analysis, including the appropriate level of scrutiny, in students’ First Amendment rights cases is not entirely clear. *Id.* at 2626. However, the Court believed that resolving this issue was unnecessary to assess the legitimacy of banning student speech when the prohibition furthered compelling governmental interests and when the speech directly violated school policy. *Id.* at 2626, 2628.

In *Morse*, the Court stated that legal precedent recognized “that deterring drug use by schoolchildren is an important-indeed, perhaps compelling interest.” *Id.* at 2628. Like the situation in *Morse*, the interests furthered in this case are undoubtedly important, and we think compelling. We agree with the appellee that *Fraser* supports its compelling interest in protecting students from sexually inappropriate speech on school grounds. *Fraser*, 478 U.S. at 675. Similar to the Supreme Court in *Fraser*, we defer to the New Mexico School District’s judgment to assess what manner of speech is sexually inappropriate. *Id.* at 683. We also believe that the appellee

has a compelling interest in preventing minors from the harms associated with sexual activity. See *Caudillo*, 311 F. Supp. 2d at 563.

In *Morse*, the Court upheld the school's ability to ban student speech advocating illegal drug use when school policy expressly prohibited assembly or public expression that advocated the use of substances that are illegal to minors. 127 S. Ct. at 2623. In this case, NTHS, through its abstinence policy, has prohibited any discussion of sexual activity in order to shield students from the harms associated with minor sexual activity and indecent speech. Given that some members of QSA are as young as fourteen years old, discussions about sexuality in light of their limited maturity are detrimental to their well-being. *Fraser*, 478 U.S. at 683. Since the essential bond between QSA members is rooted in their common sexualities, we find that the appellee has the authority to ban QSA from meeting because their discussions will violate NTHS's abstinence policy.

We also disagree with the appellants that the appellee's decision to ban QSA from meeting on school grounds constitutes viewpoint discrimination. In support of their viewpoint discrimination claim, the appellants contend that NTHS allowed Christian Athletes Alliance (CAA) to meet on campus in September of 2006 and that during this meeting, it permitted a CAA student and his parent to distribute flyers in support of a proposed New Mexico constitutional amendment that would ban same-sex marriage. QSA's faculty advisor intended for the group to hold discussions on how discrimination has historically burdened and currently burdens LGBT people in marriage, employment, and the military.

When a school makes its facilities generally available for student group activities, it has created a "limited public forum" for First Amendment purposes and may not discriminate against student groups on the basis of their content or subject matter. *Widmar v. Vincent*, 454 U.S. 263, 267-70 (1981). For the appellants to establish that the appellee's actions amount to viewpoint exclusion, they must prove that the excluded content is germane to the permissible subject matter of the school's forum. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). Courts have allowed restrictions of subject matter when they are (1) reasonable in relation to the purpose served by the forum, and (2) not merely efforts to censor speech based on opposition to the speaker's viewpoint. *Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666, 678 (1998); *East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166, 1187 (D. Utah 1999); *Caudillo*, 311 F. Supp. 2d at 560. We hold that the appellee can meet both requirements. Through its abstinence policy, the appellee has clearly established that sexual viewpoints, whether heterosexual or homosexual, have no place within the NTHS school forum. Since QSA is a sexuality-based group, it is reasonable for the appellee to prevent QSA from meeting. Even though a CAA student and his parent distributed flyers containing anti-homosexual viewpoints on school grounds, NTHS did not have notice that flyers would be distributed at this meeting. Although unfortunate, we do not believe that this one incident obligates NTHS to open its doors to speech that is antithetical to its educational mission. Appellee's motive to ban QSA from meeting goes above and beyond mere disagreement with QSA's LGBT-positive viewpoints.

Conclusion

For the foregoing reasons, the decision of the District Court of New Mexico is

Affirmed.

Goodridge, J. dissenting:

I agree with the majority that the Equal Access Act is triggered in this case. However, I cannot agree that the appellee's actions are consistent with the EAA or the First Amendment.

A. *Equal Access Act*

I agree with the standard articulated by the majority for analyzing whether the appellee can avail itself of any of the exceptions to the EAA. In my view, however, the appellee cannot meet this standard under any of the EAA exceptions. Thus, prohibiting QSA from meeting on school grounds violates the EAA.

In allowing the appellee to invoke the EAA exceptions to prohibit QSA from meeting, the majority concludes that QSA is a sexuality-based club and that the group's discussions would inherently contain sexually inappropriate content. I disagree with this conclusion. In *Caudillo v. Lubbock Independent School District*, members of the LGBT student organization requested to distribute flyers with links to websites displaying sexually explicit material. 311 F. Supp. 2d 550, 557 (N.D. Tex. 2004). The LGBT student organization in *Caudillo* also explicitly listed safe-sex education as one of its goals. *Id.* at 556. In this case, QSA has not requested to distribute flyers containing sexually explicit material and contends that its sole mission is to promote respect and tolerance through programming and education on lesbian, gay, bisexual, and transgender issues. In fact, the organization intended for its first meeting to be a forum on Stonewall, a historical event which has been interpreted as the birth of the current LGBT rights movement. QSA also encourages both LGBT people and supporters to join the group. Although the group is predominantly comprised of LGBT students, a significant number of QSA members identify as straight allies to the LGBT community. Other courts have concluded that in order to invoke the EAA exceptions, school district defendants must offer concrete evidence showing that a student organization is involved with accessing or sharing obscene or explicit material; school districts cannot solely rely on the name of the student organization to reach this conclusion. *See, e.g., Gay-Straight Alliance of Okeechobee High Sch. v. Sch. Bd. of Okeechobee County*, 483 F. Supp. 2d 1224, 1229 (S.D. Fla. 2007). In my view, it is possible for QSA to simultaneously promote LGBT tolerance and abstinence. Other courts have similarly concluded that LGBT student organizations may not hinder the teaching of the benefits of abstinence at school. *Id.* at 1229. Given that the appellee has offered no concrete evidence showing that QSA will engage in sexually inappropriate discussions or distribute sexually inappropriate material, it cannot establish that allowing QSA to meet on campus would violate its abstinence policy or jeopardize the well-being of students. Hence, the appellee cannot meet the "material and substantial interference" standard to invoke the EAA exceptions on these grounds.

I also disagree with the majority that the appellee may ban QSA from meeting on school grounds to prevent anti-LGBT harassment at NTHS. In *Caudillo*, the court highlighted that schools are caught in a conundrum; they risk lawsuits if they allow anti-LGBT harassment to occur on school grounds, but also risk lawsuits similar to the one at hand if they deny activities to prevent harassment. *Caudillo*, 311 F. Supp. 2d at 568-69. In *Tinker v. Des Moines Independent Community School District*, the Supreme Court criticized allowing a heckler's veto to justify the suppression of student expression. 393 U.S. 503, 509 (1969). Rather, the Court determined that prohibition of student expression must be grounded in the disruptive potential of those who actually participate in the expression. *Id.* at 505-06. In *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*, 258 F. Supp. 2d 667, 690 (E.D. Ken. 2003), the court explicitly relied on *Tinker* to reject the argument that a school district could prevent a student gay-straight alliance from meeting on school grounds as a means of preventing disruptive

responses to it. *See also Franklin Central Gay/Straight Alliance v. Franklin Township Community School Corp.*, Case No. IP01-1518, 2002 WL 32097530, at *20 (S.D. Ind. Aug. 30, 2002) (holding that school’s “concern that the members of the GSA might become targets for harassment is not a justification for content-discrimination under the EAA”). In this case, the clear mission of QSA is to lessen disorderly conduct by preventing violence and harassment against LGBT students and supporters by other students. QSA intends to promote a school atmosphere that would make it a safer place for LGBT students to be themselves free from harassment. Other courts have upheld the right of LGBT-related student organizations to meet on school grounds when their missions expressly serve similar purposes. *Gay-Straight Alliance of Okeechobee*, 483 F. Supp. 2d at 1230. In my view, student driven attempts to prevent harassment through tolerance-building support maintaining order and discipline on school grounds and the well-being of LGBT students.

For these reasons, the appellee should not be able to invoke the EAA exceptions to prohibit QSA from meeting on NTHS school grounds.

B. The First Amendment

I also believe that the appellee has violated the appellants’ First Amendment rights.

I agree that the appellee has compelling interests in protecting students from sexually obscene speech on school grounds and the harms associated with sexual activity. However, banning QSA from meeting does not further either of these compelling interests. Although the majority relies on *Bethel School District No. 403 v. Fraser* when explaining the appellee’s authority to prohibit QSA from meeting under the First Amendment, the case at hand is distinguishable. In *Fraser*, the Court allowed a public school to suspend a student after he gave a speech containing sexually graphic metaphors in a school-wide assembly. 478 U.S. 675, 677-78 (1986). Unlike the *Fraser* scenario, there is no evidence in the record establishing that QSA’s discussions will include matters pertaining to sexual conduct or innuendo. In fact, the appellants persistently assert that QSA discussions serve to promote tolerance and respect. For example, QSA intended for its first event, “The Stonewall Riot and its Aftermath,” to be a student forum dedicated to historical perspectives on the importance of Stonewall to the LGBT rights movement.

The majority’s reliance on *Morse v. Frederick*, 127 S. Ct. 2618 (2007), is also misplaced. This situation is clearly distinguishable from *Morse* because QSA expression cannot be reasonably viewed to advocate illegal drug use. At least one federal district court has narrowly interpreted *Morse* to carve out a new exception in First Amendment jurisprudence that gives schools the authority to censor student speech that is reasonably related to promoting illegal drug use. *See DePinto v. Bayonne Bd. of Educ.*, No. 06-5765, 2007 WL 2726534, at *4 (D.N.J., Sept. 17, 2007) (“*Morse* adds a third exception to *Tinker*, allowing a school to censor speech that is ‘reasonably viewed as promoting illegal drug use.’”) (citing *Morse*, 127 S. Ct. at 2625). Even if courts broadly interpret *Morse* to grant schools greater authority to censor speech that reasonably relates to promoting illegal conduct, or even conduct against school policy, the appellee cannot meet its burden of proof. There is nothing illegal about maintaining a student forum to have discussions promoting tolerance and respect, even when such discussions focus on identities based on sexual orientation. Moreover, unlike the expression in *Morse*, which clearly violated school policy, the appellee cannot meet its burden to establish that QSA’s expression would violate the NTHS abstinence policy. As discussed above, there is no evidence in the record illustrating that QSA’s discussions will include matters pertaining to sexual conduct or innuendo. Rather, QSA consistently asserts that its mission is to promote tolerance and respect, not sex. It is

also reasonable to conclude that QSA can simultaneously promote respect, tolerance, and abstinence. Without proffering evidence demonstrating that QSA's discussions will contain sexually inappropriate content, the appellee cannot invoke its abstinence policy to limit QSA expression. See e.g., *Gay-Straight Alliance of Okeechobee*, 483 F. Supp. 2d at 1229.

Banning QSA from meeting on campus also constitutes viewpoint discrimination. The majority correctly states that the appellee may restrict subject matter when such restrictions are (1) reasonable in relation to the purpose served by the forum, and (2) not merely efforts to censor speech based on opposition to the speaker's viewpoint. *Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666, 678 (1998); *East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.* 81 F. Supp. 2d 1166, 1187 (D. Utah 1999). I believe that the appellee cannot meet either requirement. Under the first requirement, the appellee has the authority to limit sexually inappropriate discussions to preserve the integrity of its abstinence policy. However, since QSA discussions focus on tolerance and respect, it is unreasonable for the appellee to prevent QSA from meeting to ensure that NTHS's school forum will be void of discussions relating to sexual activity. I also believe that the record supports that the appellee's actions are attempts to eliminate LGBT-positive viewpoints from the NTHS school forum. In September of 2006, NTHS allowed the Christian Athletes Alliance (CAA) to hold a social gathering in a NTHS classroom. During this meeting, a CAA student and his parent distributed flyers to influence other CAA parents to vote for a proposed amendment to the New Mexico state constitution banning same-sex marriage. A teacher who attended the gathering heard multiple CAA students and their parents discussing anti-LGBT viewpoints, including the immorality of homosexuality. The NTHS administration failed to reprimand CAA or respond in any fashion when it was informed by a teacher that a CAA student and his parent had distributed flyers containing anti-LGBT viewpoints. In my view, if the appellee failed to reprimand a student organization for expressing anti-LGBT viewpoints on campus, then the only reason why it would prohibit QSA from promoting the opposite perspective on campus is to shield LGBT-positive viewpoints from NTHS school grounds.

For the foregoing reasons, I would reverse the judgment of the District Court of New Mexico.