

2008 Legal Seminar

**ASSOCIATION OF WISCONSIN SCHOOL
ADMINISTRATORS**

**REGULATING ACCESS TO SCHOOL
PROPERTY & RESOURCES**

Presented by Michael J. Julka

December 3, 2008



740 Regent Street, Suite 400
Post Office Box 1507
Madison, Wisconsin 53701-1507
(608) 257-7766
mjulka@lathropclark.com

I. Introduction

Parents, community members, students, and employees often access school property for different events and purposes. Such access may include a parent entering school for parent-teacher conferences, a student attending an athletic event, or a community group using the gymnasium for a speaking event. Certain laws and constitutional provisions provide protections for such access; however, there are limitations. For example, in order to protect the safety and well-being of students, a building administrator may ban an individual because he or she has committed a violent act against children. Building administrators must proceed with caution in this area, however, in order to avoid violating the law and/or the constitution. This presentation will provide a review of the laws and constitutional provisions that regulate access to school property, examine the court's interpretation of these laws and constitutional provisions, and discuss strategies for addressing these concerns.

II. Public Access to School Property

A. Relevant Law

1. First Amendment to the United States Constitution. Congress shall make no law . . . abridging the freedom of speech.
2. Fourteenth Amendment to the United States Constitution. No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
3. Wis. Stat. § 120.13(35). A school board may adopt rules applicable to persons who enter or remain in a building operated by the school board, including requirements that such persons identify themselves and sign in when entering or remaining in the building or any specified portion of the building and designating time periods during which such persons may enter or remain in the building or any portion of the building.
4. Wis. Stat. § 943.13(1m). Whoever does any of the following is subject to a Class B forfeiture: . . . (b) enters or remains on any land of another after having been notified by the owner or occupant not to enter or remain on the land.

B. Freedom of Expression

1. A school seeking to ban an individual from school-sponsored events or school facilities must determine whether this action will infringe the individual's freedom of expression.
 - a. In deciding whether First Amendment protections are implicated, courts will focus on past actions by the banned individual rather

than activities that the ban might prevent in the future. *See Doe v. City of Lafayette*, 377 F.3d 757, 768 (7th Cir. 2004).

- b. For example, if a school seeks to ban a registered sex offender from school property, the court would analyze whether there was an expressive element in the offender's previous criminal conduct, not whether prohibited future activities (such as attending sporting events) could contain expressive elements.
2. Even if an individual's actions contain expressive elements, the individual can still be banned from school property, because a school is not presumed to be a public forum and members of the public have no constitutional right of access to public schools. *Vukadinovich v. Bd. of Sch. Trustees*, 978 F.2d 403 (7th Cir. 1992).
 - a. Unlike streets and parks, a school is not presumed to be a public forum. A public school becomes a public forum only if school authorities have opened the school facilities for indiscriminate use by the public.
 - b. If a school board has not taken affirmative steps to open the school as a public forum, members of the public have no constitutional right of access to the schools.
 - c. In *Vukadinovich*, a terminated teacher continued to appear on school grounds and discuss his termination with other employees and students. The school board banned the teacher from entering the school and the teacher brought suit alleging a violation of his First Amendment rights. The court found that a school becomes a public forum only if school authorities have opened the school facilities for indiscriminate use by the public.
 - d. In *May v. Evansville-Vanderburgh School Corp.*, a teacher was prohibited from conducting teachers-only religious meetings in the school before classes began. The school claimed that teachers were not allowed to conduct meetings other than those necessary to the operation and management of the school, while the teacher argued that this policy violated her right to freedom of speech. The court held that even school employees have no constitutional right to use school property for public speech in the absence of a school-created public or limited public forum. 787 F.2d 1105 (7th Cir. 1986).

C. Procedural Due Process

1. A school district must also consider whether it will infringe the procedural due process rights of the individual it seeks to ban. Under the Fourteenth Amendment, a government actor, such as a school district, may not

deprive an individual of a protected interest without providing appropriate due process.

2. The school district must first determine whether it is depriving the individual of a protected interest.
 - a. A banned individual may claim a property interest in accessing school property. However, to claim a protected property interest, a person must have more than a unilateral expectation of the interest. That person must have a legitimate claim of entitlement to it, stemming from an existing rule or understanding, such as state law. *Bd. of Regents v. Roth*, 408 U.S. 564 (1972).
 - b. A banned individual may also claim that the school district has violated a liberty interest by damaging the individual's reputation. However, to prove deprivation of a liberty interest, the individual must show defamation by the government and a change in legal status. *Paul v. Davis*, 424 U.S. 693 (1976).
3. In *Brown v. Michigan City*, 462 F.3d 720 (7th Cir. 2006), a convicted child molester was banned from a city park after engaging in suspicious activity and brought suit against the city. The court held that the man did not have a property interest in accessing the public park because no state or local law guaranteed that access. The court also held that he was not deprived of a liberty interest because he suffered no change in legal status. Therefore, the court found that it need not determine whether he received sufficient process before being banned.
4. Because schools are not public forums, individuals have even less of a protected interest in accessing them than in accessing other types of public property.

D. Substantive Due Process

1. Finally, school districts must also consider whether banning an individual from school property infringes the substantive due process rights of that individual. An individual's due process rights have been infringed when a government entity, including a school district, has arbitrarily exercised its powers to deprive that individual of a protected property or liberty interest. *City of Lafayette*, 377 F.3d at 768.
 - a. If the government action infringes on a right that the court considers "fundamental," the action must be narrowly tailored to achieve a compelling government interest. This standard is very high and difficult to meet.
 - b. If the government action does not infringe on a fundamental right, the action must only be rationally related to a legitimate

government interest. This standard gives more deference to the decisions of government bodies.

2. Fundamental rights are those rights that are “objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [they] were sacrificed.” Fundamental rights include, but are not limited to the right to marry and to have children, and the right to bodily integrity. *Washington v. Glucksberg*, 521 U.S. 702 (1997).
 - a. The freedom to loiter in public places for innocent purposes is a liberty interest protected by the Due Process Clause. This interest is identified as “the right to move from one place to another according to inclination” or to remain in a public place of one’s choosing. *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999). However, the Seventh Circuit has held that this liberty interest does not have the historical or precedential importance to be considered a *fundamental right*. *City of Lafayette*, 377 F.3d at 770-71.
 - b. Exclusion of parents from school property presents a different question, as parents have a fundamental right to direct and participate in the education of their children. *See Glucksberg*, 521 U.S. at 720. However, this does not create a fundamental right for parents to be present on school property.
3. Because banning an individual from school property does not infringe on a fundamental right, the school district must only be able to show that the decision was made based on a legitimate interest and that the method used is rationally related to achieving the desired result.
 - a. The Seventh Circuit has held that the desire of a government to protect its children is not only legitimate, but compelling. *City of Lafayette*, 377 F.3d at 773. Therefore, limiting access to student by individuals who pose a risk to those students is a legitimate government interest.
 - b. Showing that a method is rationally related to achieving a desired result does not require a school district to prove that there are no other reasonable means that impose a lower burden on the individual being banned. *Id.* at 773-74. Because limiting or prohibiting access to school property by individuals who pose a risk to students is a rational means of preventing access to the students themselves, the restriction should meet the requirements of the rational basis test.

E. Equal Protection

1. Like substantive due process, the Equal Protection Clause of the Fourteenth Amendment prohibits a government entity, including a school district, from exercising its authority in an arbitrary way that has a detrimental effect on an individual or class of individuals.
2. Unlike substantive due process, an individual bringing an equal protection claim need not show that he or she was deprived of a liberty or property interest. The individual must only demonstrate that he or she was treated differently than other similarly-situated individuals or classes of individuals.
3. Unless the government entity treats individuals differently based on a suspect classification such as race or national origin, this distinction is subject only to the rational basis test. This is a highly deferential standard which requires only that the difference in treatment be rationally related to a legitimate state purpose.
4. Where an individual does not allege membership in a class or group and proceeds as a “class of one,” the individual must prove that he or she was intentionally treated differently than other individuals similarly situated for reasons of a personal nature unrelated to the duties of the person engaging in disparate treatment. The individual must also show that there is no rational basis for the difference in treatment. To be considered similarly situated, the individuals must be prima facie identical in all relevant respects. *Tuffendsam v. Dearborn County Bd. of Health*, 385 F.3d 1124, 1127 (7th Cir. 2004).
5. Some courts within the Seventh Circuit have addressed cases involving the Equal Protection Clause and access to school property.
 - a. In *Crowley v. McKinney*, 400 F.3d 965 (7th Cir. 2005), a school district denied a divorced, non-custodial parent several rights it granted to the custodial parent, including the right to enter school property and monitor his son on the playground. The non-custodial parent brought suit, claiming among other things that the principal had refused him these rights because of personal animosity, a violation of his equal protection rights as a “class of one.” The court held that the parent would be entitled to relief if he could prove all the elements of his “class of one” claim.
 - b. In *Doe v. Paris Union School District*, 2006 U.S. Dist. LEXIS 1606 (C.D. Ill. 2006), a school district prohibited the parent of several students from attending school events because of a previous child sex offense. The school based the decision on an Illinois statute prohibiting child sex offenders from being present on school property in the absence of a specific exception. The

parent sought an injunction to permit him to attend school activities, claiming among other things, that the school district has violated his right to equal protection. The court recognized that although the parent was prohibited from attending school activities, attendance at sporting events and concerts is common but not mandatory. The court, however, noted that events such as graduation ceremonies are a right of passage to students appropriately honored by parents' presence, and had the parent only sought an injunction to permit his attendance at graduation, instead of the broader right to attend all school events, the result might have been different.

6. In most cases, a school district will have a rational basis for excluding certain individuals from school facilities. However, the severity of the misconduct in which that individual has engaged and the length of time that has passed since the misconduct will affect the strength of the connection between the misconduct and the school's decision to exclude that individual.
 - a. For example, if an individual was recently convicted of sexually assaulting a child or having an inappropriate relationship with a student, a school should have a strong interest in excluding that individual from school property.
 - b. On the other hand, such an interest would be harder to establish in a situation where an individual was charged with a less serious offense in the distant past. For example, a 50-year-old man who was charged at 19 with statutory rape of his then-17-year-old girlfriend is less likely to pose a current threat to students justifying exclusion.
 - c. There are also a range of cases between these two which may pose difficult challenges for schools in finding a balance between the rights of a particular individual and the safety of students and others present on school property.

F. Restricting Parents' Access to School Property

1. Wis. Stat. § 120.13(35). A school board may adopt rules applicable to persons who enter or remain in a building operated by the school board, including requirements that such persons identify themselves and sign in when entering or remaining in the building or any specified portion of the building and designating time periods during which such persons may enter or remain in the building or any portion of the building.
2. Several courts have upheld the authority of school boards to restrict parents' access to school property when a parent has engaged in conduct

that is potentially dangerous, or inconsistent with the school board's goals or expectations.

- a. In *Nichols v. Western Local Bd. of Educ.*, 805 N.E.2d 206 (Ohio 2003), a school board made a decision to ban a student's mother from all school activities and from school property for a three-month period because of a verbal altercation that occurred between the mother and her daughter's volleyball coach in the locker room of another school after a volleyball game. The mother alleged that she had a constitutional liberty interest that permitted her to attend school activities and be present on school property, and that school authorities did not have the right to exclude persons from school activities and school property without a due process hearing. The mother claimed that she was denied her constitutional freedom to participate in her child's education by being prohibited from attending school events or being present on school property. The court recognized that the education and upbringing of one's children is a recognized liberty interest under the constitution; however, the court stated that that liberty interest does not create a constitutional right for a parent to attend school events or be present on school property. *The court concluded that because there is no constitutional right for parents of students to attend school activities, school authorities have the right to exclude parents from such activities without a hearing.* The court further held that school officials have the responsibility for assuring that parents and other third parties behave appropriately and should be granted the deference and authority to meet that obligation.
- b. In *Van Deelen v. Shawnee Mission Unif. Sch. Dist. #512*, 316 F. Supp. 2d 1052 (D. Kan. 2004), a father was notified that he was no longer allowed on school district property for an unspecified amount of time due to the father's conduct at a wrestling meet in which his son was an athlete. The father's conduct included using inappropriate language and obscene hand gestures directed at the teachers, students, and himself. In that case, the court held that school officials have the authority to control students and school personnel on school property, and also have the authority and responsibility for assuring that parents and third parties conduct themselves appropriately while on school property.
- c. In *Mitchell v. Beaumont Independent School District*, 2006 U.S. Dist. LEXIS (E.D. Tex. 2006), a parent was escorted off of school property after entering the building without a visitor's pass and getting into an argument with a teacher over her daughter's in-class treatment. The court held that the constitutional right of a parent to oversee the education of his or her child does not provide for unfettered access to school property. Because there was no showing that removing the parent from the school interfered with

her ability to direct the education of her daughter, there was no deprivation of a liberty interest.

3. When a school board finds it necessary to restrict a parent's access to school property, it may be necessary for the board to identify alternative strategies for ensuring parental participation in educational decision-making.
 - a. For example, where two parents are available, school officials may have one parent who can attend school activities, even if the other parent's access has been restricted.
 - b. Alternatively, the school can make certain accommodations, such as arranging for a parent to participate in parent-teacher conferences by telephone.

G. Restricting Sex Offenders' or Other Convicted Criminals' Access to School Property

1. Registered sex offenders.
 - a. Individuals who have been convicted of certain crimes are required to register on Wisconsin's Sex Offender Registry, which is accessible to the public.
 - b. Although Wisconsin law does not restrict registered sex offenders from entering on school property, many school boards wish to impose such a restriction.
 - c. It is permissible for a school board to adopt such a restriction, subject to the considerations discussed above; however, schools boards way want to adopt a policy that would ban *all* registered sex offenders from school property, in order to avoid claims that certain individuals were targeted unfairly.
2. Convicted Criminals.
 - a. Schools boards that wish to ban individuals convicted of certain other crimes also may do so, provided there is a sufficient connection between the crime committed, and the potential for harm to students.
 - b. For example, a policy banning all individuals who have been convicted of distributing drugs to minors would be appropriate, whereas a policy banning all individuals who have been convicted of retail theft would be unreasonable.
 - c. In addition, school boards should consider the length of time

individuals will be banned from school property following a conviction, again based on the type of crime and the potential for harm to students.

III. Equal Access Act and Student Groups' Access to School Property and Resources

A. Application of the Equal Access Act

1. The Equal Access Act provides that “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 equal opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.” 20 U.S.C. § 4071.
2. The Equal Access Act applies to all secondary schools that receive federal financial assistance and have created a limited public forum by allowing at least one student-led, noncurricular club to meet outside class time.
3. The Act requires schools to treat all noncurricular student groups equally, regardless of their religious, political, philosophical or other content-related affiliation. Affected schools must give all noncurricular student groups equal access to meeting space and use of the school PA system, periodicals and bulletin boards for promoting or providing information about the group.
4. Schools may not prohibit additional noncurricular student groups from forming, provided that (1) participation is voluntary; (2) the group is student-initiated; (3) employees of the school or government are present in a non-participatory capacity only; (4) the group meetings do not materially or substantially interfere with school order; and (5) non-students do not direct, conduct, control or regularly attend group activities.
5. School officials may monitor meetings, require that the groups follow certain rules, regulate the groups in terms of meeting times and locations or prohibit members of the community from participating in the clubs, so long as all noncurricular student groups are treated equally.

B. Defining Terms within the Equal Access Act

1. The Equal Access Act was passed to facilitate formation of religious student clubs in schools with a limited open forum by giving all noncurriculum-related student groups equal access to school facilities during non-instructional time. Cases that followed helped clarify ambiguous terms within the Equal Access Act, including “noninstructional time,” “noncurriculum-related student group” and “equal access.”

2. *Straights and Gays for Equality v. Osseo Area Schools*, 540 F.3d 911 (8th Cir. 2008): A school district permitted a gay-straight alliance group to meet at school and utilize some avenues of communication, but limited the group's access to other avenues of communication and certain meeting times and places. The school district asserted that it gave the group the same access as other *noncurricular* groups, albeit less access than *curricular* student groups. However, the court found that another student group, the "Spirit Council," was a noncurricular group where it did "not address academic or curricular issues relating to the body of courses." Therefore, when the Spirit Council received greater access to avenues of communication and meeting space and times than the gay-straight alliance group, the school district violated the Equal Access Act.
3. *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990): A school district denied students' request to form a Christian club to meet at the school for prayer and Bible study. The school claimed that the club would violate the Establishment Clause and that the Equal Access Act did not apply because the school had not created a limited open forum. The court held that the school created a limited open forum by allowing other noncurricular student groups to meet and therefore must provide the Christian club access to school facilities subject to the same terms, conditions and limitations as other non-curriculum related groups.
4. *Ceniceros v. Board of Trs.*, 106 F.3d 878 (9th Cir. 1997): A school district denied a student permission to form a religious club that met over the lunch period. The court held that the lunch hour was noninstructional time under the Equal Access Act because all students took lunch at the same time, no classes were held, and students were permitted to leave school grounds. By permitting other student groups to meet during the lunch hour, the school had established a limited open forum and could not discriminate against the religious club in making facilities available.
5. *Donovan v. Punxatawney Area Sch. Bd.*, 336 F.3d 211 (3rd Cir. 2003): A school district denied a religious group permission to meet during an activity period between homeroom and the first class session. The court held that the activity period was noninstructional time under the Equal Access Act and that the school triggered the creation of a limited open forum when it allowed noncurriculum-related groups to meet before actual classroom instruction began. Denying the religious club access to that forum discriminated against the club because of its religious viewpoint.
6. *Pope v. E. Brunswick Bd. of Educ.*, 12 F.3d 1244 (3rd Cir. 1993): A religious student group was denied permission to organize and brought suit under the Equal Access Act. The school district argued that the Act did not apply because it had implemented a system of school board-sponsored groups rather than student-initiated groups. The court found that student initiation of the group was not required for the Act to apply. Because the school had created a limited open forum by allowing

noncurricular school board-sponsored groups to form, it was required to let the religious group meet.

7. *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002): A school allowed student government-sponsored student groups to form, as well as nonsponsored groups. Students claimed that the school was required to provide nonsponsored groups with access to fundraising opportunities, the yearbook, school bulletin boards and loudspeakers, and other school resources as sponsored groups. The court held that the school was required to provide equal access to any resources that were not funded with public money, including the yearbook, bulletin boards, loudspeakers and fundraising opportunities.

C. Limits of the Equal Access Act

1. The scope of the Equal Access Act is not unlimited. For example, school districts may regulate student groups to the extent necessary to maintain order and discipline on school premises.
2. *Gernetzke v. Kenosha Unified Sch. Dist.*, 274 F.3d 464 (7th Cir. 2001): A high school offered all student groups the chance to paint a mural on the wall of the school. The principal decided to remove an image of a cross from the mural because he feared a lawsuit and conflicts within the school. Other murals were censored, including removal of a swastika and a brand of beer. The court held that the school district had not discriminated against the club because of its religious content but because of concern that inclusion of the cross might cause disruptive conflicts among the students. Because the action was based on safety concerns rather than anti-religious bias, it did not violate the students' First Amendment rights or their rights under the Equal Access Act.
3. *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667 (E.D. Ky. 2003): A school district approved formation of a gay-straight alliance. Students opposed to the alliance staged a protest and a boycott that led the school to suspend all noncurricular student groups. Many of the suspended student groups continued to meet on school grounds, and the court held that the school could not deny the alliance permission to meet at school while other groups were continuing to meet. The court noted that the alliance had not caused a substantial disruption to the school; *rather it was the opponents to the alliance that caused the disruption*. Therefore, refusing to allow the alliance to meet while other noncurricular clubs continued to meet violated the Equal Access Act.

D. Viewpoint Discrimination and the Equal Access Act

1. Although the Equal Access Act was intended to facilitate formation of religious student groups, the Act has also been used by students attempting to form other politically unpopular groups, including gay-straight

alliances. Courts have held banning gay-straight alliances violates the Act where a school district is engaging in viewpoint discrimination. However, districts may ban the alliances where the restriction is based on a valid, educational objective.

2. *East High Gay/Straight Alliance v. Bd. of Educ.*, 81 F. Supp. 2d 1166 (D. Utah 1999): A school district denied a gay-straight alliance group the right to meet on school premises during non-instructional time. The court held that to the extent the school allowed other noncurricular groups to meet during these times, the school was engaging in viewpoint discrimination in violation of the Equal Access Act.
3. *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550 (N.D. Tex. 2004): A school district prohibited a gay-straight alliance group from forming, meeting on school premises, using the school loudspeakers for announcements or distributing fliers in the school. The court found that the district's abstinence-only education policy was a reasonable subject matter limitation and that the restrictions imposed on the gay-straight alliance were intended to prevent students from being exposed to material inappropriate for their age group. For these reasons, the court held that the restrictions did not violate the Equal Access Act or the affected students' First Amendment rights.

E. Boy Scouts of America Equal Access Act

1. The Boy Scouts Equal Access Act was passed as part of the No Child Left Behind Act, based on response to *Boy Scouts of America v. Dale*, 530 U.S.640 (2000). *Dale* held that forcing the Boy Scouts to accept openly gay scouts or group leaders violated their right of expressive association. After *Dale*, school districts felt that allowing the Scouts to meet on school property could violate state or local regulations that prohibited discrimination based on sexual orientation. The Act was passed in part to clarify school districts' obligations with regard to the Scouts.
2. The Boy Scouts Equal Access Act applies to any public educational institution that receives federal funds through the Department of Education. It prohibits any school with an open or limited open forum from denying access to any youth group associated with the Boy Scouts of America or any other group defined as a "patriotic society" by the U.S. Code, based on the group's membership or leadership criteria, or oath of allegiance to God or country. 20 U.S.C. § 7905. The Act was expanded to cover all state or local government entities that receive federal funding by the Support Our Scouts Act of 2005.
3. The Act requires schools to provide access to school facilities for meetings before, during and after school. It also requires equal access to school activities and methods of communication and recruitment on terms that are

no less favorable than the most favorable terms provided to one or more outside youth or community groups.

4. The Boy Scout Act is broader than the Equal Access Act in that it is not limited to secondary schools or to student-initiated meetings. The Boy Scout Act defines a “youth group” as any group or organization intended to serve young people under age 21.
5. The Boy Scout Act is also broader than the Equal Access Act and First Amendment protection in that it eliminates school district discretion to establish viewpoint-neutral purposes of the forum. The Boy Scout Act is triggered simply by granting access to any outside youth or community group.
6. The Act does, however, distinguish between allowing youth groups to use school facilities and requiring a school to sponsor a youth group such as a Scout troop. Under the Act, no school is required to sponsor any group officially affiliated with the Scouts or any other youth group.
7. The Boy Scouts may be charged a fee for using school facilities, but the fee must be on terms no less favorable than the most favorable terms provided to one or more outside youth or community groups.

IV. Rental Policies for School Facilities

A. Relevant Federal and State Law

1. First Amendment to the United States Constitution. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. The Supreme Court has historically applied a three-part test, commonly referred to as the *Lemon* test, to determine whether a particular government action violates the establishment clause. For an action to comply with the establishment clause, it must (1) have a secular purpose, (2) not, as its principal or primary effect, advance or inhibit religion, and (3) not foster excessive government entanglement with religion.
2. The Wisconsin Constitution
 - a. Article 1, § 3. Every person may freely speak . . . and no laws shall be passed to restrain or abridge the liberty of speech[.]
 - b. Article 1, § 18. The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed . . . nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

- c. Article 1, § 24. Nothing in the constitution shall prohibit the legislature from authorizing, by law, the use of public school facilities by civic, religious or charitable organizations during non-school hours upon payment by the organization to the school district of reasonable compensation for such use.
3. Wisconsin Statute § 120.13(17). A school board of a common school district may grant the temporary use of school grounds, buildings, facilities, or equipment, upon such conditions, including fees not to exceed actual cost, as determined by the school board, to any responsible person for any lawful, non-school purpose if such use does not interfere with the use for school purposes or school related functions.

B. Forum Analysis

1. For purposes of a free speech analysis, the Supreme Court has defined four types of forums:
 - a. A public forum is an area which has traditionally been open for public speech. Examples of public forums include sidewalks and public parks. In public forums, the government has little latitude to regulate speech. If the government wishes to ban speech in a public forum, it must demonstrate a compelling state interest in doing so, and the restrictions must be narrowly drawn to achieve that interest.
 - b. A non-public forum is an area which is traditionally not open for public discourse, and which is preserved by the government for its intended purposes. Schools are generally recognized as non-public forums, except in areas that have been designated a limited public forums.
 - c. A designated public forum is created when a non-public forum is opened for all types of expressive activity. In a designated public forum, the government has the same limited ability to regulation expression as in a traditional public forum.
 - d. A limited public forum is created when a non-public forum is opened for specified types of expressive activity. The types of expression to which the forum has been opened will be determined not only by reference to the written policies of a public body, but also by reviewing the actual practices in place with respect to public facilities. In a limited public forum, a public body may restrict the expression that takes place within the forum so long as the restrictions (1) do not discriminate against speech on the basis of viewpoint and (2) are reasonable in light of the purpose served by the forum.

2. Reasonable time, place, and manner restrictions may serve as constitutionally appropriate means of regulating expressive activities, short of a ban on such activities.

C. Access by Community Groups

1. The school board has broad discretion to control access to and use of school property or events because schools are not traditional public forums. However, if a school district determines it will open its schools to limited public access, it may not do so in a discriminatory manner.
2. Viewpoint Neutrality. If a school district creates a limited public forum, it must administer the forum in a viewpoint-neutral manner. This means that a school must give individuals and organizations access to school facilities to speak about the same subject matter irrespective of the chosen ideologies and viewpoints, including religious ones.
 - a. In *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), a school policy allowed use of school facilities by community groups relating to the welfare of the community but prohibited use of school facilities by religious groups. Pursuant to the policy, the school denied the request of a Christian organization to use the facilities to conduct religious instruction on issues of morals and values. It conceded, however, that it would have allowed another group to conduct the instruction on the same topic but without a religious perspective. The Supreme Court held that the policy violated the First Amendment because it discriminated based on viewpoint. In doing so, the Court distinguished the subject matter of the activity, instilling morals and values, from the religious viewpoint.
 - b. In *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), a law school's Christian student organization was stripped of its status as an official student organization because it prohibited students who engaged in homosexual conduct from becoming members. The court granted a preliminary injunction restoring its status because the court found it was likely that the school violated its First Amendment rights. The court held that although a school policy prohibiting discrimination by student organizations was viewpoint-neutral on its face, the policy had not been applied in a viewpoint-neutral manner. The court noted that the Christian student organization was the only group that had been stripped of its official status even though many groups limited membership based on impermissible factors.
 - c. In *DeBoer v. Village of Oak Park*, 267 F.3d 558 (7th Cir. 2001), a municipal use policy for public facilities identified a "civic program or activity" as a permissible use. The court held that

denying access to the facilities on the grounds that prayer, hymns and Bible transformed an event from civic to religious was viewpoint discrimination, as these activities were used to convey the group's point of view on civic matters. The court further held that the municipality would not engage in viewpoint discrimination if it denied permission to conduct worship services that had no relationship to a specific civic purpose.

3. Establishment Clause Violations. School districts must also consider whether allowing a religious group to use school facilities is an endorsement of religion that violates the Establishment Clause. A school endorses religion when it conveys or attempts to convey a message that religion or a particular religious belief is favored or preferred. There is a distinction between government speech endorsing religion, which is prohibited, and private speech endorsing religion, which is protected by the free speech and free exercise clauses.
 - a. When a district allows a group or individual to use school facilities to convey a religious message, it must attempt to dissociate itself from the religious activity or risk an Establishment Clause violation.
 - i. In *Warnock v. Archer*, 443 F.3d 954 (8th Cir. 2006), the court upheld contempt sanctions against a school district that allowed prayers at an unofficial baccalaureate service in violation of an outstanding injunction. The court stated that the district's actions violated the Establishment Clause because district employees were involved in nearly every aspect of the baccalaureate service, including planning and orchestrating the prayers themselves.
 - ii. In *Lassonde v. Pleasanton United School District*, 320 F.3d 979 (9th Cir. 2003), a court held that a district was required to prevent a student from delivering a proselytizing valedictory speech. The court stated that even if the ceremony was a public or limited public forum and the school could conduct the ceremony as to avoid the appearance of entanglement with the religious message, it had no means of preventing the coerced participation of other attendees.
 - b. A school district must exercise more caution when allowing use of school facilities by community groups during the school day.
 - i. Because people are more likely to interpret activities conducted during the school day on school grounds as being endorsed by the school, these activities are more likely to constitute a violation of the Establishment Clause.

- ii. In *Doe v. Porter*, 370 F.3d 558 (6th Cir. 2004), a school board permitted students and staff from a Christian college to conduct a voluntary Bible-study course in an elementary school during school hours. The court found that, although the program focused on instilling moral values, the primary purpose was to inculcate Christian beliefs. The court held that because an objective observer of the program would conclude that the school district was endorsing Christianity, the program violated the Establishment Clause.

- 4. Participation by school staff members.
 - a. A school may not prohibit staff participation in community group meetings based on the viewpoint expressed by the group.

 - b. In *Wigg v. Sioux Falls School District*, 382 F.3d 807 (8th Cir. 2004), a teacher was prohibited from participating in the meetings of a religious community group that met at her school. The court held that the ban was discriminatory because it impermissibly limited those who could attend the group meetings based on the viewpoint of the speech, and was an unconstitutional restriction on the teacher's rights under the Free Speech and Free Exercise clauses.

- 5. Assessment of Rental Fees.
 - a. A school may not discriminate against a church or other religious organization in assessing rental fees.

 - b. In *Fairfax Covenant Church v. Fairfax County School Board*, 17 F.3d 704 (4th Cir. 1994), a church was treated differently than other non-profit organizations in the assessment of rental fees. Under the school board's policy, the church was treated the same as other non-profit organizations for the first five years, but was then charged at an increasing rental rate designed to reach the rate charged to commercial users by the ninth year. The court held that the policy discriminated against religious speech in violation of the free speech and free exercise clauses. The court awarded damages in the amount the church had paid rental fees above the standard non-profit rental fee.