Facilities Use

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Quick Guide to Regulating Community Use of School Facilities

A. School facilities are not automatically open for public use.

In the words of the United States Supreme Court, “[N]owhere [have we] suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited expressive purposes.” Grayned v. City of Rockford, 408 U.S. 104, 117-18 (1972).

B. School officials can intentionally open school facilities for public use through policy or past practices.

School officials can open school facilities for public use—in other words, create a “public forum”—by opening facilities to the public for certain purposes through the policies or practices of the district or an individual campus.

Whether a particular forum is open to the public is determined by examining the history of the forum:

1. Identify the forum. A forum is either a place for communication (such as a classroom or cafeteria) or a means of communication (such as a school newspaper or campus mailboxes).

2. Check written policies and regulations for the district and the relevant campus. To ensure uniform practices across the district, TASB recommends adopting explicit policies at GKD(LOCAL), regarding community use of district facilities, and FNA(LOCAL) and FNAB(LOCAL), which respectively govern student distribution of literature and use of district facilities by student groups. In addition, districts are required by state law to adopt a local policy governing certain aspects of student expression, which can be found at FNA(LOCAL).

3. Examine the history of the particular forum. What uses have been permitted in the past?

4. Decide whether the district has intentionally opened a forum for the requested use.

C. A school’s ability to regulate expression depends on the type of “public forum” it has created.

1. Limited public forum—A school or school district can designate the equivalent of a traditional public forum (like a park or sidewalk) where any viewpoint on any topic must be allowed. Typically, however, when a school or school district opens a forum for public use, it does so to permit certain topics or uses, but not others. This is called a “limited public forum.” Within a limited public forum, limits on expression must be “viewpoint neutral” and reasonable in light of the purpose of the forum. The district may also impose reasonable
“time, place, and manner” restrictions, as long as these restrictions are unrelated to the viewpoints expressed by potential users. See generally Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788 (1985) (holding that government did not violate First Amendment by limiting participation in charity drive in order to minimize disruption to the federal workplace, to ensure the success of the fundraising effort, or to avoid the appearance of political favoritism without regard to the viewpoint of the excluded groups).

**Equal Access Act**—When considering a request from secondary school students to meet on campus, school officials must also consider the Equal Access Act. Under the Act, a school that has created a “limited open forum” for use by noncurriculum related student groups may not deny access to students wishing to meet as part of the forum on the basis of the content of the students’ speech. Equal Access Act, 20 U.S.C. §§ 4071-4074 (1984).

2. **Nonpublic forum**—If a school has not opened a public forum, the school remains a nonpublic forum. Although limits on expression must be reasonable and viewpoint neutral even within a nonpublic forum, a school district will have greater discretion to control the content of speech within such a forum. This is particularly true in light of the educational mission of the public schools. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (“A school need not tolerate student speech that is inconsistent with its ‘basic educational mission,’ even though the government could not censor similar speech outside the school.”) (citations omitted).

D. **School officials’ decisions must be “viewpoint neutral.”**

District decisions about who may use a limited public forum must be “viewpoint neutral.” In other words, once a district has opened its doors to community use, the district may not pick and choose among the views to be expressed in its limited public forum. Unless the district can point to some other reason to exclude a group, such as a safety reason, the fact that a group is controversial or the district disagrees with the message of the group will not suffice as a legal reason to keep a group off school grounds. Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

E. **When in doubt . . . call your attorney!**

Guessing incorrectly could lead to a Section 1983 federal lawsuit alleging a violation of the requestor’s First Amendment rights. The school district could be sued for injunctive relief and monetary damages, as well as attorneys’ fees. Individual school officials will have qualified immunity from liability unless they reasonably should have known that their actions were illegal in light of the known facts and existing law. Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992); Chiu v. Plano Indep. Sch. Dist., 339 F.3d 273 (5th Cir. 2003).
I. Community Use of School Facilities

A. School officials may open school facilities for community uses.

1. A school district may create a limited public forum. A school district, like the owner of private property, may limit use of its property to purposes for which it is dedicated; a school district need not allow after-hours use of its property. Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993). A school district may, however, choose to open its facilities for specified purposes.


Determining the intent of a school district can prove difficult in practice, however. A school district cannot open a forum unintentionally. See, e.g., Full Gospel Tabernacle v. Cmty. Sch. Dist. 27, 979 F. Supp. 214 (S.D.N.Y. 1997) (mem.), aff’d, 164 F.3d 829 (2d Cir. 1999) (per curiam) (concluding that a school did not open a limited public forum when a secretary mistakenly granted two permits for religious worship in contravention of district policy). But a school district that has knowingly permitted similar uses in the past and has not taken steps to prevent similar uses in the future may be unable to deny access to a group seeking access to school facilities. See, e.g., Liberty Christian Ctr., Inc. v. Bd. of Educ. of the City Sch. Dist. of the City of Watertown, 8 F. Supp. 2d 176 (N.D.N.Y. 1998) (rejecting school district’s argument that district was justified in denying access to religious group because past religious uses had been contrary to policy). The question of whether a school district has opened a forum broad enough to permit a particular form of expression must be resolved on a case-by-case basis. See Searcey v. Crim, 815 F.2d 1389, 1392-93 (11th Cir. 1987) (“Determining what type of public forum exists requires development of the relevant facts that bear upon the character of the property at issue.”).

3. Once a school district has opened a limited public forum, the school may not pick and choose among the views to be expressed. For example, a school violated the First Amendment by permitting committee members to distribute literature opposed to a bussing scheme while denying access to a group in favor of the plan. Bonner-Lyons v. Sch. Comm. of Boston, 480 F.2d 442 (1st Cir. 1973).
In addition to this First Amendment protection, the federal Boy Scouts of America Equal Access Act ensures the Boy Scouts continued access to school facilities that have been opened for community use. The statute provides that if a school operates a limited open forum, it may not exclude the scouts based on the organization’s membership or leadership criteria or oath of allegiance to God or country. The statute does not require schools to sponsor the Boy Scouts, however. Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905 (2002).

4. **Within a limited public forum, limits on expression must be viewpoint neutral.** Even if a district has opened a limited public forum for community use, the district still has some measure of control over the activities of groups meeting on campus. Within a limited public forum, for example, the district can prohibit or regulate speech that is likely to cause a material and substantial disruption of school operations. In addition, a district can impose regulations on behavior, such as prohibiting the alteration of school facilities. The district may not, however, apply its regulations unevenly, depending on the views expressed by the groups meeting on campus. For example, many districts require parental permission before allowing elementary-aged students to participate in community groups that meet on campus after school. Such a regulation is viewpoint neutral and should be applied uniformly to all groups; it should not be applied to some groups and not others, like to a Bible study but not to a Scout meeting.

A second example of a viewpoint-neutral limitation would be one that permits use by nonprofit groups but disallows commercial use of school facilities. It would even be permissible to adopt a policy that prohibits commercial use but makes an exception to permit use for private academic tutoring. Under such a policy, a district could permit a local teacher to offer violin lessons in the band room after school but refuse to allow a teacher to sell cosmetics in the teachers’ lounge after school.

5. **School officials may not dedicate school property to community use in a way that might interfere with the primary educational purpose of the facilities.** For example, a court declared void a school district’s long-term lease of a football stadium to a corporation. The lease effectively divested the district of its exclusive right to manage and control the property, including its right to determine when the district could use school property for school purposes. *River Rd. Neighborhood Ass’n v. S. Tex. Sports*, 720 S.W.2d 551 (Tex. App.—San Antonio 1986, writ dism’d). *See also Carter v. Lake City Baseball Club*, 62 S.E.2d 470 (S.C. 1950) (invalidating school’s lease of baseball field to professional baseball team because lease denied students use of field for two months of school year).
B. Schools may open school facilities for religious uses.

1. Elementary and secondary schools are not automatically public forums where religious views may be freely aired. The public has no constitutional right under the Free Exercise Clause of the First Amendment to gain access to school facilities. See *Brandon v. Bd. of Educ. of Guilderland Cent. Sch. Dist.*, 635 F.2d 971 (2d Cir. 1980) (opining that a public high school is not a public forum where religious views of the public can be freely expressed), *abrogated by the Equal Access Act as recognized in Bd. of Educ. of Westside Cmty. Schs. v. Mergens ex rel. Mergens*, 496 U.S. 226 (1990). A school may, however, choose to open a limited public forum that will permit religious expression.

2. A school district does not violate the Establishment Clause simply by permitting religious groups to use school facilities on the same terms as other groups. When opening facilities for religious use, a school must balance individuals’ First Amendment free speech and freedom of association rights with the school’s need to avoid an unconstitutional establishment of religion. A school balances these competing interests by granting access to religious groups to the same extent it grants access to other groups for purposes that fall within the scope of the school’s limited public forum. See, e.g., *Moore v. City of Van*, 238 F. Supp. 2d 837 (E.D. Tex. 2003) (concluding that city violated First Amendment by excluding religious uses from open forum for facility use).

For example, a school district violated the First Amendment by enacting a policy requiring higher fees from religious groups than from other community groups. The district had adopted a fee schedule applicable only to churches that required progressively higher rental fees to discourage long-term use of school facilities. *Fairfax Covenant Church v. Fairfax Cnty. Sch. Bd.*, 17 F.3d 703 (4th Cir. 1994). See also *Resnick v. East Brunswick Twp. Bd. of Educ.*, 389 A.2d 944 (N.J. 1978) and *Wallace v. Washoe Cnty. Sch. Dist.*, 818 F. Supp. 1346 (D. Nev. 1991) (both reasoning that religious groups should be allowed access on the same terms as other nonprofit groups). *But see Pratt v. Arizona Bd. of Regents*, 520 P.2d 514 (Ariz. 1974) (noting that permitting religious services on a permanent basis or for less than a fair market rental fee would be unconstitutional).

3. A school district must permit expressive activity, regardless of any religious viewpoint, if the activity falls within the same subject matter of activities the district has permitted in the past as part of a limited public forum. For example, a church sued a school district after being denied the use of a classroom to show a six-part film series on Christian family values. The Supreme Court acknowledged that public schools are not traditional public forums, and schools may refuse access to all people during non-instructional hours. If, however, a school chooses to open a limited public forum, the school must treat all similarly situated groups the same.
Therefore, because the school would have permitted a secular film on family values, the school had to allow films regarding family values based on a religious viewpoint. Finally, the Court held that the proposed use would not violate the Establishment Clause because the film would not be shown during school hours, would not be sponsored by the school, and would be open to the public. *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). See also *Liberty Christian Ctr., Inc. v. Bd. of Educ. of the City Sch. Dist. of the City of Watertown*, 8 F. Supp. 2d 176 (N.D.N.Y. 1998) and *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366 (3rd Cir. 1990) (both concluding that districts’ failures to grant access to religious groups were unconstitutional discrimination).

4. **Is religion a subject or a viewpoint?** Once school facilities are open for community use, schools may not prohibit the expression of religious viewpoints on otherwise permissible subjects. With this in mind, the United States Supreme Court struck down a school district policy that opened school facilities for “social, civic, and recreational meetings” but prohibited “religious uses.” The school district applied this policy to prohibit use by the Good News Club, a community-based Christian youth group open to children between the ages of six and twelve. The club argued that its meetings taught moral values from a religious viewpoint, against which the school could not discriminate. The school argued that the club meetings were a religious activity, which the school could exclude as a subject matter from its forum. The Court agreed with the club. The club had requested to use school facilities for a permissible purpose—teaching morals and character development—and the school rejected the request based solely on the club’s religious viewpoint. The Court rejected the idea that the club meetings constituted mere religious worship (apart from moral teachings). The Court also concluded that permitting the meetings on campus would not violate the Establishment Clause, even though the students involved were very young. In the Court’s opinion there was no danger of coercion because the meetings were not school-sponsored and students’ parents—not the children themselves—decided whether to attend. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). See also *Child Evangelism Fellowship of Minnesota v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, 1004 (8th Cir. 2012) (holding that neither the Good News Club nor judicial precedent have changed since Milford, the meetings are not school-sponsored, and take place on school campuses as part of an open forum for community use); *Campbell v. St. Tammany Parish Sch. Bd.*, 231 F.3d 937 (5th Cir. 2000) (per curiam) (denying rehearing *en banc* after panel upheld school district policy opening a limited open forum for “civic and recreational” meetings, but excluding partisan political activity, for-profit fund-raising, and “religious services”), *vacated and remanded*, 533 U.S. 913 (2001); *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207 (2d Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998) (ruling that a school district was not obligated to grant a request to hold regular religious services on campus).
C. Schools may open facilities for political uses.

1. Once a school district opens a public forum for community use, the district may not discriminate based on the viewpoint promoted by a group seeking access. See *Knights of the Ku Klux Klan v. East Baton Rouge Parish Sch. Bd.*, 578 F.2d 1122 (5th Cir. 1978) (issuing a temporary injunction against school district’s selective denial of access to designated public forum based on group’s racially discriminatory views). See also *Local Org. Comm., Denver Chapter, Million Man March v. Cook*, 922 F. Supp. 1494 (D. Colo. 1996) (mem.) (holding school district’s denial of permit to use school auditorium on ground that proposed use was not in the best interests of the school was impermissible viewpoint discrimination absent showing that rally would cause school disruptions).

2. Schools may, however, deny access to a public forum for legitimate reasons unrelated to the speaker’s viewpoint. See, e.g., *Nationalist Movement v. City of Cumming*, 913 F.2d 885 (11th Cir. 1990) (school could refuse use of its parking lot out of concern that assembly in parking lot would disrupt previously scheduled basketball tournament), aff’d sub nom; *Forysth County v. Nationalist Movement*, 505 U.S. 123 (1992) (invalidating ordinance that permitted county to vary fee for use based on estimated cost of maintaining order); *Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshippers*, 735 F. Supp. 745 (M.D. Tenn. 1990) (holding school could deny KKK use of gym, which was already reserved for basketball tournament because high school gymnasium was public forum leased on “first come, first served” basis).

3. Use of a school building as a polling place does not constitute opening a forum for all election-related communications. Texas law provides that school campuses may be used as election polling places. Tex. Elec. Code §§ 43.001-.034. Designation of a school campus as a polling place does not, standing alone, create a public forum for electioneering. *Embry v. Lewis*, 215 F.3d 884 (8th Cir. 2000); *United Food & Commercial Workers v. City of Sidney*, 174 F. Supp. 2d 682 (S.D. Ohio 2001). Generally, electioneering, defined as the posting, use or distribution of political signs or literature, is prohibited within 100 feet of the entrance to a polling site. Tex. Elec. Code § 61.003. A district may not prohibit electioneering beyond the 100-feet marker, but it may adopt reasonable time, place, and manner regulations. Tex. Elec. Code § 61.003(a-1). It is, therefore, appropriate to adopt a permissive distribution policy (allowing legal distribution of campaign materials in appropriate areas of campus) for the period of time the campus is being used as a polling site.
Distribution of campaign materials on campus is complicated by the fact that the Texas Election Code prohibits a school district from using district funds to distribute campaign materials, and the Ethics Commission has interpreted use of school facilities (including placing flyers on a table in the teachers’ lounge) to be a prohibited use of district funds. Tex. Ethics Comm’n Op. No. 443 (2002). Campus mailboxes and other means of mail distribution (potentially including e-mail) may not be used to distribute campaign materials. Tex. Elec. Code § 255.0031. For more information, see TASB Legal Services’ memo Campaign Speech During Elections.

II. Community Access to Forums for Communication

A. Advertisements are not necessarily an open forum.

1. By policy, school districts can clarify that advertising can be rejected if reasonable and viewpoint neutral. For example, an organization promoting materials called “Jesus Tattoo” asked to purchase advertising space on the Lubbock ISD jumbotron for high school football games. The superintendent denied the advertisement for two reasons. First, in light of the holding in Doe v. Santa Fe Independent School District, the advertisement contained proselytizing religious content in violation of the First Amendment’s Establishment Clause. Second, the advertisement prominently displayed tattoos, which are inappropriate for a school setting. The organization filed suit against the district in federal court claiming that the district’s actions and policies violated the First and Fourteenth Amendments to the United States Constitution. The U.S. District Court granted Lubbock ISD’s motion for summary judgment and dismissed the case, holding that the district’s jumbotron was a limited public forum and that the district’s rejection of the advertisement was reasonable in light of the purpose of the forum and the venue in which the forum was located. The court also upheld the district’s policy GKB(LOCAL) finding that it was not unconstitutionally vague. The Court was satisfied that the policy sufficiently restrained the superintendent so as to prevent abuse by “unfettered discretion.” Plaintiffs appealed to the U.S. Court of Appeals for the Fifth Circuit, and the Fifth Circuit issued an opinion affirming the decision of the district court. Little Pencil, LLC v. Lubbock Indep. Sch. Dist., 616 F. App’x 180 (5th Cir. 2015) (per curiam). See also DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958 (9th Cir. 1999) (upholding school district’s refusal to sell ad with text of Ten Commandments), cert. denied, 529 U.S. 1067 (2000); Planned Parenthood, Inc. v. Clark County Sch. Dist., 941 F.2d 817 (9th Cir. 1991) (en banc) (holding school newspaper did not open a public forum by selling advertising space merely to fund the project, and school’s reason for declining an ad from Planned Parenthood about birth control was reasonable and viewpoint neutral). For more information, see TASB Legal Services’ memo Advertising in Public Schools.
2. **Displays or banners endorsed and controlled by the school district may be considered government speech rather than advertisements.** The government does not unconstitutionally discriminate on the basis of viewpoint when it chooses to advance permissible goals, even if advancing those goals necessarily discourages alternative goals. The government may exercise its freedom to express its views, even when it receives assistance from private sources for the purpose of delivering a government-controlled message. See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015) (Texas specialty license plate designs were government speech, thus state did not violate nonprofit organization’s free speech rights by denying its application for design with Confederate flag.) Consequently, certain banners or recognitions shared by a school district may be viewed as government speech rather than private speech. See, e.g., *Mech v. Sch. Bd. of Palm Beach County, Fla.*, 806 F.3d 1070 (11th Cir. 2015) (School district did not violate business owner’s free speech rights by removing sponsorship banners from school property because school endorsed the banners and exercised substantial control over messages conveyed by banners).

B. **Displays may be government speech or a forum for communication.**

1. **A display selected by the school district may be viewed as a form of government communication.** In assessing whether speech constitutes government speech as opposed to private speech, the Supreme Court has considered at least three factors: whether government has historically used the speech in question “to convey state messages,” whether that speech is “often closely identified in the public mind” with the government, and the extent to which government “maintain[s] direct control over the messages conveyed.” *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017) (quoting *Walker*, 135 S. Ct. at 2246–49). For example, when the City of Boston declined to display a Christian flag as part of its city hall flag display, the court applied the Supreme Court factors and concluded that the city’s selection and presentation of flags constituted government speech. The city had used its flag display to communicate, the flags would have been attributed to the city, and the city had effectively controlled which flags have flown at city hall. Consequently it was reasonable and viewpoint-neutral for the city to decline to avoid the appearance of endorsing a particular religion. *Shurtleff v. City of Boston*, 337 F. Supp. 3d 66 (D. Mass. 2018).

2. **The purpose of a display or art installation with contributions from students or the community should be defined in advance.** Similar issues arise with student or community displays on school grounds. The legal question is whether the speech remains private, as part of a limited public forum, or is school sponsored, as a school-directed addition to the campus. For example, upon reopening Columbine High School, school officials organized a project in which students and others would decorate tiles to be installed on school walls. School officials
directed participants not to include material that would memorialize the shootings, including the date, names of victims, and religious content. Family members of victims claimed these restrictions violated their free speech rights. The Tenth Circuit disagreed. The court held that the tile project constituted school-sponsored speech because the tiles would be permanently affixed and the school was significantly involved in the creation, funding, and supervision of the project. The school’s restrictions were upheld because they were reasonably related to the legitimate pedagogical concern of avoiding religious controversy. 

_Fleming v. Jefferson County Sch. Dist. R-1_, 298 F.3d 918 (10th Cir. 2002), _cert. denied_, 537 U.S. 1110 (2003). See also _Gernetzke ex rel. Bezotte v. Kenosha Unified Sch. Dist. No. 1_, 274 F.3d 464 (7th Cir. 2001) (upholding a principal’s refusal to permit a Bible Club to paint a cross as part of mural on school walls); _Anderson v. Sch. Bd. of the Mexico Acad. & Cent. Sch._, 186 F. Supp. 2d 193 (N.D.N.Y. 2002) (denying injunction to force school board to include bricks with Christian messages in walkway to be constructed in front of a high school).

3. **Holiday displays must meet requirements for use of public funds and the Establishment Clause.** The Texas attorney general has opined that a local government may expend public funds to erect a holiday display if the display serves a valid public purpose of the local governmental entity, adequate controls are established on the use of funds, and the controls ensure the public purpose is fulfilled. In addition, in considering whether to expend funds for holiday lights and decorations, if the decorations include a religious aspect, the local governmental entity should further consider whether the particular display complies with the United States Supreme Court’s Establishment Clause jurisprudence. Two Supreme Court cases provide Establishment Clause standards specifically concerning holiday displays and are informed by recent Establishment Clause interpretations. See generally _Cnty. of Allegheny v. Am. Civil Liberties Union_, 492 U.S. 573 (1989), abrogated on other grounds by _Town of Greece v. Galloway_, 134 S. Ct. 1811 (2014); _Lynch v. Donnelly_, 465 U.S. 668 (1984). Applying Supreme Court precedent, a court would likely conclude that a passive, secular display of holiday lights and decorations would not violate the Establishment Clause. Tex. Att’y Gen. Op. No. KP-116 (2016).

C. **Online communications may also establish forums for public use.**

1. **District-operated social media may create a forum.** To qualify as a forum, the space in question must be owned or controlled by the government. Although a school district does not own the Internet or a social media application, courts have indicated that a forum for communication that is under government control may still constitute a public forum. “[A] space may be a forum based on government control even absent legal ownership . . . . This requirement of governmental control, rather than complete governmental ownership, is not only consistent with forum analysis’s
focus on ‘the extent to which the Government can control access’ to the space and whether that control comports with the First Amendment, but also better reflects that a space can be ‘a forum more in a metaphysical than in a spatial or geographic sense.’ Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 566 (S.D.N.Y. 2018) (citations omitted) (applying forum analysis to @realDonaldTrump Twitter account).

2. **Filters on district-operated Internet access may be viewed as a forum.** In some circumstances, a court may view a school district’s provision of community and student access to the Internet as nonpublic form. As such, access to the nonpublic forum may be based on subject matter and speaker identity, but only to the extent the distinctions are viewpoint neutral and reasonable in light of the purpose served by the forum. If a school district’s internet filter system discriminates based on viewpoint, the filter system will violate the First Amendment unless it is narrowly designed to serve a compelling state interest. Parents, Families, & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist., 853 F. Supp. 2d 888 (W.D. Mo. 2012) (concluding that filter software specifically designed to block access to information about homosexuality on the basis of religion rather than sexual content was not viewpoint neutral).

D. **Distribution of literature by nonstudents: Adopt and follow a clear policy.**

1. **Nonschool literature:** Nonschool literature refers to any materials over which the district does not exercise control. Although the word “materials” might be a more accurate term, the word “literature” is used because it is the term used in the relevant court cases. This term includes printed materials, such as handbills, flyers, book covers, signs, or posters, as well as other materials, such as electronic files, pictures, or other items like pencils or t-shirts bearing messages. Examples of nonschool literature might include pamphlets about an upcoming arts festival, invitations to a church social event, flyers advertising guitar lessons, or copies of the Bible.

2. **Local policy:** A school district may permit nonstudents to distribute nonschool literature on school grounds. The best way for a school district to regulate this practice is by adopting and enforcing an explicit local policy at GKDA(LOCAL). See TASB Policy Service’s [Distribution of Nonschool Materials on School Property](#).

3. **Limited public forum:** As with use of facilities, a district’s ability to regulate distribution of literature depends in part on the type of public forum it has created. For example, a school district may adopt a policy FNAA(LOCAL) that permits students to distribute nonschool materials to their peers. The district may choose, however, to adopt a policy GKDA(LOCAL) that denies access for
distribution of nonschool materials by community members. *See Hedges v. Wauconda Cnty. Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993) (holding that by allowing students to distribute materials, a school does not obligate itself to allow nonstudents similar distribution rights). Such a distinction is viewpoint neutral: it focuses on the identity of the potential distributors, not the viewpoints they will espouse. Under such policies, a student could pass out invitations to an event at her church, but an adult youth group leader from the church could not come on campus and pass out invitations to the same event.

4. **Viewpoint neutrality:** Once a limited public forum for distribution of nonschool literature has been opened, district decisions about what may be distributed must be viewpoint neutral. For example, if a district sends students home with flyers about a summer enrichment program operated by the John Birch Society, the district cannot refuse to send home flyers about a summer enrichment program sponsored by the American Civil Liberties Union (ACLU) based solely on the viewpoint of the ACLU.

5. **“Time, place, and manner” restrictions:** Even if a district opens a limited public forum for distribution of nonschool literature, the district can impose reasonable “time, place, and manner” restrictions on distributors. For example, a school district could adopt a “time” restriction that allowed nonstudents to disseminate nonschool materials in the public schools only one day each year. *Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274 (4th Cir. 1998). Or a campus could adopt a “place” restriction that required all materials to be placed on a particular table in the front office. Or a district could impose a “manner” restriction that required all remaining materials to be picked up after a certain number of days. Another common example of a reasonable “time, place, and manner” restriction arises in the elementary setting, where a school might permit community members to stack materials in a specified location but decline to have district staff facilitate distribution by handing the materials to students or placing materials in students’ backpacks.

6. **Restrictions on content:** Even if a district has opened a limited public forum for distribution of nonschool materials, the district still has some control over the content of the materials that can be distributed on campus. A district can prohibit certain categories of speech that courts have determined do not qualify for First Amendment protection. For example, the district can prohibit or regulate speech that is obscene or is likely to cause a material and substantial disruption of school operations.

7. **Prior review:** Whether a district can require prior review depends on the circumstances of the distribution. If distribution will occur during the school day or at a school event where students are likely to be present, then the district can impose a prior review requirement. For example, a community member may be
required to seek prior review of handbills to be distributed at a school-sponsored extracurricular event, such as a football game. The Fifth Circuit Court of Appeals has indicated, however, that a district may not impose such a requirement at school-sponsored events that take place after hours and are intended for adults rather than students. See Chiu v. Plano Indep. Sch. Dist., 339 F.3d 273 (5th Cir. 2003) (rejecting prior review requirement before parents distributed materials critical of the district’s math curriculum at district-sponsored “Math Nights” for parents). Consequently, a school district should not require a community member to seek prior review of handbills to be distributed at a school-sponsored open house for parents. Even if prior review is not required, however, the district’s other policies concerning distribution of nonschool literature—such as limitations on content and time, place, and manner restrictions—still apply.

8. **Requiring a disclaimer**: A school may take steps to avoid an appearance of school sponsorship of nonschool materials. For example, a school may require a disclaimer statement to be posted or included with materials. Muller ex rel. Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530 (7th Cir. 1996).

### III. Student Use of School Facilities

#### A. Schools may allow student groups to meet on campus.

1. **Student groups are groups run by students, for students.** From a legal perspective, school districts typically receive requests for two different types of after-hours nonschool use. One type of use is referred to as “community use,” described above and governed by policy GKD; the other is referred to as “student use,” described below and governed by policy FNAB.

   “Student use” occurs when a district permits noncurriculum-related groups organized by and for students to make use of school facilities after hours. To qualify as a “student group,” a group must be operated by students; neither adults nor children who are not students at the school may regularly attend or lead the group. 20 U.S.C. § 4071(c). For example, a Boy Scout troop, led by a Scout’s parent, does not qualify as a “student group,” even though its meetings are attended primarily by school-aged children. Instead, the Boy Scouts’ meetings are a community use, governed by policy GKD. On the other hand, noncurriculum-related groups led by students, for students (such as a Bible study, chess club, or scuba club) constitute student groups whose use of school facilities is governed by policy FNAB.

   If a district permits nonschool-sponsored student use of school facilities, all of the First Amendment principles described above apply. In addition, when considering a request from secondary school students, school officials must consider the Equal Access Act.
2. **The Equal Access Act prohibits discrimination against student groups based on the content of the students’ speech if other noncurriculum-related groups are allowed to meet on campus.** The Equal Access Act, 20 U.S.C. §§ 4071-4074 (1984), states: “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 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). A “limited open forum” exists whenever a public secondary school “grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.” 20 U.S.C. § 4071(b).

3. **The Equal Access Act applies whenever a secondary school permits even one noncurriculum-related student group to meet on campus.** When a school allows even one noncurriculum-related student group to meet, the obligations of the Equal Access Act are triggered, and the school cannot deny other clubs access to meet on school grounds during noninstructional time based on the content of their speech. Therefore, a school that had several noncurriculum-related groups—including a scuba club, a chess club, and a service club—violated the Equal Access Act when it refused to recognize a Christian student group. *Bd. of Educ. of Westside Cmty. Schs. v. Mergens ex rel Mergens*, 496 U.S. 226 (1990).

4. **“Noncurriculum related” means not directly related to the body of courses offered by a school.** A group is directly related to the school’s curriculum if the subject matter of the group is actually taught or will soon be taught in a regularly offered course, if the subject matter of the group concerns the body of courses as a whole, if participation in the group is required for a particular course, or if students get academic credit for participating in the group. *Van Schoick v. Saddleback Valley Unified Sch. Dist.*, 104 Cal. Rptr. 2d 562 (Cal. Ct. App. 2001) (refusing to conclude that service clubs were curriculum related even though community service was required for graduation), *review den.* (May 16, 2001).

5. **The Act allows students to meet during noninstructional time.** Noninstructional time means “time set aside by the school before actual classroom instruction or after actual classroom instruction ends.” 20 U.S.C. § 4072(4). If other noncurriculum-related student groups are permitted to meet during the lunch period—which qualifies as “noninstructional” time under the Equal Access Act—religious groups must be allowed to do the same. *Ceniceros ex rel. Risser Ov. Bd. of Trs. of the San Diego Unified Sch. Dist.*, 106 F.3d 878 (9th Cir. 1997).
6. A group protected by the Equal Access Act must get access to school facilities (like the public address system, bulletin boards, and club fairs) on an equal basis with other student groups. Under the Equal Access Act, a school that had established a limited open forum for noncurriculum-related student groups was required to allow a Christian club to use school facilities to the same extent as other student clubs. Because other clubs had access to the school’s public address system, the school newspaper, bulletin boards, and an annual club fair, the Christian club was entitled to the same access. Bd. of Educ. of Westside Cmty. Schs. v. Mergens ex rel. Mergens, 496 U.S. 226 (1990).

7. Equal Access Act protection extends to student groups that are not school-sponsored. A public high school violated the Equal Access Act by denying students’ Bible Club equal treatment with other student groups. In an effort to avoid application of the Act, the district had passed a policy that only board-sponsored clubs and activities would be allowed access to school facilities. The court held that an activity does not have to be student-initiated to trigger application of the Act; the board-sponsored Key Club—a service organization—was not curriculum related and therefore the Bible Club qualified for Equal Access Act protection. Pope v. East Brunswick Bd. of Educ., 12 F.3d 1244 (3d Cir. 1993).

The Equal Access Act also mandated that a school recognize a student religious club that required certain officers and prayer leaders to be Christians. Although the school argued that it should not be required to recognize the group in light of the religious discrimination embodied in the group’s charter, the court concluded that the club’s officer requirement was part of the content of the club’s speech, protected by the Equal Access Act and the First Amendment. Hsu ex rel. Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839 (2d Cir. 1996).

8. School personnel may not sponsor, promote, or participate in religious meetings. The Equal Access Act requires schools to give student groups a “fair opportunity” to meet on campus. Part of the Act’s definition of a “fair opportunity” is that school personnel may be present but may not participate in religious student group meetings. 20 U.S.C. § 4071(c)(3). Nor may school personnel influence the form or content of any prayer or other religious activity. 20 U.S.C. § 4071(d)(1).

For example, a high school violated the Equal Access Act by permitting a school employee to lead a student gospel choir that met on campus during noninstructional hours. Under the Equal Access Act, school employees may be present during student meetings “only in a nonparticipatory capacity.” This prohibition prevents employee participation of any kind—not just supervising, teaching, or leading student groups. Sease v. Sch. Dist. of Phila., 811 F. Supp. 183 (E.D. Pa. 1993). But see Wigg v. Sioux Falls Sch. Dist. 49-5, 382 F.3d 807 (8th Cir.
2004) (holding district’s policy of prohibiting all employees from participating in any religious-based programs held on school property was overbroad and violated elementary school teacher’s free expression rights).

B. The Equal Access Act requires equal access for all student groups—not just religious groups—regardless of the content of their message.

1. Along with religious groups, the Equal Access Act protects student groups that advocate particular political or philosophical positions. For example, a school that allowed its gym to be used for a noncurriculum-related student meeting—an annual volleyball marathon—created a limited open forum and had to allow a student group to use the gym for a public antinuclear and peace exposition. Student Coal. for Peace v. Lower Merion Sch. Dist. Bd. of Sch. Dirs., 633 F. Supp. 1040 (E.D. Pa. 1986).

2. If a secondary school has opened a forum for noncurriculum-related student groups, the school may not deny a request based on the content of a gay rights group’s message.

   a. Closed-door policy: A support group for gay high school students asked to meet on campus under the Equal Access Act, but the school refused. The school successfully showed that none of its student organizations—including Future Business Leaders of America and National Honor Society—were noncurriculum related. Therefore, the school had not created a limited public forum, and the group seeking access could not rely on the Equal Access Act. East High Gay/Straight/Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist., 30 F. Supp. 2d 1356 (D. Utah 1998) (mem.), partial summary judgment granted by 81 F. Supp. 2d 1166 (D. Utah 1999).

   b. Open-door policy: When schools outside of Texas have established limited open forums under the Equal Access Act, courts have ordered the schools to permit gay rights groups to meet on campus. See, e.g., Colin ex rel. Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135 (C.D. Cal. 2000) (granting a preliminary injunction to permit “Gay-Straight Alliance Club” to meet on campus pursuant to the Equal Access Act).

   c. Abstinence policy: In Texas, one school district has successfully relied on its abstinence policy to exclude such a group. A student group known as the Gay and Proud Youth (GAP Youth), later known as the Lubbock Gay-Straight Alliance—sued Lubbock ISD, claiming that the district violated the group’s First Amendment rights or the Equal Access Act when the district denied the group’s request to post and distribute fliers, use the school’s public address system, and be recognized as a student group with the right to meet on
campus. Lubbock ISD had adopted a limited open forum for student groups in its policy FNAB. LISD had also adopted an abstinence policy applying to all matters concerning sexual activity. The school district successfully argued in federal district court that it denied GAP Youth’s request based upon its abstinence-only policy and the well-being and disruption exceptions to the Equal Access Act. The court concluded that the district’s exclusion of the group was viewpoint neutral because the entire subject matter of sexual activity was banned. The court also found that the abstinence-only policy was clearly reasonable in light of the age group affected (ages 12-17); therefore, the promulgation of an abstinence-only policy did not violate the students’ First Amendment rights. The court also concluded that the school district properly relied on the “well being” exception to the Equal Access Act, which reads; “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.” The court explicitly distinguished cases from other jurisdictions because the cases did not involve schools that maintained an abstinence-only policy or banned any discussion of sexual activity on its campuses. Caudillo ex rel. Caudillo v. Lubbock Indep. Sch. Dist., 311 F. Supp. 2d 550 (N.D. 2004) (mem.).

C. When the Equal Access Act does not apply to a student group’s request, the school should still consider whether a limited public forum exists.

1. **Elementary students have First Amendment rights, too.** The Equal Access Act applies only to secondary schools (middle and high schools). Nevertheless, first amendment principles apply to requests for use of elementary school facilities as well. *See, e.g., Good News Club v. Milford Cent. Sch.,* 533 U.S. 98 (2001) (granting Christian youth club access to elementary school facilities); *Culbertson v. Oakridge Sch. Dist. No. 76,* 258 F.3d 1061 (9th Cir. 2001) (applying Milford to Good News Club that included even younger students and met immediately after school). The Fifth Circuit Court of Appeals, which has jurisdiction over Texas, has also established that elementary school student expression is protected by the First Amendment. *Morgan v. Swanson,* 659 F.3d 359 (5th Cir. 2011) (en banc) (holding that standard in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), applies to elementary school students, although not to the same extent as older students).

2. **Means of communication other than “meetings” are also subject to the First Amendment.**

   **Distribution of literature:** The Equal Access Act applies only to “meetings.” As a result, the Equal Access Act does not govern students’ distribution of nonschool literature. Nevertheless, students, like community members, have First Amendment rights that must be respected. For example, even though the Equal
Access Act did not apply to junior high school students’ distribution of religious literature in the halls during noninstructional time, under traditional forum analysis, a school that had created a limited open forum for distribution of literature had to permit the students to distribute a religious newspaper at school. *Thompson ex rel. Thompson v. Waynesboro Area Sch. Dist.*, 673 F. Supp. 1379 (M.D. Pa. 1987). See also *Hedges v. Wauconda Cmty. Unit Sch. Dist. No.* 118, 9 F.3d 1295 (7th Cir. 1993) (requiring school to permit students to distribute religious materials on the same terms as other non-school materials). The Fifth Circuit Court of Appeals has established that when students’ communications take place during noninstructional time and do not interfere with the work of the school or the rights of others, students have a right to share written religious materials with classmates to the same extent they are permitted to share written materials on other topics. *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc). TASB recommends adopting a local policy at FNAA(LOCAL). See TASB Policy Service’s *Starting Points: First Amendment Resources*.

a. **Announcements:** A school’s practice of allowing the public address system to be used by students to broadcast devotionals and prayers to students in grades K-12 was not governed by the Equal Access Act. These announcements were not “meetings” covered by the Equal Access Act. Moreover, the devotionals were broadcast to all grades, not just secondary school. Finally, there was no evidence that other groups used the PA system for anything other than announcements. As a result, this practice violated the Establishment Clause. *Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582 (N.D. Miss. 1996) (mem.).

b. **Student publications:** A school-sponsored newspaper published for instructional purposes with teacher supervision is a nonpublic forum, unless the school takes some additional, intentional action to create a public forum. Within a nonpublic forum, a school may limit expression for any reasonable pedagogical concern. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (upholding principal’s action to delete two student-written articles on teen pregnancy and divorce from the school newspaper on the grounds that the articles invaded students’ privacy rights and concerned topics inappropriate for younger students).

**IV. Employee Use of School Facilities**

A. **School employees do not have a special right of access to school facilities.**

For example, a school was free to grant exclusive access rights to one teachers’ union for the use of on-campus employee mailboxes. The mailboxes constituted a nonpublic forum. Within that forum, the school was free to regulate speech for any reasonable, viewpoint-neutral reason. The school’s decision to exclude other unions...
was viewpoint-neutral because it was based not on the excluded unions’ viewpoints but on the approved union’s status under a collective bargaining agreement. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983).

Note that if a district permits a school communications system, such as internal district mail boxes or e-mail, to be used by a broader selection of outside organizations, or to be used for communication regarding a specific topic, it may create a limited public forum. See e.g., *Ysleta Fed’n of Teachers v. Ysleta Indep. Sch. Dist.*, 720 F.2d 1429 (5th Cir. 1983) (concluding that when district opened up mail system to all employee organizations it became bound by constitutional standard for public forums). If a limited public forum is created, employees will have greater rights of expression and the district’s ability to regulate the expression must meet a stricter level of judicial review.

**B. School employees do have First Amendment rights to discuss political or other matters during free time at work.**

Because school facilities—including campuses, school mailboxes, and bulletin boards—are nonpublic forums, teacher groups’ representatives do not have to be given special access to school campuses. Nevertheless, individual school employees have First Amendment free speech and freedom of association rights while at work. Schools must permit employees to talk about teacher groups’ activities or other matters during their free time, such as breaks or lunchtime. See, e.g., *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175 (10th Cir. 2010) (denying qualified immunity to charter school principal who directed teachers not to discuss school matters); *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 777 F.2d 1046 (5th Cir. 1985), aff’d per mem., 479 U.S. 801 (1986) (concluding district could not prohibit teachers from nondisruptive discussions about teacher organization or labor relations on campus).

Excluding teachers’ organizations from even a nonpublic forum may only be done for reasons that are reasonable and viewpoint neutral. For example, in anticipation of a teachers’ strike (in a state where such action is lawful), a public school district adopted policies that prohibited picketing on property owned or leased by the school district, prohibited strikers from coming on school grounds, even for reasons unrelated to the strike, and prohibited signs and banners at any facilities owned or leased by the school district without advance written approval by the district superintendent. Because the restrictions specifically targeted the strike, the teacher’s union sued, contending that the district had infringed on its members’ First Amendment rights. The court agreed, holding that speech in a nonpublic forum can be restricted, but the restrictions must be (1) reasonable and (2) not an effort to suppress expression merely because public officials oppose the speaker’s view. *Eagle Point Educ. Ass’n/ SOBC/OEA v. Jackson Cnty. Sch. Dist. No. 9*, 880 F.3d 1097 (9th Cir. 2018).
C. As a policy matter, districts may want to give employee organizations priority access.

Districts may want to allow priority access to groups composed of district employees meeting during their free time. Groups composed of district employees are subject to the same rules of access as other community groups unless district policy specifically grants employee groups special access to school facilities. For example, the district may want to specify in policy DGA(LOCAL) that employees’ professional organizations are permitted to meet in district facilities during noninstructional time. Under such a policy, a professional association of school employees would be able to meet on a campus after school. If, however, employees formed a group for a nonschool-related purpose, such as a sewing circle, the group’s access to school facilities would depend on the district’s policy GKD(LOCAL).

D. Employees may have right to attend religious meetings on campus after school hours.

School districts are at risk of violating the Establishment Clause if employees acting in an official capacity worship with students, but the Free Exercise clause protects an employee’s right to engage in religious practices or expression when off-duty. An issue arises when employees assert that they are acting as private citizens during activities that take place on district property.

In 1995, the Fifth Circuit Court of Appeals ruled that school district employees may not lead, encourage, promote or participate with students in prayers during school activities, including activities outside of the regular school day. *Doe ex rel. Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402(5th Cir. 1995). The court rejected the argument that employees acting in their official capacities had a constitutional right to participate in student-initiated religious activities. In a case from South Dakota, the Court of Appeals for the Eighth Circuit held that a district could not prohibit an elementary school teacher from attending after-school meetings of a private, evangelical group held on campus, even when some of the meetings held on the teacher’s campus included her own second and third grade students. *Wigg v. Sioux Falls Sch. Dist.*49-5, 382 F.3d 807 (8th Cir. 2004). But see *May v. Evansville-Vanderburgh Sch. Corp.*, 787 F.2d 1105 (7th Cir. 1986) (concluding that teachers had no First Amendment right beyond that of the general public to hold prayer meetings on school property before school). In reaching this conclusion, the Eighth Circuit rejected the district’s argument that avoiding Establishment Clause violations justified inhibiting the First Amendment rights of its employees after work hours when the relevant activity takes place at school. Although the Equal Access Act does not apply to elementary school student groups, some commentators have raised a concern that the holding in *Wigg* conflicts with the Act’s prohibition on employee participation in student groups.
Currently, no Fifth Circuit court has adopted the holding in *Wigg* permitting employees to pray with students on campus before or after school. When faced with a tough decision, districts should consult an attorney.

V. Parents’ Use of School Facilities

A. Like employees, parents have no special right of access to district property.

Parents’ statutory and substantive due process rights to direct their children’s education do not include a special right of access to their children’s classrooms. Consequently, school officials’ decision to have an uncooperative parent removed from her child’s classroom and arrested for trespass did not violate the parent’s free speech rights. *Ryans v. Gresham*, 6 F. Supp. 2d 595 (E.D. Tex. 1998) (mem.). *See also Frost v. Hawkins County Bd. of Educ.*, 851 F.2d 822 (6th Cir. 1988) (holding parent who was arrested when she came on to school premises to give child a private reading lesson from a book the parent did not find objectionable was not deprived of her freedom of expression or custody of her child without due process). For example, the Fifth Circuit Court of Appeals upheld a district policy requiring all visitors, including parents, to provide identification to determine whether they were registered sex offenders. *Meadows v. Lake Travis Indep. Sch. Dist.*, 397 F. App’x 1 (5th Cir. 2010) (per curiam).

B. After school hours, parents are entitled to access to school facilities on the same basis as other community members.

Parents must be allowed access to school facilities on the same terms as other community members. For example, a school that allowed Cub Scouts to use its facilities to promote the moral development of youth from a secular perspective had to allow the same access to a parent-led group seeking to promote the moral development of youth from a Christian perspective. *Good News/Good Sports Club v. Sch. Dist. of the City of Laude*, 28 F.3d 1501 (8th Cir. 1994).

C. District-affiliated school support groups may be given priority access.

Districts may want to allow priority access to district-affiliated school support organizations, like PTAs and booster clubs. This can be addressed in policy GE(LOCAL) regarding district-affiliated school support groups, rather than in policy GKD(LOCAL) regarding nonschool use of school facilities by community groups. PTAs, PTOs, and booster clubs are key mechanisms for promoting parental involvement in schools, and schools routinely grant these groups priority access, free of charge, to assist them in their efforts and to facilitate coordination between these organizations and the schools. Most PTA groups, for example, meet at the relevant school campus. It is from
this vantage point that these organizations are best able to accomplish their mission of supporting public schools, parents, students, and teachers. Because this broader grant of access is based on the nature of these groups and the schools’ need to coordinate with the groups (not on any particular viewpoint espoused by the groups), this broader access does not conflict with First Amendment principles.