

# What School Officials Should Know

## About Addressing Homosexuality in Public Schools

### *Clarification for Administrators and Educators*

“In our system, state-operated schools may not be enclaves of totalitarianism ... [and] students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.”

— U.S. Supreme Court, *Tinker v. Des Moines* (1969)

The enclosed legal memorandum has been given to you by a student, parent or community citizen who is concerned about the increasing amounts of political pressure—often accompanied by legal threats—being applied to our nation’s K-12 public schools by national homosexual advocacy groups.

Often this pressure is applied in the form of demands to create a safe environment for gay and lesbian students. Schools are told that if they do not ban messages perceived to be “homophobic” and “anti-LGBT” (lesbian, gay, bisexual, and transgender)—as well as include positive statements about homosexuality in their policies and classroom materials—they will face legal liability.

This information has been compiled to offer clarification and a more balanced legal perspective, and is just one component of a larger packet that can be found at [www.truetolerance.org](http://www.truetolerance.org)

For more information regarding Focus on the Family’s specific responses to misleading claims made by homosexual advocacy groups, we highly encourage you to visit the Web site and download a document entitled “Unsubstantiated Claims Made By Homosexual Advocacy Groups”—as well as other helpful information and tools.

This packet contains the following components:

- Letter from Alan Sears, President, CEO and General Counsel for the Alliance Defense Fund
- Executive Summary from Focus on the Family
- Legal Memorandum for School Officials from the Alliance Defense Fund

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[TrueTolerance.org](http://www.TrueTolerance.org)

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Dear Public School Educator or Administrator,

As an individual entrusted with the critical role of educating the next generation, I am confident you agree that schools should be places where varying points of view are respected.

Unfortunately, there are individuals and organizations that seek to limit the information students receive, rather than expand their knowledge on some of the critical issues they face during their formative years. This one-sided approach is especially visible during events such as the Day of Silence, which is annually promoted by GLSEN—the Gay, Lesbian and Straight Education Network. GLSEN and other advocacy groups encourage students and teachers to use events like the Day of Silence as a political tool to force an adult agenda into school policy and curriculum. (For specific examples of this, please visit [www.truetolerance.org](http://www.truetolerance.org).)

However, at the same time that these special-interest groups are pressuring schools to promote homosexual behavior, they also are attempting to shut out competing messages that express alternative points of view. For example, GLSEN initiated an effort to send school districts a publication—which you may have received—entitled “Just the Facts about Sexual Orientation and Youth.” In addition to containing inaccurate and misleading information, the document appears to be an effort to intimidate school administrators into promoting programs and policies which advocate only one viewpoint on the issue of homosexual behavior. It appears that the main goal of the “Just the Facts” booklet is to force schools to shut down all rigorous debate on the issue of homosexual behavior, including its causes, the role of choice and the possibility for change.

But GLSEN and groups that advocate homosexual behavior cannot have it both ways. Student and faculty should not be forced to support GLSEN’s political agenda. Moreover, opposing viewpoints should not be excluded from the debate. In fact, contrary to GLSEN’s legal threats, silencing one side of the discussion could result in unconstitutional discrimination. Furthermore, GLSEN fails to indicate that many young people *actually want* information regarding the possibility of change.

So while no one disagrees with the fact that all students should enjoy a safe environment, at the same time, schools are not required to encourage particular sexual practices or views on sexuality. That is why we want to assist you in your efforts to provide a quality, fact-based education for your students and to bring a reasonable balance in discussing these issues. To that end, we have made available the enclosed memorandum, which includes references to pertinent legal cases, many of which have been handled by the Alliance Defense Fund. Please know that the Alliance Defense Fund stands ready to provide free legal assistance to help clarify any questions or concerns you may have.

Thank you for taking the time to review this material!

Alan Sears  
President, General Counsel, CEO  
Alliance Defense Fund

# Executive Summary

*This booklet has been developed to reassure school officials that they cannot be legally forced into promoting messages about homosexuality against their will—and also to help them fully understand the legal complexities involved if they do choose to do so. The information presented can be summarized into the following points.*

- ◆ **Messages promoting homosexuality in public schools create complicated legal dilemmas.** When school officials allow outside groups to introduce politicized messages about homosexuality on publicly funded campuses, they may unknowingly wade into a legal quagmire with liability risks on all sides.
- ◆ **Events and materials touted by outside groups as “safety” or “diversity” initiatives all too often cross the line into the promotion of a political agenda—and worse, an open attack on students’ individually held religious convictions.** As a result, schools have much more risk of violating First Amendment rights and viewpoint discrimination prohibitions.
- ◆ **The U.S. Constitution protects all speech, including differing points of view about homosexuality.** The U.S. Supreme Court has repeatedly stated that public schools cannot restrict speech simply because it may be perceived by some as controversial or because the speaker or writer may happen to have a religious perspective.
- ◆ **Homosexual advocacy groups like GLSEN make an unprincipled argument when they pressure schools to censor other viewpoints.** School officials should be aware that materials and activities being marketed to schools by gay advocacy groups often make negative or biased statements about particular denominations and religions, while at the same time seeking to shut out opposing viewpoints. Not only is this an unprincipled approach, but it is legally incorrect.
- ◆ **Therefore, if schools do choose to address the issue of homosexuality, they should make a good-conscious effort to provide a balanced presentation.** Contradictory to GLSEN’s assertion otherwise, the debate has not been settled on complex questions involving sexuality.



**MEMORANDUM**

DATE: September 2008

FROM: Alliance Defense Fund

RE: Constitutional rights in public schools regarding issues related to sexual preference and the homosexual agenda

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School districts are often heavily lobbied by certain groups to take sides in the debate concerning national political issues, such as sexual preference or the homosexual agenda. But rather than entering into the fray in the first place, school districts are wise to avoid involvement in such issues. Choosing to tackle these issues through curriculum selection or school assemblies is by no means something that schools are legally *required* to do. In fact, schools may actually open themselves up to legal problems if they do so, especially by favoring one side of the debate over the other. Groups like GLSEN, GLAAD, and others often promote such favoritism. They contend that *their* views on homosexual behavior are the only views properly fostered on campus, and that opposing voices – whether of students, teachers, or parents – can be silenced. Their position is wrong, both from a legal and ethical standpoint, and schools that so proceed may well find themselves in a legal quagmire (one they could have avoided in the first instance by staying out of the debate).

If a school does choose to open its halls, classrooms, or assemblies to speech on a subject like homosexual behavior, it should afford equal treatment to both sides of the debate. Too often schools celebrate so-called “diversity” by silencing students with “unpopular” viewpoints on homosexual behavior, while actively promoting the competing view. This “one-way diversity,” as one federal court described it,<sup>1</sup> can amount to viewpoint discrimination in violation of the First Amendment to the United States Constitution.<sup>2</sup> Such discrimination occurs when the government denies a speaker access to a speech forum based solely on the viewpoint that speaker expresses on an otherwise permissible topic,<sup>3</sup> and it is usually held unlawful no matter the forum.<sup>4</sup> Even in situations where the speech is considered school-sponsored (such as that which occurs at a school-wide assembly or in a school newspaper, for example), several courts have held that schools do not have an unrestricted right to prohibit certain views on the subject, while allowing others.<sup>5</sup> The discussion

below highlights general principles of First Amendment law, and illustrates several cases where school districts have run afoul of the First Amendment by restricting so-called “unpopular” or “negative” speech regarding homosexual behavior.

### **THE CONSTITUTION PROTECTS ALL SPEECH INCLUDING DIFFERING POINTS OF VIEW ABOUT HOMOSEXUAL BEHAVIOR**

The Supreme Court has warned school officials not to trample the rights of students in public schools:

[S]tate-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.<sup>6</sup>

Students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>7</sup> School officials must permit student speech unless it creates, or is reasonably forecast to create, a material and substantial disruption to the school’s ability to fulfill its educational goals.<sup>8</sup> But mere fear and apprehension of a disruption is not sufficient to enable the school to prohibit the speech.<sup>9</sup>

### **STUDENT RELIGIOUS SPEECH IS PROTECTED UNDER THE FIRST AMENDMENT**

Invariably, school districts aim their restrictions on student speech regarding homosexual behavior solely at students expressing a religious perspective on that topic. Thus, it is important to note the fundamental principle of constitutional law that a government body may not suppress or exclude the speech of private parties just because the speech is religious or contains a religious perspective.<sup>10</sup> This principle cannot be denied without eviscerating the essential First Amendment guarantees of free speech and religious freedom. As the Supreme Court has stated:

Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression . . . . Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.<sup>11</sup>

Importantly, the Supreme Court recently held in *Morse v. Frederick* that public schools cannot restrict religious speech simply because it may be perceived by some as “offensive” or “controversial.”<sup>12</sup> There, the defendant school district urged the Court to adopt the broad rule that a student’s speech “is proscribable [if] it is plainly ‘offensive.’”<sup>13</sup> The Court rejected this proposed rule, observing that employing an “offensiveness” approach in regulating student speech would

imperil political and religious expression since “much political and religious speech might be perceived as offensive to some.”<sup>14</sup> As the Third Circuit Court of Appeals said in summarizing Supreme Court case law, “The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.”<sup>15</sup>

### **THE FIRST AMENDMENT’S ESTABLISHMENT CLAUSE DOES NOT REQUIRE SCHOOL OFFICIALS TO SUPPRESS STUDENT RELIGIOUS EXPRESSION**

Schools and school officials often believe (mistakenly) that allowing students to engage in religious speech at school would violate the so-called “separation of church and state” - a doctrine often cited in connection with the Establishment Clause of the First Amendment. This very argument has been reviewed and rejected by the United States Supreme Court. In *Mergens*, the Supreme Court stated as a general proposition that students’ private religious expression within a public school does not present any Establishment Clause problem:

[P]etitioners urge that, because the student religious meetings are held under school aegis, and because the State’s compulsory attendance laws bring the students together (and thereby provide a ready made audience for student evangelists), an objective observer in the position of a secondary school student will perceive official school support for such religious meetings. . . . We disagree.<sup>16</sup>

Indeed, the Supreme Court has never held that the Constitution “require[s] complete separation of church and state.”<sup>17</sup> The Court has merely held that the Establishment Clause requires the state to be neutral in its relations with religious believers and non-believers; it does not require the state to oppose religion or religious expression.<sup>18</sup> In fact, the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”<sup>19</sup> “State power is no more to be used so as to handicap religions, than it is to favor them.”<sup>20</sup>

It is legally incorrect to apply the Establishment Clause to restrict private religious expression, because that Clause is a restriction on government speech. As the Supreme Court has succinctly articulated this principle, “there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”<sup>21</sup> Therefore, it is unconstitutional for public officials to deny students or other private citizens the right to religious speech and expression by imposing on them a limitation intended for the government.

### **CASES WHERE SCHOOL DISTRICTS VIOLATED THE FIRST AMENDMENT IN RESTRICTING SPEECH ABOUT HOMOSEXUAL BEHAVIOR**

School districts that permit speech about homosexual behavior, yet hinder or restrict a particular or point of view about that topic, violate the First Amendment’s prohibition on viewpoint discrimination. As noted above, viewpoint discrimination occurs when the government denies a speaker access to a speech forum based solely on the viewpoint that speaker expresses on an otherwise permissible topic.

An illustrative case is *Hansen v. Ann Arbor Public Schools*.<sup>22</sup> The school district in *Hansen* invited discussion on the topic of “homosexuality and religion” through two distinct speech forums: 1) a panel discussion where local religious leaders would explain related religious doctrines, and 2) student speeches where selected students were to express their views about “what diversity means to me.”<sup>23</sup>

A student who desired to express her Christian views asked for access to each forum. As to the panel discussion, the student requested that the school permit a religious leader from her faith background to appear on the panel and express her religious views. The school denied this request, finding that the student’s viewpoint would “be negative” and “water down the view that the [Gay Straight Alliance] was trying to convey” with the panel.<sup>24</sup>

The school permitted the same student to give a speech on the topic “what diversity means to me,” but once again censored her religious views. The student sought to express her view that racial, sexual, and religious diversity should not be lumped together because one’s race is not chosen, while sexual and religious acts and ideas are.<sup>25</sup> She also wished to express that for this reason she “whole-heartedly” supported racial diversity, “but I can’t accept religious and sexual ideas or actions that are wrong.”<sup>26</sup> The school prohibited her from expressing this perspective, once again, because it deemed her views to be inconsistent with the goal of promoting tolerance.

The court held that both denials of access constituted unlawful viewpoint discrimination because the school was favoring the views of some students on the topic of “homosexuality and religion” over the plaintiff’s differing views.<sup>27</sup> Further, the court rejected the school’s explanation that its censorship of the student’s religious views was necessary to achieve its “pedagogical objective of promoting ‘student tolerance and acceptance of minority points of view.’”<sup>28</sup> As the court bluntly put it, “That Defendants can say with apparent sincerity that they were advancing the goal of promoting ‘acceptance and tolerance for minority points of view’ by their demonstrated *intolerance* for a viewpoint that was not consistent with their own is hardly worthy of serious comment.”<sup>29</sup>

In addition to express discrimination, school districts can also violate the First Amendment rights of students by adopting policies that grant school officials unbridled discretion over student speech. The danger of such policies to free expression has been long recognized by the Supreme Court: “[A] government regulation that allows arbitrary application . . . has the potential for becoming a means of suppressing a particular point of view.”<sup>30</sup> And the Fourth Circuit Court of Appeals recently affirmed the application of the prohibition on policies of unbridled discretion in the public school context:

the dangers posed by unbridled discretion-particularly the ability to hide unconstitutional viewpoint discrimination-are just as present in other forums [as they are in traditional public forums]. . . .  
. . . [E]ven in cases involving nonpublic or limited public forums, a policy . . . that permits officials to deny access for any reason, or that does not provide sufficient criteria to prevent viewpoint discrimination, generally will not survive constitutional scrutiny.<sup>31</sup>

The First Amendment forbids unbridled discretion precisely because it can lead to discriminatory applications, aimed at silencing particular points of view.

The Third Circuit Court of Appeal’s decision in *Saxe v. State College Area School District*<sup>32</sup> is directly on point. In *Saxe*, the plaintiffs brought a facial challenge to a school district harassment policy that prohibited, among other things, “verbal . . . conduct based on one’s actual or perceived . . . sexual orientation.”<sup>33</sup> The plaintiffs believed that they had a right to speak out about “the sinful nature and harmful effects of homosexuality” and feared that they would be punished under the policy if they expressed their Christian views on this and other moral issues at school.<sup>34</sup> The Third Circuit struck down the policy. Its rationale goes to the heart of why school districts must tread lightly when imposing restrictions on students’ views regarding homosexual behavior and other important moral and social issues:

By prohibiting disparaging speech directed at a person’s “values,” the Policy strikes at the heart of moral and political discourse—the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment. That speech about “values” may offend is not cause for its prohibition, but rather the reason for its protection: “a principal ‘function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.’”<sup>35</sup>

Recognizing that “[l]oosely worded anti-harassment” policies could easily be used to regulate “offensive and potentially disruptive categories of speech based . . . on subject matter and viewpoint,” like the religious views of the plaintiffs, the court struck down the policy.<sup>36</sup>

ADF has prevailed in several other cases where school districts attempted to restrict students from expressing their religious views regarding homosexual behavior. For example, in *Arthurs v. Sampson County Board of Education*,<sup>37</sup> the plaintiff sought to participate in the national Day of Truth, a day on which Christian students express a different point of view regarding homosexual behavior from the view espoused on the Day of Silence. Specifically, the plaintiff sought to distribute literature student-to-student that expressed his religious views regarding homosexual behavior. The school enforced two of its policies against the plaintiff. One expressly discriminated against the distribution of literature that addressed “religious preference or belief.”<sup>38</sup> The other granted school officials complete discretion, without any guidelines, over whether students could distribute literature. The school gave the plaintiff in-school suspension for handing out his religious materials in violation of school policy. The school punished the student for handing out his cards in part because it determined that he was “pushing his religion” on others. The court granted ADF’s motion for a preliminary injunction, and in its accompanying order prohibited the school from enforcing both of the policies outlined above.<sup>39</sup>

Likewise, in *Nuxoll v. Indian Prairie School District*,<sup>40</sup> ADF secured the right of a high school student to wear a t-shirt that bore the message “Be Happy, Not Gay.” While the school district’s policies prohibited “demeaning” and “derogatory” comments about a person’s personal characteristics, the Seventh Circuit held that the student’s shirt did not fall within this ban:

But it is highly speculative that allowing the plaintiff to wear a T-shirt that says “Be Happy, Not Gay” would have even a slight tendency to [demean homosexual students], or for that matter to poison the educational atmosphere. Speculation that it might is, under the ruling precedents . . . too thin a reed on which to hang a prohibition of the exercise of a student’s free speech.<sup>41</sup>

Finally, in *Aufiero v. Northern Highlands Regional High School Board of Education*,<sup>42</sup> ADF successfully defended the right of a student and his religious club to participate in the Day of Truth. The school district involved in this case actively promoted the Day of Silence, and gave the Gay Straight Alliance Club (“GSA”) multiple avenues to promote its views regarding homosexual behavior. However, when the religious club and its members sought to express their religious views using the same avenues of communication the school district said “no.” The school district had no written policy regarding student expression, and in practice simply allowed school officials to decide what expression to permit at their sole discretion. This unbridled discretion allowed school officials to favor the GSA’s views, and silence the religious club’s differing point of view on the same topic. Shortly after ADF filed a complaint and threatened the filing of a motion for a temporary restraining order, the school district allowed the club and its members to engage in their desired expression. As part of the settlement of the case, the school district also adopted a policy that permitted student speech and established standards to guide school officials in handling student speech requests.<sup>43</sup>

**EVEN WHEN THE SPEECH IS “SCHOOL-SPONSORED,” A SCHOOL DISTRICT MAY COMMIT VIEWPOINT DISCRIMINATION WHEN IT SILENCES A PARTICULAR POINT OF VIEW REGARDING HOMOSEXUAL BEHAVIOR**

“School-sponsored” speech is controlled by the Supreme Court’s decision in *Hazelwood Sch. Dist. v. Kuhlmeier*.<sup>44</sup> To be “school-sponsored,” speech must bear the imprimatur of the school, and occur in a curricular activity.<sup>45</sup> Representative examples of activities that “may fairly be characterized as part of the school curriculum” and might reasonably be perceived to “bear the imprimatur of the school” are school-sponsored publications, assemblies, and theatrical productions.<sup>46</sup>

Importantly, several courts have held that the prohibition on viewpoint discrimination applies with full force even when the speech involved is “school-sponsored.” For example, in *Searcey v. Harris*, the Eleventh Circuit Court of Appeals stated, “[T]here is no indication that the [*Hazelwood*] Court intended to drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker’s views.”<sup>47</sup> In *Searcey*, the court found unconstitutional viewpoint discrimination where a school district excluded a peace organization from a Career Day forum where outside groups were allowed to place materials related to the advantages and disadvantages of careers in guidance counselors’ offices. The Ninth Circuit followed suit in *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*, holding that *Hazelwood* requires a school district’s restrictions on school-sponsored speech related to the topic of abortion to be “viewpoint neutral.”<sup>48</sup> There, the court applied *Hazelwood*’s viewpoint-neutrality requirement to advertisements of outside organizations appearing in school newspapers, yearbooks, and athletic programs. And in *Chiu v. Plano Independent School District*,<sup>49</sup> the Fifth Circuit Court of Appeals held that the requirement of viewpoint neutrality prohibits a school district from forbidding a parent from distributing flyers critical of the district’s new math curriculum at a school-sponsored curriculum meeting. As the court

said, “The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction”<sup>50</sup>

This well-recognized prohibition on viewpoint discrimination, even in the context of school-sponsored speech, has been applied to find a school district’s actions unconstitutional in the context of speech regarding homosexual behavior. In *Hansen*, discussed above, the court determined that the speakers on the “Homosexuality and Religion” panel constituted school-sponsored speech under *Hazelwood*.<sup>51</sup> The court also noted that under *Hazelwood* “a school does not have a completely unfettered right to restrict speech,” but rather must ensure that its restrictions are “viewpoint-neutral.”<sup>52</sup> As noted above, the Court in *Hansen* went on to hold that the school district engaged in unlawful viewpoint discrimination because it favored the views of some students on the topic of “homosexuality and religion” over the plaintiff’s differing views.<sup>53</sup>

## CONCLUSION

The best decision for schools is to stay out of the debate regarding issues related to sexual preference and the homosexual agenda. Adopting curricula and giving assemblies about such issues leads to thorny legal questions and could very easily result in litigation, as discussed above. However, should schools choose to enter the fray, they must comply with the demands of the First Amendment. In essence, they must grant equal speech rights to all sides of the debate. This principle is especially important where schools are touching on matters of deep personal conviction and national significance, like the demands of the homosexual agenda. Such issues naturally stir debate and dialogue, and schools violate the First Amendment where they permit one side of the debate a platform to express its views, while prohibiting others from making their different views known.

## ENDNOTES

1. *Hansen v. Ann Arbor Public Schools*, 293 F. Supp. 2d 780, 783 (E.D. Mich. 2003) (holding that school district engaged in unlawful viewpoint discrimination by denying representation of a student's viewpoint opposing homosexual behavior, and censoring her speech as to the same, at a school assembly, when opposing views were allowed).

2. See, e.g., *Good News Club v. Milford Central School*, 533 U.S. 98, 107 (2001) (finding impermissible viewpoint discrimination where school district excluded Christian club from after school forum on basis of its religious nature); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387-89, 394-95 (1993) (where school opened its facilities for "social, civic, or recreational uses," but prohibited use by "any group for religious purposes," the school engaged in unconstitutional viewpoint discrimination); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 826, 831 (1995) (public university's denial of funding to student publication offering a Christian viewpoint amounted to unconstitutional viewpoint discrimination).

3. See, e.g., *Chiu v. Plano Independent School Dist.*, 260 F.3d 330, 350-51 (5th Cir. 2001) (noting that in the context of parents desiring to speak at a school-sponsored curriculum meeting, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction"); *Prince v. Jacoby*, 303 F.3d 1074, 1091-92 (9th Cir. 2002) (concluding that a school district's exclusion of a Bible Club from a student organization forum was unconstitutional viewpoint discrimination); *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 226 (3d Cir. 2003) (school district's exclusion of a Bible club from a student organization forum constituted unlawful viewpoint discrimination).

4. See *Lamb's Chapel*, 508 U.S. at 392-93 (viewpoint discrimination is unconstitutional regardless of the forum's classification); *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 n.2 (4th Cir. 2006) (noting that viewpoint discrimination is "prohibited in all forums").

5. See, e.g., *Planned Parenthood of Southern Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) (holding that the reasonableness required to justify school authorities to regulate speech requires viewpoint neutrality, and concluding that school district's actions were viewpoint neutral in prohibiting the entire subject of birth control in school-sponsored publications); *Searcey v. Harris*, 888 F.2d 1314, 1319, 1325 (11th Cir. 1989) (holding that school officials must "make decisions relating to speech which are viewpoint neutral"); *Hansen*, 293 F. Supp. 2d at 795, 800 (speech regarding diversity and homosexual behavior given at assembly was school-sponsored speech, but school's restrictions on the content of that speech still violated First Amendment because they constituted unlawful viewpoint discrimination).

6. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (holding that the wearing of armbands by students to show disapproval of Vietnam hostilities was constitutionally protected speech).

7. *Id.* at 506.

8. *Id.*

9. *Id.* at 508.

10. *Good News Club*, 533 U.S. at 107-09 (school district committed viewpoint discrimination by opening its facilities to speech about morals and character development, yet denying access to a group that desired to express a religious point of view on that topic); *Lamb's Chapel*, 508 U.S. at 393-394 (school district engaged in viewpoint discrimination by prohibiting group from expressing religious point of view about otherwise permissible topic of child rearing and family values); *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (public university committed unlawful content-based discrimination by prohibiting student group from using facilities based on the religious speech and worship involved in its meetings).

11. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

12. 127 S. Ct. 2618 (2007).

13. *Id.* at 2629.

14. *Id.* The principle that the government may not restrict speech that may be offensive to its hearers is a fundamental rule of First Amendment law. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); *Boos v. Barry*, 485 U.S. 312, 322 (1988) (“[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.”) (citations and quotations omitted); *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (“[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it”); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) (“[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.”).

15. *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001).

16. *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 249-50 (1990) (emphasis added).

17. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (holding that the display of a nativity scene by a city was constitutional because the city’s conduct was supported by a legitimate secular purpose).

18. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947).

19. *Lynch*, 465 U.S. at 673.

20. *Everson*, 330 U.S. at 18.

21. *Mergens*, 496 U.S. at 250.

22. 293 F. Supp. 2d 780 (E.D. Mich. 2003).

23. *Id.* at 790-792.

24. *Id.* at 790.
25. *Id.* at 791.
26. *Id.* at 792.
27. *Id.* at 800 (“[I]t is clear to the Court that Defendants’ decision to restrict [the student’s] speech, both with respect to her ‘What Diversity Means to Me’ speech and the . . . Homosexuality and Religion panel, was far from viewpoint-neutral. Rather, the record makes clear that Defendants’ actions were predominantly motivated by their disagreement with [her] message”).
28. *Id.* at 801.
29. *Id.* at 801-02.
30. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992).
31. *See Child Evangelism Fellowship of MD, Inc. v. Montgomery County Pub. Sch.*, 457 F.3d 376, 386-87 (4th Cir. 2006).
32. 240 F.3d 200 (3d Cir. 2001).
33. *Id.* at 202.
34. *Id.* at 203.
35. *Id.* at 210 (citations omitted).
36. *Id.* at 207.
37. *Arthurs v. Sampson County Bd. of Educ.*, No. 7:06-CV-66-BR (E.D.N.C. November 2, 2006) (order granting preliminary injunction).
38. *Id.* at 6.
39. *Id.* at 13.
40. 523 F.3d 668 (7th Cir. 2008).
41. *Id.* at 676.
42. *Aufiero v. Northern Highlands Regional High Sch. Bd. of Educ.*, No. 07-01693-DMC-MF (D.N.J. filed April 11, 2007).
43. Plaintiff’s Notice of Voluntary Dismissal, *Aufiero v. Northern Highlands Regional High Sch. Bd. of Educ.*, No. 07-01693-DMC-MF (D.N.J. filed July 2, 2007).
44. 484 U.S. 260 (1988).

45. *Id.* at 271-73.

46. *Hazelwood*, 484 U.S. at 271.

47. 888 F.2d 1314, 1319 n.7 (11th Cir. 1989). *See also Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 633 (2d Cir. 2005) (“[A] manifestly viewpoint discriminatory restriction on school-sponsored speech is, *prima facie*, unconstitutional, even if reasonably related to legitimate pedagogical interests”).

48. 941 F.2d 871, 829 (9th Cir. 1991).

49. 260 F.3d 330 (5th Cir. 2001).

50. *Id.* at 350-51.

51. *Hansen*, 293 F. Supp. 2d at 795 (“Therefore, it is the *Hazelwood* standards that are applicable in analyzing Plaintiffs’ freedom of speech claim in this case”).

52. *Id.* at 797.

53. *Id.* at 800-03.