

Appendix A: Guidelines for a child-protective facility use policy

This Appendix provides general guidelines for drafting a child-protective facility use policy. A facility use policy:

- Must be religiously neutral;
- Must be viewpoint neutral on its *face* and in its *application*;
- Must be reasonably related to the purposes of the forum;
 - E.g., the provisions should not be pretextual;
- Must impose substantive constraints on official discretion;
- Should provide persons of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits;
 - E.g., intelligible criteria or articulated standards spelling out what is forbidden;
- Should avoid overbreadth, where a substantial number of its applications would be unconstitutional, judged in relation to the policy's plainly legitimate sweep; and
- Should have procedural safeguards, such as:
 - Providing for prompt approval or disapproval;
 - Specifying the effect of a failure to act promptly;
 - Requiring a factual explanation for decisions; and
 - Providing an adequate and prompt appeals procedure.

Important Note: Many states have statutory provisions that shape and/or regulate their public schools' facility use policies. State constitutional provisions protecting the freedoms of speech and religion may also have a different scope than their federal counterparts. The evaluation and application of such provisions go beyond the scope of this article.

➤ Preamble

The following preamble frames the facility use policy with principles drawn from Supreme Court cases.

The District has the right, consistent with fundamental constitutional safeguards, to prescribe and control conduct in its schools. *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 507 (1969). This includes advancing its educational mission; protecting the physical, emotional, and psychological wellbeing of children; and proscribing activities that would materially and substantially disrupt the work and discipline of the school. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986). The District seeks to inculcate in its students fundamental values necessary to the maintenance of a democratic political system, including promoting understanding, tolerance, and respect for the diverse beliefs and values and the universal and shared dignity of all people. *Id.*; see also *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998). Therefore Applicants—whether students or adults—shall honor boundaries of socially appropriate behavior and avoid the use of demeaning, vulgar or abusive language. *Bethel Sch. Dist.*, 478 U.S. at 682, 683.

➤ Good Behavior Provisions

The following Good Behavior provision fences out groups that engage in physical, emotional, or psychological maltreatment. The provision imposes substantive constraints on and objective criteria for the identification of emotional or psychological maltreatment by reference to professional community standards⁵⁸⁸ and professionally recognized forms of maltreatment. Preferably, a determination that a group violates the maltreatment provision would be made by a school psychologist.

Good Behavior Requirement. No person, group or organization shall be permitted to use a district facility if a reasonably prudent person, applying prevailing community or professional standards, would find that the group’s activities, curriculum or practices:

- a. engage in physical, emotional, or psychological maltreatment of students;

Criteria for establishing emotional or psychological maltreatment. Emotional or psychological maltreatment is defined as acts or statements that would, when applying an objective professional community standard, be considered damaging to children, and that fall into one or more of the following categories:

- 1) *Degrading*: undermining a child’s sense of self-worth, social competence, self-confidence, or development of self (including age-appropriate autonomy and self-determination);⁵⁸⁹
- 2) *Rejecting*: instilling a fear of abandonment or denying the legitimacy of the child’s needs;
- 3) *Terrorizing*: threatening a child with severe or sinister punishment or deliberately developing a climate of fear or threat;
- 4) *Ignoring*: depriving a child of essential stimulation and responsiveness or stifling emotional growth and intellectual development;
- 5) *Isolating*: cutting off a child from normal social experiences, preventing the child from forming friendships, or making the child feel alone in the world;
- 6) *Corrupting*: encouraging a child to develop false social values that reinforce antisocial or deviant behavioral patterns, such as aggression, criminal acts or substance abuse; or

⁵⁸⁸ *Ridley v. Massachusetts Bay Transportation Authority*, 390 F.3d 65, 74-75 (1st Cir. 2004) (upholding provision that referenced “prevailing community standards” to determine whether a proposed ad demeans or disparages a person or group of persons); *see also Hopper v. City of Pasco*, 241 F.3d 1067, 1080 (9th Cir. 2001) (“This is not to say that community standards of decency have no place in the regulation of government property; our cases merely insist that such standards be reduced to objective criteria set out in advance.”)

⁵⁸⁹ *Cf.* “What is Child Abuse and Neglect,” *United States Department of Health & Human Services Child Welfare Information Gateway* (“Emotional abuse (or psychological abuse) is a pattern of behavior that impairs a child’s emotional development or sense of self-worth. This may include constant criticism, threats, or rejection, as well as withholding love, support, or guidance.”) (<https://www.childwelfare.gov/pubs/factsheets/whatiscan.cfm>); Model Code on Education & Dignity: Presenting a Human Rights Framework for Schools (Aug. 2012), at p. 18 (“In order to ensure that every child receives a high quality education, schools must create healthy, respectful climates for learning where the fundamental dignity of students and all members of the school community is protected and nurtured. A school climate that protects human dignity exists when students feel socially, emotionally and physically safe, when there is mutual respect between teachers, students, parents or guardians, and when students’ self-expression and self-esteem are supported.”).

- 7) *Exploiting/trauma bonding*: manipulatively alternating between any of the foregoing forms of maltreatment and affirmation in order to maintain a relationship or exert control.

Application of this standard should account for the severity and repetitiveness of the violations. Either a substantial violation or a sustained and repetitive pattern of mild violations⁵⁹⁰ will violate this standard. Factors relevant in determining the severity of a violation include the age of the child or children affected and whether:

- 1) it is deliberate and concerted;
- 2) singles a child or group of children out (e.g., by being personally insulting or socially stigmatizing);
- 3) relates to something the child did versus the child's basic identity (e.g., race, gender, sexual orientation);
- 4) the length of the incident;
- 5) the tone and hyperbole, if any, used; and
- 6) whether it is followed by other mitigating conduct (e.g., an apology).

The following subparts to the Good Behavior Requirement add criteria drawn from Ridley (§ 4.3.6), Muller (§ 6.2.1), Morgan (§6.2.1), Harper (§ 6.2.2), Nuxoll (§ 6.2.2), Kowalski (§ 6.2.3), and S.J.W. (§ 6.2.3), without capturing within its scope merely offensive speech.

Good Behavior Requirement. No person ... shall be permitted to use a district facility if ... the group's activities, curriculum or practices...

- b. bully, ridicule, abuse, debase, or degrade students or cause them to question their self-worth;
- c. are calculated to traumatize students or make them feel excluded, ashamed or unacceptable because of their lack of a shared core identifying characteristic, such as race, religion or sexual orientation;

The following subpart to the Good Behavior Requirement promotes the core mission of public schools—to educate and encourage critical thinking and prepare students to become flourishing self-sufficient adults—and excludes groups that directly undermine that goal by promoting a fear of science or learning or manipulating children into insular or hidebound thinking.

Good Behavior Requirement. No person ... shall be permitted to use a district facility if ... the group's activities, curriculum or practices...

- d. discourage students from critical and open thinking by employing shame, conditional affirmation, or fear;
- e. are calculated to stifle students' expressive, creative, and/or intellectual individuality;
- f. are calculated to create in students a sense of powerlessness, fear, and dependency;

⁵⁹⁰ See Adam M. Tomison & Joe Tucci, "Emotional Abuse; the hidden form of maltreatment," *Issues in Child Abuse Prevention*, No. 8 (Spring 1997) ("Emotional abuse is characterized by a sustained and repetitive pattern of behaviors occurring over time.").

The following subparts to the Good Behavior Requirement add Fraser’s obscene and vulgar speech limitations (§ 6.1) and Tinker’s substantial disruption test (§ 6.1).

Good Behavior Requirement. No person ... shall be permitted to use a district facility if ... the group’s activities, curriculum or practices...

- g. are directed to students and are obscene, vulgar or otherwise age-inappropriate;⁵⁹¹
- h. substantially disrupt or interfere with the work, order, or discipline of the school;
- i. collide with the rights of other students, including interfering with their educational development...

The following subparts to the Good Behavior Requirement draw upon Article 13 of the United Nations Convention on the Rights of the Child and Principal 2 of the United Nations Declaration of the Rights of the Child (1959).

Good Behavior Requirement. No person ... shall be permitted to use a district facility if ... the group’s activities, curriculum or practices...

- j. are calculated to deprive a student—through shame, terror, intimidation, conditional approval, or other attempts at milieu control—the freedom to think openly and to seek, receive and impart information and ideas of all kinds; or
- k. are calculated to deprive a student from developing a moral, social, and/or spiritual identity in conditions of freedom and dignity.

➤ Defining the forum

The provision immediately below would make the forum open to a wide range of uses and activities. The alternative provision that follows would limit the forum from the closing bell to 6 pm. to a closed set of exemplary categories.

Broad Forum Definition:

The District may make school facilities available for student and community-related activities and programs which are educational, cultural, social, recreational or civic in nature, primarily for the benefit of district students and residents and consistent with the District’s educational mandate and all applicable state laws. Use of school facilities shall be subject to the following requirements....

⁵⁹¹ See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684 (1986) (“Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.”); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (upholding NEA’s substantial discretion to consider “general standards of decency and respect for the diverse beliefs and values of the American public” in awarding grants because of the NEA’s educational mission).

*Public forum caselaw calls for extreme care (see especially §§ 4.3.3-4.3.5) in defining the school forum.⁵⁹² In the Narrow Forum Definition offered below, one of the approved categories would be student-led clubs, as defined by the Equal Access Act. Four of the categories would be community service, outdoor skills, and agricultural and horticulture skills groups, which would include most, if not all, Congressionally-chartered youth groups covered by the Boy Scouts Equal Access Act (§ 8.2). Another category would be—as suggested by *CEF v. Anderson School District Five* (§ 4.3.4)—extracurricular extensions of traditional classroom subjects. In view of the cases discussed in § 4.3.3, liberal arts programs are limited to those that are curricular, school program related (e.g., a school play or musical production), or that represent the school in competition. This alternative provision concludes with a requirement that the use bear a substantial and predominant relationship to one or more of the listed categories.*

This alternative provision is also drafted in a way that accommodates a more open forum on evenings and weekends.

Narrow Forum Definition:

The District may make school facilities available between the closing bell and 6 p.m. for any of the following approved uses:

- 1) middle and high school student groups within the scope of the Equal Access Act, 20 U.S.C. § 4071, that are directed, conducted and controlled by students, and whose meetings are not regularly attended by non-students;
- 2) extracurricular extensions⁵⁹³ of traditional classroom subjects, including academic competitions and technical programs (e.g., math, science, engineering, technical, and/or computer skill development), and non-technical liberal arts programs (e.g., arts, crafts, literature, music, dance, drama, debate). Unless the program is a technical program, in order to qualify the program must either:
 - a) provide students with class credit;
 - b) be school-sponsored and produce programs promoted by the school; or
 - c) represent the school in individual or team competitions and that use, with the school's permission, the name, logos, and identity of the school;
- 3) competitive nonprofit youth sports leagues;

⁵⁹² A district should be prepared to justify its selection of different forum categories against the argument, expressed in *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1375 (3d Cir. 1990), that faith-based uses would be “gerrymandered” out of the facilities on the basis of their religious content.

⁵⁹³ **Note:** The “extracurricular extension” provision was not drafted with the intent to disqualify *student-led* middle and high-school faith based clubs from equal access. Indeed, the immediately preceding EAA provision expressly allows such groups. Were a school to include *only* the “extracurricular extension” provision suggested above, it would not, under many circumstances, disqualify student-led middle and high school clubs from access under the Equal Access Act (EAA). Access under the EAA is governed by the statute’s text and the Supreme Court’s narrow four-category test in *Mergens*. See *supra* § 8.1. Although the “extracurricular extension” provision above is slightly broader than *Mergens*’ four-category test, it would still narrow the scope of the forum sufficiently to disqualify some faith-based groups from the *elementary* context, because the EAA does not regulate access to elementary school forums.

- 4) community service groups;
- 5) agricultural skills programs;
- 6) horticulture skills programs; or
- 7) outdoor skills programs.

To be eligible, the proposed or actual use must bear a substantial and predominant relationship to one or more of the categories.

➤ **Classifying uses by speaker, audience, and time-slots**

For brevity's sake, the Model Policy in Appendix B does not classify facility uses by speaker, audience, or time-slots. But different degrees of sensitivity are appropriate for high school and elementary students. For example, a high school sports program or JROTC program might employ shouting and mild humiliation to motivate its players or recruits—conduct that would be inappropriate toward young elementary students. Also, because a school district has more constitutional flexibility to protect its youngest students from verbal abuse, a tiered approach may be better able to weather a legal challenge. To facilitate the development of a tiered approach to dignitary protections, the definitions below classify different uses.

Definitions.

- a. Audience Classifications
 - i. A **student-targeted program** is a program directed to students, advertised on school grounds or through school communications facilities to students, or where a majority of audience participants are students.
 - ii. A **general-audience program** is a program that does not fall within the definition of a student-targeted program.
- b. Speaker Classifications
 - i. A **faculty-based program** is a program directed, conducted and controlled by two or more District faculty members.
 - ii. An **educator-based program** is a program directed, conducted and controlled by two or more members of the community that are licensed by this state to teach primary or secondary education.
 - iii. A **community-based program** is a program directed, conducted and controlled by residents of the District.
- c. Program Classifications
 - i. An **Equal Access Act student group** is a middle or high school student group within the scope of the Equal Access Act, 20 U.S.C. § 4071, that is directed, conducted and controlled by students, and whose meetings are not regularly attended by non-students;
 - ii. A **curriculum-related program or group** is a program or group falling into one of the four classifications set forth in *Westside School District v. Mergens*, 496 U.S. 226

(1990): (1) whose subject matter is actually taught, or will soon be taught, in a regularly offered course; (2) whose subject matter concerns the body of courses as a whole; (3) whose participation is required for a particular course; or (4) whose participation results in academic credit.

iii. A **Congressionally-chartered youth group** is a youth group as defined under 20 U.S.C. § 7905(b)(1), meaning any group or organization intended to serve young people under the age of 21.⁵⁹⁴

d. Time Slot Classifications

i. The **afternoon period** refers to school days and spans the time of the first closing bell to [set time] hours after the last closing bell for the school.

ii. The **evening period** refers to school days and commences at the conclusion of the afternoon period.

iii. **Non-school days** refer to non-school days.

The following grid segregates uses according to program and time-slot classifications. Many other arrangements are possible. The distinction between categories must be reasonably related to the purposes of the forum and viewpoint neutral. Also, all uses within a given category should be treated equally.

	High School or Middle School Facilities			Elementary School Facilities		
	Afternoon Period	Evening Period	Non-School Days	Afternoon Period	Evening Period	Non-School Days
curriculum-related program or group	Y	Y	Y	Y	Y	Y
noncurriculum-related student groups (including Equal Access Act student groups)	Y	Y	Y	Y	Y	Y
outside youth or community groups (including Congressionally-chartered youth groups)	N	Y	Y	N	Y	Y
other student-targeted programs	Y	Y	Y	N	Y	Y
other general-audience programs	N	Y	Y	N	N	N

⁵⁹⁴ The Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905, defines a “youth group” as “any group or organization intended to serve young people under the age of 21” which is also one of the approximately 100 organizations listed in Title 36, subtitle II. In a Federal Register notice, the Department of Education suggested analytical factors for determining whether an organization is a Title 36 youth group. See 71 FR 14994, 14996 (Mar. 24, 2006).

Alternative: According to the Eighth Circuit case of Victory Through Jesus Sports Ministry Foundation (§ 4.3.2), a district could effectively “freeze” the forum by limiting uses to those with a longstanding, or strongly reciprocal, relationship with the district.

➤ **Inclusiveness provision**

The following provision imposes non-discrimination requirements (see Martinez case, § 4.2) on the use of school facilities. However, it exempts Equal Access Act student groups in view of cases holding that schools cannot apply religious nondiscrimination requirements to them (see footnote 514). And it exempts youth groups in view of the anti-nondiscrimination provisions of the Boy Scouts Equal Access Act (§ 8.1).

Inclusiveness Requirement. All meetings must be non-exclusive and open to the public. No group that restricts its membership, attendance, or leadership by reason of racial, ethnic, or national origin; sexual orientation; or religious identity or commitment may use District facilities, with the following exceptions:

- a. A youth group that primarily serves young people under age 21, including but not limited to youth groups defined in the Boy Scouts of America Equal Access Act, 42 U.S.C. § 7905, may restrict its membership and leadership and/or include an oath of allegiance to God and country.
- b. A non-curriculum related student group, as described in the Equal Access Act, 20 U.S.C. § 4071 may restrict its leadership and membership on the basis of shared religious, political, and philosophical views if the group is led, directed, and controlled by students.

➤ **Promissory provision**

In Healy v. James (§ 4.2), the Supreme Court held that a college could require a radical leftist student chapter to affirm its intention to comply with reasonable campus regulations and adhere to generally accepted standards of conduct. The following provision requires applicants to affirm in writing that they will refrain from behavior that abuses or demeans students or promotes disrespect for teachers. Applicants must agree to respect the inherent dignity and rights of each student, of people generally, regardless of their core identity, and—in a nod to the rights of children to be free from both physical and mental violence—to indemnify the district for any violation of a child’s rights.

Promissory Requirement. Each group that applies for a facility use permit will affirm in writing that they will:

- a. refrain from behavior that abuses, degrades, demeans, humiliates, or bullies students;

- b. refrain from provoking disrespect for, or imputing improper motives to, the District’s teachers and employees in any program directed to students;⁵⁹⁵
- c. respect the inherent dignity and rights of each student, and of people generally, regardless of race, color, religion, creed, ancestry, age, sex, sexual orientation, physical handicap or national origin;⁵⁹⁶ and
- d. fully indemnify the District from any claims that may arise out of any violation of a child’s rights.

➤ **Transparency provision**

The following provision imposes transparency requirements, requiring the submission of organizing and governing documents and any curricular materials.⁵⁹⁷

Transparency Requirement. Any group that applies for a facility use permit must submit the following documents, in searchable electronic form if available:

- a. the organizing documents (e.g., articles of incorporation, by-laws, and charter, if any) of the organization;
- b. any governing document setting forth requirements or prerequisites for leadership or membership;
- c. any curricular materials for any program directed primarily toward students; and
- d. any and all changes to previously submitted documents listed above.

➤ **Procedural safeguards**

The following model provision—taking note of the strict scrutiny applied to speech restrictions in public forums (§ 4)—imposes a broad swath of procedural safeguards. Although the extent to which such procedural safeguards are required in a limited public forum is uncertain, the prudent course is to implement them.

Viewpoint neutrality. The District facilities coordinator shall administer this Policy in a manner that does not discriminate based on viewpoint.

⁵⁹⁵ See *Bethel Sch. Dist.*, 478 U.S. at 682 (“The Rules of Debate applicable in the Senate ... provide that a Senator may be called to order for imputing improper motives to another Senator.... Can it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?”).

⁵⁹⁶ See Model Code on Education & Dignity § 1.1(B)(1) (stating that one of the aims of education is to “develop[] understanding, peace and respect among all people”).

⁵⁹⁷ See *CLS v. Martinez*, 130 S. Ct. 2971, 2980 (2010) (noting and not objecting to the fact that Hastings’s application process required CLS to submit the set of bylaws mandated by CLS-National); *Good News Club v. Milford Central School*, 533 U.S. 98, 137-38 (2001) (Stevens, J., dissenting) (describing a sample lesson from the Club’s curriculum).

Application Review Process

- a. A qualifying request for a new facilities use must be filed at least 12 weeks in advance and be accompanied by a complete Application.
- b. Applications to renew an existing facility use must be filed every year at least 4 weeks in advance of the requested use, and must include, if not provided previously, the information set forth in § [insert section].
- c. An Application for a new facilities use or to renew an existing use is not a qualifying application if the Applicant has had an Application denied or revoked in the previous 2 years.
- d. The District facilities coordinator (DFC) will review and approve or provisionally deny the Application. The DFC may delegate some or all of the review to a school psychologist. The DFC may ask the Applicant to provide information to facilitate the review. Failure to provide the requested information shall be treated as a withdrawal of the Application.
- e. If the DFC finds that an Applicant is disqualified because of noncompliance with this Policy, then the DFC will provide the Applicant with notice of a denial of the Application along with a written explanation identifying the Policy provisions breached and the materials or incidents breaching those provisions.
- f. In the case of a denial or revocation of a facilities use application, the applicant or existing permit holder may, within 2 weeks, request a review by the School Board. The Applicant may also request a hearing before, and present evidence to, the Board. The Board will render a decision with written findings.
- g. If the DFC or the Board does not issue a decision on a timely and complete Application at least 1 week before the requested use, then the Application will be treated as approved until and if the Board revokes the approval.
- h. A parent of a District student may request review by the School Board to revoke a facility use permit for noncompliance with this Policy. Such a request must be accompanied by a notarized statement that explains the facts pertaining to the alleged noncompliance.

The legal information provided in this document does not constitute legal advice or legal representation.