Reference No. B-14

Public School Religious Clubs: Rights & Reasons

While it would be inappropriate for The Rutherford Institute to provide you with legal advice under these circumstances, the Institute is pleased to provide you with the following information.

I. The Equal Access Act

The United States Congress passed the Equal Access Act (the "EAA" or the "Act") in 1984 to protect the religious rights of public school students.[1] The Act broadly prohibits public schools from discriminating against any student group based on the religious, political, philosophical, or other content of the group's speech.[2] In addition, the Act requires that schools grant religious student groups official recognition with the same rights and privileges enjoyed by non-religious student groups.[3]

The EAA applies, and mandates equal access and privileges for religious student groups, if the school has three characteristics:[4]

* The school must be a public secondary school.[5] This term is defined by the law of the state in which the school is located[6] and usually includes high schools and sometimes junior high schools.
* The school must receive federal funding.[7]
* The school must have created a "limited open forum"[8] (also called limited public forum). Under the EAA, a school establishes a limited open forum when it permits non-curricular student groups to meet on school grounds during "non-instructional time,"[9] that is, during time set aside by school officials before or after actual classroom instructional time. Thus, if the school chooses to permit only those student activities that are related to the curriculum, it does not create a limited open forum and is not bound by the EAA's requirements. If, however, the school chooses to permit non-curricular groups, such as a chess club, to meet on campus, it establishes a limited open forum and must abide by the EAA and permit a student prayer group to meet on campus as well.[10]

The United States Supreme Court upheld the EAA in *Mergens v. Board of Education of Westside Community Schools*[11] against a challenge based on the Establishment Clause of the First Amendment.[12] The Westside Board of Education in this case argued that allowing religious groups on a high school campus would violate the Establishment Clause,[13] which prohibits governmental endorsement of religion. The Court rejected that argument and held instead that student religious expression is private speech, not government speech, and thus protected by the Free Speech Clause and the Free Exercise Clause of the First Amendment, not forbidden by the Establishment Clause.[14] Because the school in *Mergens* had allowed non-curricular clubs like a scuba diving club and a chess club to meet on campus, the Court ruled the school had established a limited open forum and was required by the EAA to allow religious

groups to so meet. If even one non-curricular group has access to the student newspaper, bulletin boards, public address system, and annual school events, all groups, including religious ones, must be allowed the same access.[15]

Following *Mergens*, the Ninth Circuit Court of Appeals in *Ceniceros v. Board of Trustees of San Diego Unified School District*[16] held that a student religious club in a public high school had a constitutional right to meet in empty classrooms during lunch period where other non-curricular student groups were allowed to do the same.

Some courts read the EAA even more broadly than the *Mergens* Court. In *Hsu v. Roslyn Union Free School District*,[17] the Second Circuit Court of Appeals interpreted the EAA's protection of "speech" to encompass the leadership policy of a religious club. The club's policy, which required office holders to be professing Christians, violated a school non-discrimination policy applicable to all clubs, but the court determined that the EAA required the high school to make an exception for the religious club.[18] The court noted that allowing the club to maintain this requirement for leadership ensures that the club can preserve the religious content of its speech. The court held that "exemptions from neutrally applicable rules that impede one or another club from expressing the beliefs that it was formed to express may be required if a school is to provide equal access."[19]

Other courts read the EAA narrowly. In *Berger v. Rensselaer Central School Corporation*,[20] the Seventh Circuit Court of Appeals held that the EAA did not require the school district to permit a religious organization to distribute Bibles to fifth grade public school students. The court noted that the organization in this case sought access to the classrooms during school hours, and that the students were a captive audience; thus the case was different from *Mergens*.[21] Similarly, a U.S. District Court in Arkansas held the EAA did not permit a public elementary school to offer voluntary Bible classes during regular school hours.[22] In *Herdahl v. Pontotoc County School District*,[23] a district court in Mississippi held that although some students were allowed to broadcast announcements over the public address system, the school was justified in forbidding a student religious group from broadcasting devotionals and prayers.[24]

Some schools have resisted submitting to the EAA?s requirements. In *Pope v. East Brunswick Board of Education*,[25] for example, a school board refused to recognize a high school student Bible club, though it recognized other clubs including drama, art, students against drunk drivers, and service organizations.[26] Though the school attempted to define the groups it recognized as curriculum-related in order to avoid triggering the EAA's restrictions, the Third Circuit stated that the language of the Act "is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school."[27] The court held that at least one of the existing clubs (the service club) was non-curricular; thus, the school had established a limited open forum and was required to allow the Bible club to meet.

Other schools have argued that the EAA does not override conflicting state law.[28] However, the Ninth Circuit Court of Appeals held in *Garnett v. Renton School District*[29] that the EAA preempts any conflicting provisions of a state constitution. The court stated that Congress intended through the EAA to

"provide religious student groups a federal right. State law must therefore yield."[30]

The EAA gives religious student groups equal footing with other student clubs. In order to ensure that a school avoids violating the Establishment Clause, though, religious groups must follow certain guidelines:

* The club must be student-led.[31] Teachers, as agents of the state when acting in their official capacities, may not lead religious groups, as this would give the appearance of endorsing a certain religion.[32] However, a teacher or other school administrator may be present to maintain control of the group.[33] Community members may not conduct, control, or regularly attend group meetings.[34]
* The meetings must be voluntary.[35] The EAA does not, however, contain a requirement for parental permission for students to attend such meetings.
* Religious clubs must not materially and substantially interfere with the orderly conduct of educational activities within the school.[36]

II. Free Speech of Religious Clubs

Aside from the EAA, courts often look directly to the Free Speech Clause of the First Amendment to justify the formation of religious clubs in public schools.[37] Courts use a legal doctrine called forum analysis[38] in order to determine when the government must grant a speaker access to public property, such as school property, for expressive purposes.[39] Courts have generally determined that a public school is a nonpublic forum;[40] however, as with the EAA, if a school has intended to allow, or has by practice allowed, non-curricular groups to meet on its premises, it becomes a limited open forum.

Where a school maintains a closed, or nonpublic, forum, its speech restrictions must only be reasonably related to legitimate pedagogical concerns.[41] Thus, a school would be justified in disallowing all non-curricular clubs from meeting on its campus when the clubs are unrelated to the school's educational mission. Even in a nonpublic forum, though, the school cannot engage in viewpoint-based discrimination, that is, regulate the private speech of religious clubs simply because of their religious viewpoint.[42] Further, once a school opens its facilities to non-curricular groups and
becomes a limited open forum, it must meet a higher standard than just being reasonably related to a legitimate concern. The school must show that any content-based ban on expression, that is, the exclusion of a religious club because it is religious, is narrowly tailored to further a compelling state interest.[43]

In *Widmar v. Vincent*,[44] the Supreme Court used forum analysis to hold that a university that opened its facilities for use by student groups maintained a limited public forum and thus was prohibited by the Free Speech Clause of the First Amendment from refusing a religious student group similar access to the facilities. The Court held further that allowing religious groups such access would not violate the Establishment Clause and that public college students are mature enough not to infer state endorsement from the university's giving religious groups equal access.[45] Yet, again, a college can exclude religious clubs as long as it excludes all other non-curricular clubs.

With regard to high school, junior high, and elementary school religious clubs, different courts have reached conflicting results. In *Good News/Good Sports Club v. School District of the City of Ladue*,[46] the Eighth Circuit Court of Appeals held that a student-led junior high school religious group had a constitutional right to meet at a public middle school. The court assumed that the lower court was correct in holding that the school property remained a nonpublic forum.[47] Nonetheless, the court found that the school, by excluding the religious club while allowing other clubs to meet, engaged in viewpoint discrimination, which violates the First Amendment in any forum.[48]

By contrast, in *Quappe v. Endry*,[49] a district court in Ohio held that it was not a constitutional violation for a school board to refuse to allow an elementary school Bible club to meet directly after school like other clubs. The court determined that because a teacher used her classroom to promote the club, permitting the club to meet right after school would create the appearance of state sponsorship in violation of the Establishment Clause.[50] Reaching the same conclusion in a different situation, the Tenth Circuit Court of Appeals in *Bell v. Little Axe Independent School District*[51] held that a public elementary school had violated the Constitution by permitting student-led religious meetings to occur on campus. The court held the school?s own equal access policy, which protected voluntary religious meetings on the school grounds before the start of the school day, was a violation of the Establishment Clause.[52]

Courts have also reached conflicting results when conducting forum analysis to determine whether students may distribute religious literature to classmates. A U.S. district court in Texas held in *Clark v. Dallas Independent School District*[53] that a school district that prohibited the distribution of religious tracts by high school students on their campus violated the First Amendment.[54] Other courts have struck down schools? regulations that restricted the distribution of religious material to areas outside the school,[55] that banned the distribution of religious materials,[56] that banned the distribution of religious material that would appear to be school-sponsored,[57] and that required prior approval by the superintendent before a student could distribute non-school materials.[58]

By contrast, in *Muller v. Jefferson Lighthouse School*,[59] the Seventh Circuit Court of Appeals upheld the validity of an elementary school?s rule that required advance approval of nonschool materials before students could distribute them on campus, even where no safeguards were placed on the school?s authority to deny permission. In *Harless v. Darr*,[60] a district court in Indiana upheld a school policy requiring students who wish to distribute more than ten copies of written material on school grounds to have material reviewed by superintendent. A district court in Colorado in *Hemry v. School Board of Colorado Springs*[61] held that restrictions on the distribution of a religious newspaper in a public high school was appropriate in light of the nature and purpose of the school as a nonpublic forum.

Courts have used forum analysis to determine whether school facilities should be available to non-student groups as well. In *Yeo v. Lexington*,[62] a high school yearbook and newspaper refused to print an advertisement promoting sexual abstinence that was offered by a parent of public high school students. The First Circuit Court of Appeals held that the advertising pages of the publications were "limited public fora" that could not constitutionally be subjected to content-based restriction, and thus the school must run the advertisement.[63] Other courts have made similar rulings in cases where school boards charged churches higher rents than other nonprofit organizations or refused to allow an organization with a religious message to rent school facilities.[64]

III. Conclusion

Under the United States Constitution and the Equal Access Act, public school students have the right to express their faith. College students and high school students have the same rights as other groups of students to meet and associate with others during non-curricular times. This principle generally applies to junior high and elementary school student groups, although a few courts have denied equal access to such groups because of the students' maturity level and the associated Establishment Clause concerns.

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Endnotes

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1. 20 USCS 4071-74 (1998)
2. 4071-74
3. 4071(a)
4. *Id.*
5. *Id.*
6. 4072(1)
7. 4071(a)
8. *Id.*
9. 4071(b)
10. *See Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 236 (1990).
11. *Id.*
12. The Establishment Clause states, "Congress shall make no law respecting an establishment of religion..." U.S. Const. Amend. I.
13. *Mergens*, 496 U.S. at 233.

14. *Id.* at 250. The Free Exercise Clause states, "Congress shall make no law...prohibiting the free exercise [of religion] ..." U.S. Const. Amend. I.

15. *Id.* at 247.

16. 106 F.3d 878 (9th Cir. 1997).

17. 85 F.3d 839 (2d Cir. 1996).

18. *Id.* at 848.

19. *Id.* at 860 (internal quotations omitted).

20. 982 F.2d 1160 (7th Cir. 1993).

21. 982 F.2d at 1166-67.

22. *See Doe v. Human*, 725 F.Supp. 1503, 1507 (W.D. Ark. 1989), *aff'd.*, 923 F.2d 857 (8th Cir. 1990).

23. 933 F.Supp. 582 (N.D. Miss. 1996).

24. *Id.* at 587 (holding EAA not applicable to intercom prayers broadcast to all classrooms, grades K though 12, because school not properly characterized as secondary school).

25. 12 F.3d 1244 (3d Cir. 1993).

26. *Id.* at 1247.

27. *Id.* at 1246.

28. *See Hoppock v. Twin Falls Sch. Dist.*, 772 F. Supp. 1160 (D. Idaho 1991); *Garnett v. Renton Sch. Dist.*, 772 F.Supp. 531 (W.D. Wash. 1991), *rev'd.*, 978 F.3d 641 (9th Cir.), *cert. denied*, 114 S.Ct. 72 1993).

29. 987 F.2d 641 (9th Cir. 1993).

30. *Id.* at 646: *see also Hoppock*, 772 F.Supp. at 1164.

31. 20 U.S.C. 4071(c)(3), (5) (1984).

32. *See Quappe v. Endry*, 772 F.Supp. 1004, 1014 (S.D. Ohio 1991), *aff'd.*, 979 F.2d 851 (6th Cir. 1992) (holding elementary school teacher who used classroom as forum to promote club created appearance of state sponsorship of club in violation of First Amendment); *Sease v. School Dist. of Philadelphia*, 811 F. Supp. 183, 192 (E.D. Pa. 1993) (holding high school

secretary was prohibited by EAA from sponsoring school gospel choir even though she led group after school hours).

33. 4071(c)(3)

34. 4071(c)(5)

35. 4071(c)(1)

36. 4071(c)(4)

37. The Free Speech Clause states, "Congress shall make no law...abridging the freedom of speech..." U.S. Const. Amend. I.

38. *See Perry Educ. Ass?n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45-46 (1983) (noting three general types of forums: traditional public forum, designated public forum (also called limited public or limited open forum), and non-public forum). The public forum is a place that has "immemorially been held intrust for the use of the public," such as a street or park; the government must show that a content-based restriction on speech in a public forum is narrowly tailored to achieve a compelling state interest. *Id.* at 955. A designated public forum is a place the government has opened for use by the public for expressive activity; as long as the government retains the open character of the forum, it is bound by the same standards as apply in a public forum. *Id.* A nonpublic forum is public property that is not by tradition or designation a forum for public communication; the government may restrict speech in this forum as long as the regulation is reasonable and not an effort to suppress a speaker's viewpoint. *Id.*

39. *See, eg., Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (holding university that maintained limited public forum violated First Amendment when it refused religious student group access to university facilities); *Good News/Good Sports Club v. Sch. Dist. of the City of Ladue*, 28 F.3d 1501, 1510 (8th Cir. 1994) (holding junior high school that permitted other clubs to meet, though it remained a nonpublic forum, must give religious club similar permission).

40. *See Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985) (plurality): Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1370 (3d Cir. 1990).

41. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

42. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993), citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (holding "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"); *see also Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that regardless of forum, "students do not shed their right to freedom of expression a the schoolhouse gate").

43. *Perry Educ. Ass'n. v. Perry Local Educators' Ass?n.*, 460 U.S. 37, 45 (1983).

44. 454 U.S. 263 (1981).

45. *Id.* at 276-77.

46. 28 F.3d 1501 (8th Cir. 1994).

47. *Id.* at 1505 n.6.

48. *Id.* at 1507.

49. 772 F. Supp. 1004 (S.D. Ohio 1991), *aff'd.*, 979 F.2d 851 (6th Cir. 1992).

50. *Id.* at 1014.

51. 766 F.2d 1391 (10th Cir. 1985).

52. *Id.* at 1401. The court distinguished *Widmar v. Vincent*, 454 U.S. 263 (1981), by emphasizing that most elementary school children, as opposed to college students, are unable to appreciate a wide diversity of view-points nor distinguish private speech from school-endorsed speech. *Bell*, 766 F.2d at 1401.

53. 806 F.Supp. 116 (N.D. Texas 1992); *see also Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 512-13 (1969) (holding students' free speech rights are protected whether students are "in the cafeteria, or on the playing field, or on the campus during authorized hours").

54. *Clark*, 806 F.Supp. at 120.

55. *See Thompson v. Waynesboro Area Sch. Dist.*, 673 F. Supp. 1379, 1392 (M.D. Pa. 1987) (holding where school district created limited public forum at junior high school by permitting school groups to use school facilities, it violated students' freedom of speech when it restricted distribution of religious literature to area outside school building). The court did not invoke the EAA to strike down the policy because the newspaper distribution was not a "meeting." *Id.* at 1383.

56. *See Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 293 (E.D. Pa. 1991) (holding school district's ban on students' distribution of religious materials in public high school, a limited public forum, did not advance educational environment nor create danger that students would infer school endorsement and thus was not narrowly tailored to achieve compelling state interest); *Rivera v. East Otero Sch. Dist.*, 721 F. Supp. 1189, 1194 (D. Colo. 1989) (holding ban on distribution of religious material in public high school unlawful, unless material was being distributed in disruptive manner, and noting that ?such inhibitions on individual development

defeat the very purpose of public education in secondary schools?).

57. *See Hedges v. Wauconda Community Unit Sch. Dist.*, 9 F.3d 1295, 1300 (7th Cir. 1993) (striking down junior high school's prohibition on distribution of religious material that students would reasonably believe to be sponsored, endorsed, or given official imprimatur by school, while holding school could place time, place, and manner restrictions on distribution). The court noted that "ignorant bystanders cannot make censorship legitimate...Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether...schools can teach anything at all." *Id.* at 1299-1300.

58. *See Johnston-Loehner v. O?Brien*, 859 F. Supp. 575, 581 (M.D. Fla. 1994) (holding elementary school policy requiring prior approval by superintendent before distribution of non-school materials was impermissible content-based prior restraint on speech).

59. 98 F.3d 1530 (7th Cir. 1996).

60. 937 F. Supp. 1351 (S.D. Ind. 1996).

61. 760 F. Supp. 856 (D. Colo. 1991).

62. 131 F.3d 241 (1st Cir. 1997), *cert. denied.*, 118 S. Ct. 2060.

63. *See id.* at *16; *but see Planned Parenthood of Southern Nevada, Inc. v. Clark County Sch. Dist*., 941 F.2d 817, 829 (9th Cir. 1991) (holding high school yearbook, newspapers, and athletic programs were not limited public forum and school's justification for refusing to publish family planning advertisement was reasonable).

64. *See Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703, 707 (4th Cir. 1994) (holding school facilities were public forum and school board that charged churches higher rents than other nonprofit organizations discriminated against religious speech in violation of the First Amendment). *See also Travis v. Owego-Appalachian Sch. Dist*., 927 F.2d 688, 694 (2d Cir. 1991) (holding school auditorium was limited open forum and school district that refused to allow nonprofit pregnancy counseling organization to use it for fund-raiser with religious theme engaged in unconstitutional viewpoint discrimination); *Gregoire v. Centennial Sch. Dist*., 907 F.2d 1366, 1382 (3d Cir. 1990) (holding high school auditorium was limited open forum and school board that excluded religious organization from worshiping and distributing literature there unconstitutionally discriminated against religious speech); *Wallace v. Washoe County Sch. Dist.*, 818 F. Supp. 1346, 1392 (D. Nev. 1991) (holding school district?s practice of renting school facilities to wide variety of applicants created limited open forum and denying church access for Sunday worship services because it was religious in nature was unconstitutional content-based discrimination).