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EQUAL ACCESS IN PUBLIC SCHOOLS

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.

The free speech rights of public school students are protected by both the First Amendment [1] and, in many cases, the federal Equal Access Act.[2] This brief addresses both avenues of protection for the rights of public school student groups. For more information on the First Amendment's protections for public school students see The Rutherford Institute's freedom resource brief entitled, "Student Free Speech."

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. Where applicable, 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.[3] 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.[4]

When does the EAA Apply?

The EAA applies, and mandates equal access and privileges for religious student groups, if the school has three characteristics.[5] First, the school must be a public secondary school.[6] This term is defined by the law of the state in which the school is located[7] and usually includes high schools and sometimes junior high schools. Second, the school must receive federal funding.[8] Third, the school must have created a "limited open forum"[9] (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,"[10] 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.

Is the EAA constitutional?

[11]The United States Supreme Court upheld the EAA in *Mergens v. Board of Education of Westside Community Schools*[12] against a challenge based on the Establishment Clause of the First Amendment.[13] The Westside Board of Education in this case argued that allowing religious groups on a high school campus would violate the Establishment Clause,[14] 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.[15] 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, annual school events, and other privileges, all groups, including religious ones, must be allowed the same access.[16]

Other schools have argued that the EAA violates provisions of their state constitutions.[17] However, the Ninth Circuit Court of Appeals held in *Garnett v. Renton School District*[18] that the EAA pre-empts any conflicting provisions of a state constitution. The court stated, "The EAA provides religious student groups a federal right. State law must therefore yield."[19]

In most cases, it is undisputed that the public school at issue is a secondary school and that it receives federal funding. Thus, the critical questions in determining whether the EAA applies are whether non-curricular groups are permitted to meet and whether such groups meet during non-instructional time. As explained above, if both of these requirements are met, the school has created a limited open forum as defined by the EAA.

What is non-instructional time?

The Equal Access Act defines "non-instructional time" as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends."[i] Where the time period where students are permitted to meet is before homeroom or after the end of the school day, there is usually no doubt that it is "non-instructional time." Periods during the school day present more difficult questions.

In *Ceniceros v. Board of Trustees of San Diego Unified School District*,[20] the Ninth Circuit Court of Appeals held that a school lunch period was "non-instructional time" and that a student religious club in a public high school had a right to meet in empty classrooms during the lunch period where other non-curricular student groups were allowed to do the same. Recently, in *Donovan v. The Punxsutawney Area School Board*,[ii] a case litigated by Rutherford Institute affiliate attorneys, the Third Circuit Court of Appeals held that when the school board denied the Bible club access to the school's limited public form on the ground that the club was religious in nature, they violated the EAA and discriminated against the club because of its religious viewpoint. The school held a 10 minute activity period between homeroom and the first class of the day. The court held that the Punxsutawney Area High School activity time constitutes "noninstructional time" under the EAA, so the school board must permit the Bible club (FISH) to meet during that period.[iii] In reaching this conclusion, the Third Circuit rejected the argument that any time when student attendance is mandatory is necessarily instructional time. Instead, the Court held that noninstructional time within the meaning of the EAA is any period where there is no "classroom instruction in discrete areas." [iv]

What is a "noncurriculum related student group?"

In *Mergens*, the Supreme Court defined the term "noncurriculum related student group" as:

"one that has more than just a tangential or attenuated relationship to courses offered by

> the school. . . It follows, then that a student group that is 'curriculum related' must have a more direct relationship to the curriculum than a religious or political club would have."[v]

The Court went on to state that "the term 'noncurriculum related student group' is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school."[vi]

In *Pope v. East Brunswick Board of Education*,[21] 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.[22] 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 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.[23] The Third Circuit explained that for a group to be curricular (and thus not trigger the EAA),

> the subject matter of the student group must be taught in a class. Thus, a chess club does not become curriculum-related merely because its subject matter relates to mathematics and science by building the ability to engage in critical thought processes; unless chess is actually taught, the club is a noncurriculum related student group.[vii]

What opportunities and privileges are covered by the EAA?

If the EAA applies, it requires that student religious groups generally be given the same opportunities and privileges as non-religious groups. However, the Act also prohibits school districts from "expending public funds beyond the incidental cost of providing the space for student-initiated meetings." viii

In *Prince v. Jacoby*, a high school student sued under EAA challenging the school district's refusal to allow her Bible Club to be an Associated Student Body club, with the same benefits as other student clubs.[ix] The court ruled that the school district had violated EAA by denying the club equal access to student body funds (which the court held were not "public funds") and other fund raising opportunites, free yearbook access, the use of the public address system for announcements, and the use of bulletin board space.[x] However, the Court held that the EAA did not require the school to provide the Bible Club with access to staff time, school supplies, the use of school busses for trips, and the use of audio-visual equipment although other student groups did receive these benefits.[xi] The Court reasoned that these latter benefits and privileges were not encompassed within the term "space" to which the Act required schools to provide equal access.[xii] Nevertheless, the Ninth Circuit went on to hold that although these additional items were not required by the EAA, they were required by the First Amendment.[xiii] (See part II below).

In *Hsu v. Roslyn Union Free School District*,[24] 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.[25] 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."[26]

Moreover, the EAA only requires that schools provide religious groups the same opportunities as other non-curricular groups. Thus, in *Herdahl v. Pontotoc County School District*,[27] a district court in Mississippi held that although secular clubs 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 in addition to announcements.[28]

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. First, the club must be student-led.[29] 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.[30] However, a teacher or other school administrator may be present to supervise the group.[31] Non-school community members may not conduct, control, or regularly attend group meetings.[32] Second, the meetings must be voluntary.[33] The EAA does not, however, contain a requirement for parental permission for students to attend such meetings. Third, religious clubs must not "materially and substantially interfere with the orderly conduct of educational activities within the school."[34]

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. Courts use a legal doctrine called forum analysis in order to determine when the government must grant a speaker access to public property, such as school property, for expressive purposes. Courts have generally determined that a public school is a nonpublic forum; however, as with the EAA, if a school has by policy or practice allowed non-curricular groups to meet on its premises, it opens a limited public forum for such groups.

Where a school maintains a closed, or nonpublic, forum, its speech restrictions must only be reasonably related to legitimate pedagogical concerns. 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. Further, once a school opens its facilities to non-curricular groups and becomes a limited public forum, it must meet a higher standard to justify the exclusion of some clubs. The school must show that any content-based ban on expression, i.e. the exclusion of a religious club because it is religious, is narrowly tailored to further a compelling state interest.

In *Widmar v. Vincent*, the Supreme Court held 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 access to its 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. In *Good News Club v. Milford Central School*, a case litigated by Rutherford Institute affiliate attorneys, the Supreme Court extended *Widmar* to high schools, junior high schools, and elementary schools, finding unpersuasive the argument that young children would observe religious activities at the school and might perceive an establishment of religion.

Nonetheless, a school can exclude religious clubs as long as it excludes all other non-curricular

clubs and the exclusion is not based on viewpoint. Furthermore, if there are additional rationales beyond mere concern that school children might perceive an establishment of religion, some courts have permitted schools to place unique restrictions on religious clubs. In *Quappe v. Endry*, a pre-*Milford* decision, 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.

Conclusion

Under the Federal Equal Access Act, student religious groups must be accorded the same opportunity to use school facilities for their meetings as other non-curricular student groups. Moreover, even if the EAA does not apply or does not require equal access to certain benefits or privileges, the First Amendment may require that student religious groups be treated the same as other groups.

The Rutherford Institute hopes that this information has been helpful to you in your fight for religious freedom. If you desire additional information on this or other issues of religious liberty, or if you need personal legal assistance in any area regarding religious freedoms, please feel free to write to us at The Rutherford Institute, P.O. Box 7482, Charlottesville, Virginia 22906-7482, email us at tristaff@rutherford.org, or call us at (434) 978-3888. Additional information may also be found on our website at www.rutherford.org.

1 The Free Speech Clause states, "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

2 20 U.S.C. §§ 4071-74 (2000).

3 § 4071(a).

4 Id.

5 Id.

6 Id.

7 § 4072(1).

8 § 4071(a).

9 Id.

10 § 4071(b).

11 See Board of Educ. of Westside Comty. Sch. v. Mergens, 496 U.S. 226, 236 (1990).

12 Mergens, 496 U.S. 226.

13 The Establishment Clause states, "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

14 Mergens, 496 U.S. at 233.

15 Id. at 250. The Free Exercise Clause states, "Congress shall make no law . . . prohibiting the free exercise [of religion] . . ." U.S. CONST. amend. I.

16 Id. at 247-248.

17 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, 987 F.3d 641 (9th Cir.), cert. denied, 510 U.S. 819 (1993).

18 987 F.2d 641 (9th Cir. 1993).

19 Id. at 646; see also Hoppock, 772 F. Supp. at 1164.

i 20 U.S.C. § 4072(4)

20. 106 F.3d 878 (9th Cir. 1997).

22. Donovan v. Punxsutawney Area School Board, 336 F. 3d 211 (3rd Cir. 2003).

23. Id. at 222.

24. Id. at 224.

ii 496 U.S. at 238.

iii Id. at 239.

21 12 F.3d 1244 (3d Cir. 1990).

22 Id. at 1247.

23 Id. at 1246 (citing Mergens, 496 U.S. 226, 239 (1990)).

iv Id. at 1253.

v Prince v. Jacoby, 303 F.3d 1074, 1084 (9th Cir. 2002), quoting 20 U.S.C. §4071(d)(3).

32. Prince v. Jacoby, 303 F.3d 1074, (9th Cir. 2002)

vi Prince, 303 F.3d at 1089.

vii Id.

viii Id.

ix Id. at 1092.

24 85 F.3d 839 (2d Cir. 1996).

25 Id. at 848.

26 Id. at 860 (internal quotations omitted).

27 933 F. Supp. 582 (N.D. Miss. 1996).

28 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 and the participation was not voluntary).

29 20 U.S.C. §§ 4071(c)(3), (5) (2000) (stating that school employees or agents can attend group activities in a non-participate capacity).

30 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).

31 § 4071(c)(3).

32 § 4071(c)(5).

33 § 4071(c)(1).

34 § 4071(c)(4).

35. The Free Speech Clause states, "Congress shall make no law...abridging the freedom of speech…" U.S. CONST. amend. I.

36. *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.* 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. See also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001).

37. *See, e.g., 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).

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

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

40. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993)(citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (holding "the govern ment 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. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that regardless of forum, "students do not shed their right to freedom of expression at the schoolhouse gate"); *Milford*, 533 U.S. at 106.

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

42. 454 U.S. 263 (1981).

43. *Id.* at 276-77.

x *Milford*, 533 U.S. 98 (2001).

44. 772 F. Supp. 1004 (S.D. Ohio 1991),