Equal Access 201

Refresh your memory about limited open forums and which student clubs can form and meet on campus.

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Once upon a time, the US Supreme Court held that public high school officials' prohibition against the formation of a Christian club violated the federal Equal Access Act (*Board of Education of Westside Community Schools v. Mergens*, 1990). Since that ruling, various courts have heard cases stemming from confusion over the mandates of the act. The following will refresh your understanding of the Equal Access Act and its important and practical applications in your school.

Westside's Refusal

In the late 1980s, Westside High School in Omaha, NE, a public secondary school that received federal financial assistance, permitted its students to voluntarily join a number of recognized groups and clubs that met after school. Some students requested permission to form a Christian club and were told by school officials that they could not do so because school board policy required clubs to have faculty member sponsors. School officials believed that the faculty sponsor requirement would create an improper entanglement of church and state in violation of the US Constitution.

Current and former Westside students eventually sued the school district, arguing that the school's refusal to allow the proposed club to meet at school under the same conditions as similarly situated clubs violated the Equal Access Act. Under the act, public secondary schools that receive federal assistance and maintain a "limited open forum" cannot deny equal access to students who wish to meet within that forum because of the "religious, political, philosophical, or other content" of the speech at such meetings.

The district court ruled in favor of the school district, but the court of appeals reversed. The US Supreme Court eventually affirmed the appellate court's opinion, holding that the school district had violated the Equal Access Act by denying official recognition to the student's proposed Christian club. In doing so, then-Justice O'Connor distinguished curriculum and noncurriculum student groups, explaining that the school's acceptance of other noncurrircular clubs made it illegal to deny equal access to any other similar club solely on the basis of the content of the club's speech.

Specifically, O'Connor explained that the proposed Christian club would be a noncurriculum group because no class required students to join the Christian club and the club's subject matter would not be taught in classes. In addition, the topics the Christian club would cover did not concern the school's curricular material, and the club members would not receive academic credit for their participation in club activities.

The court further held that the Equal Access Act was constitutional because the act served an overriding secular purpose by prohibiting discrimination on the basis of philosophical, political, or other types of speech. As a result, the Equal Access Act protected the formation of the Christian club, despite its religious bent.

Although the act does not mention specific types of student groups to which equal-access rights apply, the US Department of Education (n.d.) summarizes the equal access requirements as follows:

> If a federally funded public secondary school allows at least one noncurriculum-related student group to meet on school premises during noninstructional time, it has created a "limited open forum" that triggers the Act's protections. In that case, the school may not deny the same access

> for similarly situated clubs on the basis of the content of the clubs' speech. (pp. 1–2)

This summation, however, raises such questions as, What are non-curriculum-related groups? What is noninstructional time? and What does access mean, anyway?

CURRICULUM-RELATED GROUPS

In Mergens, the Supreme Court defined a curriculum-related student group as one that directly relates to the body of courses offered at a school. Essentially, "if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit," the group is curriculum-related for purposes of the Equal Access Act. For example, according to the Supreme Court and supported by the Department of Education, a "French club would directly relate to the curriculum if a school taught French in a regularly offered course or planned to teach the subject in the near future."

NONINSTRUCTIONAL TIME

In its legal guidelines regarding the Equal Access Act, the Department of Education defines "noninstructional time" as "time set aside by the school before actual classroom instruction begins or after actual instruction ends" (20 U.S.C. § 4072[4] [2010]). Noninstructional time also includes student meetings that occur before or after school or during lunch, activity periods, and other noninstructional periods during the school day.

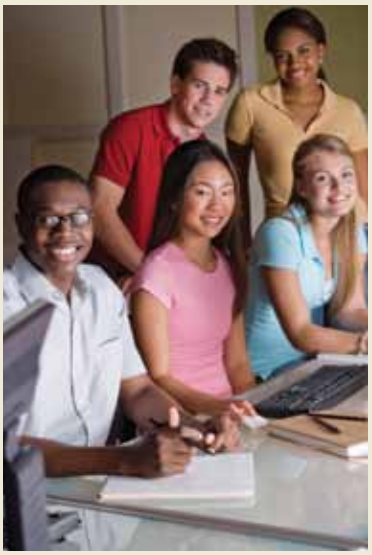
ACCESS

According to the Department of Education, "access" does not just refer to providing physical meeting spaces on school premises. For purposes of the act, access also includes privileges and recognition given to other similarly situated groups at the school, such as "the right to announce club meetings in the school newspaper, on bulletin boards, or over the public-address system" (US Department of Education, n.d., p. 2).

SCHOOL AUTHORITY

The Equal Access Act does not negate all school authority with regard to student clubs. The Department of Education (n.d.) explained that schools may still

> ban unlawful groups, maintain discipline and order on school premises, protect the well-being of students and faculty, assure that students' attendance at meetings is voluntary, and restrict groups that materially and substantially interfere with the orderly conduct of educational activities. (p. 3)



But schools may not lawfully disallow certain student groups on the basis of mere dislike of a message or unsubstantiated fear about potential disruption as a result of a group's message. The material and substantial disruption standard in the Equal Access Act is similar to the standard regarding free speech and expression in the school environment with which most of you are familiar.

In addition to illegal groups and the precedence of maintaining order and safety in the school environment, schools have the right to deny groups that are "directed, conducted, controlled, or regularly attended by nonschool persons" (US Department of Education, n.d., p. 2). A key requirement for equal access is that the groups are legitimately led by students.

Analyses in this column are intended to be informative, not definitive legal advice. School leaders should contact their districts' legal counsel for information about specific legal matters arising in their schools.

Although it is sometimes difficult to understand views and beliefs that are different than our own or to square certain beliefs and messages with our perception of the school environment, the Equal Access Act demands that school administrators provide appropriate access without discrimination.

Sometimes, in an effort to avoid trampling the mandates of equal access, school officials will take steps to ban all noncurricular student groups. In its legal guidance, the Department of Education cautioned against this, explaining that as a practical matter, it could be difficult for a school to successfully close a previously open forum. In addition, the department points out that "in an Equal Access Act challenge, a written policy banning noncurricular clubs [would not be sufficient] and [that] a court will scrutinize a school's actual practices to ensure each remaining club is genuinely curricular (20 U.S.C. § 4071[f] [2010]" (p. 4). As a result, a school should not arbitrarily define "curriculum-related" to exclude certain clubs.

The department also cautioned against schools using morality as the basis of censoring certain student groups. Under the act, schools may not ban certain groups based on "general moral disapproval about the content of speech at group meetings" (US Department of Education, n.d., p. 4), such as a group designed for students who are members of a minority faith or for students who are lesbian, gay, bisexual, or transgender.

Finally, the department cautioned school officials to avoid imposing special requirements on certain student groups. The department pointed out that a school would violate the Equal Access Act if it required a gay-straight alliance to change its name to make it palatable to a potential faculty adviser or set different requirements for that group's posters or announcements than those set for other similarly situated student groups.

Access Versus Endorsement

One of the key points of contention or confusion underlying Mergens (1990) was the apparent conflict between the requirements in the Equal Access Act and the type of club (in that case, Christian). It seemed to school officials that allowing such a club was an unconstitutional endorsement of religion in the public school. On this point, the department explains that schools should not equate providing access under the law with endorsing a given student group or its message. In doing so, the department quoted the US Supreme Court: "'schools do not endorse everything they fail to censor.' (See Mergens, 496 U.S. at 250)" (US Department of Education, n.d., p. 3).

As a result, the department reasoned that "granting access on a nondiscriminatory basis does not constitute a school's endorsement of a group's activities, and avoiding the appearance of endorsement does not, therefore, justify denying the group equal access" (US Department of Education, n.d., p. 3). In the same vein, noncurricular student groups can have faculty sponsors without compromising the requirement that the clubs be student initiated. The department clarified, "The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting (20 U.S.C. § 4071(c)(1) (2010)" (p. 3).

The Big Picture

Although it is sometimes difficult to understand views and beliefs that are different than our own or to square certain beliefs and messages with our perception of the school environment, the Equal Access Act demands that school administrators provide appropriate access without discrimination. From that viewpoint, the overarching mandate to provide equal treatment without improper discrimination becomes a key guiding principle that permeates much of law and education and, therefore, daily work and life in school. **PL**

REFERENCES

- Board of Education of Westside Community Schools v. Mergens By and Through Mergens, 496 U.S. 226 (1990).
- US Department of Education. (n.d.). *Legal guidelines regarding the Equal Access Act and the recognition of student-led noncurricular groups*. Retrieved from www2.ed.gov/policy/elsec/guid/secletter/groupsguide.doc

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