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## The Equal Access Act: Still Controversial After All These Years

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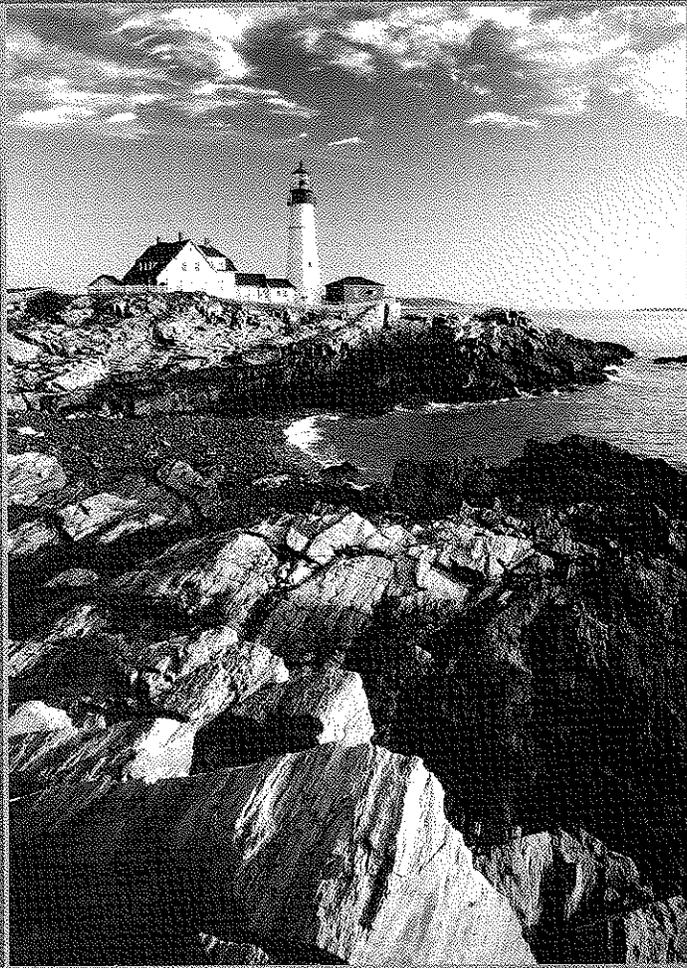
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## The Equal Access Act: Still Controversial After All These Years

Congress enacted the Equal Access Act<sup>1</sup> almost twenty years ago in order to guarantee that student religious clubs would have the right to meet in public high schools on the same terms as other noncurricular clubs. The statute followed on the heels of the Supreme Court's decision in *Widmar v. Vincent*<sup>2</sup> requiring a state university to grant student religious organizations the same rights of access to use campus facilities as other recognized student groups. In *Widmar*, the Supreme Court based its decision on the First Amendment's public forum doctrine and rejected the University's attempt to rely on the Establishment Clause to justify its discriminatory treatment of religious organizations. The Court did not decide, however, whether similar rights of access would be constitutionally mandated in the context of public secondary schools.<sup>3</sup>

Congress, preferring not to wait for the Court to answer this unresolved question, and in the aftermath of several lower court decisions that rejected access claims by student religious groups at public high schools,<sup>4</sup> enacted the Equal Access Act on August 11, 1984 to mandate access rights at public high schools that receive federal financial assistance. Under its provisions, equal access obligations are imposed on public high schools that permit noncurricular student organizations to meet during noninstructional times and thereby create "limited public forums."<sup>5</sup> Despite a narrow Congressional purpose that focused on an effort to prevent discrimination against student religious clubs, the statute is broadly worded to prevent discrimination "on the basis of the religious, political, philosophical, or other content of the speech."<sup>6</sup> The broad scope of the Act's protections is necessary to avoid violations of both the free speech guarantee, as recognized in *Widmar*, and the Establishment Clause.

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<sup>1</sup> 20 U.S.C. §§ 4071-4074 (2004).

<sup>2</sup> 454 U.S. 263 (1981).

<sup>3</sup> In reaching its decision, the Court relied on the fact that "[u]niversity students are, of course, young adults" and "are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." *Id.* at 274 n.14. The Court did not, however, address the issue of whether the greater impressionability of younger students would be sufficient to justify exclusion of a student Bible club at a public high school.

<sup>4</sup> *Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669 F.2d 1038, 1041 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983) (striking down school board policy that provided "The School Board permits students to gather at the school with supervision either before or after regular school hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary."); *Brandon v. Guilderland Bd. of Ed.*, 635 F.2d 971, 979 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981) (Students for Voluntary Prayer were denied permission to conduct prayers on school grounds: "The record indicates that school buses discharge students at the Guilderland High School between 7:20 a.m. and 7:40 a.m., and that the official school day 'begins' at this point. Any voluntary student prayer meetings conducted after the arrival of the school buses and before the formal 'homeroom' period at 7:50 a.m., therefore, would occur during school hours. The prayer meetings would create an improper appearance of official support, and the prohibition against impermissibly advancing religion would be violated.").

<sup>5</sup> 20 U.S.C. §§ 4071 (a) and (b).

<sup>6</sup> 20 U.S.C. § 4071 (a).

Schools that trigger the statute's provisions by creating a limited public forum are required to provide "equal access" and "a fair opportunity" to student groups that wish to meet on school property as well as refrain from discriminating against such groups.<sup>7</sup> The statute specifies five "fair opportunity criteria" that operate as a safe harbor for school officials. Schools are in compliance with the fair opportunity requirement of the statute if they uniformly require that the meetings of student groups be "voluntary and student initiated," refrain from sponsoring such meetings, require that employees of the school may be present, but not participate in meetings of student religious groups, preclude meetings that materially and substantially disrupt the school's educational activities and preclude nonschool personnel from playing a significant role in the group's activities.<sup>8</sup>

Since its enactment, the Equal Access Act has produced a steady stream of controversies. The diverse range of issues that have been raised include whether allowing clubs to meet during the lunch hour satisfies the statutory trigger of allowing clubs to meet during "noninstructional time," whether the statute creates rights in addition to the right to hold meetings on school premises, such as the right to distribute literature about a club or use the school's public address system, what constitutes a noncurricular student club, and whether the access rights created under the act also apply to gay and lesbian student organizations. Many of these disputes are complicated by the fact that the student group bringing the legal challenge also relies on the First Amendment's free speech guarantee and the public high school defending against the lawsuit asserts an Establishment Clause justification for its actions.

The Supreme Court has considered issues arising under the Equal Access Act only once since the enactment of the statute. In 1990, in the case of *Board of Education of the Westside Community Schools v. Mergens*,<sup>9</sup> the Supreme Court both interpreted the Act's provisions and upheld it against a constitutional challenge based on the First Amendment's Establishment Clause. In *Mergens*, the Westside High School allowed 30 student groups and clubs to meet in the school building after school had ended for the day. When a group of students asked permission to start a Christian club to pray, read from and discuss the Bible and have fellowship, school officials rejected their request on the ground that allowing the club to meet would violate the Establishment Clause.

The Supreme Court, in interpreting the statute, considered the meaning of the term "noncurriculum related student group," a term left undefined by the Equal Access Act. Relying on the text and legislative history of the statute, the Court concluded that the term should be broadly interpreted "to mean any student group that does not directly relate to the body of courses offered by the school."<sup>10</sup> In defining "noncurriculum related," the Court first focused on the opposing concept of curriculum-related. It identified four criteria used to determine if a student group directly relates to the school's curriculum: (1) "if the subject matter of the group is actually taught, or will soon be

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<sup>7</sup> *Id.*

<sup>8</sup> 20 U.S.C. § 4071 (c).

<sup>9</sup> 496 U.S. 226 (1990) (plurality opinion).

<sup>10</sup> *Id.* at 239.

taught, in a regularly offered course;" (2) "if the subject matter of the group concerns the body of courses as a whole;" (3) "if participation in the group is required for a particular course; or" (4) "if participation in the group results in academic credit."<sup>11</sup>

Supplementing its list of general criteria, the Court also provided examples. The Court expressed the view that the practices of a student orchestra would be curriculum-related if participation was required of those enrolled in music classes at the school or if academic credit was awarded for participation.<sup>12</sup> A French club would be curriculum-related if the school included a course in French in its curriculum or was planning to offer the course in the near future.<sup>13</sup>

In addition to clubs related to particular curricular offerings, the Court also recognized that a club might be related to the school's curriculum as a whole. The example it offered was student government if "it addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses offered by the school."<sup>14</sup> Interestingly, student government organizations were not identified as potentially within the category of curriculum-related based on the fact that the school curriculum included the study of government in some of its courses. Indeed, the Court specifically rejected the school's argument that "student government clubs 'advance the goals of the School's political science classes by providing an understanding and appreciation of government processes.'"<sup>15</sup>

The Court also gave examples of noncurriculum related clubs. These included "a chess club, a stamp collecting club, or a community service club."<sup>16</sup> While the Court did not conclude that such clubs could never be considered to be curricular-related, it put the burden on the school to demonstrate that such clubs were directly related to the curriculum.<sup>17</sup> In doing so, it specifically rejected the school's argument that a club should be considered related to the curriculum if its subject matter is "remotely related to abstract educational goals."<sup>18</sup> According to the Court:

Allowing such a broad interpretation of "curriculum-related" would make the [Act] meaningless. A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. This is exactly the result that Congress sought to prohibit by enacting the [Act]. A public secondary school cannot simply

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<sup>11</sup> *Id.* at 239-40.

<sup>12</sup> *Id.* at 240.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 244.

<sup>16</sup> *Id.* at 240.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 244.

declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech of that group.<sup>19</sup>

The Court also considered and rejected an Establishment Clause challenge to the facial validity of the statute. It found that the purpose of the statute, to eliminate viewpoint-based discrimination against student groups, was a secular purpose and that the statute's effect, which was to create an opportunity for a multiplicity of student groups to meet at public high schools without significant involvement by school personnel, was similar to the effect in *Widmar v. Vincent* and was not constitutionally problematic.<sup>20</sup>

Since *Mergens*, a wide array of issues have arisen over the scope of the rights created by the Equal Access Act. Some of the issues are made more difficult to resolve because of the absence of clear directions in the statute. While the statute defines the key statutory trigger of a "limited open forum," it does so by providing that a limited open forum is created when a "school grants an offering to or opportunity for one or more noncurriculum related student groups to meet during noninstructional time."<sup>21</sup> Unfortunately, it fails to define "noncurriculum related" and only defines "noninstructional time" as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends."<sup>22</sup> Moreover, while the statute guarantees "equal access," it fails to specify what rights are included within that statutory term.

This vagueness in the statute's terms has left room for significant disagreements over the meaning of those terms. In some of those disputes, issues have arisen over whether a school has or has not limited student groups to those that are curriculum-related.<sup>23</sup> In other disputes, major issues have arisen over whether the time used by clubs to meet is noninstructional time or not. Some courts have limited noninstructional time to time before or after the school day while others have included times such as the lunch hour

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<sup>19</sup> *Id.* at 244-45 (quoting from *Mergens v. Bd. of Educ.*, 867 F.2d 1076, 1078 (8th Cir. 1989)).

<sup>20</sup> *Id.* at 247-53.

<sup>21</sup> 20 U.S.C. § 4701 (b).

<sup>22</sup> 20 U.S.C. § 4702 (4).

<sup>23</sup> Compare *East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166 (C.D. Utah 1999) (finding Future Homemakers of America, Future Business Leaders of America and National Honor Society to be curriculum-related) with *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244 (3d Cir. 1993) (holding that the Key Club, a student service organization connected with the Kiwanis, was not curriculum-related).

when classes are not in session.<sup>24</sup> Issues have even arisen over when the school day begins.<sup>25</sup>

While the focus of the Act is on the opportunity for student groups to use school facilities for their meetings, cases arising under the Act have also raised substantial issues over whether it mandates that religious clubs receive other benefits provided to student clubs such as opportunities to publicize the meetings and activities of a student group and the availability of various sources of funds made available to student groups. This issue was first addressed in *Mergens*. In that case, the Court concluded, without discussion, that the equal access rights guaranteed by the statute meant that the student Bible club was entitled to the same opportunities to publicize club activities as other student groups.<sup>26</sup>

While most courts have followed the lead of *Mergens* and granted access on the same terms as are made available to other student groups,<sup>27</sup> the resolution of this issue, however, is not always without controversy. It is made more complicated by the fact that the statute contains several provisions that limit the access available to students. One such provision is the right of the school to act "to maintain order and discipline on school premises" as well as "to protect the well-being of students and faculty."<sup>28</sup> Another limitation is the fact that the statute must be interpreted not to authorize the school "to expend public funds beyond the incidental cost of providing the space for student-initiated meetings."<sup>29</sup> Thus access to school funds may be beyond the reach of the

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<sup>24</sup> Compare *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002), cert. denied, 124 S. Ct. 62 (2003) (finding that student/staff time is instructional time because student attendance is required even though no formal classroom instruction takes place during this time period) with *Ceniceros v. Bd. of Trustees of the San Diego Unified Sch. Dist.*, 106 F.3d 878 (9th Cir. 1997) (finding that lunch hour is noninstructional time).

<sup>25</sup> *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211 (3d Cir. 2003) (finding that the school day does not include either homeroom or an activity period both of which occur prior to the first classroom period).

<sup>26</sup> *Mergens*, 496 U.S. at 247. ("Although the school apparently permits respondents to meet informally after school, App. 315-316, respondents seek equal access in the form of official recognition by the school. Official recognition allows student clubs to be part of the student activities program and carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair. *Id.* at 434-435. Given that the Act explicitly prohibits denial of 'equal access . . . to . . . any students who wish to conduct a meeting within [the school's] limited open forum' on the basis of the religious content of the speech at such meetings, § 4071(a), we hold that Westside's denial of respondents' request to form a Christian club denies them 'equal access' under the Act.")

<sup>27</sup> See, e.g., *Westside High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 118 n.17 (D. Mass. 2003) ("Additionally, denying the LIFE Club official school recognition would violate the Equal Access Act if such a designation would allow the Club to be 'part of the student activities program' and to have access to the school bulletin, school bulletin boards, and the public address system."). But see *Thompson v. Waynesboro Area Sch. Dist.*, 673 F. Supp. 1379, 1383-84 (M.D. Pa. 1987) (students wishing to distribute a religious newspaper in school hallways were not protected by the Equal Access Act since their conduct was not a "meeting" under § 4072 (3) of the Act).

<sup>28</sup> 20 U.S.C. § 4071 (f).

<sup>29</sup> 20 U.S.C. § 4071 (d).

statute's protections. These limitations arguably compromise the statutory goal of equality of opportunity for all student groups.

One recent case in which a claim under the statute was rejected illustrates the relevance of these limitations on the scope of access rights. In *Gernetzke v. Kenosha Unified School District*,<sup>30</sup> a student Bible club challenged the principal's censorship of the Bible club's design for a hall mural. The case was triggered by the fact that the school had invited all student organizations to submit sketches for a mural to be painted in the main hallway. The principal approved the club's design, which included a Bible open to a well known passage from the New Testament, but refused to allow the mural to include a large cross. The principal had also refused to allow a group of skinheads to paint a mural containing a swastika and to allow Students Against Drunk Driving to include a reference to a specific brand of beer in its mural. When the exclusion of the cross was challenged under the Equal Access Act, the court found no discrimination based on the club's views because the principal's reasons for excluding the cross were his fear of litigation and fear of conflicts among the members of the student body.<sup>31</sup> In upholding the principal's decision, the court cited to section 4071(f) of the Equal Access Act which limits the act so it does not restrict the authority of the school to "maintain order and good discipline on school premises."<sup>32</sup> The court found that the principal was not discriminating against religion, but was banning displays that would lead to litigation or disruption.<sup>33</sup>

The Ninth Circuit in *Prince v. Jacoby*<sup>34</sup> also attempted to interpret the statute to steer a course between the two potentially contradictory aspects of the statute. In *Prince*, the Bethel School District granted a student Bible club, World Changers, only some of the rights available to other student clubs. The discriminatory treatment was challenged in a lawsuit filed by one of the student members of the club based on both the Equal Access Act and the First Amendment's free speech guarantee. In considering the challenge, the Ninth Circuit first addressed the statutory issues. It concluded that under the Equal Access Act the Bible club was entitled to participate in various fund-raising activities, have a club photograph appear in the yearbook at no cost, post flyers on bulletin boards and use the school's public address system on the same basis as other clubs.<sup>35</sup> However, relying on the Act's focus on noninstructional time and its funding restriction, it denied the Bible club the right to meet during instructional time<sup>36</sup> as well as the right to use school supplies, audio/visual equipment and school vehicles.<sup>37</sup>

*Prince* also presents a good opportunity to review the interaction between the Equal Access Act and the First Amendment, an issue the Supreme Court refused to address in

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<sup>30</sup> 274 F.3d 464 (7th Cir. 2001).

<sup>31</sup> *Id.* at 466.

<sup>32</sup> *Id.* at 467.

<sup>33</sup> *Id.* at 466.

<sup>34</sup> 303 F.3d 1074 (9th Cir. 2002), *cert. denied*, 124 S. Ct. 62 (2003).

<sup>35</sup> *Id.* at 1086-87.

<sup>36</sup> *Id.* at 1087-89.

<sup>37</sup> *Id.* at 1090.

*Mergens*.<sup>38</sup> In *Prince*, having found that the statute precluded granting a variety of benefits to the Bible club, the court went on to consider whether these restrictions were consistent with the free speech rights of the members of the Bible club.<sup>39</sup> The court concluded that the Bible club was entitled to meet in classrooms during instructional time, receive school supplies, borrow audio/visual equipment and use school vehicles on the same basis as other student groups under the First Amendment.

Citing *Widmar* and similar cases, the court found that all of the restrictions imposed on the Bible club were based on the viewpoint of the club and were unconstitutional under the free speech clause of the First Amendment.<sup>40</sup> Moreover, according to the Court, nothing in the Establishment Clause precluded the club from receiving the same benefits as other student groups.<sup>41</sup> Therefore, by combining statutory and constitutional reasoning, the Ninth Circuit found that the Bible club was entitled to complete parity of treatment with other student clubs.<sup>42</sup>

A dissenting opinion in *Prince* saw things differently. According to Judge Berzon, Congress limited the reach of the Equal Access Act in order to avoid any violation of the Establishment Clause.<sup>43</sup> Thus the limitations on the use of classrooms during instructional time and the funding restrictions were designed to avoid a clash between the statute and the Establishment Clause. Analyzing the grant of such benefits under the Supreme Court's Establishment Clause precedents, Judge Berzon dissented from the majority's view that such benefits were constitutionally required and found them to be barred by the Establishment Clause.<sup>44</sup> Other courts have expressed similar reservations over whether the First Amendment grants rights to student religious groups that go beyond the statutory guarantees of the Equal Access Act.<sup>45</sup>

While the primary concern of the sponsors of the Equal Access Act focused on discrimination against student religious groups, the language of the statute is not limited to the protection of such groups. The Act protects student groups generally against discrimination on the basis of the content of their speech. Nevertheless, until recently the cases that have arisen under the Act have involved access claims by religious groups. Several recent cases, however, have raised the rights of gay and lesbian student groups under the Act. The results of this group of cases have been mixed. In one case, a federal district court, relying on a strained interpretation of the Act, concluded that the high

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<sup>38</sup> 496 U.S. 226, 247.

<sup>39</sup> 303 F.3d at 1090.

<sup>40</sup> *Id.* at 1090-92.

<sup>41</sup> *Id.* at 1092-94.

<sup>42</sup> See also *Thompson v. Waynesboro Area Sch. Dist.*, 673 F. Supp. 1379 (M.D. Pa. 1987) (holding that student conduct in distributing a religious newspaper in school hallways was protected by the First Amendment even though it was not a meeting within the meaning of the Equal Access Act).

<sup>43</sup> 303 F.3d at 1098 (Berzon, J., dissenting in part).

<sup>44</sup> *Id.* at 1097.

<sup>45</sup> *Gernetzke v. Kenosha Unified Sch. Dist.*, 274 F.3d 464, 467 (7th Cir. 2001) ("[W]e shall not conceal our doubts that the First Amendment has a broader scope than the Equal Access Act.").

school at issue did not permit noncurriculum related student groups to meet, thereby denying access to the gay/straight alliance.<sup>46</sup> By contrast, several courts have granted preliminary injunctions against high schools that refused to allow a gay/straight alliance club to meet.<sup>47</sup>

Over its twenty-year history, the Equal Access Act has continued to spark controversy. Despite a large number of court decisions that have interpreted the scope of the statute, those controversies have not yet subsided nor are they likely to for the foreseeable future. Interpretation of the Equal Access Act is complicated by ambiguities in the statute's language and the complex relationship that exists between the statute and the First Amendment's prohibition on religious establishments combined with its protection for freedom of expression. The delicate constitutional balancing act that the statute attempts to accomplish complicates the task of statutory interpretation in a way that courts have still been unable to fully resolve.

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<sup>46</sup> *East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166 (C.D. Utah 1999).

<sup>47</sup> *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County, Kentucky*, 258 F. Supp. 2d 667 (E.D. Ky. 2003); *Colin v. Orange County Unified Sch. Dist.*, 83 F. Supp. 2d 1135 (C.D. Cal. 2000).