

Western New England University

Digital Commons @ Western New England University

Faculty Scholarship

School of Law Faculty Scholarship

2004

The Equal Access Act: Still Controversial After All These Years

Leora Harpaz

Western New England University School of Law, lharpaz@law.wne.edu

Follow this and additional works at: <https://digitalcommons.law.wne.edu/facschol>



Part of the [Constitutional Law Commons](#), and the [Education Law Commons](#)

Recommended Citation

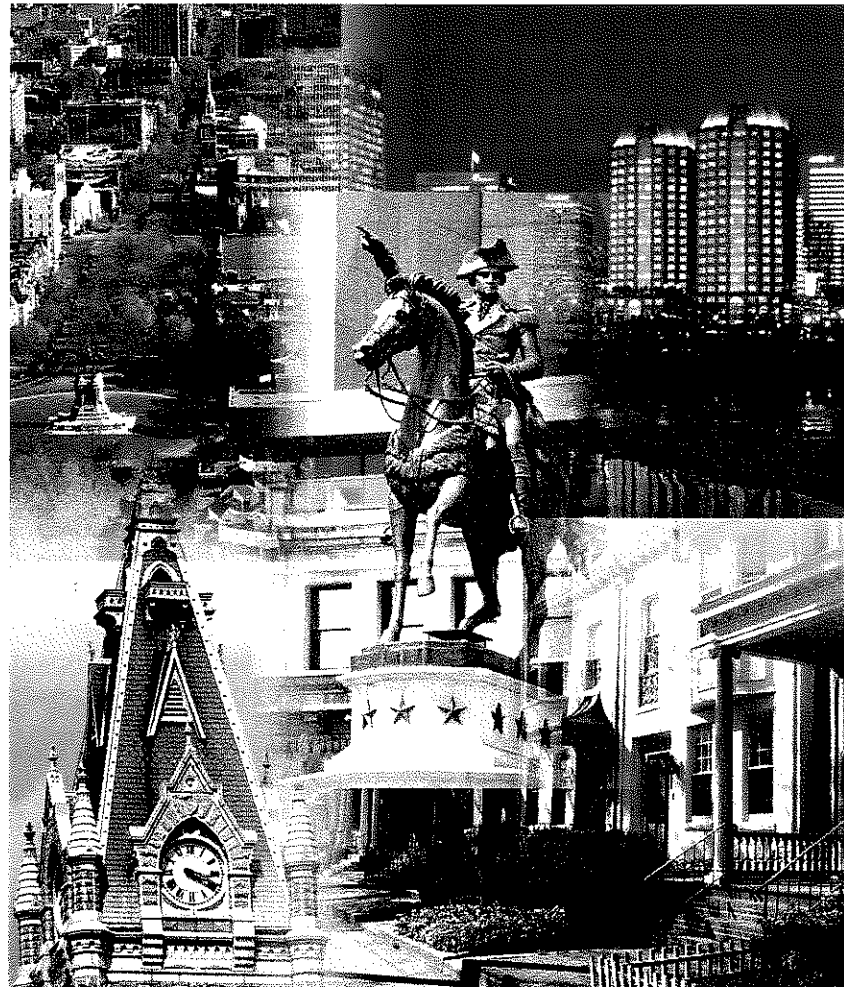
Second Virginia Education Law Conference: Critical Issues in Education Law and Policy 93 (2004)

This Conference Proceeding is brought to you for free and open access by the School of Law Faculty Scholarship at Digital Commons @ Western New England University. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Digital Commons @ Western New England University.

SECOND VIRGINIA EDUCATION LAW CONFERENCE

April 15-17, 2004

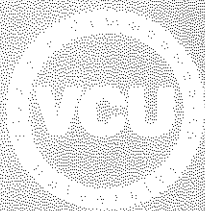
Richmond, Virginia



CRITICAL ISSUES IN EDUCATION LAW AND POLICY

Presented by

COMMONWEALTH EDUCATIONAL POLICY INSTITUTE
VIRGINIA COMMONWEALTH UNIVERSITY



LexisNexis™

The Equal Access Act: Still Controversial After All These Years

by

Leora Harpaz, Professor, Western New England College School of Law, Springfield,
Massachusetts

Congress enacted the Equal Access Act, 20 U.S.C. § 4071, 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*, 454 U.S. 263 (1981), 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 specifically declined, however, to decide whether similar rights of access would apply in the context of public secondary schools.

Congress, preferring not to wait for the Court to answer this unresolved question, 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." 20 U.S.C. § 4071 (a) and (b). 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." 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 discrimination against such groups. The statute specifies five "fair opportunity criteria" so that schools are in compliance with the fair opportunity requirement of the statute if they 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. 20 U.S.C. § 4071 (c).

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, 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*, 496 U.S. 226 (1990) (plurality opinion), 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 student group 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." 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." 496 U.S. at 239. By way of examples, the Court was of the view that the practices of a student orchestra would be curriculum-related if participation was required for academic credit as would a French Club if the school included a course in French in its curriculum. By contrast, a chess club and a stamp collecting club would be unlikely to be curriculum-related. *Id.* at 240. 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. *Id.* at 247-53.

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." 20 U.S.C. § 4701 (b). 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." 20 U.S.C. § 4072 (4).

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. Compare *East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District*, 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 Board of Education*, 12 F.3d 1244 (3d Cir. 1993)

(holding that the Key Club, a student service organization connected with the Kiwanis, was not curriculum-related). In others 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 when classes are not in session. 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. Board of Trustees of the San Diego Unified School District*, 106 F.3d 878 (9th Cir. 1997) (finding that lunch hour is noninstructional time). Issues have even arisen over when the school day begins. *Donovan v. Punxsutawney Area School Board*, 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).

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. The resolution of these issues is made complicated by the fact that the statute contains arguably conflicting provisions on such issues. On the side of an expansive interpretation of access rights, the statute provides that schools may not discriminate against student groups. On the side of a more restricted interpretation of access rights, the statute contains numbers of limitations on the statutory rights of student groups, some specifically applying to student religious groups and others that are more generally applicable. The limitations are spelled out in two sections of the statute. One section is the list of fair opportunity criteria that allow schools to satisfy the statutory requirements while imposing certain limitations on student groups. Those limitations allow schools to refrain from sponsoring the meetings of student groups and allow schools to require that school personnel be "present at religious meetings only in a nonparticipatory capacity." 20 U.S.C. § 4071 (c). In addition, the statute also contains a section that limits the construction of the statute. Among those limitations 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." 20 U.S.C. § 4041 (d).

The Ninth Circuit in *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002), *cert. denied*, 124 S. Ct. 62 (2003), attempted to steer a course between these two potentially contradictory aspects of the statute. In *Prince*, a student Bible club was granted only some of the rights available to other student clubs. In considering, a challenge based on both the Equal Access Act and the First Amendment's free speech guarantee, the Court 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. However, it denied the Bible Club the right to meet during student/staff instructional time and the right to use school supplies, audio/visual equipment and school vehicles because of the funding limitation in 20 U.S.C. § 4041 (d).

However, having found the statute to preclude granting such benefits to the Bible club, it went on to consider whether these restrictions were consistent with the free speech rights of the members of the Bible Club. It concluded that all of the restrictions were based on the viewpoint of the club and were unconstitutional under the free speech clause of the First Amendment. 303 F.3d at 1092.

While the primary concern of the sponsors of the Equal Access Act was 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 school at issue did not permit noncurriculum related student groups to meet, thereby denying access to the gay/straight alliance. *East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District*, 81 F. Supp. 2d 1166 (C.D. Utah 1999). By contrast, several courts have granted preliminary injunctions against high schools that refused to allow a gay/straight alliance club to meet. *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County, Kentucky*, 258 F. Supp. 2d 667 (E.D. Ky. 2003); *Colin v. Orange County Unified School District*, 83 F. Supp. 2d 1135 (C.D. Calif. 2000).

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.