Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Equal Access Act: QUESTIONS AND ANSWERS

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RELIGIOUS FREEDOM CENTER
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—THE FIRST AMENDMENT TO THE U.S. CONSTITUTION

The Equal Access Act: Questions and Answers, first published by the First Amendment Center—the precursor to the Religious Freedom Center of the Newseum Institute—is jointly sponsored by:

- American Academy of Religion
- American Association of School Administrators
- American Federation of Teachers
- American Jewish Committee
- American Jewish Congress
- Americans United Research Foundation
- Association for Supervision and Curriculum Development
- Baptist Joint Committee for Religious Liberty
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- National Education Association
- National PTA
- National School Boards Association

THE EQUAL ACCESS ACT

The Equal Access Act is designed to ensure that, consistent with the First Amendment, student religious activities are accorded the same access to public school facilities as are student secular activities. Based on decisions of the federal courts as well as its interpretations of the Act, the Department of Justice has advised that the Act should be interpreted as providing, among other things, that:

General provisions

Student religious groups at public secondary schools have the same right of access to school facilities as is enjoyed by other comparable student groups. Under the Equal Access Act, a school receiving federal funds that allows one or more student noncurriculum-related clubs to meet on its premises during noninstructional time may not refuse access to student religious groups.

Prayer services and worship exercises covered

A meeting, as defined and protected by the Equal Access Act, may include a prayer service, Bible reading, or other worship exercise.

Equal access to means of publicizing meetings

A school receiving federal funds must allow student groups meeting under the Act to use the school media—including the public address system, the school newspaper and the school bulletin board—to announce

their meetings on the same terms as other noncurriculum-related student groups are allowed to use the school media. Any policy concerning the use of school media must be applied to all noncurriculum-related student groups in a nondiscriminatory matter. Schools, however, may inform students that certain groups are not school-sponsored.

Lunch-time and recess covered

A school creates a limited open forum under the Equal Access Act, triggering equal access rights for religious groups, when it allows students to meet during their lunch periods or other noninstructional time during the school day, as well as when it allows students to meet before and after the school day.

The Equal Access Act became law on August 11, 1984, passing the Senate 88-11 and the House 337-77. Congress's primary purpose in passing the Act, according to the Supreme Court, was to end "perceived widespread discrimination" against religious speech in public schools. While Congress recognized the constitutional prohibition against government promotion of religion, it believed that non- school-sponsored student speech, including religious speech, should not be excised from the school environment.

The U.S. Supreme Court, by a vote of 8-1, held in *Westside Community Schools v. Mergens* (1990) that the Equal Access Act is constitutional. This chapter is designed to help school board members, administrators, teachers, parents, religious leaders and students understand and conform to the Act.

The title—*the Equal Access Act*—explains the essential thrust of the Act. There are three basic concepts.

The first is *nondiscrimination*. If a public secondary school permits student groups to meet for student-initiated activities not directly related to the school curriculum, it is required to treat all such student groups equally. This means the school cannot discriminate against any students conducting such meetings "on the

basis of the religious, political, philosophical, or other content of the speech at such meetings." This language was used to make clear that religious speech was to receive equal treatment, not preferred treatment.

The second basic concept is *protection of student-initiated and student-led meetings*. The Supreme Court has held unconstitutional state-initiated and state-endorsed religious activities in the public schools. (This Act leaves the "school prayer" decisions undisturbed.) However, in upholding the constitutionality of the Act, the Court noted the "crucial difference between government speech endorsing religion, which the Establishment clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise clauses protect."

The third basic concept is *local control*. The Act does not limit the authority of the school to maintain order and discipline or to protect the well-being of students and faculty.

While the Act does not cover every specific situation, an understanding of the three basic concepts—as fleshed out by the questions and answers below—should be a sufficient guide for addressing most situations.

Many of the sponsors of these guidelines were actively involved in the debate over equal access. Some supported the Act, others remained neutral, and some opposed it. All of the sponsors, however, agree that the provisions of the Act need to be understood clearly as public secondary schools develop policies concerning student groups.

The Equal Access Act
(20 U.S.C. 4071-74)

Denial of Equal Access Prohibited Sec. 4071.

(a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum-related student groups to meet on school premises during noninstructional time.

(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof—

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

Definitions Sec. 4072. As used in this subchapter—

(1) The term "secondary school" means a public school which providessecondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

Severability Sec. 4073.
If any provision of this subchapter or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the subchapter and the application to other persons or circumstances shall not be affected thereby.

Construction Sec. 4074.
The provisions of this subchapter shall supersede all other provisions of Federal law that are inconsistent with the provisions of this subchapter.

QUESTIONS AND ANSWERS: EQUAL ACCESS AND THE PUBLIC SCHOOLS

The following questions and answers indicate how the act is to work:

What triggers the Equal Access Act?

The creation of a "limited open forum." A limited open forum is created whenever a public secondary school provides an opportunity for one or more "noncurriculum-related student groups" to meet on school premises during noninstructional time. The forum created is said to be "limited" because it is only the school's own students who can take advantage of the open forum. Outsiders are not granted an independent right of access by the Act.

Must a school board create a limited open forum for students?

No. The local school board has exclusive authority to determine whether it will create or maintain a limited open forum. However, if a school has a "limited open forum," it may not discriminate against a student group because of the content of the group's speech.

What is a "noncurriculum-related student group"?

In *Mergens*, the Supreme Court interpreted a noncurriculum-related student group to mean "any student group [or club] that does not directly relate to the body of courses offered by the school." According to the Court, a student group directly relates to a school's curriculum only if (1) the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; (2) the subject matter of the group concerns the body of courses as a whole; or (3) participation in the group is required for a particular course or results in academic credit.

Schools may not substitute their own definition of "noncurriculum-related student group" for that of the Court.

Did the Supreme Court give any examples of "noncurriculum- related student groups"?

The Court noted that unless a school could show that groups such as a chess club, stamp- collecting club, or community service club fell within the definition of curriculum-related set forth by the Court, they would be considered noncurriculum-related for purposes of the Act.

In *Mergens*, the Court found at least three groups that were noncurriculum-related for that school: (1) a scuba club, (2) a chess club, and (3) a service club. Each of these clubs was found to be noncurriculum-related because it did not meet the Court's criteria set forth in the question above.

What examples did the Court give of curriculum-related student groups?

The Court noted that "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. A school's student government would generally relate directly to the curriculum to the extent that it addresses concerns, solicits opinions and formulates proposals pertaining to the body of courses offered by the school. If participation in a school's band or orchestra were required for the band or orchestra classes, or resulted in academic credit, then those groups would also directly relate to the curriculum."

Who determines which student groups are, in fact, curriculum-related?

Local school authorities, subject to review by the courts. However, the Supreme Court has made clear that a school cannot defeat the intent of the Act by defining "curriculum-related" in a way that arbitrarily results in only those student clubs approved by the school being allowed to meet.

When can noncurriculum-related student groups meet?

A limited open forum requiring equal access may be established during "noninstructional time," which is defined as time set aside by the school before actual classroom instruction begins or after it ends.

Can noncurriculum-related student groups meet during the day?

The Equal Access Act is not triggered by student club meetings that occur only during instructional time. The constitutionality of allowing or disallowing student religious clubs to meet during instructional time has not been expressly ruled upon by the Supreme Court.

To what schools does the Act apply?

The Act applies only to public secondary schools (as defined by state law) that receive federal financial assistance.

May a school establish regulations for meetings that take place in its limited open forum?

Yes. The Act does not take away a school's authority to establish reasonable time, place and manner regulations for its limited open forum. For example, a school may establish a reasonable time period on any one school day, a combination of days or all school days. It may assign the rooms in which student groups can meet. It may enforce order and discipline during the meetings. The key is that time, place and manner regulations must be uniform and nondiscriminatory.

May schools promote, and teachers participate in, some club meetings and not others in a limited open forum?

Some of the Act's language implies that schools may not sponsor any noncurriculum-related club. Other language suggests that schools can sponsor all noncurriculum clubs except religious ones. Subsequent to the *Mergens* decision, some schools have in fact promoted, or assigned teachers to teach, drama or debate clubs and the like, even though the school does not offer formal instruction in these subjects or give credit to those who participate in such clubs. There may be other clubs (such as political clubs) for which school sponsorship is inappropriate.

School sponsorship of some noncurriculum-related student clubs does not mean, however, that a limited open forum does not exist or that non-sponsored clubs may not meet.

May a school require a minimum number of students to form a noncurriculum-related club?

Not if it "limit[s] the rights of groups of students." Care must be exercised that the school not discriminate against numerically small student groups that wish to establish a club. If the number of clubs begins to tax the available space in a particular school, one teacher might be used to monitor several small student groups meeting in the same large room. The key is to be flexible in accommodating student groups that want to meet.

What does "student-initiated" mean?

It means that the students themselves are seeking permission to meet and that they will direct and control the meeting. Teachers and other school employees may not initiate or direct such meetings, nor may outsiders.

May outsiders attend a student meeting?

Yes, if invited by the students and if the school does not have a policy barring all "nonschool persons." However, the nonschool persons "may not direct, conduct, control, or regularly attend activities of student groups."

A school may decide not to permit any nonschool persons to attend any club meetings, or it may limit the number of times during an academic year a nonschool person may be invited to attend.

Obviously, no nonschool person should be permitted to proselytize students who are not voluntarily attending the meeting to which the nonschool person is invited.

May teachers be present during student meetings?

Yes, but there are important limitations. For insurance purposes or because of state law or local school policy, teachers or other school employees are commonly required to be present during student meetings. In order to avoid any appearance of state endorsement of religion, teachers or employees are to be present at student religious meetings only in a "nonparticipatory capacity." The Act also prohibits teachers or other school officials from influencing the form or content of any prayer or other religious activity.

May a teacher or other school employee be required to be present at a student meeting if that person does not share the beliefs of the students?

The Act provides that no school employee may be required to attend a meeting "if the content of the speech at the meeting is contrary to the beliefs" of that employee. If a school establishes a limited open forum, however, it is responsible for supplying a monitor for every student group meeting if a monitor is required.*

**Editor's Note: Although the endorsers of this guide agreed on this answer, legal experts are divided about whether or not school officials are required to provide a monitor.*

Does the assignment of a teacher to a meeting for custodial purposes constitute sponsorship of the meeting?

No.

Does the expenditure of public funds for the incidental cost of providing the space (including utilities) for student-initiated meetings constitute sponsorship?

No.

If a school pays a teacher for monitoring a student religious club, does this constitute sponsorship?

Congressional debate apparently took for granted that payment of a school-required monitor for any club was an "incidental cost of providing the space for student-initiated meetings."

Does the use of school media to announce meetings of noncurriculum-related student groups constitute sponsorship of those meetings?

No. The Supreme Court has interpreted the Act to require schools to allow student groups meeting under the Act to use the school media—including the public address system, school paper and school bulletin board—to announce their meetings if other noncurriculum-related student groups are allowed to use the school media. Any policy concerning the use of school media must be applied to all noncurriculum-related student groups in a nondiscriminatory manner. Schools, however, may inform students that certain groups are not school-sponsored.

Do school authorities retain disciplinary control?

Yes. The Act emphasizes the authority of the school "to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary." Furthermore, the school must provide that

the meeting "does not materially and substantially interfere with the orderly conduct of educational activities within the school." These two provisions, however, do not appear to authorize a school to prohibit certain student groups from meeting because of administrative inconvenience or speculative harm. For example, a group cannot be barred at a particular school solely because a similar student group at another school has caused problems.

What about groups that wish to advocate or discuss changes in existing law?

Students who wish to discuss controversial social and legal issues such as abortion, drinking age, the draft and alternative lifestyles may not be barred on the basis of the content of their speech. The school is not required, however, to permit meetings in which unlawful conduct occurs.

What if some students object to other students meeting?

The right of a lawful, orderly student group to meet does not depend on the approval of other students. All students enjoy the constitutional guarantee of free speech. It is the school's responsibility to maintain discipline in order that all student groups are afforded an equal opportunity to meet peacefully without harassment. The school must not allow a "hecklers' veto."

May any groups be excluded?

Yes. Student groups that are unlawful or that materially and substantially interfere with the orderly conduct of educational activities may be excluded. However, a student group cannot be denied equal access simply

because its ideas are unpopular. Freedom of speech includes ideas the majority may find repugnant.

Must noncurriculum-related student groups have an open admissions policy?

The Act does not address this issue. There are, however, several federal, as well as state and local, civil rights laws that may be interpreted to prohibit student groups from denying admission on the basis of race, national origin, gender or handicap.

What may a school do to make it clear that it is not promoting, endorsing, or otherwise sponsoring noncurriculum-related student groups?

A school may issue a disclaimer that plainly states that in affording such student groups an opportunity to meet, it is merely making its facilities available, nothing more.

What happens if a school violates The Equal Access Act?

The law contemplates a judicial remedy. An aggrieved person may bring suit in a U.S. district court to compel a school to observe the law. Violations of equal access will not result in the loss of federal funds for the school. However, a school district could be liable for damages and the attorney's fees of a student group that successfully challenges a denial by the school board of its right to meet under the Act.

Should a school formulate a written policy for the operation of a limited open forum?

If a school decides to create a limited open forum or if such a forum already exists, it is strongly recommended that a uniform set of regulations be drawn up and made available to administrators, teachers, students, and parents. The importance of having such a document will become clear if the school either denies a student group the opportunity to meet or is forced to withdraw that opportunity. When the rules are known in advance, general acceptance is much easier to obtain.

What about situations not addressed in these guidelines?

Additional questions may be directed to the organizations listed as sponsors of these guidelines.

ABOUT US

RELIGIOUS FREEDOM CENTER
NEWSEUM INSTITUTE

The Religious Freedom Center of the Newseum Institute is a nonpartisan national initiative focused on educating the American public about the religious liberty principles of the First Amendment. Reorganized in 2010 to expand on religious liberty initiatives begun by the First Amendment Center in 1994, the Religious Freedom Center has sponsored numerous public programs at the Newseum, developed partnerships with national and international organizations, and convened a broad range of religious and civil liberties groups. The mission of the Religious Freedom Center is twofold: to educate the public about the history, meaning and significance of religious freedom and to promote dialogue and understanding among people of all religions and none. The Religious Freedom Center carries out its mission through five initiatives: promoting civil dialogue, engaging the public, equipping schools, educating leaders and publishing religious liberty scholarship. To learn more visit ReligiousFreedomCenter.org.

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The Equal Access Act:
QUESTIONS AND ANSWERS

Publication # XXXX

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