

## U.S. DEPARTMENT OF EDUCATION

### LEGAL GUIDELINES REGARDING THE EQUAL ACCESS ACT AND THE RECOGNITION OF STUDENT-LED NONCURRICULAR GROUPS

The Equal Access Act ensures that noncurricular student groups are afforded the same access to public secondary school facilities as other, similarly situated student groups. Based on decisions of the U.S. Supreme Court and other federal courts interpreting the Act, the U.S. Department of Education’s Office of the General Counsel provides the following guidance.<sup>1</sup>

#### 1. General Scope

The Act applies to: (1) any public secondary school (2) that receives federal funds (3) and creates a limited open forum by allowing one or more noncurricular student groups to meet on its premises (4) during noninstructional time.<sup>2</sup> Schools meeting these criteria are forbidden to prevent access or deny fair opportunity to students who wish to hold meetings on school grounds.

The Act does not mention specific types of student groups to which equal-access rights apply. It instead broadly provides that schools allowing at least one “noncurriculum related student group” may not deny comparable access to any other student group because of the “religious, political, philosophical, or other content of the speech at [the group’s] meetings.”<sup>3</sup> The Act therefore prohibits schools from banning student-led noncurricular groups because of the content of the speech at the groups’ meetings.

The Act identifies narrow exceptions; however, schools may not ban or suppress the speech of student groups based on a “desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>4</sup>

#### 2. Legal Principles and Obligations

When framing policies regarding equal access, schools are advised to consider the following:

- If a federally funded public secondary school allows at least one noncurriculum-related student group to meet on school premises during noninstructional time, it

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<sup>1</sup> We intend for these guidelines to provide schools with the information and resources they need to help ensure that all students, including lesbian, gay, bisexual and transgender (LGBT) students and gender nonconforming students, have a safe place to learn, meet, share experiences, and discuss matters that are important to them. This guidance represents the Department’s current thinking on this topic. It does not create or confer any rights for or on any person. This guidance does not impose any requirements beyond those required under applicable law and regulations. If you are interested in commenting on this guidance, please email us your comment at [equalaccessact@ed.gov](mailto:equalaccessact@ed.gov).

<sup>2</sup> The Equal Access Act, 20 U.S.C. §§ 4071 – 4073 (2010).

<sup>3</sup> 20 U.S.C. § 4071(a) (2010).

<sup>4</sup> See *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 509 (1969).

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.<sup>5</sup>

- “Access” refers not only to physical meeting spaces on school premises, but also to recognition and privileges afforded to other groups at the school, including, for example, the right to announce club meetings in the school newspaper, on bulletin boards, or over the public-address system.<sup>6</sup> Noninstructional time is “time set aside by the school before actual classroom instruction begins or after actual instruction ends,”<sup>7</sup> and covers student meetings that take place before or after school as well as those occurring during lunch, “activity periods,” and other noninstructional periods during the school day.<sup>8</sup>
- The Supreme Court defines a curriculum-related student group as one that “directly relates” to the body of courses offered at a school.<sup>9</sup> A student group directly relates to a school’s curriculum “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.”<sup>10</sup> According to the Supreme Court, for example, 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.”<sup>11</sup>
- Schools retain the right to exclude groups that are directed, conducted, controlled, or regularly attended by nonschool persons.<sup>12</sup>
- Noncurricular student groups may have faculty sponsors without compromising the requirement that they are student-initiated.<sup>13</sup> “The assignment of a teacher,

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<sup>5</sup> See, e.g., *Bd. of Educ. v. Mergens*, 496 U.S. 226, 236 (1990) (“Thus, even if a public secondary school allows only one ‘noncurriculum related student group’ to meet, the Act’s obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time.”).

<sup>6</sup> *Id.* at 247 (holding that to deny the school’s Bible club official recognition, which included access to the school newspaper, bulletin boards, and public address system, was to deny it “equal access”); *Straights & Gays for Equality v. Osseo Area Schools - District No. 279*, 540 F.3d 911, 914 (8th Cir. 2008) (holding that the school district violated the Act by providing noncurricular groups with greater access to communication avenues than it provided to SAGE); *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 683 (E.D. Ky. 2003).

<sup>7</sup> 20 U.S.C. § 4072(4) (2010).

<sup>8</sup> See *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 222 (3d Cir. 2003) (“Simply because the period may fall within the more general parameters of the school day does not indicate that all time within those parameters necessarily constitutes actual classroom instruction.”); *Ceniceros ex rel. Risser v. Bd. of Trustees*, 106 F.3d 878, 880 (9th Cir. 1997) (holding that the plain meaning of the term “noninstructional time” under the Act includes meetings held during lunch time).

<sup>9</sup> *Mergens*, 496 U.S. at 238-40.

<sup>10</sup> *Id.* at 239-40.

<sup>11</sup> *Id.* at 240.

<sup>12</sup> 20 U.S.C. § 4071(c)(5) (2010).

administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.”<sup>14</sup>

- Schools retain authority to 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.<sup>15</sup> But the Act does not permit schools to ban groups or suppress student speech based on unpopularity of the message or on unfounded fears that the group may incite violence or disruption. Where the material and substantial interference is caused not by the group itself but by those who oppose the group’s formation or message, the disruption will not justify suppressing the group.<sup>16</sup>

### 3. Issues to Consider When Applying the Act

- **Viewing Access as an Endorsement of a Student Group or its Message:** A school may not discriminate against a student group on the basis that allowing access would constitute an endorsement of the group. The U.S. Supreme Court has specifically recognized that public “schools do not endorse everything they fail to censor,” because secondary school students are generally capable of understanding that schools do not endorse or support speech that an institution merely permits on a nondiscriminatory basis.<sup>17</sup> Thus, 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.
- **Defining the Meaning of “Curriculum Related” Too Broadly:** If a school has not created a limited open forum (*i.e.*, the only student groups are curricular), the Act does not require the school to grant a request to allow a noncurricular group to meet. The meaning of “curriculum related” cannot, however, be broadened in ways that would render the Act meaningless. For example, a school cannot evade the Act by declaring that all existing student clubs are curricular, and invoking some broad, vague educational goals that they all serve, while labeling as noncurricular any student groups that it wishes to exclude.<sup>18</sup> What matters are the

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<sup>13</sup> 20 U.S.C. § 4071(c)(1) (2010) (providing that a school shall be deemed to offer a fair opportunity to students who wish to conduct a meeting if the school uniformly provides that “the meeting is voluntary and student-initiated”).

<sup>14</sup> *Id.* at § 4072(2) (2010).

<sup>15</sup> 20 U.S.C. § 4071(d)(5), (c)(4), (f) (2010).

<sup>16</sup> *See, e.g., Boyd County High Sch. Gay Straight Alliance*, 258 F. Supp. 2d at 690 (“the Equal Access Act permits [a school] to prohibit Plaintiffs from meeting on equal terms with the noncurriculum-related student groups that have been permitted to meet... only upon a showing that Plaintiffs’ *own* disruptive activities have interfered with [the school’s] ability to maintain order and discipline.”).

<sup>17</sup> *See Mergens*, 496 U.S. at 250.

<sup>18</sup> *Id.* at 244-245 (quoting *Mergens v. Bd. of Educ.*, 867 F.2d 1076, 1078 (8th Cir. 1989)).

groups' actual relationships to the curriculum and the school's actual practices in granting access.<sup>19</sup>

- **Banning All Noncurricular Groups:** A school could close a limited open forum by banning all noncurricular groups, thereby avoiding any obligations under the Act. But successfully closing a previously open forum will often prove difficult: In an Equal Access Act challenge, a written policy banning noncurricular clubs is insufficient and a court will scrutinize a school's actual practices to ensure each remaining club is genuinely curricular.<sup>20</sup>
- **Invoking Moral Reasons or Censorship of Explicit Content:** The Act guarantees schools' right "to protect the well-being of students and faculty."<sup>21</sup> And the U.S. Supreme Court has recognized that public schools may restrict students' access to and expression of obscene or sexually explicit material to protect students.<sup>22</sup> But the Act does not permit schools to ban a group based on school officials' general moral disapproval or on assumptions about the content of speech at group meetings. A school would, for example, violate the Act by excluding a group based on the fact that it addresses issues of interest to members of a minority faith or to lesbian, gay, bisexual and transgender (LGBT) students.<sup>23</sup>
- **Viewing Student Groups as Controlled or Directed by Nonschool Persons:** Schools may uniformly deny access to groups that are controlled, directed, or regularly attended by nonschool persons.<sup>24</sup> But schools may not exclude certain student groups merely because of national affiliations, while providing access to other groups with similar affiliations.<sup>25</sup> For instance, if a school recognizes a service club or honor society such as Beta Club or Key Club that shares its name

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<sup>19</sup> *Id.* at 246.

<sup>20</sup> *Id.* at 244 ("To define 'curriculum related' in a way that results in almost no schools having limited open fora, or in a way that permits schools to evade the Act by strategically describing existing student groups, would render the Act merely hortatory. See 130 Cong. Rec. 19222 (1984) (statement of Sen. Leahy) ('[A] limited open forum should be triggered by what a school does, not by what it says'.)").

<sup>21</sup> 20 U.S.C. § 4071(f) (2010) (stating that "nothing in [the Act] 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").

<sup>22</sup> See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986) (holding that it is appropriate for educators to protect students from sexually explicit, indecent, or lewd speech).

<sup>23</sup> See *Gay-Straight Alliance of Okeechobee High Sch. v. Sch. Bd.*, 483 F. Supp. 2d 1224, 1229 (S.D. Fl. 2007) (rejecting school district's assumption that a gay-straight alliance is a "sex-based" club, after examining club's stated purposes of promoting tolerance and providing a safe environment for students, and concluding that school district failed to establish that it would be involved in "accessing or sharing with other students obscene or explicit sexual material; rather, this appears to be an assumption or conclusion derived from the name of the club").

<sup>24</sup> 20 U.S.C. § 4071(c)(5) (2010).

<sup>25</sup> See *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d at 1146 (C.D. Cal. 2000) (holding that sharing a name suggested by national organization and shared with other student clubs elsewhere does not approach level of control necessary to exempt group from Act's protections, and therefore holding that school board violated Act when it excluded gay-straight alliance on basis of supposed association with "nonschool persons" but failed to apply restriction uniformly to groups such as Red Cross and Key Club, whose names similarly suggested affiliations with national organizations).

with a national organization, the school cannot deny access to a gay-straight alliance merely because it shares a name with a national organization.<sup>26</sup>

- **Imposing Special Requirements on Some Student Groups:** The Act requires the school to treat each group like other, similarly situated groups, and prohibits imposing additional requirements on some student-run groups that are not imposed on all others.<sup>27</sup> A school would violate the Act by, for example, requiring a gay-straight alliance to change its name, requiring it to have a faculty adviser when faculty advisers are not generally required for all other groups, or imposing different requirements for the group's posters, leaflets, and announcements than the school places on other groups' promotional materials.

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<sup>26</sup> *Id.*

<sup>27</sup> *See, e.g., Colin*, 83 F. Supp. 2d at 1147-48.