

Students

Student Use of Buildings - Equal Access ¹

[For high school and unit districts]

Student groups or clubs that are not school sponsored are granted free use of school premises for a meeting or series of meetings under the following conditions: ²

1. The meeting is held during those noninstructional times identified by the Superintendent or designee for noncurricular student groups, clubs, or organizations to meet. “Noninstructional time” means time set aside by the school before actual classroom instruction begins or after

The footnotes are not intended to be part of the adopted policy; they should be removed before the policy is adopted.

¹ State or federal law controls this policy’s content. This policy concerns an area in which the law is unsettled. This sample policy implements the Equal Access Act (EAA), 20 U.S.C. §4071 *et seq.* The EAA applies to public secondary schools that receive federal financial assistance. The policy should be adopted by districts with secondary school(s) that wish to establish or already have a “limited open forum” as defined in the EAA and quoted below. The policy allows non-school sponsored student groups to meet on school premises, free of charge, on the same basis that non-curriculum related student groups are allowed to meet. Hence the policy is named, *Equal Access*. The EAA has no applicability to the community’s use of school facilities. See policy 8:20, *Community Use of School Facilities*.

The EAA requires a secondary school to grant fair opportunity or “equal access” to students who wish to conduct a meeting within a *limited open forum* without regard to the religious, political, philosophical, or other content of the speech at such a meeting. A secondary school has a *limited open forum* whenever it “grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.” (20 U.S.C. §4071(a)). Thus, the equal access obligation is triggered when a secondary school allows one *noncurriculum related* group, e.g., a sports team, to meet.

The EAA’s requirements may be avoided by closing the forum, i.e., by refusing to permit any noncurriculum related group to use its facilities (thereby creating a closed forum). Creating a closed forum is difficult, however, given the U.S. Supreme Court’s expansive interpretation of *noncurriculum related*.

A student group is *noncurriculum related* if it does not directly relate to the body of courses offered by the school. Board of Education of Westside Community School Dist. v. Mergens, 110 S.Ct. 2356 (1990). School officials cannot avoid triggering the EAA’s equal access requirements by tying the purposes of the student clubs it wants to allow to some broadly defined educational goal. Likewise, it does not matter whether the school sponsors, recognizes, or supports the student group – the Act’s equal access requirements will be triggered whenever any student group is allowed to meet that is unrelated to the curriculum. The Mergens Court said that a student group directly relates to a school’s curriculum only if:

1. The group’s subject matter is actually taught, or will soon be taught, in a regularly offered course;
2. The group’s subject matter concerns a body of courses as a whole; or
3. Participation in the group is required for a particular course or results in academic credit.

Just as a *noncurriculum related* determination is fact-sensitive, so is determining whether a particular time period is *noninstructional time*. A morning activity period was found to be *noninstructional time* making a high school’s refusal to allow a student Bible club to meet in school during that period a violation of the EAA. Donovan v. Punxsutawney Area Sch. Board, 336 F.3d 211 (3d. Cir. 2003). The Ninth Circuit reached the opposite conclusion in a similar case. Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002).

A school violates the EAA by allowing some student groups to meet on campus but refusing similar access to gay-lesbian clubs. Colin v. Orange Unified School Dist., 83 F.Supp.2d 1135 (C.D. Cal. 2000); White County High School Peers Rising In Diverse Education v. White County School Dist., 2006 WL 1991990, (D. Ga. 2006); SAGE v. Osseo Area Sch. Dist., 2007 WL 2885810 (D. Minn. 2007). But see Caudillo v. Lubbock Independent School Dist., 311 F.Supp.2d 550 (N.D.Tex. 2004)(school did not violate the EEA when it denied a gay student club’s request for access because the “maintain order and discipline” exception applied). Note the U.S. Supreme Court refused to apply N.J.’s public accommodation law to the Boy Scouts because forcing the Boy Scouts to accept a homosexual as a member would violate the Scouts’ freedom of expressive association. Boy Scouts of America v. Dale, 120 S.Ct. 2093 (2000).

² All of the listed conditions are from the Equal Access Act, except for #10 and #11.

actual classroom instruction ends. “Noncurricular student groups” are those student groups, clubs, or organizations that do not directly relate to the curriculum. ³

2. All noncurriculum related student groups that are not District sponsored receive substantially the same treatment. ⁴
3. The meeting is student-initiated, meaning that the request is made by a student.
4. Attendance at the meeting is voluntary.
5. The school will not sponsor the meeting.
6. School employees are present at religious meetings only in a non-participatory capacity.
7. The meeting and/or any activities during the meeting do not materially or substantially interfere with the orderly conduct of educational activities.
8. Non-school persons do not direct, conduct, control, or regularly attend the meetings.
9. The school retains its authority to maintain order and discipline. ⁵
10. A school staff member or other responsible adult is present in a supervisory capacity.
11. The Superintendent or designee approves the meeting or series of meetings.

The Superintendent or designee shall develop administrative procedures to implement this policy.

The footnotes are not intended to be part of the adopted policy; they should be removed before the policy is adopted.

³ 20 U.S.C. §4072.

⁴ The Ninth Circuit Court of Appeals found that a school district violated the EAA and the student’s First Amendment rights by denying her Bible club the same rights and benefits as other student clubs. Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002). Nothing in the decision suggests that the school was required to “sponsor” the Bible club and financially support it. However, the school board voluntarily gave “associated student body” clubs certain benefits that were denied the plaintiff’s religious club. Thus, the district unlawfully treated one noncurriculum related student club differently from another noncurriculum related student club.

⁵ In response to a school’s invitation for all student groups to paint murals in the school hallway, a Bible club sought to include a large cross. The school principal forbid the cross in order to avoid conflicts among students – there was evidence the student body contained Satanic and neo-Nazi adherents. The principal’s decision was insulated from liability under the EAA by the Act’s provision that “nothing in [the Act] shall be construed to limit the authority of the school ... to maintain order and discipline on school premises.” Gernetzke v. Kenosha Unified School Dist. No. 1, 274 F.3d 464 (7th Cir. 2001), *cert. denied*, 122 S.Ct. 1606.

Action Needed: 1st Reading

Summary of Changes:

New policy that is referenced in 6:190. It outlines rules for student groups that may begin at some point.

LEGAL REF.: Equal Access Act, 20 U.S.C. §4071 et seq.
Board of Education of Westside Community School Dist. v. Mergens, 496 U.S.
226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990).
Gernetzke v. Kenosha Unified School Dist. No. 1, 274 F.3d 464 (7th Cir. 2001),
cert. denied, 122 S.Ct. 1606.

CROSS REF.: 7:10 (Equal Education Opportunities), 8:20 (Community Use of School
Facilities)