

Students

Student Use of Buildings - Equal Access¹

[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 non-instructional times identified by the Superintendent or designee for non-curricular student groups, clubs, or organizations to meet. *Non-instructional*

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 sample 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 *non-curriculum 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 non-curriculum related group to use its facilities (thereby creating a closed forum). But creating a closed forum is difficult given the U.S. Supreme Court's expansive interpretation of *non-curriculum related*.

A student group is *non-curriculum related* if it does not directly relate to the body of courses offered by the school. *Bd. of Ed. of Westside Community Sch. Dist. v. Mergens*, 496 U.S. 226 (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:

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

Just as a *non-curriculum related* determination is fact-sensitive, so is determining whether a particular time period is *non-instructional time*. A morning activity period was found to be *non-instructional 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. Bd.*, 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 Sch. Dist.*, 83 F.Supp.2d 1135 (C.D. Cal. 2000); *White County High School Peers Rising In Diverse Ed. v. White Cty. Sch. Dist.*, 2006 WL 1991990 (D. Ga. 2006); *SAGE v. Osseo Area Sch. Dist. No. 279*, 2007 WL 2885810 (D. Minn. 2007). But see *Caudillo v. Lubbock Ind. Sch. Dist.*, 311 F.Supp.2d 550 (N.D.Tex. 2004)(school did not violate the EAA 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 Amer. v. Dale*, 530 U.S. 120 (2000).

- ² All of the listed conditions are from the EAA, except for 10 and 11.

time means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends. *Non-curricular student groups* are those student groups, clubs, or organizations that do not directly relate to the curriculum.³

2. All non-curriculum 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.

LEGAL REF.: 20 U.S.C. §4071 *et seq.*, Equal Access Act.
Bd. of Ed. of Westside Community Sch. Dist. v. Mergens, 496 U.S. 226 (1990).
Gernetzke v. Kenosha Unified Sch. Dist. No. 1, 274 F.3d 464 (7th Cir. 2001), *cert. denied*, 535 U.S. 1017.

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

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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 non-curriculum related student club differently from another non-curriculum 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 forbade 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 Sch. Dist. No. 1, 274 F.3d 464 (7th Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002).