5-2015

An Update on Student Equal Access

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Education leaders must be cautious about how they treat student-organized groups on campus.

In *Board of Education of Westside Community Schools v. Mergens* (1990), the Supreme Court upheld the Equal Access Act (EAA), a federal law enacted to permit student-organized groups to meet during noninstructional time.

The EAA traces its origins to *Widmar v. Vincent* (1981). At issue in *Widmar* was a policy whereby officials at a state university in Missouri made campus facilities generally available to student groups for their activities. Treating religion as a form of free speech, the Supreme Court ruled that insofar as officials allowed more than 100 student groups to use campus facilities, they created a forum for the exchange of ideas and could not bar a club because of the religious content of its speech.

Spurred in part by *Widmar*, Congress passed the EAA and President Ronald Reagan signed it into law on August 11, 1984. The act clearly states, "It shall be unlawful for any public secondary school 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 . . . on the basis of the religious, political, philosophical, or other content of the speech at such meetings" (20 U.S.C. § 4071[a]).

In addition, the EAA specifies that "[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" (20 U.S.C. § 4071[b]).

The EAA does set limits. Schools are deemed to offer an opportunity for students to conduct a meeting within its limited open forum if the school 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.
5. Nonschool persons may not direct, conduct, control, or regularly attend activities of student groups. 20 U.S.C. § 4071(c)

Board of Education of Westside Community Schools v. Mergens

High school students in Nebraska sued their board for refusing to permit them to organize a Christian club under the EAA. After the federal trial court upheld the board's action, the Eighth Circuit (1989) reversed in favor of the students. The court found that the presence of more than 30 noncurriculum-related clubs at the school—including the band, chess club, cheerleaders, choir, future medical assistants, Latin and math clubs, student publications, athletics, and the National Honor Society—meant that the board created a limited open forum such that the religion club had to be allowed to form.

On appeal to the Supreme Court in *Mergens*, following a review of the EAA's history, the Court deferred to congressional ability to enact such a law. However, as to the establishment clause question, the Court lacked a clear majority of five justices and could not agree on whether the EAA was constitutional.

A majority of the Supreme Court agreed that Congress had the authority to extend the reasoning of *Widmar* to eliminate discrimination against religious speech in public secondary schools. As such, it explained that a "noncurriculum related student group" is "best interpreted broadly to mean any student group that does not *directly* relate

to the body of courses offered by the school" (p. 239), thereby making it easier for EAA clubs to form.

Turning to the establishment clause question, Justice Sandra Day O'Connor, who wrote the majority opinion, reasoned that in *Widmar*, the Supreme Court upheld the principle of equal access under the *Lemon v. Kurtzman* (1971) test that the Court applies in most cases involving religion:

1. The statute must not result in an "excessive government entanglement" with religious affairs.
2. The statute must not advance nor inhibit religious practice.
3. The statute must have a secular legislative purpose.

Justice O'Connor rejected the board's argument that the EAA had the primary effect of advancing religion, because high school students can distinguish between officials' permitting and officials' endorsing a club on campus. She observed that because the prayer club was only one of a variety of clearly student-initiated voluntary organizations, students would have been unlikely to perceive it as an official endorsement.

Justice O'Connor also rejected the board's argument that the club's presence resulted in excessive government entanglement, observing that although the EAA allows education officials to assign supervisory personnel to oversee student behavior, it forbids monitoring, participation, or involvement by faculty or nonschool personnel, concluding that the EAA also prohibits school sponsorship of clubs.

Because only four justices agreed that the EAA passed establishment clause analysis, the Supreme Court left the door open to more litigation over its status.

Subsequent Developments

Religious groups. In a dispute from New York, the Second Circuit allowed students to create a policy establishing religious standards for its top three officers (*Hsu v. Roslyn Union Free School District* 1996a, 1996b).

The Ninth Circuit allowed a religious club in California to meet during lunchtime (*Ceniceros v. Board of Trustees of the San Diego Unified School District* 1997), because it considered that noninstructional time; it also granted a Bible club at a high school in Washington State access to public funding, school supplies, school vehicles, and audiovisual equipment (*Prince v. Jacoby* 2002, 2003).

On the other hand, a federal trial court in Mississippi rejected the claim that a board created a limited open forum designed to permit members of a religious club to make announcements involving prayers and Bible readings before classes on a school's public address system (*Herdahl v. Pontotoc County School District* 1996). The court did permit voluntary student prayer before school.

The Ninth Circuit initially upheld a school board in California's refusal to recognize a club because of its proposal to require voting members to express their faith in the Bible and in Jesus Christ, because officials feared that was a violation of its nondiscrimination policies (*Truth v. Kent School District* 2007). However, an en banc panel reversed in favor of the club, because a question remained about whether educators refused to grant the club the exemption because of its Christian character or the religious content of its speech (*Truth v. Kent School District* 2008).

Lesbian, gay, bisexual, transgender (LGBT) clubs. Unanticipated applications of the EAA arose when students who are LGBT and their supporters sought to form clubs. Those groups relied on language in the act that forbids boards from discriminating "on the basis of the religious, political, philosophical, or other content of the speech at such meetings" (20 U.S.C. § 4071[a)].

The Eighth Circuit, in a case from Minnesota (*Straights and Gays for Equality v. Osseo Area Schools–District No. 279* 2008) agreed that education officials could not deny LGBT clubs the opportunity to use school facilities.

Three federal trial courts disagreed. When a board in Colorado limited clubs to those that are curriculum related, the court refused to disturb the judgment of school officials (*Palmer High School Gay/Straight Alliance v. Colorado Springs School District No. 11* 2005). A court in Texas deferred to educators because of their concerns about sexually explicit content accessible from the group's Website (*Caudillo v. Lubbock Independent School District* 2004). More recently, a federal trial court in Florida refused to extend the EAA to a middle school (*Carver Middle School Gay-Straight Alliance v. School Board of Lake County, Fla.* 2014), because it applies only to secondary, not middle, schools.

Postscript

The status of the EAA may be in doubt in light of the Supreme Court's opinion in *Christian Legal Society v. Martinez* (*CLS* 2010). *CLS* examined whether Christian law students at a public law school in California could apply membership and leadership requirements to individuals who wished to join their organization.

A divided Supreme Court affirmed that law school officials could require all on-campus groups to admit everyone from the student body, even for leadership position, regardless of whether they agree with organizational beliefs. Even though a related issue was unresolved in *Truth*, a case predating *CLS*, it remains to be seen how that might affect EAA clubs.

Reflections

It is important to recall why Congress enacted the EAA: to ensure that

students could have their own voices in schools where boards and education officials allowed other groups to meet during noninstructional time.

Some educators fear that allowing religious and LGBT clubs to meet in schools may be interpreted as supporting student views about religion or sexuality, possibly in violation of the establishment clause. Accordingly, it is worth reviewing the safeguards included in the EAA to help allay such concerns.

1. Student participation must be voluntary, thereby avoiding any concern about official coercion or endorsement.
2. Educators may not serve as moderators or sponsors, thereby avoiding establishment clause concerns.
3. Educators can be present in nonparticipating capacities, essentially to supervise, but they cannot be present on a regular basis. As such, the occasional presence of educators is unlikely to raise legitimate establishment clause concerns or to increase costs, because they are responsible for student safety, regardless of what pupils are doing during the school day.
4. Education leaders can prevent clubs from forming if they "materially and substantially" (20 U.S.C. § 4071[c][4]) interfere with school activities. Even so, this section cannot be used to deny clubs the opportunity to form absent evidence that their members are likely to be disruptive, even if the content of their speech may not be popular in their communities.

An important, yet unresolved, question remains about the status of these clubs in light of *Christian Legal Society v. Martinez*. There can be little doubt that board policies should allow membership to be open to all who wish to join student clubs. Less clear, though, is whether clubs should be required to permit students who do not share their values to become leaders, or whether groups can develop their own criteria so as to preserve their identity and missions.

Although the Supreme Court brushed aside such concerns when the students raised them in *CLS*, this issue is worthy of consideration. Further, to the extent that the EAA allows opposing groups to establish their own organizations, policies should consider granting clubs the freedom to apply reasonable membership requirements, especially if they are grounded in long-held sincere religious or other beliefs or values.

Policy Recommendations

As school business officials work with their boards and other education leaders to develop policies regulating student clubs, they should be mindful of the explicit terms of the EAA discussed earlier. Even so, two key questions emerge.

First, policies should address the nature of the clubs. In other words, policies should state whether clubs can be organized for socialization or extracurricular purposes, or if they must be curriculum related. If the clubs are not curriculum related, then boards probably do not have to recognize them, provide funding, or grant them access to facilities during noninstructional time. However, this approach runs the risk of shortchanging students, because they can benefit greatly from participating in clubs.

Second, if policies do allow those clubs to form, they need to specify whether they grant organizations exceptions from district antidiscrimination rules so that founders can set reasonable criteria for candidates seeking leadership positions. Again, as discussed above, if clubs are going to be able to form, it seems to make sense to allow their organizers to create fair standards designed to permit them to preserve group goals, because students who disagree are free to form their own clubs taking on different perspectives.

In keeping with the American ideal of free speech, school boards have the duty to devise policies that ensure access for all student groups. The trick, of course, is to enact policies that walk the fine line between maintaining safe and orderly learning environments while protecting the rights of all students.

References

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