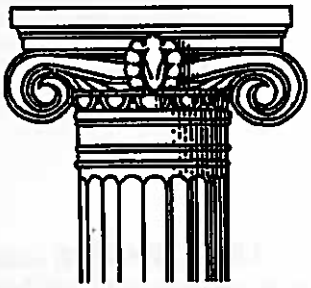
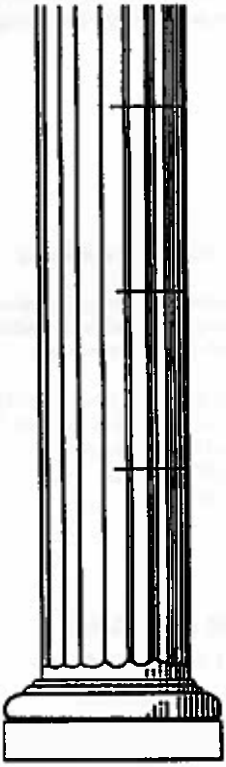


A GUIDE TO THE

Equal Access Act



CHRISTIAN LEGAL SOCIETY, established in 1961, is a nationwide membership organization of Christian attorneys, judges, law professors and law students, as well as supportive laypeople. The Center for Law and Religious Freedom is CLS' legal advocacy arm and is highly regarded for its well-balanced briefs written by top church/state scholars. Through the Center, CLS advocates for religious liberty in cases involving the First Amendment's establishment and free exercise clauses, with particular emphasis on public education.

CLS and the Center for Law and Religious Freedom serves as a major legal resource for Congress in the drafting stages and at hearings on the Equal Access Act and have continued to be the acknowledged expert in cases involving the Act.

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TABLE OF CONTENTS

** To assist the reader, the Table of Questions, pp.II-IV, infra, lists the specific questions addressed in Part III.*

TABLE OF QUESTIONS ADDRESSED

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 provides secondary 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.

INTRODUCTION

In 1990, the Supreme Court upheld the Equal Access Act, which requires public secondary schools to allow student religious groups to meet on an equal basis with other student groups. The Supreme Court resoundingly affirmed that the Establishment Clause does *not* require schools to censor, or discriminate against, students' religious speech. Instead, students' religious speech is protected by federal law and must be treated evenhandedly with other student speech.

The Equal Access Act restores the proper balance between the Free Speech Clause and the Establishment Clause of the First Amendment, by requiring nondiscriminatory treatment of students' religious speech, while recognizing that schools may not promote religion through school-initiated, school-led activities. In the early 1980s, as the result of a few misguided lower court decisions, many school administrators had adopted an incorrect interpretation of the Establishment Clause and had banned students' religious speech, ignoring their constitutional rights of freedom of speech and free exercise of religion. The Act was passed by the Congress in 1984 to end the widespread discrimination against student religious groups that was occurring in many public secondary schools.

This booklet was written to assist school administrators in the proper implementation of the Equal Access Act. Part I discusses the key points of the Supreme Court decision upholding the Equal Access Act. Part II contains an overview of the Equal Access Act to assist persons in understanding both what the Act does and does not do. Part III features specific questions and answers about the Equal Access Act and covers most questions that school administrators ask about implementation of the Act. In order to assist readers who already have specific questions about the Act, the "Table of Questions Addressed," at pages 23-44, *supra*, lists the sixty common questions answered in Part III. Part IV contains a sample policy that school districts might follow in order to comply with the Act.

Both the Congress and the Supreme Court have made it clear that equal access for secondary students' religious speech is the legally correct course that school administrators must follow. Discrimination against students' religious speech is censorship and is impermissible under the Equal Access Act and the First Amendment.

Part I:
The Supreme Court Requires Equal Access

The Equal Access Act was passed by Congress in 1984 to end discriminatory treatment of students' religious speech.[1] It mandates that any public secondary school which allows one or more noncurriculum related student groups to meet must allow students to meet for religious, political, philosophical or other speech. The Act ensures that school officials retain the necessary authority to maintain discipline and protect student well-being at any meeting on school property.

After passage of the Act, the United States Department of Justice intervened on behalf of students who had been denied equal access in several lawsuits against school districts that refused to comply with the Act. School districts were liable for the attorney fees of the students who won their right to meet.[2]

In a landmark decision, on June 4, 1990, the Supreme Court upheld the constitutionality of the Equal Access Act in a case called *Board of Education of Westside Community Schools v. Mergens*.[3] The Supreme Court rejected the idea that the Establishment Clause[4] requires schools to censor, or discriminate against, students' religious speech. Instead, students' religious speech is protected by federal law and must be treated evenhandedly with speech by other student groups.

In *Mergens*, the Supreme Court ruled that the Equal Access Act was constitutional and was to be given a broad interpretation in order to end discrimination against students' religious speech in public education. Specifically, the Court ruled that a public secondary school, which allowed a chess club, a scuba club and a service club to meet, must allow a religious club to meet as well. The *Mergens* decision triggered several lower court decisions affirming the right of equal access for religious speech.[5]

A. The *Mergens* Facts: A Classic Equal Access Situation

The *Mergens* case presented the classic equal access situation. A few students requested permission to form an extracurricular group for Bible study, prayer and fellowship. School officials denied their request. After the school board upheld the denial of permission, the students filed a lawsuit in federal district court.

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[1] The official citation for the Equal Access Act is 20 U.S.C. Sec. 4071-4074. It is part of the Education for Economic Security Act of 1984.

[2] Pursuant to 42 U.S.C. Section 1988, students who prevail in cases brought to enforce their right of equal access may recoup their attorney fees from the school district. *See, e.g., Perger v. Wilson County Sch. Bd.*, No. 3:89-0822 (M.D. Tenn. Aug. 1, 1990); *Amidei v. Spring Branch Indep. Sch. Dist.*, No. H-84-4673 (S.D. Tex. May 9, 1985); *Bender v. Williamsport Area Sch. Dist.*, 563 F. Supp. 697 (M.D. Pa. 1983); *Board of Educ. of City of Buffalo v. Burr*, No. 11097/88 (N.Y. Sup.Ct., Sept. 4, 1991).

[3] 496 U.S. 226 (1990).

[4] These guidelines will frequently refer to three clauses of the First Amendment: the Establishment Clause, the Free Speech Clause, and the Free Exercise of Religion Clause. The First Amendment in its entirety reads as follows: "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 peacefully to assemble, and to petition the Government for a redress of grievances."

[5] Courts have required equal access for student religious groups in the following cases: *Garnett v. Renton Sch. Dist.*, 987 F.2d 641 (9th Cir. 1993); *Pope v. East Brunswick Bd. of Educ.*, No. 91-785 (D.N.J. April 26, 1993); *Perger v. Wilson County Sch. Bd.*, No. 3:89-0822 (M.D. Tenn. Aug. 1, 1990); *Hoppock v. Twin Falls Sch. Dist.*, 772 F. Supp. 1160 (D. Idaho 1991); *Board of Educ. of City of Buffalo v. Burr*, No. 11097/88 (N.Y. Sup.Ct., Sept. 4, 1991).

The students claimed that the Equal Access Act required the school officials to allow them to meet on the same basis as the other student groups at Westside High School. The students claimed that the Act applied to Westside High School due to the fact that school officials allowed at least one noncurriculum related[6] student group to meet during noninstructional time on school property. The noncurriculum related student groups included a chess club, a scuba club and a service club.

The school officials argued that the Act did not apply to Westside High School because all of the student groups were curriculum related and, therefore, the Act was not triggered. For example, according to the school officials, the chess club taught logic and was, therefore, an extension of the math curriculum; the scuba club was an extension of the physical education curriculum; and the service club (a "Peer Advocates" program in which students worked with special education classes) was an extension of the overall curriculum. Essentially, the school officials defined all activities permitted by the school as curriculum related.

The school also challenged the constitutionality of the Act under the Establishment Clause of the First Amendment. Because school policy required that each student group have a faculty advisor, the school believed that a student religious meeting would violate the Establishment Clause.

The school district won at the trial level. However, on appeal, the students won in the Court of Appeals for the Eighth Circuit and, ultimately, in the Supreme Court.

B. The Supreme Court Upholds the Equal Access Act

The Supreme Court ruled in favor of the students, requiring the school district to obey the Equal Access Act and to grant to the student religious group official recognition as a student activity. The Court's ruling had two major parts:

Post-*Mergens* decisions that have granted community religious groups equal access include: *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, No. 91-2024 (U.S. June 7, 1993); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 498 U.S. 899 (1990)(school district required to rent school facilities to religious speaker); *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. #5*, 941 F.2d 45 (1st Cir. 1991) (same); *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 811 F. Supp. 1137 (E.D. Va. 1993)(school board may not charge religious group higher rental fee than other community groups); *Randall v. Pegan*, 765 F. Supp. 793 (W.D.N.Y. 1991)(student religious group may rent school auditorium for private, voluntary baccalaureate service); *Verbena United Methodist Church v. Chilton County Bd. of Educ.*, 765 F. Supp. 704 (M.D. Ala. 1991)(school district required to allow church to rent school auditorium for private baccalaureate service); *Youth Opportunities Unlimited v. Bd. of Educ.*, 769 F. Supp. 1346 (W.D. Pa. 1991)(summer religious program for youth granted access to school facilities); *Wallace v. Washoe County Sch. Dist.*, 701 F. Supp. 187 (D. Nev. 1988)(school district must rent to religious community group).

On June 7, 1993, the Supreme Court unanimously ruled that a school district violated the free speech rights of a church, by refusing to allow the church access to school facilities in the evenings and weekends to show a film series on family issues from a religious viewpoint. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, No. 91-2024 (U.S. June 7, 1993). While allowing other community groups access to school facilities, the school district had claimed that it could refuse access to all religious speakers. The Court rejected that argument, ruling that once the school district allowed community groups to discuss certain subject matter (in this case, family issues), it could not refuse access to groups with religious viewpoints on the same subject matter.

[6]The equal access requirement of the Act is triggered when a public secondary school allows any noncurriculum related student group to meet. The determination of whether a student group is noncurriculum related was the crux of the *Mergens* decision and was resolved in favor of a broad definition of noncurriculum related, triggering the Act in most situations. See pp. 12-14 and pp. 28-32, *infra*. Generally, most schools that allow student groups to meet have noncurriculum related student groups meeting and are subject to the equal access requirement.

1. ***The presence of one or more noncurriculum related groups triggers the Equal Access Act.*** The Act applied to Westside High School, because at least one of the student groups allowed to meet at the school was noncurriculum related. Specifically, the Court determined that the chess club, the scuba club and the "Peer Advocates" were noncurriculum related. (Other groups that were meeting might also have been noncurriculum related, but the Court did not address all of the groups, given that the Act is triggered when *only one* noncurriculum related group is allowed to meet.)

   The Court interpreted "noncurriculum related" broadly, in order to ensure that discrimination against students' religious speech ceased. The Court understood that it was limiting, to a very small degree, school administrators' discretion in the area of extracurricular student groups, but recognized that Congress had allowed minor administrative limitations in order to achieve the overriding goal of ending discriminatory treatment of students' religious speech.[7]

2. ***The Equal Access Act does not violate the Establishment Clause.*** The Court emphasized 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."[8] According to the Court, secondary school students are able to understand that the school is not endorsing religion when it merely permits students to engage in religious speech on a nondiscriminatory basis. Nor did Westside High School's requirement of a faculty advisor prohibit application of the Act. The Act permits the presence of a teacher as a nonparticipatory monitor to protect student safety and school property, and a monitor's presence does not violate the Establishment Clause.

C. Key Points of the *Mergens* Decision

The following points are important to note about the Equal Access Act and the *Mergens* decision:

1. ***One "noncurriculum related" group triggers the right of a religious group to meet.*** The Act's protection of religious groups is triggered when a school allows one or more noncurriculum related student groups to meet.[9] The Supreme Court rejected the school district's argument that all groups that it allowed to meet were curriculum related.[10] Instead, the Court adopted a broad definition of "noncurriculum related" that makes it likely that most schools that allow student groups to meet must allow a student religious group to meet.[11] In *Mergens*, the groups that triggered the Act were a chess club, a scuba club and a service club.[12]

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[7] For a detailed discussion of school administrators' continuing authority to prohibit extremist groups on school campus, see Question 8 at p.25, *infra*.

[8] 496 U.S. at 250.

[9] See Section 4071(b).

[10] 496 U.S. at 244.

[11] *Id.* at 239-40.

[12] See pp. 29-31 , *infra*, for examples of other noncurriculum related groups.

2. ***Broad definition of noncurriculum related adopted.*** The Act applies to a public secondary school *unless all* of the student groups that meet fall into one of the following categories described by the Supreme Court[13]:

   a. the subject matter of the group is actually taught or will soon be taught in a regularly offered course (for example, a French club, if French is taught at the school);

   b. the subject matter of the group concerns the body of courses as a whole (for example, student government); or

   c. participation in the group is required for a particular course or results in academic credit (for example, band or orchestra, if participation is tied to a band or orchestra class).

   If *one* group does not belong to one of the above categories, the Act is triggered, and a student religious group must be allowed to meet. Examples of groups that are likely to trigger the Act include: SADD, chess club, ski club or Key Club. *Only one* noncurriculum related group is necessary to trigger the Act.[14]

3. ***Access to school media required.*** The Court ruled that the Act requires that a religious group be given equal access to all aspects of the student activities program, including access to the school newspaper, bulletin boards, the public address system and the annual club fair.[15]

4. ***The school may not endorse religious activities.*** The decision does not affect the Court's earlier decisions that struck down state-initiated, state-led prayers and Bible reading in the public school classroom. The Court in the *Mergens* decision emphasized 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."[16]

5. ***Students lead, not teachers or outsiders.*** The religious group should be student-initiated and student-led. A teacher should be present only as a nonparticipatory monitor to protect the safety of the students and school property.[17]

6. ***School officials retain the authority to prohibit disruptive groups.*** Opponents of the Act often have used a "red herring" argument to intimidate school officials into noncompliance with the Act, by arguing that the Act requires access for extremist groups. To the contrary, the Supreme Court emphasized that the Act allows school districts to "retain a significant measure of authority over the type of officially recognized activities in which their students participate."[18] School officials may deny permission to a student group to meet if:

   a. the meeting would materially and substantially interfere with the orderly conduct of educational activities within the school;[19]

   b. unlawful conduct would occur at the meeting;[20] or

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[13] 496 U.S. at 239-40.
[14] *Id.* at 246. See Section 4071(b).
[15] 496 U.S. at 247. See Section 4071(a).
[16] 496 U.S. at 250. See also Sections 4071(d)(1) and (2).
[17] Outsider participation in student religious groups is addressed in Questions 33-36 at pp. 37-38, *infra.*
[18] 496 U.S. at 240-41. See Question 8 at p. 25, *infra.*
[19] Section 4071(c)(4).
[20] Section 4071(d)(5).

c. denial is necessary 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.[21]

D. Earlier Supreme Court Decisions Favoring Equal Access

The *Mergens* decision is not the first time that the Supreme Court has required equal access for students' religious speech. In 1981, in *Widmar v. Vincent*,[22] the Supreme Court ruled that public university students have a free speech right to meet on university property for prayer, Bible study and religious discussion on the same basis as other student groups. The Court rejected the idea that the Establishment Clause *requires* university officials to deny students permission to meet for religious speech. Instead, the Court held that the First Amendment protects students' religious speech on the same basis as it protects other types of speech.[23] The *Widmar* decision relied on several earlier cases in which the Court protected individuals' religious expression on public property or rejected an interpretation of the Establishment Clause which would have required censorship of religious speech.[24]

Congress explicitly applied *Widmar*'s protection of religious speech to public secondary students' religious speech when it passed the Equal Access Act. Similarly, the Supreme Court relied heavily on the *Widmar* decision in protecting the students' religious speech in *Mergens*.

In 1986, the Supreme Court considered a case virtually identical to the *Mergens* case, called *Bender v. Williamsport Area School District*.[25] Public high school students were denied permission to meet for Bible study and prayer during an activity period. The students won in district court when the federal judge ruled that the *Widmar* protection of religious speech should extend to high school students' religious speech.[26] One school board member appealed to the Court of Appeals for the Third Circuit, which reversed the district court.[27]

In *Bender*, the Supreme Court effectively reinstated the district court decision, permitting the students to meet. The Court ruled that the school board member did not have the authority to appeal the decision; therefore, the decision by the court of appeals was invalid.

The primary issue in *Bender*, the constitutionality of equal access for secondary school students, was decisively resolved by the Court in *Mergens*. Of interest is the fact that *Bender* involved student groups meeting during an activity period following homeroom. The Court's implicit reinstatement of the *Bender* district court decision indicates that equal access protects a student religious group at any time other student groups are allowed to meet.

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[21] Section 4071(f).

[22] 454 U.S. 263 (1981).

[23] Noting the importance of freedom of speech, the Court also rejected the university's argument that the establishment clause of the Missouri state constitution required denial of permission to meet.

[24] These cases include: *McDaniel v. Paty*, 435 U.S. 618 (1978); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 340 U.S. 290 (1951); *Saia v. New York*, 334 U.S. 558 (1948); *Tucker v. Texas*, 326 U.S. 517 (1946); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); and *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

[25] 475 U.S. 534 (1986).

[26] 563 F. Supp. 607 (M.D.Pa. 1983).

[27] 741 F.2d 538 (3d Cir. 1984).

E. The Graduation Prayer Decision Does Not Affect Equal Access

In 1992, the Supreme Court held unconstitutional a school district's practice of inviting a member of the clergy to deliver an invocation and benediction as part of the official graduation ceremony of a public middle school. That decision, *Lee v. Weisman*,[28] does not undermine students' equal access rights but affirms the strength of the *Mergens* decision.

In *Mergens*, the Court emphasized 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."[29] In *Weisman*, the Court reiterated this all-important distinction between religious speech by the state and religious speech by private individuals, when it wrote that "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State."[30]

Indeed, the *Weisman* Court referred to *Mergens* when it "recognize[d] that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices and religious persons will have some interaction with the public schools and their students."[31] Thus, *Weisman* and *Mergens* both underscore the duty of school districts to respect the religious beliefs of their students and their private religious expression. The State may not promote its own views of religion, but neither may it censor students' religious expression.

Apart from equal access situations, it is important to bear in mind that the *Weisman* decision does not require school officials to censor private religious expression, even in the context of the graduation ceremony. Justice Souter, in his concurring opinion, observed: "If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State."[32] Instead, the school district in *Weisman* had intentionally invited a member of the clergy to deliver two prayers during the graduation ceremony, when dissenting students could not easily avoid participation in the ceremony, and had given the clergy member guidelines as to the content of his prayer. The *state* involvement in selection of the clergy member and in the content of his prayers violated the Establishment Clause.[33]

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[28] 112 S. Ct. 2649 (1992).

[29] 496 U.S. at 250.

[30] 112 S. Ct. at 2656.

[31] *Id.* at 2661. Justice Souter, in his concurring opinion, noted: "If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State....Nor is this a case where the State has, without singling out religious groups or individuals, extended benefits to them as members of a broad class of beneficiaries defined by clearly secular criteria." *Id.* at 2678 n.8 (citing *Widmar*) (other citations omitted).

[32] *Ibid.*

[33] *Id.* at 2656.

F. Summary of Supreme Court Decisions Regarding Religion and the Public Schools

The *Mergens* decision and the Equal Access Act are consistent with earlier Supreme Court decisions involving the constitutional protection of freedom of speech and free exercise of religion.

1. FIRST AMENDMENT: A CHECK ON THE FEDERAL GOVERNMENT.
   "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...." [First Amendment (1791)].
2. FOURTEENTH AMENDMENT: A CHECK ON STATE AND LOCAL GOVERNMENTS.
   "No state shall...deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." [Fourteenth Amendment (1868)].
3. THE FEDERAL PROTECTION OF FREE EXERCISE OF RELIGION APPLIES TO THE STATES.
   The Free Exercise Clause applies to state and local governmental entities. [*Cantwell v. Connecticut*, 310 U.S. 296 (1940)].
4. SCHOOLS CANNOT FORCE STUDENTS TO VIOLATE RELIGIOUS CONVICTIONS.
   Public school students cannot be forced to participate in an activity that forces them to say words that violate their religious convictions. [*West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943)].
5. THE ESTABLISHMENT CLAUSE APPLIES TO THE STATES.
   The Establishment Clause applies to state and local governmental entities and not just the federal government. [*Everson v. Board of Education*, 330 U.S. 1 (1947)].
6. PUBLIC SCHOOLS CANNOT INCULCATE "THE FAITH."
   The public school curriculum cannot be used to inculcate "the faith," whether Catholicism, Protestantism, Mormonism, Judaism or any other "ism." [*McCollum v. Board of Education*, 333 U.S. 203 (1948)].
7. PUBLIC SCHOOLS MAY ACCOMMODATE STUDENTS' SPIRITUAL NEEDS.
   The public school may adjust its program to accommodate the spiritual needs of schoolchildren by working with churches, synagogues and families in released time programs, by which children are excused from school to be taught "the faith" during the schoolday by instructors of the parents' own choosing, free from direct school input or influence. [*Zorach v. Clauson*, 343 U.S. 306 (1952)].
8. OFFICIAL STATE-COMPOSED PRAYERS FOR STUDENTS ARE OUT.
   The state cannot write official school prayers to be recited by children in the public schools. [*Engel v. Vitale*, 370 U.S. 421 (1962)].

9. STATE-INITIATED DEVOTIONAL EXERCISES ARE OUT; OBJECTIVE TEACHING OF RELIGION AND THE BIBLE IS DESIRABLE.
State-initiated devotional exercises for public schoolchildren in the public school classroom as part of the curricular program are barred by the Establishment Clause. The objective teaching about religion in history, music, literature and art, and courses teaching the Bible as literature or comparative religion, are both permissible and desirable for a complete education. [*Abington School District v. Schempp*, 374 U.S. 203 (1963)].

10. EVOLUTION CANNOT BE EXCLUDED FOR RELIGIOUS REASONS.
The state cannot exclude the teaching of evolution in the public schools for religious reasons. [*Epperson v. Arkansas*, 393 U.S. 97 (1968)].

11. STUDENTS DO NOT LEAVE THEIR CONSTITUTIONAL RIGHTS AT THE SCHOOLHOUSE GATE.
Public school students and teachers do not leave their First Amendment rights at the schoolhouse gate. Students may discuss controversial subjects in and out of the classroom during the school day as long as school discipline is not disrupted and the rights of others are not invaded. [*Tinker v. Des Moines School District*, 393 U.S. 503 (1969)].

12. STUDENT GROUPS MAY ENGAGE IN CONTROVERSIAL SPEECH.
Banning by university officials of a student group engaged in controversial speech violates the First Amendment. [*Healy v. James*, 408 U.S. 169 (1972)].

13. PARENTS DIRECT THEIR CHILDREN'S EDUCATION.
Parents have the primary responsibility for directing the education of their children in a manner consistent with their religious convictions. [*Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Employment Division v. Smith*, 494 U.S. 872 (1990)].

14. A PUBLIC UNIVERSITY MAY NOT DENY EQUAL ACCESS.
A public university may not deny voluntary student groups equal access to the use of the university facilities because the content of their speech is religious. Worship and prayer are protected speech. [*Widmar v. Vincent*, 454 U.S. 263 (1981)].

15. STATE-INITIATED, STUDENT-LED DEVOTIONS ARE OUT.
State-initiated programs allowing students to lead classroom devotional exercises as part of the daily curricular activities of the school violate the Establishment Clause. [*Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982)].

16. A MOMENT OF SILENCE DURING THE SCHOOLDAY PROBABLY IS PERMISSIBLE.
A moment of silence must not be instituted for the purpose of putting "prayer in schools." However, a school probably may have a period of silence during the schoolday during which individual students may think about whatever they want, including prayer. The state, school or teacher may not encourage students to use the time to pray, although students may use the time to pray. [*Wallace v. Jaffree*, 472 U.S. 38 (1985)].

17. EQUAL ACCESS REINSTATED.
The Supreme Court effectively reinstated a federal district court decision permitting public high school students to meet during a student activity period for prayer, Bible study and religious discussion during the schoolday on campus. [*Bender v. Williamsport Area School District*, 475 U.S. 534 (1986)].

18. SCHOOL ADMINISTRATORS MAY PUNISH STUDENTS FOR LEWD SPEECH.
Public school administrators may discipline students for offensively lewd and indecent speech. The Court notes that the fundamental values to be taught in public school include tolerance of divergent political and religious views, even when the views expressed may be unpopular. [*Bethel School District v. Fraser*, 478 U.S. 675 (1986)].

19. CURRICULUM MAY NOT HAVE THE PURPOSE OF PROMOTING A PARTICULAR RELIGIOUS TENET.
A state law requiring balanced treatment of the teaching of creation science and evolution is unconstitutional if its sole purpose is to change the curriculum to endorse a particular religious belief. [*Edwards v. Aguillard*, 482 U.S. 578 (1987)].

20. SCHOOL MAY REGULATE CURRICULAR SPEECH.
A school may exercise editorial control over the content of a school newspaper that is published as a regular class activity for which students receive grades and academic credit. Students' personal speech remains protected under *Tinker*. [*Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)].

21. A PUBLIC SECONDARY SCHOOL MAY NOT DENY EQUAL ACCESS.
A public secondary school that allows one noncurriculum related student group to meet must allow a religious student group to meet under the Equal Access Act. [*Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990)].

22. SCHOOL-ENDORSED PRAYERS MAY NOT BE INCLUDED IN A GRADUATION CEREMONY.
A graduation ceremony may not include an invocation or benediction where the school district has chosen a member of the clergy to deliver such prayers in the graduation ceremony and has given him or her guidelines as to the content of the prayers. Individual speakers may include religious expression, values and ideas in their speeches on their own initiative. [*Lee v. Weisman*, 112 S. Ct. 2649 (1992)].

23. SCHOOL MAY NOT DENY EQUAL ACCESS TO RELIGIOUS COMMUNITY GROUP.
A school district must grant access to school facilities during evenings and weekends to religious community groups to discuss religious viewpoints on social and civic subjects that it allows other community groups access to discuss. [*Lamb's Chapel v. Center Moriches Union Free School District*, No. 91-2024 (U.S. June 7, 1993)].

Part II:
The Equal Access Act is the Law

A. An Overview of the Equal Access Act

The Equal Access Act, which the Supreme Court upheld as constitutional on June 4, 1990,[34] requires public secondary schools to grant equal access to student groups who wish to meet for religious, political or philosophical purposes, if the school allows any noncurriculum related student group to meet.

The title of the Equal Access Act captures the fairness theme of the entire law and provides the guiding principle for applying its provisions. The Act is designed to remedy discrimination against students' religious, political or philosophical speech. The Act was initiated in response to an increasingly widespread uncertainty among school administrators about permitting students to meet, particularly for religious speech. This uncertainty no longer exists after the *Mergens* decision, in which the Supreme Court made clear that students' religious meetings on school property do not violate the Establishment Clause.

When applying the Act, a school administrator must understand these *three fundamental principles*:

1. The Act requires *equal access*, not *preferential* treatment, for religious, political or philosophical speech.
2. The Act protects religious speech that is *student*-initiated and *student*-led, not religious speech that is *state*-initiated. In *Mergens*, the Supreme Court emphasized 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."[35]
3. The Act in no way diminishes the authority of school administrators to maintain *order* and *discipline* in the schools or to *protect* the *well-being* of students and faculty.

Structurally, the Act has seven parts:

1. Section 4071(a) spells out the basic principle of equal access: students cannot be denied access to school facilities solely because the content of their speech is religious, political or philosophical.
2. Section 4071(b) states the trigger for the equal access requirement.
3. Section 4071(c) describes a "safe harbor" in which a school may be virtually assured of compliance with the Act.
4. Section 4071(d) spells out certain actions the Act does not authorize.
5. Section 4071(e) clarifies how the Act is enforced.
6. Section 4071(f) emphasizes that school administrators retain control to protect both school property and students.
7. Section 4072 defines key terms of the Act.

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[34] *Board of Educ. of Westside Comm. Sch. v. Mergens*, 496 U.S. 226 (1990).
[35] *Id.* at 250.

1. SECTION 4071(a): THE HEART OF THE LEGISLATION: EQUAL TREATMENT

"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."[36]

As the Supreme Court ruled in *Mergens*,[37] Section 4071(a) makes it illegal for a secondary school to deny equal access to school facilities to students wishing to meet, merely because the students' speech is religious. The Act specifically does not protect meetings that are unlawful, involuntary, or threaten the order or discipline of the school or the well-being of students and faculty.[38] School officials retain all authority necessary to deny permission to student groups that pose any harm to the school, its mission or its students.[39]

The Act applies to any public secondary school receiving federal financial assistance. State law determines whether a school is providing secondary education.[40] The Act applies to a secondary school if the school has a "limited open forum," as defined in Section 4071(b).

"Equal access" is both a federal statutory and constitutional requirement. In *Mergens*, the Supreme Court ruled that high school students have a federal statutory right to equal access for religious speech under the Equal Access Act. In *Widmar v. Vincent*,[41] the Supreme Court held that university students have a free speech right to meet for religious speech on university property under the First Amendment. Equal access means that student religious groups must be given equal treatment, including formal recognition, with other groups that the school allows to meet.[42] It does not require special treatment, merely equal treatment.

Section 4071(a) speaks only of *students* wishing to conduct a meeting. The Act itself does not give special protection to outsiders, including students from another school, to enter the school to conduct meetings.[43]

The phrase "conduct a meeting" includes activities of students that are permitted for all groups by a particular school.[44] Therefore, the term "meeting" is not limited to a formal meeting

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[36] Questions 1-11, pp. 23-27, *infra*, deal with Section 4071(a) in detail.

[37] 496 U.S. 226 (1990).

[38] See Sections 4071(c)(4), 4071(d)(5) and 4071(f). See also, *Mergens*, 496 U.S. at 241.

[39] Some opponents of the Act incorrectly argue that schools that comply with the Act lose the ability to deny permission for meetings by hate groups and cults. For a detailed explanation of the error of this argument, see Question 8 at p. 25, *infra*.

[40] Section 4072(1).

[41] 454 U.S. 263 (1981).

[42] *Mergens*, 496 U.S. at 247 (equal access includes formal recognition and use of school newspaper, bulletin boards, public address system and annual club fair). See also, *Student Coalition for Peace v. Lower Merion School District*, 776 F.2d 431, 442 (3d Cir. 1985).

[43] See Question 2 at p. 23, *infra*.

[44] See Section 4072(3).

but might also include dances, athletic events, distribution of literature, a club fair or other activities in which student groups are allowed to take part.[45]

Finally, the Act protects religious, political or philosophical speech. Prayer, study of religious books, including the Bible, religious discussions, worship and other religious expression are all included in the term "religious speech." In *Mergens*, the Supreme Court held that the Act protected the right of students to meet for prayer and Bible study.[46] The Supreme Court has held that prayer and religious worship are forms of speech protected by the First Amendment.[47] Nonverbal religious expression, such as the wearing of religious symbols or religious clothing, is also protected by the First Amendment.[48]

2. SECTION 4071(b): THE TRIGGER FOR THE EQUAL ACCESS REQUIREMENT: A LIMITED OPEN FORUM

"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."[49]

Generally, if a secondary school allows student groups to meet for extracurricular activities, the school has a limited open forum that triggers the Act. Section 4071(b) defines a limited open forum as existing "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."

In *Mergens*, the Court discussed in detail the meaning of the limited open forum requirement. The Court emphasized that the language of the Act, including the term "limited open forum," should be interpreted broadly in order to end discrimination against religious speech.[50]

The Court emphatically stated that it would not permit schools "to evade the Act by strategically describing existing student groups" in a way that avoided compliance with the Act.[51] In determining whether a school has a limited open forum, the courts will look "to a school's actual practice rather than its stated policy."[52] School officials will not be allowed to thwart a federal statute intended to end discrimination in federally funded public schools.[53] Furthermore, school districts may be liable for the attorneys' fees of

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[45] *Mergens*, 496 U.S. at 247 (equal access includes formal recognition and access to school newspaper, bulletin boards, public address system, and the annual club fair). See also, *Student Coalition for Peace v. Lower Merion Sch. Dist.*, 776 F.2d 431 (3d Cir. 1985)(use of school athletic field for exposition).

[46] 496 U.S. at 232.

[47] *Widmar*, 454 U.S. at 269.

[48] In *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), the First Amendment protected students' wearing of a black armband that expressed their political and religious opposition to the Vietnam War. The wearing of yarmulkes, religious jewelry, and other articles of clothing would be similarly protected nonverbal expression.

[49] Questions 12-22, pp. 27-33, *infra*, deal with Section 4071(b) in detail.

[50] 496 U.S. at 239.

[51] *Id.* at 244.

[52] *Id.* at 246.

[53] *Id.* at 241.

students who are forced to obtain legal counsel in order to persuade a school district to comply with the Act.[54]

To understand Section 4071(b), it is helpful to look at its four key phrases:

1. *"an offering to or opportunity for"*: The Act does not require that other student groups actually be meeting in order for a student group to have equal access to school facilities. The Act only requires that the school has made an offering to or opportunity for one or more groups to be meeting. In other words, if a school normally has a policy or practice of allowing student groups to meet, then equal access applies, even if no student group is actually taking advantage of the opportunity at the time.

2. *"one or more"*: The opportunity need be available only to one noncurriculum related student group in order to trigger the equal access requirement.[55]

3. *"noncurriculum related"*: A noncurriculum related student group is an activity not *directly* related to the school curriculum.[56] The emphasis is on the word "directly." The Act applies to a public secondary school *unless all* of the student groups that meet fall into one of the following categories set forth by the Supreme Court[57]:
   a. "the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course" (for example, a French club, if French is taught at the school);
   b. "the subject matter of the group concerns the body of courses as a whole" (for example, student government); or
   c. "participation in the group is required for a particular course [ ] or...results in academic credit" (for example, band or orchestra, if participation is tied to a band or orchestra class).[58]

   If *one* group does not belong to one of the above categories, the Act is triggered, and a student religious group must be allowed to meet.

   In *Mergens*, several groups, including a chess club, a stamp collecting club, a scuba club and a service club, were determined to be noncurriculum related and, therefore, triggered the Act.[59] Other courts have given additional examples of noncurriculum related groups, which include: Key Club[60]; chess club[61]; aviation

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[54] Pursuant to 42 U.S.C. Section 1988, students who prevail in cases brought to enforce their right of equal access may recoup their attorney fees from the school district. *See, e.g., Perger v. Wilson County Sch. Bd.*, No. 3:89-0822 (M.D. Tenn. Aug. 1, 1990); *Amidei v. Spring Branch Indep. Sch. Dist.*, No. H-84-4673 (S.D. Tex. May 9, 1985); *Bender v. Williamsport Area Sch. Dist.*, 563 F. Supp. 697 (M.D. Pa. 1983); *Board of Educ. of City of Buffalo v. Burt*, No. 11097/88 (N.Y. Sup.Ct., Sept. 4, 1991). It should be noted that after passage of the Act, the United States Department of Justice intervened in several cases, on behalf of students who had been denied equal access, in lawsuits against school districts who refused to comply with the requirements of the Act.

[55] 496 U.S. at 246.

[56] See Section 4072(3).

[57] 496 U.S. at 239-40.

[58] *Ibid.*

[59] *Id.* at 245-46.

[60] *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 549 n.18 (3d Cir. 1984), *vacated on procedural grounds*, 475 U.S. 534 (1986).

[61] *Id.*

club[62]; office aides[63]; drug prevention clubs[64]; peer counseling groups[65]; bowling club[66]; community service clubs (for example, Special Kiwanis Youth Club and Varsity Club)[67]; international cultural club[68]; minority student union[69]; dance squad[70]; Future Business Leaders of America[71]; pep club[72]; girls' club[73]; ski club[74]; and a volleyball marathon[75].

During legislative debate on the Act, Congress gave many examples of groups that might trigger equal access, including: political activities; philosophy; music; photography; ethics; business club; sports club; Key Club; school band; drama club; math club; science club; language clubs; stamp club; debate; cheerleading; groups fundraising for charities; aerobics; private social organizations; Hi-Y; card clubs; and gymnastics club[76].

As the Supreme Court made clear in *Mergens*, the "noncurriculum related" requirement is not a loophole by which school districts may avoid compliance with the Act.[77] The Supreme Court rejected the school district's argument that all the groups that the school allowed to meet were curriculum related. Instead, the Court adopted a broad definition of "noncurriculum related" under which most schools that allow student groups to meet must allow a student religious group to meet. A school district *cannot* claim that all of its groups are curriculum related by its own definition and, thereby, avoid application of the Act. The actual, objective practice of a school, *not* its own classification of student activities, determines whether it has created a limited forum.[78]

4. *"on school premises during noninstructional time"*: Noninstructional time is time set aside by the school before *actual* classroom instruction begins or after *actual*

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[62] *Id.*

[63] *Id.*

[64] *Perger v. Wilson County Sch. Bd.*, No. 3:89-0822 (M.D. Tenn. Aug. 1, 1990).

[65] *Id.*

[66] *Garnett v. Renton Sch. Dist.*, 772 F.Supp. 531, 533 (W.D. Wash. 1991), *rev'd on other grounds*, 987 F.2d 641 (9th Cir. 1993). The Ninth Circuit accepted the district court's holding that eleven clubs were noncurriculum related and reversed the district court's unrelated holding that a state constitutional provision could bar application of the Equal Access Act to schools. See Questions 45, 46 and 48 at pp. 39-40, *infra*. The *Garnett* district court opinion demonstrates the rigorous standard courts will use to review school board determinations regarding whether clubs are truly curriculum related.

[67] *Garnett*, 772 F.Supp. at 533, 534. See footnote 66.

[68] *Id.* at 533. See footnote 66.

[69] *Id.* at 534. See footnote 66.

[70] *Ibid.* See footnote 66.

[71] *Ibid.* See footnote 66.

[72] *Id.* at 532. See footnote 66.

[73] *Ibid.* See footnote 66.

[74] *Ibid.* See footnote 66.

[75] *Student Coalition for Peace v. Lower Merion Sch. Dist.*, 633 F. Supp. 1040, 1042 (E.D. Pa. 1986).

[76] See pp. 30-31, *infra*, for citations to the *Congressional Record*.

[77] 496 U.S. at 244, *citing* 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").

[78] 496 U.S. at 244. Lower courts have also disregarded school officials' claims that all student groups were curriculum related. See *Garnett v. Renton Sch. Dist.*, 987 F.2d 641 (9th Cir. 1993); *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 549 n.18 (3d Cir. 1984); *Perger v. Wilson County Sch. Bd.*, No. 3:89-0822 (M.D. Tenn. Aug. 1, 1990); *Student Coalition for Peace v. Lower Merion Sch. Dist.*, 633 F. Supp. 1040, 1042 (E.D. Pa. 1986); *Amidei v. Spring Branch Indep. Sch. Dist.*, No. H-84-4673 (S.D. Tex. May 9, 1985).

classroom instruction ends.[79] It is time when the school allows students to meet for noncurriculum related activities. Any time during which noncurriculum related student groups are permitted to meet should be considered "set aside" by the school, and thus, should constitute noninstructional time.

Noninstructional time may occur before students attend their first class or after students attend their last class. It should also include time before an individual student's schoolday begins or after it ends, even though other students may be receiving classroom instruction at that time. For example, when students have varied schedules, as is common in many high schools, the Act should be triggered by the individual student's schedule rather than the school's schedule.[80]

Noninstructional time also should include the lunch hour or any time during the school day when the school does not offer actual classroom instruction but allows students to attend extracurricular activities. For example, in *Bender*, the student activity period occurred during the half-hour after homeroom.[81] In a post-*Mergens* case, students won the right to meet for Bible study during the activity or homeroom period.[82]

3. SECTION 4071(c): A SAFE HARBOR THAT SUCCESSFULLY FULFILLS THE ACT'S EQUAL ACCESS REQUIREMENT

"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."[83]

Section 4071(c) has been interpreted in two different ways: 1) as a set of *requirements* with which a school must comply or 2) as a "*safe harbor*," that is, one of several sets of circumstances by which a school may fulfill the requirement to offer equal access to student

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[79] See Section 4072(4).

[80] 130 *Cong. Rec.* S8355-56 (daily ed. June 27,1984)(statement of Sen. Denton). See Question 21, p. 32, *infra*, for a more detailed discussion.

[81] 475 U.S. 534 (1986).

[82] *Perger v. Wilson County Sch. Bd.*, No. 3:89-0822 (M.D. Tenn. Aug. 1, 1990)(school required to grant equal access to student religious group during schoolday).

[83] Questions 23-36, pp. 33-38, *infra*, deal with Section 4071(c) in detail.

groups. A "safe harbor" describes a set of policies that a school may adopt without violating the equal access requirement of the Act; however, the school is not required to adopt those policies in order to comply with the Act.[84] Section 4071(c) addresses five concerns, as follows:

1. *The meeting is voluntary and student-initiated.* This provision recognizes the critical distinction between *state*-initiated and *student*-initiated activity. For religious meetings, this distinction is particularly relevant because the Establishment Clause generally prohibits religious speech by the state, while the Free Speech and Free Exercise Clauses protect religious speech by private individuals, as the Court emphasized in *Mergens*.[85] The request to meet should come from a student rather than from a teacher, a parent or a nonschool person.

2. *The school or its employees may not sponsor the meeting.* For purposes of the Act, sponsorship is a legal term and *not* what school administrators typically mean by "sponsorship." In Section 4072(2), sponsorship is defined to include promoting, leading or participating in a meeting. However, an employee may be present for custodial purposes to ensure the safety of the students and school property.

   As the Court made clear in *Mergens*, granting permission for a group of students to meet does *not* constitute sponsorship for purposes of the Act and, indeed, is required by it.[86] Access to the school newspaper, bulletin boards, public address system and club fairs does *not* constitute sponsorship under the Act.[87] Furthermore, the Court required equal access for a student religious group, despite the school's requirement that all groups have active faculty sponsors. The Court noted that the religious group could have a nonparticipatory faculty sponsor, if it had any faculty sponsor.[88]

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[84] The accepted reading of Section 4071(c) remains open, as Justice Kennedy noted in his concurring opinion in *Mergens*. Justice O'Connor, in her opinion joined by three other Justices, seemed to assume that the provisions were requirements and not discretionary provisions. However, Justice Kennedy, in his concurring opinion, noted that: "It is not altogether clear, however, whether satisfaction of these criteria is the sole means of meeting the statutory requirement that schools with noncurriculum related student groups provide a 'fair opportunity' to religious clubs. 4071(a). Although we need not answer it today, left open is the question whether school officials may prove that they are in compliance with the statute without satisfying all of the criteria in Section 4071(c)." 496 U.S. at 260 (Kennedy, J., concurring).

Although open to interpretation, the "safe harbor" reading seems the better reading, being fully consistent with the statutory framework, the actual language of the Act, and the legislative history. See *Student Coalition for Peace v. Lower Merion Sch. Dist.*, 776 F.2d 431, 442 (3d Cir. 1985). Furthermore, a "safe harbor" reading leaves maximum discretion to local school administrators, while protecting students' First Amendment rights. As Representative William Goodling, a key sponsor of the Act and a former school administrator, stated: "[N]othing in subsections c and d of the Act are stated as requirements." 130 *Cong. Rec.* H12273 (daily ed. October 11, 1984) (statement of Rep. Goodling).

[85] 496 U.S. at 250.

[86] In *Mergens*, the school district argued that giving permission to a religious group to meet constituted impermissible sponsorship under the Establishment Clause. The school district claimed that merely allowing the religious group to meet *informally* was sufficient to meet the Act's requirement of equal access. The Court rejected this argument, stating that the Act required that the religious student group be given official recognition and permission to meet. 496 U.S. at 247. Official permission to meet, even with a school requirement that a faculty member be present, would not be sponsorship in violation of the Establishment Clause. *Id.* at 251-53.

[87] In *Mergens*, the Court required the school to allow the religious group to have equal access to all of these activities. *Id.* at 247.

[88] *Id.* at 252-53.

3. *Employees may be present at a religious meeting only in a nonparticipatory capacity.* Some persons believe that participation, beyond mere presence for safety reasons, by an employee of the state in a religious student meeting would be sufficient state involvement in the meeting to violate the Establishment Clause, although other persons believe that prohibition of teacher participation in a religious student meeting would be a violation of the employee's equal protection and free speech rights.[89] The Act clearly states that employees may be present at religious meetings to ensure students' safety and protect school property.[90] Although the Court in *Mergens* did not state that involvement by a school employee in a religious student meeting would violate the Establishment Clause, the plurality opinion assumed that they would be present only in a nonparticipatory capacity and noted that this avoided potential Establishment Clause difficulties.[91]

4. *The meeting may not interfere with necessary school discipline.* Students have a free speech right to express themselves to other students at school during appropriate times. This right, however, does not override the school's authority to prohibit any activity that materially and substantially interferes with the orderly conduct of educational activities within the school.[92]

   This provision ensures that school officials retain the necessary authority to maintain school discipline and demonstrates the fallacy of the argument that, by allowing equal access, school officials must allow disruptive groups to meet. This provision, in combination with Sections 4071(d)(5) and 4071(f), allows school officials to have an equal access policy without fear of having to allow harmful groups.[93]

5. *The meeting may not be directed, conducted, controlled or regularly attended by nonschool persons.* The term "nonschool persons" includes persons who are not students or school employees.[94] If school policy allows students in one noncurriculum related group to invite a nonstudent to attend, all student groups must be allowed to do so. One court, in interpreting this provision has held that "if the school's limited open forum includes nonstudent participation, then nonstudent participation must be permitted for all such student groups, subject only to reasonable, nondiscriminatory regulation."[95]

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[89] If this provision were adopted by a school, the school would still only be concerned with contacts between students and school employees on school premises. The provision would not require, and the Constitution does not permit, school administrators to prohibit students from having discussions with school employees, acting as private individuals, off school premises outside of school hours.

[90] See Section 4072(2).

[91] 496 U.S. at 251-53.

[92] The importance of students' freedom of speech and the standard of discipline are discussed by the Supreme Court in *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969), and *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986). Of course, school rules governing discipline must apply equally to all student groups.

[93] For a more detailed discussion of the authority school administrators retain under the Act to deal with disruptive groups, see Question 8, at p. 25, *infra*.

[94] The school is concerned only with contacts between students and nonschool persons on school premises. The provision does not require, and the Constitution does not permit, school administrators to prohibit students from having contact with nonschool persons off school premises outside of school hours.

[95] *Student Coalition for Peace v. Lower Merion Sch. Dist.*, 776 F.2d 431, 442 (3d Cir. 1985). In *Widmar v. Vincent*, the Court indicated that to deny religious nonschool persons equal access for student extracur-

In *Mergens*, Justice O'Connor assumed that "nonschool persons may not direct, control or regularly attend activities of student groups," citing Section 4071(c)(5).[96] In his concurring opinion, Justice Kennedy said the Court had not decided the express issue of whether the provisions of 4071(c) were mandatory or optional,[97] for example, whether school policies could allow nonschool persons to direct, conduct, control or regularly attend activities of student groups. Even under the former, more restrictive reading of 4071(c)(5), school policy could allow nonschool persons to attend some meetings and participate in discussions at those meetings at the invitation of the students, as long as the meetings remained in the control of the students. The key is for the school to apply the same policy regarding nonschool persons to all student groups.

4. SECTION 4071(d): WHAT THE ACT DOES NOT DO

"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."[98]

The Act does not authorize a school to do several things; neither does it prohibit the following things. A school or school district is not authorized by the Act:

1. *to influence* the form or content of any prayer or any other religious activity;

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ricular meetings may violate the Free Speech and Equal Protection provisions of the Constitution. 454 U.S. at 269 n.6. On the other hand, some persons would argue that in *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948), nonschool persons were prohibited from coming on campus to engage in student activities with religious content. This seems to be too narrow a reading of *McCollum*, particularly in light of *Widmar*, in which the Supreme Court distinguished the *McCollum* program, which allowed access only to religious groups, from a policy of equal access for religious and nonreligious speakers. *McCollum* prohibited a policy that allowed *only* religious nonschool persons to conduct *curricular* religious activities in school classrooms. It should not be read to prohibit extracurricular activities with religious content and participation by nonschool persons, if nonschool persons may attend nonreligious meetings.

[96] 496 U.S. at 253.

[97] *Id.* at 260.

[98] Questions 37-48 at pp. 38-41, *infra*, deal with Section 4071(d) in detail.

2. *to require any person to participate* in prayer or other religious activity. These first two provisions are included in order to comply with the Supreme Court "school prayer" decisions,[99] which prohibit state-initiated prayer or devotional Bible reading;
3. *to expend public funds* beyond the incidental costs of providing the space for the meeting. For example, school districts should not buy supplies for the meetings. Incidental costs, which are permissible, include heat, lights, custodial services and employee compensation for supervision;
4. *to compel any school employee* to attend a meeting if the speech at that meeting is contrary to the beliefs of the employee. This would protect teachers or other employees from having to supervise a meeting with which they disagree. If a teacher does not wish to serve as a monitor for a particular meeting due to the speech at that meeting, the teacher should be allowed to decline to serve;
5. *to sanction* meetings that are otherwise unlawful;[100]
6. *to set numerical limits* for the size of groups allowed to meet;[101]
7. *to abridge the constitutional rights* of any person. The Act does not specifically address the constitutional rights of every person with whom the school district deals. The Act protects secondary school students who are seeking to meet with other students. The Act does not, and cannot, abridge constitutional rights that otherwise may exist for students below the secondary level, or for teachers, parents or nonschool persons.

5. SECTION 4071(e): ENFORCEMENT OF THE ACT

"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."[102]

The Act does not authorize the denial or withholding of federal financial assistance to any school. The primary enforcement mechanism of the Act is a lawsuit by students who are denied their right to meet by a school. Students may ask for an injunction or monetary damages. A school may be liable for the students' attorneys' fees, if the students seek legal counsel to gain their right to meet.[103] The United States Department of Justice has intervened when necessary to defend the Act.

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[99] *Engel v. Vitale*, 370 U.S. 421 (1962), and *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963). See pp. 7-8, *supra*.

[100] Question 45 at p. 39, *infra*, discusses what constitutes "unlawful."

[101] This provision was included particularly to reassure all religious minority groups that they would not be excluded because of size.

[102] Questions 48 and 49 at pp. 40-41, *infra*, deal with Section 4071(e) in detail.

[103] See footnote 2.

6. SECTION 4071(f): THE SCHOOL ADMINISTRATOR RETAINS DISCIPLINARY AUTHORITY

"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."[104]

The Act in no way diminishes the authority of school administrators to maintain order and to protect students on school property. The school remains free to prohibit any meeting that disrupts the school environment, that threatens the well-being of students or faculty or that threatens school property. The school may also take any measure necessary to assure that attendance of students at any meeting is completely voluntary. This section demonstrates that school officials need not grant access to harmful groups.[105]

7. SECTIONS 4072, 4073 and 4074: SELF-EXPLANATORY PROVISIONS

"Section 4072. As used in this subchapter—

"(1) The term 'secondary school' means a public school which provides secondary 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.

"Section 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.

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

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[104] Questions 50-54 at pp. 41-42, *infra*, deal with Section 4071(f) in detail.

[105] See Question 8 at p. 25, *infra*.

Section 4072 contains definitions of the terms "secondary school," "sponsorship," "meeting" and "noninstructional time," all of which were discussed earlier in the discussion of Section 4071.

Section 4073 is a severability clause. It simply states that, if a court determines any specific part of the Act or its application to be invalid, the application of the Act to other circumstances or persons shall not be affected, and the remainder of the Act will still be law.

Section 4074 says that the requirements of this Act supersede all other federal law inconsistent with the Act.

B. Legislative History of the Equal Access Act

The Equal Access Act is formally known as Title VIII of the Education for Economic Security Act of 1984, 20 U.S.C. Sections 4071, *et seq.* The Act was passed by a vote of 88-11 on June 27, 1984, by the United States Senate. On July 25, 1984, the House of Representatives passed the Act by a vote of 337-77. On August 11, 1984, President Reagan signed the Act into law.

The Act was designed to address an increasingly widespread perception by public school administrators that they must prohibit any religious activity by students at any time on school premises in order to comply with the Establishment Clause of the First Amendment.

Many legislators were concerned that school administrators were infringing upon the free speech, free association and free exercise rights of public school students. Furthermore, many members of Congress believed that lower courts had failed to protect the important right of students to engage in extracurricular religious speech. They believed this was wrong, especially in light of the Supreme Court decisions in *Widmar v. Vincent*[106] and *Tinker v. Des Moines Independent School District*[107] that protected, respectively, religious speech and secondary school students' speech.

Considering *Tinker* and *Widmar*, the Congress became increasingly convinced that the free speech rights of secondary students included the right to meet for religious, political, philosophical and other speech. Congressional committees held numerous hearings on the issue of whether students were being denied this right. Not only did students testify about the infringement of their free speech rights, but school administrators testified that there was indeed confusion as to what was permissible on school property.[108]

In its consideration of the legislation, the Congress found that denial of equal access to students violates their freedom of speech, freedom of association and, in the case of religious speech, freedom of religion. These rights are basic rights of Americans, including public secondary school students.

The Congress recognized that the public schools must teach students, by word and deed, the proper exercise of these First Amendment rights. By denying students these rights, a school would teach students that freedom of speech is relatively unimportant to the school and the state. Furthermore, in denying students equal access for religious

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[106] 454 U.S. 263 (1981).
[107] 393 U.S. 503 (1969).
[108] S. Rep. No. 357, 98th Cong., 2d Sess. 14-21 (1984); H.R. Rep. No. 710, 98th Cong., 2d Sess. 3 (1984).

speech, the school would demonstrate a hostility to religious speech that is prohibited not only by the Free Speech Clause of the First Amendment but also by the Establishment Clause itself.[109]

Although it realized that students' free speech rights must not disrupt the school environment, the Congress believed that secondary school students are mature enough to engage in religious, political and philosophical speech.[110] Secondary school students also are mature enough to recognize that the mere allowance of equal access does not mean that the state approves the content of all student speech. The Congress found that secondary school students can appreciate state neutrality toward religious speech, as well as other types of speech.[111]

The Congress also was sensitive to any Establishment Clause concerns. The Act is drafted to avoid violation of the Establishment Clause. The Congress recognized that the state must not promote religious activity. However, a policy of equal access does not promote religious activity, but merely gives it neutral treatment.

The Congress also was careful to protect the necessary discretion of school administrators to maintain order and discipline and to protect the well-being of students and faculty. Under the Act, school administrators retain full disciplinary authority.

The Congress recognized the need for careful guidance on an important nationwide problem. Passed by overwhelming, bipartisan majorities in both houses, the Act forcefully expresses the congressional conviction that equal access for religious, political and philosophical speech is a constitutional and equitable educational goal.[112]

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[109] As the Supreme Court said in *Mergens*, "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." 496 U.S. at 248.

[110] *Id.* at 250-51, *citing* S.Rep. No. 98-357, p.8, 35 (1984)("[S]tudents below the college level are capable of distinguishing between State-initiated, school-sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other").

[111] *Id.* at 21,36; *Mergens*, 496 U.S. at 250-51.

[112] Leading proponents of the Senate equal access legislation were Senator Jeremiah Denton (R-Ala.), Senator Mark Hatfield (R-Ore.), and Senator Patrick Leahy (D-Vt.). On the House side, Congressmen Carl Perkins (D-Ky.), Don Bonker (D-Wash.), William Goodling (R-Pa.), Rod Chandler (R-Wash.), and Trent Lott (R-Miss.) were key sponsors of the Act.

Part III:
Questions and Answers About the Equal Access Act

A. Who and What Are Covered by the Act?

Q1: ***Does the Act apply to every public school? (Section 4071(a)).***[113]

A: The Act applies to most public secondary schools. It applies to a school that: 1) provides secondary education as determined by state law, 2) receives federal financial assistance and 3) has a limited open forum.[114]

Q2: ***Who are the "students" referred to in the Act? (Section 4071(a)).***

A: The students are those who attend the particular school involved. The Act does not create a right for students from outside the school to come into that school.

Q3: ***What does it mean to "conduct a meeting"? (Section 4071(a)).***

A: The Act itself defines the term "meeting" in Section 4072(3). The term "meeting" is broad and includes any activity of a student group that the school permits under its limited open forum.

For example, if any noncurriculum related student group is allowed to use the school diamond for a baseball game, the school cannot discriminate against religious, political or philosophical student groups that also want to use the diamond for a baseball game.

In *Mergens*, the Court required equal access for a religious student group to the school newspaper, bulletin boards, the public address system and the annual club fair, in addition to the right to meet.[115]

Q4: ***What does the term "religious content of speech" include? (Section 4071(a)).***

A: One of the benefits of the Act is to relieve school administrators of the burden of deciding whether or not a group is religious. Before the Act was passed, some administrators believed that the Constitution required them to prohibit any religious activity on school premises. Therefore, an administrator had to decide whether or not a particular activity of a student group was religious, which could be an extremely difficult task. (For example, to some, a Marxist club would have religious overtones, whereas to others, it would be purely political or philosophical).[116]

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[113] The section numbers in parentheses refer to the section of the Equal Access Act that the question addresses.

[114] The meaning of the term "limited open forum" is discussed on pp 12-15 and 27-28 of these guidelines.

[115] *Board of Educ. of Westside Comm. Sch. v. Mergens*, 496 U.S. 226, 247 (1990). *See also, Student Coalition for Peace v. Lower Merion Sch. Dist.*, 776 F. 2d 431 (3d Cir. 1985) (use of school athletic field for exposition).

[116] See *Malnak v. Yogi*, 592 F.2d 197, 212 (3d Cir. 1979).

Under the Act, administrators need not concern themselves with categorizing the type of speech that occurs at student meetings. The school administrators need only concern themselves with whether the meeting would cause a material and substantial interference with the orderly conduct of educational activities within the school,[117] involves unlawful conduct,[118] threatens the well-being of students and faculty[119] or occurs at a meeting at which attendance is not voluntary.[120] If a student meeting does any of these things, the school may deny permission to meet on school property, regardless of whether the content of the speech is religious, political or philosophical.[121]

Q5: ***May student meetings include prayer? (Section 4071(a)).***

A: Yes. In *Mergens*, the Supreme Court held that the Equal Access Act protects the right of a student group to meet for prayer, Bible study and fellowship.[122] The Court earlier had held that prayer and worship are forms of speech completely protected by the First Amendment.[123] The Court reasoned that any attempt to distinguish prayer from religious discussions is untenable.[124] In *Mergens*, the Court emphasized 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."[125]

Q6: ***Are "religious services" permitted during student-initiated meetings? (Section 4071(a)).***

A: A school administrator should not attempt to determine whether students' religious speech is a religious discussion or a religious service. As explained in Question 4, *supra*, such a distinction would be extremely difficult to administer and is unconstitutional.[126] A school administrator may maintain school order and discipline, avoid any material and substantial interference with the educational process of the school, protect the well-being of the students and faculty and ensure that attendance at any meeting is voluntary.[127]

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[117] See Section 4071(c)(4).
[118] See Section 4071(d)(5).
[119] See Section 4071(f).
[120] *Ibid.*
[121] See Question 8 at p. 25, *infra.*
[122] 496 U.S. at 232.
[123] *Widmar v. Vincent*, 454 U.S. 263, 269 (1981). It should also be noted that nonverbal religious expression, such as the wearing of religious symbols or clothing, is also protected by the First Amendment. In *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969), the First Amendment protected students' wearing of a black armband that expressed their political and religious opposition to the Vietnam War. The wearing of yarmulkes, religious jewelry and other articles of clothing would be similarly protected nonverbal expression.
[124] *Widmar*, 454 U.S. at 272 n.11.
[125] *Mergens*, 496 U.S. at 250.
[126] *Widmar*, 454 U.S. at 269 n.6; *Mergens*, 496 U.S. at 248.
[127] See Sections 4071(c)(4), 4071(d)(5), and 4071(f).

Q7: ***Must religious groups be nonsectarian in order to meet under the Act? (Section 4071(a)).***

A: No. In *Mergens*, the Court expressly held that a "Christian club" must be allowed to meet under the Act. [128]

Q8: ***Does the Act require schools to allow cults or hate groups, such as the Nazis or the Ku Klux Klan, to meet? (Section 4071(a)).***

A: No. The Act allows school officials the necessary authority to deny permission to hate groups, cults or any group whose conduct is disruptive or threatens students' well-being. The Supreme Court pointedly noted in *Mergens*:

"The Act expressly does not limit a school's authority to prohibit meetings that would 'materially and substantially interfere with the orderly conduct of educational activities within the school.' Sec. 4071(c)(4); *cf. Tinker v. Des Moines Independent School District*, 393 U.S. 503, 509 (1969). The Act also preserves '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.' Sec. 4071(f)."[129]

Unfortunately, some opponents of the Act use the "hate groups and cults" argument in order to intimidate school officials into closing, unfairly and unnecessarily, the forum for all noncurriculum related student groups. The argument is a red herring that, if believed, may cause school officials to needlessly restrict many legitimate student groups, out of the *false* belief that the Act restricts school officials' authority to deal effectively with hate groups and cults. School officials have several protections against such groups, including:

1. *Section 4071(c)(4)* specifically assures that school administrators retain the authority to prohibit activities that materially and substantially interfere with the orderly conduct of educational activities within the school. This standard comes directly from the Court's decision in *Tinker v. Des Moines Independent School District*.[130] In *Tinker*, the Court protected the political speech of students. In the twenty-five years since the *Tinker* decision, extremist political groups have not gained access to school campuses, because the Court set forth a workable standard in *Tinker*, allowing school administrators to prohibit activity or speech that materially and substantially interferes with the orderly conduct of educational activities within the school. The Act includes this standard as a protection against extremist groups.

The fact that a disruptive activity is religious, political or philosophical, does not give it special protection. The Act merely gives religious, political or

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[128] *Mergens*, 496 U.S. at 232. As discussed in Question 9, *infra*, school officials may be allowed to require an open attendance policy for all student meetings using school facilities.

[129] *Id.* at 241.

[130] 393 U.S. 503 (1969).

philosophical groups equal access to school facilities. Those groups still must abide by the same disciplinary rules that are applied to any other activity within the school.

2. *Section 4071(f)* was adopted explicitly to give school administrators the authority to exclude cults from the school campus. The Act allows school administrators to maintain order and discipline on school premises, to protect the well-being of students and faculty and to ensure that student attendance at any meeting is voluntary.

3. *Section 4071(d)(5)* makes clear that the Act does not require the school to allow meetings at which illegal activity is occurring. For example, school administrators retain the authority to prohibit illegal activities.

4. Under *Section 4071(c)(1)*, the school may require that all student groups must be initiated by students at the school. The Act protects only the right of students at a particular school to meet at that school. It does not give special protection to outsiders or students from other schools seeking to use school facilities.

5. The school may require, as part of its limited open forum policy, that all student groups be open to all students in the school. Thus, groups that exclude persons on the basis of race or national origin would be effectively precluded from meeting.

6. The Supreme Court has recognized the authority of school administrators to restrict lewd or obscene speech in *Bethel School District v. Fraser*.[131]

For these reasons, the argument that a closed forum must be adopted in order to prevent meetings by hate groups or cults is false. The Act provides adequate safeguards against meetings by such groups.

Q9: ***Must the meetings be open to all students?*** *(Section 4071 (a))*.

A: School officials may be able to require that all meetings of student groups be open to attendance by all students in the school. It is likely that federal or state civil rights laws may be interpreted to prohibit student groups from denying admission on the basis of race, national origin, gender or handicap. An open attendance policy does not mean that all students must agree with what is said at the meetings. It means that any student should be free to go to any meeting, even if the rest of the students at the meeting disagree with his or her views.

Q10: ***What if some students object to other students' meetings?*** *(Section 4071(a))*.

A: The students still have a right to meet, if they do so in a lawful and orderly manner. The First Amendment does not allow a "heckler's veto" of another person's right to speak but protects both the right of persons to meet and the right of other persons to disagree, in a nondisruptive manner, with the ideas of those meeting together.

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[131] 478 U.S. 675 (1986).

Q11: ***May a school meet the requirements of the Act by allowing religious groups to meet informally while withholding formal recognition? (Section 4071(a)).***

A: No. Before the *Mergens* decision, some school officials told students that they could meet informally without permission on an irregular basis and, therefore, the school did not have to give them official recognition. In *Mergens*, the Court ruled that such action denied the students equal access by withholding official recognition of the group "[a]lthough the school apparently permits [the students] to meet informally after school."[132] Official recognition, which the Court ruled to be required by the Act, allows a religious student group "to be part of the student activities program and carries with it access to the school newspaper, bulletin boards, the public address system and the annual Club Fair."[133]

B. When Is the Act Triggered?

Q12: ***What triggers the Equal Access Act? (Section 4071(b)).***

A: The Act is triggered if a public school that provides secondary education and receives federal financial assistance has a limited open forum.

Q13: ***What is a "limited open forum"? Section 4071(b)).***

A: A "limited open forum" is a term adopted from free speech cases, although the Act made important modifications in its use of the term.[134] Basically, it means that a school allows students to meet to discuss subjects, or engage in activities, of interest to the students. Having done this, the school must treat with fairness other students who wish to meet to discuss their religious values. However, the forum is "limited" in the sense that the school's obligation of fair treatment extends only to the students at that school and not to every person who might wish to speak in school facilities. For example, under the Act, the school retains the right to deny access to all nonschool persons.[135]

Q14: ***Does every public secondary school have a limited open forum? (Section 4071(b)).***

A: A school that allows extracurricular student activities usually has a limited open forum. However, a school may choose not to permit students to meet for any extracurricular activity. Then the school would not have a limited open forum.[136]

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[132] 496 U.S. at 247.

[133] *Ibid.*

[134] As the Court stated in *Mergens*, the Act uses the term "limited open forum," rather than the term "limited public forum" used in the Court's free speech cases. Therefore, the Act establishes "a standard different from the one established by our free speech cases." 496 U.S. at 242. The most significant result of this difference is that the Act is triggered by the presence of "one or more noncurriculum related student groups," whereas some free speech cases have required a larger number of groups or speakers in order to trigger a First Amendment public forum analysis.

[135] For a discussion of access by nonschool persons, see Questions 33-36, pp. 37-38, *infra*.

[136] See Questions 8 and 19, for reasons why closing a forum is not a good or necessary policy.

Q15: ***When has a school created a limited open forum? (Section 4071(b)).***

A: A school has created a limited open forum whenever it allows one or more noncurriculum related student groups to meet during noninstructional time.[137] The key issue in *Mergens* was whether the school had created a limited open forum. The school claimed that it had not, because in its view, all of the student groups were curriculum related. The Supreme Court rejected the school's contention[138] and found that at least three of the student groups which were meeting were noncurriculum related and triggered the Act.

The Supreme Court emphatically stated that it would not permit schools "to evade the Act by strategically describing existing student groups" in a way that avoids compliance with the Act.[139] In determining whether a school has a limited open forum, the courts will look "to a school's actual practice rather than its stated policy."[140] The Supreme Court emphasized that the Act would be interpreted broadly, in order to carry out Congress' intent to protect students' religious speech from discriminatory treatment by school officials.[141] School officials will not be allowed to thwart a federal statute intended to end discrimination in federally funded public schools.[142]

The Act is triggered if *only one* noncurriculum related group is allowed to meet. Furthermore, the Act does not require that other student groups actually be meeting; it only requires that the school has made an offering to or opportunity for one or more groups to meet.

Q16: ***What is a "noncurriculum related" student group? (Section 4071(b)).***

A: A noncurriculum related student group is a group or club "that does not directly relate to the body of courses offered by the school."[143] The Supreme Court addressed the definition of a "noncurriculum related student group" by setting forth the criteria for a "curriculum related student group." A student group is "curriculum related" *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;"

3) or "participation in the group is required for a particular course [ ] or... results in academic credit."[144]

If *one* group does not belong to one of the above categories, the Act is triggered, and a student religious group must be allowed to meet.

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[137] See Section 4071(b).

[138] 496 U.S. at 244.

[139] *Id.*, *citing* 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").

[140] 496 U.S. at 246.

[141] *Id.* at 239.

[142] *Id.* at 241.

[143] *Id.* at 239.

[144] *Ibid.*

The "noncurriculum related" trigger is not a loophole by which school districts may avoid compliance with the Act. The Court noted that school officials may not "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" as curriculum related in order to avoid triggering the Act.[145] A school cannot claim that all of its groups are curriculum related by definition and, thereby, avoid application of the Act.[146] Furthermore, a school district stands to lose not only its own attorneys' fees, but also the attorneys' fees of the students who must obtain legal counsel to force the school district to comply with the Act.[147]

Q17: ***What examples of noncurriculum related student groups did the Supreme Court give? (4071(b)).***

A: As examples of noncurriculum related student groups, the Court noted that groups such as a chess club, a stamp collecting club or a community service club would be noncurriculum related, unless a school could show that such groups fell within the Court's description of groups that directly relate to the curriculum of that particular school.[148]

In the *Mergens* case, the Court found at least three groups that specifically were noncurriculum related: 1) "Subsurfers," a scuba diving group; 2)"Chess club;" and 3) "Peer Advocates," a service group working with special education classes. [149]

Other courts have given additional examples of noncurriculum related groups, including: Key Club[150]; chess club[151]; aviation club[152]; office aides[153]; drug prevention clubs[154]; peer counseling groups[155]; bowling club[156]; commu-

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[145] *Id.* at 244, *citing* 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").

[146] Lower courts have also disregarded school officials' claims that all student groups were curriculum related. See, *e.g., Garnett v. Renton Sch. Dist.*, 987 F.2d 641 (9th Cir. 1993); *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 549 n.18 (3d Cir. 1984); *Pope v. East Brunswick Bd. of Educ.*, No. 91-785 (D.N.J. April 26, 1993); *Perger v. Wilson County Sch. Bd.*, No. 3:89-0822 (M.D. Tenn. Aug. 1, 1990); *Student Coalition for Peace v. Lower Merion Sch. Dist.*, 633 F. Supp. 1040, 1042 (E.D. Pa. 1986); *Amidei v. Spring Branch Indep. Sch. Dist.*, No. H-84-4673 (S.D. Tex. May 9, 1985).

[147] Pursuant to 42 U.S.C. Section 1988, students who prevail in cases brought to enforce their right of equal access may recoup their attorney fees from the school district. *See, e.g., Perger v. Wilson County Sch. Bd.*, No. 3:89-0822 (M.D. Tenn. Aug. 1, 1990); *Amidei v. Spring Branch Indep. Sch. Dist.*, No. H-84-4673 (S.D. Tex. May 9, 1985); *Bender v. Williamsport Area Sch. Dist.*, 563 F. Supp. 697 (M.D. Pa. 1983); *Board of Educ. of City of Buffalo v. Burr*, No. 11097/88 (N.Y. Sup.Ct., Sept. 4, 1991). It should be noted that after passage of the Act, the United States Department of Justice intervened in several cases, on behalf of students who had been denied equal access, in lawsuits against school districts who refused to comply with the requirements of the Act.

[148] 496 U.S. at 245-46.

[149] *Ibid.*

[150] *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 549 n.18 (3d Cir. 1984), *vacated on procedural grounds*, 475 U.S. 534 (1986); *Pope v. East Brunswick Bd. of Educ.*, No. 91-785 (D.N.J. April 26, 1993).

[151] *Ibid.*

[152] *Ibid.*

[153] *Ibid.*

[154] *Perger v. Wilson County Sch. Bd.*, No. 3:89-0822 (M.D. Tenn. Aug. 1, 1990).

[155] *Ibid.*

[156] *Garnett v. Renton Sch. Dist.*, 772 F. Supp. 531, 533 (W.D. Wash. 1991), *rev'd on other grounds*, 987

nity service clubs (for example, Special Kiwanis Youth Club and Varsity Club)[157]; international cultural club[158]; minority student union[159]; dance squad[160]; Future Business Leaders of America[161]; pep club[162]; girls' club[163]; ski club[164]; and a volleyball marathon.[165]

During legislative debate on the Act, Congress gave many examples of groups that might trigger equal access, including: political activities[166]; philosophy[167]; music[168]; photography[169]; ethics[170]; business club[171]; sports club[172]; Key Club[173]; school band[174]; drama club[175]; math club[176]; science club[177]; language clubs[178]; stamp club[179]; debate[180]; cheerleading[181]; groups fundraising for

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F.2d 641 (9th Cir. 1993). The Ninth Circuit accepted the district court's holding that eleven clubs were noncurriculum related and reversed the district court's unrelated holding that a state constitutional provision could bar application of the Equal Access Act to schools. See Questions 45, 46 and 48 at pp. , *infra*. The *Garnett* district court opinion demonstrates the rigorous standard courts will use to review school board determinations regarding whether clubs are truly curriculum related.

[157] *Garnett*, 772 F. Supp. at 533, 534. See footnote 156.

[158] *Id.* at 533. See footnote 156.

[159] *Id.* at 534. See footnote 156.

[160] *Ibid.* See footnote 156.

[161] *Ibid.* See footnote 156.

[162] *Id.* at 532. See footnote 156.

[163] *Ibid.* See footnote 156.

[164] *Ibid.* See footnote 156.

[165] *Student Coalition for Peace v. Lower Merion Sch. Dist.*, 633 F. Supp. 1040, 1042 (E.D. Pa. 1986).

[166] 130 *Cong. Rec.* S8335 (daily ed. June 27, 1984)(statement of Senator Denton); *id.* at S8337 (statement of Senator Hatfield); *id.* at S8354 (statement of Senator Levin); *id.* at S8358 (statement of Senator Biden); *id.* at S8364 (statement of Senator Thurmond); *id.* at S8366 (statement of Senator Grassley); 130 *Cong. Rec.* H7724 (daily ed. July 25, 1984) (statement of Representative Frank); *id.* at H7726 (statement of Representative Roukema); *id.* at H7732 (statement of Representative Goodling); *id.* at H7737 (statement of Representative Emerson).

[167] 130 *Cong. Rec.* S8335 (daily ed. June 27, 1984)(statement of Senator Denton); *id.* at S8337 (statement of Senator Hatfield); *id.* at S8358 (statement of Senator Biden); *id.* at S8364 (statement of Senator Thurmond).

[168] *Id.* at S8337 (daily ed. June 27, 1984)(statement of Senator Hatfield);

[169] *Ibid.*; *id.* at S8365 (statement of Senator Baucus); 130 *Cong. Rec.* H7730 (daily ed. July 25, 1984) (statement of Representative Clinger).

[170] *Id.* at S8354 (daily ed. June 27, 1984)(statement of Senator Levin).

[171] *Id.* at S8358 (daily ed. June 27, 1984)(statement of Senator Biden).

[172] *Id.* at S8359 (statement of Senator Biden); 130 *Cong. Rec.* H7737 (daily ed. July 25, 1984) (statement of Representative Emerson).

[173] 130 *Cong. Rec.* S8359 (daily ed. June 27, 1984)(statement of Senator Nickles); 130 *Cong. Rec.* H7735 (daily ed. July 25, 1984) (statement of Representative Bonker).

[174] 130 *Cong. Rec.* S8359 (daily ed. June 27, 1984)(statement of Senator Nickles).

[175] *Id.* at S8360 (statement of Senator Mattingly); *id.* at S8364 (statement of Senator Thurmond).

[176] *Id.* at S8360 (statement of Senator Mattingly).

[177] *Ibid.*

[178] *Id.* at S8360 (statement of Senator Mattingly); *id.* at S8365 (statement of Senator Baucus); *id.* at S8366 (statement of Senator Grassley); 130 *Cong. Rec.* H7730 (daily ed. July 25, 1984) (statement of Representative Clinger); *id.* at H7834 (statement of Representative Siljander).

[179] 130 *Cong. Rec.* S8361 (daily ed. June 27, 1984)(statement of Senator Jepsen); *id.* at S8367 (statement of Senator Gorton); H. Rep. 710, 98th Cong., 2d Sess. (1984) (dissenting views of Representative Boucher).

[180] 130 *Cong. Rec.* S8368 (daily ed. June 27, 1984)(statement of Senator Evans); 130 *Cong. Rec.* H7732 (daily ed. July 25, 1984) (statement of Representative Lloyd).

[181] 130 *Cong. Rec.* S8367 (daily ed. June 27, 1984)(statement of Senator Gorton).

charities[182]; aerobics[183]; private social organizations[184]; Hi-Y[185]; card clubs[186]; and gymnastics club[187].

Q18: ***Did the Supreme Court give examples of curriculum related student groups? (4071(b)).***

A: As examples of curriculum related student groups, the Court in *Mergens* 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 addressed concerns, solicited opinions and formulated 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. [188]

Q19: ***Who determines whether student groups are in fact curriculum related? (4071(b)).***

A: Local school authorities make the initial determination within the strict confines of the Supreme Court's guidelines in *Mergens*. As the *Mergens* decision itself illustrates, when necessary, the courts will set aside the determination of school officials in order to prevent discriminatory treatment of a group protected by the Act.[189]

As the Court made clear, school officials may not define "curriculum related" to mean every activity remotely related to abstract educational goals.[190] "Curriculum related" may not be defined "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" to avoid triggering the Act.[191] Whether a specific student group is a "noncurriculum related student group" will depend on a particular school's curriculum; but such determinations are subject to factual findings by trial courts.[192] Furthermore, a school district stands to lose not only its own attorneys' fees but also the

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[182] 130 *Cong. Rec.* H7726 (daily ed. July 25, 1984)(statement of Representative Roukema).
[183] *Id.* at H7727 (statement of Representative Roukema).
[184] *Id.* at H7732 (statement of Representative Goodling).
[185] *Id.* at H7735 (statement of Representative Bonker).
[186] *Id.* at H7834 (statement of Representative Siljander).
[187] H. Rep. 710, 98th Cong., 2d Sess. (1984) (dissenting views of Representative Boucher).
[188] 496 U.S. at 240.
[189] Lower courts have also disregarded school officials' claims that all student groups were curriculum related. See *Garnett v. Renton Sch. Dist.*, 987 F.2d 641 (9th Cir. 1993); *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 549 n. 18 (3d Cir. 1984); *Pope v. East Brunswick Bd. of Educ.*, No. 91-785 (D.N.J. April 26, 1993); *Perger v. Wilson County Sch. Bd.*, No. 3:89-0822 (M.D. Tenn. Aug. 1, 1990); *Student Coalition for Peace v. Lower Merion Sch. Dist.*, 633 F. Supp. 1040, 1042 (E.D. Pa. 1986); *Amidei v. Spring Branch Indep. Sch. Dist.*, No. H-84-4673 (S.D. Tex. May 9, 1985).
[190] 496 U.S. at 244.
[191] *Ibid.*
[192] *Id.* at 240. The district court decision in *Garnett v. Renton Sch. Dist.*, 772 F. Supp. 531 (W.D. Wash. 1991), *rev'd on other grounds*, 987 F.2d 641 (9th Cir. 1993), demonstrates the rigorous standard courts will use to review school board determinations regarding whether clubs are truly curriculum related. See footnote 189.

attorneys' fees of the students who must obtain legal counsel to force the school district to comply with the Act.[193]

Q20: ***What is "noninstructional time"? (Section 4071(b)).***

A: The term "noninstructional time" is defined in Section 4072(4) as time set aside by the school before *actual* classroom instruction begins or after *actual* classroom instruction ends. In short, it is the time when the school allows students to meet for student activities.

Q21: ***Does noninstructional time include lunch periods, activity periods during the school day, or other times when students may meet? (Section 4071(b)).***

A: Any time during which noncurriculum related student groups are permitted to meet should be considered time "set aside" by the school and, thus, should constitute noninstructional time. Noninstructional time may occur before students attend their first class or after students attend their last class. It should also include time before an individual student's school day begins or after it ends, even though other students may be receiving classroom instruction at that time. For example, when students have varied schedules, as is common in many high schools, the Act should be triggered by the individual student's schedule rather than the school's schedule.[194]

Although some opponents of the Act question its applicability to times when students are required to be at school, the safest course for a school administrator to follow is to grant equal access any time student groups are allowed to meet. While the clubs in *Mergens* met before and after school, the Supreme Court's rationale is equally applicable to meetings during the schoolday, given its emphasis on 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."[195] This rationale should apply any time student groups are allowed to meet.[196]

In a post-*Mergens* case, students won the right to meet for Bible study during the activity or homeroom period.[197] The *Bender* case also supports the right of students to meet during an activity period after homeroom. In that case, the

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[193] Pursuant to 42 U.S.C. Section 1988, students who prevail in cases brought to enforce their right of equal access may recoup their attorney fees from the school district. *See, e.g., Perger v. Wilson County Sch. Bd.*, No. 3:89-0822 (M.D. Tenn. Aug. 1, 1990); *Amidei v. Spring Branch Indep. Sch. Dist.*, No. H-84-4673 (S.D. Tex. May 9, 1985); *Bender v. Williamsport Area Sch. Dist.*, 563 F. Supp. 697 (M.D. Pa. 1983); *Board of Educ. of City of Buffalo v. Burr*, No. 11097/88 (N.Y. Sup.Ct., Sept. 4, 1991). It should be noted that after passage of the Act, the United States Department of Justice intervened in several cases, on behalf of students who had been denied equal access, in lawsuits against school districts who refused to comply with the requirements of the Act.

[194] 130 *Cong. Rec.* S8355-56 (daily ed. June 27,1984)(statement of Sen. Denton).

[195] 496 U.S. at 250.

[196] For example, a key sponsor of the Act indicated that the Act covers time before an *individual* student's school day begins or after it ends, even though other students may be receiving classroom instruction at the time because of split sessions or staggered school schedules. 130 *Cong. Rec.* S8355-56 (daily ed. June 27, 1984)(statement of Sen. Denton).

[197] *Perger v. Wilson County Sch. Bd.*, No. 3:89-0822 (M.D. Tenn. Aug. 1, 1990).

students sought to meet for religious speech during the club activity period, which took place after the homeroom period. A federal district court ruled that the students had a free speech right to meet for religious speech during the activity period.[198]

Q22: ***May a school place any restrictions on student meetings in a limited open forum? (4071(b)).***

A: Yes. A school may place "time, place or manner" restrictions on student meetings in a limited open forum, as long as those restrictions are *reasonable* and *neutrally* applied to *all* groups.

Examples of neutral time restrictions would be a requirement that *all* student meetings must take place on Monday or must last less than 30 minutes. Neutral restrictions may be placed on where the students meet and how they meet. The school also retains disciplinary authority and the ability to protect the well-being of students and faculty.[199]

C. What Does Not Violate the Act?

Q23: ***When has a school fulfilled the requirements of the Equal Access Act? (Section 4071(c)).***

A: Section 4071(c) has been interpreted in two different ways: 1) as a set of *requirements* with which a school must comply or 2) as a "*safe harbor*", that is, one of several sets of circumstances by which a school may fulfill the requirement to offer equal access to student groups. A "safe harbor" describes a set of policies that a school may adopt without violating the equal access requirement of the Act[200]; however, the school is not required to adopt those policies in order to comply with the Act.[201]

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[198] 563 F. Supp. 697 (M.D. Pa. 1983). Although the *Bender* case was decided on procedural grounds when it reached the Supreme Court, the Court effectively reinstated the district court decision to allow the students to meet during the activity period following the homeroom period. *Bender*, 475 U.S. 534 (1986). Furthermore, the *Bender* district court decision was the model for the Equal Access Act, as repeated references in the legislative debates demonstrate.

[199] See Section 4071(c)(4), (d)(5), and (f). *Accord*, *Mergens*, 496 U.S. at 241.

[200] This is not a guarantee that any of these policies might not violate the Constitution, but it seems unlikely that they would. See pp. 15-19, *supra*.

[201] The accepted reading of Section 4071(c) remains open, as Justice Kennedy noted in his concurring opinion in *Mergens*. Justice O'Connor, in her opinion joined by three other Justices in *Mergens*, seemed to assume that the provisions were requirements and not discretionary provisions. However, Justice Kennedy, in his concurring opinion, noted that: "It is not altogether clear, however, whether satisfaction of these criteria is the sole means of meeting the statutory requirement that schools with noncurriculum related student groups provide a 'fair opportunity' to religious clubs. 4071(a). Although we need not answer it today, left open is the question whether school officials may prove that they are in compliance with the statute without satisfying all of the criteria in Section 4071(c)." 496 U.S. at 260 (Kennedy, J., concurring).

Although open to interpretation, the "safe harbor" reading seems the better reading, being fully consistent with the statutory framework, the actual language and the legislative history of the Act. See *Student Coalition for Peace v. Lower Merion Sch. Dist.*, 776 F.2d 431, 442 (3d Cir. 1985). Furthermore, a "safe harbor" reading leaves maximum discretion to local school administrators, while protecting students' First Amendment rights. As Representative William Goodling, a key sponsor of the Act and a former school administrator, stated: "[N]othing in subsections c and d of the Act are stated as requirements." 130 *Cong. Rec.* H12273 (daily ed. October 11, 1984) (statement of Rep. Goodling).

Q24: ***What does it mean to say that Section 4071(c) is a "safe harbor" provision? (4071(c)).***

A: If a "safe harbor" reading of Section 4071(c) is adopted, the only requirement of the Act is that a school must grant equal access, if it has a limited open forum. Section 4071(c) then gives examples of policies that are not required by the Act, but neither are they violations of the Act.

If a school district chooses to follow these provisions and is challenged for allegedly violating the Act, generally it will be presumed that there has been no violation. However, policies and practices differing from those described in Section 4071(c) would not be prohibited by the Act. Such policies and practices would have to be carefully examined to ascertain that they were in conformity with the Constitution.

As already noted, Justice O'Connor, in her opinion in *Mergens*, joined by three other Justices, seemed to assume that a school must adopt the provisions of Section 4071(c).[202] However, Justice Kennedy, in his concurring opinion with Justice Scalia, noted that the Court was *not* deciding whether school officials might prove that they were in compliance with the Act without satisfying all of the criteria in Section 4071(c).[203]

Q25: ***What does "student-initiated" mean? (Section 4071(c)(1)).***

A: It means the students themselves seek permission to meet and take responsibility for leading the meeting.

Q26: ***Why is student initiation of the meetings important? (Section 4071(c)(1)).***

A: This distinction is particularly relevant for religious meetings, because the Establishment Clause generally prohibits *state*-initiated religious activities but does not prohibit *student*-initiated religious activities. In *Mergens*, the Supreme 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."[204] The request to meet should come from a student or students rather than from a teacher, a parent or a nonschool person.[205]

Q27: ***What is "sponsorship" of a meeting?*** (Section 4071(c)(2)).

A: For purposes of the Act, sponsorship is a legal term and is *not* what school administrators typically mean by "sponsorship." In Section 4072(2), sponsorship is defined to include promoting, leading or participating in a meeting. However, an employee may be present for custodial purposes to ensure the safety of the students and school property.

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[202] 496 U.S. at 251, 253.

[203] *Id.* at 260.

[204] *Id.* at 250.

[205] Of course, students may discuss whether to initiate such meetings with their parents or other persons they wish to consult. Such discussions do not mean that the students have not initiated the request, if the students have actually handled the school's procedures themselves. Inquiries into whether the students have discussed the meetings with other persons would violate their rights of freedom of speech and association.

As the Court made clear in *Mergens*, granting permission for a group of students to meet does *not* constitute sponsorship for purposes of the Act.[206] Access to the school newspaper, bulletin boards, public address system and club fairs does *not* constitute sponsorship under the Act.[207] Furthermore, the Court required equal access for a student religious group, despite the school's requirement that all groups have active faculty sponsors. The Court noted that the religious group could have a nonparticipatory faculty sponsor, if it had any faculty sponsor.[208] The Court also implied that the school could keep its name from being used by any student organization.[209]

The Court distinguished recognition and equal treatment, which it required, from endorsement, which it disfavored: "To the extent a school makes clear that its recognition of respondents' proposed club is not an endorsement of the views of the club's participants, students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech."[210] A school may affirmatively disclaim any sponsorship of any group allowed to meet under the Act.[211]

Q28: ***Why is nonsponsorship of the meeting important?*** *(Section 4071(c)(2)).*

A: Sponsorship of a religious student meeting, either by special encouragement, endorsement or special financial assistance, raises serious Establishment Clause concerns and must be avoided. However, merely granting equal access to school facilities, school media and other aspects of the student activity program is *not* unconstitutional sponsorship of religious student meetings but is required by the Act.[212]

Q29: ***Does the assignment of a teacher for custodial purposes constitute sponsorship of the meeting?*** *(Sections 4071(c)(2), 4071(c)(3) and 4072(2)).*

A: No. As Section 4072(2) makes clear, the assignment of a teacher or other school employee for custodial purposes does not constitute sponsorship of the meeting. The teacher is present merely to ensure the protection of the school's property and the students' well-being.[213] Any payment of a monitor,

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[206] In *Mergens*, the school district argued that giving permission to a religious group to meet constituted impermissible sponsorship under the Establishment Clause. The school district claimed that merely allowing the religious group to meet *informally* was sufficient to meet the Act's requirement of equal access. The Court rejected this argument, stating that the Act required that the religious student group be given official recognition and permission to meet. 496 U.S. at 247. Official permission to meet would not be sponsorship in violation of the Establishment Clause. *Id.* at 251-53.

[207] In *Mergens*, the Court required the school to allow the religious group to have equal access to all of these activities. *Id.* at 247.

[208] *Id.* at 252-53.

[209] *Id.* at 251, citing *Widmar* factual pattern in which university prohibited identification of the university's name "with the aims, policies, or opinions of any student organization or its members".

[210] *Ibid.*

[211] *Ibid.*

[212] *Id.* at 247.

[213] Some persons believe that participation by a teacher in a student religious meeting would be sufficient state involvement in the meeting to violate the Establishment Clause. Other persons believe that denial of teacher participation in a religious student meeting would be a violation of the teacher's equal protection and free speech rights. The plurality opinion in *Mergens* assumed teachers would be present only in a nonparticipatory capacity and noted that this avoided potential Establishment Clause difficulties. *Id.* at 251, 253.

which may be required by the teachers' contract, should be considered an "incidental cost" of providing space for student-initiated meetings allowed by the Act.[214]

Q30: ***If school policy requires that each student group have a faculty monitor actively involved with the group, may the school deny a religious student group permission to meet because a teacher can not be actively involved with the group?*** *(Section 4071(c)(2), 4071(c)(3) and 4072(2)).*

A: No. That is precisely one of the arguments made by the school district that the Court rejected in *Mergens*. As the Court made clear, even if a school requires that student groups have "a faculty sponsor who would be charged with actively directing the activities of the group," the school must still allow a religious student group to meet with a nonparticipatory monitor.[215]

Q31: ***Is it "sponsorship" for a school to allow students to announce meetings through the school media?*** *(Section 4071(c)(2)).*

A: No. In *Mergens*, the Supreme Court required that the religious student group receive official recognition from the school, including participation in the student activities program, with access to the school newspaper, bulletin boards, public address system and the annual club fair on an equal basis with other student groups.[216] Of course, the school may not give a religious student group preferential access to school media. Announcements or other uses of media should not be worded in ways that suggest that the school promotes or disapproves of the views of the religious student group. Neutral treatment of the religious student group is the key. If it wishes, a school may announce or post a disclaimer that it does not promote, endorse or otherwise sponsor all or any particular noncurriculum related student group, including the religious student group.[217]

Q32: ***What does "materially and substantially interfere with the orderly conduct of educational activities within the school" mean?*** *(Section 4071(c)(4)).*

A: This language is taken from the Supreme Court decision in *Tinker v. Des Moines School District*.[218] The Court required the school to allow students to wear armbands protesting the Vietnam War, unless school administrators could show that the students' activity would materially and substantially interfere with the orderly conduct of the educational activity of the school.

This provision ensures that school officials retain the necessary authority to maintain school discipline and demonstrates the fallacy of the argument that, by allowing equal access, school officials must allow disruptive groups to meet. In combination with Sections 4071(d)(5) and 4071(f), Section 4071(c)(4)

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[214] See Section 4071(d)(3).
[215] 496 U.S. at 252-53.
[216] *Id.* at 247.
[217] *Id.* at 251.
[218] 393 U.S. 503 (1969).

allows school officials to have an equal access policy without fear of having to allow harmful groups.[219]

Q33: ***Who are "nonschool persons"? (Section 4071(c)(5)).***

A: A nonschool person includes anyone who is not a student, a teacher, an administrator or an employee at the particular school.

Q34: ***Does the Act give nonschool persons a right to attend student meetings? (Section 4071(c)(5)).***

A: A school may decide whether or not to allow any participation by nonschool persons in student meetings. However, if school policy allows students in one noncurriculum related group to invite a nonstudent to attend, all student groups must be allowed to do so. One court, interpreting this provision, has held that "if the school's limited open forum includes nonstudent participation, then nonstudent participation must be permitted for all such student groups, subject only to reasonable, nondiscriminatory regulation."[220]

Q35: ***May nonschool persons "direct, conduct, control or regularly attend" student meetings? (Section 4071(c)(5)).***

A: In *Mergens*, Justice O'Connor assumed that "nonschool persons may not direct, control or regularly attend activities of student groups," citing Section 4071(c)(5).[221] In his concurring opinion, Justice Kennedy said the Court had not decided the express issue of whether the provisions of 4071(c) were mandatory or optional,[222] for example, whether school policies could allow nonschool persons to direct, conduct, control or regularly attend activities of student groups. Even under the former, more restrictive reading of 4071(c)(5), school policy could allow nonschool persons to attend some meetings and participate in discussions at those meetings at the invitation of the students, as long as the meetings remained in the control of the students. The key is for the school to apply the same policy regarding nonschool persons to all student groups.

Q36: ***What does "direct, conduct, control or regularly attend" mean? (Section 4071(c)(5)).***

A: Asking questions or conversing with the students while the students are running the meeting would not be conducting or controlling the meeting.

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[219] See Question 8 at p. 25, *supra*.

[220] *Student Coalition for Peace v. Lower Merion Sch. Dist.*, 776 F.2d 431, 442 (3d Cir. 1985). In *Widmar v. Vincent*, the Court indicated that to deny religious nonschool persons equal access for student extracurricular meetings may violate the Free Speech and Equal Protection provisions of the Constitution. 454 U.S. at 269 n.6. On the other hand, some persons would argue that in *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948), nonschool persons were prohibited from coming on campus to engage in student activities with religious content. This seems to be too narrow a reading of *McCollum*, particularly in light of *Widmar*, in which the Supreme Court distinguished the *McCollum* program, which allowed access only to religious groups, from a policy of equal access for religious and nonreligious speakers. *McCollum* prohibited a policy that allowed *only religious* nonschool persons to conduct *curricular* religious activities in school classrooms. It should not be read to prohibit extracurricular activities with religious content and participation by nonschool persons, if nonschool persons may attend nonreligious meetings.

[221] 496 U.S. at 253.

[222] *Id.* at 260.

"Regularly attend" most probably means attending almost every meeting. The important point is that the school's policy regarding nonschool persons, including its definition of "direct, conduct, control or regularly attend," must apply to all student groups.[223]

A school administrator should be concerned with the activities of nonschool persons only when they are on school property. Off school property, outside of school hours, a student is free to talk with whomever he or she wishes. The school is not to be concerned with whether a student involved in a meeting chooses to consult with a nonschool person outside of school hours.

D. What Is a School Not Authorized to Do?

Q37: ***Does the Act authorize the school district to influence the form or content of the religious activity?*** *(Section 4071(d)(1))*.

A: No. In Section 4071(d)(1), the Act states that it does not authorize the school district to influence the form or content of any religious activity occurring on school property.

Both the Act and the *Mergens* decision leave the "school prayer" decisions[224] intact. As the Supreme Court noted in *Mergens*, there is a "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."[225]

Q38: ***Does the Act authorize the school to require a student or a teacher to participate in prayer or any religious student activity?*** *(Section 4071(d)(2))*.

A: No. Section 4071(d)(2) affirms that the Act does not authorize the school to require any student or teacher to participate in any religious activity.

Q39: ***Does the Act authorize the school to give student groups money to buy religious, political or philosophical material to use in their meetings?*** *(Section 4071(d)(3))*.

A: No. The Act neither authorizes nor prohibits such expenditures. The expenditure of funds for some meetings may raise constitutional issues.

Q40: ***Is payment of a monitor at student meetings, including student religious meetings, permissible?*** *(Section 4071(d)(3))*.

A: Yes. The monitors at the high school involved in *Mergens* were paid.[226]

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[223] *Student Coalition for Peace v. Lower Merion Sch. Dist.*, 776 F.2d 431, 442 (3d Cir. 1985).

[224] *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). See pp. 7-9, *supra*, for a summary of Supreme Court decisions regarding religion in the public schools.

[225] 496 U.S. at 250.

[226] *Mergens v. Bd. of Educ. of Westside Comm. Sch.*, No. CV 85-0-426, slip op. at 12 (D. Neb. Feb. 2, 1988)("sponsors receive remuneration for their services").

Q41: ***May a religious student group engage in fund-raising?***

A: If other student groups are allowed to fund-raise on school property (for example, holding bake sales or dances), the religious group may not be discriminatorily prohibited from doing so. The rules that apply to fund-raising by other student groups apply to fund-raising by the religious group. Schools that audit the fund-raising process of all student groups should be able to audit the fund-raising process of the religious student group, as long as the process does not treat the group unfairly. Such an audit would be a permissible incidental cost to the school.

Q42: ***May the school provide heat, light and janitorial services for the meetings? (Section 4071(d)(3)).***

A: Yes. In *Widmar*, the Court said that such incidental costs were not constitutionally significant.[227]

Q43: ***Does the Act authorize a school to require a teacher to supervise a meeting with which he or she disagrees? (Section 4071(d)(4)).***

A: No. Under the First Amendment, a teacher should not be required to supervise any meeting, if the content of the speech at the meeting is contrary to his or her religious beliefs.

Q44: ***What if every teacher objects to being present at a particular group's meeting? (Section 4071(d)(4)).***

A: If no teacher will agree to supervise a meeting, the school should consider the alternative of allowing the students to have a nonschool person as a monitor, perhaps a parent of one of the students. If no monitor is required by state law, the school, at its discretion, may allow the meeting to take place without a monitor. By no means should a monitor requirement be used as a loophole to prohibit religious groups from meeting. The school must accommodate the student meeting.

Q45: ***What meetings are "otherwise unlawful"? (Section 4071(d)(5)).***

A: School officials may prohibit meetings that are unlawful for reasons *other* than the fact that the content of the meetings is religious, political or philosophical.[228] Basically, "otherwise unlawful" means activities that are criminally unlawful, such as drug use, violence and illegal sexual conduct.[229] Activities that are otherwise unlawful may be prohibited even if the group claims to be engaging in religious, political or philosophical speech.

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[227] 454 U.S. at 274.

[228] In *Garnett v. Renton School District*, a federal court of appeals rejected a school district argument that the Act did not protect student religious meetings if state or local law made religious meetings unlawful on school premises. In rejecting the school district's argument, the court said that such a reading of the Act ignored the word "otherwise" in Section 4071(d)(5) and would allow school districts to easily circumvent the Act, which the Supreme Court had made clear in *Mergens* would not be countenanced *Garnett*, 987 F.2d at 645-46.

[229] *See, e.g.*, 129 *Cong. Rec.* 5360 (1983) (statement of Sen. Hatfield).

Q46: ***Does the Act protect student religious meetings even if a state statute or state constitutional provision could be interpreted as prohibiting religious meetings on school property?***

A: Yes, the Act protects student religious meetings even if state law or a state constitutional provision has been interpreted as prohibiting religious meetings on school property.[230] The Supremacy Clause of the United States Constitution[231] makes the Equal Access Act, and its protection of the right of students to meet for religious speech, superior to any claim that a local or state law, including a state constitutional provision, prohibits such meetings.

Q47: ***May a school district specify a numerical size that a student group must attain before it is allowed to meet under the Act? (Section 4071(d)(6)).***

A: This provision was written into the Act specifically to meet the fears of some religious minorities that a school district might place a numerical size requirement on groups allowed to meet, thereby excluding meetings of students from minority groups. In passing the Act, the Congress was convinced that such a limitation should not be used to prevent minority religious groups from meeting.

Although the Act neither authorizes nor prohibits a numerical size requirement, such a requirement should be exercised only in rare circumstances, if at all. A numerical size requirement is vulnerable to constitutional challenge. A school district should place a size limitation on student groups only if an emergency shortage of facilities for student meetings exists. Even in a shortage, the school should consider rotation of student groups, allowing each student group to meet less often, thereby opening up facilities for more groups to meet.

Q48: ***What does the term "to abridge the constitutional rights of any person" mean? (Section 4071(d)(7)).***

A: The language of Section 4071(d)(7) simply reaffirms that the Act does not authorize school districts to engage in actions that violate the federal constitutional rights of any person, including freedom of speech, freedom of association and free exercise of religion. Nor is the Act to be seen as the final interpretation of the full extent of the rights of students, teachers or nonschool persons at school.[232]

In Sections 4071(a) and (b), the Act sets forth a specific set of circumstances under which equal access must be granted. The Act does not indicate that there are no other circumstances under which equal access might also be constitutionally required or allowed. For example, elementary students,

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[230] *Garnett v. Renton Sch. Dist.*, 987 F.2d at 646 ("The EAA provides religious student groups a federal right. State law must therefore yield."). *Accord*, *Pope v. East Brunswick Bd. of Educ.*, No. 91-785 (D.N.J. April 26, 1993); *Hoppock v. Twin Falls Sch. Dist. No. 411*, 772 F. Supp. 1160 (D. Idaho 1991).

[231] U.S. Const., art. VI, cl. 2.

[232] *Garnett v. Renton Sch. Dist.*, 987 F.2d at 645 ("Section 4071(d)(7) is a 'savings' clause that protects against reading implications into the EAA which might abridge federal constitutional rights, either for persons and schools within its scope, or for those outside its scope, such as secondary school teachers and elementary school students").

parents or teachers may have greater free speech rights to be involved in religious meetings than the Act itself specifically protects.

E. How Is The Act Enforced?

Q49: ***May federal funds be cut off to a school district that violates the Act? (Section 4071(e)).***

A: Probably not. Congress was concerned that a school district might unknowingly violate the Act in good faith and did not want to jeopardize such a school district's federal funding.

Q50: ***What is the remedy under the Act? (Section 4071(e)).***

A: Persons who are aggrieved under the Act may sue in federal district court for the proper judicial remedy.[233] Students may seek an injunction to prohibit the school from denying them the right to meet under the Act. They may also seek monetary damages for violation of their statutory rights. Students' attorneys' fees also may be awarded against a school district found to have violated the Act.[234] The United States Department of Justice has intervened when necessary to defend the Act.

F. What Authority Does the School Retain?

Q51: ***What authority does the school retain over the student meetings allowed under the Act? (Section 4071(f)).***

A: As the Supreme Court recognized in *Mergens*,[235] the school retains complete authority 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. The school also has authority to ensure that no meeting materially and substantially interferes with the orderly conduct of educational activities within the school.[236] Nor must the school sanction meetings that are otherwise unlawful.[237]

Q52: ***If students engage in activity that substantially or materially disrupts the orderly conduct of educational activities, claiming that their activity is religious, political or philosophical, may the school prohibit the activity? (Section 4071(f) and 4071(c)(4)).***

A: Yes, the school may prohibit such activity. The fact that a disruptive activity is religious, political or philosophical, does not give it special protection. The

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[233] *Student Coalition for Peace v. Lower Merion Sch. Dist.*, 776 F.2d 431 (3d Cir. 1985).

[234] Students may also sue under the First and Fourteenth Amendments. Pursuant to 42 U.S.C. Section 1988, students who prevail in cases brought to enforce their right of equal access may recoup their attorney fees from the school district. *See, e.g., Perger v. Wilson County Sch. Bd.*, No. 3:89-0822 (M.D. Tenn. Aug. 1, 1990); *Amidei v. Spring Branch Indep. Sch. Dist.*, No. H-84-4673 (S.D. Tex. May 9, 1985); *Bender v. Williamsport Area Sch. Dist.*, 563 F. Supp. 697 (M.D. Pa. 1983); *Board of Educ. of City of Buffalo v. Burr*, No. 11097/88 (N.Y. Sup.Ct., Sept. 4, 1991).

[235] 496 U.S. at 241.

[236] See Section 4071(c)(4).

[237] See Section 4071(d)(5). For further discussion of school authority over student meetings, see Question 8 at p. 25, *supra*.

Act merely gives religious, political or philosophical groups equal access to school facilities. Those groups still must abide by the same disciplinary rules that are applied to any other activity within the school.

Q53: ***How may a school administrator determine whether the well-being of students and faculty needs to be protected? (Section 4071(f)).***

A: This is an issue that must be left up to the reasonable discretion and fair judgment of school administrators. The purpose of this provision is to reaffirm existing school authority to protect students and faculty from harm.

Q54: ***How may a school administrator assure that attendance of students at a meeting is voluntary? (Section 4071(f)).***

A: Although it is unlikely to be needed, this provision allows schools to protect students from any form of alleged coercion or undue influence, which some opponents of the Act feared. If there were any suspicion that students were not attending a meeting of their own volition, the school could take measures to assure that their attendance was voluntary, by asking the students whether their attendance was voluntary or by notifying the students' parents of the school's concern.

Q55: ***May a school require parental consent for attendance at meetings? (Section 4071(f)).***

A: Yes, if the school wants to require parental consent, nothing in the Act prohibits it from doing so.

G. Additional Questions

Q56: ***What is a sample policy implementing the Act?***

A: A sample policy may be found in Part IV at pages 45-46.

Q57: ***How long must a student group wait before being given equal access?***

A: If one or more noncurriculum related student groups are meeting, a student group seeking to meet under the Act must be given immediate permission to meet. A school board may not delay giving a religious group permission to meet, while allowing other noncurriculum related groups to meet, on the excuse that it is formulating its policy. If a noncurriculum related group is meeting, the school already has a policy, by virtue of its practice, that triggers the Act's protection for the religious group.

Q58: ***What effect do lower court decisions before Mergens have on the application of the Equal Access Act?***

A: After *Mergens*, none of the court decisions that challenged the constitutionality of the Equal Access Act, or of equal access as a constitutional matter, is valid law.[238] Numerous courts have applied the *Mergens* decision to require

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[238] For example, the Supreme Court noted that the Act was passed in response to lower federal court decisions that had prohibited religious student meetings during noninstructional time. *Mergens*, 496 U.S. at 239, *citing Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983), and *Brandon v. Bd. of Educ. of Guilderland Cent. Sch. Dist.*, 635 F.2d 971 (2nd Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). After the Act, these decisions are no longer good law.

school districts to allow student extracurricular groups to meet for religious speech.[239] Other courts have applied the *Mergens* rationale to require school officials to allow religious community groups to meet in school facilities in the evenings and weekends.[240]

Q59: ***What effect does the Mergens decision have on the rental of school facilities to religious community groups for evening and weekend use?***

A: While the Act specifically applies only to student groups, the rationale of the *Mergens* decision has been applied by lower courts to require rental to religious community groups for evening and weekend use on the same basis as rental is allowed to nonreligious groups.[241] As the Court emphasized in *Mergens*, "if a State refused to let religious groups use facilities open to others,

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[239] *Garnett v. Renton Sch. Dist.*, 987 F.2d 641 (9th Cir. 1993); *Hoppock v. Twin Falls Sch. Dist.* No. 411, 772 F. Supp. 1160 (D. Idaho 1991); *Perger v. Wilson County Sch. Bd.*, No. 3:89-0822 (M.D. Tenn. Aug. 1, 1990); *Board of Educ. of City of Buffalo v. Burr*, No. 11097/88 (N.Y. Sup.Ct., Sept. 4, 1991); *Amidei v. Spring Branch Indep. Sch. Dist.*, No. H-84-4673 (S.D. Tex. May 9, 1985).

[240] See footnote 241 for case citations.

[241] Post-*Mergens* decisions that have granted community religious groups equal access include: *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, No. 91-2024 (U.S. June 7, 1993); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 498 U.S. 899 (1990) (school district required to rent school facilities to religious speaker); *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. #5*, 941 F.2d 45 (1st Cir. 1991) (same); *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 811 F. Supp. 1137 (E.D. Va. 1993) (school board may not charge religious group higher rental fee than other community groups); *Randall v. Pegan*, 765 F. Supp. 793 (W.D.N.Y. 1991) (student religious group may rent school auditorium for private, voluntary baccalaureate service); *Verbena United Methodist Church v. Chilton County Bd. of Educ.*, 765 F. Supp. 704 (M.D. Ala. 1991) (school district required to allow church to rent school auditorium for private baccalaureate service); *Youth Opportunities Unlimited v. Bd. of Educ.*, 769 F. Supp. 1346 (W.D. Pa. 1991) (summer religious program for youth granted access to school facilities); *Wallace v. Washoe County Sch. Dist.*, 701 F. Supp. 187 (D. Nev. 1988) (school district must rent to religious community group).

On June 7, 1993, the Supreme Court unanimously ruled that a school district violated the free speech rights of a church, by refusing to allow the church access to school facilities in the evenings and weekends to show a film series on family issues from a religious viewpoint. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, No. 91-2024 (U.S. June 7, 1993). While allowing other community groups access to school facilities, the school district had claimed that it could refuse access to all religious speakers. The Court rejected that argument, ruling that once the school district allowed community groups to discuss certain subject matter (in this case, family issues), it could not refuse access to groups with religious viewpoints on the same subject matter.

In pre-*Mergens* cases, the right of equal access for community religious groups was generally upheld. These cases include: *Laity and Clergy Concerned v. Chicago Bd. of Educ.*, 586 F. Supp. 1408 (N.D. Ill. 1984) (outside religious group has equal access right to use campus during school hours if other outside groups allowed access); *Country Hills Christian Church v. Unified Sch. Dist. No. 512*, 560 F. Supp. 1207 (D. Kan. 1983) (school district required to rent school facilities to religious group); *Civil Liberties Union of Mass. v. Sch. Comm. of Greenfield*, Civil No. 15281 (Mass. Dist. Ct. Sept. 4, 1984) (same); *Resnick v. East Brunswick Township Bd. of Educ.*, 389 A.2d 944 (N.J. 1978) (Establishment Clause not violated by rental to religious group); *Keegan v. Univ. of Delaware*, 349 A.2d 14 (Del. 1975) (equal access for religious student group in public university dormitory); *Pratt v. Arizona Bd. of Regents*, 520 P.2d 514 (Ariz. 1974) (state constitution does not prohibit rental of public university facilities to religious speaker); *Southside Estates Baptist Church v. Bd. of Trustees*, 115 S.2d 697 (Fla. 1959) (same).

Courts have also protected religious speech in public facilities other than school facilities. *See, e.g., Paulsen v. County of Nassau*, 925 F.2d 65 (2d Cir. 1991) (religious leafletting and speech in civic center protected by Free Speech Clause); *Concerned Women for America v. Lafayette County and Oxford Public Library*, 883 F.2d 32 (5th Cir. 1989) (religious group has equal access right to use public library auditorium for meeting); *Jews for Jesus, Inc. v. Massachusetts Bay Trans. Auth.*, 783 F. Supp. 1500 (D. Mass. 1991) (religious leafletting and speech in transit stations protected by Free Speech Clause).

then it would demonstrate not neutrality but hostility toward religion."[242] Access by religious groups during evening and weekend hours when students are not required to be on school property creates little potential for violation of the Establishment Clause.

Q60: ***What records should a school administrator keep in administering the Act?***

A: No recordkeeping is required by the Act. The maintenance of records is within the discretion of the administrator. A school administrator may want to record the name of the student requesting the meeting, when the request was made and the response of the administrator.

Q61: ***Where may further information be obtained regarding the Act?***

A: Further information may be obtained by contacting:

Christian Legal Society
4208 Evergreen Lane, Suite 222
Annandale, VA 22003
(703)642-1070

[242] 496 U.S. at 248.

Part IV:
A Model Policy Implementing the Act

No single policy exists that a school district must adopt in order to comply with the Equal Access Act. However, the following is a model policy that school districts may wish to consider:

"This policy is intended to implement the federal Equal Access Act, 20 U.S.C. Section 4071, *et seq.*, as upheld by the Supreme Court in *Board of Education v. Mergens*, 496 U.S. 226 (1990). The school district believes that it is important for students to learn the responsible exercise of freedom of speech, as well as the leadership qualities, individual skills and team cooperation that student extracurricular activities develop. In adopting this policy, the school district does not forego its authority to maintain an orderly and disciplined school environment.

"The secondary schools in this district shall have a limited open forum for student groups wishing to meet to engage in speech, subject to the following criteria:

"1. Students shall be permitted to meet during the noninstructional time of the individual students involved in the meeting. (4071(b)).

"2. All meetings shall be student-initiated and open to all students in the school. Student attendance at any meeting shall be completely voluntary.(Section 4071(c)(1) and (f)).

"3. All student groups shall have a faculty advisor. The faculty advisor for the religious student group shall be present only in a nonparticipatory role to monitor student safety. (Section 4071(c)(3)).

"4. Student groups may invite nonschool persons to attend their meetings, as long as the nonschool persons do not direct, conduct, control or regularly attend activities of the group. Nonschool persons must follow the school's established procedure for allowing nonschool persons on campus, including registration procedures. (Section 4071(c)(5)).

"5. All student groups shall have equal access to the school newspaper, bulletin boards, public address system and club fairs. (*Mergens*, 496 U.S. at 247.)

"6. Permission to meet will not be given to:
   a) any meeting that materially and substantially interferes with the orderly conduct of educational activities within the school (Section 4071(c)(5));
   b) any meeting at which unlawful conduct is likely to occur (Section 4071(d)(5));
   c) any meeting that threatens order and discipline on school premises (Section 4071(f));
   d) any meeting that threatens the well-being of students and faculty (Section 4071(f)); or
   e) any meeting at which attendance of the students is not completely voluntary (Section 4071(f)).

"7. The school, its agents and employees will not:

a) influence the form or content of any prayer or other religious activity (Section 4071(d)(1));

b) require any person to participate in prayer or other religious activity (Section 4071(d)(2));

c) expend public funds beyond incidental costs for student-initiated meetings (Section 4071(d)(3));

d) compel any employee to supervise a meeting to which he or she objects (Section 4071(d)(4)); or

e) impose a minimum size limit on student meetings. (Section 4071(d)(6))."

NOTES