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The Equal Access Act and the First Amendment
Equal Access Means Equal Treatment

Although the Equal Access Act[1] (hereinafter the "Act") prohibits discrimination against student-initiated, noncurriculum-related student clubs, the First Amendment provides additional rights not covered by the Act. The Act should be thought of as a law that provides basic rights. Issues not covered by the Act, or not commanded by the federal law, are often commanded by the First Amendment. For example, while the Act requires the club to be student-initiated and student-led, the First Amendment may allow the club to be adult-initiated and adult-led. The Act applies to clubs desiring to meet during "noninstructional" time.[2] The First Amendment applies to any time the school allows other clubs or groups to meet, which could include instructional time. Furthermore, while the Act applies to "secondary schools," which each state typically defines as high school, middle and junior high, the First Amendment applies to all grade levels, including elementary.

In *Good News Club v. Milford Central School District*,[3] the United States Supreme Court ruled that a public school which allows use of its facilities to secular groups may not discriminate against religious groups. The *Good News Club* case involved an adult-initiated and adult-led after school religious club sponsored by Child Evangelism Fellowship. Good News Clubs are designed for children ages 6 to 12. These clubs teach morals and character development from a decidedly Christian viewpoint. A typical Good News Club meeting includes Bible reading, Scripture memorization, prayer, singing, stories about Biblical or modern people, and games. The Milford

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[1]20 U.S.C. §§ 4071-74. The constitutionality of the Act has been upheld by the United States Supreme Court in *Board of Education of Westside Community School v. Mergens*, 496 U.S. 296 (1990).

[2]20 U.S.C. §§ 4071(b), 4072(4). Noninstructional time includes time set aside by the school before actual classroom instruction begins or ends.

[3]533 U.S. 98 (2001).

School District argued that the school must ban the club from meeting on campus because (1) the club engaged in religious instruction, and (2) the young elementary students would mistakenly believe the school endorsed religion, especially since the club met immediately after the last bell. The Court rejected all these arguments.

The Court found that the school's "exclusion of the Club on the basis of its religious viewpoint constitutes unconstitutional viewpoint discrimination...."[4] The Court also rejected the argument that the school was required to discriminate against the Christian club because state law mandated such discrimination.[5] Thus, a school may not argue that the state law, or even the state constitution, provides for strict separation of church and state, because the Free Speech Clause of the United States Constitution would preempt any state law to the contrary.[6] Noting that the Good News Club sought "nothing more than to be treated neutrally and given access to speak about the same topics as ... other clubs," the Court ruled that "the school could not deny equal access to the Club for any time that is generally available for public use."[7] The Court also found that allowing adults on campus immediately after school to teach Christian principles to elementary students did not violate the Establishment Clause. The mere fact that some might perceive that the school endorsed religion by allowing the Christian club on campus, or the possibility that only religious groups may choose to use the facilities at a particular time, was irrelevant.[8]

Following the lead of the Supreme Court's opinion in the *Good News Club* case, other federal courts similarly recognized that the First Amendment grants broader rights than the Equal Access Act.[9] In the *Prince* case the school allowed a Christian Bible club called the "World Changers" to meet on campus after school hours.[10] However, the school treated the religious club differently from other clubs. The school withheld money to fund club activities, denied the club participation in fund-raising events such as the annual Club Fair and the school auction, denied the club free access to the yearbook, prohibited the club from meeting during school hours, did not allow the publicizing of

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[4] *Id*. at 107 n.2.

[5] *Id*.

[6] *Id*. *See also Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002).

[7] *Good News Club*, 533 U.S. at 114 n.5.

[8] *Id*. at 119.

[9] *Culbertson v. Oakridge Sch. Dist. No. 76*, 258 F.3d 1061 (9th Cir. 2001) (public school may not ban the Christian Good News Club from meeting immediately after school on an elementary school campus). *See also Good News/Good Sports Club v. School Dist. of City of Ladue*, 28 F.3d 1501 (8th Cir. 1994).

[10] *Prince v. Jacoby*, 303 F.3d at 1077.

club events (including posting flyers throughout the school instead of on a single bulletin board and access to the public address system) and denied the right to use school supplies, copiers, audio/visual equipment, and the use of vehicles for field trips. The court found that either under the Equal Access Act, or the broader rights protected by the First Amendment, a denial of these benefits to the religious club is unconstitutional.

The court in *Prince* stated that "equal access" under the Equal Access Act means that "religiously-oriented student activities must be allowed under the same terms and conditions as other extracurricular activities, ..."[11] The court noted that "discriminatory actions in the form of harassment or unequal penalties, as well as clear cut denial, constitute a violation of the law."[12] The court addressed each one of the issues separately.

Two different kinds of funds were analyzed by the court. The court first addressed the funds that were generated by the sale of student cards, which cost $20.00 and entitled the holder to participate in school sports and to receive various discounts. This particular fund also was generated by the selling of crafts at annual club fairs, participating in the school auction, and through other fund-raising activities, such as candy sales and car washes. The other student clubs were allowed access to these funds, but the religious club was denied the same access. The court concluded that when the school prohibits the religious club from having access to the funds, it violated the Equal Access Act "by denying them equal access to those funds."[13] The school also violated the Act "when it prohibits [the religious club] from engaging in or charges them to participate in other fund-raising activities, including the auction and the craft fair, on an equal basis with other [student] groups."[14]

In *Prince*, the school also denied the religious club free access to the yearbook and instead charged them advertising fees to appear in the publication. The court noted that it is "unlawful viewpoint discrimination" under the Act to allow other noncurriculum student clubs to appear in the yearbook free of charge, while requiring the religious club to pay a fee.

The school also prohibited the religious club equal access to the public address system and limited the club to a single bulletin board. The court found this discriminatory treatment violated the Act and stated, "We hold that the Act requires the School District to afford the World Changers the same access to the public address system and bulletin boards enjoyed by ASB groups to publicize

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[11] *Id*. at 1081.

[12] *Id*.

[13] *Id*. at 1086.

[14] *Id*.

their activities."[15]

Noncurriculum clubs were not allowed to meet during what the school termed as "student/staff" time, which is "a scheduled class where attendance is taken, and where no formal class-room instruction takes place, except on a voluntary, individual basis."[16] Although the court stated that the Equal Access Act did not require the school to permit the religious club to meet during the school day at a time when attendance was mandatory, the First Amendment is broader than the Equal Access Act and does require the school to allow the Christian club to meet at the same time as any other noncurriculum secular club.[17]

The court noted that the use of school supplies, audio/visual equipment and the use of school vehicles involved direct funding by the school and was not generated by club fund-raising activities. While the court held that the Equal Access Act did not require the school to provide religious clubs with use of school supplies, audio/visual equipment and the use of school vehicles, the broader provisions of the First Amendment did require the school to provide equal access to these benefits.[18]

One final important difference between the Act and the First Amendment involves the question of what triggers the legal protection. The Act is triggered whenever (1) a public secondary school (2) which receives federal funds (3) allows at least one noncurriculum-related student club on campus. The First Amendment is triggered whenever (1) any public facility (2) allows use of its facilities for certain persons or groups to conduct meetings. The First Amendment, therefore, applies to all schools, regardless of grade level and irrespective of whether the public school receives federal funds. The First Amendment is triggered even if the school has no noncurriculum-related student clubs, so long as the school allows any public use of its facilities. Thus, any club organized primarily for students should rely on both the Act and the First Amendment for protection. Rights not covered by the Act may well be covered by the First Amendment.

Equal Treatment Includes Financial Benefits or Burdens

Equal access under the First Amendment demands that private religious after-school clubs receive equal treatment. Equal treatment does not end with the provision of access alone. Discriminatory financial schemes also violate equal access.

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[15] *Id*. (ASB stands for an Associated Student Body club. The ASB clubs were noncurriculum-related clubs.).

[16] *Id*. at 1087.

[17] *See id.* at 1089, 1092.

[18] *See id*. at 1092.

In *Rosenberger v. Rector & Visitors of the University of Virginia*,[19] the Supreme Court found that the placing of a "financial burden" on speech based on viewpoint is unconstitutional.

> In the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed unconstitutional. These rules informed our determination that *the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression*. When the government targets not the subject matter, but particular views taken by the speakers on the subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when a specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.[20]

The Ninth Circuit decision in *Gentala v. City of Tuscon*[21] serves to inform this Court regarding the impact of the United States Supreme Court's decision in *Good News Club*. Although *Gentala* focused more on the Establishment Clause than the Free Speech Clause, the underlying principles are essentially the same for purposes of this Court's inquiry. The city of Tuscon maintains a Civic Events Fund, which consists of funds appropriated from its general coffers and derived from a tax revenue. Organizers of eligible civic events may apply for payment from the fund of any fees incurred for the use of city equipment or services.[22] Organizers of a National Day of Prayer applied for $340.00 from the fund to pay for lighting and sound equipment and services. Their request for reimbursement was denied on the basis that the event involved religious services and organizations. The Ninth Circuit upheld the exclusion from the fund, stating that the violation of the Establishment Clause is a sufficiently compelling reason to justify exclusion from certain private speech in a forum otherwise dedicated to community activity.[23] The *Gentala* opinion was decided on March 30, 2001. Then on June 11, 2001, the United States Supreme Court handed down the *Good News Club* decision.[24] On October 9, 2001, the United States Supreme Court granted a Petition for Writ of Certiorari, vacated the judgment, and remanded the case to the Ninth Circuit for further consideration

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[19]515 U.S. 819 (1995).

[20]*Id.* at 828-29 (citations omitted) (emphasis added).

[21]244 F.3d 1065 (9th Cir. 2001)(en banc).

[22]*Gentala*, 244 F.3d at 1069.

[23]*Id.* at 1073.

[24]*See Good News Club*, 533 U.S. 98.

in light of *Good News Club*.[25] The *Good News Club* decision clearly cut the heart out of the *Gentala* decision, and thus the Ninth Circuit remanded the case to the district court for further consideration in light of *Good News Club*.[26] The history of the Gentala case illustrates that discriminating against a religious viewpoint from an otherwise permissible forum may not be upheld under the Establishment Clause. Moreover, under the free speech analysis, the imposition of a discriminatory fee must also be rejected.

At issue in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*,[27] was the so-called "Son of Sam" law, which required that income from an accused or convicted criminal's written works describing the crime be deposited in an escrow account and then made available to victims of the crime as well as creditors. The court began the constitutional analysis by stating a "statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."[28] The court further addressed its distaste for financial burdens on speech:

> In the context of financial regulation, it bears repeating, as we did in *Leathers*, that the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace. The First Amendment presumptively places this sort of discrimination beyond the power of government.[29]

In *Arkansas Writers' Project, Inc. v. Ragland*,[30] the Supreme Court found that the imposition of a discriminatory fee on a magazine was unconstitutional. The tax imposed on the magazine was imposed upon certain magazines depending upon their content. The Court noted that if the *Arkansas*

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[25]*See Gentala v. City of Tuscon*, 534 U.S. 946 (2001).

[26]*See Gentala v. City of Tucson*, 275 F.3d 1160 (9th Cir. 2002)(en banc).

[27]502 U.S. 105 (1991).

[28]502 U.S. at 115 (emphasis added). Note the court used the broader subject matter term of "content" as opposed to the narrower word "viewpoint", which is an expression on the subject matter. If a financial burden placed on a speaker's "content" is presumed unconstitutional, then how much more will a financial burden imposed on a speaker's "viewpoint" be presumed unconstitutional? *See Rosenberger*, 515 U.S. at 828-29 ("When the government targets not the subject matter, but particular views taken by the speakers on the subject, the violation of the First Amendment is all the more blatant.").

[29]Simon & Schuster, 502 U.S. at 116 (citing *Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991)).

[30]481 U.S. 221 (1987).

Times devoted its discussion to subjects of religion or sports, the magazine would be exempted from the sales tax, but because the articles dealt with a variety of subjects (which sometimes included religion and sports), the tax was imposed. Arkansas state law exempted from taxation certain subject matters, such as religion and sports, but did not exempt other subject matters. The *Arkansas Times* addressed a variety of issues, and since it addressed issues outside of the exempted subjects, the magazine was taxed. "Our cases clearly established that a discriminatory tax on the press burdens rights protected by the First Amendment."[31]

In *Fairfax Covenant Church v. Fairfax County School Board*,[32] the court struck down a school board policy that imposed different fees for religious use of school facilities than imposed for secular use. The policy at issue allowed groups like the Boy Scouts and Girl Scouts, which provided activities for school children, to use the facilities with no fee. Cultural, civic and educational groups paid a noncommercial rate. Churches were allowed to use the facilities under the noncommercial rate for the first five years, but thereafter, the Church was required to pay the higher commercial rate. After paying the higher rate for a period of time, the Church challenged the policy. The court agreed with the Church, finding the policy unconstitutional because of the discriminatory fee between religious and nonreligious uses, and further rejected the school's Establishment Clause defense.[33] In support of its conclusion, the court pointed to Supreme Court precedent in *Widmar v. Vincent*, [34] and *Lamb's Chapel v. Center Moriches Union Free School District*.[35] The Fourth Circuit Court of Appeals in *Fairfax Covenant Church* found that the policy imposing different fees for religious use "discriminates against religious speech in violation of the Free Speech Clause."[36]

Placing different financial burdens or schemes on religious viewpoints is clearly unconstitutional.

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[31] *Arkansas Writers' Project*, 481 U.S. at 227.

[32] 17 F.3d 703 (4th Cir. 1994).

[33] *Id.* at 707.

[34] 454 U.S. 263 (1981)(finding that a university's denial of a student religious club from use of school facilities violated the right to free speech and rejected the university's Establishment Clause defense).

[35] 508 U.S. 384 (1993)(finding that access to a public school facility to show a film addressing an otherwise permissible subject matter of family from a religious viewpoint is unconstitutional).

[36] 17 F.3d at 707. The Supreme Court has clearly stated that "religious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736, 746 (1976).

Equal Treatment Includes Distributing Announcements About Religious Meetings

A final issue that sometimes arises is the issue of distributing information to announce the meetings of Good News Clubs or other after-school religious meetings. The same principles already set forth equally apply to distributing such announcements.

In *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*,[37] the federal appeals court ruled that a school district must allow the Good News Club informational flyers to be distributed by teachers to students. The school district permitted many after-school organizations to give informational flyers to teachers for distribution to the students. However, the district refused to permit distribution of the Good News Club flyers, stating that the flyers were religious and contained a proselytizing message. The court rejected this argument, finding that it is impermissible to discriminate against the religious viewpoint of the Good News Club. Thus, if the school permits informational flyers of secular organizations to be distributed to parents through the students, then the school must also allow the distribution of flyers by religious organizations.

Similarly, in *Child Evangelism Fellowship of New Jersey Inc. v. Stafford Township School District*,[38] a federal court of appeals held that the district engaged in "viewpoint-based religious discrimination" by refusing to allow faculty to distribute flyers for Good News Clubs. The court ruled that the district must treat Child Evangelism Fellowship like other community organizations with respect to the distribution and posting of materials and participation in school events.

In *Hills v. Scottsdale Unified School District No. 48*,[39] the school district refused to distribute to students a brochure announcing a Christian summer camp that offered classes on "Bible Heros" and "Bible Tales." Although the school distributed information to the students regarding other after school secular programs, the school would not distribute the brochures regarding the summer camp because of its religious character. The court of appeals in *Hills* ruled that the school violated the First Amendment by refusing to give equal treatment to the religious event. The court stated: "If an organization proposes to advertise an otherwise permissible type of extra-curricular event, it must be allowed to do so, even if the event is obviously cast from a particular religious viewpoint."[40] Thus, if the school distributes information about secular after-school programs or events to students, it must also distribute information to students regarding religious after-school events.

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[37]373 F.3d 589 (4th Cir. 2004).

[38]386 F.3d 514 (3d Cir. 2004)

[39]329 F.3d 1044 (9th Cir. 2003).

[40]*Id.* at 1052.

In *Rusk v. Crestview Local School District*,[41] a federal court of appeals found that a school district's practice of distributing flyers advertising activities sponsored by religious groups did not violate the Establishment Clause. The Crestview Elementary School occasionally distributed flyers regarding after-school programs sponsored by various groups, including the American Red Cross, the 4-H Club, sports leagues and local churches. Some of the flyers described religious activities such as Bible stories, "crafts and songs that celebrate God's love," and one program that was "Rated Religious." Although the recipients were elementary students and their parents, the court ruled that the practice of distributing flyers regarding after-school religious activities is permissible under the First Amendment.

Equal access means equal treatment. Discrimination in any form between secular and religious clubs is unconstitutional.[42]

Conclusion

In light of the above, it is clear that religious groups and meetings must receive equal treatment in terms of access (place, time, facilities and transportation if applicable), financial benefits and/or fee structures, and announcements (distributing flyers, posting on bulletin boards, intercom announcements and fairs). Providing equal treatment in one area while discriminating in another area means that equal treatment is not being provided. As the secular groups or meetings are treated, so must the religious groups and meetings be treated.

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[41] 379 F.3d 418 (6th Cir. 2004).

[42] Public school teachers may also participate in religious clubs and organizations after class when community groups are allowed to use school facilities. A federal appeals court ruled that a teacher's participation in a Good News Club held on school property constituted private speech. As a result, the district could not forbid the teacher from teaching a Good News Club immediately after school in the same school where she taught during the day. *Wigg v. Sioux Falls Sch. Dist. 49-5*, 382 F.3d 807 (8th Cir. 2004), reh'g and reh'g en banc denied.