



# STUDENT RIGHTS HANDBOOK



A Guide to Constitutionally Protected  
**RELIGIOUS FREEDOM** on Campus



# YOU DON'T HAVE TO LEAVE YOUR FAITH AT HOME



ALLIANCE DEFENDING  
FREEDOM

FOR FAITH. FOR JUSTICE.

**A**lliance Defending Freedom is an alliance-building legal ministry that advocates for the right of people to freely live out their faith. Its highly experienced team of attorneys has litigated hundreds of cases against public schools throughout the nation, enabling students from elementary through post-graduate school to freely exercise their faith. These cases have established the individual right of students to speak publicly about their faith, distribute religious literature, and hold religious events, as well as their collective right to form religious student groups and enjoy equal access to school facilities and funding.

## KNOW YOUR RIGHTS

The purpose of this handbook is to inform students, teachers, and coaches of their constitutionally protected rights regarding the free expression of their faith on campus. If you have been discriminated against because of your faith or simply have questions about your rights, Alliance Defending Freedom is here to help. Please email us at [legalhelp@AllianceDefendingFreedom.org](mailto:legalhelp@AllianceDefendingFreedom.org) or call us at **1-800-835-5233**.

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## PART I

# WHAT RIGHTS DO INDIVIDUAL STUDENTS HAVE TO EXPRESS THEIR FAITH AT SCHOOL?

The First Amendment to the U.S. Constitution, which states that “Congress shall make no law...abridging the freedom of speech” or “prohibiting the free exercise” of religion, protects students’ right to engage in religious expression and freely exercise their faith. Government bodies, including public schools, are thus prohibited from singling out religious speech or religious conduct for discriminatory treatment.<sup>1</sup> As the Supreme Court has explained, “[s]tudents in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect.”<sup>2</sup>

Accordingly, public schools may not suppress or exclude student speech simply because it is religious or contains a religious perspective.<sup>3</sup> Many students nonetheless face hostility and censorship in expressing their faith. The following discussion addresses common questions regarding students’ individual right to express their faith in public schools.

## QUESTION

***Do students have the First Amendment right to express their religious beliefs at school?***

## ANSWER

Students retain their First Amendment liberties while on campus. They have the right to share their beliefs, pray, evangelize, read Scripture, and invite other students to participate in such activities so long as they are voluntary, student-initiated, and not disruptive or coercive. A school may not prohibit student expression during noninstructional time unless it (1) materially and substantially interferes with the operation of the school, or (2) infringes on the rights of other students.<sup>4</sup> A school may not prohibit student expression solely because others might find it offensive.<sup>5</sup>

## QUESTION

***Can students express their religious beliefs during class or as part of an assignment?***

## ANSWER

While in class, students are free to express their religious views in a class discussion or as part of an assignment (such as an oral presentation or written essay), so long as the expression is relevant to the subject under consideration and meets the requirements of the assignment. School officials cannot prohibit religious expression in class unless they have a legitimate educational purpose for doing so.<sup>6</sup>

## QUESTION

***Can students distribute written, religious material at school?***

## ANSWER

Yes, students have the right to distribute written, religious material at school during noninstructional time. As with any material, if it (1) materially and substantially interferes with the operation of the school, or (2) infringes on the rights of other students, then the school can prohibit it.<sup>7</sup> But schools may not impose an outright ban on religious materials if they allow students to distribute non-religious materials.<sup>8</sup> Many schools, for example, allow students to distribute noncurricular material such as Christmas gift bags and birthday invitations to their classmates. If students are allowed to distribute such materials, the school cannot ban individual gifts and invitations – which are private speech – simply because they contain religious content.<sup>9</sup> As there is no danger that peacefully distributing free literature on school grounds during noninstructional time will disrupt school activities, students are also free to distribute literature about religious events (for example, a church-sponsored activity).<sup>10</sup> But schools are permitted to enact reasonable time, place, and manner regulations – for example, a requirement that students distributing free literature to the general student population do so during noninstructional time.

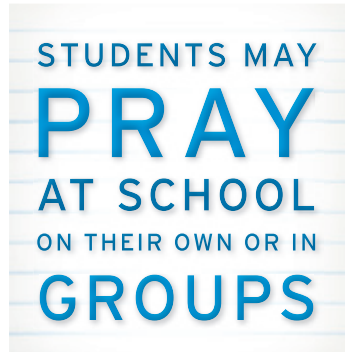


## QUESTION

*Can students advertise religious events at school?*

## ANSWER

Students may post signs on walls and bulletin boards and make announcements over public address systems about religious events at school to the same extent they may advertise similar secular activities. If students are, for example, allowed to post signs or make announcements regarding noncurricular events, such as the Day of Silence, students may similarly advertise religious events, such as See You at the Pole and the Day of Dialogue.<sup>11</sup>



school endorsed it.<sup>12</sup> Thus, students may pray at school on their own or in groups during noninstructional time so long as it is not disruptive. Students can, for example, pray over their meals in the cafeteria and even join with other students to pray around the flagpole before the start of school.

## QUESTION

*Is it true that students can pray at school?*

## ANSWER

Since prayer is private speech, students may engage in it at school, as long as it would not appear that the

## QUESTION

*Can students pray at their high school graduation, or hold baccalaureate ceremonies?*

## ANSWER

The constitutionality of a graduation message, including a religious message, hinges on whether it is considered private speech – or, in other words, whether an objective observer would view the message as a “state endorsement of prayer in public schools.”<sup>13</sup> A school policy containing the following elements should prevent any appearance of endorsement: (1) The school creates a time at graduation for a student to speak on a matter of his or her own choosing; (2) Neutral criteria determine which student(s) is (are) allowed to speak during this time; (3) There is no involvement or prior review of the speaker’s message by the school or school staff; and (4) Students are instructed that their speech may not materially and substantially interfere with the graduation ceremony, or be vulgar, lewd or obscene.<sup>14</sup>

Similarly, a school may permit a baccalaureate ceremony with religious content on its property when the event is sponsored and organized solely by a private party and when the school opens up its facilities to community groups generally. A private religious event that happens to be graduation-related simply does not pose a constitutional problem.

## QUESTION

***Can students offer a prayer before the beginning of a sporting event?***

## ANSWER

Private speech even at school-related functions is protected by the Constitution. Courts have held that school policies that equate all student religious speech with state speech go too far and actually violate an individual's free speech rights.<sup>15</sup>

A school does not need to prohibit private religious speech in public places in order to avoid violating the Establishment Clause.<sup>16</sup> The test is whether the prayer is genuinely student-initiated and student-led, and not part of a school policy that encourages or endorses it. Similar to the guidelines noted above for graduation, a school can allow a pre-game message to be given by a neutrally selected student, and the message chosen by the student, whether religious or not, should be permissible. This should prevent any appearance of endorsement regarding student messages, including those that are religious in nature. Students, including those on sports teams, are also permitted to pray together before or after sporting events, provided the prayer is student-initiated and student-led.

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## QUESTION

***Can students wear religious clothing to school?***

## ANSWER

Schools may not single out religious clothing or articles (such as rosary beads) or clothing displaying a religious message for unfavorable treatment. Students may wear religious clothing required by their religion to the extent that other like articles of dress are permitted. Clothing or jewelry bearing a religious message is treated as speech, and cannot be restricted unless it (1) materially and substantially interferes with the operation of the school, or (2) infringes on the rights of other students.<sup>17</sup>

## QUESTION

***Do the Establishment Clause or the so-called "separation of church and state" justify restrictions on student religious expression?***

## ANSWER

Schools cannot claim that the so-called "separation of church and state" or the First Amendment's Establishment Clause justifies banning religious expression on campus. The school does not endorse private, student speech. Indeed, courts have made it very clear that the school's obligation is to educate the audience about the First Amendment, not silence the speaker out of fear that the audience will misperceive that the school, by allowing the speech, is endorsing it.<sup>18</sup>



## PART II

# WHAT RIGHTS DO RELIGIOUS CLUBS HAVE TO ACCESS SECONDARY SCHOOL FACILITIES?

The rights of religious student clubs in public secondary schools are protected by the First Amendment and the Equal Access Act (“the Act”), passed by Congress in 1984.<sup>19</sup> The basic purpose of the Act is to put religious clubs on equal footing with all other student clubs by allowing them the same privileges and access to school facilities that other recognized student clubs enjoy.<sup>20</sup> Once the school recognizes a single non-curriculum related club, it is said to have created a “limited open forum,” triggering the Act and entitling all other qualified student clubs (such as a Bible Club) to the same access and benefits of school facilities as that first club.<sup>21</sup>

A “qualified student club” is one that is student-initiated and student-led. Faculty can be involved only to monitor, facilitate, or supervise, and non-school persons cannot be regularly and directly involved in the meetings.<sup>22</sup> The school still retains the ability to regulate and restrict clubs that “materially and substantially interfere with the orderly conduct of educational activities within the school.”<sup>23</sup> Schools also have the right 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.”<sup>24</sup>



The rights of religious student clubs also stem from the First Amendment to the U.S. Constitution, which offers protection beyond that which the Act provides.<sup>25</sup> Religious student clubs are allowed in public schools because there is a 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.”<sup>26</sup> Public schools cannot exclude clubs based on their religious viewpoints or practices.<sup>27</sup> Once a school allows access to any student club, school officials cannot deny recognition or benefits to other clubs based on students’ desire to exercise their religious freedom.<sup>28</sup> The following discussion addresses some common questions regarding the right of religious student clubs to express their faith in public schools.

### QUESTION

***When can religious clubs hold meetings on campus?***

### ANSWER

In general, the Equal Access Act says that meetings of recognized non-curriculum related clubs, like religious clubs, may take place on campus “during noninstructional time.”<sup>29</sup> “Noninstructional time” means “time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.”<sup>30</sup> Although attendance at school during certain hours is mandatory, courts will look at the actual activity taking place and evaluate whether the activity

is voluntary and/or related to school instruction, even though students are required to be on campus during the time period.<sup>31</sup> If, for example, students may choose from a variety of activities

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during lunch or a student activity period, the period should not be considered instructional time because students may receive instruction only if they so choose, and they also may choose to participate in a club if they wish.<sup>32</sup> The important aspect of the

meeting is that it is voluntary – it is not a question of whether students have to be at school during that time, but whether they may choose to attend the meeting itself.<sup>33</sup>

More specifically, a school may limit the time and place it allows recognized non-curriculum clubs to meet on its campus, but it must treat all student clubs equally.<sup>34</sup> Usually, clubs meet during a school’s activity hour, just before or after school, or during lunch. All of these are permitted by the U.S. Constitution and the Act. A school may place restrictions on the time periods as long as the same rules apply to all clubs. For example, the school could indicate that no clubs may use the cafeteria after school, or that clubs meeting before school cannot meet earlier than an hour before school starts.

## QUESTION

***Can religious clubs use school equipment, such as audio/visual or sports equipment?***

## ANSWER

Under the Equal Access Act, the school is not required “to expend public funds beyond the incidental cost of providing the space for student-initiated meetings.”<sup>35</sup> But under the First Amendment, if the school allows secular clubs to use supplies or equipment such as audio/visual or transportation equipment that clearly fall outside the incidental costs of providing a meeting place, these benefits must be made available to religious clubs as well.<sup>36</sup> In other words, if the school allows a recognized student club to use supplies and equipment, then it is a violation of religious clubs’ free speech rights to disallow them the same use based on the religious nature of their speech.<sup>37</sup> Courts have made it clear that equal access is not endorsement of religion, and students have the maturity to understand that principle.<sup>38</sup> Granting equal access to religious clubs ensures neutrality, rather than showing any partiality on the part of the school.<sup>39</sup> Furthermore, if any partiality is inferred, it is the fault of the school, because “the school itself has control over any impressions it gives its students”<sup>40</sup> and can easily make clear that religious clubs’ activities are not endorsed by the school. Therefore, allowing equal access to school equipment does not amount to an improper endorsement of religion by the school.

## QUESTION

***How may a religious club advertise its meetings and other events?***

## ANSWER

Under the First Amendment and the Equal Access Act, every club that meets the Act’s requirements and is a recognized student club is allowed the same access to the school’s facilities as every other recognized club. This includes access to public address systems, bulletin boards, the school newspaper, and other avenues that schools allow students to use to advertise meetings and other events.<sup>41</sup>

Students also have First Amendment free speech rights to distribute religious literature. But schools may “impose content-neutral time, place, and manner restrictions” on student clubs’ advertisements.<sup>42</sup> For instance, a school may require all flyers for club activities to be posted on a certain bulletin board to avoid clutter (so long as all clubs are treated equally).

## QUESTION

***Can religious clubs get funding from the school for their activities?***

## ANSWER

School funding for general student activities may come out of the Associated Student Body (ASB) budget or other student organizational funds that come from student fees. In that scenario, the school cannot discriminate against recognized religious student clubs by denying them equal access to funds simply because of their religious viewpoint.<sup>43</sup> If other recognized clubs are allowed to access ASB funds and participate in activities such as fundraisers and other events, a recognized religious student club must have the same opportunities.

## QUESTION

***Can club meetings be held on campus if the student club is not recognized by the school?***

## ANSWER

Student clubs usually need to apply with the school to be an officially recognized student organization. To do so, a student representative should contact an administrator (such as a student life office), find out how to apply for recognition, and complete the required steps. Once the club is approved as a recognized organization, the club must be provided access to facilities, funding, and other privileges to the same degree afforded other

student organizations. The school may not place restrictions on a religious club's ability to function as a student organization based on its religious point of view.

## QUESTION

***If the school does not recognize any noncurricular student clubs, is there a way to hold religious club meetings?***

## ANSWER

First, students should be certain that there are, in fact, no extracurricular student clubs meeting on campus. Schools have been known to call certain clubs "curriculum-related," when they were actually determined by a court to be noncurricular student clubs.<sup>44</sup> If the school has allowed at least one noncurricular student club to meet and use school facilities and equipment, it must allow other noncurricular clubs an equal opportunity to do so.

If the school legitimately does not allow any student-led, noncurricular clubs on campus, a request to use school facilities as an off-campus, private group may still be allowed. If the school allows community groups to use its facilities, it may have established parameters covering the types of groups and activities allowed. As long as the group meets the criteria, the school must not discriminate against a club based on its religious speech.<sup>45</sup> Students may also "meet" informally during lunch and before or after school in the same manner other students may gather to socialize.

## QUESTION

*What recourse does a religious club have if the school refuses to recognize it as a student club?*

## ANSWER

If your school denies a religious club equal access to resources or facilities, or has established restrictions that infringe upon your freedoms of speech or religion, you should meet with your principal or dean to discuss the matter and request a resolution. Alliance Defending Freedom can provide documentation to help you explain the law. Should school officials still refuse to adjust their policy or practice, Alliance Defending Freedom can write a letter on your behalf to ask that the school officials correct their actions, and then look into the possibility of litigation in court if the school persists in its unlawful conduct.



## QUESTION

*Can schools place restrictions based on religious content? (For example, can a school disallow including "Jesus," a cross, or a Bible verse on posters advertising events?)*

## ANSWER

Schools cannot censor the speech of student groups simply because the speech is religious. A school can only restrict student speech if it can show that the speech will cause a material and substantial disruption." Generally, that means

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that any policies regulating speech should be content-neutral and geared toward ensuring a safe, non-disruptive educational environment. Prohibitions against using certain words or wearing items that have religious significance are viewpoint-based and

considered discriminatory under the First Amendment.<sup>46</sup> Schools cannot prohibit religious clubs from using religious words or symbols on their advertisements and other documents distributed to students, unless the speech causes a material and substantial disruption.



### PART III

# WHAT CAN STUDENTS, COACHES, AND TEACHERS DO AS PART OF A RELIGIOUS CLUB ON CAMPUS?

### QUESTION

*What can our religious club talk about during our meetings?*

### ANSWER

Students are free to discuss any issues and engage in any religious speech they desire at meetings. The school does not have control over the content of the meeting, even though the meeting takes place on the school's campus. The school is obligated under the Equal Access Act and the First Amendment to provide equal access to all recognized student clubs, regardless of the content of their meetings, unless they "materially and substantially" disrupt the educational process.<sup>47</sup> Since the meetings take place during noninstructional time, there is little, if any, danger that the educational process would be materially and substantially disrupted by religious activities. Therefore, students may pray, sing, read the Bible, and evangelize during their meetings.

The only restrictions would be on teachers or coaches who attend meetings of clubs officially recognized by the school. Since teachers and coaches are school employees, their speech may be considered endorsed by the school, which raises Establishment Clause concerns. The Act states that school officials may be "present... only in a nonparticipatory capacity."<sup>48</sup>



## CLUB LEADERS

### QUESTION

***Who can be a leader of a religious club?***

### ANSWER

The Equal Access Act specifies that school-recognized clubs must be “voluntary and student initiated,...there [can be] no sponsorship of the meeting by the school,...[and] employees or agents of the school or government [may be] present at religious meetings *only in a nonparticipatory capacity* (emphasis added).”<sup>49</sup> Students may serve as club leaders and participate without restriction. But teachers and coaches, including those who serve as faculty advisors, may only attend meetings of recognized clubs to monitor, facilitate, and/or supervise. It is up to school officials, not the students, to make it clear that the club is student-led.<sup>50</sup>

The Act also provides that “nonschool persons may not direct, conduct, control, or regularly attend activities of [recognized] student groups.”<sup>51</sup> Therefore, if a parent or some other person who does not either attend the school or work at the school wants to be involved in club meetings, they can only do so in a facilitative manner, and cannot regularly attend or lead the meetings.

If a religious club wants a greater degree of leadership from its faculty advisor or another outside person, it has the choice not to register as a recognized student club. In that case, the club

will still be able to use the campus for meetings as an outside community group, provided outside groups are permitted to use school facilities. But the club may not receive the same access to benefits, such as bulletin board and equipment usage, that the school allows recognized student clubs.

### QUESTION

***What if the religious club would like to be considered a community group, rather than a recognized student club, so that teachers and coaches can be more involved with meetings?***

### ANSWER

If religious clubs would rather meet as a community group than a recognized student club, then the first thing to do is contact the school and ask about the proper procedure for doing so. Becoming a community group will mean fewer restrictions on teacher, coach, and parent involvement, so teachers and coaches can lead meetings and participate in any and all religious speech.<sup>52</sup> But it will also mean that the club will be giving up the benefits of being a recognized student club, including access to advertising avenues, school funding, and the ability to meet on campus during the school’s activity period.

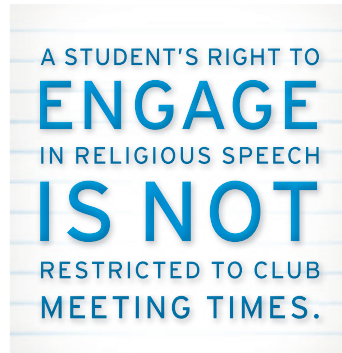
## QUESTION

*What can students who serve as religious club leaders do on campus?*

## ANSWER

Students are allowed to freely pray and discuss religious ideas during their meetings, as discussed above. Their rights of free speech and free exercise of religion are protected by the First Amendment and cannot be taken away by public schools. This rule applies even if a student is in a position of leadership, as long as the position does not require the student to speak on behalf of the school.

A student's right to engage in religious speech is not restricted to club meeting times. The First Amendment right of free speech extends to students as individuals wherever they are on campus, as long as they do not interfere with school activities or the rights of other students.<sup>53</sup>



## QUESTION

*Can religious clubs invite outside speakers to meetings?*

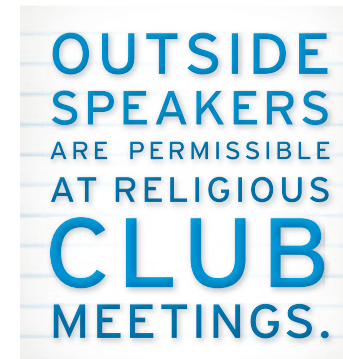
## ANSWER

Outside speakers are permissible at religious club meetings, and they can speak on any topic. A club inviting a speaker to participate in a meeting must follow the school's policies related to recognized student clubs' use of school facilities. Promotion of the event must make it clear that attendance is purely voluntary,

and that the speaker is hosted and endorsed by the student club, not the school.

A school may decide to reserve use of its facilities for certain general groups or topics, but it cannot exclude religious views or otherwise "regulat[e] speech when

the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."<sup>54</sup> To do so is considered viewpoint discrimination, which violates freedom of speech rights and is unconstitutional.<sup>55</sup>



## COACHES & TEACHERS

Generally, coaches and teachers are free to talk about religion in an objective manner.<sup>56</sup> But when acting as school employees, they must be more careful when engaging in a discussion of their own religious beliefs with students, whether or not the discussion is part of a student meeting. Courts have two main concerns with school employees' speech that do not arise with student speech.

The first is a concern that the school will appear to endorse the teacher's religious views. Courts have held that, simply because of the teacher's position in the school, "a teacher's speech can be taken as directly and deliberately representative of the school."<sup>57</sup> If a teacher or coach engages in religious speech, concerns may arise under the Establishment Clause.

The second concern is that because teachers give grades and coaches evaluate athletes, the sharing of religious beliefs by teachers and coaches could have a coercive effect on students.<sup>58</sup> Students and student athletes may think that if they share the religious views of their teacher or coach, they will be given an advantage; or conversely, if they do not share the same views, then they will be penalized by receiving lower grades or being put on the bench.

When considering involvement with a religious club, teachers should take care to separate their private religious speech from their role as a public employee, to preserve the club's opportunity to exist on campus. While faculty may serve as advisors to a religious club or gather with students outside of their school responsibilities to discuss personal views, they must prevent the impression that their support of a religious club indicates favoritism toward participating students.

### QUESTION

***May coaches lead prayer at practices and games?***

### ANSWER

Since coaches are employees of the school, they may not lead prayer at either practices or games. This could create an appearance of school endorsement, because coaches represent the school to the athletes during these times.<sup>59</sup> In addition, athletes may feel compelled to participate in the religious activity.

Students may have their own times of prayer (as long as they initiate it and lead it) that take place immediately before or after practices and games, and the coach may be present at the place and time to maintain order and discipline.

## QUESTION

***How much involvement can faculty sponsors have in religious club meetings?***

## ANSWER

Many schools require each recognized student club to have a faculty sponsor. It is permissible for a teacher or coach to fulfill this role, but it must be done in a way that is “nonparticipatory,” according to the Equal Access Act.<sup>60</sup> This means that all activities that students participate in as part of the meeting are led by students, and the teacher or coach is only there to supervise. As a faculty sponsor, the teacher or coach is still acting in his or her official capacity as a school employee and therefore cannot participate in religious speech with students. The fact that the teacher or coach is only there to supervise should be made clear by school officials, so students will not misunderstand that the school in any way endorses the religious club’s mission because of the presence of the teacher or coach.

## QUESTION

***Is there a way a coach or teacher can actively lead and participate in a religious club?***

## ANSWER

Yes – a coach or teacher can lead a religious club if it is not a recognized school club. Whether or not a school district recognizes student clubs, it may allow its facilities to be used

by community groups that have no affiliation with the schools, such as the Boy Scouts, or various churches that may use school facilities during non-school hours. Religious clubs may request to use school facilities before or after school hours as an independent community group. In that scenario, teachers may participate fully in meetings as individuals engaging in private speech, even if they are employed at that particular school.<sup>61</sup> A school cannot restrict employees from participating in religious-based activities that occur on their own time, outside of school-sponsored events or instruction.<sup>62</sup> But religious clubs that elect not to be recognized may not have the same rights and privileges given to recognized student clubs.

## QUESTION

***Can coaches participate in religious activities with other coaches and teachers as a group?***

## ANSWER

Even though school employees may not take an active role in meetings of recognized student clubs, teachers and coaches in public schools may exchange religious ideas or even have prayer meetings with one another, provided students are not present. If teachers are allowed to hold meetings unrelated to school business on the school premises, then they must also be allowed to discuss religion and pray with one another when there are no students involved.<sup>63</sup>

# GLOSSARY OF TERMS

## **Associated Student Body (ASB) Funds/Student**

**Organizational Funds** – Funds derived from student fees.

**Equal Access Act** – Government Act granting recognized student clubs in public high schools equal access to school facilities and benefits, regardless of their religious or political views. 20 U.S.C. § 4071 et seq.

## **First Amendment –**

**Establishment Clause** “Congress shall make no law respecting an establishment of religion, ....”

**Free Exercise Clause** “Congress shall make no law ... prohibiting the free exercise thereof, ....”

**Free Speech Clause** “Congress shall make no law ... abridging the freedom of speech, ....”

**Limited Open Forum** – Defined in the Equal Access Act as existing “whenever [a] school grants an offering to or opportunity for one or more noncurriculum related student groups [or clubs] to meet on school premises during noninstructional time.” 20 U.S.C. § 4071(b).

**Limited Public Forum** – A forum that is reserved for certain groups or the discussion of certain topics, but not limited in a way that discriminates against speech based on viewpoint. The limitations also must be reasonable in light of the forum’s purpose. *Good News Club v. Milford*, 533 U.S. 98, 106-07 (2001).

**Noncurriculum Related Student Group** – “Best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school.” *Pope by Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1251 (3d Cir. 1993) (citing *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 239 (1990)). The Pope court also said that religious and political clubs by their nature are noncurriculum related. *Id.*

**Noninstructional Time** – “Time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.” 20 U.S.C. § 4072(4).

**Nonschool Person** – Anyone who is not affiliated with the school, as either an employee or a student.

**Private Group/Community Group** – A group that is not a recognized school club and therefore whose access is not protected by the Equal Access Act. The group’s access will be evaluated under the First Amendment Free Speech Clause, depending on what type of forum the school has created for community groups (e.g., open, limited open, closed – see this glossary for definitions).

**Private Speech** – Individual speech that is protected by the First Amendment.

**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.” 20 U.S.C. § 4072(2).



# END NOTES

<sup>1</sup> *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

<sup>2</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

<sup>3</sup> *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (“[T]here 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.”).

<sup>4</sup> *Tinker*, 393 U.S. at 509.

<sup>5</sup> *Morse v. Frederick*, 551 U.S. 393, 408 (2007) (rejecting use of “offensiveness” standard for regulating student speech because “much political and religious speech might be perceived as offensive to some”); *Nuxoll v. Indian Prairie Sch. Dist.*, 523 F.3d 668, 672 (7th Cir. 2008) (“[P]eople do not have a legal right to prevent criticism of their beliefs or for that matter their way of life.”).

<sup>6</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

<sup>7</sup> *K.A. v. Pocono Mtn. Sch. Dist.*, No. 3:11-CV-417, 2011 WL 5008358, at \*5 (M.D. Penn. Oct. 20, 2011) (noting that “vague concerns over possible disruption” are not sufficient to satisfy “the *Tinker* test”).

<sup>8</sup> *Hedges v. Wauconda Community Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993).

<sup>9</sup> *J.S. v. Holly Area Sch.*, 749 F. Supp. 2d 614, 623 (E.D. Mich. 2010) (“[A] blanket prohibition upon a student’s distribution of materials on the basis of religious viewpoint is not constitutionally permissible.”); *C.H. v. Bridgeton Bd. of Educ.*, No. 09-5815, 2010 WL 1644612, at \*4 (D.N.J. Apr. 22, 2010) (“[I]f student speech is not lewd, school-sponsored, or advocating drug use, the speech can only be prohibited if it is likely to cause a disruption.”).

<sup>10</sup> *United States v. Kokinda*, 497 U.S. 720, 734 (1990); *Tinker*, 393 U.S. at 508; *Wright v. Pulaski Cnty. Special Sch. Dist.*, 803 F. Supp. 2d 980, 983 (E.D. Ark. 2011) (“[T]he record is devoid of anything showing how the work of the school will be affected at all by the dissemination of flyers regarding church-sponsored activities, especially considering the vast array of materials presently circulated.”); *C.H.*, 2010 WL 1644612, at \*9 (“[S]peech [leafleting] is described as the essence of the first amendment.” (quotation omitted)).

<sup>11</sup> *Good News Club*, 533 U.S. at 112; *Wright*, 803 F. Supp. 2d at 983 (“[T]he prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.” (quotation omitted)).

<sup>12</sup> See *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1082 (11th Cir. 2000); *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 969 (5th Cir. 1992); *Chandler v. Siegelman*, 230 F.3d 1313, 1317 (11th Cir. 2000).

<sup>13</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000).

<sup>14</sup> *Tinker*, 393 U.S. at 509; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986). For an example of a constitutional graduation policy, see *Adler*, 206 F.3d at 1072. But see *Cole v. Niemeyer*, 228 F.3d 1092 (9th Cir. 2000) (the Ninth Circuit held that allowing a sectarian prayer and message at graduation would violate the Establishment Clause).

<sup>15</sup> *Chandler*, 230 F.3d at 1316 (“The Free Exercise Clause does not permit the State to confine religious speech to whispers or banish it to broom closets. If it did, the exercise of one’s religion would not be free at all”).

<sup>16</sup> *Id.*

<sup>17</sup> *Tinker*, 393 U.S. at 509; *Jacobs v. Clark Cnty. Sch. Dist.*, 373 F. Supp. 2d 1162, 1172-73 (D. Nev. 2005) (ruling that “shirts bearing religious messages” qualify as “speech within the ambit of First Amendment protection”); *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 665-66 (S.D. Tex. 1997) (finding that a rosary is “akin to pure speech” and “a form of religious expression protected under the First Amendment”).

<sup>18</sup> *Rusk v. Crestview Local Sch. Dist.*, 379 F.3d 418, 422 (6th Cir. 2004); *Hedges*, 9 F.3d at 1300; *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1055 (9th Cir. 2003).

<sup>19</sup> 20 U.S.C. § 4071.

<sup>20</sup> *Mergens*, 496 U.S. at 238 (“[T]he purpose of granting equal access is to prohibit discrimination between religious or political clubs on the one hand and other noncurriculum-related student groups on the other....”).

<sup>21</sup> 20 U.S.C. § 4071(b). The Act defines a “limited open forum” as existing in a public secondary school “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.” *Id.*

<sup>22</sup> 20 U.S.C. § 4071(c)(1)-(3), (5).

<sup>23</sup> 20 U.S.C. § 4071(c)(4); cf. *Tinker*, 393 U.S. at 509; *Mergens*, 496 U.S. at 241.

<sup>24</sup> 20 U.S.C. § 4071(f); *Mergens*, 496 U.S. at 241.

<sup>25</sup> U.S. CONST. amend. I.

<sup>26</sup> *Prince v. Jacoby*, 303 F.3d 1074, 1094 (9th Cir. 2002) (quoting *Mergens*, 496 U.S. at 250 (emphasis added)). The Establishment, the Free Exercise, and the Free Speech Clauses read as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .” U.S. CONST. amend. I.

<sup>27</sup> See *Prince*, 303 F.3d at 1092.

<sup>28</sup> *Id.* at 1091; see also *Good News Club*, 533 U.S. at 112; *Widmar v. Vincent*, 454 U.S. 263, 269 (1981).

<sup>29</sup> 20 U.S.C. § 4071(b).

<sup>30</sup> 20 U.S.C. § 4072(4).

<sup>31</sup> *Donovan v. Punxsutawny Area Sch. Bd.*, 336 F.3d 211, 223 (3d Cir. 2003) (Interpretation should be “consistent with Congress’ intent to provide a low threshold for triggering the Act’s requirements.”) (quoting *Mergens*, 496 U.S. at 239, 240); see also *Ceniceros v. Bd. of Trs. of the San Diego Unified Sch. Dist.*, 106 F.3d 878 (9th Cir. 1996); *Mergens*, 496 U.S. at 251 (noting that the Act “avoids the problems of ... mandatory attendance requirements.”); compare *Prince*, 303 F.3d at 1088 (defining “noninstructional time” as when attendance is not required, but holding that the First Amendment requires schools to allow religious clubs to meet when other student clubs meet, even if that is during instructional time).

<sup>32</sup> *Donovan*, 336 F.3d at 223-24.

<sup>33</sup> *Id.* at 224; *Thompson v. Waynesboro Area Sch. Dist.*, 673 F. Supp. 1379, 1383 (M.D.Pa. 1987) (giving criteria for voluntariness as entirely student initiated, place set aside where student must go for the meeting, and student could reject any other choice of activity).

<sup>34</sup> See, e.g., *Prince*, 303 F.3d at 1082.

<sup>35</sup> 20 U.S.C. § 4071(d)(3); see also *Prince*, 303 F.3d at 1090.

<sup>36</sup> *Prince*, 303 F.3d at 1092 (“The School District’s restriction on access to facilities is based purely on the World Changer’s religious viewpoint in violation of the First Amendment.”).

<sup>37</sup> In that case, the school has established a limited public forum by choosing to grant access to school equipment, and therefore “cannot deny access to some student groups because of their desire to exercise their First Amendment rights....” *Prince*, 303 F.3d at 1091-92 (citing *Widmar*, 454 U.S. at 269).

<sup>38</sup> *Mergens*, 496 U.S. at 250 (“We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.”).

<sup>39</sup> *Prince*, 303 F.3d at 1092; see also *Good News Club*, 533 U.S. at 114; *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995).

<sup>40</sup> *Mergens*, 496 U.S. at 251; *Prince*, 303 F.3d at 1094.

<sup>41</sup> *Mergens*, 496 U.S. at 247; *Prince*, 303 F.3d at 1086-87, 1092.

<sup>42</sup> See *Thompson*, 673 F.Supp. at 1393 (holding that it was a violation of the students’ free speech to disallow the distribution of a religious student newspaper, but that the school also had authority to impose content-neutral time, place, and manner restrictions on the distribution).

<sup>43</sup> See *Prince*, 303 F.3d at 1094 (holding that withholding official recognition from a legitimate student club was discriminatory in that it denied equal access to ASB funds and charged them to participate in school fundraising activities based on the group’s Christian viewpoint).

<sup>44</sup> *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1248 (3d Cir. 1993) (where a school allowed the Key Club access as a curriculum-based group, which the court deemed non-curricular; therefore, the school was found to have opened its forum to student groups).

<sup>45</sup> See *Good News Club*, 533 U.S. at 112; *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

<sup>46</sup> *Chalifoux*, 976 F. Supp at 670.

<sup>47</sup> 20 U.S.C. § 4071(c)(4); see also *Tinker*, 393 U.S. at 509.

<sup>48</sup> 20 U.S.C. § 4071(c)(3).

<sup>49</sup> 20 U.S.C. § 4071(c)(1)-(3).

<sup>50</sup> See *Mergens*, 496 U.S. at 251 (noting that any fear of mistaken inference of endorsement by school officials is “largely self-imposed, because the school itself has control over any impressions it gives students.”); see also *Widmar*, 454 U.S. at 274 n.14.

<sup>51</sup> 20 U.S.C. § 4071(c)(5).

<sup>52</sup> *Wigg v. Sioux Falls Sch. Dist.* 49-5, 382 F.3d 807, 815 (8th Cir. 2004) (concluding that an elementary school teacher had the right to “participat[e] in [an] after-school [religious] Club” because this activity “constitute[d] private speech”).

<sup>53</sup> *Slotterback v. Interboro School District*, 766 F. Supp. 280, 293 (E.D. Pa. 1991).

<sup>54</sup> *Wigg*, 382 F.3d at 813 (citing *Rosenberger*, 515 U.S. at 829).

<sup>55</sup> *Rosenberger*, 515 U.S. at 828-29.

<sup>56</sup> *James v. Bd. of Educ.*, 461 F.2d 566, 574 (2d Cir. 1972).

<sup>57</sup> *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991); *Pelozo v. Capistrano Unif. School Dist.*, 37 F.3d 517, 522 (9th Cir. 1999).

<sup>58</sup> *Bishop*, 926 F.2d at 1074.

<sup>59</sup> *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 405 (5th Cir. 1995).

<sup>60</sup> 20 U.S.C. § 4071(c)(3).

<sup>61</sup> See *Wigg*, 382 F.3d at 814 (stating that school district’s policy of prohibiting all employees from participating in any religious-based programs, including those held after school hours on school grounds, requiring parental permission for student participation, under a broad school policy allowing community groups to use its facilities, was viewpoint discriminatory and therefore unconstitutional).

<sup>62</sup> *Id.* at 812 (“[A] school’s concern for avoiding accusations of establishment of religion [does not] justify inhibiting the free speech and association rights of employees after work hours when the relevant activity takes place on school property....”).

<sup>63</sup> *Texas State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 777 F.2d 1046, 1053-54 (5th Cir. 1985); *Tucker v. State of Cal. Dept. of Educ.*, 97 F.3d 1204, 1213 (9th Cir. 1996) (state school board could not restrict employee’s religious speech where students were not exposed to the speech).



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