Schools cannot engage in 'viewpoint discrimination' when students wish to form political, religious clubs

By the New York State Association of School Attorneys

Divisive political issues have been splitting the nation, and many Americans have responded by joining political organizations or forming their own. When public school students decide to form groups with a political, religious or philosophical perspective, it is important for school leaders to know their legal obligations when responding to requests from student groups to meet or raise funds on school grounds.

A federal law called the Equal Access Act prohibits schools from engaging in a kind of bias sometimes called "viewpoint discrimination." This means that if a district permits a single noncurriculum-related student organization to either raise money or meet on school grounds, it cannot lawfully deny the same kinds of opportunity to other noncurriculum-related student groups based on the content of their political or religious views.

According to federal courts, a noncurriculum-related student group is any student group that does not directly relate to the body of courses offered by the school. (See sidebar, below.)

In *Widmar v. Vincent* (1981), the U.S. Supreme Court found that state universities which permit their facilities to be used by student groups could not discriminate against religious student groups who wished to do the same because of the religious content of the groups' speech. Reasonable time, manner, and place restrictions were permitted so long as they are content neutral.

Congress enacted the Equal Access Act to codify the decision in *Widmar* and extend the standard set by the Supreme Court to all public secondary schools that receive federal funds. The act provides that schools may not "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" (emphasis added).

Citing the act, courts have ordered school districts to permit Bible study groups and gay-straight alliances to use school facilities in the same manner as any other student group. That includes permitting meetings on school grounds during noninstructional hours, official recognition as a school club, access to the school newspaper, bulletin boards, public address system and club fairs in the same manner as they are made available to other student groups.

In order to trigger the protections of the Equal Access Act, a school must receive federal funds and have created a "limited open forum" for free speech. A "limited open forum" occurs when a school has permitted (or offered the opportunity to permit) any kind of noncurriculum-related student group to meet on school premises during noninstructional time.

Notably, a student group that is "curriculum-related" is *not* protected by the Equal Access Act.

Suppose students in your district wanted to form clubs dedicated to fighting climate change, supporting transgender rights, promoting the Black Lives Matter movement or supporting President Donald Trump. Would those be curricular or noncurricular clubs?

Although political issues are discussed in schools in history, civics and government classes, it is likely that courts would find student political clubs to be only tangentially related to the curriculum. Therefore, a court would probably view a political club as noncurriculum-related student group protected by the Equal Access Act.

In *Westside Community School v. Mergens* (1990), the U.S. Supreme Court found that to be curriculum related, a student group "must at least have a more direct relationship to the curriculum than a religious or *political* club would have" (emphasis added). In *Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd Cnty.* (2003), a U.S. District Court for the Eastern District of Kentucky ruled that curriculum-related "must mean something other than being remotely related to abstract educational goals."

School leaders may be concerned that permitting noncurricular clubs and creating a "limited open forum" pursuant to the Equal Access Act would require them to provide equal access to all student groups, including more controversial groups (i.e. "hate groups," cults, Neo-Nazi groups, etc.). For several reasons, this is not the case.

First, the act does not restrict a school's ability to prohibit speech which is vulgar, lewd, obscene and plainly offensive, according the U.S. Supreme Court's ruling in *Bethel v. Fraser* (1986). District action to "maintain order and discipline on school premises" or to "protect the well-being of students and faculty" conceivably could include denying equal access to that student group; be sure to consult with legal counsel regarding such a step.

Second, the Supreme Court in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* (1969) found that schools can restrict speech which "intrudes upon the rights of other students," or "colli[des] with the rights of other students to be secure and to be let alone."

Finally, Congress included "safe harbor" provisions within the Equal Access Act to protect schools from abuse by extremists and other similar groups. Pursuant to the Equal Access Act, districts retain the authority to "maintain order and discipline on school premises, [and] to protect the well being of students and faculty."

Districts, therefore, can restrict speech in order to maintain order and discipline and to protect students and faculty, by prohibiting speech that "materially and substantially interfere[s] with the orderly conduct of educational activities within the school," and any speech which offends the standards set in *Tinker* and *Fraser.*

Those limits were tested in *Harper v. Poway* (2006), in which students wore T-shirts to school with anti-homosexual slogans. (The students were protesting against a "Day of Silence" organized by a gay-straight alliance.) Following the standard set in *Tinker*, the Ninth Circuit U.S. Court of Appeals found that it was proper for the district to prohibit the students from wearing those T-shirts because "students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation have a right to be free from such attacks while on school campuses."

While banning a club is a more serious action than banning a T-shirt, the same legal standards under *Tinker* and *Fraser* would apply.

In addition, there are two ways school districts

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'Noncurriculum-related' and 'curriculum-related' clubs have different legal rights

The federal Equal Access Act guarantees certain school access rights to student clubs that are "noncurriculum-related" but does not confer the same rights on "curriculum-related" clubs. What's the difference between the two types of clubs?

This is a judgment call that school officials should make on a case-by-case basis with their school attorneys when questions of access arise. But court decisions provide guidance and examples of both kinds of clubs.

"A group directly relates to a school's curriculum if the group's subject matter is actually taught, or will soon be taught, in a regularly offered course; if that subject matter concerns the body of courses as a whole; or if participation in the group is required for a particular course or results in academic credit," according the U.S. Supreme Court's ruling in *Board of Education of Westside Community Schools v. Mergens* (1990).

In *Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd Cnty.* (2003), a U.S. District Court for the Eastern District of Kentucky ruled that "curriculum related must mean something other than being remotely related to abstract educational goals … [and] the term noncurriculum related student group is to be interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school."

The Kentucky case involved a school district's claim that it was lawful to prevent a gay-straight alliance from using school facilities because all noncurricular clubs were banned. The district asserted that the only clubs that were functioning on campus were curriculum-related and, therefore, not protected by the Equal Access Act. This prompted the court to examine which clubs were and were not curriculum-related.

The court identified four clubs at Boyd County High School that were curriculum-related: (1) Future Farmers of America, (2) Future Career and Community Leaders of America, (3) Future Business Leaders of America, and (4) the Health Occupation Student Organizations. The court noted that "maintenance of these student organizations is required for the career and technical education program to be in compliance with state regulations." In addition, participation in some of those clubs was necessary for certain classes within the district, such as home economics, marketing and agriculture classes.

The Gay-Straight Alliance, on the other hand, was noncurriculum-related, according to the court. Likewise, the court determined, the Drama Club, Bible Club, Executive Councils and Beta Club were also noncurriculum-related. (This was critical to the case because the latter had been granted access to school facilities despite an official ban on all noncurriculum-related clubs including the Gay-Straight Alliance.)

The *Boyd* court left open the possibility that certain other clubs involved in the case – the Kentucky United Nations Assembly, the Mock Trial and Teen Court, academic teams, athletic teams and cheerleading squads – could be curriculum-related but did not state this explicitly.

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could lawfully avoid the requirements of the Equal Access Act: (1) stop receiving any federal aid or (2) prohibit all noncurriculum-related student groups.

In *Boyd*, the school board went so far as to suspend all clubs, including both curriculum and noncurriculum-related groups, for the rest of the school year, in order to quell the controversy surrounding the formation of a gay-straight alliance student group. The board's decision to suspend all clubs was subsequently overturned, but not because the board lacked the authority to do so. Rather, the court found that the board acted improperly because it failed to enact a bona fide blanket prohibition; some student groups were still using school facilities, contrary to the board's official action to prohibit all student groups.

As social, political, and other issues prompt students to become more politically active, schools are sure to receive requests from students who wish to form noncurriculum-related clubs to express viewpoints. When issues involving free speech and equal access knock on the schoolhouse gates, school leaders need to be well-versed in the legal standards that apply. Be sure to consult your legal counsel with questions about specific applications from students who wish to form clubs or hold fundraisers.

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