

Students

Student Use of Buildings - Equal Access ¹

[For high school and unit districts]

The footnotes are not intended to be part of the adopted policy; they should be removed before the policy is adopted.

¹ State or federal law controls this policy's content. This policy concerns an area in which the law is unsettled. This sample policy implements the Equal Access Act (EAA) (20 U.S.C. §4071 *et seq.*). The EAA applies to public secondary schools that receive federal financial assistance. The policy should be adopted by districts with secondary school(s) that wish to establish or already have a *limited open forum* as defined in the EAA and quoted below. Under the EAA, it is unlawful 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. The term *meeting* under the EAA 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. This prohibition and definition under the EAA are the basis for the term of art *noncurriculum related student group*. See 20 U.S.C. §§4071(a) and 4072(3).

The policy allows non-school sponsored noncurriculum related student groups to meet on school premises, free of charge, on the same basis that other non-school sponsored noncurriculum related student groups are allowed to meet. Hence the policy is named, Equal Access.

The EAA has no applicability to the community's use of school facilities. See sample policy 8:20, *Community Use of School Facilities*.

A secondary school has a limited open forum whenever it "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. §4071(a). Thus, the equal access obligation is triggered when a secondary school allows one noncurriculum related student group that is not school sponsored, e.g., a political party interest club, to meet.

The EAA's requirements may be avoided by closing the forum, i.e., by refusing to permit any noncurriculum related student group that is not school sponsored to use its facilities (thereby creating a closed forum). But creating a closed forum is difficult given the U.S. Supreme Court's expansive interpretation of what constitutes a noncurriculum related student group.

A student group is "noncurriculum related" if it does not directly relate to the body of courses offered by the school. Bd. of Ed. of Westside Community Sch. Dist. v. Mergens, 496 U.S. 226 (1990). School officials cannot avoid triggering the EAA's equal access requirements by tying the purposes of the student clubs it wants to allow to some broadly defined educational goal. The Mergens Court said that a student group directly relates to a school's curriculum only if:

1. The group's subject matter is actually taught, or will soon be taught, in a regularly offered course;
2. The group's subject matter concerns a body of courses as a whole; or
3. Participation in the group is required for a particular course or results in academic credit.

Just as a noncurriculum related student group determination is fact-sensitive, so is determining whether a particular time period is noninstructional time. The term *noninstructional time* under the EAA means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends. 20 U.S.C. §4072(4). A morning activity period was found to be noninstructional time making a high school's refusal to allow a student Bible club to meet in school during that period a violation of the EAA. Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211 (3d. Cir. 2003). The Ninth Circuit reached the opposite conclusion in a similar case. Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002). But see Caniceros ex rel. Risser v. Bd. of Trustees, 106 F.3d 878, 880 (9th Cir. 1997) (holding that the plain meaning of the term "noninstructional time" under the EAA includes meetings held during lunch time).

A school violates the EAA by allowing some student groups to meet on campus but refusing similar access to gay-lesbian clubs. Colin v. Orange Unified Sch. Dist., 83 F.Supp.2d 1135 (C.D. Cal. 2000); White County High School Peers Rising In Diverse Ed. v. White Cty. Sch. Dist., 2006 WL 199190 (D. Ga. 2006); SAGE v. Osseo Area Sch. Dist. No. 279, 2007 WL 2885810 (D. Minn. 2007). But see Caudillo v. Lubbock Ind. Sch. Dist., 311 F.Supp.2d 550 (N.D.Tex. 2004)(school did not violate the EAA when it denied a gay student club's request for access because the "maintain order and discipline" exception applied). Note the U.S. Supreme Court refused to apply N.J.'s public accommodation law to the Boy Scouts because forcing the Boy Scouts to accept a homosexual as a member would violate the Scouts' freedom of expressive association. Boy Scouts of Amer. v. Dale, 530 U.S. 120 (2000).

The Seventh Circuit upheld the actions of high school officials who suspended an anti-abortion student club, due to neutral reasons unrelated to viewpoint. E.D. by Duell v. Noblesville Sch. Dist., 151 F.4th 907 (7th Cir. 2025).

For purposes of this Board policy, the District has established a *limited open forum* for high school students enrolled in the District. Each District high school shall offer an opportunity for student-led *noncurriculum related student groups* to meet on school premises during *noninstructional time*. Noncurriculum related student groups are those student groups, clubs, or organizations that do not directly relate to the curriculum.² For purposes of this Board policy, a *non-school sponsored* noncurriculum related student group is a noncurriculum related student group that is student led.

A student group or club is *school sponsored* if the District approves the student group or club to have a paid adult sponsor to promote, participate, and/or lead its activities. However, assigning a teacher, administrator, or other school employee to supervise a meeting for custodial purposes, allowing groups to promote meetings, and providing access to resources as determined by the District do not constitute sponsorship of the student group or club, nor does it constitute the District's endorsement or agreement with the activity or the speech of the students who participate in the activity.

Extracurricular and co-curricular student groups or clubs that are school sponsored are governed by Board policy 6:190, *Extracurricular and Co-Curricular Activities*.

Student groups or clubs directed and controlled by non-school persons are governed by Board policy 8:20, *Community Use of School Facilities*.

Student-led noncurriculum related student groups or clubs that are not school sponsored are granted free use of school premises and/or access to school resources for a meeting or series of meetings under the following conditions: ³

1. The meeting is held during those noninstructional times identified by the Superintendent or designee for noncurriculum related student groups, clubs, or organizations to meet. *Noninstructional time* means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.
2. All noncurriculum related student groups that are not school sponsored receive substantially the same treatment. ⁴
3. The student group or club and the meeting are student-initiated, meaning that the request is made by a student, and the group or club is led by a student. ⁵
4. Student attendance at the meeting is voluntary.
5. The school and school employees will not promote, lead, participate in, or otherwise sponsor the meeting.
6. School employees are present at religious meetings only in a nonparticipatory capacity.

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² 20 U.S.C. §4072. See also discussion in f/n 1.

³ All of the listed conditions are based on language from the EAA, except for 10 through 12.

⁴ The Ninth Circuit Court of Appeals found that a school district violated the EAA and the student's First Amendment rights by denying her Bible club the same rights and benefits as other noncurriculum related student clubs. *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002). Nothing in the decision suggests that the school was required to *sponsor* the Bible club and financially support it. However, the school board voluntarily gave "associated student body" clubs certain benefits that were denied the plaintiff's religious club. Thus, the district unlawfully treated one noncurriculum related student club differently from another noncurriculum related student club. See also U.S. Dept. of Education *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools* (2026), available at: www.ed.gov/media/document/2026-guidance-constitutionally-protected-prayer-and-religious-expression-public-elementary-and-secondary-schools-113182.pdf.

⁵ In *E.D.*, the Court found no violation of the EAA where a school official decided to suspend a student anti-abortion club based on evidence that the club was partially run by the student's parent, and the student failed to follow the school's content-neutral flyer rules by including political messages.

7. The meeting and/or any activities engaged in by the student group or club do not materially or substantially interfere with the orderly conduct of educational activities.
8. Non-school persons do not direct, conduct, control, or regularly attend the meetings. ⁶
9. The school retains its authority to maintain order and discipline. ⁷
10. A school staff member is present in a supervisory capacity.
11. The Superintendent or designee approves the use of school premises and/or access to school resources for a meeting or series of meetings.
12. The school requires neutral content generally limited to club/group name, meeting time(s), and location(s) as well as the approval of the Building Principal or designee for all advertisements, wall postings, or flyers. ⁸

The Superintendent or designee shall develop administrative procedures to implement this policy.

LEGAL REF.: 20 U.S.C. §4071 et seq., Equal Access Act.
Bd. of Ed. of Westside Community Sch. Dist. v. Mergens, 496 U.S. 226 (1990).
E.D. by Duell v. Noblesville Sch. Dist., 151 F.4th 907 (7th Cir. 2025).
Gernetzke v. Kenosha Unified Sch. Dist. No. 1, 274 F.3d 464 (7th Cir. 2001), *cert. denied*, 535 U.S. 1017.

CROSS REF.: 6:190 (Extracurricular and Co-Curricular Activities), 7:10 (Equal Educational Opportunities), 8:20 (Community Use of School Facilities), 8:25 (Advertising and Distributing Materials in Schools Provided by Non-School Related Entities)

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⁶ Bd. of Ed. of Westside Community Sch. Dist. v. Mergens, 496 U.S. 226, 236 (1990).

⁷ In response to a school's invitation for all student groups to paint murals in the school hallway, a Bible club sought to include a large cross. The school principal forbade the cross in order to avoid conflicts among students — there was evidence the student body contained Satanic and neo-Nazi adherents. The principal's decision was insulated from liability under the EAA by the Act's provision that "nothing in [the Act] shall be construed to limit the authority of the school ... to maintain order and discipline on school premises." Gernetzke v. Kenosha Unified Sch. Dist. No. 1, 274 F.3d 464 (7th Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002).

See E.D. at 917, (quoting Gernetzke, "[o]rder and discipline are part of any high school's basic educational mission; without them, there is no education.").

⁸ The content-neutral restrictions contained in this item were upheld in E.D. The Court found, "[t]he District could reasonably conclude that covering its walls with warring political messages would undermine that order and divert attention from the business of learning." Id. at 917.

This condition's application should be consistent with a board's adopted language in policy 8:25, *Advertising and Distributing Materials in Schools Provided by Non-School Related Entities*.