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## LEGAL MEMORANDUM REGARDING

### **EQUAL ACCESS**

Equal access is simple and straightforward. A person or group has the right to express a religious viewpoint on permissible subject matters in a public forum. Whether the forum is a park, street, sidewalk, government building or property, the government may not exclude religious viewpoints from the forum. Equal access means equal treatment.

#### *Equal Access and the Public Forum*

Public parks, streets, sidewalks, and other public places are important areas for discussion and discourse. For purposes of free speech, public property is classified as a traditional, limited or nonpublic forum. A traditional public forum includes parks, streets, and sidewalks.<sup>1</sup> Unlike a limited public forum, a traditional public forum must always remain open to the public.

Government property that is not a park, street or sidewalk is either a limited or a nonpublic forum.<sup>2</sup> To be classified as a limited public forum, the government must intentionally open the property to the general public for expressive activity. Examples include, but are not limited to, public schools, meeting rooms in libraries, civic centers or public housing, public arenas or any other place where the general public is permitted to meet for expressive activity. Unlike a park, street or sidewalk, the government does not have to create a limited public forum, and may close the forum. However, while it is open, the government may not discriminate against the viewpoints of those persons or groups seeking to use the forum.

#### *The Equal Access Act and the First Amendment*

In addition to the First Amendment, the federal law known as the Equal Access Act<sup>3</sup>

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<sup>1</sup> See *Frisby v. Schultz*, 487 U.S. 474, 481 (1988); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). Sidewalks within residential neighborhoods are also considered traditional public fora. A person can picket within a residential neighborhood so long as the picketing is not targeted toward a specific residence.

<sup>2</sup> The nonpublic forum will not be discussed here due to space limitation. A nonpublic forum is public property which the government has not intentionally opened for the purpose of expressive activity by the general public. In a nonpublic forum, the government may place restrictions on speech so long as they are reasonable and viewpoint-neutral. An example of a nonpublic forum is an international airport, where speech is permitted, and reasonable, viewpoint-neutral restrictions are allowed. See *ISKCON v. Lee*, 505 U.S. 672 (1992); *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987). For more information, call Liberty Counsel.

<sup>3</sup> 20 U.S.C. §§ 4071-74. The constitutionality of the Act has been upheld by the United States Supreme Court in

(hereinafter “Act”) prohibits public secondary schools from discriminating against student-initiated, student-led, noncurriculum-related student clubs.<sup>4</sup> Issues not covered or commanded by the Act are often commanded by the First Amendment. For example, while the Act requires a 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.<sup>5</sup> 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.

Federal courts recognize that the First Amendment grants broader rights than the Act.<sup>6</sup> In *Prince v. Jacoby*,<sup>7</sup> the school allowed a Bible club to meet on campus after school hours. However, the school treated the religious club differently than 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 when other secular student clubs were allowed to meet, did not allow the club to publicize events (including posting flyers on a bulletin board or making announcements on the public address system), and denied the right to use school supplies, copiers, audio/visual equipment and vehicles for field trips. The court found that, either under the Act or the broader protections of the First Amendment, denying equal treatment to a religious club is unlawful.

The court in *Prince* stated that “equal access” means “religiously-oriented student activities must be allowed under the same terms and conditions as other extracurricular activities....”<sup>8</sup> Indeed, “discriminatory actions in the form of harassment or unequal penalties, as well as clear cut denial, constitute a violation of the law.”<sup>9</sup>

Although the Act does not require a school to permit religious clubs to meet during the school day at a time when attendance is mandatory, the First Amendment is broader than the Act

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*Board of Education of Westside Community School v. Mergens*, 496 U.S. 296 (1990).

<sup>4</sup> A noncurriculum student club means any student group that does not directly relate to the body of courses offered by the school. A student group relates directly to a school’s curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit. See *Mergens*, 496 U.S. at 238-39. See also *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244 (3rd Cir. 1993).

<sup>5</sup> 20 U.S.C. §§ 4071(b), 4072(4). Noninstructional time under the Act includes time set aside by the school before actual classroom instruction begins or after it ends.

<sup>6</sup> *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 *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2d Cir. 1996), cert. denied, 519 U.S. 1040 (1996) (school may not require a Christian club to admit those opposed to the its mission and stated beliefs); *Good News/Good Sports Club v. School Dist. of City of Ladue*, 28 F.3d 1501 (8th Cir. 1994), cert. denied, 515 U.S. 1173 (1995). The discussion in this section regarding the First Amendment is applicable to any person or group seeking equal access to a traditional or limited public forum.

<sup>7</sup> 303 F.3d 1074 (9th Cir. 2002), cert. denied, 124 S. Ct. 62 (2003).

<sup>8</sup> *Id.* at 1081.

<sup>9</sup> *Id.*

and does require the school to allow such clubs to meet at the same time as any other noncurriculum secular student club.<sup>10</sup>

One important difference between the Act and the First Amendment involves the question of what triggers the legal protection. The Act applies 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 applies whenever (1) any public facility (2) allows use of its property for certain persons or groups for expressive activity.<sup>11</sup> 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 does not have noncurriculum-related student clubs, so long as the school allows use of its facilities by students or the general public for expressive activity. A 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. Since the Act only applies to student-initiated, student-led clubs, any other group must rely solely on the First Amendment.

### ***Equal Access and the First Amendment***

In *Good News Club v. Milford Central School District*,<sup>12</sup> the United States Supreme Court ruled that a public school which allows use of its facilities after school 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 Christian viewpoint. A typical Good News Club meeting includes Bible reading, Scripture memorization, prayer, singing, stories about biblical or modern characters, and games. The district argued that it had to ban the club from meeting on campus because (1) the group 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.

Rejecting these arguments, the Court declared that excluding “the Club on the basis of its religious viewpoint constitutes unconstitutional viewpoint discrimination....”<sup>13</sup> The Court also declared that the First Amendment preempts any state law that may require strict separation of church and state.<sup>14</sup> The Good News Club sought “nothing more than to be treated neutrally and given access to speak about the same topics as ... other clubs,” and thus, “the school could not deny equal access to the Club for any time that is generally available for public use.”<sup>15</sup> That some might perceive the school endorses religion by allowing the Christian club on campus, or that only religious groups may choose to use the facilities at a particular time, is irrelevant.<sup>16</sup>

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<sup>10</sup> See *id.* at 1089, 1092. See also *Ceniceros v. Board. of Trustees of the San Diego Unified Sch. Dist.*, 106 F.3d 878 (9th Cir. 1997) (finding that a school violated equal access when it refused to allow a religious club to meet during the lunch hour along with the other student clubs).

<sup>11</sup> As already noted, parks, streets and sidewalks are traditional public fora, and as such, the government may not permanently close them to the general public for expressive activity.

<sup>12</sup> 533 U.S. 98 (2001).

<sup>13</sup> *Id.* at 107 n.2.

<sup>14</sup> *Id.* See also *Prince*, 303 F.3d at 1074.

<sup>15</sup> *Good News Club*, 533 U.S. at 114 n.5.

<sup>16</sup> *Id.* at 119.

### ***Equal Treatment Includes Financial Benefits or Burdens***

Equal treatment does not end with the provision of access alone. Discriminatory financial schemes also violate equal access.

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.... [T]he government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression.... 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.<sup>17</sup>

A restriction on speech “is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.”<sup>18</sup>

A federal court struck down a school board policy that imposed different fees for religious and secular use of school facilities. While churches were allowed to use the facilities, they were required to pay commercial, rather than nonprofit rates. The court ruled that imposing different fees for religious use “discriminates against religious speech in violation of the Free Speech Clause.”<sup>19</sup>

### ***Equal Treatment Includes Distributing Announcements About Religious Meetings***

Equal access requires equal treatment in every respect. One school district refused to distribute brochures to students announcing a Christian summer camp that offered classes on “Bible Heroes” and “Bible Tales.” Although the school distributed information to the students regarding other after-school secular programs, the school would not distribute the brochures because of their religious content. Finding the school’s actions unconstitutional, the court stated: “If an organization proposes to advertise an otherwise permissible type of extracurricular event, it must be allowed to do so, even if the event is obviously cast from a particular religious viewpoint.”<sup>20</sup> Another court ruled a school district must allow the Good News Club

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<sup>17</sup> *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828-29 (1995) (citations omitted) (emphasis added).

<sup>18</sup> *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S.105, 115 (1991) (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.”). See also *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

<sup>19</sup> *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703, 707 (4th Cir. 1994). 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).

<sup>20</sup> *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1052 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1146 (2004).

informational flyers to be distributed by teachers to students.<sup>21</sup> The school district permitted other secular after-school organizations to give informational flyers to teachers for distribution to the students, but 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.

Equal access means equal treatment.<sup>22</sup> Discrimination against the viewpoint of religious persons or groups in traditional or limited public fora is unconstitutional.

### **SUMMARY OF EQUAL ACCESS**

- Equal access requires equal treatment.
- Except for temporary, short-term closure, public parks, streets and sidewalks must remain available for expressive activity.
- Other public property may be available for expressive activity if the government intentionally opens the property to the general public for expressive activity.
- In traditional (streets, sidewalks and parks) or limited (other public property) public fora, the government may not discriminate against religious viewpoints of permissible subject matters.
- In addition to the First Amendment, the federal Equal Access Act applies to student-initiated, student-led noncurriculum-related groups meeting in public secondary schools.
- If the group is not student-initiated and student-led, then only the First Amendment applies.
- The First Amendment grants broader free speech rights than provided under the Act.
- Equal treatment is required for every conceivable access or benefit.

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<sup>21</sup> *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Pub. Schs.*, 373 F.3d 589 (4th Cir.). See also *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township Sch. Dist.*, 386 F.3d 514 (3d Cir. 2004).

<sup>22</sup> See e.g., *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (public school's refusal to allow the showing of a Christian film by private group violated free speech); *Widmar v. Vincent*, 454 U.S. 263 (1981) (university's denial of a student religious club from use of school facilities violated free speech).