

Knowing Your Rights

A GUIDE FOR CHRISTIAN STUDENTS.



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KNOWING YOUR RIGHTS. A GUIDE FOR CHRISTIAN STUDENTS.

Education Is a Journey.

The vast majority of your experiences will be positive. However, there may be times when the expression of your Christian beliefs is challenged, and you may not always be able to anticipate where the challenge will come from. This guide will help you understand your rights.

Throughout this handbook, you will find helpful answers to questions posed by individuals from all over the country. Although each query is addressed in great detail, the specifics behind every situation will undoubtedly vary. For this reason, we recommend you (or a parent) contact ADF before pursuing a resolution.

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Part 1

What Rights Do Religious Clubs Have to Access Public High School Facilities?



The rights of religious student clubs in public high schools are protected by the First Amendment to the U.S. Constitution and the Equal Access Act (“the Act”), passed by Congress in 1984.¹ 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.² Once the school provides an opportunity for a non-curriculum related club to meet, it is said to have created a “limited open forum,” triggering the Act and entitling all other qualified student clubs (like a Bible Club) to the same access and benefits of school facilities as that first club.³

A “qualified student club” is one which is student initiated and student led. Faculty can be involved only to monitor, facilitate, or supervise, and nonschool persons cannot be regularly and directly involved in the meetings.⁴ 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.”⁵ 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.”⁶

The rights of religious student clubs also stem from the First Amendment of the U.S. Constitution, which offers protection beyond that which the Act provides.⁷ 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.”⁸ Public schools cannot exclude certain clubs based on their religious viewpoints or practices.⁹ Once a school allows access to any student club, school officials cannot deny recognition or benefits to some clubs based on students’ desires to exercise their religious freedom.¹⁰

[Q] When can the religious clubs hold meetings on campus?

[A] In general, the Act says that meetings of recognized non-curriculum related clubs, like religious clubs, may take place on campus “during noninstructional time.”¹¹ “Noninstructional time” means “time set aside by the school before actual classroom instruction begins

Usually, clubs meet during a school’s activity hour, just before or after school, or during lunch.

or after actual classroom instruction ends.”¹² 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.¹³

If, for example, during an activity period, students may choose from a variety of activities, this 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.¹⁴ The important aspect of the meeting is that it is voluntary, not as to whether the students have to be at school during that time, but whether they may choose to attend the meeting itself.¹⁵

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.¹⁶ 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 limit time periods as long as it does so across the board. For example, the school could say that no clubs may use the cafeteria after school, or clubs meeting before school cannot meet earlier than an hour before school starts.

[Q] Can religious clubs use school equipment, such as projectors, TV/VCRs, or sports equipment?

[A] Under the First Amendment, if the school allows some recognized clubs to use supplies, then it is a violation of the free speech rights of religious clubs to disallow such use by them simply because of their religious speech.¹⁷ Sometimes it is constitutionally permissible for a school to restrict free speech rights in order for the school to avoid violating the Establishment Clause of the First Amendment.¹⁸ The main concern is whether it appears that the school is endorsing the religious message. Courts have made it clear that equal access is not endorsement of religion, and the students of a high school have the maturity to understand that.¹⁹ Granting equal access to religious clubs ensures neutrality, rather than showing partiality of the school.²⁰ 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.”²¹ The school can make it clear that none of what a religious club says or stands for is the endorsed speech of the school. Therefore, allowing equal access to school equipment is not improper endorsement of religion by the school.

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The school is not required “to expend public funds beyond the incidental cost of providing the space for student-initiated meetings,” under the Act.²² Therefore, the school does not have to allow clubs to use supplies or equipment such as audio/visual or transportation equipment that clearly fall outside the realm of incidental costs of providing a meeting place — as long as it treats all clubs the same.

[Q] How may a religious club advertise for its meetings and other events?

[A] Under the First Amendment and the 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 their meetings and other events.²³

Students also have First Amendment free speech rights to distribute religious literature. However, schools may "impose content-neutral time, place, and manner restrictions" on the advertisement of student clubs.²⁴ For instance, it may require all flyers for club activities to be posted on a certain bulletin board, to avoid clutter (as long as all clubs are treated equally).

[Q] Can religious clubs get funding from the school for their activities?

[A] 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, which are not considered public funds. In that scenario, the school cannot discriminate against religious or other recognized student clubs by denying equal access to funds simply based on their religious viewpoint.²⁵ If other recognized clubs are allowed to access ASB funds and participate in activities such as fund-raisers and other events, a recognized religious club must have the same opportunities.²⁶

[Q] We are not recognized as a student club. How can we hold meetings on campus?

[A] Student clubs usually need to apply with the school to be an officially recognized student organization. If your religious club has not yet done so, contact an administrator (such as a student life office), find out how to apply for recognition, and complete the required steps. Once your club is approved as a recognized organization, you 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.

[Q] Our school does not recognize any non-curricular student clubs. Is there any way we can still hold meetings for our religious clubs?

[A] First, be certain that there are, in fact, no extracurricular student clubs meeting on your campus. Schools have been known to call certain clubs "curriculum-related," which were actually determined by the court to be non-curricular student clubs.²⁷ If your campus has allowed at least one non-curricular student club to meet and use school facilities and equipment, it must allow other non-curricular clubs an equal opportunity to do so.

If the school legitimately does not allow any student-led, non-curricular clubs on campus, you still may be able to request use of school facilities as an off-campus, private group. If your school allows community groups to use its facilities, it may have established parameters covering the types of groups and activities allowed. As long as you meet the criteria, the school must not discriminate against a club based on its religious speech.²⁸

[Q] What if our school has restrictions based on religious content? (For example, we cannot put “Jesus,” “God,” or “Christ” on posters advertising our events.)

[A] Schools cannot censor the speech of student groups simply because the speech is religious. A school can only place restrictions on speech content if the regulation is necessary to serve a compelling state interest and the rules are narrowly drawn for that purpose.²⁹ Generally, that means that any policies regulating speech should be content-neutral and geared toward ensuring a safe, nondisruptive educational environment. But, prohibitions against using certain words or wearing items that have religious significance are viewpoint based and considered discriminatory under First Amendment free speech protection.³⁰ Schools cannot prohibit religious clubs from using religious words on its advertisements and other documents distributed to students, unless the speech causes a material disruption.

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

[A] If your school denies a religious club equal access to resources or facilities, or has established restrictions that infringe upon your freedom of speech or religion, you should meet with your principal or dean to discuss the matter and request a resolution. The Alliance Defense Fund (ADF) can provide documentation to help you explain the law. Should school officials still refuse to adjust their policy or practice, ADF 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.

Part 2

What Are Students, Coaches, and Teachers Allowed to Do as Part of a Religious Club on Campus?

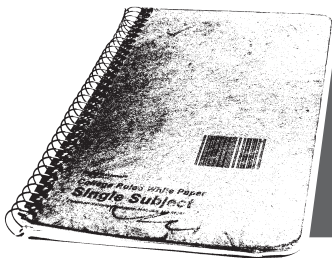
[Q] What can our religious club talk about during our meetings?

[A] 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 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.³¹ This is not a significant danger for religious clubs, whose meetings the Act was passed to protect in the first place.³² Also, 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 the students in the meeting. Therefore, students may pray, sing songs, read the Bible, and evangelize others during their meetings.

The only restrictions here would be on teachers or coaches who attend meetings. Since teachers and coaches are employees of the school, there is concern that what they say may be considered speech endorsed by the school. This could violate the Establishment Clause of the First Amendment (discussed in greater detail on pages 16–20). Students who participate in the meetings are not employees, and, therefore, there is no concern that their speech would be misunderstood as government or school speech.

[Q] What can we do outside our club meetings?

[A] As a general rule, conduct outside of the time set aside for meetings is governed by the school's interest in maintaining an educational environment, balanced against the Free Speech and Free Exercise rights of the students and school employees. Students' Free Speech rights are protected so long as they do not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," or infringe on the rights of others.³³ The teachers' and other school employees' rights to free speech have these same limitations,³⁴ and are further limited by the school's concern that it does not endorse religion in violation of the Establishment Clause, or coerce students into sharing teachers' religious beliefs.³⁵ Therefore, employees of the school have more restrictions on their Free Speech and Free Exercise Rights than students do.



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Club Leaders

[Q] Who can be a leader of a religious club?

[A] The Act specifies that the 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.”³⁶ Therefore, students as club leaders will always be allowed to participate without restriction. If a teacher or a coach is a leader of a religious club, then he or she can attend meetings only to monitor, facilitate, and/or supervise. Many schools require that each recognized club have a faculty sponsor, so it is appropriate for religious clubs to have one as well. However, the activities of the meetings must be primarily led by students. It is up to school officials, not the students, to make it clear that the club is student-led.³⁷

If a teacher or a coach is a leader of a religious club, then he or she can attend meetings only to monitor, facilitate, and/or supervise.



There is also a requirement in the Act that “nonschool persons may not direct, conduct, control, or regularly attend activities of student groups [clubs].”³⁸ 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, he or she can only do so in a facilitative manner, and cannot 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 to not 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, if other such outside groups are permitted to use school facilities (see further discussion). However, it may not receive the same access to benefits, such as bulletin board and equipment usage, that the school allows recognized student clubs.

[Q] What if our 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?

[A] 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. Most likely, simply notifying the school will be enough. Becoming a community group will mean that there are fewer restrictions on teacher and coach involvement, so teachers and coaches can lead meetings, but it will also mean that the club is 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.

[Q] What can religious club leaders do on campus?

[A] Student leaders are allowed to freely pray and discuss religious ideas during their meetings, as discussed previously. Their rights of free speech and free exercise of religion are protected by the First Amendment, and cannot be taken away by schools. This 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.³⁹

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.⁴⁰ This includes the freedom to witness to other individuals, which the Supreme Court has never held to receive less protection than other types of speech. Talking to others about one's personal beliefs is exactly the type of speech the First Amendment was established to protect.⁴¹ Schools should encourage and foster personal student expression.⁴² As long as students are not speaking as school representatives, their religious speech is protected.

If a teacher or coach serves as a club leader in a recognized student club, greater limitations apply since, in their capacities as school employees, teachers and coaches are seen to be agents of the state. If the religious club is not a recognized student club, however, and merely meets on school property outside of any school affiliation (like the Boy Scouts), then teacher participation is seen as personal and private involvement which is protected by freedom of speech rights.⁴³

[Q] Can religious clubs invite outside speakers to meetings?

[A] Outside speakers are permissible at religious club meetings, and they can speak on any topic. However, if a speaker is invited for a school-wide assembly which could conceivably bear the stamp of approval of the school, then there can be no endorsement of religion in the speech, especially if the school assembly is mandatory for all students.⁴⁴

It is permissible for outside speakers to follow their nonreligious speech at school-wide assemblies with an optional religious message held during noninstructional time (such as at lunch, or before or after school). A club inviting speakers to supplement their presentation 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.

Outside speakers are permissible at religious club meetings, and they can speak on any topic.

Schools do retain some discretion over speech presented by non-affiliated individuals, even during nonschool hours. A school may decide to reserve use of its facilities for certain general groups or topics, but it cannot exclude religious views or otherwise “regulate speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”⁴⁵ To do so is considered viewpoint discrimination, which violates freedom of speech rights and is presumed to be unconstitutional.⁴⁶

Student Members

[Q] May religious club members lead prayer at athletic practices and games?

[A] Since prayer is private religious speech, students are permitted to engage in it at school, as long as it would not appear that the school endorsed it.⁴⁷ When students are acting as private individuals, they are permitted to pray. This includes praying as a team before a game or at practice, as long as it is completely student-led and initiated.⁴⁸

Private speech even at school-related functions is protected by the Constitution. Courts have held that school policies which equate all student religious speech with state speech go too far and actually violate an individual's free speech rights.⁴⁹ A school does not need to prohibit private religious speech in public places in order to avoid violating the Establishment Clause.⁵⁰ The test is whether the prayer is genuinely student-initiated, and not part of a school policy which encourages it.⁵¹

Conversely, public prayers are not permitted where they might be construed as school-sponsored or coercive. For example, a school policy endorsing student-led public prayer before football games was found unconstitutional since it took place during a school-sponsored event, on school property, and under faculty supervision.⁵² The degree of school involvement in this particular setting gave the prayer the "imprint of the state" such that it could not be considered private, free speech.⁵³

Coaches and Teachers

Generally, coaches and teachers are free to talk about religion in an objective manner.⁵⁴ However, when acting as a school employee, they may not engage in a discussion of their own religious beliefs with students, whether that is part of a student meeting or not. Courts have two main concerns with school employees' speech, which do not arise with student speech. The first is a concern that it will appear that the school endorses 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."⁵⁵ If this happens when a teacher or coach engages in religious speech, the school could face problems with the Establishment Clause.

The second concern is that because teachers give grades and, similarly, coaches evaluate athletes, when teachers and coaches share their religious beliefs, it could have a coercive effect on the students.⁵⁶ Students and student athletes may feel that if they shared the religious views of their teacher or coach, they would be given more recognition; or, conversely, if they did not share the views, then they would be penalized by receiving lower grades or being put on the bench.

Teachers should take care to separate their private religious speech from their role as a public employee to preserve the religious 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 their support of religious clubs from coming across as favoritism toward participating students. In one instance, a head coach's strong personal support for a religious club on his campus led to a harassment complaint. As a result, the school adopted a "closed forum" policy which eliminated recognized student clubs from campus.⁵⁷

[Q] May coaches lead prayer at practices and games?

[A] Since coaches are employees of the school, they may not lead prayer at either practices or games. The dangers of an appearance of school endorsement and fear of coercion are present with coaches as well as teachers, because coaches are also employees of the school and represent the school to the athletes during these times.⁵⁸ While the restriction on religious speech of coaches in this context may be viewed as a violation of the coach's First Amendment rights, courts have said that "free expression rights must bow to the Establishment Clause prohibition on school-endorsed religious activities."⁵⁹ In addition, the possibility of athletes feeling compelled to participate in the religious activity is great.

Even if the coach wants to propose a voluntary extension of practice time for those who would like to stay and pray, this is likely to be considered unconstitutional, mostly due to the concern

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their own times
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that athletes may feel coerced to participate.⁶⁰ The best practice is for students to 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. The coach may be present at the place and time to maintain order and

discipline, but as soon as the coach takes part in the prayer, while still acting in his or her official capacity as coach, it "cross[es] the line between respect for religion and endorsement of religion."⁶¹

[Q] How much involvement can faculty sponsors have in religious club meetings?

[A] Many schools require each recognized student club to have a faculty sponsor. It is fine 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.⁶² This means that all of the 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 or think that the school in any way endorses the religious club’s mission because of the presence of the teacher or coach.

[Q] What if students ask me as a faculty member about my religious beliefs?

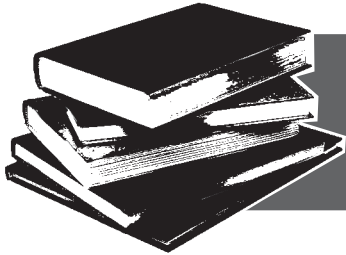
[A] If a student asks a faculty member about his or her personal religious beliefs, the teacher or coach should politely decline to discuss his or her personal views while acting as a school employee. A teacher may invite further dialogue when not acting as a school employee, as long as it is clear that the discussion is private speech rather than anything endorsed or supported by the school. It is also important to protect students from the coercive effect of a teacher’s beliefs, and, therefore, the teacher should make it clear that the discussion is unrelated to class or grades.

While acting as a school employee, teachers and coaches may explain what being a Christian means, but it must be done in an objective manner, and not one that is coercive or indoctrinating.⁶³ For example, a teacher may say “Christians believe that ...” as opposed to “I believe that ...” to make the answer informational rather than personal.

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

[A] 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 which have no affiliation with the schools, such as the Boy Scouts, or various churches that may use school facilities on the weekends. Religious clubs may request to use school facilities before or after 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.⁶⁴ A school cannot restrict employees from participating in religious-based activities that occur on their own time, outside of school-sponsored events or instruction.⁶⁵

Religious clubs that elect not to be recognized will not have the same rights and privileges as other recognized student clubs. For example, the religious club will not have access to the various means of advertising usually available to student organizations for their meetings on campus. An unrecognized club will not be able to use on-campus facilities for meetings during the school day (lunch or during an activity period), or utilize school equipment. Furthermore, it will not have access to any student club funding that may support other recognized clubs. If a religious club is already a recognized school club and no longer wishes to be, the leader should contact the school for information about how to remove itself from recognized student club status.



A coach or teacher can lead a religious club if it is not a recognized school club.

[Q] Can coaches meet with other coaches and teachers as a group?

[A] Even though teachers may not take an active role in meetings of recognized student clubs, teachers and coaches in public schools may exchange ideas or even have prayer meetings with one another, absent student involvement. If teachers are allowed to hold meetings unrelated to school business on the school premises, then they must also be allowed to discuss religion, pray with one another, etc., when there are no students involved.⁶⁶ However, in the same way that a school can limit student meeting times, the school can also place viewpoint-neutral limits on teachers' meeting times. For example, school officials might require teachers to only use the time for curriculum planning. If this is the case, then teachers must abide by that neutral limitation.

Part 3

What Differences in the Law Do Student Clubs Face on a Public University Campus?

The main difference between a high school and a university campus that courts have noted is that students at the university level are deemed more mature. This means that they are better able to distinguish between the views of the school and the views of the teacher or coach, and, therefore, Establishment Clause concerns are not as great.⁶⁷ However, there is still a concern with the possibility of teachers' personal beliefs having a coercive effect on the students.

Students

Student organizations have the same equal access rights at public universities as they do on public high school campuses (even though the Equal Access

Act does not apply). While a university has authority to impose "reasonable regulations compatible with its educational mission on the use of its campus and facilities," a

university may not deny

recognized student religious clubs equal access to facilities made generally available to other recognized student clubs.⁶⁸ Any policies designed to restrict access must be neutral toward religion. Courts have held that policies are sufficiently neutral when they extend "benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."⁶⁹

Any policies designed to restrict access must be neutral toward religion.

Professors and Coaches

In general, university and college professors have greater leeway in their religious speech than public school teachers. The courts recognize professors' constitutionally protected right of academic freedom as a form of free speech.⁷⁰ Although the boundaries of this freedom are not well defined, case precedent indicates that a university administration must have a strong reason to interfere, and still must limit its intrusion.⁷¹ However, this does not mean that professors can openly discuss personal religious beliefs at anytime. In a public university setting, there must be adequate separation so that an employee's views are not perceived as connected to a university course.⁷² Such restrictions, though, do not apply to extracurricular meetings with students to discuss religious issues, as long as they are held completely separate from class.⁷³

Generally, if a professor's speech is considered a "matter of public concern," it is protected as free speech under the First Amendment.⁷⁴ The key is to have an appropriate balance between a professor's free speech rights and the school's interest in efficiently providing educational services.⁷⁵ Courts will look to a professor's or coach's motivation behind the speech to determine whether it comes from his status as a public citizen or public employee.⁷⁶ Generally, speech used to motivate students or athletes in a professor's role as state employee is not considered a matter of public concern and therefore not individual, protected speech. For example, coaches may not be able to claim motivational purposes for leading teams in prayer before games. However, an optional prayer session or Bible study held separately from game preparation would be appropriate as an exercise of a coach's protected First Amendment rights.

[Q] What if students in my class or on my team ask what my religious beliefs are? What am I allowed to discuss in class or with the team?

[A] As in the high school context, professors and coaches must present beliefs objectively, by discussing aspects of Christian faith rather than putting forth their own personal beliefs, due to the potential coercive effects on the students. However, keeping in mind the fact that college students are less impressionable and more likely to separate the teacher's personal views from those of the university, there is more leeway for professors and coaches to discuss their own beliefs, as long as it is not in the context of official school activities such as class or athletic practice.⁷⁷

Final Thoughts

We need to ensure that Christians remain free in their educational pursuits. That is the purpose behind this handbook—to inform students, parents, teachers, and coaches about their constitutional rights. We hope that this guide has been a helpful tool for you. If you still have questions, please do not hesitate to e-mail **ADF** at **legalhelp@telladf.org** or write to them at the following address:

**Alliance Defense Fund
15100 N. 90th Street
Scottsdale, AZ 85260**

Summary of Terms

Associated Student Body (ASB) Funds/Student Organizational

Funds — funds typically derived from student fees, as opposed to taxpayer dollars given to the school by the government.

Closed Forum — a forum where schools have the greatest discretion to restrict speech. Schools may disallow all student groups, or set neutral policies as to which groups are allowed, but cannot regulate or discriminate based on viewpoint.

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.

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.”

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 must be reasonable in light of the forum’s purpose. *Good News Club v. Milford*, 533 U.S. 98, 106-07 (2001).

Matter of Public Concern — issue one would discuss that is of interest to the general public, not simply an internal workplace matter.

Non-curriculum 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 *Mergens*, 496 U.S. at 239). The Pope court also said that religious and political clubs by their nature are non-curriculum related. *Id.*

Noninstructional Time — “time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.” Equal Access Act, § 4072(4).

Nonschool Persons — anyone who is not affiliated with the school, as either an employee or a student.

Private Group/Community Group — a group which is not a recognized school club and whose access therefore is not protected by the Equal Access Act. These groups’ 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., limited open, closed — see this glossary for definitions).

Private Speech — individual speech that is always protected.

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.” Equal Access Act, § 4072(2).

End Notes

¹ 20 U.S.C. § 4071 (2005).

² *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 238 (1990) (“[T]he purpose of granting equal access is to prohibit discrimination between religious or political clubs on the one hand and other non-curriculum-related student groups on the other. ...”).

³ § 4071(b). The Act defines a “limited open forum” as existing in a public high school “whenever such school grants an offering to or opportunity for one or more non-curriculum related student groups to meet on school premises during noninstructional time.” *Id.*

⁴ § 4071(c)(1)-(3), (5).

⁵ § 4071(c)(4); cf. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 509 (1969); *Mergens*, 496 U.S. at 241.

⁶ § 4071(f); *Mergens*, 496 U.S. at 241.

⁷ U.S. CONST. amend. I.

⁸ *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.

⁹ See *Prince*, 303 F.3d at 1092.

¹⁰ *Id.* at 1091. See also *Good News Club v. Milford Cent Sch.*, 533 U.S. 98 (2001); *Widmar v. Vincent*, 454 U.S. 263, 269 (1981).

¹¹ § 4071(b).

¹² § 4072(4).

¹³ *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), cert. denied, 540 U.S. 813 (2003).

¹⁴ *Donovan*, 336 F.3d at 223-24.

¹⁵ *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).

¹⁶ See, e.g., *Prince*, 303 F.3d at 1082.

¹⁷ In that case, the school established a limited public forum by choosing to grant access to school equipment, and, therefore, “could not 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 v. Vincent*, 454 U.S. 263, 269 [1981]).

¹⁸ *Lee v. Weisman*, 505 U.S. 577 (1992) (prayer at graduation limited).

¹⁹ *Id.*, *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (“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.”).

²⁰ *Prince*, 303 F.3d at 1092; see also *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995).

²¹ *Mergens*, 496 U.S. at 251; *Prince*, 303 F.3d at 1094.

²² 20 U.S.C. § 4071(d)(3) (2005); see also *Prince*, 303 F.3d at 1090.

²³ *Mergens*, 496 U.S. at 247; *Prince*, 303 F.3d at 1086-87, 1092.

- ²⁴ See *Thompson v. Waynesboro Area Sch. Dist.*, 673 F.Supp. 1379, 1393 (M.D.Pa. 1987) (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).
- ²⁵ 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 fund-raising activities based on the group's Christian viewpoint).
- ²⁶ However, if student funds are derived solely from taxes, there may be an exception. See *Id.* at 1093-94.
- ²⁷ *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).
- ²⁸ See *Good News Club v. Milford Cent Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).
- ²⁹ *Widmar v. Vincent*, 454 U.S. 263, 270 (1981).
- ³⁰ *Chalfoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp 659, 670 (S.D. Tex. 1997).
- ³¹ 20 U.S.C. § 4071(c)(4) (2005); see also *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 509 (1969).
- ³² See *Bd. of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 238 (1990).
- ³³ *Tinker*, 393 U.S. at 509, 513 (citing *Burnside v. Byars*, 363 F.2d 744, 749 [1966]).
- ³⁴ See *James v. Bd. of Educ.*, 461 F.2d 566, 571-72 (2d Cir. 1972).
- ³⁵ See *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991).
- ³⁶ § 4071(c)(1)-(3).
- ³⁷ 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 v. Vincent*, 454 U.S.263, 274 n.14 (1981).
- ³⁸ § 4071(c)(5).

- ³⁹ For an example of a student speaking on behalf of the school, see *Santa Fe v. Doe*, 530 U.S. 290 (2000), where a student leading prayer before school football games was seen as bearing the “imprint of the state” since the prayer was specifically allowed by a school policy, and delivered on school property, during a school-sponsored event under faculty supervision.
- ⁴⁰ *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 293 (E.D. Pa. 1991).
- ⁴¹ See *Id.* at 293-94.
- ⁴² *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511-12 (1969).
- ⁴³ *Wigg v. Sioux Falls Sch. Dist.*, 382 F.3d 807, 815 (8th Cir. 2004).
- ⁴⁴ *Lee v. Weisman*, 505 U.S. 577, 598-99 (1992).
- ⁴⁵ *Wigg*, 382 F.3d at 813 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 [1995]).
- ⁴⁶ *Rosenberger*, 515 U.S. at 828-29.
- ⁴⁷ See *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992); *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000); *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070 (11th Cir. 2000).
- ⁴⁸ See *Doe v. Duncanville Independent School District*, 70 F.3d 402, 405 (5th Cir. 1995) (noting that while coaches were not permitted to lead or participate in prayer, students could still do so).
- ⁴⁹ *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.”).
- ⁵⁰ *Id.*; see also *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).
- ⁵¹ *Chandler*, 230 F.3d at 1317.
- ⁵² *Santa Fe*, 530 U.S. at 290.
- ⁵³ *Id.* at 305 (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992)).
- ⁵⁴ *James v. Bd. of Educ.*, 461 F.2d 566, 574 (2d Cir. 1972), *cert. den.*, 409 U.S. 1042 (1972), *reh’g denied*, 410 U.S. 947 (1973).
- ⁵⁵ *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).

⁵⁶ *Bishop*, 926 F.2d at 1074.

⁵⁷ Dena S. Davis, *Religious Clubs in the Public Schools: What Happened After Mergens?* 64 ALB. L. REV. 225, 238 (2000); see *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1245 (3d Cir 1993) (court found that school was entitled to close its forum, but had failed to do so); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 290 (1990) (dissent stating that a school's only recourse is to close its doors to traditional extracurricular activities).

⁵⁸ *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 405 (5th Cir. 1995).

⁵⁹ *Id.* at 406 (citing *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160, 1168 (7th Cir. 1993)); see also *Lee v. Weisman*, 505 U.S. 577, 586-87 (1992); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981).

⁶⁰ See *Bishop*, 926 F.2d at 1076 (holding that a professor who was told by university he could not hold an optional class period to discuss subject matter from a Christian perspective was not deprived of free exercise or free speech rights, due to the concerns of coercion and appearance of endorsement).

⁶¹ *Doe v. Duncanville*, 70 F.3d at 406 n.4 (same idea in reference to teachers: "Nothing compels [school] employees to make their nonparticipation vehemently obvious or to leave the room when students pray. ... However, when acting in their official capacities, [school] employees join hands in a prayer circle or otherwise manifest approval and solidarity with student religious exercises, they cross the line between respect for religion and endorsement of religion.").

⁶² 20 U.S.C. § 4071(c)(3) (2005).

⁶³ *James v. Bd. of Educ.*, 461 F.2d 566 (2d Cir. 1972), *cert. den.*, 409 U.S. 1042 (1972), *reh'g denied*, 410 U.S. 947 (1973).

⁶⁴ See *Wigg v. Sioux Falls Sch. Dist.*, 382 F.3d 807, 814 (8th Cir. 2004) (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).

⁶⁵ *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. ...").

- ⁶⁶ *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 777 F.2d 1046, 1053-54 (5th Cir. 1085), *aff'd* 479 U.S. 801 (1986); *Tucker v. State of Cal. Dept. of Educ.*, 97 F.3d 1204, 1213 (9th Cir. 1996) (state school board could not restrict employees' religious speech where students were not exposed to the speech).
- ⁶⁷ *Tilton v. Richardson*, 403 U.S. 672, 686 (1971). See also *Scallet v. Rosenblum*, 911 F.Supp. 999 (W.D. Va. 1996) ("...achieving some sort of uniform value system is not part of the mandate of higher education."); John W. Hamilton, *Religion-Tainted Viewpoints are Banned from the Marketplace of Ideas*, 49 WASH. & LEE L. REV. 1557, 1558 (1992).
- ⁶⁸ *Widmar v. Vincent*, 454 U.S. 263, 271 (1981).
- ⁶⁹ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) (striking down restrictions a university placed on funding a registered student journal with a decidedly Christian viewpoint, when the university's policy to cover production costs of all registered student journals was neutral on its face).
- ⁷⁰ *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547, 552-53 (5th Cir. 1982), *cert. denied*, 457 U.S. 1106 (1982) (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Healy v. James*, 408 U.S. 169, 180-81 [1972]).
- ⁷¹ *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1275 (5th Cir. 1982).
- ⁷² *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991).
- ⁷³ *Id.* at 1076 ("When [a professor] makes it plain to his students that such meetings are not mandatory, not considered part of the course work, and not related to grading, the university cannot prevent him from conducting such meetings. ...").
- ⁷⁴ *Connick v. Myers*, 461 U.S. 138, 146 (1983).
- ⁷⁵ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).
- ⁷⁶ *Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Circ. 1994).
- ⁷⁷ *Bishop*, 926 F.2d at 1076.

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