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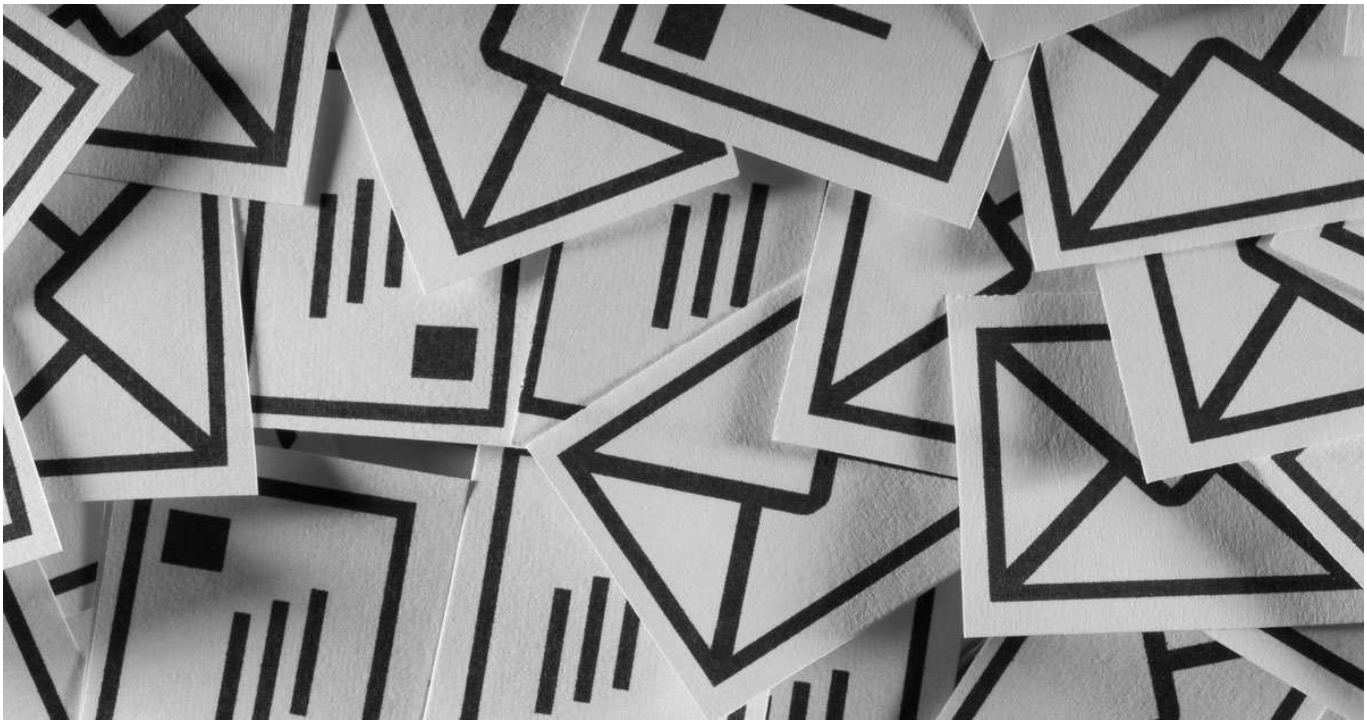
Emerging School Law Issues

CAS Legal Mailbag Question of the Week – 1/21/2021



By Thomas B. Mooney on January 21, 2021

Dear Legal Mailbag:

As a middle school principal and a fan of *Legal Mailbag*, I read with interest your reference last week to the Equal Access Act. We have a number of clubs at our school, but we know where to draw the line. For example, a local preacher asked me earlier this year to grant him permission to extend his ministry to my school. Specifically, he and several students from my school submitted an application for school approval of a new club, The High Road, which was to meet weekly to study the Bible and do good works in my school.

I did take a school law course when I was studying for my 092 Intermediate Administration and Supervision certificate, and I think that I know what is what. I told the preacher that my school (and all public schools) are required to maintain a "wall of separation" between church and state. Given that requirement, I went on, there is no way on God's green earth that I could permit him to come into my school to promote the Bible and do good works.

The preacher was good about it, and he dropped the idea. But your reference to the Equal Access Act piqued my curiosity. Did I do the right thing? I certainly don't want to be sued or go to Hell or anything.

Signed,
A Curious Soul

Dear Curious:

On the facts that you shared, Legal Mailbag concludes that you did the right thing. But as usual, there is more to the story. The Equal Access Act, found **here**, is a federal law passed by Congress in 1984, and it permits students in secondary schools to establish clubs on their own. Subject to the limitations described below, school districts that accept federal funds (i.e., all of them) must permit all non-curriculum related student groups to meet on school property during non-instructional time without discrimination by school authorities "on the basis of the religious, political, philosophical, or other content of the speech" if they permit any non-curriculum related student groups to meet during non-instructional time. The construct is that schools create a limited public forum when they permit non-curriculum related student clubs to meet, and once school officials create that forum (for example, by permitting the organization of a ski club or a social service club), other students have a right to equal access to that forum for the club activities that they wish to pursue.

There are limitations on this right of equal access, and those limitations justified your denying the request of the preacher here. Among the limitations on equal access for independent school clubs are the following:

> (3) employees or agents of the school or government are present at religious meetings only in a non-participatory capacity;
> (5) non-school persons may not direct, conduct, control, or regularly attend activities of student groups.

Since the preacher is not a school official, his proposal to lead the club activities falls outside the scope of the Equal Access Act.

That said, it is clear that students themselves may organize Bible study or other religious clubs as long as their activities are not directed by outside persons. Congress enacted the Equal Access Act in response to some court rulings that religious clubs violated the First Amendment prohibition against government establishment of religion. At the time, Legal Mailbag and others wondered whether the Equal Access Act would survive the challenge, given the strong precedent from various lower courts holding that Bible-study clubs in public secondary schools violate the First Amendment. However, the United States Supreme Court decided the matter in 1990, ruling that the Equal Access Act is constitutional. *Westside Community Board of Education v. Mergens, 496 U.S. 226* (1990).

Interestingly, though the thrust behind the Equal Access Act was clearly to give religious clubs in secondary schools equal access to school facilities, the broad language of the law enables students to create any number of clubs without discrimination "on the basis of the religious, political, philosophical, or other content of the speech," and such speech includes gay-straight alliance clubs or similar clubs. Indeed, a group in Bethesda, Maryland, reports that over half of the high schools in Connecticut have such clubs. **https://www.childtrends.org/blog/11-5-19**.

Finally, Legal Mailbag notes that you are the principal of a middle school, which makes your question even more interesting. The Equal Access Act confers these rights on students in "secondary schools," a term that divides K-12 education into two parts – elementary and secondary. However, the term "secondary school" is not defined under Connecticut law, which divides K-12 education into three parts – elementary, middle and high schools. Should we consider middle schools in Connecticut to be "secondary" schools subject to the Equal Access Act? Legal Mailbag thinks so, but it is not clear. Such uncertainties keep us all young.

Originally appeared in the ***CAS Weekly Newsletter***.