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# Legal Issues Related to Extracurricular Activities

by Jean M. Cary

Extracurricular activities are generally defined as those voluntary activities sponsored or sanctioned by a school that supplement or complement the school's instructional program but are not a part of it<sup>1</sup>—for example, student government, interscholastic athletics, service clubs, drama and French clubs, and many others. The operation of extracurricular activities can generate a variety of legal controversies. Common questions include (1) whether students have a “right” to participate in extracurricular activities, (2) what kinds of fees or insurance requirements can be placed upon participants, (3) how a school should regulate the contracts and finances of extracurricular activities, (4) what types of membership policies are acceptable in light of Title IX's prohibition on sex discrimination, (5) how the risk of tort liability can be minimized, and (6) how the Equal Access Act affects school policies concerning extracurricular activities. This article addresses each of these questions.

## The Right to Participate

Controversy over whether an individual student can participate in extracurricular activities is most likely to arise when that student is suspended from extracurricular activities for disciplinary reasons or is excluded from an honorary group because he or she did not meet one or more of the admission requirements, such as a specified grade point average or satisfactory faculty recommendations.

On what basis are disgruntled students likely to claim they have a “right” to participate in extracurricular activities? The federal Constitution protects people's rights to life, liberty, or property by providing that no one may be denied one of these rights without due process of law. Disgruntled students may claim that participation in extracurricular activities is a property interest. Thus, the students may claim, they are entitled to “due process”—that is, they must be given notice and a hearing that includes their being told why they are to be denied the right and their having a chance to tell their side of the story before being excluded from an extracurricular activity.

Is the right to participate in extracurricular activities a property interest, protected by the constitutional guarantee of due process?<sup>2</sup> With the rising importance of scholarships and the concomitant decrease in federal funding for college aid, students and their parents have claimed that because extracurricular activities are a springboard to college and professional opportunities, they are an integral part of the education process and thereby merit due process protection. Nevertheless, the great majority of courts that have considered the question have concluded that, while important to the student's development, extracurricular activities do not rise to the level of a property interest, and the right to engage in them may therefore be denied without due process.<sup>3</sup>

For example, an eleventh grader in Wisconsin claimed that he was unfairly denied membership in his

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1. Martha McCarthy and Nelda Cambron-McCabe, *Public School Law, Teachers' and Students' Rights*, 3d ed. (Boston: Allyn and Bacon, 1992), 126; James Rapp, *Education Law* (New York: Matthew Bender, 1991), vol. 2, § 8.07[1].

2. See *Goss v. Lopez*, 419 U.S. 565 (1975).

3. *Palmer v. Merluzzi*, 689 F. Supp. 400, 408 (D.N.J. 1988), *aff'd*, 868 F.2d 90 (3d Cir. 1989). See also *Denis J. O'Connell High School v. Virginia High School League*, 581 F.2d 81, 84 (4th Cir. 1978), in which the court stated that neither participation in interscholastic athletics nor the speculative possibility of acquiring an athletic scholarship is a fundamental right under the Constitution.

school's chapter of the National Honor Society because he did not receive a majority vote in favor of his selection from a faculty selection committee. He sued, alleging that the selection process violated his constitutional right of due process, and sought a court order that he be admitted to the honor society unless a new and impartial panel was appointed to review his application. The federal district court concluded that "an applicant for membership in the National Honor Society has no constitutionally protected liberty or property interest in *selection* to the society. The procedures governing the election process, therefore, need not afford to an applicant the requirements of due process of law."<sup>4</sup> Because the young man's constitutional rights were not violated, the case was dismissed.

Another case involved a starting player on the football team who was suspended from school for ten days and denied the right to participate in extracurricular activities for sixty days after he admitted that he had smoked marijuana and drunk beer at the school radio station. The student was not given a hearing before he was suspended from extracurricular activities. The administrative law judge who first heard the case concluded that the student had not received adequate due process before the suspension, but the federal district court concluded that students do *not* have a federally protected property interest in extracurricular activities.<sup>5</sup> Therefore this student was not entitled to notice and a hearing before the sixty-day suspension was imposed.

In a case involving student council elections, a boy was denied the opportunity to run for council president because he did not meet a faculty approval criterion, specified by student council bylaws, that required all students who wished to run for office to have written approval of their candidacy from two thirds of their current teachers (four of his seven teachers declined to

approve).<sup>6</sup> The student spearheaded a "write-in" campaign, but write-in votes were not counted in determining a winner because the school's constitution and bylaws did not provide for them. In federal court the student sought to have the election set aside, himself installed as student council president, and the school enjoined from enforcing the faculty-approval bylaw.

The court held that the student had no constitutional right to run for high school student council. Nevertheless, it noted that the faculty-approval policy could not (1) infringe on a fundamental right like the student's First Amendment right of free speech, (2) provide opportunities other than on a fair and equal basis, or (3) extend or withdraw a privilege arbitrarily.<sup>7</sup> After examining the policy, the court concluded that it did not burden the plaintiff's First Amendment rights, did not grant unfettered discretion to teachers and thus was not arbitrary or discriminatory, and served a legitimate educational purpose of ensuring that qualified, responsible students would be elected. Thus the policy did not violate the student's constitutional rights.<sup>8</sup>

In *Pegram v. Nelson*<sup>9</sup> a federal court in North Carolina concluded that "[t]he opportunity to participate in extracurricular activities is not, by and in itself, a property interest." A student had been suspended from school for ten days and suspended from all extracurricular activities for four months after he was accused of stealing money from a teacher's purse during a school basketball game. The boy argued that he should have received a full administrative hearing before the suspension. Saying that it knew of no North Carolina statute or law that created a right to participate in extracurricular activities, the court clearly held that the plaintiff had no property interest in extracurricular activities. But it did allow that "*total exclusion* from participation in . . . extracurricular activities for a *lengthy period of time*" might be a sufficient deprivation to require due process.<sup>10</sup> Because the student in this case had been excluded from only those extracurricular activities that occurred after school and only for four months, the court said, he had been afforded all the due process he was entitled to.<sup>11</sup>

Since *Pegram* was decided, most courts in other jurisdictions have found that students do not have a

4. *Karnstein v. Pewaukee School Bd.*, 557 F. Supp. 565, 567 (E.D. Wis. 1983), *aff'd* (7th Cir. 1984, unpublished opinion) (emphasis added). *But see Wort v. Vierling*, No. 82-3169 (C.D. Ill. Sept. 4, 1984), *aff'd on other grounds*, 778 F.2d 1233 (7th Cir. 1985), and *Pfeiffer v. Marion Center Area School Dist.*, 917 F.2d 779 (3d Cir. 1990) (dismissal of a pregnant student from the National Honor Society may violate Title IX and the student's equal protection rights). For cases finding no property interest, see *Dangler v. Yorktown Cent. Schools*, 771 F. Supp. 625, 1175 (S.D.N.Y. 1991) (school system awarded attorneys' fees after jury ruled in its favor and district court held that plaintiff's lawsuit was frivolous); *Price v. Young*, 580 F. Supp. 1 (E.D. Ark. 1983) (membership in the honor society does not give rise to a property interest that entitles one to due process of law); *Moore v. Hyche*, 761 F. Supp. 112 (N.D. Ala. 1991) (no liberty or property interest in membership in the Beta Club). See also Ivan Gluckman, "Non-Selection for Membership in a High School Honor Society: The Limits of Student Constitutional Protection," *Education Law Reporter* 22 (1985): 683.

5. *Palmer v. Merluzzi*, 689 F. Supp. 400, 410 (D.N.J. 1988), *aff'd*, 868 F.2d 90 (3d Cir. 1989).

6. *Bull v. Dardanelle Pub. School Dist.*, 745 F. Supp. 1455 (E.D. Ark. 1990). See also *Poling v. Murphy*, 872 F.2d 757, 764 (6th Cir. 1989) (no constitutional right to run for high school student council).

7. *Bull*, 745 F. Supp. at 1461, citing James Rapp, *Education Law* (New York: Matthew Bender, 1990), vol. 2, § 8.07[2][a].

8. *Bull*, 745 F. Supp. at 1461-62.

9. 469 F. Supp. 1134, 1139 (M.D.N.C. 1979).

10. *Id.* at 1140 (emphasis in original).

11. *Id.* The student was told of the accusation and evidence against him and given a chance to explain his version of the facts.

property interest in extracurricular activities and therefore have no right to due process if they are denied the opportunity to participate.<sup>12</sup> But a few courts, none with jurisdiction over North Carolina, have held that students have a property interest when they plan to use the extracurricular activity as a springboard for college scholarships or future employment.<sup>13</sup> Because school officials will not be faulted for providing too much due process, they would be wise to offer the student at least an opportunity to explain his or her side of the story before depriving the student of the right to participate in extracurricular activities. This makes sense educationally as well because every occasion of discipline is an opportunity for learning. In addition, school officials want to avoid erroneous or arbitrary decisions.

While courts have held that students do not have a property interest in membership in extracurricular activities like an honor society, other statutory or constitutional rights can be violated when a student is not allowed to participate in an activity. For example, one court held that school officials in Illinois violated both Title IX of the Education Amendments of 1972 and the equal protection clause of the Fourteenth Amendment of the Constitution when they dismissed a pregnant girl from the National Honor Society.<sup>14</sup> A court will reach this conclusion if a school system has a double standard with respect to discipline—that is, for example, if girls are removed from extracurricular activities as discipline for sexual conduct leading to pregnancy but boys who father children are not.

## Required Fees or Insurance as a Condition for Participation

May a school system charge students a fee to participate in athletics or other extracurricular activities? In *Sneed v. Greensboro City Board of Education* the North Carolina Supreme Court addressed whether the state

constitutional guarantee of a “general and uniform system of free public education” precludes charging students with incidental course and instructional fees.<sup>15</sup> The court held that collecting modest, reasonable fees for supplies, materials, and supplementary materials from students who are financially able to pay did not violate the North Carolina Constitution. For the fees to be constitutional, however, the school system must give students and their parents adequate, timely notice that a waiver is possible and simple, confidential procedures for applying for it.<sup>16</sup> In addition, Section 115C-103 of the North Carolina General Statutes authorizes school systems to collect “fees, charges, and costs” from students and their parents as long as the local board has approved the fees.<sup>17</sup> But neither the North Carolina Supreme Court nor the statute specifically speaks to whether participation in extracurricular activities can be conditioned on payment of a fee. It appears that a modest, reasonable fee may be imposed on students who participate in extracurricular activities as long as the local board approves the fee and some sort of waiver system is included for students who cannot pay.

In 1988 the North Carolina attorney general was asked whether a school board was authorized to adopt a policy that (1) required all students to purchase hospitalization insurance before they could participate in extracurricular activities, (2) had no waiver for students who have other insurance or cannot afford the fee, and (3) provided that the school insurance would not pay any benefits if a claim was covered by other insurance. In an unpublished opinion the attorney general responded that such a policy would very likely be unconstitutional if it did not contain a waiver for low-income and indigent students. Second, because any fees adopted by the school board must be reasonable, the proposed policy would have to be examined for “reasonableness.” In this case the attorney general stated that the proposed policy may not be reasonable because in some circumstances it would serve no useful purpose. For example, required school insurance under these conditions would be unnecessary for students who are covered by other insurance, by Medicaid, or by the catastrophic hospitalization plan that covers high school students who participate in interscholastic athletics.<sup>18</sup>

12. Martha McCarthy and Nelda Cambron-McCabe, *Public School Law, Teachers' and Students' Rights*, 3d ed. (Boston: Allyn and Bacon, 1992), at 131. See also *Palmer v. Merluzzi*, 689 F. Supp. 400, 408-9 (D.N.J. 1988), *aff'd*, 868 F.2d 90 (3d Cir. 1989), for a listing of cases in other jurisdictions.

13. *Boyd v. Board of Directors of McGehee School Dist. No. 17*, 612 F. Supp. 86, 93 (E.D. Ark. 1985) (outstanding player's status as member of football team during senior year was very important to student's development educationally and economically); *Duffley v. New Hampshire Interscholastic Athletic Ass'n*, 446 A.2d 462, 467 (N.H. 1982) (state constitutional claim); *Behagan v. Intercollegiate Conf. of Faculty Representatives*, 346 F. Supp. 602, 604 (D. Minn. 1972) (intercollegiate athletics).

14. *Wort v. Vierling*, No. 82-3169 (C.D. Ill. Sept. 4, 1984), *aff'd on other grounds*, 778 F.2d 1233 (7th Cir. 1985). See also *Pfeiffer v. Marion Center Area School Dist.*, 917 F.2d 779 (3d Cir. 1990).

15. 299 N.C. 609, 264 S.E.2d 106 (1980). See generally Thomas J. Pepe and Alice L. Tufts, “Pay for Play: Fees for Extracurricular Activities,” *Education Law Reporter* 16 (1984): 1013.

16. *Sneed*, 299 N.C. at 617, 264 S.E.2d at 114.

17. N.C. GEN. STAT. § 115C-47(b). Hereinafter the General Statutes will be referred to as G.S.

18. Unpublished Attorney General's Opinion, April 14, 1988, as digested in “Clearinghouse,” *School Law Bulletin* 19 (Fall 1988): 25.

## School Officials' Power to Regulate

North Carolina law requires local school boards to control extracurricular activities: "Local boards of education shall make all rules and regulations necessary for the conducting of extracurricular activities in the schools under their supervision, including a program of athletics, where desired, without assuming liability therefor; provided, that all interscholastic athletic activities shall be conducted in accordance with rules and regulations prescribed by the State Board of Education."<sup>19</sup> The board may delegate some of this authority to the superintendent and the individual school principals so long as it retains the ultimate control.

### Contracts

According to G.S. 115C-522(a), boards of education, not principals or other employees of the board, have the sole authority to purchase all school supplies, equipment, and materials. The state court of appeals has said that this statute applies to purchases for extracurricular activities as well as to purchases for regular classroom use.<sup>20</sup> One teacher violated this statute when he contracted directly with a supplier for the delivery of 870 decorative oil lamps to be sold in a fund raiser to buy robes for the school chorus.<sup>21</sup> Neither the school principal nor the local school board ratified (that is, approved or confirmed) the contract. When the teacher left school at mid-year, the principal returned the unsold lamps and the money that had been collected. The supplier sued the teacher, the high school, the board of education, and the individual board members, seeking the \$2,500 it had lost in the transaction. The appeals court ruled that the supplier could not collect the unpaid portion of the contract from the school board because under the statute the board *alone* had the power to make the contract, and it had neither made nor ratified the contract. The court further found that the principal also was not authorized to ratify the contract.

G.S. 115C-522(a) does not refer explicitly to contracts for "services." Presumably a court would also require the local school board's approval before school officials could sign a contract for services—for example, before they booked a band to play at a dance. The school board may choose to delegate authority to enter into certain types of contracts to the superintendent or school principal, but principals and faculty advisers should take care to determine their board's policy on delegating power

to make contracts before they unwittingly sign a contract they are not authorized to make.

Occasionally students attempt to enter contracts on behalf of student clubs. Board policy should prohibit this practice. Most student participants in extracurricular activities are unemancipated minors—that is, they are under age eighteen and still legally dependent on their parents or guardians. In North Carolina contracts entered into by unemancipated minors are voidable at the option of the minor.<sup>22</sup> Most contracts are agreements whose terms both parties can enforce legally. If a contract is voidable, one party has no power to enforce its provisions, while the other party—in this case the student—can choose either to enforce or to void the agreement.

### Finances

G.S. 115C-448 provides for the control of extracurricular student groups' finances by school officials. The local board is required to appoint a treasurer for each school to handle special funds. Special funds include, but are not limited to, "funds realized from gate receipts of interscholastic athletic competition, sale of school annuals and newspapers, and dues of student organizations." Student organizations are not authorized to keep their own funds; they must turn them over to the school treasurer.

The treasurer must keep a complete record of all moneys in his or her charge. The treasurer provides reports to the superintendent and the school system's finance officer as they or the board of education require.

Each school system must have an official depository where the various schools' special funds are kept. The funds must go into special accounts that are credited to the respective schools, and they may be withdrawn only by checks or drafts signed by the treasurer and the principal of the school whose account is to be debited.<sup>23</sup> Students and faculty advisers may not authorize or sign checks from these special funds.

When the fiscal year closes, each school system must have its own accounts and the accounts of its individual schools audited.<sup>24</sup> Embezzlement or misapplication of

22. G.S. 48A-2 (1984). Occasionally courts have upheld contracts entered into by minors when the contract is for "necessaries," as for food or lodging. See 7 17 N.C. INDEX 4th, *Infants or Minors* § 6 (1992). See also *Fisher v. Taylor Motor Co.*, 249 N.C. 617, 107 S.E.2d 94 (1959) (North Carolina Supreme Court permitted a minor to renounce a contract for purchase of a car and receive a refund of the contract price; the court allowed this refund even though the minor had wrecked the car during his brief ownership).

23. G.S. 115C-448(a) (1987). The local board of education also has the power to require that all funds of individual schools be deposited with and accounted for by the school finance officer and disbursed and accounted for in the same manner as other school funds. *Id.* § 115C-448(b).

24. G.S. 115C-447 (1989).

19. G.S. 115C-47(4) (1987).

20. *Community Projects for Students v. Wilder*, 60 N.C. App. 182, 298 S.E.2d 434 (1982).

21. *Id.*

funds by a school official is a Class H felony punishable by up to ten years in prison, a fine, or both.<sup>25</sup> There are no reported North Carolina cases concerning the misapplication of student funds.

In a Mississippi case involving the misapplication of extracurricular funds the principal had received money from students to order caps and gowns but had used the funds to purchase fans for the cafeteria. This case illustrates the problem school officials may encounter if they do not apply strict accounting procedures to the funds of student organizations.<sup>26</sup> The court concluded,

[O]ne who is authorized to receive "activities funds" should make, as a minimum, at least some record of how much he receives, from whom, and for what purpose he receives it, to whom he paid the funds, and on what account. When a school principal buys books, class rings, class annuals, class pictures and other articles, and equipment for resale to students—or on order from the students—the sums paid by the students should be applied to that particular account payable and should not be applied to other school activities.<sup>27</sup>

## Membership Policies

Participation in extracurricular activities must be available to all qualified students regardless of religion, sex, race, or disability.<sup>28</sup> Other types of requirements for participation in an activity—for example, a specified grade point average for membership in an honor society—will generally be upheld unless they are capricious, arbitrary, or unjustly discriminatory.<sup>29</sup> In general, membership policies based on the sex of the participants must comply with the requirements of Title IX, as follows.

In recent years, most legal questions involving membership policies have focused on activities that were traditionally all male or all female. Under Title IX<sup>30</sup> school systems that receive federal assistance may not discriminate against students on the basis of sex in any academic or extracurricular program or activity offered by the

school system.<sup>31</sup> For instance, under Title IX school officials may not form a "females only" science club to encourage girls to pursue careers in science.

That is the general rule, but Title IX regulations contain two specific exceptions to it. First, the YMCA, YWCA, Girl Scouts, Boy Scouts, and Camp Fire Girls are exempted by name from complying with membership requirements of Title IX.<sup>32</sup> Thus activities sponsored by these organizations that are part of the school extracurricular program are also exempt. Second, voluntary youth service organizations whose membership has traditionally been limited to persons of one sex, most of whom are younger than nineteen, are also exempt from Title IX membership requirements. Thus if a school has traditionally had some type of all-male or all-female service club, the club could continue to exist without violating Title IX.<sup>33</sup> Title IX also does not apply to any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys' State Conference, Boys' Nation Conference, Girls' State Conference, or Girls' Nation Conference.<sup>34</sup> It also does not prohibit father-son and mother-daughter activities at an educational institution, so long as reasonably comparable activities are provided for students of each sex.<sup>35</sup>

Title IX forbids discrimination based on sex in interscholastic, club, or intramural athletics.<sup>36</sup> But school officials do not violate Title IX when they operate or sponsor separate teams for members of the respective sexes if selection is based on competitive skill or when the activity involved is a contact sport. But if the sport is not a contact sport, if the school does not sponsor a team in the same sport for members of the other sex, and if opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the existing team.<sup>37</sup> Contact sports are defined as including boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.<sup>38</sup> In addition, some courts have required schools to permit females to try out for traditionally male teams in contact sports as well as noncontact sports.<sup>39</sup> These courts have reasoned that the denial of the right to participate constituted a

25. *Id.* §§ 14-92 and 14-1.1 (1986).

26. *State v. Eakin*, 203 So. 2d 587 (Miss. 1967).

27. *Id.* at 589.

28. *Ridgeway v. Montana High School Ass'n*, 633 F. Supp. 1564, 1579 (D. Mont. 1986). See also *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954); U.S. CONST. amend. I; 42 U.S.C. § 2000d(1)-(7) (1988); 20 U.S.C. §§ 1681-82 (1988); § 504, Rehabilitation Act of 1973, 29 U.S.C. §§ 701 (1988); Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (1988); and G.S. 168A-1 (1987). The topic of extracurricular activities and students with disabilities will not be discussed in this article.

29. James Rapp, *Education Law* (New York: Matthew Bender, 1991), vol. 2, § 8.07[2][b].

30. 20 U.S.C. §§ 1681-82 (1988). For more information on Title IX and sex discrimination, see Jean M. Cary, "Title IX: Sex Discrimination in Public Elementary and Secondary Schools," *School Law Bulletin* 22 (Spring 1991): 8-18.

31. 34 C.F.R. § 106.31.

32. 20 U.S.C. § 1681(a)(6)(B) (1988).

33. *Id.*

34. *Id.* § 1681(a)(7) (1982).

35. *Id.* § 1681(a)(8) (1982).

36. 34 C.F.R. § 106.41(a).

37. *Id.* § 106.41(b).

38. *Id.*

39. *Saint v. Nebraska School Activities Ass'n*, 684 F. Supp. 626 (D. Neb. 1988) (wrestling); *Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985)

violation of either state law or the constitutional right to equal protection even though Title IX permits separate teams in contact sports.

## Liability for Injuries Incurred during Extracurricular Activities

As with curricular activities, school officials should strive to operate extracurricular programs that are safe for student participants, employees, and spectators. Among other duties, school officials must hire, train, and supervise qualified coaches and other personnel, provide appropriate equipment, inspect buildings and playing fields for unsafe conditions, provide safe transportation, and provide safe conditions for spectators.

How can school officials determine what amount of supervision to provide at extracurricular activities? The general rule is that school officials owe a student participant in an extracurricular activity the same degree of care as is required for a participant in a curricular activity.<sup>40</sup> In North Carolina the test of the extent of the school unit's duty to safeguard a student from danger is the foreseeability that the student will be harmed by the relevant activity or condition. School employees are bound to anticipate and guard against hazards that are common or likely to occur; they are not expected to anticipate and guard against the unusual or the only remotely probable.<sup>41</sup>

Thus, in a relatively safe activity like a French club meeting, students need not be supervised every minute if the teacher has no reason to anticipate that a problem will occur. But at a hotly contested intramural championship game, school officials certainly can foresee that injuries might occur or that tempers may flare in the heat of the competition and therefore should provide sufficient supervision to control the situation. At large events where many spectators will be present, arrangements should be made with appropriate law-enforcement agencies for personnel to provide adequate crowd control.

School officials must be uncompromising in their enforcement of fire and safety regulations—including making sure that fire exits are unlocked and accessible and wiring for concession stands meets all building code regulations. Fear of lost revenue if a few spectators

“sneak in” is no justification for violating fire regulations and endangering large numbers of student participants and spectators.

## Extracurricular Activities and the Equal Access Act

Although North Carolina law governs most regulations for extracurricular activities, a major exception to this rule is the Equal Access Act. Before this legislation was passed in 1984, local school boards were free, within the limits of the United States Constitution and state law, to fashion their own policies concerning which student clubs would be allowed to meet on campus. Some school systems permitted student religious clubs; others did not, primarily because they believed that such clubs violated the establishment of religion clause of the United States Constitution, as some courts had held.<sup>42</sup>

In response to the controversy surrounding this issue, Congress passed the Equal Access Act (EAA).<sup>43</sup> The EAA provides that if a public high school that receives federal aid allows one or more “noncurriculum-related” extracurricular student groups to meet on school grounds during “noninstructional time,” the school has created a “limited open forum” and must grant a fair opportunity (“equal access”) to all such noncurriculum-related student groups without discriminating against any such group “on the basis of the religious, political, philosophical, or other content” of views expressed during the group’s meetings.<sup>44</sup> Basically the EAA provides that once high school officials allow one student group to meet on campus for purposes not related to curriculum, they may not deny similar permission to other noncurriculum-related student groups.

A high school that allows noncurriculum-related groups will be deemed to offer a fair opportunity or equal access to such groups if school policy provides that (1) meetings shall be voluntary and initiated by students; (2) meetings shall not be sponsored by the school, the government, or its agents; (3) employees or agents of the school or government who are present at religious meetings shall not participate in them; (4) the group shall not materially and substantially interfere with the orderly conduct of educational activities within the school; and (5) nonschool persons shall not direct, conduct, control, or

(football); *Force v. Pierce City R-VI School Dist.*, 570 F. Supp. 1020 (W.D. Mo. 1983) (football); *Hoover v. Meiklejohn*, 430 F. Supp. 164 (D. Colo. 1977) (soccer); *Balsley v. North Hunterdon Regional High School Bd. of Educ.*, 225 N.J. 221, 542 A.2d 29 (1988) (football); *Opinion of the Justices to the House of Representatives*, 374 Mass. 836, 371 N.E.2d 426 (1977) (all sports).

40. Douglas Punger, “The Legal Status of School Clubs,” *School Law Bulletin* 17 (Spring 1986): 18, 24.

41. *James v. Charlotte-Mecklenburg Bd. of Educ.*, 60 N.C. App. 642, 648, 300 S.E.2d 21, 24 (1983).

42. *Brandon v. Board of Educ. of Guilderland Central School Dist.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977), *cert. denied*, 434 U.S. 877 (1977); *Trietley v. Board of Educ.*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (N.Y. App. Div. 1978). *But see* *Reed v. Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965).

43. 20 U.S.C. §§ 4071-74 (1988).

44. *Id.* § 4071(a)-(b).

regularly attend the activities of a given student group.<sup>45</sup> These provisions were included in the EAA in part to assure that schools that permit noncurriculum-related clubs do not advertently or inadvertently sponsor or endorse religious clubs; such a sponsorship would violate the establishment clause.

Although the EAA was originally devised to give access to student religious groups, as finally enacted it grants access to all types of extracurricular groups, including political and philosophical groups as well as religious groups. Thus the EAA applies to mainstream groups and controversial fringe groups alike. A school that permits a Baptist student prayer group or a student Young Republicans group to meet on campus may not, on the basis of its members' views, bar a student Hare Krishna chanting group or a student Socialist group from meeting there.

The EAA applies only to schools that permit noncurriculum-related groups to meet during noninstructional time. If school officials do not allow any noncurriculum-related groups to meet on campus, their school is exempt from the EAA. The EAA defines a noncurriculum-related group as one with activities "not directly related to the school curriculum."<sup>46</sup>

### The *Mergens* Decision

After the EAA was enacted, questions arose about what noncurriculum related means. School officials found some groups difficult to label. While some types of groups plainly are related to the curriculum (for example, a language club, a choral group, or a literary magazine), others seem to be noncurricular, though they are not easily categorized (for example, a service club or a chess club).

In 1990 the United States Supreme Court clarified the definition of *noncurriculum related* when it decided *Board of Education of the Westside Community Schools v. Mergens*.<sup>47</sup> In *Mergens* a student at Westside High School in Nebraska had asked permission to form a club in which students would read and discuss the Bible, enjoy fellowship, and pray together. Students in the proposed club had sought the same privileges (including access to the school newspaper, bulletin boards, the public address system, and the annual club fair) as other officially recognized Westside clubs enjoyed, except that the club would not have a faculty sponsor. Membership would be voluntary and open to all, regardless of religious affiliation. When her request was denied, the girl challenged the denial in federal district court on the grounds that it violated the Equal Access Act and her First and

Fourteenth Amendment rights to the free exercise of religion. The school board responded that the EAA did not apply because Westside did not permit noncurriculum-related groups to meet on the school grounds and therefore was not a limited open forum. It also argued that even if the school did maintain such a forum, the EAA was unconstitutional because it violated the establishment clause of the First Amendment. The trial court ruled for the school board but was reversed by the United States Court of Appeals for the Eighth Circuit,<sup>48</sup> which held that many of Westside's student clubs were noncurriculum related. This fact, the appeals court said, triggered the EAA's requirement that the school not deny recognition to student groups on the basis of the religious content of club members' speech. The school board appealed to the United States Supreme Court.

In *Mergens* the Court faced two legal issues. First, were any of Westside's student groups noncurriculum related, so as to trigger the EAA's equal access requirement? And second, if so, did the act itself violate the establishment clause? The Court held that some of Westside's clubs were noncurriculum related and Westside was therefore a limited open forum for purposes of the EAA. It also held that the act was constitutional as applied to Westside.

The Court defined a curriculum-related student group as one that has "more than just a tangential or attenuated relationship to courses offered by the school."<sup>49</sup> It concluded that a "curriculum-related club" must have a more direct relationship to the curriculum than a religious club would have.<sup>50</sup> The Court then defined a noncurriculum-related group as "any student group that does not *directly* relate to the body of courses offered by the school."<sup>51</sup>

In our view, a student group directly relates 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.<sup>52</sup>

The board of education argued that all thirty of the groups that currently met at Westside were curriculum related. The Court disagreed. It found that a scuba diving club and the chess club were not curriculum related; on the other hand, it found that the Latin Club, the dramatics

45. *Id.* § 4071(c).

46. *Id.* § 4072(3).

47. 496 U.S. 226 (1990).

48. 867 F.2d 1076 (8th Cir. 1989).

49. *Mergens*, 496 U.S. at 238.

50. *Id.*

51. *Id.* at 239 (emphasis in original).

52. *Id.*



club, and student government (to the extent that it addressed concerns, solicited opinions, and formulated proposals pertaining to the body of courses offered by the school) were curriculum related.

Because the Court found that the school permitted other noncurriculum-related student groups to meet, it concluded that school officials had to permit the religious group access to the school grounds. It also held, by a plurality opinion, that the EAA did not violate the establishment clause and was thus constitutional.

### Student Clubs and the EAA after *Mergens*

From *Mergens*, we now know that secondary schools may, in accordance with the EAA's provisions, permit student-initiated religious clubs. If a school permits even one noncurriculum-related club, religious or otherwise, to meet on campus, a secondary school must grant equal access to other student-initiated religious, political, or philosophical groups.

Now that *noncurriculum-related student groups* has been defined, a school board should determine whether its existing school clubs require that it conform with the EAA. A school board can either (1) formulate a school policy that forbids noncurriculum-related clubs to avoid having to comply with the Equal Access Act or (2) adopt policies that permit noncurriculum-related student clubs, thus placing an obligation on the school to conform with the act's requirements.

School systems that wish to avoid being subject to the EAA must revise their policies to reflect this choice, review the list of permitted clubs at their high schools, and make adjustments to assure that all clubs qualify as curriculum related as defined in *Mergens*. By that standard, a club is curriculum related if its subject matter is actually taught—or will soon be taught—in a regularly offered course, if the subject matter is concerned with the body of courses as a whole, if participation in the club is required for a particular course, or if participation results in academic credit.<sup>53</sup>

If a school system uses these criteria in assessing its policies, some of its extracurricular clubs might have to be eliminated. In some cases a club that appears to fall outside the curriculum-related category could be brought within the category by expanding the subject matter of a relevant school course to cover the club's subject matter or by altering the club's subject matter to include material directly related to the curriculum. For example, a math course could be expanded to include a class on logical progressions as exemplified in the game of chess. But a

school that attempts such "fine tuning" should be aware that the United States Supreme Court explicitly stated that it rejected attempts to define "'curriculum related' in a way that results in almost no schools having limited open fora, or in a way that permits schools to evade the Act by strategically describing existing student groups."<sup>54</sup>

Schools that choose to permit only curriculum-related clubs would be wise to include in their school policy handbook a statement that describes how each club is related to the curriculum. In *Mergens* the Court found that such statements as "choir 'is a course offered as part of the curriculum....,' International Club is 'developed through our foreign language classes....,' Latin Club is 'designed for those students who are taking Latin as a foreign language' [are] persuasive evidence that these student clubs directly relate to the curriculum."<sup>55</sup>

School systems that permit noncurriculum-related student groups must be careful to comply with the EAA's provisions. It is important to note that although the Court held that the EAA did not, on its face and as applied to Westside High, violate the establishment clause, certain types of school support or endorsement of student religious clubs would almost certainly violate the establishment clause and the EAA. To avoid such violations, school policies and student handbooks should clearly state that the school does not endorse or support the views of student-initiated, noncurriculum-related clubs. School officials should explicitly inform teachers assigned to monitor meetings of these groups that they are not to participate in or attempt to influence the format or content of the meetings. Care should be taken that the school's name not be identified with the aims, policies, or opinions of a noncurriculum-related student organization.

It seems that schools could develop two different categories of officially recognized school clubs. Curriculum-related clubs could be granted more extensive privileges, such as financial support and possibly extra credit for student participation. Noncurriculum-related clubs could be granted certain more limited privileges, such as a place to meet and access to specified modes of communication within the school. If a school adopts this type of system, the clubs in the curriculum-related category should be strictly limited to those that conform to the *Mergens* criteria for curriculum-related clubs. Policies adopted for noncurriculum-related clubs should be applied consistently to all clubs in that category.

While the *Mergens* case did not answer every question that could arise in interpreting the Equal Access Act,

53. *Id.*

54. *Mergens*, 496 U.S. at 244.

55. *Id.* at 246.

it did provide school officials with important legal information. First, the act on its face is constitutional. Second, the term curriculum related will be strictly interpreted. With this information, school officials can adopt and enforce policies about student clubs with some degree of certainty.

## Conclusion

Control over extracurricular activities rests largely with local school boards and school officials. In exercising that control, it is important to remember that students learn from everything they experience and observe at school. Extracurricular activities complement a school's instructional program, and students who participate in

them receive a broader education than those who only attend class. School officials should recognize that students learn not just from the activities themselves but also from the way they are organized and administered. Educators should model fair, reasoned decision making, whether the issue is a student's desire to participate in an activity or a group of students' plan to develop a new activity.

Extracurricular activities also serve interests beyond those of individual students. For example, publications, athletics, and service clubs all connect the school community to the larger community. They offer adults who are not otherwise a part of the school system opportunities to learn about schools and students. Again, a diverse program, fairly administered, may teach valuable lessons. ■