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Equal Access Act - Religious Clubs May Meet during Public Secondary School Mandatory Attendance Periods If No Discrete Academic Instruction Is Taking Place - Donovan v. Punxsutawney, The

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THE EQUAL ACCESS ACT—RELIGIOUS CLUBS MAY MEET DURING PUBLIC SECONDARY SCHOOL MANDATORY ATTENDANCE PERIODS IF NO DISCRETE ACADEMIC INSTRUCTION IS TAKING PLACE—*Donovan v. Punxsutawney*, 336 F.3d 211 (3d Cir. 2003).

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THE Equal Access Act ("EAA") prohibits public secondary schools from denying noncurriculum related student groups equal access to hold club meetings when other noncurriculum student groups have been given the opportunity to meet during noninstructional time.[1] In *Donovan v. Punxsutawney*, a recent case dealing with the interpretation of the EAA, the Third Circuit Court of Appeals held that according to the plain language of the statute, "noninstructional time" can include a school period when students are required to be present at the school but are not being given discrete academic instruction.[2] Because of both the plain language of and the congressional intent behind the EAA, the Third Circuit correctly interpreted "noninstructional time" as defined by the EAA to permit religious club meetings at public secondary schools during times of mandatory attendance, provided that there is a "limited open forum" and the students are not receiving discrete classroom instruction.

The EAA applies to public secondary schools that receive federal financial assistance and have a "limited open forum."[3] As background, the statute defines a "limited open forum" as an "opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time."[4] Additionally, "noninstructional time" is defined as "time set aside by the school before actual classroom instruc-

1. Equal Access Act, 20 U.S.C. §§ 4071-4074 (2000).
2. 336 F.3d 211, 227 (3d Cir. 2003).
3. 20 U.S.C. § 4071(a).
4. *Id.* § 4071(b).

tion begins or after actual classroom instruction ends."[5] Meetings are "those activities of student groups which are permitted under a school's "limited open forum" and are not directly related to the school curriculum."[6] The EAA now controls the law relating to the rights of student-led groups in public high schools;[7] however, the courts have differed in the specific application and interpretation of the statute's terminology.[8]

The Punxsutawney Area High School ("PAHS") is just such a "public secondary school that receives federal financial assistance."[9] PAHS holds an activity period every day from 8:15 a.m. to 8:54 a.m., after the homeroom attendance is taken.[10] During that time, students are allowed to go to club meetings, take make-up tests, or attend a study hall, but they may not leave the campus.[11] The school allows voluntary, noncurriculum related clubs to meet during this time, including a ski club, a future health services club, and an anti-alcohol and anti-tobacco club.[12]

The plaintiff, PAHS senior Melissa Donovan, leads a Bible club called FISH.[13] The focus of the club is on community service and "other issues of concern to students of [PAHS] from a Christian perspective;" prayer is held at the beginning and end of each meeting.[14] The club never sought permission to meet during the activity period, because the plaintiff expected the request would be denied; indeed, the defendants stipulated that FISH would not be allowed to meet during the activity period because of its religious nature.[15] Instead, the club may only convene at 7:15 a.m., a time when no other club is required to meet.[16]

In January of 2002, Donovan filed suit against PAHS under the First and Fourteenth Amendments, 42 U.S.C. § 1983, and the EAA, alleging that PAHS violated her First Amendment free speech rights by refusing to allow FISH to meet at the school during the activity period simply because of the club's religious nature.[17] She filed a motion seeking a temporary restraining order, along with a permanent injunction "prohibiting the defendants from denying her access to school facilities during the ac-

5. *Id.* § 4072(4).
6. *Id.* § 4072(3).
7. *Donovan*, 336 F.3d at 220.
8. *See, e.g.*, Bd. of Edu. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 244-46 (1990) (defining a "noncurriculum related student group" as a club centered around a subject that "does not directly relate to any courses offered by the school and is not required by any courses offered by the school"); Prince v. Jacoby, 303 F.3d 1074, 1086-88 (9th Cir. 2002), cert. denied, 124 S. Ct. 62 (2003) (holding that the term "public funds" does not include funds that "subsidize club expenditures consistent with [the school's] educational mission" and that "noninstructional time" cannot occur during times of mandatory attendance at the public secondary school).
9. *Donovan*, 336 F.3d at 214.
10. *Id.*
11. *Id.*
12. *Id.* at 215.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*

tivity period;" she also sought a preliminary injunction requiring the school board and school district to allow the club to meet during the activity period while a final decision was pending.[18]

Finding that the claim was unlikely to succeed on the merits, the District Court denied the motion.[19] The District Court further held that the EAA would not apply to the school's activity period because it was not "noninstructional time" as defined in the statute, because it occurred during a time of mandatory attendance.[20] The decision was based in part on the fact that the school counts the activity period toward the minimum number of instructional hours required by the state.[21] The District Court held that the school district "had a compelling interest in not violating the Establishment Clause," and this compelling interest outweighed Donovan's First Amendment interests.[22] Donovan appealed the final order closing the case.[23]

At issue in recent cases involving the EAA has been the appropriate application of the term "noninstructional time" to various public school periods, and specifically as to whether noninstructional time can occur during periods of mandatory attendance.[24] The court in *Donovan* directly faced such an issue when determining whether the activity period in question constituted "noninstructional time" under the EAA.[25] The Third Circuit Court of Appeals compared the District Court's reasoning[26] with the Ninth Circuit Court of Appeal's recent decision in *Prince v. Jacoby*,[27] which similarly held that actual classroom instruction as defined by the EAA is triggered by mandatory attendance.[28] The Third Circuit Court of Appeals then compared the *Prince* decision with another Ninth Circuit Court of Appeals decision, *Ceniceros v. Board of Trustees of the San Diego School District*, which seemed to contradict the *Prince* holding because it defined a lunch period as "noninstructional time because it was time set aside by the school before actual classroom instruction begins or after classroom instruction ends."[29]

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18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 224.
22. *Id.* at 215.
23. *Id.*
24. *See* Ceniceros v. Bd. of Trs. of the San Diego Sch. Dist., 106 F.3d 878, 880-81 (9th Cir. 1997) (holding that, although lunch periods were times of mandatory attendance, because they were treated as noninstructional time and other groups were meeting, a Christian club had the right to meet to the same extent); Prince v. Jacoby, 303 F.3d 1074, 1088-89 (9th Cir. 2002), *cert. denied*, 124 S. Ct. 62 (2003) (holding that because "mandatory attendance marks the beginning of 'actual classroom instruction,'" a religious group could not meet during an open period called student/staff time when other noncurricular clubs were allowed to meet).
25. *Donovan*, 336 F.3d at 221.
26. *See supra* text accompanying notes 19-22.
27. *Prince*, 303 F.3d at 1087-89.
28. *Donovan*, 336 F.3d at 222 (citing *Prince*, 303 F.3d at 1088).
29. *Id.* at 223 (citing *Ceniceros*, 106 F.3d at 880 (internal quotations omitted)).

Rejecting the Ninth Circuit's *Prince* analysis, the Third Circuit Court of Appeals held that according to the plain meaning of the EAA, there can be times of mandatory attendance falling within a school day that are "noninstructional" as defined by the statute if no discrete classroom instruction is taking place.[30] Because the EAA would therefore apply, a noncurricular religious club should be allowed to meet to the same extent as other noncurricular clubs.[31] Writing for the court, Judge Aldisert looked at the meetings held during the activity period under the EAA and found that the activity period was open to various noncurricular clubs, the initial determination for finding a "limited open forum."[32] The court rejected the school district's attempt to proscribe FISH from meeting during the activity period by counting it as a state-required instructional hour, because PAHS "cannot be permitted to evade application of the EAA by stating that a period that is otherwise a 'limited open forum' does not constitute 'noninstructional time' under the EAA simply because the school system chooses to count that time toward the state minimum number of hours of instruction time."[33]

In considering the issue of noninstructional time as defined in the EAA, the court held that

> [t]he very phrases "noninstructional time" and "actual classroom instruction" demonstrate that there may very well be times in the school day during which students would not be receiving "actual classroom instruction." Under this reading that is both plain and coherent, the PAHS activity period falls into the category of "noninstructional time."[34]

The court found that just because students were able to seek classroom instruction during that time, the entire session was not therefore instructional: "[s]imply because the period may fall within the more general parameters of the school day does not indicate that all time within those parameters necessarily constitutes actual classroom instruction."[35] While the court noted that being present at the school was mandatory, the students were not required to attend any specific club meeting, such as FISH: "[i]t is not mandatory attendance at the school, but mandatory attendance *at the group's meeting* that raises Establishment Clause concerns."[36]

Looking at the plain meaning of the statute, the court found that "[i]n drafting the EAA, Congress could have said 'before or after the school day' or 'before or after classes,' but it did not. Instead it used the concept of 'actual classroom instruction,' which we take to mean classroom in-

30. *Donovan*, 336 F.3d at 223-24.
31. *See id.*
32. *Id.* at 221.
33. *Id.* at 225.
34. *Id.* at 222.
35. *Id.*
36. *Id.* at 224.

struction in discrete areas."[37] The court also held that restricting FISH from meeting simply because it discussed subjects from a religious perspective constituted viewpoint discrimination.[38] Therefore, the court held that "permitting FISH to meet during the PAHS activity period would not have violated the Establishment Clause . . . [and] that the PAHS activity period constitutes 'noninstructional time' under the EAA."[39]

The Third Circuit Court of Appeals correctly interpreted the EAA by allowing for the possibility that noninstructional time as defined by the EAA can occur during times of mandatory attendance at a public secondary school.[40] Congress passed the EAA to counter the perceived discrimination of public secondary schools against religious speech and content.[41] Thus the court in *Donovan* correctly used the plain language rule to interpret the EAA and hold that while requiring attendance at a club would raise Establishment Clause concerns, allowing a meeting to occur when attendance at the school is required would not.[42] The court in *Prince* had relied heavily on discussions that occurred during the Congressional legislative debates to support their contention that once attendance is required, instructional time necessarily begins.[43] But the language of the EAA itself does not restrict the opportunity to times before and after the school day starts – rather, it designates the time as "before actual classroom instruction begins or after actual classroom instruction ends."[44] The Third Circuit Court of Appeals was correct to rely on the plain language of the statute and read it broadly, because that corresponds with Congress' goal for the Act.[45]

Additionally, as Congress was concerned about the perceived discrimination against students expressing religious speech, the EAA is also supposed to discourage public secondary schools from sending a message of hostility against religion to the students. When a school treats a religious club differently from every other club, a message might be inferred that

37. *Id.* The court emphasized using the plain language of the statute, and rejected using the legislative history where it was not needed. *See id.* at 221-23 (citing United States v. Hodge, 321 F.3d 429, 436 (3d Cir. 2003) ("[W]e begin with the plain meaning of [the] statute."); and Zubi v. AT&T Corp., 219 F.3d 220, 231 (3d Cir. 2000) ("Recourse to the legislative history . . . is unnecessary in light of the plain meaning of the statutory text.")).

38. *Id.* at 225-26.

39. *Id.* at 227.

40. *See id.*

41. *Id.* at 219; Prince v. Jacoby, 303 F.3d 1074, 1078-79 (9th Cir. 2002), *cert. denied*, 124 S. Ct. 62 (2003); *see also* Bd. of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 241 (1990) ("Congress clearly sought to prohibit schools from discriminating on the basis of the content of a student group's speech.").

42. *Donovan*, 336 F.3d at 224. "Where the intent of Congress 'has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.'" *Id.* at 222 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982)).

43. *Prince*, 303 F.3d at 1088-89.

44. Equal Access Act, 20 U.S.C. § 4072(4) (2000).

45. *Mergens*, 496 U.S. at 239 (stating that a "broad reading of the Act would be consistent with the views of those who sought to end discrimination by allowing students to meet and discuss religion before and after classes").

those expressing religious speech are "subversive of American ideals and therefore subject to unique disabilities."[46] Thus when schools allow any other noncurriculum related clubs to meet but deny the same rights to a student-led club merely because the club's meeting has religious content, the refusal creates the appearance of hostility against religion, not an appearance of neutrality toward religion.[47] This not only violates the students' right to free expression but also the Establishment Clause.[48]

The decision in the *Donovan* case creates a circuit split between the Third and Ninth Circuit Courts of Appeals regarding the meaning of "noninstructional time" and whether times when students are required to attend school but are not receiving discrete classroom instruction can fit that definition. Because this term has been subjected to differing interpretations in the current case law, public secondary schools worried about violating the Establishment Clause may continue to disallow religious student groups the same opportunity to meet that they give to other noncurricular student groups.[49] This may happen despite that it is the clear intent of Congress to stop such discrimination[50] and that refusing to allow religious student groups to participate on the campus to the same extent as other student groups "would demonstrate not neutrality but hostility toward religion."[51] If religious student groups are continually excluded from fair opportunity of participation, more claims may be brought against school districts, and the uncertainty in the area may necessitate a clear holding on the issue from the Supreme Court.

46. *Id.* at 248 (quoting McDaniel v. Paty, 435 U.S. 618, 641 (1978)).
47. *See id.*
48. *See id.*
49. As was part of the PAHS's rational for denying FISH the right to meet during the morning activity period. *See Donovan*, 336 F.3d at 215.
50. *Donovan*, 336 F.3d at 219.
51. *Mergens*, 496 U.S. at 248.

Articles


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