Religious Discrimination in Public Schools: A Legal Analysis

Cynthia Brougher
Legislative Attorney

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Summary

Reports of harassment in schools, including examples based on religious identity and practices, have raised public attention and congressional interest in the issue of religious discrimination in schools. Congressional attention to the issue has focused on efforts to prevent discrimination in programs receiving federal funding, namely, public schools. The 112th Congress has introduced proposals (e.g., the Student Non-Discrimination Act) to curtail harassment in public schools and may consider related issues in the potential reauthorization of the Elementary and Secondary Education Act. Some proposals have specifically addressed religious discrimination, while other proposed nondiscrimination measures have raised tangential concerns regarding religious freedom, namely, the ability of students to maintain religious identity or beliefs that would conflict with the protections offered in legislation.

Both constitutional and statutory protections prevent discrimination based on religion in school contexts. The First Amendment of the U.S. Constitution generally prohibits public schools from limiting access of religious groups to school facilities and resources for the purpose of religious expression. The Equal Access Act provides similar protection to ensure that student religious groups have access to secondary school facilities on an equal basis as other groups. Finally, the Civil Rights Act of 1964 includes several protections to prevent religious discrimination, including Title IV and Title VI. Title IV prohibits discrimination based on religion in education, and Title VI prohibits discrimination based on religion in federally funded programs generally, which includes public schools.

This report analyzes the legal protections available to students and student groups that may be subject to religious discrimination in public schools. It examines the current interpretations of the Establishment and Free Exercise Clauses of the First Amendment, as well as protections available to religious student groups under the Equal Access Act and the Free Speech Clause of the First Amendment. The report also discusses the effect of Titles IV and VI of the Civil Rights Act as they relate to school programs. The report specifically analyzes two significant issues related to religious discrimination in schools: access of religious student groups to school facilities and resources and the rights of such groups to be selective in their membership. Finally, the report examines the status of these legal protections under the proposed Student Non-Discrimination Act (H.R. 998; S. 555).

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Background

The issue of religious discrimination in public schools has been a subject of congressional attention in a variety of contexts over the past several years. In 2010, legislation was introduced in both the House of Representatives and Senate addressing religious discrimination in schools in response to a number of incidents targeting students of certain faiths, particularly Jewish, Muslim, and Sikh communities.[1] That legislation would have amended Title VI of the Civil Rights Act of 1964 (CRA) to prohibit discrimination based on religion in programs receiving federal funds, in addition to the other classes already protected under the CRA. In 2011, the U.S. Commission on Civil Rights submitted a report to Congress addressing discrimination against students on various bases, including religion, noting that bullying constituted a significant problem in schools, including bullying based on students' religion.[2]

Most recently, in the 112th Congress, both the House and Senate have pending legislation to prohibit discrimination, including harassment and bullying, against students based on the individual's sexual orientation or gender identity: the proposed Student Non-Discrimination Act (SNDA).[3] SNDA explicitly preserves "the legal standards and rights available to religious and other student groups under the First Amendment and the Equal Access Act."[4] Because some individuals' religious beliefs disapprove of certain sexual orientations and gender identities, concerns arise regarding whether SNDA would compromise the ability of individuals with such beliefs to freely exercise their religion. Additionally, because of recent judicial decisions, student religious groups may be concerned about their rights to access school resources if they do not comply with policies requiring acceptance of all individuals, without regard to religious objections.[5] As Congress continues to consider potential reauthorization of the Elementary and Secondary Education Act (ESEA), issues related to religious discrimination in schools are particularly relevant.

This report analyzes the constitutional and statutory protections that may prevent religious discrimination against students.[6] It examines the current interpretations of the Establishment and Free Exercise Clauses of the First Amendment, as well as the protections available to religious student groups under the Equal Access Act and the Free Speech Clause of the First Amendment. The report also discusses the effect of Titles IV and VI of the CRA, which prohibit discrimination in education and federally funded programs, respectively. It addresses the Supreme Court's rulings on student religious groups in the context of access to school facilities and funds. Finally, the report analyzes the extent to which religious student groups may be selective in their membership requirements without violating nondiscrimination requirements.

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[1] *See* H.R. 6216, 111th Cong. (2010); S. 3821, 111th Cong. (2010). *See also* Press Release, Rep. Brad Sherman, Senator Arlen Specter and Congressman Brad Sherman Want Students Protected From Religious Discrimination (September 24, 2010), *available at* http://bradsherman.house.gov/2010/09/senator-arlen-specter-and-congressman-brad-sherman-want-students-protected-from-religious-discrimina.shtml.

[2] U.S. Commission on Civil Rights, *Peer-to-Peer Violence and Bullying Examining the Federal Response* (September 2011), *available at* http://www.usccr.gov/pubs/2011statutory.pdf.

[3] H.R. 998, 112th Cong. (2011); S. 555, 112th Cong. (2011).

[4] S. 555, §9(b).

[5] *See* Christian Legal Society v. Martinez, 130 S.Ct. 2971 (2010).

[6] This report does not cover issues that arguably might be labeled as discrimination against religion generally in schools, such as restrictions on prayer in schools or the content of a school's curriculum.

Religious Discrimination in the Context of Schools

At the outset, it is important to note that religious discrimination may take a number of forms, which may raise different legal questions. A myriad of constitutional and statutory laws are relevant to discussions of religious discrimination and often overlap in litigation of such claims.

Traditionally, claims of religious discrimination imply that an individual has been treated differently on the basis of his or her religious beliefs, for example, a Christian student receives an excused absence to attend services on Good Friday, but a Jewish student's request for an excused absence for Passover is denied. Individual students may allege religious discrimination in schools if they are the victims of violence or other harassment that is related to their religious beliefs (e.g., a derogatory term for a religious group is painted on a student's locker) or if they are excluded from some school activities or groups because of their religious beliefs (e.g., a Muslim student is denied membership in a Bible study club). As a general rule, these claims would likely be challenged under civil rights laws (i.e., the Civil Rights Act of 1964) or criminal laws (i.e., assault). Students may also have constitutional claims under the Free Exercise Clause if a public school's actions burdened their religious exercise.

Although religious discrimination in legal terminology generally refers to these types of examples, it also may be alleged in the context of a school's treatment of student groups organized based on common religious beliefs. That is, a student group may claim "discrimination" if a public school denies access to school facilities because of the religious identity of the group. Legally, this type of claim is actually a constitutional claim and the group is alleging that the school's decision based on the group's religious identity signals disfavor prohibited by the Establishment Clause. Similarly, if school policy imposes conditions on official recognition and related benefits, a religious group with beliefs that conflict with those conditions may claim "discrimination" based on its religious identity. Again, this would be analyzed as a constitutional claim.

To illustrate the complexity of the legal issues involved in these scenarios, a group may challenge a school's policy requiring acceptance of any interested student as a condition to use school resources on a number of counts: (1) the Establishment Clause, alleging disfavorable treatment based on the group's religious identity; (2) the Free Exercise Clause, alleging infringement on the group's ability to maintain its religious identity and beliefs; (3) the Free Speech Clause, alleging that the policy limits the group's ability to express its beliefs as other groups might be permitted to do; (4) the Equal Access Act, alleging that the school has limited access to its facilities based on the religious content of the proposed speech; (5) the constitutional freedom of association, alleging that the school's policy requires groups to accept members who may not otherwise be identified with the group.

Legal Rules Governing Religion in Schools

The primary legal protections that may be used to prevent discrimination based on religion in schools are the First Amendment, the Equal Access Act, and the Civil Rights Act of 1964. An overview of these legal rules follows. Specific application to questions of religious discrimination in schools is analyzed later in this report.

First Amendment Protection of Religion

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…."[7] These clauses are known respectively as the Establishment and Free Exercise Clauses. In order for the religious protections afforded by these clauses to apply, there must be a government action. Thus, if students feel that their religious freedom is being burdened because of an enacted law that interferes with their religious beliefs or because of a policy adopted by a public school, they may be protected by the First Amendment. However, these protections would not apply in cases involving only private actors, for example, a policy at a private school that burdens a student's religious exercise or establishes a preference among religions.

Establishment Clause

The Establishment Clause forbids the government from acting to benefit one religion over another or religion generally over non-religion.[8] The U.S. Supreme Court has applied a number of tests to legal challenges arising under the Establishment Clause. Under the tripartite *Lemon* test, a challenged law must (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive entanglement with religion.[9] The Court has also applied modified versions of this traditional test. The endorsement test examines whether the purpose or effect of the challenged law conveys a message that certain religions are preferred or disfavored over others.[10] The neutrality test requires a law to be neutral among religions and between religion and non-religion.[11]

Free Exercise Clause

The Free Exercise Clause generally prohibits governmental regulation of religious beliefs.[12] Actions motivated by an individual's religious beliefs, however, are not immune from all regulation.[13] Government regulation of religiously motivated behavior may be constitutional if the challenged regulation is "a valid and neutral law of general applicability."[14] Such laws may *incidentally* burden individuals' religious practices, but may be constitutional if the law is related to a legitimate government interest. However, if a law specifically targets one religion's practices or religiously motivated practices generally, the Court has held that it must be related to a compelling government interest and be narrowly tailored to advance that interest.[15]

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[7] U.S. Const. amend. I.

[8] *See* Everson v. Board of Education, 330 U.S. 1, 15 (1947).

[9] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[10] Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring).

[11] Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968).

[12] *See* Sherbert v. Verner, 374 U.S. 398 (1963).

[13] *See* United States v. Lee, 455 U.S. 252 (1982); Gillette v. United States, 401 U.S. 437 (1971); Braunfeld v. Brown, 366 U.S. 599, 603 (1961); Prince v. Massachusetts, 321 U.S. 158 (1944); Reynolds v. United States, 98 U.S. 145 (1878).

[14] Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 879 (1990) (internal quotes omitted).

[15] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 533 (1993).

Equal Access Act and Freedom of Speech

Congress enacted the Equal Access Act to establish a right for student religious groups in public secondary schools to have access to school facilities on the same basis as other groups.[16] The Equal Access Act states:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.[17]

The rights conferred by the Equal Access Act stem from both the freedom of religion and freedom of speech clauses of the First Amendment. Congress enacted the Equal Access Act after the Supreme Court recognized a constitutional right under the Establishment Clause for religious student groups at public universities to have equal access to school facilities as the school offered to other student groups.[18] Restricting access for student groups to meet based on the content of the meeting also implicated the groups' free speech rights. The Establishment Clause rationale is discussed in further detail below, but an overview of the Free Speech Clause is necessary to understanding the scope of the Equal Access Act.

The Free Speech Clause states that "Congress shall make no law … abridging the freedom of speech."[19] The Court has explained that certain categories of speech may be entirely prohibited, while other categories are protected to varying degrees.[20] As a general rule, the Free Speech Clause prohibits content-based restrictions on protected speech unless the restriction promotes a compelling interest using the least restrictive means.[21] The prohibition on content-based restrictions reflects the constitutional principle that the government may not favor one message by suppressing or otherwise burdening another message.[22]

The degree to which protected speech may be burdened generally depends on where it takes place, that is, the forum where the expression occurs. The Court has recognized three categories of fora: (1) the traditional public forum; (2) the designated public forum; and (3) the nonpublic forum. The first category is generally the most open forum, and the third is the most restricted forum. In a traditional public forum (e.g., public spaces generally open to all people to express themselves), the government may impose "regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[23] A designated public forum "consists of public property which the State has opened for use by the public as a place for

[16] 20 U.S.C. §4071.

[17] 20 U.S.C. §4071(a).

[18] *See* Widmar v. Vincent, 454 U.S. 263 (1981).

[19] U.S. Const. amend. I.

[20] For a comprehensive analysis of the Free Speech Clause, see CRS Report 95-815, *Freedom of Speech and Press: Exceptions to the First Amendment*, by Kathleen Ruane.

[21] Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115, 126 (1989).

[22] *See* Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995).

[23] Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45 (1983).

expressive activity."[24] It "may be created for a limited purpose such as use by certain groups (e.g., … student groups) or for the discussion of certain subjects (e.g., … school board business)."[25] Like a traditional forum, any content-based regulation in a designated forum must have a compelling government interest.[26] The third category, nonpublic fora, includes public property that is not traditionally used for public communication.[27] If the government chooses to limit the use of its property for a particular purpose which does not include communication, its regulation of speech on such property is subject only to requirements that are reasonable and viewpoint-neutral.[28]

The Equal Access Act refers to a "limited open forum," which it defines as a forum created "whenever [the school] grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time."[29] The statutory definition reflects the intermediate category under the constitutional forum analysis, the designated public forum. The Equal Access Act grants access for religious purposes, and it also appears to reflect the constitutional prohibition on school sponsorship of religion, noting that the school must uniformly apply "fair opportunity" criteria to all student groups, which include (1) voluntary, student initiated meetings; (2) no official sponsorship of the meeting by the school or school officials; (3) employees attend religious meetings as non-participants only; (4) the meeting does not interfere with educational activities; and (5) student group activities cannot be directed or regularly attended by "nonschool persons."[30]

Civil Rights Act of 1964

The Civil Rights Act of 1964 provides civil rights protections across a range of activities, including education, employment, federally funded programs, public accommodations, and voting.[31] In the context of discrimination in schools, two portions of the Civil Rights Act are particularly relevant. Title IV prohibits discrimination based on race, color, religion, sex, or national origin in public schools.[32] Title VI prohibits discrimination in federally funded programs or activities on the basis of race, color, or national origin.[33]

Title IV specifically addresses the desegregation of public schools.[34] Under Title IV, the Department of Justice may file civil lawsuits in response to written complaints from parents of students who are "deprived by a school board of the equal protection of the laws," or from a college student (or parent of such student) indicating that he or she was "denied admission to or not permitted to continue in attendance at a public college…."[35] To the extent that discrimination

[24] *Id*.

[25] *Id*. at 46, n.7.

[26] *Id*. at 46.

[27] *Id*.

[28] *Id*.

[29] 20 U.S.C. §4071(b).

[30] 20 U.S.C. §4071(c).

[31] P.L. 88-352, 78 Stat. 241.

[32] 42 U.S.C. §2000c et seq.

[33] 42 U.S.C. §2000d et seq.

[34] 42 U.S.C. §2000c(b).

[35] 42 U.S.C. §2000c-6(a).

against students based on religion affects their attendance of a particular school or their status while enrolled at that institution, Title IV may provide legal protection.[36]

Title VI provides significant nondiscrimination protection in schools, but it does not extend to discrimination based on religion. With respect to its protected classes (race, color, national origin), Title VI forbids any person from being "excluded from participation in, … denied the benefits of, or … subjected to discrimination under any program or activity receiving Federal financial assistance."[37] Programs and activities covered by Title VI include "all of the operations … any part of which is extended Federal financial assistance" of covered entities, which include state or local government entities, institutions of higher education, and local educational entities.[38]

Each federal agency is responsible for enforcing Title VI with respect to its funding recipients. The Department of Education (ED) has issued guidance related to Title VI and its application to discrimination based on religion. ED has indicated that religious groups which share ethnic characteristics are protected under Title VI, stating that "while Title VI does not cover discrimination based solely on religion, groups that face discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics may not be denied protection under Title VI on the ground that they also share a common faith."[39] Accordingly, ED has explained that students, for example, Jewish, Muslim, or Sikh students, who are discriminated against based on shared ethnic characteristics, regardless of whether they share the same religious identity, are protected by Title VI.[40]

Use of Schools and School Resources for Religious Purposes

The U.S. Supreme Court has considered challenges to school policies regulating the use of schools and school resources under a combination of constitutional and statutory rules discussed above. Under the Court's jurisprudence, public schools generally cannot deny religious groups access to the schools or the schools' resources if the same facilities or resources are made available to nonreligious groups.[41]

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[36] For more information on the enforcement of Title IV, see "Religious Discrimination," Civil Rights Division, U.S. Department of Justice, *available at* http://www.justice.gov/crt/about/edu/types.php.

[37] 42 U.S.C. §2000d.

[38] 42 U.S.C. §2000d-4a.

[39] Office of Civil Rights, U.S. Department of Education, Dear Colleague Letter: Harassment and Bullying (October 26, 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

[40] *Id. See also* Office of Civil Rights, U.S. Department of Education, Dear Colleague Letter: Title VI and Title IX Religious Discrimination in Schools and Colleges (September 13, 2004), *available at* http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html. The U.S. Department of Justice has affirmed ED's interpretation of its authority under Title VI. Letter from Thomas E. Perez, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Russlynn H. Ali, Assistant Secretary for Civil Rights, Office of Civil Rights, U.S. Department of Education, Re: Title VI and Coverage of Religiously Identifiable Groups (September 8, 2010), *available at* http://www.justice.gov/crt/about/cor/TitleVI/090810_AAG_Perez_Letter_to_Ed_OCR_Title%20VI_and_Religiously_Identifiable_Groups.pdf.

[41] *See Widmar*, 454 U.S. 263; Westside Community Board of Education v. Mergens, 496 U.S. 226 (1990); Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993); Good News Club v. Milford Central School, 533 U.S. 98 (2001); *Rosenberger*, 515 U.S. 819.

Access to School Facilities

As a general rule, schools may not rely on the Establishment Clause to justify restrictions on access by religious groups to school facilities. The Court's jurisprudence indicates that permitting groups access on a neutral basis does not confer endorsement of the underlying message and does not provide additional substantive benefits to the religious group.[42] The Court has repeatedly held that nondiscrimination in access policies serves a secular, not religious purpose, and accordingly comports with, rather than violates, the Establishment Clause.[43] If the student group seeking access is of a reasonable age (i.e., secondary or university level) to understand that the school has not endorsed their extracurricular meetings, they must be afforded the same access to facilities as other groups.[44] Likewise, if access is granted after school hours to the community or even to young children, religious groups may not be discriminated against in use of the school's facilities.[45]

When faced with challenges to the use of school property by religious groups, the Court has emphasized that a public school, "like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated."[46] If the school opens its facilities as a limited open forum, it may impose restrictions based on content and the identity of the speakers, but the restrictions must be reasonable and viewpoint neutral.[47] For example, a school may adopt a policy opening its auditorium to use by student groups for the purpose of musical practice and performance. If the school's show choir is granted access to the auditorium to rehearse for the annual school musical, then the school also would grant access to a student group seeking to use the facility to practice Christmas carols.

In *Widmar v. Vincent*, the Supreme Court explained that a public university may not deny religious student groups access to school facilities if it makes the facilities available to other similar student groups.[48] The university allowed student groups to meet on school grounds, but prohibited the use of its buildings or grounds "for purposes of religious worship or religious teaching," thus denying religious groups' access to the facilities.[49] The Court explained that the university's policy discriminated against certain student groups "based on the religious content of a group's intended speech."[50] In order to make such a content-based restriction, the university needed to show it had a compelling interest in doing so and that its policy was narrowly tailored to achieve that interest.[51] The university claimed that it had a compelling interest in restricting

[42] *Lamb's Chapel*, 508 U.S. at 395.

[43] *See Westside*, 496 U.S. at 249-50; *Widmar*, 454 U.S. at 271-72; *Lamb's Chapel*, 508 U.S. at 394-95; *Good News Club*, 533 U.S. at 114. *See also* Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (holding that religious exemption to employment nondiscrimination law did not violate the First Amendment).

[44] *See Widmar*, 454 U.S. 263; *Westside*, 496 U.S. 226.

[45] *See Good News Club*, 533 U.S. 98.

[46] *Lamb's Chapel*, 508 U.S. at 390-91. In *Lamb's Chapel*, the Court held that a school's refusal to permit a group to use school property to present a religious film was unconstitutional because the subject matter was not "placed off limits to any and all speakers. Nor [was] there any indication … that the application to exhibit the particular film series involved here was, or would have been, denied for any reason other than the fact that the presentation would have been from a religious perspective." *Id*. at 393-94.

[47] *See* Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 806 (1985).

[48] *Widmar*, 454 U.S. 263.

[49] *Id*. at 265 (internal quotations omitted).

[50] *Id*. at 270.

[51] *Id*.

access based on religious purposes because its policy was designed to ensure compliance with the Establishment Clause. The Court noted that comporting with constitutional obligations would be compelling, but the policy was not required under the Establishment Clause. According to the Court, an equal access policy, which would allow access to school facilities by secular and religious groups, would not advance religion in violation of the Establishment Clause.[52] The Court held that permitting open access to school facilities, which would provide an "incidental" benefit to religious groups, was permissible because the same benefit was offered to nonreligious groups, satisfying the requirements of neutrality among religion and nonreligion.[53]

Congress enacted the Equal Access Act in 1984, which applied the rule announced by the Court in *Widmar* to public secondary schools.[54] In 1990, the Supreme Court upheld the constitutionality of the Equal Access Act, reasoning that equal access in secondary schools, like universities, does not violate the Establishment Clause.[55] In *Westside Community Board of Education v. Mergens*, the Court reiterated its opinion that permitting access to both secular and religious groups does not "confer any imprimatur of state approval on religious sects or practices" and sends a message of neutrality, not endorsement of religion.[56] Noting that the First Amendment generally forbids government *aid* for religious purposes because of the "risk of creating a crucial symbolic link between government and religion," the Court distinguished the permissibility of a public school providing *access* to religious student groups.[57]

> There is a crucial 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. 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.[58]

Thus, the Court has held that excluding religious groups from meeting in school facilities would violate the Free Speech rights of students and that permitting access to such groups would not violate the Establishment Clause.

In later cases, the Court indicated that religious groups seeking to use school facilities for religious purposes after school hours was also constitutionally permissible.[59] While *Widmar* recognized the rights of religious student groups at the university level and *Westside* recognized the rights of such groups in secondary schools, *Good News Club v. Milford Central School* acknowledged the right of religious groups involving elementary students to meet at public school facilities.[60] The school adopted a "community use policy" to permit certain meetings and events open to the general public to be hosted at the school, but rejected the Good News Club's

[52] *Id*. at 270-73.

[53] *Id*. at 273-75.

[54] 20 U.S.C. §4071.

[55] *Westside*, 496 U.S. 226.

[56] *Id*. at 248 (internal quotations and citations omitted). The Court explained that secondary students were not significantly more impressionable than university students and therefore heightened protections with respect to exposure to religion in a school setting was not necessary in this case. *Id*. at 250-51.

[57] *Westside*, 496 U.S. at 250 (internal quotation omitted).

[58] *Id*.

[59] *Lamb's Chapel*, 508 U.S. 384 (permitting a private organization to show a religious film series at school facilities after school hours); *Good News Club*, 533 U.S. 98.

[60] 533 U.S. 98.

request to use the school's facilities for religious instruction.[61] Applying a limited public forum analysis, the Court emphasized that the school may limit use of the forum it creates to particular subjects, but that it must not discriminate based on the viewpoint expressed on the subjects for which it permits the forum to be used.[62] The Court noted that the school had opened its facilities to community groups that met for the purpose of "teaching morals and character development to children."[63] The Court explained that, because the group sought "to address a subject otherwise permitted under the rule … from a religious standpoint," the school had engaged in unconstitutional viewpoint discrimination.[64]

Responding to the school's argument that the discrimination resulting from its policy was justified by the Establishment Clause, the Court noted that the nature of the forum was critical to the analysis. It rejected the school's argument because the "meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just to Club members."[65] Relying on the neutrality test, the Court explained that providing equal access to religious groups to express their perspective in the same manner that other groups may express contrary perspectives comports with the requirements of the Establishment Clause, rather than violating it.[66] The Court also explained that after-school meetings attended with parental permission do not raise the risk of coercion to participate that would otherwise invalidate religious activities at school.[67] Thus, schools may restrict meetings for religious purposes during the school day, but permitting meetings for religious purposes after hours may be permissible under the First Amendment even at the elementary level.

Availability of School Activities Fees

Like its decisions requiring religious groups to have equal access to school facilities, the Court has also held that student groups must be given equal opportunities to use funds administered by the school for student activities.[68] The Court examined the right of student groups to have equal access to certain public university activities funds in a challenge to the University of Virginia's policy that student groups' religious activities may not be funded from the school's Student Activities Fund (SAF).[69] University policy required student groups wishing to register with the school to meet qualifying criteria, and permitted some registered groups to apply for funds from the school's SAF. The SAF is funded through a mandatory fee assessed to all full-time students, and may be disbursed to student groups if the funds are connected with the school's educational purpose.[70] A student group organized for a number of religious purposes, including publication of a magazine related to religious expression, met the criteria to become a registered group, but the

[61] *Id*. at 102-04.

[62] *Id*. at 106-07.

[63] *Id*. at 108.

[64] *Id*. at 109-10.

[65] *Id*. at 113.

[66] *Id*. at 114.

[67] *Id*. at 115-16. *See also* Lee v. Weisman, 505 U.S. 577 (1992).

[68] *Rosenberger*, 515 U.S. 819.

[69] *Id*.

[70] *Id*. at 824.

school denied its request to use SAF funds for printing costs of its publication. The university reasoned that the publication was a religious activity for which SAF funding is prohibited.[71]

Noting that speech may not be regulated based on content or message, the Court explained that "The government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."[72]

The Court examined the administration of the SAF as a limited public forum, created by the school for a variety of purposes. It concluded that the university's decision to reject the group's application for printing costs constituted viewpoint discrimination because "the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."[73]

According to the Court, the constitutional rules associated with providing benefits to student groups do not change when comparing access of groups to school facilities or the ability of groups to receive school funds.[74] Acknowledging "the principle that when the State is the speaker, it may make content-based choices," the Court emphasized that the government may not control the message of speech it invites in a forum for the expression of a diverse collection of views of private speakers.[75]

Even in cases involving funding of activities with a religious viewpoint, the Court reiterated that restrictions on such speech cannot be justified by the Establishment Clause. The Court recognized that the challenged program maintained a neutrality toward religion, and the University took steps to demonstrate that use of the SAF does not denote endorsement of any participating group's message.[76] Under the Court's ruling, the Establishment Clause does not justify or require schools to forbid religious groups from participating "in broad-reaching government programs neutral in design."[77]

[71] *Id*. at 826.

[72] *Id*. at 828-29 (internal citations omitted).

[73] *Id*. at 831.

[74] *See id*. at 833. It is important to note a distinction between the type of funds for student groups at issue in *Rosenberger* and the use of public funds for school expenses. Activities funds in *Rosenberger* were collected from students and administered by the school, but not appropriated by the government for use by the school itself for teaching or materials. For a comprehensive analysis of the constitutionality of public funding for religious purposes, see CRS Report R40195, *The Law of Church and State: Public Aid to Sectarian Schools* and CRS Report R41099, *Faith-Based Funding: Legal Issues Associated with Religious Organizations That Receive Public Funds*.

[75] *Rosenberger*, 515 U.S. at 833-34.

[76] *Id*. at 834-35, 840, 841-42.

[77] *Id*. at 839.

Selectivity in Membership by Religious Student Groups

In addition to protecting individuals' religious exercise and speech rights, the First Amendment also protects the ability to associate with others who share similar beliefs.[78] However, at times, public policy goals may present potential conflicts in the freedom of association, for example, nondiscrimination laws. Some schools have implemented so-called "all-comers policies" to promote inclusion of any interested student in officially affiliated student groups. These policies are driven by principles of nondiscrimination, but some groups have argued that they cause a different form of discrimination. That is, while the policies ensure that *individual students* are not discriminated against, their application arguably effects discrimination against *student groups* that seek to exercise their right for selectivity in membership.

Freedom of Expressive Association

Student groups may argue that restrictions imposed by the school on their membership criteria violate their right to associate under the First Amendment. Supreme Court decisions have indicated that an organization may not exclude certain groups of people from its membership unless doing so would interfere with the organization's principles or purpose.[79] The Court has recognized that "it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."[80] It has limited the strictest application of that protection to associations that were relatively small, highly selective, and secluded from others.[81] For example, the Court has held that the First Amendment may not permit an organization to discriminate against potential members based on sex if it has otherwise indiscriminate criteria for membership.[82] Accordingly, the government's interest in providing equal access under nondiscrimination laws overrides the interest of large and unselective groups to discriminate against potential members.[83]

The First Amendment may protect some organizations' ability to discriminate in membership, however. The Court has recognized First Amendment violations in cases where compliance with nondiscrimination requirements would alter the identity of the organization.[84] For example, the Court held that requiring the Boy Scouts of America to offer membership to homosexuals would violate its First Amendment rights.[85] The Boy Scouts forbid homosexuals to be members of the

[78] *See* NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958);

[79] *See* Roberts v. United States Jaycees, 468 U.S. 609 (1984); Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557 (1995); Dale v. Boy Scouts of America, 530 U.S. 640 (2000).

[80] *Roberts*, 468 U.S. at 618.

[81] *Id*. at 619-20.

[82] *See id*.; *Rotary Int'l*, 481 U.S. 537.

[83] *Roberts*, 468 U.S. at 625-27.

[84] *See Dale*, 530 U.S. 640 (Boy Scouts may discriminate against members on the basis of sexuality because including members with opposing views would impair the organization's expression). *See also Hurley*, 515 U.S. 557 (private organizers of St. Patrick's Day parade are not required to include a group of gay rights activists in the parade because inclusion would require organizers to convey a message they did not choose).

[85] *Dale*, 530 U.S. 640.

organization based on its mission to instill certain values in its members, including being "morally straight" and "clean."[86] The Court held that the First Amendment prohibited application of nondiscrimination laws to the Boy Scouts' membership policy with respect to homosexuals because the Boy Scouts engage in expression through their mission to instill values in young people and inclusion of a homosexual leader in the organization would significantly affect the group's ability to transmit its values that homosexuality is not a legitimate behavior.[87] The Court indicated deference to the organization's understanding of its expression and to what might impair its expression.[88] The Court also noted that in order to be protected by the First Amendment, an organization does not need to have uniform agreement by its members of its policies, and the organization may tolerate dissent within its membership regarding the policy without losing First Amendment protection for enforcing its discriminatory position in its membership.[89]

A group may be protected by a First Amendment right of expressive association if it "engage[s] in some form or expression, whether it be public or private."[90] The Court stated that "the forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[91] According to the Court, regardless of the public policy interests of the government, it is limited to promoting conduct and it cannot interfere with an organization's expressive rights for the sake of promoting its preferred message.[92] These rulings have formed the basis of student groups' challenges to school requirements that they accept all students for membership in order to be officially recognized by the school.[93]

All-Comers Policies

A student group's right to expressive association and its ability to accept benefits from the school's activities program may be limited by a school's nondiscrimination policy. Schools may require that official recognition of student groups be conditioned on the groups' adherence to school rules, but schools may not "restrict speech or association simply because it finds the views expressed by [a] group to be abhorrent."[94] Both free speech and free association jurisprudence affect whether a public school may require student groups to accept any interested student.[95] In 2010, the Supreme Court held that while the First Amendment protects organizations' expressive activity even if it is exclusionary, it does not entitle such groups to government assistance to

[86] *Id*. at 649-50.

[87] *Id*. at 650-56.

[88] *Id*. at 653. The organization's understanding must be a sincere belief that their expressive rights would be infringed, and not merely a claim of infringement to avoid compliance with nondiscrimination laws. *Id*. at 653-54.

[89] *Id*. at 655-56 ("The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment right to choose to send one message but not the other.").

[90] *Id*. at 648 (finding that the Boy Scouts engaged in expressive activity because its mission was to transmit a system of values).

[91] *Id*. at 648.

[92] *Hurley*, 515 U.S. at 579.

[93] *See Christian Legal Society*, 130 S.Ct. 2971.

[94] Healy v. James, 408 U.S. 169, 187-88, 193 (1972).

[95] *Christian Legal Society*, 130 S.Ct. 2971.

conduct such activity.[96] The Court explained that the right of student groups to restrict membership under the First Amendment did not include a concurrent right to benefits offered by the school to groups with neutral membership policies.

The Christian Legal Society (CLS) at the University of California, Hastings College of the Law challenged the school's so-called all-comers policy, which conditioned the benefits for official recognition of student groups on the groups' adherence to a policy of welcoming all students for membership.[97] Groups that are officially recognized by the school are eligible for financial assistance from the school's collection of a mandatory activity fee collected from students. They may also use school resources such as newsletters and bulletin boards for advertising, and they may participate in recruitment fairs. Official recognition requires that groups adhere to the school's nondiscrimination policy, which it interpreted "to mandate acceptance of all comers: School-approved groups must 'allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs.'"[98]

CLS requires members and officers to sign a statement of faith and behave in accordance with the tenets of the organization's principles, which include opposition to homosexual conduct.[99] The school rejected the organization's application for official recognition, citing the exclusion of individuals who engage in homosexual behaviors as non-compliant with the conditions of recognition. Without official recognition, CLS still had access to school facilities for meetings and activities and to public posting space for public announcements.

The Court relied upon its limited public forum framework to analyze the all-comers policy and upheld the school's policy.[100] To exempt religious groups like CLS from a neutral requirement such as the all-comers policy would be to give preferential treatment to religious groups, according to the Court.[101]

The Court explained that "speech and expressive-association rights are closely linked. When these intertwined rights arise in exactly the same context, it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association."[102] As a limited public forum, the school's program for recognition of student groups must limit any restrictions on expressive association to those which are reasonable and viewpoint neutral.

The Court cited a number of factors demonstrating the reasonableness of the all-comers policy, including the opportunities it posed for all students; the avoidance of inquiries into groups' motivations; its promotion of tolerance; and the availability of alternative means of

[96] *Id.* at 2978.

[97] *Christian Legal Society*, 130 S.Ct. 2971.

[98] *Id*. at 2979.

[99] *Id*. at 2980.

[100] Notably, the Court characterized the benefits offered to registered student groups as "a state subsidy," noting that CLS "[faced] only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition." *Id*. at 2986. The Court noted that because the school's policy would condition benefits, rather than require direct action, it may appropriately be considered under the limited public forum framework. *Id.*

[101] *Id*. at 2978.

[102] *Id*. at 2985

communications for non-participating groups.[103] The Court emphasized that the policy allowed the school to encourage equal opportunities for all students to participate in various aspects of the educational process and prevented students from being forced to fund a group that would reject them as members.[104] The all-comers rule also allowed the school to implement its non-discrimination policy "without inquiring into [a group's] motivation for its membership restrictions."[105] In other words, the school would not need to determine the actual reason for a group's rejection of a potential member, that is, whether the group's assertion that the member disagreed with the group's mission masked a different, improper reason for discriminating against the individual's membership. Additionally, the policy fostered tolerance and cooperation and reflected the public policy goals of the state of California, and it provided alternative means for communication by groups that did not seek official recognition which allowed such groups to participate effectively.[106]

The university's all-comers policy was clearly viewpoint neutral according to the Court: "It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers. … Hastings' all-comers requirement draws no distinction between groups based on their message or perspective."[107]

Distinguishing the case from other cases involving access to school resources, the Court noted that it had overturned policies which denied religious student groups the ability to fully participate in school activities programs because those decisions involved "disfavored treatment" for such groups based on the perspective of their message.[108] In upholding Hastings' student group policy and denying an exemption to religious groups like CLS, the Court reiterated the First Amendment requirement for neutrality not only in speech, but also in religion. To exempt religious groups like CLS from a neutral requirement such as the all-comers policy would be to give preferential treatment to religious groups, according to the Court.[109]

The Proposed Student Non-Discrimination Act (H.R. 998; S. 555)

Intended to ensure that students are free from discriminatory conduct such as harassment, bullying, intimidation, and violence, the proposed Student Non-Discrimination Act (SNDA) would prohibit discrimination on the basis of actual or perceived sexual orientation in public elementary and secondary schools. However, the tenets of some religions disapprove of certain sexual orientations or gender identities, and some religious groups may seek legal protections to ensure that their ability to exercise those religious beliefs would not be infringed if SNDA were enacted. To ensure the continued protection of these groups' existing rights, Section 9(b) of SNDA states: "Nothing in this Act shall be construed to alter legal standards regarding, or affect

[103] The Court noted that a policy restricting access to a limited public forum is not required to be the most reasonable option. *Id*. at 2992.

[104] *Id*. at 2989.

[105] *Id*. at 2990.

[106] *Id*. at 2990-91.

[107] *Id*. at 2993 (emphasis in original).

[108] *Id*.

[109] *Id*. at 2978.

the rights available to individuals or groups under, other Federal laws that establish protections for freedom of speech and expression, such as legal standards and rights available to religious and other student groups under the First Amendment and the Equal Access Act."[110]

Therefore, under SNDA, protections afforded by the First Amendment and the Equal Access Act discussed in this report would apply without change. To the extent that SNDA implied a restriction on those protections, Section 9(b) would instruct courts that the legal rules under the First Amendment and Equal Access Act should prevail.

SNDA would not restrict access to school facilities to student groups, and therefore would not appear to implicate the protections provided by the Court's decisions on access to school facilities and resources or the protections available under the Equal Access Act. Other questions arising from SNDA include whether religious groups would be able to claim exemption from SNDA.

Applicability of SNDA to Religious Student Groups

One of the concerns raised by SNDA is how the legislation would be applied to religious groups that may disapprove of certain sexual orientations or gender identities. The Free Exercise Clause prohibits the government from burdening the exercise of religious beliefs, but it never "relieve[s] an individual of the obligation to comply with a valid and neutral law of general applicability."[111] Under this interpretation, religious groups are less likely to successfully claim constitutional exemption from laws of general applicability that incidentally burden their religious exercise.[112]

Historically, the Court has indicated that religious groups are not guaranteed to avoid burdens on their religious exercise when a law serves a valid and important public purpose. Since 1879, the Court has drawn an important distinction in Free Exercise cases—that religious exercise includes both beliefs and actions, stating that "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[113] The Court's decisions permit the government to regulate individuals' actions stemming from a religious belief, but not the religious belief itself.[114] According to the Court, "the First Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but … the second cannot be. Conduct remains subject to regulation for the protection of society."[115] The history of the Court's free exercise jurisprudence indicates that religious beliefs cannot excuse "compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[116] The Court has upheld laws proscribing behavior that may be compelled by some religious beliefs, including polygamy laws,[117] child labor laws,[118] Sunday-closing laws,[119] conscription laws,[120] and tax laws,[121] as well as controlled substances laws.[122]

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[110] S. 555, 112th Cong. §9(b) (2011).

[111] *Smith*, 494 U.S. at 879.

[112] Exemptions based on religious objections have been held to be permissible accommodations of religion under the First Amendment, but they are not required. *See Corp. of the Presiding Bishop*, 483 U.S. at 338.

[113] *Reynolds*, 98 U.S. 145.

[114] *Id*.; Cantwell v. Connecticut, 310 U.S. 296 (1940).

[115] *Id*. at 303-04.

[116] *Smith*, 494 U.S. at 878-79.

[117] *Reynolds*, 98 U.S. 145.

[118] *Prince*, 321 U.S. 158.

SNDA's prohibition against discrimination would be a law of general applicability. It would apply broadly to regulate the behavior of all students, regardless of their religious affiliation. It would not impact only a particular religious group, nor would it restrict actions taken only because of religious belief. For example, a student with no religious affiliation who opposes homosexuality would be equally affected by the enactment of SNDA as would a student whose opposition of homosexuality stemmed from his or her religious beliefs. Regardless of the source of animus toward a particular sexual orientation or gender identity, discrimination resulting from that animus would be prohibited.

Furthermore, SNDA would not require acceptance of all sexual orientations or gender identities. It only would require that individuals refrain from discriminating against students based on sexual orientation or gender identity. In other words, SNDA would regulate behaviors, not beliefs, consistent with First Amendment requirements.

Author Contact Information

Cynthia Brougher
Legislative Attorney
[redacted]@crs.loc.gov, 7-....

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[119] *Braunfeld*, 366 U.S. 599.

[120] *Gillette*, 401 U.S. 437.

[121] *United States v. Lee*, 455 U.S. 252.

[122] *Smith*, 494 U.S. 872.