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Recent Developments: Board of Education of the Westside Community Schools v. Mergens: Equal Access Act Allowing a High School Student Religious Group to Meet on School Premises during Noninstructional Time Does Not Violate the Establishment Clause

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Board of Education of the Westside Community Schools v. Mergens:
**EQUAL ACCESS ACT ALLOWING
A HIGH SCHOOL STUDENT
RELIGIOUS GROUP TO MEET ON
SCHOOL PREMISES DURING
NONINSTRUCTIONAL TIME
DOES NOT VIOLATE THE
ESTABLISHMENT CLAUSE**

In *Board of Education of the Westside Community Schools v. Mergens*, 110 S. Ct. 2356 (1990), the Supreme Court held that the Equal Access Act ("Act") prohibited a public high school from denying a student religious group permission to meet on school premises during noninstructional time. The Court based its decision on statutory interpretation of the Act and *Widmar v. Vincent*, 454 U.S. 263 (1981), which allowed university students to form a similar religious club.

In 1985, a group of students led by Bridget Mergens met with Westside High School's principal and requested permission to form a Christian Bible Club at the school. The club was to have the same privileges and conditions as other Westside school groups, except that it would not have a faculty sponsor, such a sponsor would violate the Establishment Clause. School officials denied the request, explaining that school policy required a faculty sponsor for all student clubs, and a religious club at a public high school would in itself violate the Establishment Clause. The school board upheld the denial.

A suit seeking declaratory and injunctive relief was brought by Westside students in the United States District Court for the District of Nebraska. The students argued that the denial violated the Equal Access Act, 20 U.S.C. §§ 4071-4074 (1984). The Act prohibits public secondary schools, which receive federal assistance and maintain a "limited open forum" from denying "equal access" to students who wish to meet within the forum on the basis of the content of the speech at such meetings. *Westside*, 110 S. Ct. at 2364 (citing 20 U.S.C. § 4071(a)).

The trial court determined that the Act did not apply in that all of the school's student clubs were curriculum-related and tied to the educational function of the school. *Id.* at 2363. Therefore, Westside did not have a "limited open forum" as defined by the Act. *Id.*

The United States Court of Appeals for the Eighth Circuit reversed the district court's judgment. *Id.* The Court noted that many of Westside's student clubs were non-curriculum related and thus, the school maintained a "limited open forum." The court of appeals held that the Act applied and prohibited discrimination against the students' proposed club on the basis of religious content. *Id.*

The Supreme Court affirmed the decision, holding that the school board violated the Equal Access Act in denying the students' religious club official recognition. *Id.* The Court also held that the Act, and its application to Westside, did not violate the Establishment Clause of the first amendment. *Id.* at 2373. In reaching this conclusion, the Court's analysis was splintered. Three opinions and eight Justices agreed that the Act was not an unconstitutional establishment of religion.

The plurality opinion, delivered by Justice O'Connor, was an extension of the holding in *Widmar v. Vincent*, 454 U.S. 263 (1981). In *Widmar*, the Court held that public universities must offer student religious groups the same privileges and conditions afforded other student organizations. The ruling, however, suggested that a different analysis might be needed for younger, more impressionable students below the college level. The *Westside* Court concluded that the analysis should apply to secondary students. *Westside*, 110 S. Ct. at 2371.

The Court began its analysis by interpreting the language of the Act which states that whenever a public secondary school allows "one or more noncurriculum related student groups to meet on school premises during noninstructional time," a "limited open forum" exists. *Id.* at 2364 (quoting 20 U.S.C. § 4071(b)). Although the Act did not explicitly define the phrase "noncurriculum related student group," the Court concluded that such a group included any student group not directly related to the body of courses offered by the school. *Id.* at 2366.

The Court then determined that Westside permitted noncurriculum-related student groups to meet after school on school premises. The Court noted that other groups, including a scuba diving club and a chess club, were not directly related to official school courses. There-

fore, because Westside permitted "one or more noncurriculum student groups to meet on school premises during non-instructional time," the Court concluded that Westside maintained a "limited open forum." *Id.* at 2370. Thus, Westside could not discriminate based on the content of the student's speech, and its refusal to grant recognition to the religious group constituted a denial of equal access to the school's limited open forum in violation of the Act. *Id.*

The second step of the Court's analysis focused on whether the Equal Access Act, on its face and as applied to Westside, violated the Establishment Clause of the first amendment. In making its determination, the Court applied the three-prong test set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The *Lemon* test provided that an equal access law must have a secular purpose, that its primary effect may neither advance nor inhibit religion, and that it may not foster excessive governmental entanglement with religion. *Id.* at 612-13. The Court relied on its application of the test to religious clubs at a state university level in *Widmar*, where the Court held that the "equal access" policy was not a violation of the Establishment Clause. *Westside*, 110 S. Ct. at 2370 (citing *Widmar*, 454 U.S. at 274-75). The *Westside* Court stated that the logic of *Widmar* applied with "equal force to the Equal Access Act." *Id.* at 2371.

First, the Court determined that the secular purpose prong of the test was satisfied in that the Act on its face grants equal access to both secular and religious speech. *Id.* The Court then determined that because the Act did not have the primary effect of advancing religion, the second prong of the test was also satisfied. The Court proposed that a "crucial difference" existed between government and private speech endorsing religion. *Id.* at 2732. The Court stated 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." *Id.* Furthermore, the Act avoided the problem of student emulation of teachers as role models and mandatory attendance requirements, which might indicate official endorsement, by expressly limiting the participation of school officials at student religious club

meetings. The Court recognized that the possibility of student peer pressure would still remain, however, this pressure presented little risk of official endorsement or coercion because no formal classroom activities were involved and school officials could not actively participate. *Id.*

Finally, applying the *Lemon* entanglement prong, the Court concluded that the school did not risk excessive entanglement by complying with the Act. The Act prohibited faculty monitors from participating in the meetings, as well as non-school persons from directing or regularly attending the student religious meetings. Moreover, school "sponsorship" of religious meetings was prohibited. *Id.* The Court again relied on *Widmar*, stating that a denial of equal access might create greater entanglement problems through invasive monitoring to prevent religious speech at such meetings. *Id.* Accordingly, the Court held that the Equal Access Act did not violate the Establishment Clause. *Id.*

Two concurring opinions expressed a different establishment premise. Justice Kennedy concluded that the incidental benefits realized by allowing official recognition of a student religious club did not lead to an establishment of religion. He stated that nothing on the face of the Act or the *Westside* facts demonstrated the presence of pressure to participate in the religious club. *Id.* at 2376-77 (Kennedy, J., concurring). Justice Marshall offered a more cautious opinion, stating that the school must "fully disassociate" itself from the club's religious speech, activities, and goals. In his view, the school must also avoid the appearance of sponsoring or endorsing the club's goals. *Id.* at 2378 (Marshall, J., concurring).

The Supreme Court's holding in *Westside* will have an immediate impact on this country's school systems. Some school districts have waited for the *Westside* opinion before deciding whether to approve similar after-school student clubs. Now, student religious groups can demand equal access without fear of violating the first amendment.

— Scot D. Morrell

***Hodgson v. Minnesota*: STATE ABORTION LAW REQUIRING TWO-PARENT NOTIFICATION PRIOR TO A MINOR'S OBTAINING AN ABORTION IS CONSTITUTIONAL IF A JUDICIAL BYPASS PROCEDURE IS PROVIDED**

In *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), the United States Supreme Court upheld the constitutionality of a Minnesota statute requiring that a pregnant minor notify both of her parents before having an abortion. Although the Court found the notification requirement itself to be unconstitutional, the statute as a whole was saved because it provided the alternative of bypassing such notice by obtaining judicial approval.

The Minnesota statute provided that, with certain exceptions, an abortion could not be performed on a woman under 18 years of age until at least 48 hours after both of her parents were notified. *Hodgson*, 110 S. Ct. at 2930. This notice was mandatory unless 1) the attending physician certified the necessity of an immediate abortion to prevent the woman's death, 2) both of her parents had consented to the abortion in writing, or 3) the minor declared that she was a victim of parental abuse or neglect and notice of her declaration was given to the proper authorities. *Id.*

The statute provided that if the court enjoined the enforcement of the parental notice requirement, the same requirement would be effective unless the pregnant woman obtained a court order permitting the abortion. *Id.* To acquire such a court order, the minor had to convince a judge either that she was "mature and capable of giving informed consent" to the abortion or that an abortion without notice to both parents would be in her best interests. *Id.* at 2932-33.

A group consisting of pregnant minors, clinics, doctors, and the mother of a pregnant minor challenged the statute by filing suit in district court. The group alleged that the statute violated the Due Process and Equal Protection clauses of the fourteenth amendment. *Id.* at 2934. The district court found both the two-parent notification requirement and the 48-hour waiting period to be invalid, and therefore concluded that the statute was unconstitutional in its entirety and

enjoined its enforcement. *Id.* The United States Court of Appeals, sitting en banc, reversed. The court determined that the two-parent notification requirement was unconstitutional unless, as in this case, a judicial bypass procedure was provided. *Id.* at 2935. The Supreme Court granted certiorari and affirmed. The Court held that the two-parent notification requirement was not reasonably related to legitimate state interests and was therefore unconstitutional, but agreed that the bypass procedure saved the statute as a whole. *Id.* at 2947.

The Court began its analysis by recognizing that the due process clause's constitutional protection against unjustified state intrusion into a woman's decision whether to bear a child extended to pregnant minors. *Id.* (citing *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)). Since the Minnesota statute placed obstacles in the pregnant minor's path to an abortion, the state had the burden of establishing its constitutionality; to wit, that the obstacles imposed were reasonably related to legitimate state interests. *Id.*

In considering the constitutionality of the notification requirement, the Court recognized that similar statutes containing parental consent or notification requirements had previously been evaluated by the Court and were determined to be constitutional. The Court noted, however, that none of these cases had considered the significance of requiring the notification of two parents, rather than only one. *Id.* at 2938. Thus, the Court focused its analysis on this distinction.

In defending the statute, the state relied primarily on the state's interest in protecting the independent right of parents "to determine and strive for what they believe to be best for their children," and not on the best interests of the minor. *Id.* at 2946. While the Court recognized that such an interest may be legitimate, it found that it would be fully served by a requirement that the minor notify one parent. *Id.* at 2945.

The Court determined that in functioning families, where the parents communicate with each other, notice to one parent would normally constitute notice to both and the two-parent notification requirement would therefore be unnec-