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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

February 20, 1996

The Honorable Michael L. Fair
Senator, District No. 6
501 Gressette Building
Columbia, SC 29202

Re: Informal Opinion

Dear Mike:

You have requested the advice of this Office as to whether the Fellowship of Christian athletes may meet during time set aside during the school day when non-academic related clubs are permitted to meet. The Equal Access Act provides, in part, as follows:

> 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...to...any students who wish to conduct a meeting within that limited open forum on the basis of the religious...or other content of the speech at such meetings. 20 U.S.C. § 4071 (a). (Emphasis added).

Whether a "limited open forum" exists depends upon whether "non-curriculum related student groups [are granted an opportunity] to meet on school premises during noninstructional time." § 4071 (b). "...'[N]on-instructional time' means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." § 4072 (4). (Emphasis added).

Just recently, a court has addressed the question of whether "noninstructional time" includes time set aside during the school day. In Ceniceros v. Board of Trustees, 66 F. 3d 1535 (9th Cir. 1995) (copy enclosed), the Court held that this term included the lunch period at a high school when no classroom instruction occurred during that period. The Court also noted that students were not even required to remain on campus during the lunch period but did not clearly indicate that this policy was a controlling

factor in its conclusion. See Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226, 110 L.Ed.2d 191, 110 S. Ct. 2356, 2373 (1990).[1] Ceniceros also upheld the constitutionality of this law under the Establishment Clause of the First Amendment of the United States Constitution as applied to the facts of that case.[2]

Although not binding on the Court of Appeals for the Fourth Circuit in which South Carolina is located, Ceniceros does support a conclusion that "noninstructional time" could include a similar period in a South Carolina school when no classroom instruction was ongoing; however, whether a particular school's activity, club or lunch period would constitute "noninstructional time" would be dependent upon those facts associated with the period. An investigation and review of all of the facts associated with the

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[1] The Supreme Court did not expressly rule upon the question presented here; however, the Court made some comments related to this issue. The Court stated that the Equal Access Act would not have the primary effect of advancing religion as applied to the facts of that case, because among other reasons, "...a school that permits a student-initiated and student-religious club to meet after school, just as it permits any other student group to do, does not convey a message of state approval or endorsement of the particular religion." (emphasis added). 110 S.Ct. at 2373. The Court thought that the limitation of meetings to "noninstructional time" avoided "the problems of 'students' emulation of teachers as role models' and 'mandatory attendance requirements....'" Id. at 2372.

Ceniceros found that these references "provided factual context [rather than] suggest[ed] that the timing of the meetings was an important factor upon which the Court based its decision." 66 F. 3d at 1539. Although Mergens noted the avoidance of mandatory attendance requirements by after school programs and Ceniceros mentioned that the students could leave school during lunch, the factor alone of being able to leave campus is not necessarily controlling.

[2] Bender v. Williamsport Area School District, 741 F.2d 538 (3rd Cir. 1984) held that a student initiated religious group meeting during an activity period would be violative of the Establishment Clause of the First Amendment of the United States Constitution. The Court concluded that the free speech rights of the students would be outweighed by the Establishment Clause concerns (Id. at 559); however, Bender was vacated by the U.S. Supreme Court on grounds unrelated to this issue. 475 U.S. 534, 89 L.Ed.2d 501, 106 Sup.Ct. 1326 (1986). Bender also did not address the Equal Access Act which was passed afterward.

activity period would not fall within the scope of opinions of this Office. Ops. Atty. Gen. December 12, 1983. If the period in question did constitute "noninstructional time", whether the school were required to permit the Fellowship to meet would also be dependent upon whether the school maintained a "limited open forum" during that period by permitting "noncurriculum related student groups" to meet. § 4071 (a) and (b).

This letter is an informal opinion. It has been written by the designated Assistant Deputy Attorney General and represents the opinion of the undersigned attorney as to the specific questions asked. It has not, however, been personally reviewed by the Attorney General nor officially published in the manner of a formal opinion.

I hope that this information is of assistance to you. If you have any questions or need further assistance, please let me know.

Yours very truly,

J. Emory Smith, Jr.
Assistant Deputy Attorney General

JESjr