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Can schools deny groups access to facilities based on the focus of the group? The issue continues to surface.

Access to Facilities by Nonschool Religious Groups: An Enduring Issue

By Charles J. Russo, J.D., Ed.D.

Among the many duties of school business officials (SBOs), their boards, and other education leaders is establishing policies governing access to district facilities. When disputes over access are litigated, the judiciary walks a fine line, as courts generally grant school officials discretion in defining use policies. However, as discussed below, when it comes to granting access to public school facilities, educators cannot violate the constitutional rights of a group based on the religious content of its speech.

In a recent case, *Child Evangelism Fellowship of Minnesota v. Minneapolis Special School District No. 1* (2012), the Eighth Circuit ruled that officials engaged in impermissible viewpoint discrimination in denying a religious group access to district facilities to conduct after-school enrichment programs.

In light of the enduring issue over access to facilities by nonschool religious groups, this column reviews relevant Supreme Court precedent before examining the Eighth Circuit's analysis in *Child Evangelism*. Then, in the wake of *Child Evangelism*, four access options are presented for SBOs, their boards, and other education leaders.

Key Litigation on Access

In a 1993 case, *Lamb's Chapel v. Center Moriches Union Free School District*, a local school board in New York, acting pursuant to a state statute, enacted a policy that made its facilities available to an array of social and civic groups. When the board refused to rent space to a religious group to show a film series on child rearing, the case went to court and lower courts upheld the district's policy.

On appeal, the Supreme Court unanimously reversed in favor of the religious group. The Court decided that insofar as officials created a limited public forum, they

could not discriminate against the religious content/speech of the films. In treating religious speech as a fully protected subset of free speech, the Court indicated that the board could not deny the group access to district facilities as long as they were available to other organizations.

Two years later, in *Rosenberger v. Rector and Visitors of the University of Virginia* (1995), the issue was funding for a religious magazine published by an on-campus Christian student group. A divided Supreme Court relied in part on *Lamb's Chapel* in extending the concept of viewpoint neutrality to funding. The Court explained that the policy permitting the university to pay for printing publications of student organizations applied to the religious journal since its speech, which discussed issues from a Christian perspective, was protected by the First Amendment.

A second case from a K–12 setting was litigated in New York when officials refused to permit a non-school-sponsored club to meet after the school day ended so that students and moderators could discuss character and moral development from a religious perspective.

Although forbidding the religious club from meeting under their community use policy, officials allowed three other groups—the Boy Scouts, Girl Scouts, and 4-H—to gather because they addressed related topics from secular perspectives.

On review of orders in favor of the school board (*Good News Club v. Milford Central School* 1998, 2000), the Supreme Court agreed to resolve a split in the lower courts since the Eighth Circuit upheld the right of a like club in Missouri to use school facilities (*Good News/Good Sports Club v. School District of the City of Ladue* 1994).

In *Good News Club v. Milford Central School* (2001), a divided Supreme Court

reversed in favor of the club. The Court reasoned that the board violated the club's rights to free speech by engaging in impermissible viewpoint discrimination in refusing to allow it to use school facilities for its meetings because of their religious content. The Court added that the board's action was not justified by fears of violating the establishment clause.

Finding that the board created a limited public forum and that children remained after school with the written permission of their parents, the Court was convinced that there was no risk that the meetings could have been viewed as school-sponsored.

The Good News Club

Child Evangelism Fellowship (CEF) of Minnesota is a local chapter of an organization whose leaders conduct free weekly Good News Club meetings for elementary school children aged 5–12 regardless of their religious beliefs or lack thereof. The meetings, which teach Christian moral values and character development through the use of the Bible, songs, prayers, and related activities, are designed to instill spiritual growth and leadership skills in children.

CEF leaders procured a permit from school board officials in Minneapolis Special School District Number 1 in 2000 that granted them access to a local public school and its distribution forum. Materials distributed in this forum contained a disclaimer that the board did not endorse any group's activities. After five years without incident, during the 2005–2006 school year, board officials changed or formalized procedures such that selected participating groups, including CEF, were designated "community partners" that could offer after-school enrichment programs.

The new school site coordinator hired by the board for the 2008–9 school year was concerned about the religious tone of CEF's meetings

because she overheard prayers and references to Jesus Christ at a session. Consequently, CEF was removed from the list of designated after-school program providers effective for the 2009–10 school year. CEF was still listed as a community partner, but its attendance dropped from 47 to 10 to 5 participants over the three years ending in 2010–11.

Since other community partners with similar, albeit nonreligious goals—including the Boy and Girl Scouts, Big Brothers Big Sisters, and Boys and Girls Clubs—were permitted to remain as after-school programs providers, CEF filed suit claiming that officials violated its rights, most notably to free speech under the First Amendment.

Judicial Analysis

The federal trial court in Minnesota denied CEF's motion for a preliminary injunction to restore its status as a provider of after-school programs. The court refused to apply *Milford* and its own precedent in *Ladue* and decreed that insofar as officials had not created a limited public forum, CEF engaged in school-sponsored speech that was subject to the restrictions of the establishment clause (*Child Evangelism* 2011). The court also rejected CEF's claim that it suffered an irreparable harm entitling it to an injunction allowing it to retain its status.

On further review, a unanimous three-judge panel of the Eighth Circuit reversed in favor of CEF. At the outset, the court noted that it would focus on whether CEF suffered an irreparable harm to its First Amendment rights. The court maintained that the board engaged in unconstitutional viewpoint discrimination by removing CEF from the list of programs while it did not do so to secular groups.

The panel explicitly referred to *Milford* and *Ladue* in pointing out that the trial court misapplied the law by subjecting CEF to less

favorable treatment based on the content of its religious message.

The Eighth Circuit next considered whether the board had a compelling interest to exclude CEF because of the fear that its presence in the school would have violated the establishment clause.

Relying on *Lamb's Chapel*, *Rosenberger*, and *Milford*, among other cases, the court held that insofar as CEF's activities occurred after the school day ended, there was no risk that it would have provided the board with a compelling interest to avoid a purported establishment clause violation. The court further observed that the club's private speech activities were simply not school sponsored.

Opposition by critics simply because they disagree with viewpoints does not justify the denial of access to religious, or other, groups.

In concluding, the Eighth Circuit wrote that that the trial court abused its discretion in denying CEF's requested relief. The court's opinion was that insofar as CEF suffered an irreparable harm, as witnessed by its decline in participants, once excluded from the list of community partners, it was entitled to be restored to its former status.

Reflections

Christian Evangelism highlights four options that SBOs, their boards, and other education leaders may wish to reflect on when evaluating the extent to which they should make district facilities available to non-school groups.

1. As reflected in *Child Evangelism*, and consistent with Supreme Court precedent, board policies that create limited public forums must grant all outside organizations access to facilities. The one exception is that boards can prohibit use if a

group's presence or speech constitutes a reasonable forecast of material and substantial disruption giving rise to a compelling interest against granting access.

However, the mere fear of an establishment clause violation—as in *Child Evangelism*, and relying on *Milford*—is an unacceptable rationale. Similarly, opposition by critics simply because they disagree with viewpoints does not justify the denial of access to religious, or other, groups.

2. School board policies could narrow the focus of access to curricular-related groups while imposing moratoriums on nonschool organizations. Yet this approach might exclude an array of traditional, popular activities that would understandably upset parents and students. Although it may be argued that a moratorium for a set time might provide a cooling off period, it risks throwing “the baby out with the bathwater.”

In other words, as demonstrated in *Child Evangelism*, the Eighth Circuit ruled that CEF's exclusion caused it to suffer irreparable harm because once interests in activities dwindle, they may be difficult to rekindle. The upshot, then, is that students may be deprived of activities and that may create public relations problems for school district officials. This approach might also unfairly cause resentment toward students who wish to participate in religious activities.

At the same time, such a freeze risks depriving students—especially those in families with single parents and where both parents work full-time outside their homes—of after-school activities, making them more

vulnerable to the many temptations confronting children today.

3. Education officials could prohibit all access to facilities by outside groups while turning over the responsibility for clubs to such organizations as the local Parent-Teacher Association. Although this option might appear to relieve educators of the duty of approving clubs and granting access, it is unlikely to pass constitutional muster. Put another way, although groups such as the PTA may not officially be part of school systems, since it could be argued that they are sufficiently closely related to the schools, this approach would probably be unable to withstand a legal challenge.

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4. As a fourth draconian option, board policies could create closed forums and would not have to open their doors to non-school community groups. However, insofar as creating closed forums would undoubtedly exclude many groups, such as those that were permitted in *Child Evangelism*, this option is overkill.

Further, to the extent that many boards already make their facilities available to a variety of community groups without incident, including religious clubs, why board officials proceeded as they did in *Child Evangelism* is unclear. As such, since community groups contribute a great deal to the lives of schools, and their students, education leaders should think twice about closing

their doors in order to exclude clubs or organizations based solely on the religious content of their speech as they continue to grant access to community groups in a manner with the first reflection.

Teachable Moments

Fear of violating the establishment clause or receiving opposition from students, parents, or others is an insufficient reason for school officials to prevent groups from meeting in school facilities. To the extent that boards make district facilities available to community groups, SBOs, their boards, and other education leaders would be wise to use their policies as the basis for teachable moments in which they make it clear that tolerance, and the law, require them to allow people to express their opinions as long as their doing so does not present a threat to the well-being of others.

References

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