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USE OF SCHOOL FACILITIES BY OUTSIDE GROUPS: POLICY IMPLICATION

Overview

In many of this nation's public school districts school buildings and other facilities are regularly used by a variety of community groups—including churches and other faith-based organizations. In many localities the elementary school, or high school, or athletic field is the only facility large enough to accommodate group meetings and other civic gatherings.

While local school boards do not surrender legal control over school facilities, more often than not they enact policies and establish formal business-type arrangements and procedures specifically applicable to outside groups in an effort to demonstrate a spirit of reasonable accommodation. However, it is when community faith-based groups request access to a public school building or other facility for regularly scheduled religious services or to work directly with students during or after school (in curricular or extracurricular activities) that legal and/or constitutional issues spring up. As a general rule, where school officials have either limited, or placed restrictions on, or denied access to school facilities by faith-based groups they have done so to avoid Establishment Clause problems. See, *e.g.*, Lamb's Chapel v. Center Moriches Union Free School District (1993), Bronx Household of Faith v. Community School District No. 10 (2*nd* Cir. 1997), and Wigg v. Sioux Falls School District 49-5 (8th Cir. 2004)

Equal Access and Extracurricular Activities. As my colleague Professor Bosher and I have observed, "[l]itigation over the place of religion in the general curriculum has also spilled over into its involvement in extracurricular activities. People have objected to the promotion of religion in required or elective courses; similarly, they have objected to its inclusion in clubs or extracurricular activities." (Vacca and Bosher, 2012)

As legal experts tell us, following the United States Supreme Court's decisions in Widmar v. Vincent (1989) and Board of Education v. Mergens (1990), two student club cases, "the courts began to rely on the free speech test more frequently when dealing with church-state issues. They reasoned that if religious groups were denied the use of school facilities, while other groups, such as civic organizations, scouts, and so forth, were permitted to use them, then religious groups' free speech rights would be denied. To do otherwise would violate the

requirement of neutrality. The *free speech test*, sometimes called the *public forum test*, has been applied to the use of school facilities." (Alexander and Alexander, 2012)

Forum Analysis. As the Rehnquist Court reasoned, "government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." Hazelwood v. Kuhlmeier (1988) Because public school buildings and other facilities possess special purposes and special characteristics they do not fit the definition of a traditional open forum; rather, where school authorities have permitted access to facilities by diverse student groups and outside community organizations (including faith-based groups) they actually have created a "limited public forum." Within that limited forum school authorities do not relinquish control over speech and expression that bears the "imprimatur of the school." Hazelwood (1988) However, to avoid allegations of impermissible *viewpoint discrimination* (*e.g.*, allegations that school authorities were motivated solely because they disagree with symbolism or content), school system decisions to permit or deny access to school facilities must be: (1) motivated by "legitimate pedagogical concerns," Hazelwood (1988), (2) consistent with and exercised in a spirit of accommodation, and (3) consistently applied. Good News Club v. Milford Central (2001)

Recently, I found and reviewed a decision from the United States Court of Appeals for the Eighth Circuit in which an outside faith-based organization alleged viewpoint discrimination. The Eighth Circuit's opinion in the case reads like a restatement of the law on viewpoint discrimination.

Child Evangelism Fellowship of Minn. v. Minneapolis Special School District No. 1

Facts: Child Evangelism Fellowship of Minnesota (CEF) is a local chapter of an international non-profit organization that conducts weekly good news clubs (GNC) for children ages five through twelve. GNC meetings are available to all elementary school age children "regardless of their religious beliefs or lack thereof." During the meetings there are Bible stories and lessons on moral and character development, creative learning activities, prayer, songs, and other activities. The meetings are free for child attendees. CEF's goals are to encourage learning, spiritual growth, service to others, and leadership development. Attendees are taught Christian Biblical principles, and moral values such as honesty, forgiveness, and similar character qualities.

In 2000, CEF obtained a permit from the school district which granted access to facilities at an elementary school. The school acted as host to CNC meetings. The permit also gave CEF access to the school district's literature distribution forum—through which CEF flyers were distributed. The flyers contained a disclaimer that the school district did not sponsor or endorse CEF's activities. CNC meetings were held at the school without incident until 2005.

During the 2005-2006 school year, the school district either changed or formalized the way it screened groups using its facilities for after-school activities. Groups seeking access to facilities had to apply to become "community partners" with the school. Community partners were granted access to district facilities and use of the flyer distribution system to reach students.

Members of a community partners subset were asked to be a part of the after-school enrichment program pursuant to *Minn. Stat. 124D.19(12)* which provided that districts operating a community education program may offer youth after-school programs designed to encourage social, mental, physical and creative abilities, promote leadership development and improve academic performance. Plus, a district implementing such a program must use an advisory council whose members represent various community groups defined in the statute. An advisory council is in charge of making sure the groups promote the values stated in the statute.

Also, each district must employ a "site coordinator" whose job it is to coordinate the after-school program and decide which groups will be invited to participate at a particular school. CEF became a community partner in 2005 and operated without incident until 2008-2009.

In 2008-2009 the elementary school hired a new coordinator who became concerned about the "religious content" of CEF clubs after hearing a prayer and reference to Jesus Christ during GNC meetings. Due to concerns about "prayer and proselytizing" during GNC meetings, CEF was ultimately informed that it would be removed from the after-school program effective in the 2009-2010 school year.

While CEF still had access to school facilities for meetings as a community partner, removal from the after-school program meant that it no longer had access to transportation and food services from the school district. Attendance at GNC weekly meetings declined greatly from 47 students in 2008-2009 to 5 participants in 2010-2011 following the school district revoking CEF's right to participate in the after-school program. Other community partners remaining in the after-school program included the Boy and Girl Scouts, Big Brothers/Big Sisters, and Boys and Girls Clubs of the Twin Cities. CEF went to court.

District Court Action. CEF filed suit in a federal district court seeking injunctive and declaratory relief and damages under 42 U.S.C. 1983. CEF claimed violations of free speech and equal protection under the First and Fourteenth Amendments.

The court denied CEF's motion for a preliminary injunction. Seeing this case as distinguishable from Good News Club v. Milford Central (2001) and Good News/Good Sports Club v. School District of Ladue (8th Cir. 1994), the court reasoned that CEF was not likely to prevail in its claim that the school district's actions constituted "impermissible viewpoint discrimination under the First Amendment." The court also found that groups participating in the after-school program "engaged in school-sponsored speech subject to the restrictions of the Establishment Clause." And, since CEF was still able to use school facilities as a community partner, it could not establish irreparable harm. Child Evangelism Fellowship v. Minnesota Special School District No 1 (D. Minn. 2011) CEF appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit.

Eighth Circuit Analysis and Rational. Initially, the Eighth Circuit Court examined the lower court's denial of a preliminary injunction. In doing so the Court reiterated the following factors necessary for a moving party to be successful and these are: (1) a likelihood of success on the merits; (2) irreparable harm; (3) that the balance of the harms of granting or denying the injunction are in its favor; and (4) that granting the injunction is in the public's interest. In this case the federal district court had decided that CEF did not establish its likelihood of success on the merits of its constitutional claims. Also, the district court did not see where CEF suffered irreparable harm solely from the loss of attendance at meetings. However, the Eighth Circuit considered it important to focus its review of CEF's likelihood of success on the merits of its First Amendment constitutional claim—which the appellate court said is enough, standing alone, to cause irreparable harm.

The Eighth Circuit Court restated CEF's argument that the school district "engaged in unconstitutional viewpoint discrimination when it removed CEF from the after-school program because of its religious viewpoint while permitting similar secular youth development programs, such as the Boy and Girl Scouts to remain." Citing R.A.V. v. City of St. Paul (1992) and Perry Educ. Ass'n v. Perry Local Educators' Ass'n (1983) the Court reiterated that when "the government targets a particular viewpoint taken by speakers on a general subject, the First Amendment is violated." It should be noted that the Eighth Circuit Court added in a footnote that "it seems uncontroversial that the school has created what the Supreme Court has dubbed a 'limited public

forum' in this case…because the school exclusion of CEF from the after-school program is viewpoint-based, there is no need to analyze the nature of the forum of the after-school program, or the level of scrutiny given to restriction in the various fora. Even in a nonpublic forum, restrictions must be viewpoint neutral."

Relying on such court decisions as Good News Club v. Milford Central School (2001), Rosenberger v. Rector and Visitors of University of Virginia (1995), Lamb's Chapel v. Center Moriches Union Free School District (1983), and Good News/Good Sports Club v. School District of City of Ladue (8th Cir. 1994) in its detailed analysis of the district court's decision, the appellate court concluded that the case under review represents "a relatively uncontroversial case of viewpoint discrimination. Thus, "the only remaining question is whether the district court was justified in its chosen course of action."

Restating that (1) an abridgement of First Amendment speech rights must be justified by a "compelling governmental interest," and (2) avoiding an Establishment Clause violation "may be" such an interest, the Eighth Circuit disagreed with the district court's finding that the school district had a compelling interest in excluding CEF from the after-school program resources in order to avoid an Establishment Clause violation—a finding driven by the trial court's view that CEF's programming was "school sponsored," *i.e.*, part of an after-school program that was accorded funding resources available to all such programs. Citing the United States Supreme Court's reasoning in Lamb's Chapel (1983), Widmar (1981), Rosenberger (1995), and Milford (2001), the Eighth Circuit concluded that the Establishment Clause: (1) does not proscribe "private religious conduct during nonschool hours merely because it takes place on school premises," and (2) requires "neutrality," as opposed to "hostility." The Eighth Circuit Court quoted directly from the Supreme Court where it was said that "neutrality is respected, not offended, when government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."

The Eighth Circuit Court emphasized that while the Establishment Clause forbids "government speech" which endorses religion the Free Exercise Clause protects "private speech endorsing religion." Thus, whether the content of CEF's GNC meetings are private speech of school-sponsored speech "is the key to analyzing the district's Establishment Clause defense to its practice of viewpoint discrimination."

The appellate court found important the fact that school district policy on after-school programs contained a disclaimer that participants are "non-school" and "non-district organizations." Also, relying on Rosenberger (1995), the appellate court did not see the school district's providing resources and funding to groups as a problem. In the words of the court, "…the district has chosen to provide funding for a variety of participants in the after-school program, including CEF until its ouster in 2009, and has taken pains to dissociate itself from the private speech of the groups involved." Seeing this case as "factually distinct" from Santa Fe I.S.D. v. Doe (2000), Lee v. Weisman (1992), and Hazelwood v. Kuhlmeier (1988) the Court concluded that CEF's GNC "is not school sponsored, even when given the after-school resources." Moreover, said the Court, the GNC meetings are held immediately after school and are open to students who obtain parental permission to attend, and are held in a "forum" "available to other secular community groups to foster character building activities." Consistent with United States Supreme Court decisions and previous decisions of the Eighth Circuit itself, the appellate court held that this type of speech is private speech, not school sponsored.

Concluding its analysis the Eighth Circuit Court held that the district court had "abused its discretion in denying the preliminary injunction." In addition, it made the following statement: "Given that the content of the GNC meetings was not government speech, the school had no compelling interest in avoiding an Establishment Clause violation, and there is no basis upon which it can justify its viewpoint discrimination." Finally, in seeing

a need to serve the public interest and the balance of harms, the Court looked favorably on granting the injunction.

Eighth Circuit Decision. The lower court's decision was reversed and the case remanded to the district court for further proceedings consistent with this opinion.

Policy Implications

As stated at the outset, local public school systems often receive requests for access to and use of school system facilities (buildings, the auditorium, gymnasium, athletic fields) from a variety of community civic groups—including faith-based organizations. It is when faith-based groups and organizations are granted access that potential legal and constitutional issues sometimes spring up—especially in situations where outside groups or organizations work directly with students in extracurricular programs..

Courts have made it clear that local school board legal authority and control of facilities and resources are conditioned when a *limited public forum* has been established. While the Child Evangelism Fellowship of Minnesota (2012) case is but one case from one federal jurisdiction, the Eighth Circuit's analysis and conclusions are instructive—especially the restatement of the law regarding outside groups and organizations. Briefly stated, the Court makes it clear that a school board's forum-access decisions must be consistent with school system policy, uniformly implemented, and viewpoint neutral. What follow are five implications for school system policy gleaned from the Eighth Circuit's rationale.

Where local school facilities are made available for use by outside community groups and organizations, school system policies must make it clear that:

- The school board does not relinquish legal authority and control over school system property.
- All outside groups and organizations seeking access to and use of school property must formally make such requests through official school system application procedures.
- Access to and use of school system property must be officially approved by the appropriate school official. Groups and organizations granted permission to use school system property must follow official school board policies, procedures, and guidelines.
- Consent to use school system property will be withdrawn from any outside community group or organization found in violation of official school board policies, procedures, and guidelines.
- The school system disclaims any endorsement or sponsorship of community groups and organizations using school system property. Outside community groups or organizations using the property are responsible for what takes place during the meeting, activity, and/or other event sponsored by that particular group or organization.

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Note: The views expressed in this commentary are those of the author.