

## BIBLE YOUTH GROUP EXCLUDED FROM SCHOOL OPEN FOR COMMUNITY USE

James C. Kozlowski, J.D., Ph.D.

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In the *Good News* opinion described herein, the Supreme Court of the United States considered "whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech." In this particular instance, a public school district had excluded a bible study youth group from using school facilities which were otherwise available to members of the community for social, civic, recreational, and other uses pertaining to the welfare of the community.

Under the circumstances of this case, the Supreme Court found that the school district had engaged in unconstitutional viewpoint discrimination when the district characterized the group's activities as "the equivalent of religious instruction" and, thus, rejected the group's request to use school facilities "for the purpose of conducting religious instruction and Bible study."

Moreover, the Court found that the school district would not violate the Establishment Clause by allowing this particular club to use public facilities on the same basis as other community groups because such use would not reasonably be perceived as governmental endorsement of the group's religious beliefs.

### Viewpoint Discrimination?

In the case of *Good News Club v. Milford Central School*, No. 99-2036 (U.S. 06/11/2001), the issue before the Supreme Court of the United States was whether a school district had violated the free speech rights of a bible study club when the school district prohibited the club from meeting at a school after school hours. The Court also considered whether the school district was justified in taking this action as a result of the school district's concern that permitting the club's religious activities would create the perception that the school district was endorsing religion or a particular creed in violation of the Establishment Clause. The facts of the case were as follows:

The State of New York authorizes local school boards to adopt regulations governing the use of their school facilities. In particular, N. Y Educ. Law (section)414 (McKinney 2000) enumerates several purposes for which local boards may open their schools to public use. In 1992, Milford Central School (Milford) enacted a community use policy adopting seven of (section)414's purposes for which its building could be used after school. Two of the stated purposes are relevant here. First, district residents may use the school for instruction in any branch of education, learning or the arts." Second, the school is available for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public."

Stephen and Darleen Fournier reside within Milford's district and therefore are eligible to use the school's facilities as long as their proposed use is approved by the school. Together they are sponsors of the local Good News Club, a private Christian organization for children ages 6 to 12. Pursuant to Milford's policy, in September 1996 the Fourniers submitted a request to Dr. Robert McGruder, interim superintendent of the district, in which they sought permission to hold the Club's weekly after school meetings in the school cafeteria.

The next month, McGruder formally denied the Fourniers' request on the ground that the proposed use - to have .a fun time of singing songs, hearing a Bible lesson and memorizing scripture," - was "the equivalent of religious worship." According to McGruder, the community use policy, which prohibits use "by any individual or organization for religious purposes," foreclosed the Club's activities.

In response to a letter submitted by the Club's counsel, Milford's attorney requested information to clarify the nature of the Club's activities. The Club sent a set of materials used or distributed at the meetings and the following description of its meeting:

The Club opens its session with Ms. Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next Club members engage in games that involve learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization.

McGruder and Milford's attorney reviewed the materials and concluded that "the kinds of activities proposed to be engaged in by the Good News Club were not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself." In February 1997, the Milford Board of Education adopted a resolution rejecting the Club's request to use Milford's facilities "for the purpose of conducting religious instruction and Bible study."

In March 1997, the Good News Club, Ms. Fournier, and her daughter Andrea Fournier collectively, the Club), filed an action against Milford in federal district court. The Club alleged that Milford's denial of its application violated its free speech rights under the First Amendment. While the litigation was proceeding, the court issued an order preventing the school from enforcing its religious exclusion policy against the Club and thereby permitting the Club's use of the school facilities. Accordingly, the Club held its weekly after school meetings from April 1997 until June 1998 in a high school resource and middle school special education room.

In August 1998, the federal district court vacated its order and granted Milford's motion for summary judgment. In so doing, the district court found that the Club's "subject matter is decidedly religious in nature, and not merely a discussion of secular matters from a religious perspective that is otherwise permitted under Milford's use policies." As a result, the court held that "the school could deny access to the Club without engaging in unconstitutional viewpoint discrimination." because "the school had not permitted other groups that provided religious instruction to use its limited public forum."

The Club appealed to the United States Court of Appeals for the Second Circuit. The federal appeals court affirmed the decision of the district court. In so doing, the federal appeals court rejected the Club's contention that Milford's restriction against allowing religious instruction in its facilities was unreasonable. Moreover, the appeals court found that "Milford's policy of excluding the Club's meetings was constitutional subject discrimination, not unconstitutional viewpoint discrimination." Specifically, the appeals court found that the Club's activities were "outside the bounds of pure moral and character development" because "the subject matter of the Club's activities is 'quintessentially religious'."

The Supreme Court of the United States granted the Club's petition to review this decision. In granting review, the Supreme Court noted that there was "a conflict among the Courts of Appeals on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech."

### Limited Public Forum

As cited by the Supreme Court, "[t]he standards that we apply to determine whether a State has unconstitutionally excluded a private speaker from use of a public forum depend on the nature of the forum." In this particular instance, the parties agreed that "Milford created a limited public forum when it opened its facilities in 1992." As a result, for the purposes of this case, the Court assumed that "Milford operates a limited public forum."

As described by the Court, the State's restrictions on speech in a limited public forum (e.g., public schools) are subject to less scrutiny than are restrictions in a traditional or open public forum (e.g., public streets, parks and squares).

When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified in reserving its forum for certain groups or for the discussion of certain topics.

The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be reasonable in light of the purpose served by the forum.

Applying this test to the facts of the case, the issue was "whether the exclusion constituted viewpoint discrimination." Under the circumstances of this case, the Court found "the restriction is viewpoint discriminatory" because "Milford's exclusion of the Good News Club [was] based on its religious nature."

Milford has opened its limited public forum to activities that serve a variety of purposes, including events "pertaining to the welfare of the community." Milford interprets its policy to permit discussions of subjects such as child rearing, and of "the development of character and morals from a religious perspective."

For example, this policy would allow someone to use Aesop's Fables to teach children moral values. Additionally, a group could sponsor a debate on whether there should be a constitutional amendment to permit prayer in public schools, and the Boy Scouts could meet "to influence a boy's character, development and spiritual growth," In short, any group that "promote[s] the moral and character development of children" is eligible to use the school building. just as there is no question that teaching morals and character development to children is a permissible purpose under Milford's policy, it is clear that the Club teaches morals and character development to children. For example, no one disputes that the Club instructs children to overcome feelings of jealousy, to treat others well regardless of how they treat the children, and to be obedient, even if it does so in a non-secular way.

Nonetheless, because Milford found the Club's activities to be religious in nature - "the equivalent of religious instruction itself," - it excluded the Club from use of its facilities.

Based upon these facts, in the opinion of the Supreme Court, it was "quite clear that Milford engaged in viewpoint discrimination when it excluded the Club from the after school forum."

[T]he local New York school district... had adopted (section) 414's "social, civic or recreational use" category as a permitted use in its limited public forum. The district also prohibited use "by any group for religious purposes."...

[T]he Club seeks to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint... [T]he Club chooses to teach moral lessons from a Christian perspective through live storytelling and prayer... [This mode of speech uses] a religious viewpoint. Thus, the exclusion of the Good News Club's activities... constitutes unconstitutional viewpoint discrimination.

As described by the Supreme Court, the school district and the lower federal courts believed that their following characterization of the Club's activities as "religious in nature warranted treating the Club's activities as different in kind from the other activities permitted by the school":

[T]he Club is doing something other than simply teaching moral values. The "Christian viewpoint" is unique, according to the court, because it contains an "additional layer" that other kinds of viewpoints do not. That is, the Club "is focused on teaching children how to cultivate their relationship with God through Jesus Christ," which it characterized as "quintessentially religious."

Based upon this characterization, the federal appeals court had determined that the Milford's exclusion of the Club's activities "did not constitute viewpoint discrimination" because these activities "fall outside the bounds of moral and character development."

The Supreme Court, however, rejected the notion that activities which are "quintessentially religious" or "decidedly religious in nature" cannot also be "characterized properly as the teaching of morals and character development from a particular viewpoint."

When the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters. What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons.

It is apparent that the unstated principle of the Court of Appeals' reasoning is its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a "pure" discussion of those issues. According to the Court of Appeals, reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not.

We, however, have never reached such a conclusion. Instead, we reaffirm... that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.

As a result, the Supreme Court held that "Milford's exclusion of the Club from use of the school, pursuant to its community use policy, constitutes impermissible viewpoint discrimination."

Establishment Clause

The Supreme Court also addressed Milford's argument that "its restriction was required to avoid violating the Establishment Clause." Specifically, Milford contended that "its interest in not violating the Establishment Clause outweighs the Club's interest in gaining equal access to the school's facilities... even if its restriction constitutes viewpoint discrimination." The Supreme Court rejected this argument. In so doing, the Court concluded that "the school has no valid Establishment Clause interest" under the circumstances of this particular case. Specifically, the Court found "no realistic danger that the community would think that the District was endorsing religion or any particular creed."

[T]he Club's 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... Milford made its forum available to other organizations... Thus, Milford's reliance on the Establishment Clause is unavailing.

As described by the Court, "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."

In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, the Court has consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. Neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges.

In this particular instance, the Court found "Milford's implication that granting access to the Club would do damage to the neutrality principle defies logic."

[T]he guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.

The Good News Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups. Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club.

Because its policy involved elementary school children, Milford had also argued that "children will perceive that the school is endorsing the Club and will feel coercive pressure to participate, because the Club's activities take place on school grounds, even though they occur during nonschool hours." The Court found this argument to be "unpersuasive."

[T]o the extent we consider whether the community would feel coercive pressure to engage in the Club's activities, the relevant community would be the parents, not the elementary school children. It is the parents who choose whether their children will attend the Good News Club meetings. Because the children cannot attend without their parents' permission, they cannot be coerced into engaging in the Good News Club's religious activities. Milford does not suggest that the parents of elementary school children would be confused about whether the school was endorsing religion. Nor do we believe that such an argument could be reasonably advanced.

[W]hatever significance we may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults, we have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present...

Here, where the school facilities are being used for a nonschool function and there is no government sponsorship of the Club's activities...

Moreover, assuming "the possible misperceptions by schoolchildren," the Supreme Court found "the facts of this case simply do not support Milford's conclusion" that "Milford's permitting the Club's activities would violate the Establishment Clause."

There is no evidence that young children are permitted to loiter outside classrooms after the school day has ended. Surely even young children are aware of events for which their parents must sign permission forms. The meetings were held in a combined high school resource room and middle school special education room, not in an elementary school classroom. The instructors are not schoolteachers. And the children in the group are not all the same age as in the normal classroom setting; their ages range from 6 to 12. In sum, these circumstances simply do not support the theory that small children would perceive endorsement here.

Further, in the opinion of the Court, "the danger that children would misperceive the endorsement of religion" was no greater than "the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum."

This concern is particularly acute given the reality that Milford's building is not used only for elementary school children. Students, from kindergarten through the 12th grade, all attend school in the same building. There may be as many, if not more, upperclassmen than elementary school children who occupy the school after hours. For that matter, members of the public writ large are permitted in the school after

hours pursuant to the community use policy. Any bystander could be aware of the school's use policy and its exclusion of the Good News Club, and could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement.

We cannot operate, as Milford would have us do, under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club's religious activity. We decline to employ Establishment Clause jurisprudence... in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive...

We are not convinced that there is any significance in this case to the possibility that elementary school children may witness the Good News Club's activities on school premises.

Accordingly, the Supreme Court concluded that "permitting the Club to meet on the school's premises would not have violated the Establishment Clause." The Supreme Court, therefore, reversed the judgment of federal appeals court and remanded (i.e., sent back) this for "further proceedings consistent with this opinion."

When Milford denied the Good News Club access to the school's limited public forum on the ground that the Club was religious in nature, it discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause of the First Amendment. Because Milford has not raised a valid Establishment Clause claim, we do not address the question whether such a claim could excuse Milford's viewpoint discrimination.