FEDERAL

Rule Interprets Law on Boy Scouts' Access to Schools

By Andrew Trotter — April 04, 2006 4 min read

The Department of Education has issued final rules underscoring that school districts must accommodate the Boy Scouts of America and certain other youth groups that ask to use schools for meetings and recruitment.

Schools risk loss of their federal education aid if they do not comply with the requirement included in the No Child Left Behind Act.

Congress added the provision, which was opposed by some national education and civil liberties groups, in the controversy that flared after the U.S. Supreme Court in 2000 upheld the right of the Boy Scouts to exclude homosexuals as adult leaders.

The Boy Scouts complained that they were having to sue to preserve long-held access to public schools. Many school districts concluded that the venerable youth organization's exclusion of openly gay members was inconsistent with district anti-discrimination policies, with most such districts going at least as far as ending special arrangements such as reduced rental fees for facilities.

'Opportunity to Meet'

The Boy Scouts count many friends on Capitol Hill; in the national BSA's estimation, more than half the members of Congress have been youth or adult participants in Scouting.

BOY SCOUTS IN THE SCHOOLS

*Click photo to enlarge.
Boy Scouts salute the colors before a speech by President Bush at the National Scout Jamboree in July 2005. —File photo by Lawrence Jackson/AP

The Department of Education has issued a final regulation interpreting a provision in in the No Child Left Behind Act that guarantees the Boy Scouts of America, and certain other "patriotic" youth groups, "equal access" to public schools that receive federal funds. The regulation says:

• Schools may not deny Boy Scout troops the same use of campus meeting space, bulletin boards, information-distribution methods, and recruiting opportunities that they provide to other outside groups.
• Schools' normal campus rules, such as prohibitions on knives, may be applied to Scout troops.
• Schools are not required to sponsor Scout troops.

• Schools may charge fees for use of facilities, as long as they treat the Scouts no less favorably than any other groups.
SOURCE: U.S. Department of Education

The relevant provision of the 4-year-old No Child Left Behind law is called the Boy Scouts of America Equal Access Act. It also grants the same access rights to affiliates of other congressionally chartered "patriotic" youth groups listed in Title 36 of the U.S. Code. Those groups include, along with veterans' organizations and scientific societies, the Board for Fundamental Education, Big Brothers/Big Sisters of America, Boys & Girls Clubs of America, Little League Baseball Inc., Future Farmers of America, the National Education Association, and the U.S. Olympic Committee.

The Education Department regulation, which appeared in the *Federal Register* on March 24 and takes effect April 24, clarifies that to be covered by the law, the groups must serve people under the age of 21.

The regulation interprets the statute as giving the Boy Scouts and other covered groups equal access, or a "fair opportunity to meet," if a public school designates a time and place for any outside youth or community groups to meet on campus, for reasons other than to provide the school's educational program.

"Any access provided under the act ... must be on terms that are no less favorable than the most favorable terms provided to one or more outside youth or community groups," the regulation says.

It makes clear that schools may not bar the Boy Scouts based on their criteria for membership or leadership or for their oath of allegiance to God and country.

Distribution of Fliers

The Education Department issued a draft regulation in October 2004, which received more than 3,000 comments. The department said in its introduction to the regulation that more than half the comments urged that gay-straight student alliances and other support groups for gay students have a right to meet in schools.

The department said that "it does not condone harassment of any students on any basis in the public schools," but that it was beyond the scope of the federal law for the regulations to afford "coverage to groups not identified in the statute."

Even before the federal regulation interpreting its finer points, public schools have been required to follow the law.

The Education Department's office for civil rights, charged with enforcement of the provision, has logged only 13 complaints of alleged violations since 2002, according to Jim Bradshaw, a department spokesman.

In a 2004 letter on the proposed regulations, the Boy Scouts told the Education Department that "while the act has generally been a great success, some school districts have continued to refuse to provide Boy Scouts with the same access to school facilities that they provide to other outside groups."

The letter said many districts were confused about the law. The letter cited the Montgomery County, Md., school district for adopting a policy "that precludes Scouting groups from distributing fliers to students to take home in their backpacks, even though outside youth sports leagues are allowed to distribute information in this fashion."

Brian K. Edwards, a spokesman for the 139,000-student Montgomery County district, confirmed that the district has restricted outside fliers sent home with students. He said that the county's general government, not the school district, was responsible for administering after-school use of the district's schools by outside groups, and that he did not know whether Boy Scout troops meet in the district's schools.

One school district that fought a legal battle to keep Scout troops out of its schools before the equal-access law was adopted appears resigned to having to accommodate them.

In 2000, a federal district judge ordered the 271,000-student Broward County, Fla., district to open its schools to the Scouts after school hours. But the judge said the district could impose the same fees on the Scouts that it charged to other groups using its facilities.

Scout troops now meet in some Broward schools and pay $100 per school to hold an annual recruiting drive, said Jeff Hunt, the executive director of the South Florida Council of the Boy Scouts of America, which includes Broward County.

"We continue to try to recruit in schools," he said. "We do not have the ability to go into classrooms like we used to. That is a problem."

Gerald N. Tirozzi, the executive director of the National Association of Secondary School Principals, based in Reston, Va., said that his group has not heard complaints about the equal-access law from its members. But he said the group still opposes the provision, as it did when Congress passed it.

"Our position is that we want any group not to discriminate, and the Boy Scouts do openly discriminate against gays," Mr. Tirozzi said. "We would hope that over time the Boy Scouts would change their policy."

State of South Dakota

NINETY-THIRD SESSION
LEGISLATIVE ASSEMBLY, 2018

547Z0416

SENATE BILL NO. 83

Introduced by: Senators Rusch, Cammack, Nelson, Stalzer, and Youngberg and Representatives Smith, Duvall, Johnson, Lesmeister, Mickelson, Rasmussen, Reed, Rounds, and Turbiville

FOR AN ACT ENTITLED, An Act to authorize certain patriotic societies access to public schools.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That chapter 13-24 be amended by adding a NEW SECTION to read:

A patriotic society shall be allowed to speak to students at each public school in the state on one day at the beginning of each academic school year as approved by the principal of the school as provided by this section. The patriotic society shall provide the principal with verbal or written notice of the patriotic society's intent to speak to the students. The principal shall allow the representatives of a patriotic society the opportunity to speak with students during school hours to inform the students about the civic involvement of the society, and to explain how students may participate in or join the patriotic society.

For purposes of this section the term, patriotic society, means a youth membership group or organization listed in title 36 of the United States Code, as of July 1, 2018.

100 copies were printed on recycled paper by the South Dakota Legislative Research Council at a cost of $.167 per page.

Insertions into existing statutes are indicated by underscores.
Deletions from existing statutes are indicated by ~~overstrikes~~.

Boy Scouts of America Equal Access Act

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The **Boy Scouts of America Equal Access Act** was passed to prevent State and Federal agencies from reducing their support for the Boy Scouts of America (and other youth organizations) based on their policies. The bill was passed in the wake of a number of controversies involving the Boy Scouts of America, such as their exclusion of gay people and atheists, and subsequent attempts to limit government support of the organization.

In particular, the bill states that no school receiving Department of Education funds:

shall deny equal access or a fair opportunity to meet to, or discriminate against, any group officially affiliated with the Boy Scouts of America, or any other youth group listed in title 36 of the United States Code (as a patriotic society), that wishes to conduct a meeting within that designated open forum or limited public forum, including denying such access or opportunity or discriminating for reasons based on the membership or leadership criteria or oath of allegiance to God and country of the Boy Scouts of America or of the youth group listed in title 36 of the United States Code (as a patriotic society).

Schools are not required to allow access to the Boy Scouts or similar organizations if they do not have a designated open or limited public forum, that is, if they do not provide meeting space for any outside groups.

The bill was included as Sec. 9525 in the No Child Left Behind Act, which was signed into law on January 8, 2002.

Access to Government Forums

In ***Boy Scouts of America v. Dale,*** 530 U.S. 640 (2000), the United States Supreme Court confirmed that Boy Scouts of America has the right under the First Amendment to the United States Constitution to select leaders who agree to live their lives according to the Scout Oath and Law. In the relatively few instances in which open homosexuals have sought to test Scouting's policies, they have not been permitted to serve as leaders.

Following Boy Scouts of America's success in *Dale*, gay rights advocates and "politically correct" government officials have attacked Scouting's right to have access to public facilities and government forums on an equal basis with other community groups.

In determining whether the government may exclude an individual speaker or group from a "forum" or facility which is generally open to others based on the speaker's or group's expression, courts apply different standards depending on the type of forum involved. No matter what the type of forum, however, any exclusion must be done on a viewpoint neutral basis. Any exclusion based on the speaker's viewpoint is unconstitutional.

The types of forums discussed in the case law include the following:

- **Traditional public forum:** A "traditional public forum" is a traditional forum for public discourse, such as a park or sidewalk. Government restrictions on speech are subject to strict scrutiny and must be narrowly drawn to achieve a compelling state interest.

- **Designated public forum:** The government creates a "designated public forum" when it intentionally opens a nontraditional forum for public discourse, such as state university meeting rooms open to student organizations, school board meetings open to the public by state statute, advertising space in state-owned subway and commuter rail stations, and public libraries. Restrictions on speech are analyzed with the same strict scrutiny as in a traditional public forum.

- **Limited public forum:** The government creates a "limited public forum" when it intentionally opens a nonpublic forum to certain groups or topics, such as public school facilities open to community groups, state university student activities fund, state university facilities open to activities of registered student groups. Restrictions on speech must be viewpoint neutral and reasonable in light of the purpose served by the forum.

- **Nonpublic forum:** Government property may be a "nonpublic forum." Examples of nonpublic forums include airport terminals, military bases and restricted access military stores, and jailhouse grounds. Restrictions on speech must be viewpoint neutral and reasonable in light of the purpose served by the forum, as in a limited public forum.

Lease Programs

State and local governments may lease property to nonprofit groups on terms which are equal to or preferential to terms allowed to commercial groups. In that context as well, governments may not engage in viewpoint discrimination.

In ***Metro Display Advertising, Inc. v. City of Victorville,***143 F.3d1191(9th Cir.1998), the City of Victorville contracted with Metro Display to build bus shelters in exchange for Metro Display being able to lease advertising space on those shelters. After a supermarket complained to the City about union ads on the shelters, the City told Metro Display that if it did not remove the ads, the City would find a pretext for canceling Metro Display's contract. Metro Display sued, and the district court denied the City's motion to dismiss based on qualified immunity. The Ninth Circuit affirmed, relying on the principle expressed in ***Rosenberger v. Rector & Visitors of University of Virginia*** that "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." "Even in a nonpublic forum, . . . 'the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.'"

In *Hawley v. City of Cleveland,* 24 F.3d 814 (6th Cir. 1994), city taxpayers brought action challenging the lease of airport space to the Catholic Diocese for use as chapel. The Sixth Circuit Court of Appeals held that operation of airport chapel did not violate Establishment Clause. The Sixth Circuit noted that sixteen other airports in the United States lease space to religious groups for chapels.

In *Christian Science Reading Room v. City & County of San Francisco,* 784 F.2d 1010 (9th Cir.), amended by 792 F.2d 124 (9th Cir. 1986), cert. denied, 479 U.S. 1066 (1987), the Ninth Circuit rejected an Establishment Clause challenge to the lease of space in a municipal airport stating that, while the religious organization did "receive some benefit," there was no effect of advancing religion

because "the benefits of rental space at the airport [were] generally available" to a variety of groups. The government did not endorse the Christian Scientists, since, if it did, it would also be "endorsing the business and labor practices of the domestic airlines, the politics and policies of the foreign governments that own airlines, the consumption of alcohol and sourdough bread, . . . the reading of Penthouse magazine" and the views of all the other organizations leasing space at the airport.

These same principles apply to Scouting's right to lease property on the same terms as others.

- ***Evans v. City of Berkeley,*** **review granted (previously published at 127 Cal. Rptr. 2d 696, 104 Cal. App. 4th 1 (Cal. Ct. App. 2002))** The City of Berkeley has a program of allowing free berthing space in the City marina to nonprofits engaged in projects beneficial to the community. The Berkeley Sea Scouts, which includes many disadvantaged youth, had been granted free berthing space for 60 years. Other groups enjoying free space include a club providing a women's sailing clinic, an association of disabled sailors, and an organization operating a youth program. The City applied the marina's nondiscrimination ordinance only to Boy Scouts' policy with respect to open homosexuals, even though the ordinance also covers sex, age, and disability discrimination. The case is now pending before the California Supreme Court.

- ***Barnes-Wallace v. Boy Scouts of America,*** **275 F. Supp. 2d 1259 (S.D. Cal. 2003)** The City of San Diego has established policies for leasing City property to nonprofit groups which benefit the community. Other lessees include the Girl Scouts, the Salvation Army, a Jewish Community Center, and Presbyterian churches, among dozens of other community organizations. Still other groups receive money subsidies from the City, although Boy Scouts does not. Nevertheless, the District Court held that the lease to Boy Scouts violated the Establishment Clause because the City did not seek non-religious bidders to compete for the lease. The effect of the decision is to discriminate against Boy Scouts for believing in God.

Access to Schools

The Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905 (2003), was passed because "[a]ll over the country the Boy Scouts are under attack and being thrown out of public facilities that are open to other similarly situated groups. From Florida to California, the Boy Scouts are being removed, not because they support an illegal right, but as retribution for the Supreme Court's ruling in the Boy Scouts of America versus Dale." 147 Cong. Rec. H2618 (daily ed. May 23, 2001) (statement of Rep. Hilleary); see 147 Cong. Rec. S6249 (daily ed. June 14, 2001) (statement of Sen. Helms); 147 Cong. Rec. S4867 (daily ed. May 14, 2001) (memorandum from Congressional Research Service on actions by school districts against Boy Scouts); 147 Cong. Rec. S6256 (daily ed. June 14, 2001) (examples of Boy Scouts being discriminated against).

The Boy Scouts of America Equal Access Act provides that,

"no public elementary school, public secondary school, local educational agency, or State educational agency that has a designated open forum or a limited public forum and that receives funds made available through the Department shall deny equal access or a fair opportunity to meet to, or discriminate against, any group officially affiliated with the Boy Scouts of America, or any other youth group listed in title 36 of the United States Code (as a patriotic society), that wishes to conduct a meeting within that designated open forum or limited public forum, including denying such access or opportunity or discriminating for reasons based on the membership or leadership criteria or oath of

allegiance to God and country of the Boy Scouts of America or of the youth group listed in title 36 of the United States Code (as a patriotic society)."

The Secretary of Education enforces the statute through rules and orders. "If the public school or agency does not comply with the rules or orders, then . . . no funds made available through the Department shall be provided to a school that fails to comply with such rules or orders or to any agency or school served by an agency that fails to comply with such rules or orders."

Apart from the Boy Scouts of America Equal Access Act, viewpoint discrimination has most often been addressed with respect to religious groups seeking the same access to public facilities as other community groups. In several key cases the United States Supreme Court has held that it is viewpoint discrimination for a public entity to allow moral issues to be discussed, but not allow them to be discussed from a religious perspective.

In ***Good News Club v. Milford Central School***,533 U.S. 98 (2001), a Christian children's club sued a public school, alleging that the school's refusal to allow club to use school facilities violated free speech rights under the First Amendment. The District Court granted summary judgment in favor of the school, and, on appeal, the Second Circuit Court of Appeals affirmed. The United States Supreme Court held that the government violates the First Amendment when it excludes "speech discussing otherwise permissible subjects" because of the viewpoint of the speaker. The school's exclusion of the club from meeting after hours at school based on its religious nature was unconstitutional viewpoint discrimination.

Similarly, in ***Lamb's Chapel v. Center Moriches Union Free School District***,508 U.S. 384 (1993), a church sued a public school district, alleging that the district's refusal to allow the church to use school facilities for a film series on family values from a religious perspective violated its First Amendment rights. The District Court granted summary judgment to the school district, and, on appeal, the Second Circuit Court of Appeals affirmed. The United States Supreme Court held that refusal to rent school building for "otherwise permissible" film series because of its religious viewpoint violated the principle that "forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." As a result, the school district violated the free speech clause of First Amendment by denying the church access to school premises simply because film presented a religious standpoint.

These same principles apply to discrimination against Scouting based on its "duty to God" and "morally straight" values.

- ***Sherman v. Community Consolidated School District 21 of Wheeling Township,*** **8 F.3d 1160 (7th Cir. 1993), cert. denied, 511 U.S. 1110 (1994)**

An atheist parent and son sued the school district alleging that it violated the Establishment Clause by allowing the Boy Scouts to use an elementary school's facilities. The District Court and the Seventh Circuit Court of Appeals held that the school district did not violate Establishment Clause by allowing Boy Scouts to distribute literature during school hours, to hang posters on school grounds, and to meet in school rooms after-hours. Boy Scouts' policies could not be attributed to the school district.

- ***Boy Scouts of America v. Till,*** **136 F. Supp. 2d 1295, 1308 (S.D. Fla. 2001)**

The Broward County School Board excluded Boy Scouts from using school facilities after hours, as many community groups had for years. After Dale, the School Board sought to exclude Boy Scouts as violating a Board nondiscrimination policy applying to age, race, gender, religion, and sexual orientation. No other groups—which included churches, a youth orchestra, a service agency for senior citizens, and an African-American sorority—were excluded. The District Court held that the School

Board engaged in viewpoint discrimination against Boy Scouts' views, and granted a preliminary injunction. The School Board ultimately agreed to a permanent injunction and agreed to pay Boy Scouts' attorneys fees.

- ***Scalise v. Boy Scouts of America,*** **No. 244883 (Mich. Ct. App.)**

An atheist parent of a child in Mt. Pleasant Public Schools in Michigan brought suit challenging the school district's policy of allowing Boy Scouts equal access to school meeting space and literature distribution systems, alleging that this policy constitutes religious discrimination under the Michigan Constitution and the Elliott-Larsen Civil Rights Act. The trial court dismissed all claims against the Boy Scouts and the school board. Mr. Scalise's appeal is pending before the Michigan Court of Appeals.

Charitable Campaigns

One type of government forum is a campaign operated by a state or local government to allow its employees to make personal charitable donations.

In ***Cornelius v. NAACP Legal Defense & Educational Fund, Inc.,*** 473 U.S. 788 (1985), the Supreme Court held that eligibility to participate in a government employee charitable campaign must be determined on a viewpoint neutral basis.

While not a charitable campaign case, ***Rosenberger v. Rector & Visitors of University of Virginia,*** 515 U.S. 819 (1995) is illustrative because it involved state outlay of funds, as opposed to mere access to a state forum. In *Rosenberger*, a public university engaged in unconstitutional viewpoint discrimination when it denied funding to an otherwise eligible student publication on the basis of the publication's religious editorial viewpoint. The Court held that when the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is blatant. "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."

- ***Boy Scouts of America v. Wyman,*** **335 F.3d 80 (2d Cir. 2003)**

The State of Connecticut excluded Boy Scouts from a charitable campaign, in which 900 groups of all different kinds participate, on the grounds that including Boy Scouts requires the State to discriminate on the basis of sexual orientation. The State has admitted that its sole reason for excluding Boy Scouts is Boy Scouts' constitutionally protected views and leadership policies with respect to homosexuals. Boy Scout councils had participated in the campaign for 30 years. The State continues to allow a wide variety of other groups to participate which obviously "discriminate" in membership and services to the same extent as Boy Scouts are being seen as doing so, including gay and lesbian groups and many organizations which limit services to a particular sex, ethnicity, age group or sexual orientation, all of which are similarly covered by State nondiscrimination laws. (*See* **Directory of Charitable Organizations**.)

The Second Circuit Court of Appeals upheld the decision of the State of Connecticut. The Second Circuit recognized that the Boy Scouts' policies were "constitutionally protected" under *Boy Scouts of America v. Dale*. The court nonetheless upheld removal of the Scouts from the charity list on the ground that Connecticut did not "require" the Boy Scouts to change their views, but merely required the Boy Scouts to "pay[] a price" for "exercising its First Amendment rights."

The Second Circuit's decision threatens First Amendment freedoms of speech and association and is part of a growing pattern of state agency actions and lower court decisions that have excluded Boy Scouts, as well as traditional religious groups, from government facilities and programs because of

their views and membership standards on matters of morality, religious belief, and sexual conduct. The Second Circuit's decision also is in direct conflict with Supreme Court precedent such as *Boy Scouts of America v. Dale* and *Rosenberger v. Rector & Visitors of University of Virginia*.

This case presents a First Amendment issue of national importance: The government cannot exclude an otherwise-eligible organization from participating in a government program because of membership policies that preserve the organization's values and form the organization's expressive identity. There are 150 charitable campaigns run by states, public universities, and local governments nationwide, and more than 140,000 charities, including Boy Scouts, participate. The Supreme Court's decision could have a profound effect on values-based and faith-based organizations that participate in government programs across the country.