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Outside Counsel

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'GOOD NEWS' MAY BE BAD NEWS FOR SCHOOL OFFICIALS

The U.S. Supreme Court has continued its movement towards greater tolerance of religious activities in public schools.

In its decision in *The Good News Club v. Milford Central School District*,¹ the Court reversed the decision of the United States Court of Appeals for the Second Circuit and advanced the cause of religious groups who wish to use public facilities to promote their moral values.

In a 6-3 decision, the Court held that the upstate New York Milford School District must allow access to a club that proposes to hold after-school meetings for children ages 6-12 to hear Bible lessons, memorize scripture and pray. Rejecting the Second Circuit's view that "quintessentially religious" activities cannot also be characterized as the teaching of morals and character development, the Court found that the school district violated the free speech rights of the Good News Club (the Club). The Court further found that the school district did not raise a valid Establishment Clause defense, even given the tender young age of the students in question.



The Court's most conservative members - Justices Antonin Scalia and Clarence Thomas (who authored the opinion) and Chief Justice William H. Rehnquist - were joined by moderate Justices Sandra Day O'Connor and Stephen G. Breyer. Justices John Paul Stevens, Ruth Bader Ginsburg and David H. Souter dissented.

The school district had denied the Club access to school facilities pursuant to the school district's "Community Use Policy," adopted under New York's Education Law §414 which governs the use of school's facilities by outside groups. The policy expressly prohibited the use of the school by persons or organizations for religious purposes. Although the school district had allowed access to groups such as the Boy Scouts, the Girl Scouts, and the 4-H Club, it denied access to the Good News Club on the grounds that the Club's religious functions were foreclosed by the district's policy. The Good News Club claimed to teach children about morals and values from a Christian viewpoint. A typical meeting involved praying, memorizing Bible passages, learning moral lessons based on Bible verses, telling Bible stories, and challenging the children to live the moral values and lessons of God and Jesus Christ.

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Second Circuit Decision

Both parties agreed that the Milford School District, by its "Community Use Policy", had created a "limited public forum." The U.S. Court of Appeals for the Second Circuit, relying on its prior decision in *The Bronx Household of Faith v. Community School Dist. No. 10*,² determined that the school district policy would withstand First Amendment challenges if its conduct was shown to be reasonable and viewpoint neutral.

The Second Circuit decided that the school was reasonable in denying the Club access to school facilities because it is "the proper state function to decide the extent to which church and school should be separated in the context of the use of school premises."³

The Second Circuit decided the school's exclusion was viewpoint neutral because the Club engaged in activities of a religious nature that went well beyond the teaching of moral values. It found the Club's activities to be in the nature of religious instruction and prayer, especially since the Club advocated the teachings of Jesus Christ. Since the children ranged from grades kindergarten to sixth and were impressionable, the Court was concerned with the influence of the Club's activities upon them.

Finally, the Second Circuit opined that the Club differed from the Boy Scouts, Girl Scouts, and 4-H Club. Although these clubs also advocated moral development, the Court said that nothing in the record suggested that these clubs were engaged in religious instruction as part of their activities.

Judge Jacobs dissented on the ground that ethics and morals are secular subjects and the Club cannot be prohibited from promoting its religious viewpoint on the matter without violating the First Amendment rights of its members. The judge reasoned that the Club simply teaches morals from a religious perspective and focuses on promoting a morally fit life, not religious worship. He observed that this case and *Lamb's*

Chapel were indistinguishable and the U.S. Supreme Court in *Lamb's* had allowed a film on child-rearing issues from a secular viewpoint to be shown in a school auditorium.⁴

Furthermore, the Eighth Circuit decided a similar case and interpreted the Supreme Court in *Lamb's Chapel* as allowing religious viewpoints on secular matters.⁵

Therefore, according to the dissenting judge, the school district was wrong in denying the Club the same access accorded to other clubs who approached the same subject from other points of view.

Argument

The school district argued (a) that it was entitled to limit the content of speech when a public facility is sought to be used, and (b) that it would be violating the Establishment Clause if it allowed religious clubs access to the school's facilities. The district denied that the Club was merely engaged in the discussion of topics from a religious perspective. According to the district, if it allowed the Club to use the school for the purposes proposed, it might appear that the district was favoring one religion over another. The district noted that any group which met on school property with the intent to conduct prayer should be excluded under the Establishment Clause, since prayer is quintessentially religious.

The Club argued that the district had engaged in viewpoint discrimination, since it allowed clubs such as the Boy Scouts access to the facilities for similar activities. It urged that its purpose was not religious worship, but rather discussion of secular issues from a religious viewpoint. Since the school allowed other groups to hold meetings on school property for similar purposes, the district's refusal to allow the Club to do so was discriminatory and a violation of the First Amendment.

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Prior Case Law

In *Lamb's Chapel v. Center Moriches Union Free School District*, the Supreme Court determined that a school district cannot discriminate on the basis of a viewpoint when it allows its buildings to be used for discussions concerning subjects on family life and child rearing.

The case involved a six-part film, discussing these family issues from a Christian viewpoint, proposed to be shown in the school's auditorium. The district determined that since it operated as a "limited open forum" it could regulate religious activity within the schools and refuse to allow use of the auditorium.

However, the Court reasoned that a school district, acting as a "limited open forum," cannot deny access to a group which wishes to present a secular subject from a religious viewpoint. The Court rejected the argument that the school district would be violating the Establishment Clause on the basis that there was no danger the community would believe that the District was endorsing religion.

In *Rosenberger v. Rector and Visitors of the Univ. of Va.*,⁶ the University denied funds for printing costs to a student organized newspaper because the organization (Wide Awake) had a Christian perspective. The Court held that the University exercised viewpoint discrimination because "the University does not exclude religion as a subject matter, but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."⁷ The University argued that *Lamb's Chapel* did not apply since only funds were at issue and not the use of school facilities.

The Court decided that this distinction was unavailing. The Court also held that the University was not violating the Establishment Clause since the provision of printing costs was neutral toward religion and there was no indication that the student newspaper spoke for the University.

In *Bronx Household*, a three-judge panel for the Second Circuit determined that a school district is generally not required to grant a religious group's request to use school's facilities for religious services or instruction. A church requested to use the school gym for Sunday services, which included Bible reading, singing hymns, communion, and Bible preaching. The court analyzed New York's Education Law §414 and determined that religious services and instruction are not social, civic or recreational meetings.

The court decided that since the school district created a "limited public forum" it could limit access, as long as the exclusion was reasonable and not based on discrimination of viewpoint. Ultimately, the court upheld the school's denial as reasonable and viewpoint neutral.

Supreme Court Decision

In *The Good News Club*, the Supreme Court reversed the judgment of the Second Circuit, a majority of the Court holding that the school district's restriction on the Club's access to its schools "violates the Club's free speech rights." The majority found in addition that "no Establishment Clause concern justifies that violation."

In so ruling, the Court found the activities of the Club indistinguishable from a constitutional standpoint from the activities of the plaintiffs in *Lamb's Chapel* and *Rosenberger*. The Court found that the district's policy gave access to groups that promote the moral and character development of children and held that the development of character and morals from a religious perspective was the very subject that the Club intended to promote.

Indeed, the Court opined that the religious perspective from which the Club approached its subject matter was not a relevant consideration in determining its entitlement to access. Said the Court:

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[W]hat 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 ...

[W]e reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* 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.

The Court further observed that allowing the Club to engage in speech on school grounds would insure the kind of neutrality envisioned by the Establishment Clause. Since, by allowing access to religious groups and non-religious groups alike, a school district does not further the establishment of any particular religion or dogma, the Court noted that "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."

There remains continuing tension between the free speech contentions of religious groups and the Establishment Clause and the concerns of school districts who wish only to abide by the Constitution and the New York State Education Law. The thin line between the activity of teaching values to children from a Christian perspective and the repetition of biblical verses (which may constitute religious worship) is blurred by this decision and may cause future litigation among school districts throughout the country.

The Court's decision will require the immediate attention of school board members, administrators and school attorneys. School district policy manuals may have to be quickly revised to comply with the Court's decision.

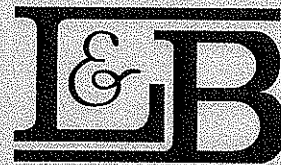
The next litigation frontier may involve the question of actual worship on school grounds, which the Supreme Court, for reasons best known to itself, did not directly answer.

Advocates for religious groups contend that the strong language of the majority may make it difficult to deny any religious activity, including mass or other Sabbath services, if a district has opened its forum to secular users who conduct discourse on moral issues.

The safer legal course may well be for districts to allow the religious use and defend litigation from the advocates of the separation of church and state.



- (1) 99-2036 decided June 11, 2001
- (2) 127 F.3d 207 (2d Cir. 1997), cert. denied, 523 U.S. 1074 (1998).
- (3) Id. at 214.
- (4) See, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 390-95 (1993).
- (5) See, *Good News/Good Sports Club v. School Dist.*, 28 F.3d 1501 (8th Cir. 1994).
- (6) 515 U.S. 819 (1995).
- (7) Id. at 831.



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