



NEWSLETTER ARTICLE

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Education Law

Religion in the Schools

By Meghan N. Knight and Donna R. Rascoe

The United States Court of Appeals for the Fourth Circuit recently held that a school district's take-home flyer policy violated the free speech rights of a religious organization. *Child Evangelism Fellowship of Md., Inc. v. Montgomery Co. Pub. Schs.*, 457 F.3d 376 (4th Cir. 2006). This was the second time this case made its way to the Court.

The religious organization at the center of the lawsuit is the Child Evangelism Fellowship ("CEF"). According to the Child Evangelism Fellowship's web site (www.cefonline.com), the organization was founded in 1937. Its purpose is "[t]o evangelize boys and girls with the Gospel of the Lord Jesus Christ and to establish (disciple) them in the Word of God and in a local church for Christian living." The organization's 5-Day Clubs® and Good News Clubs® meet, among other places, in public schools. CEF's web site indicates that "More Good News Clubs are taking place inside public schools than ever before." According to its web site, there are eleven local CEF organizations in North Carolina, located in Raleigh, Fairview, Charlotte, Durham, Murphy, Forest City, Asheville, Garner, Woodleaf, Cameron, and High Point.

Fourth Circuit – Round One

Litigation in this case began when CEF sued Maryland's Montgomery County Public Schools ("MCPS") after MCPS refused to allow CEF to distribute "take home" flyers that promoted CEF's after-school "Good News Clubs" to elementary school students. *Child Evangelism Fellowship of Md., Inc. v. Montgomery Co. Pub. Schs.*, 373 F.3d 589 (4th Cir. 2004). The school system had previously allowed more than 200 outside groups -- including the American Red Cross, the Salvation Army, the Jewish Community Center, and the YMCA -- to distribute approved flyers via "take home folders." Generally, a group representative or school official placed approved flyers in teachers' mailboxes. Teachers then placed the flyers in students' cubbies for the students to take home to their parents.

When CEF sought to distribute its flyers, school officials denied the request on the ground that involving students and teachers in distributing religious materials would imply government endorsement of religion. CEF sued, and sought a preliminary injunction ordering the school system to permit distribution while the case was pending. The district court denied the request and CEF appealed.

In its first opinion, the Fourth Circuit rejected MCPS's argument that including CEF materials in the folders would violate the Establishment Clause.¹ The Court held that the refusal to distribute CEF material was impermissible viewpoint discrimination in violation of CEF's free speech rights. To justify this viewpoint discrimination, the district would have to show a compelling government interest. Relying upon the Supreme Court's decision in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), the Fourth Circuit concluded that because allowing CEF access to the flyer forum likely would not violate the Establishment Clause, Establishment Clause concerns were not a compelling government interest that could justify viewpoint discrimination.

A New Policy

After the Fourth Circuit remanded the case for further proceedings, MCPS adopted a new take-home flyer policy. The stated purpose of this policy was to distribute “informational materials and announcements” while maintaining “a learning environment free from disruption.” MCPS’s “intent” was to “designate appropriate materials for display and distribution and maintain a limited nonpublic forum.”

MCPS then moved to dismiss CEF’s claims, on the basis that the new policy made the claims moot.ⁱⁱ In response, CEF moved for Summary Judgment, seeking, among other things, a permanent injunction granting access to the take-home flyer forum. The district court refused to issue such an injunction, holding the flyer forum was nonpublic, subject only to a reasonableness requirement, and dismissed CEF’s claims as moot.

Fourth Circuit – Round Two

CEF again appealed the district court’s decision to the Fourth Circuit. *Child Evangelism Fellowship of Md., Inc. v. Montgomery Co. Pub. Schs.*, 457 F.3d 376 (4th Cir. 2006). The Fourth Circuit rejected the district court’s decision, holding that the take-home flyer policy violated the First Amendment because it gave MCPS “unfettered discretion” to control access to the forum, and did not provide adequate protection for viewpoint neutrality.ⁱⁱⁱ

- ***Forum Analysis***

In its analysis of CEF’s First Amendment claims, the Court first described the types of forums recognized by the Supreme Court – traditional public forums, nonpublic forums, and “hybrid” forums (often referred to as “designated public forums” or “limited public forums”). The court found the fact that the MCPS flyer policy described the forum as “nonpublic” was irrelevant. The court stated: “it is what the government does, and ‘the nature of the governmental property and its compatibility with expressive activity, rather than self-serving statements, that a court examines in determining the nature of a forum.’” Because the flyer forum was for the use of certain speakers or for certain topics, the forum was, in fact, a limited public forum. The court chose not to rule on this issue, however, because even if the forum was nonpublic, the district court only subjected the forum to a “reasonableness” test, when it should also have required viewpoint neutrality. The court noted that viewpoint neutrality “requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to *protect* against the improper exclusion of viewpoints.” Thus, the court found that the “central question” was whether MCPS’ flyer policy protected against viewpoint discrimination.

CEF first argued that nothing had changed since the first appeal to the Fourth Circuit, when MCPS was admittedly engaged in viewpoint discrimination. The Court rejected this argument, because circumstances did change when MCPS enacted a flyer policy:

It is entirely proper for a governmental entity to attempt to conform its policies to the demands of the First Amendment. Even when litigation prompts the change, if a revised policy passes constitutional muster, a court will not penalize the government for transgressions under an earlier policy.

- ***Flyer Policy Rejected***

Unfortunately for MCPS, its new policy did not pass constitutional muster. The court noted that the take-home flyer policy provided MCPS with broad discretion over the distribution of flyers at several stages. Five categories of groups were allowed to submit flyers; groups that did not fall within one of those



categories were required to obtain an “endorsement” from MCPS. The policy gave MCPS exclusive authority and discretion to approve the flyers for distribution. Any group who wanted to distribute a flyer had to provide at least fifteen days notice prior to distribution, and the actual flyers had to include the name of the group wishing to distribute them. Finally, the policy retained for MCPS a right to withdraw approval “if it is determined that distribution would undermine the intent of this policy.” A regulation clarified that approval could be withdrawn if MCPS found that distribution of the flyer undermined the policy’s intent or “could reasonably be predicted to cause substantial disruption of, or material interference with, school activities.”

- ***Unbridled Discretion***

The court agreed with CEF that the policy violated the Free Speech Clause of the First Amendment. The court stated that the Supreme Court has “long held that the government violates the First Amendment when it gives a public official unbounded discretion to decide which speakers may access a traditional public forum” because it can intimidate parties into censoring their speech. Further, the “absence of express standards” makes it difficult to determine whether denial of access was legitimate or an abuse of power. Such broad discretion creates the danger that “the government may succeed in unconstitutionally suppressing particular protected speech by hiding the suppression from public scrutiny.”

The court acknowledged that the Supreme Court had not yet had occasion to apply this “unbridled discretion doctrine” outside the traditional public forum context, but found “the dangers just as present in other forums.” The court noted, however, that a court will consider a forum’s “characteristic nature and function,” and found that more official discretion is permissible in a nonpublic forum because discretionary access is one of its defining characteristics.

The court found that the policy gave MCPS “virtually unlimited discretion to control access to the flyer forum.” The policy’s language gave MCPS discretion to approve all flyers^{iv} and imposed no guidelines as to how this discretion should be exercised.

Put simply . . . *nothing* in the policy prohibits viewpoint discrimination, requires viewpoint neutrality, or prevents exclusion of flyers based on MCPS’ assessment of the viewpoint expressed in the flyer.

The Court held that “the nature and function of the take-home flyer forum cannot justify the unbounded discretion retained by MCPS to determine access to it. . . . Permitting MCPS unbridled discretion to deny access to the oft-used forum – for any reason at all, including antipathy to a particular viewpoint – does not ensure the requisite viewpoint neutrality.” Such a policy “utterly fails to provide adequate protection for viewpoint neutrality.”

The court did, however, indicate that the school district’s interest in avoiding substantial disruption of school activities would justify imposing *some restrictions*, if the district so chose. The court suggested that the school district could do such things as restrict the number or content of messages in the forum (maintaining viewpoint neutrality), enact a policy truly reserving the forum for communications for certain categories of speakers, or reserve the flyer forum solely for government messages.

Avoiding Round Three...

Thus, it would seem wise for school districts to have carefully drafted policies about distribution of materials to students. Viewpoint neutrality and reasonableness must be at the heart of any such policy, and it is important to limit the amount of discretion given to any individual or group. The simplest solution, suggested by the Fourth Circuit, would be to only allow distribution of government messages. This may



be the best solution if a district is faced with an unmanageable amount of material to distribute. Teachers know how time-consuming it can be to distribute materials from community groups to students' take-home folders each week, even with student assistance. However, many school districts understandably wish to send materials about community activities and resources home with students. Where a school wishes to keep its forum open to all groups, it would seem that permissible viewpoint neutral, reasonable limitations might include a page limit for materials, a limit on the number of flyers any one organization may distribute in a certain time period, or a deadline in advance of distribution to allow time to organize all materials to be distributed. Such guidelines would be easy-to-follow and require little, if any, discretion. Though possible, it is arguably more difficult to limit the forum to particular categories of speakers, because it might require a discretionary determination of whether a certain group falls into a permissible category. School districts do not want to be caught in a position where they cannot objectively explain a decision to exclude a particular group from their forum.

School districts should carefully review any policies they have for distribution of materials and consider whether revisions are needed in light of these cases from the Fourth Circuit.

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ⁱ The Establishment Clause is part of the First Amendment to the United States Constitution, and prohibits the government from creating or favoring a particular religion.

ⁱⁱ In other words, MCPS argued that there was no longer any controversy.

ⁱⁱⁱ The court affirmed the district court's decision as to other forums, including back-to-school nights, open houses, and community bulletin boards, because the record established that "CEF enjoys equal access to them under the new policy, thus mooting the need for permanent injunctive relief with respect to the other forums."

^{iv} The court flatly rejected MCPS' contention that the language "may approve" required MCPS to approve any flyer that received endorsement. Further, the court noted that the 15-day notice requirement "would seem unnecessary if MCPS were compelled to approve distribution of an endorsed flyer."