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The Paper Wars: First Amendment Challenges to School Material Distribution Policies

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The Paper Wars: First Amendment Challenges to School Material Distribution Policies

by
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Research has shown that employees who work in secure, predictable, and professionally nurturing environments perform better. Employees who can anticipate fair and consistent treatment in the educational workplace are more likely to identify with a school’s mission and to perceive themselves as valued human resources in pursuit of that mission. This interactive video workshop discusses the laws that guide effective human resource management in the public sector. Human resource management is a central part of public school administration. Superintendents, Assistant Superintendents, Principals, Assistant Principals, and Supervisors must understand the legal rights and responsibilities of all school employees, and consistently resolve personnel problems arising in the workplace.

Public schools are faced with an array of requests seeking permission to distribute material on school property. These requests may come from students, teachers or outside organizations. To respond to these requests, some school districts have adopted written policies to guide their determinations while others lack formal policies and respond on an ad hoc basis. Whether based on formal or informal policies, in deciding whether to permit distribution school officials typically take into account a variety of factors including the content of the material, the identity of the individual or group seeking permission and the time, place or manner of the requested distribution. This

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1 See, e.g., Hedges v. Wauconda Community Consol. Sch. Dist., 9 F.3d 1295 (7th Cir. 1993) (student sought permission to distribute religious publication entitled “Issues and Answers”).


4 See, e.g., id. at 518-19 (“Stafford has adopted written policies on ... the distribution of community group materials to students.”).

5 See, e.g., Rusk v. Crestview Sch. Dist., 379 F.3d 418, 419 (6th Cir. 2004) (“Although school does not have a written policy governing the distribution of flyers,” it does have an “unwritten policy.”).

6 See, e.g., Hills v. Scottsdale Unified Sch. Dist. No. 48, 329 F.3d 1044, 1047 (9th Cir. 2003), cert. denied, 540 U.S. 1149 (2004) (“Material ... that is not of a commercial, political or religious nature may be displayed ... at the discretion of the principal.”).

7 See, e.g., Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township, 8 F.3d 1160, 1163 (7th Cir. 1993), cert. denied, 511 U.S. 1110 (1994) (distribution is limited to not-for-profit organizations that are “based in the community or provide a service that is not offered in the community”).

8 See, e.g., Hedges v. Wauconda Community Consol. Sch. Dist., 9 F.3d 1295, 1296 (7th Cir. 1993) (“Material shall be distributed between 7:15 a.m. and 7:45 a.m. and 3:15 p.m. and 3:45 p.m. from a table to..."
decisionmaking is at its most vulnerable when it treats similarly situated groups
differently and/or discriminates based on the viewpoint of the material at issue.

School districts often find themselves in a “lose-lose” situation in responding
to distribution requests. If they deny a distribution request, they may be sued by
the attempted distributor asserting a denial of First Amendment rights. On the other hand, if
they grant the request, they may be sued by parents and students objecting to the
distribution on constitutional grounds. Increasingly, these “paper wars” and the
litigation they produce require that schools look more closely at their responses to these
requests to eliminate the use of constitutionally suspect criteria. While the requirement of
more uniform treatment of distribution requests may deprive school officials of latitude to
make contextual decisions, such policies provide greater protection in the legal arena.

When courts address the issues raised by challenges to material distribution decisions,
a number of legal claims surface, many rooted in the First Amendment to the United
States Constitution and others in analogous statutory protections. Of particular
relevance are public forum principles that vary the extent of First Amendment rights
depending on the nature of the property to which access is sought. Under public forum
analysis, if the public school has created a public forum by opening up a facility for
expressive use, its right to deny access to that forum is restricted. However, schools have
no obligation to create public forums and, even if created, schools can control the extent

be set up by the school for such purposes. The table shall be located at or near the main entrance of the
building. No more than two students distributing the same material shall be seated at the table.


10 See, e.g., Rusk v. Crestview Sch. Dist., 379 F.3d 418 (6th Cir. 2004) (parents of two elementary
school children unsuccessfully challenged school district’s decision to allow distribution of Good News
Club flyers in student mailboxes); Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township, 8
F.3d 1160 (7th Cir. 1993), cert. denied, 511 U.S. 1110 (1994) (a student and his parent unsuccessfully
challenged distribution of Boy Scout flyers).

schools that receive federal financial assistance. It creates a federal statutory equivalent of First
Amendment protections against discrimination based on the content of speech when public high schools
have created limited public forums by allowing noncurricular student organizations to meet during
noninstructional time. 20 U.S.C. § 4071 (a) and (b). While the focus of the statute is on the right to hold
meetings, the statute’s protections have been interpreted to include equal treatment to publicize a club’s
activities, Board of Education of the Westside Community Schools v. Mergens, 496 U.S. 226, 247 (1990)
(plurality opinion), including by the distribution of materials. A parallel federal statute to protect the Boy
Scouts was recently enacted as part of the No Child Left Behind Act of 2001, 20 U.S.C. § 6301 et seq.
public elementary and secondary schools that create designated or limited public forums and receive funds
from the Department of Education must not 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).” 20 U.S.C. § 7905 (b) (1).

12 Since public schools are not traditional public forums, the critical inquiry is whether the school has
voluntarily created a designated or limited public forum for purposes of expression. In identifying whether
the government has created such a forum, courts examine “the policy and practice of the government to
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of the forums they create. If they prefer to limit access to a forum to students rather than allow access to outsiders, they may do so.\textsuperscript{13} Moreover, in creating a forum to allow the dissemination of written materials,\textsuperscript{14} schools have significant latitude to create limits on the time, place and manner of distribution.\textsuperscript{15} The ability to restrict access based on content, however, is much more circumscribed.\textsuperscript{16}

While there are a substantial number of judicial opinions analyzing the First Amendment aspects of distribution policies, the vast majority of these cases involve claims of unconstitutional viewpoint discrimination. In these cases, typically an outside group claims that a school has created a public forum and denied them permission to distribute material through the use of that forum while granting other similarly situated groups the right to distribute their requested material. The difference in treatment, according to the group, is based on the viewpoint of the material it seeks to disseminate and not on any content-neutral rationale.

Recent examples of this phenomenon include the largely successful efforts by the Child Evangelism Fellowship (CEF) to challenge the denial of permission to distribute Good News Club flyers in various school forums on the ground that the rejection constituted unconstitutional viewpoint discrimination in violation of the organization’s free speech rights. In these cases, the school districts argue that they are free to treat the Good News Club flyers differently than other flyers because their distribution would violate the Establishment Clause of the First Amendment. In both Child Evangelism Fellowship of New Jersey v. Stafford Township School District\textsuperscript{17} and Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools,\textsuperscript{18} the school districts’ argument was rejected.\textsuperscript{19} Therefore, the school districts did not have a compelling justification for their content-based rejections of the Good News Club flyers. Lacking such a justification, the difference in treatment was unconstitutional viewpoint discrimination.

Despite the similarities between the cases, they did not involve identical school policies. In Child Evangelism Fellowship of New Jersey, the Stafford Township School

ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.” \textit{Cornell v. NAACP Legal Defense and Educ’l Fund, Inc.}, 473 U.S. 788, 803 (1985).


\textsuperscript{14} While the vast majority of the distribution requests concern written materials, other items may also be the subject of distribution controversies. \textit{See}, e.g., \textit{Walz v. Egg Harbor Township Bd. of Educ.}, 342 F.3d 271 (3d Cir. 2003) (pencils and candy canes).

\textsuperscript{15} \textit{See}, e.g., \textit{Walz v. Egg Harbor Township Bd. of Educ.}, 342 F.3d 271, 279-80 (3d Cir. 2003).

\textsuperscript{16} Reasonable content restrictions are acceptable to define the limits of a limited public forum or to restrict access to a nonpublic forum, but viewpoint discrimination is unconstitutional even if the property at issue is a nonpublic forum. \textit{Perry Educ. Ass’n v. Perry Local Educators’ Ass’n}, 460 U.S. 37, 46 (1983)

\textsuperscript{17} 386 F.3d 514 (3d Cir. 2004).

\textsuperscript{18} 373 F.3d 589 (4th Cir. 2004).

\textsuperscript{19} 386 F.3d at 534; 373 F.3d at 602.
District had adopted a written policy on the distribution of materials by community groups. The Stafford policy listed specific non-profit organizations that were permitted to send material home with students, but gave the school superintendent the discretion to add other non-profit organizations to the approved list. A variety of other restrictions applied as well, including the requirement that the material “should relate to school matters or public-related community activities” and that the material must be approved in advance by a designated school official. While the Court was not troubled by the viewpoint-neutral criteria utilized in the Stafford policy, it could not condone the exclusion of CEF’s speech from the forum the school had created based on the religious content of the speech.

By contrast, in Child Evangelism Fellowship of Montgomery County the school district did not have a published policy governing access to teacher mailboxes. Nevertheless, permission to use the “take-home flyer forum” had been granted to a wide variety of community groups. These groups had even included several religious organizations. The school district initially attempted to justify the exclusion of the Good News Club flyers “because the flyer forum was not open to ‘proselytization’ or ‘evangelical’ groups,” however, the school district later abandoned this argument. Given the broad range of requests the district had granted, the court found no constitutionally adequate justification for the district’s action in rejecting the Good News Club flyer.

As can be seen in Child Evangelism Fellowship of New Jersey, the existence of a written distribution policy does not insulate a school district from successful challenges to its distribution decisions. Nevertheless, school districts are more likely to succeed in litigation if denials of access are rooted in written policies that are uniformly enforced. An example of such an outcome is found in the subsequent history of the Fourth Circuit’s decision in Child Evangelism Fellowship of Maryland. After the Fourth Circuit remanded the case to the district court for the entry of an appropriate order, the school district adopted a written distribution policy.

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20 386 F.3d at 519-20. No criteria were specified for the exercise of the superintendent’s discretion. Id. at 520.
21 Id. at 519.
22 Id. at 520. A pre-approval requirement is frequently found in school district policies.
23 Id. at 527. The court rejected the district’s effort to erect additional criteria including the exclusion of groups with “controversial and divisive” views. Id. (“To exclude a group simply because it is controversial or divisive is viewpoint discrimination.”).
24 Id. at 528.
25 373 F.3d at 592. According to the evidence in the case, over 225 groups had requested permission to distribute 415 flyers during the period between August 2001 and February 2003.
26 Id.
Under the revised policy, the right to distribute material directly to students was only available to the Montgomery County Public Schools, state and federal agencies, parent teacher organizations, on campus day care providers and nonprofit youth sports leagues. Other organizations could display but not distribute material if they concerned particular topics of relevance to students. Under the new policy, CEF would be permitted to have its flyers displayed, but not distributed. In assessing the constitutional significance of the new policy, the district court concluded that limiting access to specified groups transformed the flyer forum into a nonpublic forum. Thus, the district was permitted to adopt reasonable restrictions so long as they were viewpoint neutral. Since the restrictions were based on speaker identity and not the content of the speech, the court found them to be viewpoint neutral. The court also concluded they were reasonable because they singled out "activities of traditional educational relevance to students and the categories of speakers to organizations involved in those activities."

Outside organizations are not the only challengers to distribution restrictions. In some cases, students have brought such claims. Student rights in the school setting are more extensive than the rights of non-students, although student rights are not unlimited. While student rights may not depend on the existence of a public forum to the same extent as is true in the case of outsiders, schools retain the ability to restrict student First Amendment activities to prevent the disruption of the educational environment and, in the context of school-sponsored activities, to impose reasonable restrictions to further the educational objectives of the school. This can include content restrictions to exclude profanity, libel, and sexual content, as well as to promote other educational objectives. Despite the enhanced First Amendment rights of students in the school setting as contrasted with outside groups, when courts have examined cases in which students have been denied the right to distribute material in school or been disciplined for doing so, the outcome of the case is more likely to turn on the justification for the school's action rather than the identity of the distributor.

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28 Id. at 423.
29 Id. at 430.
30 Id.
31 Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").
32 Id. at 513 ("But conduct by the student, in class or out of it, which for any reason — whether it stems from time, place, or type of behavior — materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.").
35 Compare Henerey ex rel. Henerey v. City of St. Charles, 200 F.3d 1128 (8th Cir. 1999) (court upheld discipline of student for condom distribution during campaign for junior class president) with Johnston-
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Teachers also may attempt to challenge distribution restrictions. However, teachers have not been as successful in asserting the right to distribute material because teachers, as school employees, are obligated to support the school's curricular decisions. Moreover, when a public school provides teachers with the opportunity to distribute or display speech, courts are less likely to conclude that the school has created a public forum. A public forum is created only when the government creates the opportunity for private expression and not when the government has provided itself with an opportunity to speak. Thus, an official bulletin board available for use by teachers may be a nonpublic forum since it may be available only for the use of teachers in their representative and not their private capacity.

When crafting a distribution policy, schools cannot freely pick and choose material to distribute. They must weigh their interest in being good citizens of the community by providing community groups with the opportunity to distribute literature in the public schools against the possibility that groups with messages the school would rather exclude will also seek to use those opportunities. Distribution policies require a careful weighing of competing policy interests as well as the crafting of a distribution policy that will pass constitutional muster.


36 Cf. Newton v. Slye, 116 F. Supp. 2d 677 (W.D. Va. 2000) (court refused to order principal to allow teacher to continue to post banned books pamphlet on outside of classroom door where principal's objection was based on inconsistency with the school's curriculum).

37 Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1012 (9th Cir. 2000) (Gay and Lesbian Awareness bulletin boards were not public forums because they were "an expressive vehicle for the school board's policy of 'Educating for Diversity'" and not the private expression of teachers).