

GOVERNMENT TIES TO THE BOY SCOUTS
A QUESTION AND ANSWER GUIDE

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Introduction

In the wake of the very public fight by the Boy Scouts of America (BSA) to maintain its discriminatory membership policies, cities, counties, school districts, and police, fire, and parks and recreation departments throughout the nation are reassessing their relationships with Boy Scout programs. BSA officials claim that Scouting believes that gay people cannot be “morally straight” or “clean” and the BSA therefore insists on excluding from membership any young person or adult known to be gay.

While organizations are entitled to hold whatever beliefs they choose, groups that act upon and instill disrespect and prejudice toward others have no right to special benefits or support from the government.

Lesbian and gay youth, who often are targets of harassment and violence, urgently need and deserve programs that teach tolerance and inclusion. Non-gay youth also need to learn the values of respect for all persons, including those who are different from them. Fortunately, there are many youth programs in this country that are non-discriminatory, building character up rather than tearing it down.

The harmful message sent to all Californians by the BSA is compounded when it comes with a government seal of approval – when public schools require students to attend Boy Scout recruitment assemblies and pass out BSA brochures in classrooms; when police and fire departments run Scout units and give hiring preferences to former Scouts; or when cities, counties and park districts give the BSA or Boy Scout Councils gifts or free leases of public land for Boy Scout camps and headquarters.

This question-and-answer guide is designed to help boards of supervisors, city councils and commissions, school boards, and other government officials make principled and thoughtful decisions regarding government ties to the BSA. Please contact any of the organizations listed at the end of this guide if you have questions or would like more information on any of these issues.

1. What did the Supreme Court say in *Dale v. Boy Scouts of America*?

James Dale was a 20-year-old Eagle Scout and assistant scoutmaster in New Jersey, an “exemplary scout” by all accounts. BSA officials revoked his membership in the Boy Scouts when they saw a newspaper article discussing the needs of gay young people that did not mention Scouting but quoted Dale and described him as co-president of a gay student group at Rutgers University. When he asked why his membership was revoked, BSA headquarters told him that Scouting “specifically forbids membership to homosexuals.”

Dale sued the BSA under a New Jersey law that prohibits “discrimination ... in places of public accommodation” on the basis of sexual orientation as well as race, religion, and other personal characteristics. The New Jersey Supreme Court agreed with Dale that the BSA is subject to this law and therefore could not kick Dale out of the organization simply because he is gay.

The United States Supreme Court narrowly reversed, ruling 5 to 4 that the BSA had a “right to associate” under the First Amendment that would be violated if the BSA were required to allow Dale to remain in the organization. The Supreme Court deferred to the BSA's assertion that the organization considered “homosexual conduct” inconsistent with the values expressed by the terms “morally straight” and “clean” in the Boy Scout Oath, and to the BSA's lawyers' argument that James Dale's “presence in the Boy Scouts would ... force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”

The Supreme Court may have said the BSA has a right to discriminate, but it did **not** say that discrimination is right – and it certainly did **not** say that it was right or legal for the government to participate in or support such discrimination. Those are separate questions, and it is those questions that now confront many government officials and the public.

2. Did the Supreme Court say anything in the *Dale* case about relationships between government bodies and the Boy Scouts?

The Court's ruling did not address any issues relating to government assistance, sponsorship or subsidy of the Boy Scouts. In particular, the Supreme Court said nothing that might even suggest that it would be legal or appropriate for government entities to provide such special benefits to discriminatory groups like the Boy Scouts.

3. Is it legal for California's public schools, police and fire departments, and other government agencies to sponsor Boy Scout troops?

Government sponsorship of a program that excludes people from membership because of their sexual orientation likely violates both the California and United States Constitutions' guarantees of equal protection. In addition, many cities and counties have non-discrimination ordinances that expressly preclude any government entity from sponsoring or operating a program that discriminates on the basis of sexual orientation.

Furthermore, although the Boy Scouts is non-sectarian, it requires all participants to affirm a belief in God and excludes members who are non-religious. Government sponsorship of such a program also likely violates constitutional requirements of separation of church and state as well as requirements that the government not discriminate on the basis of religious views.

As an openly discriminatory organization, the Boy Scouts of America has forfeited any entitlement to the special privileges and close relationships with local governments that it has enjoyed for many years. Having decided to discriminate, the BSA should not expect to continue receiving government sponsorship and other special privileges.

4. Should public schools, police and fire departments, and other government bodies sponsor Learning for Life and Explorer programs?

Learning for Life (which runs the in-school Scouting and the Explorer programs) is a part of, and is controlled by, the BSA. Learning for Life has the same phone number and address as the BSA and the professional staff who administer Learning for Life's programs are Boy Scouts' employees. It appears that dues and fees paid to Learning for Life and Explorer programs actually go to the BSA. While, unlike the Boy Scouts, Learning for Life and the Explorers are open to all young people, these programs frequently use the BSA logo and insignia, and both are closely associated with the Boy Scouts in the mind of the public.

As a result, it remains detrimental to young people, and to the public at large, for government bodies to sponsor Learning for Life or Explorer programs. Teaming up with any BSA program supports and endorses a discriminatory organization, and inevitably sends a harmful message to both gay and non-gay youth, as well as to youth who are not religious.

5. Is it legal for cities, counties, park districts, and other government entities to enter into or maintain “sweetheart deals” giving land, buildings or other resources to the Boy Scouts for free or for a nominal fee?

Many cities and counties have non-discrimination ordinances that preclude any government entity from allowing public resources to be used or controlled by an organization that discriminates on the basis of sexual orientation or religion. Also, such 'sweetheart deals' may violate the California and United States Constitutions' guarantees of equal protection and separation of church and state.

Having decided to discriminate, the BSA should not expect to continue receiving special privileges at taxpayer expense that have been given to other, non-discriminatory youth groups.

Cities and counties should reassess any current leases or contracts they may have with the Boy Scouts. Continuing to subsidize the BSA not only sends a harmful message to youth, but could lead to litigation. For example, the City of San Diego currently is being sued for leasing 18 acres of prime city parkland to the local Boy Scout council for \$1 per year.

6. Should the Boy Scouts still be able to use public facilities, such as schools, parks, and government buildings, for their meetings, on the same terms as other groups?

The BSA is entitled to have **equal** access to public facilities, but *not* special, privileged, or exclusive access. So, for example, if other groups are charged a fee to use public facilities, the Boy Scouts should be required to pay the same fee. Local governments should not penalize the Boy Scouts for their point of view by denying them equal access to facilities that are open to the general public. Also, as a policy matter, going down the road of barring certain groups from public meeting facilities sets up a dangerous precedent that could end up harming groups like PFLAG (Parents & Friends of Lesbians and Gays), battered women's support groups, and other important programs.

In California, the Boy Scouts are allowed to use school facilities after hours, under the Civil Center Act, Ed. Code § 38134 (school boards “shall authorize the use of any school facilities or grounds ... to nonprofit organizations, and clubs or associations organized to promote youth and school activities, including, but not limited to ... Boy Scouts”). The school may charge groups like the Boy Scouts an amount “not to exceed its direct costs.”

Also, the federal Equal Access Act, 20 U.S.C. § 4071, requires schools to allow voluntary student groups to meet in school facilities, subject only to viewpoint-

neutral restrictions. By its terms, the Equal Access Act does not cover Boy Scout troops, since they usually are not student-initiated, student-run groups, but are led by non-students. However, because the Equal Access Act has been so important in protecting the right of Gay-Straight Alliances and similar student groups to meet on school property, schools could come under criticism on political grounds if they were to oppose the Boy Scouts' equal opportunity to use school buildings after hours.

7. Should school districts allow the Boy Scouts to recruit in public school classrooms and school assemblies?

Under the Constitution and California's Unruh Civil Rights Act, public schools cannot discriminate on the basis of sexual orientation or religion. In addition, California law obligates public schools to protect students from discrimination on the basis of sexual orientation, religion, and other characteristics. Ed. Code §§ 200 and 220 provide that:

It is the policy of the State of California to afford all persons in public schools, regardless of ... any basis contained in the prohibition of hate crimes [including sexual orientation] ... equal rights and opportunities in the education institutions of the state.

No person shall be subjected to discrimination on ... any basis that is contained in the prohibition of hate crimes ... in any program or activity conducted by an educational institution that receives or benefits from state financial assistance.

These statutes give schools a duty both to refrain from discriminating against students, and to protect students from bias-motivated harassment and violence. Ensuring that discriminatory groups do not use public schools for recruitment is a key step in carrying out the purposes of this law.

Refusing to allow the Boy Scouts to recruit in public schools would **not** violate the BSA's First Amendment rights, because public school classrooms and assemblies are not a "public forum" for outside groups to express their views and recruit members. The Supreme Court and other federal courts have ruled that schools "retain authority over expressive activities that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school" and that, in situations not involving a public forum, schools may refuse to disseminate messages that are "biased or prejudiced." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988); *DiLoreto v. Downey Unified School District Board of Education*, 196 F.3d 958 (9th Cir. 1999).

Most school districts already have written criteria governing principals' decisions regarding whether or not to distribute materials from outside groups, and whether or not to allow outside groups to participate in assemblies. These criteria may include factors such as whether the information would be beneficial to students and would further educational purposes.

School districts also may decide to require any group that wishes to distribute brochures, speak at an assembly or otherwise recruit students to sign a statement certifying that it does not discriminate on any basis prohibited by Ed. Code § 200.

8. Can't individual Boy Scout troops or councils opt out of the discriminatory policy?

National BSA leaders state that the organization's anti-gay policy is not optional, and that all local councils, troops, and packs **must** follow the policy. Even if a local troop or council said it would not discriminate, that does not really cure the problem because the local group remains associated with and helps support the national organization that has explicit, and now well-known discriminatory policies. Moreover, members of Scouting join and pay dues to the BSA, not their local troop or council, and the BSA in the past has required exclusion of those known to be gay or non-religious, even when their troop supported them.

9. Are there other youth programs that do not discriminate?

Yes. Practically all other major youth organizations, including the Girl Scouts, Camp Fire Girls and Boys, Boys and Girls Clubs of America, the YMCA and the YWCA, 4-H Clubs, Big Brothers/Big Sisters, and Jewish Community Centers, do not discriminate on the basis of sexual orientation.

Cities, counties, school districts, and police, fire and parks and recreation departments can work with these groups to provide educational and recreational youth programs that are inclusive and respectful of all youth and families.

Conclusion

Public entities, schools, funders, parents and fair-minded individuals who until now have been supportive of Scouting based on the BSA's earlier pledge to be "open to all boys" are rethinking their ties to an organization whose practices are in violation of the principles it has sworn to uphold and teach. Organizations and individuals dissociating from the Boy Scouts can channel their support to youth programs that are truly inclusive and instill values of respect and fairness for all.

FOR MORE INFORMATION, contact one of the following organizations:



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