

GOVERNMENT TIES TO THE BOY SCOUTS, PART II

A QUESTION AND ANSWER GUIDE: FOR PUBLIC SCHOOL OFFICIALS & ADMINISTRATORS

May 2001



GOVERNMENT TIES TO THE BOY SCOUTS: PART II

A QUESTION AND ANSWER GUIDE FOR PUBLIC SCHOOL OFFICIALS & ADMINISTRATORS

Introduction

In light of the very public fight by the Boy Scouts of America (BSA) to maintain discriminatory membership policies, educational administrators and school boards throughout California are reassessing their relationships with Boy Scouts programs. Scouting officials claim that gay people cannot be “morally straight” or “clean” and the BSA, therefore, insists on excluding from membership or employment any young person or adult known to be gay.

While private 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. Studies show that LGBT youth are 3 to 7 times more likely to commit suicide than their straight peers. 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 school’s seal of approval – when public schools require students to attend Boy Scout recruitment assemblies; when school officials pass out BSA brochures in classrooms; when schools sponsor Boy Scout troops or Cub Scout packs; and when teachers present the in-school “Learning for Life” program.

This document is the second in a series of question-and-answer guides exploring public ties to the Boy Scouts. The first part was designed to help elected and other public officials make principled and thoughtful decisions regarding government ties to the BSA. Part II is more specifically geared for school principals, administrators and board members, and other education officials. 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. He was 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 the New Jersey decision, 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 school districts, education officials, and the public.

2. Is it legal for California's public schools to sponsor Boy Scout troops or Cub Scout packs?

Sponsorship by public schools of a program that excludes people from membership because of their sexual orientation likely violates both the California and the United States Constitutions' guarantees of equal protection. California's Unruh Civil Rights Act, which has been held to prohibit sexual orientation discrimination by business establishments, also has been held to prohibit public schools from engaging in prohibited discrimination. 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, California has adopted statutes that expressly require public schools to protect students from discrimination on the basis of sexual orientation, religion, and other personal characteristics. Education Code §§ 200 and 220 provide that:

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

No person shall be subjected to discrimination on the basis of ... religion ... or 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 impose a responsibility on schools both to refrain from discriminating against students and to protect students affirmatively from bias-motivated harassment and violence. Sponsoring an organization that excludes gay youth and religious non-believers from membership may violate these statutes, in addition to students' constitutional rights.

3. Should California public schools utilize the “Learning for Life” program?

Learning for Life, which is an classroom-based values curriculum program, is a part of, and is controlled by, the BSA. The professional staff who administer the Learning for Life programs are Boy Scouts employees. It appears that dues and fees paid to Learning for Life programs actually go to the BSA. While, unlike the Boy Scouts, Learning for Life is open to all young people, this program frequently uses the BSA logo and insignia, and is closely linked with the Boy Scouts in the mind of the public.

As a result, it remains detrimental to young people for schools to utilize Learning for Life programs as part of their teaching curriculum. 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.

4. Should public schools continue to allow the Boy Scouts to use school buildings after hours for their meetings?

The BSA is entitled to have **equal** access to public facilities, but *not* special, privileged, or exclusive access. Schools should allow the Boy Scouts to have access to school buildings after hours or during other non-instructional time on the same terms as other organizations.

The Civic Center Act, Education Code § 38134, provides that school boards “shall authorize the use of any school facilities or grounds ... to nonprofit organizations, and

clubs or associations organizes to promote youth and school activities, including, but not limited to ... Boy Scouts.” A school may charge the Boy Scouts and other groups a fee “not to exceed its direct costs” for the use of the facility.

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.

5. Should schools allow Boy Scout troops and Cub Scout packs to recruit students during instructional time?

As discussed above, under the U.S. Constitution and California’s Unruh Civil Rights Act public schools are prohibited from discriminating on the basis of sexual orientation or religion. Furthermore, California law obligates public schools to protect students from discrimination on the basis of sexual orientation, religion, and other characteristics.

Under these statutes, schools have 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 during instructional time is an important step in carrying out the purposes of the law.

Such a restriction on the Boy Scouts would be consistent with the *Dale* decision. The Supreme Court in their ruling stated that the government cannot force a private organization to accept members it does not want. However, not providing the BSA special access to students during instructional time for recruitment purposes is not the same as forcing that organization to alter its membership policies.

Refusing to allow the Boy Scouts to have its recruiting literature distributed or to address students during instructional time would not violate the BSA's First Amendment rights because, during regular teaching time, a public school classroom or assembly is not a "public forum" for outside groups to express their views and recruit members.

Most schools districts already have written policies 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 policies usually include criteria such as whether information about the group would be beneficial to students and would further educational purposes. Thus, schools already "pick and choose" which groups they should help recruit, rather than opening up a public forum for any and all groups to recruit students during school hours.

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).

School districts may want to amend their policies on distribution of outside groups’ materials and presentations by outside groups in assemblies and to require any group seeking access to a non-public forum at a school to sign a statement certifying that it does not discriminate on any basis prohibited by Education Code Section 200.

6. If a school denied the Boy Scouts assistance in recruiting on campus, wouldn't it also have to do the same regarding all-girl organizations, or religiously-affiliated organizations?

There is an important difference between organizations that have a religious, cultural, or other affiliation or target population, and organizations that discriminate in their employment or membership policies. The YMCA, YWCA and Catholic Charities, for example, are religiously-affiliated organizations, but they do not discriminate in their employment or membership policies, or in the services they provide to youth.

Single-sex programs, such as boys' and girls' sports leagues, are lawful and non-discriminatory so long as there is an adequate justification for having a single-sex program, and comparable opportunities are available to both sexes.

7. 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. In January 2001, BSA rejected the charters of 7 Cub Scout packs and Boy Scout troops because their sponsors challenged the policy of excluding gay members and leaders. The 7 groups were sponsored by parent-teacher organizations and are believed to be among the first to lose their charters because of the discriminatory policy.

Even if a local troop or council said it would not discriminate, that would not really cure the problem because the local group would remain associated with and help 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.

8. 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.

These groups provide opportunities for student participation in educational and recreational programs that are inclusive and respectful of all youth.

Conclusion

Public school districts, education administrators and officials, and other 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 was organized to uphold and teach. Organizations and individuals dissociating from the Boy Scouts can channel their support to youth programs that truly are inclusive and instill values of respect and fairness for all.

FOR MORE INFORMATION, contact one of the following organizations:



American Civil Liberties Union of Southern California

Martha Matthews
1616 Beverly Boulevard
Los Angeles, California 90026
(213) 977-9500 extension 269
mmatthews@aclu-sc.org



L.A. Gay & Lesbian Center
Policy & Public Affairs Department
1625 N. Schrader Boulevard
Los Angeles, California 90028
(323) 860-7363
publicpolicy@laglc.org

Lambda Legal Defense and Education Fund
6030 Wilshire Boulevard, Suite 200
Los Angeles, California 90036
(323) 937-2728
www.lambdalegal.org