

**Subject:** RE: Bob Holmes Ministry

Thank you for contacting the Christian Law Association regarding rental of public school or other public facilities for the Bob Holmes Ministry. I am responding by email so that you will have this information in writing. It is often said that if an attorney is not willing to put legal advice in writing, it is probably not accurate. We know that this information is accurate. If a private group is renting a public facility, it is definitely not true that religious information leading to a decision for Christ may be prohibited. Just the opposite is true. When the public facility rents the space to a religious group (which they must do on an equal access basis as the Legal Opinion Memo below discusses), then the group is free to say whatever it likes. Religious speech leading to conversions would only be unconstitutional if done directly by the government itself (according to modern law; this was not true in early America).

Public schools generally have what is called a Use Policy, in which they outline the procedures, costs, etc. under which outside groups may rent their facilities. They are not permitted to discriminate on the basis of religion in permitting this rental. Whatever the rules are for secular groups using the facilities are the same rules that must apply to you.

In this case, there is no gray area here. Not only should you be permitted to rent gyms, etc. for your youth, the public school is legally required to permit you to do that under the legal principle of equal access. Were they to refuse to rent to you on the same basis as everyone else, you could sue them for discrimination. I am including our standard Legal Opinion Memorandum regarding viewpoint neutral use of public facilities such as public schools gyms, etc. A public facility must be available for use by the whole community on an equal basis. A city or school may not discriminate in use of such public facilities based on the viewpoint of the user---even if that viewpoint is religious. There is no violation of the alleged "separation of church and state" in providing for equal use of public facilities.

## **LEGAL OPINION MEMORANDUM**

### **Question Presented**

May a City or public school refuse to rent public facilities to faith-based ministries under the same rules and regulations as other secular and not-for-profit clubs and organizations are permitted to use the facilities?

### **Summary**

The law controlling the use of public facilities by faith-based ministries is controlled by the free speech provisions of the First Amendment to the United States Constitution and has been well-settled since the United States Supreme Court decided in 1993 that public facilities must be available for use by a ministry on the same basis as they are available to other secular or not-for-profit groups.

### **Legal Analysis**

The law controlling use of public facilities by faith-based ministries has been well-settled since the United States Supreme Court decided a case on this very issue in 1993. In the case of *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S.Ct. 2141 (1993), the United States Supreme Court held that not only *may* a public facility, in this case a school, be used by a

religious ministry, but, in fact, the school *must* permit use of the facility to such a religious ministry on the same basis as other secular groups.

Lamb's Chapel Church was denied permission to use public facilities even though the school district regularly allowed such use by non faith-based groups. Lamb's Chapel challenged this denial of equal access and the case went all the way to the Supreme Court. The United States Supreme Court held that it was not reasonable for the school district to deny access to faith-based ministries on the same terms as other groups.

The Court said that the Establishment Clause does not present a bar to a policy of equal access for all groups to public facilities. In fact, the Court held that when a governmental body makes its facilities available for general use by the public or by certain segments of the public, the government may not selectively exclude users on the basis of the religious nature of their activity.

Justice White said in the Court's majority opinion said, "The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" He further said,

"[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."

When a faith-based ministry uses public facilities on the same basis as secular groups, there is no government endorsement of the religious activity. The only thing the government endorses when it allows use of public facilities by faith-based ministries on the same basis as others is the constitutional principle of equal treatment for all. This decision by the Court prohibited viewpoint discrimination in a limited open forum based on the free speech provisions of the First Amendment, an equal opportunity principle also found in the Fourteenth Amendment.

Previous rulings by the United States Supreme Court regarding non-discriminatory use of public buildings other than schools were also based on a free speech viewpoint discrimination analysis in a limited public forum. Cases involving other types of public facilities where such viewpoint discrimination was not permitted were *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788 (1985) (Regulation of speech in a limited public forum must be viewpoint neutral. The government may not allow access to some speakers and some subject matters while excluding others.); and *Concerned Women for American, Inc. v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989) (A federal appeals court upheld the right of a religious group to use the auditorium of a public library that allowed other public and private organizations such access.).

Once a limited forum in a public facility such as a public school gym or auditorium has been opened to some groups, it may not then be restricted for others. The United States Supreme Court is particularly sensitive to discrimination which shows hostility towards religion or religious expression. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).

It is well-established that religious worship and religious discussions are forms of speech protected by the First Amendment. This holding was made in *Widmar v. Vincent*, 454 U.S. 264, 269 (1981).

When a forum is created or "designated" for certain uses by the government, the facility is intentionally open for "indiscriminate use by the general public." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 47 (1983). As a designated public forum, speakers may not be excluded or restricted in the absence of a compelling governmental interest. *Perry*, 460 at

45-46. Fear of providing public moneys for upkeep of a building being used by a private religious group is not a compelling interest since such a use does not violate the Establishment Clause.

The only way the Establishment Clause would be violated would be if the city or public school *itself* were sponsoring the religious club. However, when it is a private group and not the city or school sponsoring the religious event, the Establishment Clause is not a restricting factor (i.e. the alleged “separation of church and state”). The city or public school must treat all citizen groups alike, whether religious or non religious. Otherwise, the city or public school would be favoring non-religion over religion which the Supreme Court *has* stated would violate the Establishment Clause.

Several recent court cases have all reached the same legal conclusions. These cases primarily involve public schools, but the legal principles for community centers would be the same. In the case of *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), the U.S. Supreme Court held that when a public school opened its facilities to after school clubs for children, the school engaged in impermissible viewpoint discrimination when it excluded a club from the after school forum merely because it was religious.

In the case of *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), the University of Virginia, a state school, authorized payments from its Student Activities Fund (SAF) to outside contractors for the printing costs of a variety of publications issued by student groups. The University withheld authorization for payments to a printer on behalf of a Christian group and their Christian publication. The Court held that the school violated the student’s right to free speech and engaged in viewpoint discrimination because the University gives disfavored treatment of journalistic efforts with editorial viewpoints. All private citizen groups must be treated alike in use of public facilities whether they are religious or secular. *See, Rosenberger v. Rector & Visitors of Univ. of Vir.*, 515 U.S. 819 (1995).

One recent case directly addressed the issue of community centers. In the case of *Moore v. City Van*, 238 F. Supp. 2d 837 (E.D. Tex. 2003), the city permitted use of the center by residents of the city but not to religious residents. The court concluded that the center had selectively excluded uses merely because of religious speech and that the city and officials had not shown an adequate compelling interest in restricting the equal access of religious groups.

### **Conclusion**

The City must permit use of public facilities by faith-based groups on the same basis as other non-religious groups. To refuse to do so constitutes viewpoint discrimination in a limited or designated open forum. To deny access to a religious group, the school would be required to deny access to everyone.

Sincerely,

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