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No. 23-004
STATE OF NEBRASKA
OFFICIAL

APR 10 2023

DEPT. OF JUSTICE

SUBJECT: Constitutionality of Requiring Public Schools to Allow Access to Certain Youth Organizations to Provide Information, Services, and Activities (LB 805)

REQUESTED BY: Senator Danielle Conrad
Nebraska Legislature

WRITTEN BY: Mike Hilgers, Attorney General
Leslie S. Donley, Assistant Attorney General

You have requested an opinion of the Attorney General relating to the constitutionality of proposed legislation pertaining to Nebraska public schools. As introduced, Legislative Bill 805 would require public schools to allow, upon request, a representative of any "youth organization" listed in Title 36 of the United States Code¹ to provide oral or written information to students at least once during the school year. The information would inform students about the organization and how it "furthers the educational interests and civic involvement of students in a manner consistent with good citizenship." LB 805 would also allow a youth organization representative to provide services and activities to any student who is a member of the organization.

Your opinion request raises constitutional concerns in view of *Child Evangelism Fellowship of Minnesota v. Elk River Area School District #728*, 599 F.Supp.2d 1136 (D. Minn. 2009) [*Elk River*]. You state that in *Elk River*, only the patriotic, Title 36 organizations were allowed "to distribute materials and have open houses," thus violating the free speech rights of nonprofit religious patriotic organizations. You are seeking our "opinion as to whether LB 805 mandates a similarly constitutionally suspect limited public

¹ Title 36 U.S.C. Subtitle II, Part B—Patriotic and National Organizations.

forum in Nebraska schools or raises any additional legal issues under the First Amendment or criminal laws.” You indicate that the Education Committee expressed concern about groups not listed in Title 36 “being able to maintain or seek access under a limited public forum designation in public schools as currently decided on a case by case basis or local policy basis by local school districts.”

You have also asked us to consider the propriety of Section 2 of the bill, which amends Neb. Rev. Stat. § 79-2,103 to exempt Title 36 youth representatives from criminal penalties for accessing school buildings or grounds for the purpose of soliciting or recruiting students. However, since we understand that the introducer is proposing to outright repeal § 79-2,103, see AM711, this portion of the bill will not be addressed.

FEDERAL LAW BACKGROUND

On January 8, 2002, President George W. Bush signed the No Child Left Behind Act of 2001, which included the Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905 (“Boy Scouts Act”). The Boy Scouts Act provides that no school, local educational district, or state educational agency that creates a “designated open forum” or “limited public forum”² and receives funds from the U.S. Department of Education (“Department”)

shall 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 (as a patriotic society), that wishes to conduct a meeting within that designated open forum or limited public forum, including denying such access or opportunity or discriminating for reasons based on the membership or leadership criteria or oath of allegiance to God and country of the Boy Scouts of America or of the youth group listed in Title 36 (as a patriotic society).

20 U.S.C. § 7905(b)(1). Rules implementing the Boy Scouts Act were adopted by the Department in March 2006. 34 C.F.R. §§ 108.1 to 108.9. A Title 36 youth group is defined as “a group or organization listed in title 36 of the United States Code (as a patriotic society) that is intended to serve young people under the age of 21.” 34 C.F.R. § 108.3(p). The Boy Scouts Act is enforced by the Department’s Office of Civil Rights. No Department funds shall be made available to any school or agency that fails to comply with the Boy Scouts Act. 20 U.S.C. § 7905(c).

² For purposes of the Boy Scouts Act, a “[d]esignated open forum means that an elementary school or secondary school designates a time and place for one or more outside youth or community groups to meet on school premises or in school facilities, including during the hours in which attendance at the school is compulsory, for reasons other than to provide the school’s educational program.” A “[l]imited public forum means that an elementary school or secondary school grants an offering to, or opportunity for, one or more outside youth or community groups to meet on school premises or in school facilities before or after the hours during which attendance at the school is compulsory.” 34 C.F.R. § 108.3(e) and (i), respectively.

DISCUSSION

As introduced,³ LB 805 provides that

[e]ach school shall, upon request, allow a representative of any youth organization to provide (i) oral or written information to the students of such school regarding the youth organization and how such youth organization furthers the educational interests and civic involvement of students in a manner consistent with good citizenship and (ii) services and activities to any student of such school who is a member of such youth organization.

Sec. 1(2)(a). Access shall be given at least once during the school year. Sec. 1(2)(b). Schools must make a good faith effort to schedule a time and place for the youth organization representative to provide the information, services or activities that is mutually agreeable to the parties. Sec. 1(3). Background checks shall be conducted on youth organization representatives prior to allowing access to any school. Sec. 1(4). The parameters of any background check shall be determined by the school district except as provided in Section 1 of the bill or Nebraska State Patrol rules and regulations. *Id.* A school district may prohibit access to any youth organization representative convicted of a felony. *Id.* Any costs of a background check shall be borne by the youth organization representative. *Id.*

Your opinion request raises concerns about the potential for discrimination against other groups not listed in Title 36. You question whether LB 805 impairs school districts' ability to determine access "currently decided on a case by case basis or local policy basis" We begin with a discussion of the *Elk River* decision.

The school district's policy in *Elk River* limited distribution of nonschool-sponsored materials to the "designated patriotic youth organizations' as defined by the No Child Left Behind Act" *Id.* at 1138. The policy also allowed these organizations, including the Boy Scouts of America, to distribute literature at school open houses and on school bulletin boards. In August 2007, the Child Evangelism Fellowship of Minnesota ("CEF")⁴ requested to be allowed to participate in the open houses. A school official informed CEF that it would not be allowed to participate unless it could prove that it was a patriotic organization under the No Child Left Behind Act. Because CEF was not a patriotic organization listed in Title 36, it was not allowed to participate. CEF's request in 2008 was also denied by the district. Consequently, CEF sought to enjoin the district's policy,

³ Pending AM677 would change "school" to "school district" in certain instances in the bill.

⁴ The CEF sponsors the Good News Club, organizations for children between the ages of five and twelve. These organizations "encourage[] learning, spiritual growth, and service to others by providing religious and moral education through lessons from the Bible. . . . Meetings . . . are held on elementary school campuses, and the children are taught biblical principles, moral values, character qualities, respect for authority, relationships, character development, and important community issues." *Elk River* at 1138.

alleging that its inability to distribute literature and attend open houses caused a significant decline in club membership.

The court first considered whether the district excluded CEF on the basis of its religious viewpoint in contravention of the holding in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) [*"Milford"*]. In *Milford*, the United States Supreme Court considered whether a school district's denial of a club's application to hold weekly afterschool meetings at the school discriminated against the club based on its religious viewpoint in violation of the Free Speech Clause. The school district's policy allowed afterschool use of the facilities by district residents for "instruction in any branch of education, learning or the arts" and "for 'social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public.'" *Id.* at 102. Two residents and sponsors of the club sought to hold weekly afterschool meetings in the school cafeteria. The request was denied on the basis that the club's proposed use "was 'the equivalent of religious worship'" and because the policy prohibited use of the facilities "for religious purposes." *Id.* at 103.

The Court noted that the nature of the forum dictates what standards to apply when determining whether a private speaker has been unconstitutionally excluded from the use of a public forum. It assumed that the district had created a limited public forum because it had opened up its facilities to members of the community in accordance with its policy. With respect to this forum, the Court explained that

[w]hen the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics." . . . The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, . . . and the restriction must be "reasonable in light of the purpose served by the forum[.]"

Id. at 106-07 (internal citations omitted).

Relying on *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (Free Speech Clause was violated by excluding a private group from presenting films at school facilities that discussed family values from a religious perspective), and *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (University violated the Free Speech Clause by refusing to fund a student publication which addressed issues from a religious perspective), the Court concluded that the school had discriminated against the club in violation of the Free Speech Clause. The Court noted that teaching morals and character development to children was a permissible purpose under the policy, and it was clear that the club taught these subjects but from a religious viewpoint. "What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club

and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons.” *Id.* at 111. The Court reaffirmed its precedent “that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.” *Id.* at 111-12.

In *Elk River*, the district argued that it did not consider CEF’s viewpoint and merely limited access to groups in accordance with the Boy Scouts Act. It represented “that its goal . . . was to avoid discrimination,” and in order to receive federal funds, it closed its forum “except to organizations to whom No Child Left Behind says it must grant access.” *Elk River*, 599 F.Supp.2d at 1140. The court noted that the district had created a “limited public forum” and that the standards delineated in *Milford* applied.

The court concluded that the district discriminated against CEF on the basis of viewpoint. While the court acknowledged the district’s attempt to comply with the Boy Scouts Act in a viewpoint neutral way, it found that

the nature of the Act itself classifies organizations as either “patriotic” or not. Accordingly, the inclusion on or exclusion from the list constitutes discrimination based on whether an organization is appropriately “patriotic.” The difficulty for *Elk River* is that even though it has not discriminated on the basis of viewpoint, Congress has done so by classifying certain organizations as patriotic. This classification endorses a certain patriotic viewpoint while leaving other viewpoints, that may be equally patriotic, off the list. And as the Supreme Court has found, The Good News Club and the Boy Scouts promote the same values and ideas, but they do so from different viewpoints. . . . Although *Elk River* asserts the Boy Scout Act compels its course of action, the holding in *Milford* dictates that if *Elk River* allows the Boy Scouts, or any other listed “patriotic youth group,” access to its limited public fora but does not allow the Good News Club access, it has violated the Free Speech Clause of the First Amendment.

Id. at 1140-141 (internal citations omitted). The court further determined that even if the policy were viewpoint neutral, it was not reasonable in light of the purpose served. The court noted that the receipt of federal funds requires the district to allow access to the Boy Scouts only when a limited public forum has been created. Federal funding would still be available if the district chose to close the open houses to nonschool groups, and limit distribution of literature to only school programs.

The circumstances in *Elk River* are distinguishable from the access mandated in LB 805. Under the Boy Scouts Act, school districts have the discretion to close school buildings and grounds to outside groups. The school district in *Elk River* chose to allow access to only Title 36 youth organizations, and denied access to another youth organization not listed in Title 36 but which shared a similar message. LB 805, on the other hand, *requires* school districts to allow Title 36 youth organization representatives access to schools, thus creating a limited public forum. LB 805 removes any discretion

to deny access to a representative from a Title 36 youth organization or to any other youth organization with a similar message to those organizations listed in Title 36.

LB 805 creates a limited public forum at public schools to allow Title 36 youth organizations to provide information about the organizations and the services and activities they provide relating to education and good citizenship. The forum is not restricted to Title 36 youth organizations, however. School districts retain some discretion to allow other groups and organizations to access schools so long as they do not discriminate based on viewpoint. School districts must be cognizant that if they apply the same standard as the school district in *Elk River*, such action would likely violate the First Amendment rights of other youth organizations not listed in Title 36 but which share a similar viewpoint.

Moreover, the mandate proposed in LB 805 is not unique. Several other states have enacted similar legislation requiring school districts to provide access to the Title 36 youth organizations. See Ark. Code Ann. § 6-10-132 (2017), “Patriotic Access to Students in Schools Act”; Ind. Code §§ 20-26-20-1 through 20-26-20-5 (2020), “Patriotic Youth Membership Organizations”; La. Stat. Ann. § 17:2120 (2022), “Patriotic organizations; use of school facilities; student recruitment”; N.C. Gen. Stat. Ann. § 115C-206 (2015), “State Board of Education; duties; responsibilities”; N.D. Cent. Code § 15.1-06-14.1 (2021), “Patriotic society—Permission to speak to students at public schools”; Okla. Stat. Ann. tit. 70, §§ 5-129.3 and 5-130 (2017), “Patriotic Access to Students in Schools Act”; S.D. Codified Laws § 13-24-22 (2018), “Representatives of patriotic societies permitted to speak to students at public schools”; Tenn. Code Ann. § 49-6-305 (2016), “Patriotic society”; Tex. Education Code Ann. § 25.0822 (2017), “Patriotic Society Access to Students”; and Va. Code Ann. § 22.1-132.01 (2016), “Youth-oriented, community organizations on school property.” Our research has identified no constitutional challenges to any of these statutes.

CONCLUSION

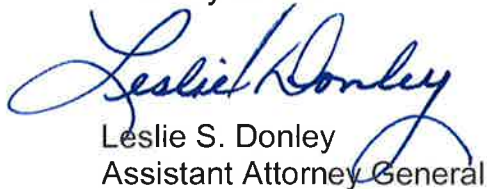
Under the federal Boy Scouts Act, any school district or other educational entity that receives federal funding and allows one or more outside youth or community groups to meet on school premises or in school facilities is prohibited from denying equal access to any group associated with the Boys Scout of America or any other youth group listed in Title 36. *Milford* and *Elk River* informs us that when a school district creates a limited public forum, it may reserve the forum for certain groups or for certain discussions, but must not restrict speech on the basis of viewpoint. The restriction must also be “reasonable in light of the purpose served by the forum” *Milford*, 533 U.S. at 107. LB 805 creates limited public fora for the public schools in Nebraska, and mandates that access be given to Title 36 youth organizations under certain conditions. However, access is not restricted to the Title 36 groups, and school districts may continue to use

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their discretion to allow or deny access to other groups so long as they do not discriminate on the basis of viewpoint and the restriction is reasonable in light of the purpose served by the forum.

Sincerely,

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Approved by:



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49-3184-30