



August 2, 2010

Board of Education
Boulder Valley School District
6500 Arapahoe Road
Boulder, CO 80303

Re: BVSD Rent Subsidy and the Boy Scouts *By email delivery to: bvs.board@bvsd.org*

To the members of the Boulder Valley School District Board of Education:

In 2001, in correspondence with both the President of the School Board and the District's Counsel, the Boulder County Chapter of the ACLU advocated that the District stop subsidizing the Boy Scouts' use of the District's facilities. The position of the ACLU at that time and now is that the District should not subsidize discriminatory organizations in violation of District policy.¹ The Boy Scouts are a discriminatory organization because they have openly defended the right to exclude homosexuals from membership. *See, Boy Scouts of America v. Dale*, 530 U.S. 640, 650 (2000).²

At that time, the District's legal counsel informed us that our "concerns stemmed from a misunderstanding as to why the Boy Scouts were category 2 users" and stated that "depriving the Scouts of their Category 2 status . . . likely would expose the District to constitutional liability, citing the case of *Good News Club v. Milford Central School*, 533 U.S. 98 (2001)."³

The recent U.S. Supreme Court decision in *Christian Legal Society v. Martinez*⁴ eliminates these liability concerns. We again pose the question to the BVSD Board of Education: *Is it the policy of the District to subsidize a youth organization that openly discriminates based on sexual orientation?*

The District's current facilities use policy⁵ does not specifically require Category 2 or other facility users to comply with the District's policies in order to receive the reduced rental

¹ Boulder Valley School District Policies AC and AC-R

² The Boy Scouts stated that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms "morally straight" and "clean," and that "it does not want to promote homosexual conduct as a legitimate form of behavior." *See* 530 U.S. 640 at 645, 651.

³ Letter from Darci Johnson Mohr to Boulder ACLU Chair Barry Satlow, Oct. 15, 2001.

⁴ <http://www.supremecourt.gov/opinions/09pdf/08-1371.pdf> (Slip opinion - decided June 28, 2010).

⁵ Under Policies KG and KG-R, Category 2 organizations are defined as "volunteer-led nonprofit community groups that charge a nominal fee and engage youth in organized community services activities for the benefit of the school district." The Boy Scouts are cited as a specific example of such a group. Category 2 users are charged a reduced fee. Categories 3-5 consist of various groups that do not fall into Category 1 or 2. These groups are charged a normal rate.

rate. The District instead “reserves the right” to deny facility use for any activity that would violate District policy.

The ACLU proposes the Board enact a minor change in the District’s facility use policy: Category 2 users shall be required to comply with the all District policies, including AC and AC-R, which among other things prohibits interference with a student’s “opportunities or benefits on the basis of an individual’s race, ethnicity, national origin, gender, gender identity/expression, sexual orientation, age, disability or religion.”

Such a change would meet the concerns of the ACLU and the students, parents and others in the District who oppose discrimination, and would not expose the District to constitutional liability.

The Boy Scouts, like all other youth or community organizations, regardless of its membership policies, by law must be provided equal access to District facilities.⁶ The change to Policies KG and KG-R we propose would eliminate the discretion of District officials to deny access to the Boy Scouts or any other group in violation of the equal access law. The District would simply be defining the boundaries of its Category 2 limited public forum. If a group is to be subsidized for the use of its facilities, it must comply with all District policies, including nondiscrimination. The Boy Scouts clearly do not.

This is essentially what was involved in the *CLS v. Martinez* case. Hastings College of Law denied official recognition to the Christian Legal Society (CLS) student organization because they violated the school’s nondiscrimination policy by excluding from affiliation anyone who engages in “unrepentant homosexual conduct.” The CLS filed suit, claiming its First Amendment rights had been violated.

The Supreme Court disagreed, finding that although the school had created a limited public forum which calls for both open expression and open access, it nonetheless could “draw a line in the sand.” All organizations will be granted access, may express what they wish, and may discriminate in membership, but that it was lawful to deny the benefits of official recognition to groups who did not agree to follow the school’s policies.

Thank you for your consideration of the ACLU’s suggestions. We await your response. Please feel free to contact me if you have any questions or concerns.

Sincerely,

Boulder County ACLU by



Johanna Blumenthal, Chapter Board Member
(303) 807-2142 Johanna.Blumenthal@colorado.edu

Copies: Boulder ACLU Board, Colo. ACLU Legal Director, media

⁶ 20 U.S.C. § 7905