
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1665

DANIEL WALZ,
BY HIS GUARDIAN AD LITEM DANA P. WALZ,
Plaintiff-Appellant,

v.

EGG HARBOR TOWNSHIP BOARD OF EDUCATION, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Judge Jerome B. Simandle

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

COMES NOW, Plaintiff–Appellant DANIEL WALZ, through his Guardian Ad Litem, Dana P. Walz, by and through his counsel, Michael P. Laffey, Esq., participating attorney for The Rutherford Institute, and John W. Whitehead, Esq. and Steven H. Aden, Esq., The Rutherford Institute, and hereby enters his opening brief in the above-captioned appeal.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Neither this nor any related case has been before this or any other court or agency.

JURISDICTIONAL STATEMENT

This action was brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, for deprivations of rights secured to Plaintiff by the First Amendment to the United States Constitution. Subject matter jurisdiction in the District Court was predicated on Sections 1311, 1338 and 1367 of Title 28 of the United States Code, 28 U.S.C. §§ 1311, 1338 and 1367. A final Order Granting Summary Judgment to defendants disposed of all claims and all parties on February 8, 2002. *See* Appendix (“Appx.”) 007. Appellant filed timely Notice of Appeal on March 5, 2002. Appx. 001. Subject matter jurisdiction in the Court of Appeals is predicated on 28 U.S.C. § 1291.

STATEMENT OF ISSUES FOR REVIEW

1. Whether the District Court erred in holding that the Defendants did not engage in viewpoint discrimination.

2. Whether the viewpoint discrimination engaged in by Defendants was permissible pursuant to the Establishment Clause of the First Amendment.

3. Whether the District Court erred in regarding Defendants' regulation of Plaintiff's speech as related to a legitimate pedagogical concern.

4. Whether the District Court correctly viewed the school holiday parties as instructional time.

5. Whether the District Court correctly refused to apply forum analysis.

6. Whether Defendants' actions violated the Establishment Clause of the First Amendment.

7. Whether Defendants' actions violated Plaintiff's rights under the New Jersey Law Against Discrimination.

STATEMENT OF THE CASE

Nature of the Case.

This is a suit for deprivations of rights secured by the First and Fourteenth Amendments to the United States Constitution and the New Jersey Law Against Discrimination. The case arises out of Defendants' policy against permitting primary school students to express themselves in social classroom settings by handing out items that reflect their religious values and beliefs.

Course of Proceedings.

On May 2, 2000, Daniel Walz, by his guardian ad litem Dana P. Walz, filed suit against the Egg Harbor Township Board of Education and Dr. Leonard Kelpsh in his official capacity as Superintendent of Egg Harbor Township schools alleging

violations of Plaintiff's rights pursuant to the First and Fourteenth Amendments to the United States Constitution and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et. seq.* Appx. 033 (Complaint); 003 (Docket Entry 1). On July 6, 2001, cross motions for summary judgment were filed. Appx. 004 (Docket Entries 12, 13).

Disposition Below.

On February 8, 2002, the District Court denied Plaintiff's motion for Summary Judgment and granted Defendants' Motion for Summary Judgment. Appx. 007 (Order); 005 (Docket Entry 21). Plaintiff now appeals.

STATEMENT OF FACTS

Plaintiff, John Walz, was born on September 25, 1992. Opinion ("Op.") at 2, Appx. 009. Plaintiff started attending Egg Harbor Township Public Schools in 1998 and continues to attend school there. In the spring of 1998, Daniel was in the Developmental Kindergarten Program. Certification of Dana Walz ("Walz Cert."), ¶2, Appx. 056.

In the spring of 1998 at a class party just prior to the Easter Holiday, Daniel passed out pencils to his classmates that said, "Jesus (heart symbol) the little children." See App. 083 (Photo of pencil). When the teacher, Ms. Safryn, saw what the pencils said she went around and took them away from the children. See Transcript of Joan Safryn Depo, pp. 9-10, Appx. 062-063. Ms. Safryn confiscated the pencils because she was afraid that other parents would view them as being from the school and not from Daniel. *Id.*, p. 10, Appx. 063.

Daniel's mother, Dana Walz, who was present in the class, then questioned the

school principal, Mr. Dellabarca, about this position with regard to what the teacher had done. Walz Cert., ¶4, Appx. 056. The principal and Ms. Walz went to the principal's office and contacted Assistant Superintendent Heery for a ruling from him. *Id.*, ¶5, Appx. 056. Dr. Heery advised Ms Walz that the pencils could not be handed out because, "it was too close to Passover and it might offend the Jewish people." *Id.*, ¶6, Appx. 056. She asked Dr. Heery to confirm that that was the school's position with the School Superintendent Dr. Leonard Kelpsh. Later that evening Dr. Heery left a message on Ms Walz's answering machine that Dr. Kelpsh had upheld his opinion. *Id.*

During the summer of 1998, Ms. Walz provided the school with information regarding religion in schools, and the Board of Education adopted a written policy regarding religion in the schools. *Id.*, ¶7, Appx. 956. Ms. Walz had the impression that the policy would allow Daniel to hand out gifts with a religious message in school. *Id.*

In December of 1998, Daniel was in Kindergarten. During the Winter Holiday party which is just prior to Christmas, Daniel wished to hand out candy canes with a religious message attached called "the Candy Maker's Witness." *Id.*, ¶8, Appx. 056. Ms. Ms Walz felt this would be permissible under the new policy but checked with the principal of the school, Dennis Burd. Mr. Burd informed Ms Walz that he had checked with the Superintendent and Daniel would not be allowed to pass out the Candy Maker's Witness in the classroom but would have to do it outside during recess or as the children were getting on the bus. *Id.*, ¶9, Appx. 056-057. As the

weather was very stormy the day of the winter party, he was permitted to hand out the Candy Maker's Witness in the hallway as the children exited the building to leave at the end of the day. *Id.*, ¶10, Appx. 057.

When questioned as to why she had collected the pencils, Joan Safryn testified that the school was not permitted to give out religious materials and she was concerned parents would view the pencils as having come from the school, not Daniel. Tr. of Safryn Depo, p. 12, Appx. 065. She acknowledged that while the party was structured, the children did have time where they were allowed to talk to one another. She further acknowledged that no aspect of the curriculum was addressed during the party. *Id.*, p. 15, Appx. 068.

Superintendent Kelpsh testified that he would not allow the pencils to be handed out because it "was not neutral and, therefore, because we consider our school parties part of the so called closed structure of our school, it was inappropriate to give it during that time because of the fact that we did not want children or parents to assume that we purported those views." Tr. of Leonard Kelpsh Depo., p. 37, Appx. 069. In response to further questioning, Dr. Kelpsh testified, "it had a message on it that had nothing to do with the curriculum nor a view that I wanted our parents to believe came from the school." *Id.*, p. 37, Appx. 069.

With regard to the candy canes which had a religious message attached to them, Dr. Kelpsh testified that he had made the decision that Daniel could not hand out that item at the holiday party because he reached the conclusion that it would be legally impermissible for the school to do that. *Id.*, p. 48, Appx. 072.

With regard to the holiday parties, Dr. Kelpsh testified that the children are allowed some free interaction during the holiday parties where they can interact freely and talk to one another. *Id.*, pp. 49-50, Appx. 073-074. He further testified that he considered the holiday parties instructional time and he defined instructional time as “child contact time with teacher, teacher present.” *Id.*, p. 51, Appx. 075. When asked what aspect of the curriculum is addressed at the parties, he responded, “I think also a lot had to do with character education. You know, teaching kid’s respect for others, sharing, caring, and all kind of those aspects that come into play.” *Id.*, p. 53, Appx. 077. Finally, Dr. Kelpsh acknowledged that there is no policy written or unwritten that prohibits gifts being handed out at the holiday parties. *Id.*, p. 61, Appx. 082.

Dana Walz testified that she had seen other children give out gifts to their classmates at parties. Tr. of Dana Walz Depo., p. 68, Appx. 060. The alleged violation of Plaintiff’s rights is ongoing as Plaintiff has sought to hand out gifts with a religious message at each Winter holiday party and has only allowed to hand out the gifts as the children leave school to get on the bus. Walz Cert., ¶¶11-12, Appx. 057. Daniel Walz is the only student, to the Walz’s knowledge, subjected to this restriction. *Id.*

STANDARD OF REVIEW

The court determined only legal issues, not facts, on the motion filed under FED.R.CIV.P. 56 and the cross motion. Appellant contends the District Court erred in the formulation and application of legal precepts, and therefore review in this case is plenary.

SUMMARY OF THE ARGUMENT

The Defendant has created and enforced against Plaintiff a policy which prohibits children from giving gifts to their classmates at holiday parties when those gifts contain a religious message. This regulation of Plaintiff's speech is not viewpoint neutral, and therefore must serve a compelling state interest in order to stand. The burden is upon Defendant to demonstrate that such an interest exists. There is no evidence that the giving of gifts with a religious message materially or substantially interfered with school work or discipline, and therefore the regulation violates Plaintiff's right to free speech under the First Amendment to the Constitution and the New Jersey Law Against Discrimination.

Furthermore, the restriction on Plaintiff's speech because of its religious content demonstrates a hostility towards religion which violates the Establishment Clause of the First Amendment to the Constitution.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE DEFENDANTS DID NOT ENGAGE IN IMPERMISSIBLE VIEWPOINT DISCRIMINATION AGAINST APPELLANT'S RELIGIOUS VIEWS.

A. The Defendants Clearly Engaged in Viewpoint Discrimination by Singling Out Religious Views for Suppression.

The Court below found that the restriction placed on Daniel's passing out gifts with religious messages was not "viewpoint discrimination because the School District did not open a forum for the exchange of views about a subject." Op. at 16, Appx. 023. This is an incorrect statement of the law. Forum analysis is used to determine

if content or subject matter discrimination is appropriate. Viewpoint discrimination is never permissible in any forum. “To be consistent with the First Amendment the exclusion of a speaker from a nonpublic forum must not be based on a speaker viewpoint.” *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 682 (1998). Any restriction must be “a reasonable, viewpoint-neutral exercise” of government discretion. *Id.* at 683; *see also Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788 (1985) (the traditional test of the regulation is that it must be viewpoint neutral and reasonably related to a legitimate government purpose); *Brody v. Spang*, 957 F.2d. 1108, 1122 (3rd Cir. 1992).

While Defendant Kelpsh tried to obfuscate the issue of whether children were allowed to directly hand out gifts at the holiday parties under examination, he did admit that there was no policy prohibiting gift giving, Tr. of Kelpsh Depo., p. 48, Appx. 072, and Ms. Walz submitted uncontradicted testimony that gifts were given out by other children. Tr. of Walz Depo., p. 64, Appx. 059. There is no dispute that the restrictions placed on Daniel’s speech were because of its religious viewpoint. While the Court below seemed to rely on the fact that there was no evidence that any other gifts had a message on them, the fact that generic holiday gifts were permitted means that gifts which contain a religious message could not be excluded.

In *Lambs Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 385 (1993), the Supreme Court rejected the argument that excluding religious speech was viewpoint neutral because it had been applied in the same way to all uses of school property for religious purposes. The Court held that because exclusion of religious

speech discriminates between the secular viewpoint and the religious viewpoint, it is by its very nature non-content neutral. The Court reaffirmed that categorical exclusion of religious viewpoint and not merely the exclusion of certain religious viewpoints constitutes viewpoint discrimination. *See also Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Hedges v. Wauconda Community Unit School District No. 118*, 9 F.3d 1295 (7th Cir. 1993); *Good News/Good Sports Club v. School Dist.*, 28 F.3d 1501 (8th Cir. 1994), *cert. den.*, 515 U.S. 1173 (1995); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), *cert. den.*, 519 U.S. 949 (1996); *Chandler v. James*, 180 F.3d 1254, 1285 (11th Cir. 1999). The Supreme Court recently reiterated its holding in *Lambs Chapel* and *Rosenberger* in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). While these cases involve a limited open forum, the analysis of the forum is not relevant to the issue of whether the speech regulation is viewpoint or content neutral.

B. Defendants' Viewpoint Discrimination Against Appellant's Religious Expression was Impermissible.

When the state engages in viewpoint discrimination, that action must pass strict scrutiny to be permissible, *i.e.*, it must serve a compelling state interest. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Capital Square review & Advisory Board v. Pinette*, 515 U.S. 753 (1995); *Texas v. Johnson*, 491 U.S. 397 (1989).

In the seminal case of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969), the Court stated, "clearly the prohibition of expression of one particular opinion at least without evidence that it is necessary to

avoid material and substantial interference with school work or discipline is not constitutionally permissible.” In *Tinker*, students expressed their opposition to the Vietnam War by wearing black armbands to school. Justice Fortas, writing for the majority, likened this to “pure speech” which is entitled to “comprehensive protection under the First Amendment.” *Id.* at 505. Like the students in *Tinker*, Plaintiff engaged in speech (handing out, during holiday parties, items with simple religious messages attached to them) that was entirely divorced from actual or potentially disruptive conduct. Handing out pencils which stated “Jesus (heart symbol) the little children” is essentially no different than if Plaintiff had turned to his classmates during snack time and stated, “Jesus loves the little children.”¹

While in *C.H. v. Oliva*, 990 F. Supp. 341 (Dist. N.J. 1997), *affd in part, rev’d in part and rem’d*, 226 F.3d 198 (3rd Cir. 2000), the court held that “viewpoint neutral” does not mean that any regulation that touches upon the viewpoint of speech prohibited but rather that regulations must be based solely on pedagogical concerns rather than a particular point of view, and cited to *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), these cases are readily distinguishable from the case currently before the Court. *Oliva* and *Hazelwood* dealt with speech in the context of the curriculum. *Hazelwood* dealt with censorship of a school newspaper that was part of a journalism class. *Id.* at 262. In *Oliva*, a student, as a reward for academic achievement, was

¹ It is interesting to note that Dr. Kelpsh could not offer an opinion as to whether such a statement would be allowed in a classroom. Tr. of Kelpsh Depo., p. 51, Appx. 075.

permitted to read a story to his class, and had drawn a picture of Jesus as part of an art assignment. 226 F.3d at 201. The speech exercised by Plaintiff in the present case, however, was not in the context of a specific assignment. It was during what can best be described as a social activity in the classroom, and as such, no pedagogical concerns existed.

The facts in this case clearly present a *Tinker*-controlled scenario and not a *Hazelwood*-controlled scenario. What has been done to Plaintiff is as if the school in *Tinker* had allowed the children in that case to wear their armbands in the cafeteria and the hallway but not the classroom, clearly an impermissible policy under the holding in *Tinker*. As Daniel’s speech activity did not cause “substantial interference with school work or discipline,” *Tinker, supra*, and no compelling reason exists for regulating his speech, the regulation is constitutionally impermissible.

II. THE DISTRICT COURT INCORRECTLY HELD THE SPEECH RESTRICTIONS RELATED TO A LEGITIMATE PEDAGOGICAL CONCERN.

A. No Legitimate Pedagogical Concern Justifies Viewpoint Discrimination Against Religious Students.

Defendant’s rationale for the regulation is that it would be legally impermissible for the school to allow Plaintiff to distribute the religious items, Tr. of Kelpsh Depo., p. 48, Appx. 072, and Defendants fear that someone would mistakenly believe the school had handed out the items. Tr. of Kelpsh Depo., p. 38, Appx. 070.

As to Defendant’s first assertion, it is completely untenable to suggest that speech by private parties could somehow trigger a violation of the establishment

clause. *See Widmar v. Vincent*, 454 U.S. 263 (1981); *Rosenberger, supra*. *See also Board of Education of Westside Community Schools Board v. Mergens*, 496 U.S. 226, 250 (1990); *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280 (E.D. Pa. 1991).²

It is true that *C.H. v Olivia, supra*, cites to *Hazelwood* for the proposition that the perception of the public as to whom the speech belongs to, school or student, is a legitimate pedagogical concern. *Id.* at 353. However, that reasoning is not applicable in the current case. The *Hazelwood* Court noted that “the question whether First Amendment requires a school to tolerate particular student speech... is different from the question whether the First Amendment requires a school to promote particular student speech.” *Hazelwood*, 484 U.S. at 270-71. While *Hazelwood* and *Oliva* dealt with the latter, the present case clearly deals with the former. The court in *Hazelwood* made it clear that the issue they were dealing with was “the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.” *Hazelwood, id.* at 272. Things that students express in class do not bear the imprimatur of the school, *Hazelwood, supra*, at 271, and “the proposition that schools do not endorse everything they fail to censor is not

² In 1995, President Clinton issued a memorandum for the U.S. Secretary of Education and the U.S. Attorney General on Religious Expression in Public Schools, 31 Weekly Comp. Pres. Doc. 1227 (July 13, 1995). The memorandum stated that, “Nothing in the First Amendment converts our public schools into religion-free zones or requires all religious expression to be left behind at the schoolhouse door. While the government may not use schools to coerce the conscience of our students, or to convey official endorsement of religion, the government’s schools may not discriminate against private religious expression during the school day.”

complicated.” *Mergens*, 496 U.S. at 250.

Reasonable students could not view the items handed out by Daniel as endorsed by the school. Parents would not necessarily know if the items were handed out in the classroom or the hallway (unless their children told them), but even if they did, upon being told the items were handed out by Plaintiff (even if in the classroom) it is difficult to envision that they would view that as an endorsement by the school, any more than a birthday card or a personal note would be viewed as being endorsed by the school.

Additionally, the endorsement argument cuts both ways. If parents and students are incapable of understanding the lack of endorsement when speech is allowed it is at least as likely that they will misapprehend the exclusion of religious speech as discrimination against religion. *Gregoire v. Centennial School Dist.*, 907 F. 2d 1366 (3rd Cir. 1990), *cert. den.*, 498 U.S. 899 (1990).

While it is true that there may be parents who would be unhappy that their children received the items Plaintiff handed out, it is a First Amendment axiom that government may not prohibit the expression on an idea simply because society finds the idea itself offensive or disagreeable. *Texas v. Johnson*, 491 U.S. at 414 ; *Tinker*, *supra*, at 508.

Further, in *Good News Club*, *supra*, the Court offhandedly dismissed the school district’s argument of the school that the speech could be prohibited because allowing it might be perceived as an Establishment Clause violation. Writing for the Court, Justice Thomas stated, “The guarantee of neutrality is respected, not offended when the government, following neutral criteria and evenhanded policies extends

benefits to recipients whose ideologies and viewpoints, including religious ones are broad and diverse.” *Good News Club, supra*, at 118, citing *Rosenberger* at 839. Justice Thomas went on to state that “we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger they would perceive a hostility toward the religious viewpoint if the club were excluded.” *Id.* Finally, the Court stated:

We cannot operate, as Milford would have us do, under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club’s religious activity. We decline to employ Establishment Clause jurisprudence using a modified heckler’s veto, in which a group’s religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive. There are countervailing constitutional concerns related to rights of other individuals in the community. In this case, those countervailing concerns are the free speech rights of the Club and its members.

Good News Club at 119, citing *Capitol Square*, 515 U.S. at 779-780 (O’Connor, J., concurring in part and concurring in judgment) (“Because our concern is with the political community writ large, the endorsement inquiry is not about the perceptions of particular individuals or saving isolated non-adherents from... discomfort.... It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech takes place]”) (emphasis added); and *Rosenberger, supra*, at 835 (“Vital First Amendment speech principles are at stake here”). The Supreme Court could not have made a clearer rejection of the argument Defendants raise in defense of their regulation of Daniel Walz’s speech.

The District Court, without specifically stating what the pedagogical concerns are, found that they do indeed exist, and seemed to indirectly challenge the age appropriateness of the materials. However, there is no evidence in the record that the materials were not age appropriate, and Appellant would submit to the court that on their face the gifts present Daniel's religious views in an entirely age appropriate manner.³ Nothing in the record remotely suggests that Daniel's activities were disruptive in any manner.

In order for the state in the persons of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" the prohibition cannot be sustained.

Tinker v. Des Moines Ind. Comm. School Dist., *supra*, at 509, quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966). In this case, the pedagogical concern the school should be concerned with is seeing that the students learn to respect diversity of opinion, learn about the religious belief of others and learn the values and freedoms enshrined in our Constitution.

³ The District Court also discounts *Tinker* because it involved high school students and the present case involves grade school. Plaintiff's complaint in this case alleges a continuing violation. He is now 9 years old. In *Tinker*, the Plaintiffs were 13 and 15. However, the younger brother and sister of the *Tinker* Plaintiffs, age 8 and 11 respectively, also wore armbands to their respective schools. *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 285 F.Supp. 971, at 972, n.1 (S.Dist. Iowa 1966).

B. The District Court Improperly Held the Holiday Parties to be Instructional Time.

In finding that the school had a legitimate pedagogical concern, the court below held that the holiday parties were instructional time. Op. at 20-21, Appx. 027-028. The court points to Ms. Safryn's deposition testimony. Op. at 20, App. 027, citing Tr. of Safryna Depo., pp. 14:1 – 15:25, Appx. 067-068. However, Ms. Safryn was asked if there was an instructional component to the party, and she explicitly stated "No." *Id.*, p. 15:4-6, Appx. 068. When asked if an aspect of the curriculum was addressed she said:

I would say no. It's basically a time for them, a play time, a relaxed time. The only aspect of the curriculum, if there are any would just be that we take turns, you know, we listen when others are speaking, you know, for the games and that type of thing, but nothing academic. Social skills.

Id., p. 15:15-21, Appx. 068. Under those criteria, there is no time of day at school that would not be instructional time. Those social skills are presumably reinforced on the playground, in the lunch room, and any time a teacher is in the vicinity. This would be so broad as to allow the school to censor the children at any time, thereby permitting the *Hazelwood* exception to completely swallow the *Tinker* rule. Moreover, even *Hazelwood* did not condone viewpoint discrimination, but rather prohibited censorship that was done on that basis. 484 U.S. at 273.

III. THE DISTRICT COURT IMPROPERLY REFUSED TO APPLY FORUM ANALYSIS.

The lower court's decision rested on the assumption that this case involved a closed forum. While Plaintiff concedes that the school parties are not a traditional

public forum, they are a limited open forum.

It has long been recognized that First Amendment protection does not end at the written or spoken word but can include expressive conduct. *Texas v. Johnson*, 491 U.S. 397. Determining whether conduct is speech involves an assessment of whether “an intent to convey a particular message was present and is the likelihood great that the message would be understood by those who viewed it.” *Texas v. Johnson*, at 405.

The school allowed gift giving. There may have been some ambivalence about the practice, but as pointed out above it was allowed. Allowing the giving of gifts created a limited open forum. Messages were allowed to be conveyed via gift giving. Gift giving conveys a number of messages: “I like you, and I want you to like me.” Daniel’s gift also contained the message, “I want you to know something about my religion.” Under the lower court’s own analysis, this then brings this case within the purview of *Good News Club v. Milford Central School*, and the restriction on Plaintiff’s speech is clearly unconstitutional.

IV. DEFENDANTS’ ACTIONS VIOLATED THE ESTABLISHMENT CLAUSE.

The Defendants have admitted that restrictions were placed on Plaintiff’s speech because of its religious content. By actively suppressing Daniel’s speech, simply because it was religious,⁴ Defendants have engaged in hostility toward religion that the

⁴ It should be noted that it is a tenet of the Christian faith that Christians share their faith. “Go ye therefore and teach all nations, baptizing them in the name of the Father and the Son and of the Holy Ghost, teaching them to observe all things whatsoever I have commanded you: and lo I am with you always, even unto the end

Establishment Clause itself forbids.

The Establishment Clause requires the government to maintain a course of neutrality among religions and between religions and non-religion, *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382 (1985); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Church of Lukumi, Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 530-532 (1993). As Justice Goldberg stated in his concurrence in *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963):

[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religion which the Constitution commands but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

Id. at 306.

In *Johnston-Loehner v. O'Brien*, 859 F. Supp. 575 (M.D Fla. 1994), the Court struck down a school's prohibition on an elementary school student passing out a religious pamphlet to her classmates under the free speech clause and the establishment clause. The Court wrote, "the establishment clause forbids Government to inhibit as well as to advance religion... it follows that regardless of an avowed purpose to the contrary, the Polk County School policy, as applies, violates the establishment clause." *Id.* at 580.

of the world." Matthew 28:19 & 20, King James Version. *See also* Luke 24:46,47: "And he said unto them, thus it is written that the Messiah is to suffer and to rise from the dead on the third day and that repentance and forgiveness of sins is to be proclaimed in his name to all nations, beginning from Jerusalem." By his actions, Daniel was not merely engaging in free speech but actually practicing his religion.

In *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), *vacated and remanded sub nom. Chandler v. Siegelman*, 530 U.S. 1256 (2000), *reinstated, Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000), *cert. den.*, 533 U.S. 916 (2001), the Eleventh Circuit struck down as unconstitutionally overbroad an injunction entered against the school system which barred not only official religious speech but constitutionally protected student religious expression as well. The court, citing to Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984), reasoned that "the prohibition of all religious speech in our public schools implied... an unconstitutional disapproval of religion. If endorsement is unconstitutional because it sends a message to non-adherents that they are outsiders, disapproval is unconstitutional because it sends the opposite message." *Chandler* at 1261. The court also noted Justice O'Connor's statement that under the Establishment Clause, "what is crucial is that a Government practice not having the effect of communicating a message of government endorsement or disapproval of religion." *Id.*, quoting *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). The court in *Chandler* concluded that "cleansing our public schools of all religious expression... inevitably results in the establishment of disbelief... since the Constitution requires neutrality, it cannot be the case that Government may prefer disbelief over religion." *Id.*

Likewise, in *Gregoire v. Centennial Sch. Dist.*, *supra*, the Third Circuit recognized that the Establishment Clause is implicated when the government refuses to provide equal access to private religious speech, holding that where speakers "are treated equally, the message communicated is one of neutrality rather than

endorsement; if a State refused to let religious groups use a forum open to others then it would demonstrate not neutrality but hostility toward religion.” 907 F.2d at 1380; *see also Bd. of Educ. v. Mergens*, 496 U.S. at 253 (denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech). By allowing children to hand out gifts at parties but prohibiting Daniel from distributing his gifts at the holiday parties, by relegating him to outside of the school building or by the door leaving the school as the children file out to get on the bus, the school sends a message that the religious message that is on the gifts is bad or disapproved of. It creates a stigma on that speech. This shows hostility towards religion and sends a message of hostility towards religious speech and that is prohibited under the Establishment Clause.⁵

V. DEFENDANTS’ ACTIONS VIOLATED NEW JERSEY’S LAW AGAINST DISCRIMINATION, N.J.S.A. 10:5-1, ET. SEQ.

N.J.S.A. 10:5-5 defines public accommodation to include "any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university or any educational institution under the supervision of the State Board of Education or the Commission of Education in the State of New Jersey." N.J.S.A. 10:5-12(F) prohibits "any... superintendent, agent, or employee of any place of public accommodation, directly or indirectly to refuse, withhold from or deny to

⁵ Appellant submits that this disparate treatment of religious speech also implicates the protections afforded by the Equal Protection clause of the Constitution. *See Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Larsen v. Valente*, 456 U.S. 228 (1982); and *Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994).

any person, any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof from... any person on account of... creed... or that the patronage or custom thereof of any person of any particular...creed...is unwelcome, objectionable or not acceptable, desired or solicited.

The Defendants in this action have withheld from the Plaintiff accommodations, advantages, facilities and privileges available to other students. The Plaintiff sought (as is the custom of Christians) to inform his classmates about his creed by gifts which contained religious messages at holiday parties. Other students were allowed to give out gifts in class. Refusing to allow Plaintiff that right because the gifts had religious significance attached to them is discrimination that is prohibited by New Jersey's Law against Discrimination.

CONCLUSION

For the reasons set forth above, Appellant respectfully submits that the Order of the District Court granting summary judgment to Defendant-Appellees should be reversed, and the case remanded for further proceedings.

June 3, 2002

Respectfully submitted,

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CERTIFICATION OF BAR ADMISSION

I, Michael P. Laffey, hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

By: _____
Michael P. Laffey

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