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Court Finds Violation of Free Speech in School's Rejection of Talent Show's Religious Song

By Jennifer A. Osborne

In *O.T. v. Frenchtown Elementary School District Board of Education, et. al.*, December 2006, the U.S. District Court for the District of New Jersey held that the Frenchtown Board of Education ("Board") violated the Plaintiff's, a student's, constitutional rights when it refused to allow her to perform the song "Awesome God" in an after-hours school-wide talent show. The Court granted the Plaintiff's Summary Judgment Motion.

In May 2005, the Frenchtown Elementary School ("School") held an after-school talent show. Participation in the show was voluntary, and participants did not receive a grade or school credit. Students, and some community adults, were invited to participate.

The talent show's guidelines included, in relevant part, the following:

"Acts must be 'G-rated' (appropriate for all ages – nothing revealing, distracting, suggestive...A copy of song lyrics (for any music used in your act)...must be reviewed by [the committee]...No changes!..."

Additionally, all acts were subject to committee review, and any "questionable" acts were referred to the Superintendent for final approval. Acts were subject to the above guidelines and Board policies which provided that school-sponsored activities could not promote nor disparage religious beliefs.

The committee immediately referred the Plaintiff's song to the Superintendent, who found it inappropriate for the talent show due to its overtly religious message and "proselytizing nature." The Superintendent noted that the lyrics were not about religious beliefs, but rather pronounced God's wisdom, power, and the need to follow his teachings. The Board did not approve the song, and the Plaintiff filed a Complaint alleging a violation of her First Amendment rights, specifically through viewpoint discrimination, and violations of Equal Protection and the Free Exercise and Establishment clauses.

Public Forum

A crucial element of the Court's decision was whether the School was a nonpublic or limited public forum. A nonpublic forum is not traditionally

open to the public, therefore the government may issue content-based regulations on expressive activity provided that the regulations are reasonable in light of the forum's purpose and viewpoint neutral. Conversely, a limited public forum is created when the government intentionally opens a non-traditional public forum to particular types of communicative activity on the basis of subject matter or speaker identity. In a limited public forum, the government may not exclude speech where its discrimination is not reasonable in light of the forum's purpose, and may not discriminate against speech on the basis of its viewpoint.

The Court's decision noted that the talent show was open to the entire Frenchtown community, and that it was not part of the School's curriculum, but rather, an entirely voluntary after-school event. Participants were required to select their own pieces for the show and rehearse at home. The show did not occur during the course of the school day, or even immediately after school, but rather, it was scheduled for 7:00 p.m. Finally, the speech at issue was a song selected and performed by a student, and, as a result, it was the private speech of a student and not a message conveyed by the School. Accordingly, even though the School promoted the talent show within the community, it did not promote the individual performances, and thus, the show did not bear the imprimatur of the School. Therefore, the Court held that a limited public forum existed.

Viewpoint Neutral

Another crucial question for the Court was whether the Board's refusal to allow the Plaintiff to perform the song "Awesome God" was viewpoint neutral and reasonable in light of the limited public forum's purpose, or if the restriction amounted to viewpoint discrimination, and therefore violated the First Amendment. The Court found that the talent show did not prohibit religious themes, and students were permitted to perform religious songs and acts. Board testimony noted that students would have been permitted to perform

songs such as "Jesus Take the Wheel" and "Jesus is Just Alright with Me." Also, the School opened its doors to religious speakers when a community pastor became the 2005 Master of Ceremonies. However, despite these findings, the Board argued that the reason the Plaintiff was prohibited from performing "Awesome God" was due to the song's proselytizing religious speech.

In response to Board arguments, the Court found that the only restrictions communicated to the performers were set forth in the show's guidelines. Therefore, since the record was not only replete with permitted religious speech, but also numerous examples of where the School would have permitted "proselytizing" speech, such as speech that espoused the belief that it is important to take care of the earth or to help the poor, the Court held that the Board's actions amounted to viewpoint discrimination.

Establishment Clause

The Establishment Clause provides, in relevant part, that the government may not promote or affiliate itself with any religious doctrine or organization, nor discriminate among persons on the basis of their religious beliefs/practices. Accordingly, there is a critical difference between government speech that endorses religion, which the Establishment Clause strictly forbids, and private speech which endorses religion, which the Free Speech and Free Exercise clauses protect. Based upon these principles and in light of its previous findings, the Court found that there was no way for the Plaintiff's performance to be imputed to the School, and therefore, it held that the Board violated the Establishment Clause, and in turn, the Plaintiff's constitutional rights.



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